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Comstock, Originalism and the Necessary and proper Clause

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I. INTRODUCTION: DIALOGIC ORIGINALISM

Constitutional doctrine and constitutional theory have a close conceptual relationship, yet they are rarely combined in the same discussion. This article bucks that academic habit by bringing together constitutional doctrine relating to the Necessary and Proper Clause and the constitutional theory of originalism in order to explore the questions and issues they prompt in tandem. This is not done in order to argue that each conforms to the expectations of the other—quite the contrary; nor is it done merely for the sake of novelty. Instead, it is done in the belief that exploring complementary issues arising in both areas improves our constitutional insight and understanding of each and clarifies constitutional meaning by exposing suggested meanings to both doctrinal and originalist constraints.

Although they differ in many ways, both constitutional doctrine and originalist theory are alike in assuming and seeking univocal meaning in constitutional provisions. In this search, however, they find conflicting and contested constitutional meanings instead of univocal meaning. So, they both then fall back on a choice of one of the contested meanings or the substitution of an artificial construct. Neither move is a satisfactory solution to the problem of

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1 When the two are brought together, it is usually to argue that a particular constitutional theory demonstrates the cogency of a particular constitutional doctrine. See, e.g., Jack M. Balkin, Commerce, 109 Mich. L. Rev. 1, 49 (2010); Randy E. Barnett, Jack Balkin’s Interaction Theory of ‘Commerce’, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1803439. It is significant to note that these two articles, although they both set out to determine the original public meaning of the word “commerce” in the Commerce Clause, reach diametrically opposed conclusions as to what this meaning is.

2 U.S. Const. art. I, §8, cl. 18 (“Congress shall have Power . . . To 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.”).
constitutional meaning, so the conflicts persist. This article tries out an alternative approach—putting the conflicting meanings in dialogue with each other, as they were in the founding era and since, to see if this conversation itself can lead us to a solution.

The breadth of federal power is perhaps the oldest and most fundamental question in American constitutional law, and the scope of Congress’s implied or incidental power under the Necessary and Proper Clause is the most contentious and significant topic within that area. Despite the importance of this topic, the meaning of the clause is usually not directly and individually discussed. Rather, it is most often dealt with in conjunction with other constitutional provisions (particularly the Commerce Clause). Conceptually, this is a consequence of its status as an implied or incidental power. Yet, even powers of this sort are in need of clear exposition. Fortunately, in 2010 the Supreme Court decided a case, United States v. Comstock, in which the Necessary and Proper Clause was the main constitutional provision involved. For this reason, the Court dealt with the clause directly and on its own terms, thus setting forth at length its doctrine of the clause. Unfortunately, this article will argue that the Comstock decision raises more questions and problems than it answers about the meaning of the Necessary and Proper Clause.

Originalism is the constitutional theory that “the meaning of the Constitution should be settled by reference to the ‘original understanding’ of those who enacted its provisions.” Originalists differ over exactly where this understanding lies. Some find it in the original public

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3 See, e.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 330 (1819) (“The question is not whether a bank be necessary or useful, but whether Congress may not constitutionally judge of that necessity or utility; and whether, having so judged and decided, and having adopted measures to carry its decision into effect, the State governments may interfere with that decision, and defeat the operation of its measures. Nothing can be plainer than that, if the law of Congress establishing the bank be a constitutional act, it must have its full and complete effects.”); United States v. Lopez, 514 U.S. 549, 556-57 (1995) (“But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits.”).
meaning of the words in the text of the Constitution; others find it in the framers’ intentions (to
name only two of the most common formulations of the theory). Despite their other differences,
most originalists assume (without much argument) that there is a correct and discoverable
unitary constitutional meaning—that is, after all, the point in holding a theory like originalism.
They just disagree about what that meaning is and how it is to be determined. Some originalists
also assume that this constitutional meaning is semantic, residing in the meaning of individual
words or phrases, rather than in larger groups of words (such as phrases, clauses, sentences, etc.)
or in broader structural, theoretical or purpose-related factors. No winners emerge from these
conflicts and disagreements. This article suggests dialogue rather than conflict as a means of
resolving the contest.

An originalist looking at Comstock finds a case that does not seek or rely on the original
understanding of the Necessary and Proper Clause, a case that does not, in the main, even deal
with the text of the clause. Instead, the Comstock Court begins with, and treats as foundational,
one of its early decisions in the area, McCulloch v. Maryland. From McCulloch, the Court
selectively proceeds through subsequent precedent and doctrine to arrive at the formula on which
it bases its holding. Despite this method (or perhaps because of it), the justices in Comstock do

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6 For a good survey of the development of contemporary originalist theory, see Lawrence B. Solum, What
Is Originalism? The Evolution of Contemporary Originalist Theory, in THE CHALLENGE OF ORIGINALISM:
THEORIES OF CONSTITUTIONAL INTERPRETATION 12 (Grant Huscroft and Bradley W. Miller eds., 2011).
7 For the leading and longest exposition of semantic originalism, see Lawrence B. Solum, Semantic
8 Comstock, 130 S. Ct. at 1956 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819))
(“Nearly 200 years ago, this Court stated that the Federal ‘[G]overnment is acknowledged by all to be one of
enumerated powers,’ which means that [e]very law enacted by Congress must be based on one or more of’
those powers.”).
9 See Comstock, 130 S. Ct. at 1956-57 (“We have since made clear that, in determining whether the
Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we
look to see whether the statute constitutes a means that is rationally related to the implementation of a
constitutionally enumerated power.”) (citing Sabri v. United States, 541 U.S. 600, 605 (2004) (“using term
‘means-end rationality’ to describe the necessary relationship”); Gonzales v. Raich, 545 U.S. 1, 22 (2005)
(“holding that because ‘Congress had a rational basis’ for concluding that a statute implements Commerce
not coalesce around a single meaning for the clause and the words in it. Instead, they disagree about the scope of the power recognized by the clause.  

Finally, the Court also evaluates the federal statute in question in the case in the light of five general structural or historical factors not explicitly drawn from or apparently related to the original meaning of the clause.

Bringing historical and doctrinal considerations concerning the Necessary and Proper Clause together will provide additional dimensions along which to reconcile these several meaning candidates, thus helping us determine the candidate most consistent with original public meaning, important precedent and current constitutional doctrine. All the original public meanings, those held by both federalists and anti-federalists, and all subsequent doctrinal positions, those held by both Courts and dissenters, and a variety of semantic, structural, interpretive, textual and intratextual factors will then play significant interrelated roles in determining constitutional meaning, not in a mechanical or rule-based manner, but rather in more holistic way.

Clause power, the statute falls within the scope of congressional ‘authority to ‘make all Laws which shall be necessary and proper’ to ‘regulate Commerce . . . among the several States’”).

Although they do agree that it does not give Congress a general police power. See Comstock, 130 S. Ct. at 1964 (quoting United States v. Morrison, 529 U.S. 598, 618 (2000) (“Nor need we fear that our holding today confers on Congress a general ‘police power, which the Founders denied the National Government and reposed in the States.’”)); Comstock, 130 S. Ct. at 1967 (Kennedy, J., concurring) (“Residual power, sometimes referred to (perhaps imperfectly) as the police power, belongs to the States and the States alone.”); Comstock, 130 S. Ct. at 1970 (Alito, J., concurring) (“The Necessary and Proper Clause does not give Congress carte blanche. Although the term ‘necessary’ does not mean ‘absolutely necessary’ or indispensable, the term requires an ‘appropriate’ link between a power conferred by the Constitution and the law enacted by Congress.”); Comstock, 130 S. Ct. at 1983 (Thomas, J., dissenting) (“Regrettably, today’s opinion breathes new life into that Clause, and—the Court’s protestations to the contrary notwithstanding, . . . comes perilously close to transforming the Necessary and Proper Clause into a basis for the federal police power that we always have rejected . . .”).

Comstock, 130 S. Ct. at 1965 (“We take these five considerations together. They include: (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute’s enactment in light of the Government’s custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute’s accommodation of state interests, and (5) the statute’s narrow scope. Taken together, these considerations lead us to conclude that the statute is a ‘necessary and proper’ means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others.”).
II. WHAT COMSTOCK SAYS (AND DOESN’T SAY)

The contrast and relation between theory and doctrine is particularly sharp in the pairing of originalism and Necessary and Proper Clause doctrine because it embodies the contrast between the public and express (in the case of original public meaning originalism) and the implicit and unsaid (in the case of incidental power of the Necessary and Proper Clause). Contemporary originalism typically casts constitutional meaning in terms of the original public meaning of the provision(s) in question.\(^\text{12}\) This originalism typically finds this meaning mainly in roughly contemporaneous dictionaries, documents, and public speeches and proceedings, and other items of this sort.\(^\text{13}\) Comstock is not at all an originalist opinion on this description, but the Court’s landmark Second Amendment decision, District of Columbia v. Heller,\(^\text{14}\) very much is.\(^\text{15}\) Despite these differences, both opinions are similarly afflicted with basic disagreements over the meaning of the constitutional provisions in question in large part because the meanings of the terms used therein are multiple and

\(^{12}\) For a discussion of the rise of original public meaning originalism, see Lawrence B. Solum, supra note 6, at 22-24.

\(^{13}\) Justice Scalia refers to all of these as evidence of original public meaning in writing for the Court. See District of Columbia v. Heller, 554 U.S. 570, 581 (2008) (“Before addressing the verbs ‘keep’ and ‘bear,’ we interpret their object: ‘Arms.’ The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson’s dictionary defined ‘arms’ as ‘weapons of offense, or armour of defense’ . . . The term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity.”); Id. at 582 (“The phrase “keep arms” was not prevalent in the written documents of the founding period that we have found, but there are a few examples, all of which favor viewing the right to “keep Arms” as an individual right unconnected with militia service.”); see also Id. at 560 (quoting The Crime Against Kansas, May 19-20, 1856, in AMERICAN SPEECHES: POLITICAL ORATORY FROM THE REVOLUTION TO THE CIVIL WAR 553, 606-607 (T. Widmer ed. 2006)).


\(^{15}\) One commentator, for example, says that, “Heller has been described, accurately enough, as the most originalist opinion in recent Supreme Court history.” Mark Tushnet, Heller and the New Originalism, 69 OHIO ST. L.J. 609, 609 (2008).
contested, regardless of their method of derivation. Neither approach, it seems, guarantees consensus.

Let us look, then, at *Comstock* and briefly compare it to *Heller* in order to examine how the two opinions derive and argue for (and over) constitutional meaning and then to suggest how conflicts and disagreements might be resolved, or at least lessened. The constitutional discussion in *Comstock* begins with a statement of the question presented in the case—“whether the Necessary and Proper Clause…grants Congress authority sufficient to enact the statute before us.” After announcing an affirmative answer to this question, the Court continues, “We base this conclusion on five considerations, taken together.”

The first and most important of these five considerations is that “the Necessary and Proper Clause grants Congress broad authority to enact federal legislation.” In his subsequent explanation and justification of this assertion, however, Justice Breyer does not parse the text of the clause; neither does he argue the original public meaning of the clause. Instead, he jumps to 1819, rather than 1787, and starts his discussion by quoting from Chief

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16 See *Comstock*, 130 S. Ct. at 1956 (“First, the Necessary and Proper Clause grants Congress broad authority to enact federal legislation.”); see also Id. (citing McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 413-15) (“Chief Justice Marshall emphasized that the word ‘necessary’ does not mean ‘absolutely necessary.’”); see also *Heller*, 554 U.S. at 577 (“The two sides in this case have set out very different interpretations of the Amendment. Petitioners and today’s dissenting Justices believe that it protects only the right to possess and carry a firearm in connection with militia service. Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.”) (citations omitted).

17 *Comstock*, 130 S. Ct. at 1956 (citation omitted).

18 It is not clear from this statement just how these factors are to be weighed and combined. In his dissent, Justice Thomas asks, “Must each of these five considerations exist before the Court sustains future federal legislation as proper exercises of Congress’ Necessary and Proper Clause authority? What if the facts of a given case support a finding of only four considerations? Or three? And if three or four will suffice, which three or four are imperative?” *Id.* at 1975 (Thomas, J., dissenting) (emphasis in original). These and other related questions are never dealt with, let alone answered, in the course of Justice Breyer’s opinion for the Court.

19 *Id.* at 1956.

20 In contrast, writing for the Court in *Heller*, Justice Scalia parses the text of the Second Amendment and offers his explanation of its original public meaning. See *Heller*, 554 U.S. at 576 (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)) (“In interpreting this text, we are guided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.’”).
Justice John Marshall’s landmark decision in *McCulloch v. Maryland*, “Nearly 200 years ago, this Court stated that the Federal ‘[G]overnment is acknowledged by all to be one of enumerated powers,’” and continues that this means “‘[e]very law enacted by Congress must be based on one or more’ of those powers.” This assertion is, in turn, balanced with the reminder that, “at the same time, ‘a government entrusted with such’ powers ‘must also be entrusted with ample means for their execution.’” As to the breadth and strength of these powers, Justice Breyer, picking terms from *McCulloch*, says they must be “‘convenient, or useful’ or ‘conducive’ to the authority’s ‘beneficial exercise’” while emphasizing that “the word ‘necessary’ does not mean ‘absolutely necessary.’”

Quoting Marshall’s opinion once again, Justice Breyer summarizes the Necessary and Proper power in this way, “In language that has come to define the scope of the Necessary and Proper Clause, he 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.’” It is true that this language has come to define the meaning and scope of the Necessary and Proper Clause, but, unfortunately, this is in large part because it means different things to different people—Justice Thomas, for example, quotes the same language in his *Comstock* dissent, calling it “this Court’s definitive interpretation of that text.”

In Justice Breyer’s discussion of the scope and basis of the Necessary and Proper power, selected quotations from *McCulloch*, rather the original public meaning (or even the text of)

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21 *Comstock*, 130 S. Ct. at 1956 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819)).
22 *Id.* (quoting United States v. Morrison, 529 U.S. 598, 607 (2000)).
23 *Id.* (quoting *McCulloch* at 408).
24 *Id.* (quoting *McCulloch* at 413, 418).
25 *Id.* (citing *McCulloch* at 413–415).
26 *Id.* (quoting *McCulloch* at 421).
27 *Comstock*, 130 S. Ct. at 1971 (Thomas, J., dissenting).
the Necessary and Proper Clause itself, are used to define the general parameters of Congress’s constitutional power. This stands in stark contrast to the originalist cast of Justice Scalia’s Second Amendment in *Heller.*

But the *Comstock* Court does not stop there; these quotations from *McCulloch* are not the Court’s last word on the meaning and scope of the Necessary and Proper Clause. Instead, the Court goes on to take its current doctrine from more contemporary cases that “look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”

This “rationally related” test is then equated with “means-ends rationality.”

What is the relationship for the *Comstock* Court of the “definitive” *McCulloch* language and the modern “rationally related” and “means-ends rationality” tests? The implication, but not the explicit assertion, of the Court’s opinion, given the absence of any differentiation or explanation, is that there is no conflict between these three versions of the Necessary and Proper power. The two modern tests merely restate the definitive *McCulloch* language as a simpler, more easily applied, test. On this view, the two modern tests are just different ways of formulating the same test rather than different tests altogether.

But, the problem with this series of definitions, equations and inferences is that they are not all true. The *McCulloch* language is only definitive to the extent contested and ambiguous language can be definitive; the point of definitions is the production of clarity, not the fostering of confusion and disagreement. More importantly, it is at the very least disputable that the two modern formulations are faithful translations of *McCulloch* or that

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28 See *Heller,* 554 U.S. at 576-77 (“Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.”).
29 *Comstock,* 130 S. Ct. at 1956.
30 *Id.* 1956-57 (citing Sabri v. United States, 541 U.S. 600, 605 (2004)).
they are functionally equivalent tests. The two concurring Comstock Justices (Kennedy and Alito) express, in different ways, concerns about the breadth of the Court’s language here. Justice Kennedy, for example, argues against an interpretation of “rationally related” or “rational basis” drawn from Due Process cases, preferring more the understanding of these phrases in their Commerce Clause context where “a demonstrated link in fact, based on empirical demonstration” is required. Likewise, he argues that the use of the phrase “means-ends rationality” in Sabri v. United States “certainly did not import the Lee Optical rational-basis test into this arena.”

Justice Alito is also “concerned with the breadth of the Court’s language” and would require an “appropriate’ link between a power conferred by the Constitution and the law enacted by Congress.” He does not, however, further specify how one determines whether or not a link is appropriate. Similarly, in his dissent, Justice Thomas sets out a two part Necessary and Proper Clause test, presenting it as a translation of McCulloch, “First, the law must be directed toward a legitimate end...[s]econd, there must be a necessary and proper fit between the ‘means’ (the federal law) and the ‘end’ (the enumerated power or powers) it is designed to serve.”

Now, if one takes the word “appropriate” to mean the same as the phrase “necessary and proper,” as is suggested by the use of the word “appropriate” in the enforcement provisions

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31 See id. at 1956 (“But the law need be in every respect logically consistent with its aims to be constitutional. It is enough that there be an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”) (quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487-488 (1955) (Kennedy, J., concurring)).
32 See id. at 1957.
33 Id.
34 Id. at 1968 (Alito, J., concurring)
35 Id. at 1970 (citation omitted).
36 Id. at 1971 (Thomas, J., dissenting).
of the Reconstruction amendments, the Comstock concurrences and dissent display the same lack of precision and clarity about the scope of the Necessary and Proper Clause and words in it and relevant precedent present in the opinion of the Court in the case. There is an (albeit negative) assertion on which they all agree, though. As Justice Breyer puts it for the Court, “[n]or need we fear that our holding today confers a general ‘police power, which the Founders denied the National Government and reposed in the States.” Agreeing with Justice Breyer, Justice Kennedy asserts that, “[t]he inferences must be controlled by some limitations lest, as Thomas Jefferson warned, congressional powers become completely unbounded by linking one power to another ad infinitum in a veritable game of ‘this is the house that Jack built.’” Justice Alito insists that, “The Necessary and Proper Clause does not give Congress carte blanche.” Finally, Justice Thomas notes that, “Anti-Federalists expressed concern that the Necessary and Proper Clause would give Congress virtually unlimited power.”

Despite this general agreement by the Court that the Necessary and Proper Clause does not confer unlimited legislative power upon Congress, there is little discussion, let alone agreement, about what the limit on that power might be. The simplest possible limit test is proffered by Justice Thomas, who says, “The Necessary and Proper Clause empowers Congress enact only those laws that ‘carr[y] into Execution’ one or more of the federal

37 U.S. CONST. amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”); U.S. CONST. AMEND. XIV, § 5 (“The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”); U.S. CONST. amend. XV, § 2 (“The Congress shall have the power to enforce this article by appropriate legislation.”).
38 Comstock, 130 S. Ct. at 1964 (quoting Morrison v. United States, 529 U.S. 598, 618 (2000)).
39 Id. at 1966 (quoting Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), 31 THE PAPERS OF THOMAS JEFFERSON 547 (B. Oberg ed. 2004)) (Kennedy, J., concurring). “The House That Jack Built” is a British nursery rhyme, a cumulative tale that does little more than tell how Jack’s house is indirectly related to numerous other things and events.
40 Id. at 1970 (Alito, J., concurring).
41 Id. at 1972 (Thomas, J., dissenting) (citation omitted). It is clear from both his vote and his rhetoric that Justice Thomas shares this concern.
powers enumerated in the Constitution. Art. I, § 8, cl. 18. Because § 4248 ‘Execut[es]’ no enumerated power, I most respectfully dissent.” 42 This formula is accepted by no other Justice and specifically refuted by Justice Kennedy, who answers, “When the inquiry is whether a federal law has sufficient links to an enumerated power to be within the scope of federal authority, the analysis depends not on the number of links in the congressional-power chain but on the strength of the chain.” 43 But neither Kennedy nor the other justices provides a clear alternative formulation to Thomas’s suggested limit on the scope of the Necessary and Proper Clause.

Although the breadth of Congressional power under the Necessary and Proper Clause is the main item of concern for both the Court, the two concurring justices and the one dissenting justice in Comstock, there is little statement, let alone agreement, as to what the limits of this power are. The discussion of the remaining four parts of the Court’s five part test 44 is briefer and less contested. The second factor, the “long history of federal involvement in this area” is clearly met. 45 The third factor, the “sound reasons for the statute’s enactment,” taken by the Court in the sense of policy reasons rather than constitutional reasons, is also clearly met.

While the second and third factors, on their face, call for factual rather than legal or constitutional determinations, the constitutional question confronting us here is whether these factors are justified, not merely whether they are factually met in this case. In a different way, the fourth and fifth factors, the statute’s accommodation of state interests and its narrow scope, also call for constitutional as well as factual determinations. Whether or not state

42 Id. at 1970 (Thomas, J., dissenting).
43 Id. at 1966 (Kennedy, J., concurring).
44 See supra note 11.
45 Although the Court concedes that “even a longstanding history of related federal action does not demonstrate a statute’s constitutionality.” Comstock, 130 S. Ct. at 1958.
interests are properly accommodated depends on what the state’s legitimate interests are. This, in turn, raises contested questions of federalism, and the Tenth Amendment (the interrelation of the Necessary and Proper Clause, federalism and the Tenth Amendment will be a recurring issue in this article). Finally, the fifth factor raises the issue of the attenuation of the links between the statute and the enumerated power, the determination of which is dependent upon the first factor of the five part test, the breadth of the Necessary and Proper Clause.

There is no discussion by any of the Comstock justices of propriety as a separate and independent requirement over and above necessity in the meaning of the clause. The phrase “necessary and proper” can be construed as having a single unitary meaning and as setting a single standard for the constitutionality of federal legislation, thus following the saw that lawyers will never use one word when two will do. It can also be seen as containing two operative terms and imposing two different requirements on legislation. This may be due in part to the fact that no specific propriety claim is raised in the case (in contrast, for example, to attacks on the individual mandate contained in the Patient Protection and Affordable Care Act). Or it may be due to an unstated belief among the justices that there is no separate propriety requirement in the clause. Thus, there are issues raised by what the Court does not say in Comstock as well as by what it does say.

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46 The Court tells us that, “Respondents and the dissent contend that § 4248 violates the Tenth Amendment because ‘it invades the province of state sovereignty’ in an area typically left to state control.” Id. at 1962 (quoting New York v. United States, 505 U.S.144, 155 (1992)).

47 See Florida v. United States Dept. of Health & Human Servs., 648 F.3d 1235, 1350 (2011) (“The plaintiffs also claim that the individual mandate exceeds Congress’ power because it is not ‘proper’—that is, because it is inconsistent with ‘the letter and the spirit of the constitution.’”); see also Ilya Somin, Taking Stock of Comstock: The Necessary and Proper Clause and the Limits of Federal Power, 2010 CATO SUP. CT. REV. 239, 264 (2010) (“The individual mandate can certainly be attacked as potentially ‘improper,’ and the state plaintiffs may well raise this point as the litigation proceeds.”).
III.  *COMSTOCK AND ORIGINAL PUBLIC MEANING*

A. Original Public Meanings and Constitutional Argument

This section introduces some issues arising for constitutional argument from the existence of original public meanings in the founding era and meanings in modern opinions such as *Comstock.* I use the plural for both meanings because in neither case is there agreement on a single meaning. Just as the justices in *Comstock* offer different takes on the phrase and the clause, so, too, does the evidence of the original public meaning of the phrase and the clause. The founding era was no golden age of consensus on constitutional meaning; neither is the present day. The disagreements over meaning were as wide and as strong then as they are today and they are, in fact, interestingly parallel. The meanings found in both eras are not only multiple, but contested.

Adding to the difficulties here is the uncertainty as to what the appropriate unit or level of constitutional meaning—word, phrase, clause, and so on—is or should be, or even that one unit or level of meaning should always control. Moreover, as John Marshall famously reminds us, we must also be concerned with the spirit of the Constitution as well as the letter.\(^48\) Finally, the answers to these several questions must be reconciled in some integrated understanding of the clause in order to arrive at the constitutional doctrine and meaning which we seek.

One might well despair at the many difficult tasks facing someone who would seek cogent and consistent answers to these various questions. Nevertheless, there is something useful to be gained by asking them, not just of one moment in time, but more broadly by

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\(^{48}\) *See supra* note 26 and accompanying text.
seeking and comparing the takes on the meaning of the Necessary and Proper Clause from the founding era through intervening precedent and history up to current doctrine in *Comstock*. Original public meaning and intervening precedent and doctrine, when compared and contrasted, provide us the means to decide among the current crop of Necessary and Proper Clause meaning candidates proffered in *Comstock*, to select one and reject the others.

Several important generalizations can be made about the competing Necessary and Proper Clause meanings which have been put forward and debated since the adoption and ratification of the Constitution. One is that these meanings have usually come in threes, with one narrow meaning, one latitudinarian meaning and one moderate meaning between the two extremes. At any given time, one of the two extreme meanings is generally rejected, while the other two do battle. After tracing these three competing categories of clause meaning over time, one finds that only the moderate meaning has a pedigree that goes back to the original understanding, while the two extreme meanings do not. This and its endorsement by the spirit of the clause provide two strong reasons to take the middle path and avoid the extremes. Much of the remainder of this article will be devoted to unpacking and arguing for the generalizations made in this paragraph.

Let us next contrast this textual/historical method to an alternative approach to legal and constitutional argument and meaning determination which, ironically, has been suggested by Justice Scalia in his continuing campaign against the use of legislative history in statutory interpretation. Perhaps his best-known remark on the topic is his quip that, “Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends.”49 In the case from which this quotation is drawn, he responds to this result-oriented use of legislative

history he criticizes by saying, “But there are many other faces in the crowd, most of which, I think, are set against today’s result.”\(^{50}\) This article does not seek to refute this “looking for one’s friends” model of argument, but rather to note its ubiquity, indirection and limitations in order to supplement it. One finds this friend-seeking approach (and the stranger-shunning, which is the flip side of the coin) in many areas of argument and reasoning, both inside and outside law. Most relevantly for the purposes of this article, it is the method employed by new originalist search for original public meaning. One finds it, for example, in Justice Scalia’s own opinion of the Court in *Heller*. Critics of *Heller* and the new originalism argue that this search cannot succeed because of contested meaning.\(^{51}\)

This sort of argument is not unique to law. Cognitive science, for example, tells us the function of human reason is not to arrive at conclusions, but rather to support and argue for already held intuitions and beliefs,\(^{52}\) that is, to convince others, rather than to convince ourselves. One social psychologist sums this theory up in this way, “[R]easoning was not designed to pursue truth. Reasoning was designed to help us win argument.”\(^{53}\) Or, more succinctly, “[O]ur thought processes tend towards confirmation of our own ideas.”\(^{54}\)

This “argumentative theory” of reason is reflected in statements about legal and constitutional reason, too. So, for example, Justice Kennedy once explained the judicial

\(^{50}\) Id.
\(^{51}\) See, e.g., Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L. J. 609, 610 (2008) (“Unfortunately, the new originalism cannot deliver on its promises, as *Heller* shows. The reason is simple: The new originalism’s search for the—that is, the single—conventional understanding of constitutional terms is doomed, at least in the most interesting cases….History is replete with…”’contested truths.’ These contests are precisely contests over conventional meaning.”) (citation omitted).
\(^{52}\) See, e.g., Hugo Mercier and Dan Sperber, *Why Do Humans Reason? Arguments for an Argumentative Theory*, 34 BEHAVIORAL AND BRAIN SCIENCES 57, 59 (“[A]ll arguments must ultimately be grounded in intuitive judgments that given conclusions follow from given premises.”) (emphasis in original).
\(^{54}\) Jonathan Haidt, *supra* note 53.
function by saying, “You know, all of us have an instinctive judgment that we make….But after you make a judgment, you must formulate the reason for your judgment into a verbal phrase, into a verbal formula.”55 This statement indicates the indirect use of “looking for one’s friends” in legal and constitutional argument. One does not make a proper legal argument by saying the equivalent of “I have sought out my friends at this cocktail party—and here they are.” This is true even though one is presumably, in fact, looking for one’s friends. This is because the fact of my “friendship” (i.e., the premises or intuitions that I hold) is not a reason for others to accept my conclusions, especially where they do not have the same “friends.”56 To state this in another way, the strength or cogency of reasons in legal argument is not a function of the arguer’s motive for urging the reason, but is rather a function of other factors relating to the matter in question.

Now, what counts as a reason in a legal argument is determined by the traditions and conventions of the practice in question. Original public meaning, precedent, policy and other factors, for example, may count as reasons in legal arguments. Unfortunately, the conventions of law do not provide determinative criteria to weigh these reasons and reach conclusions in cases where there is conflict. Because of the variable and contextual weight they possess in legal argument, legal reasons on both sides of the case cannot simply be tallied up with the decision going to the side with the most reasons or “friends.” In this way and others, legal and constitutional argument is unlike Justice Scalia’s cocktail party. Because of this, it must go beyond the mere counting of “friends.”

55 Interview by the Academy of Achievement with Anthony Kennedy, Supreme Court Justice, in New York City, N.Y. (June 3, 2005), transcript available at http://www.achievement.org/autodoc/page/ken0int-1.
56 And if they already share my premises or conclusions, no argument or reasoning is needed to convince them.
This point is illustrated, for example, in Justice Kennedy’s dispute with Justice Thomas in *Comstock* over whether it is the number of links or the strength of the chain that tells us whether a certain congressional act falls within its Necessary and Proper power.\(^{57}\) Defenders of Justice Thomas’ position here would doubtless point out that the counting of “friends” or links in a chain is more easily and less controversially done than the gauging of the strength of the connection in the links of the chain of argument. This is so because the former in numeric, while the latter is not. Yet, Justice Thomas is almost alone in holding his position, not merely among the *Comstock* justices, but also among Necessary and Proper Clause theorists.\(^{58}\)

What are the factors which compensate for the difficulty and controversy inherent in “strength of the chain” legal and constitutional argument? Let us start by noting that Justice Kennedy’s position on this issue dominates Justice Thomas’ not only despite the fact that it is more difficult and controversial to apply, but also because of this fact. It does so because it embodies and negotiates a fundamental paradox of legal and constitutional argument. Arguments are chosen because they lead to desired conclusions, but the assertion of that tendency cannot be put forward in the argument as the reason to accept the conclusion; some independent value must be put forward instead. Recall that under the argumentative theory of reason, the purpose of reasons in argument is to support conclusions already held and to lead others to those conclusions, too, not to formulate or test those conclusions/intuition for oneself in the first place. So, this is a matter of indirection rather than deception. Reasons

\(^{57}\) *See supra* notes 42 and 43 (respectively) and accompanying text.

given in legal argument serve a justificatory purpose; they are not and do not claim to be accounts of the motive of the arguer or of the psychological adoption of the conclusions argued for.

B. Determining Original Public Meaning: New Originalist Methodology

Before turning to the original public meaning of the Necessary and Proper Clause, some more must be said about New Originalist methodology generally in order to set out and critique its manner and method. A good place to start is with such basic questions as what original public meaning is, how it is determined, and from what sources it is gleaned according to the practitioners of the New Originalism. Now, although original public meaning is closely related to the plain or semantic meaning of the words of the Constitution, it is not always the same as plain or semantic meaning. Take, for example, what Justice Scalia says near the beginning of his opinion of the Court in *Heller*, that, “[i]n interpreting this text, we are to be guided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their natural and ordinary as distinguished from technical meaning’ . . . . Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.” 59 From this passage, standing alone, it is not clear whether Justice Scalia takes original public meaning to be the subjective understanding of some group of founding era citizens or else the objective, but artificial, understanding of the reasonable person of the founding era.

Justice Scalia clarifies the issue in another place, though, where he says that originalists “look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris.”60 His approach here has also been adopted by other prominent originalists.61 Although the original public meaning of the Constitution may often run no further than the plain meaning of the relevant clause, sometimes, when the plain meaning is inadequate or unacceptable, then a broader, more holistic, approach to meaning determination will be required.62

Here, as elsewhere in law, the reasonable person is an artificial construct, not an actual person or group of persons.63 However, what this reasonable person understands and believes can only be determined from the evidence of what some actual persons have said, done, and written. One important question to be asked here is what persons and which statements, deeds and writings should be consulted; another important question is how their meaning is to be determined?

Let us take the “who” question first. In the constitutional context, some writers identify New Originalism’s reasonable person with “We the people,” who “do ordain and establish this Constitution for the United States of America.”64 Both entities are artificial constructs created to give meaning and force to the Constitution at the time of its adoption. And, as is

\[\text{60} \text{Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 17 (1997). In this particular passage, Justice Scalia is speaking of statutory, rather than constitutional, interpretation, his basic point holds for both.}\]

\[\text{61 \text{See, e.g., Robert H. Bork, The Tempting of America: The Political Seduction of the Law 144 (1990) ("[W]hat the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean...The search is not for a subjective intention").}}\]

\[\text{62 Why else, for example, would Justice Scalia add the words “placed alongside the remainder of the corpus juris” in his description of new originalist methodology? See supra note 60 and accompanying text.}\]

\[\text{63 On this topic, Richard Kay says, “But unlike intended meaning, there is no ‘fact of the matter’—no ‘real’ public meaning. Public meaning is, quite explicitly, an artificial construct. The qualifying criteria...depend on assumptions about how some chosen hypothetical speaker of the language would apprehend the text at issue.” Richard S. Kay, Original Intention and Public Meaning in Constitutional Interpretation, 103 NW. U. L. REV. 703, 720 (2009).}\]

\[\text{64 U.S. CONST. pmbl.}\]
the case elsewhere in law, the construction of the reasonable person in constitutional law and theory is a legal, rather than a literary, historical, philosophical or scientific, task. To some writers, it seems natural to identify “we the people” with law’s reasonable person and, so, to attribute to “We the people” much the same characteristics typical of the reasonable person elsewhere in law.

We should not, however, jump to the conclusion that the identification of “We the people of the United States” with the reasonable person of law so easily solves the problem of determining the meaning of the text of the Constitution without first canvassing for impediments to this equation. One issue which jumps out here is that the reasonable person is singular, while “We the people of the United States” are plural. The difference between the two is more than grammatical. Unless the reasonable person is riven with deep inner conflict (a condition which none of the proponents of the reasonable person as the avatar of original public meaning suggests), the reasonable person is constructed to and will determine but one original public meaning, a meaning free of ambiguity or conflict.

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65 See, e.g., Gary Lawson and Guy Seidman, Originalism as a Legal Enterprise, 23 CONST. COMMENT. 47, 48 (2006) (“The reasonable American person of 1788 determines, for 1788 and today, the meaning of the federal Constitution. Thus, when interpreting the Constitution, the touchstone is not the specific thoughts in the heads of any particular historical people—whether drafters, ratifiers, or commentators, however distinguished and significant within the drafting and ratification process they may have been—but rather the hypothetical understandings of a reasonable person who is artificially constructed by lawyers. The thoughts of historical figures may be relevant to the ultimate inquiry, but the ultimate inquiry is legal.”) (citations omitted).

66 See, e.g., id. at 73 (“In sum, the hypothetical ‘We the people of the United States’ is a pretty good fit with the reasonable person of law. This person is highly intelligent and educated and capable of making and recognizing subtle connections and inferences. This person is committed to the enterprise of reason, which can provide a common framework for discussion and argumentation. This person is familiar with the peculiar language and conceptual structure of the law. ‘We the people of the United States’ is a formidable intellectual figure.”).

67 As, for example, Justice Scalia does in his Heller opinion. Of course, this tendency to find but one meaning of a constitutional provision is not peculiar to practitioners of originalism. See Heller at 577 (citing United States v. Sprague, 282 U.S. 716, 731 (1931) (“In interpreting this text, we are guided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.’”).
In contrast, the actual people of the United States in the founding era did not come to a common agreement concerning the meaning of the Necessary and Proper Clause; instead, they disagreed sharply over the meaning of the clause.\textsuperscript{68} Moreover, this disagreement has continued, in one form or another, to the present day.\textsuperscript{69} Given this fact, the device of the reasonable person here serves more to help paper over the absence of original public meaning consensus\textsuperscript{70} than it does to actually determine that public meaning. Any realistic and accurate notion of original public meaning must theorize and explain, rather than just try to explain away, the actual historical disagreements which have occurred concerning constitutional meaning.

Also worth noting concerning the reasonable person device here are the attributes that this person possesses. The reasonable person used here is decidedly not the average person of that time, unless the United States of 1788 was the Lake Wobegon of its day.\textsuperscript{71} Recall that the reasonable person is said to be highly intelligent, well educated, committed to reason and familiar with law—to name only a few cited characteristics.\textsuperscript{72} The problem here is not just that the typical person of the founding era (or any era) may not possess these qualities, but also that this description skews the source or evidence of original public meaning toward a political and economic elite and away from the general citizenry.

In fact, the reasonable person device of the New Originalism serves to resurrect some of the same problems that caused originalism to abandon its focus on framers’ intent as the source of constitutional meaning and switch to original public meaning in the first place.

\textsuperscript{68} As will be shown below. See infra. notes 92-99 and accompanying text.
\textsuperscript{69} As is indicated in the discussion of the \textit{Comstock} case above.
\textsuperscript{70} For example, by picking one’s “friends” (if not oneself) to compose the reasonable person.
\textsuperscript{71} Garrison Keillor’s mythical Lake Wobegon is the place where “all the women are strong, all the men are good looking, and all the children are above average.” \textit{See A Prairie Home Companion with Garrison Keillor} (last visited February 17, 2012) http://prairiehome.publicradio.org/about/podcast/.
\textsuperscript{72} \textit{See supra.} note 66.
Two questions which bedeviled framers’ intent originalism were “Whose intent counts?” and “How is that intent to be determined?” The framers wrote and adopted the Constitution, but it was the ratifiers, acting in the name of “We the people,” who gave it force. This leads us to the conclusion that it is the understanding of the ratifiers and the people which is more relevant to constitutional meaning than the intent of those in the convention that framed the document.

There is a further complication. Within each of these three groups, there are individuals with conflicting intents and understandings; some are supporters of the proposed constitution and some are not. Do both the pro and con intents or meanings count in determining constitutional meaning or only the intents or meanings of the winning (pro) side? The reasonable person of the New Originalism is a single individual with a single intent and a single understanding. But, it is not at all clear how a single person might comprehend, encapsulate and contain the conflicted and divided intents and meanings present among the entire American citizenry during the founding era or thereafter. A generation ago, when intent was the currency of originalism, it could at least be argued that a larger group (e.g., “We the people”) had delegated their intention-votes to a smaller group (e.g., members of the state ratification conventions) in a sort of proxy process. While this move is possible in a

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73 As Richard Kay says on this topic, “If the force of the Constitution is its endorsement by ‘the people,’ then, given the ratification process, only the ratified text may claim that approval.” Richard S. Kay, supra note 63, at 706.

74 Here, Richard Kay says, “It is true that only a text is presented for ratification and….only that process can set the relevant meaning….The intentions of the proposing convention of 1787 are useful only because they help us understand what the state ratifying conventions probably intended when they made the Constitution. Ratification was an intentional act and we cannot understand what it accomplished independent of what the people involved in it thought they were doing.” Id.

75 This leads us into the quasi-theological question of the extent to which this artificial construct, the reasonable person, is like or unlike natural persons in its attributes, integrity and unity. If the description of the reasonable person is tweaked, in response to the criticism raised here, to allow it to possess things such as multiple intents, meanings and understandings, then it ceases to be a recognizable individual person and instead becomes some sort of collective or group mind. But if it is not so tweaked, it cannot adequately process and resolve the multiple and conflicting meaning of the constitutional text during the founding era or since.
framers’ intent version of originalism,⁷⁶ this argument is not available to defenders of original public meaning methodology for at least two reasons. One is that the reasonable person is not a real person, but rather an artificial construction, so that we do not have two actual people (or groups of people) to delegate and receive the delegation as an historical act in space and time; we have only one artificial person. A second, independent reason is that original public meaning, as opposed to intent, is not the possession of any particular person or group of persons—it is, in effect, in the air.

Even if the problems in the last paragraph can be satisfactorily resolved, there remain important evidentiary difficulties. Although we have too much evidence of public meaning in the sense that we find public meanings rather than a single meaning, there is also a sense in which the New Originalism suffers from a dearth of evidence of founding era meaning. The historical record that we possess reflects only the relatively small number of adoption and ratification participants who spoke their minds about the Constitution, thus leaving us only to guess or presume as to what the others thought the document meant. This problem only becomes more severe as the size of the group (adopters, ratifiers, “We the people”) increases. A defender of the New Originalism is forced to the fallback position that the intent of the members of the smaller group is somehow representative of that of the larger group.⁷⁷ But this conclusion is an act of faith rather than a determination based upon evidence.

Now, one might argue that the reasonable person is precisely this sort of representative individual, and so he or she⁷⁸ should be. But, once again, historically preserved evidence of

⁷⁶ See, e.g., Paul Brest, The Misconceived Quest for the Original Understanding, 60 B. U. L. REV 204, 215 (1980) (“If the intent of the framers is to be attributed to the provision, it must be because the other adopters have in effect delegated their intention-votes to the framers.”) (citation omitted).
⁷⁷ See supra note 76 and accompanying text.
⁷⁸ Perhaps there were gender-related differences as to intent and public meaning of the constitution in the founding era.
meaning is skewed toward the elites and the winners in the ratification process, leading us to overlook and ignore the understandings and opinions of anti-federalist constitutional dissenters—“the other founders.” These problems are aggravated by what Saul Cornell calls the “constitutional idiocy” of originalism, substituting fictions for the actual beliefs held at the framing.

Public reference works of the time, such as dictionaries, might seem to offer relief for these difficulties, and originalists do sometimes lean heavily on dictionaries to support their arguments. But founding era dictionaries turn out to be a mirage rather than a salvation for originalists, mainly because of the subjective and unreliable nature. As historian Saul Cornell complains, “Nothing better illustrates the simplistic view of history favored by the New Originalists than their naïve reliance on old dictionaries.” Cornell and other historians

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79 This term comes from American historian Saul Cornell. For his survey of this dissenting tradition, see Saul Cornell, The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828 (1999).

80 See Saul Cornell, The People’s Constitution vs. the Lawyer’s Constitution: Popular Constitutionalism and the Original Debate over Originalism, 23 YALE J. L. & HUMAN. 295, 301 (2011) (“The notion of constitutional idiocy is central to virtually every brand of Originalism, new and old. The idiotic theory also enables some New Originalists to side step dealing with the actual beliefs of Americans and substitute beliefs of a fictive reader, effectively turning constitutional interpretation into an act of historical ventriloquism.”) (citation omitted). Cornell, like other historians who express opinions on the subject, has little good to say about originalism.

81 See, e.g., Heller, 554 U.S. at 581 (quoting 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978)) (“The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson’s dictionary defined ‘arms’ as ‘weapons of offence, or armour of defence.’”); Id. (quoting 1 A New and Complete Law Dictionary) (“Timothy Cunningham’s important 1771 legal dictionary defined ‘arms’ as ‘any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.’”); Id. at 584 (quoting 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978)) (At the time of the founding, as now, to ‘bear’ meant to ‘carry.’”)

82 Saul Cornell, supra note 80, at 298. He goes on to explain that, “Originalist faith in simply scouring the dictionary as a shortcut around the laborious process of doing genuine historical research rests on a serious misunderstanding of the history of dictionaries. The first American dictionaries were published after ratification. Early dictionaries, including the first American dictionaries, were not compiled according to the rules of modern lexicography. These texts were idiosyncratic products of their authors, who often had ideological and political agendas. As a general rule, such dictionaries were more prescriptive than descriptive. It is simply anachronistic to argue that one ought to consult historical dictionaries from the Founding era to elucidate a set of fixed linguistic facts that can be used to unravel the meaning of the text of the Constitution.” Id.
argue instead that historical understanding is more complicated and more nuanced than merely consulting a dictionary or other reference work.

You can get a sense of the problem and the argument Cornell and other legal historians have here with the New Originalist methodology by analogizing dictionary-based originalism by going to a foreign country, say Germany, whose language you do not speak, and expecting to get by there with nothing more than a English-German dictionary for help. In that situation, you would doubtless find that one language just does not translate into another on a strictly word-by-word basis. There are grammatical, idiomatic, cultural, and historical differences (to name only a few) that complicate translation and understanding between languages and which defeat a simple dictionary translation methodology. More relevant to originalism, the same is also true for historical understanding, even historical understanding of our own country and legal system.

As a result of these complexities, it is the case that, even if we could remedy the shortcomings of the old dictionaries of which Cornell complains by somehow bringing them up to contemporary lexicographical standards, other important problems would still remain. In illustration please consider, if you will, this example: Justice Scalia, writing the opinion of the Court in the *Heller* case, purports to draw the constitutional meaning of the Second Amendment, in significant part, from dictionaries of the founding era. In response, in his dissent, Justice Stevens rails against the Court’s “atomistic” originalism, which, he feels,

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83 Leaving aside any pronunciation issues and assuming that you are not aided by bi-lingual Germans, but have to get by on your own.

84 *Heller*, 554 U.S. at 652 (footnote 14) (Stevens, J., dissenting) (citing the poems of John Godfrey Saxe 135-136 (1873)) (“The Court’s atomistic, word-by-word approach to construing the Amendment calls to mind the parable of six blind men and the elephant, famously set to verse by John Godfrey Saxe); *Id.* at 643 (quoting Marbury v. Madison, 1 Cranch 137, 174, 2 L.Ed. 60 (1803)) (“The preamble thus both sets forth the object of the Amendment and informs the meaning of the remainder of its text. Such text should not be treated as mere surplusage, for ‘[i]t cannot be presumed that any clause in the constitution is intended to be without effect.’”); *Id.* (“The Court today tries to denigrate the importance of this clause of the Amendment by
springs from a similar mindset and has the same defects as the English-German dictionary example I have just given. These problems would not be solved to Justice Stevens’ satisfaction by expanding the inquiry beyond dictionaries to include other documents (as Justice Scalia does in *Heller*) and beyond the founding era to include later eras (as Justice Scalia also does in *Heller*), if only because these additions would not address, let alone solve, Justice Stevens’ atomism objection.

In order to explore whether these issues arising with original public meaning originalism can be ameliorated, we turn next to the more limited context of the original public meaning of the Necessary and Proper Clause. The difficulties to be overcome here include the existence of multiple and conflicting meanings of the constitutional terms employed, getting beyond atomistic “dictionary” originalism, and relating original public meaning to later constitutional doctrine.

beginning its analysis with the Amendment’s operative provision and returning to the preamble merely “to ensure that our reading of the operative clause is consistent with the announced purpose.” That is not how this Court ordinarily reads such texts, and it is not how the preamble would have been viewed at the time the Amendment was adopted.” (citation omitted).

85 *Id.* at 645–46 (“As used in the Fourth Amendment, “the people” describes the class of persons protected from unreasonable searches and seizures by Government officials. It is true that the Fourth Amendment describes a right that need not be exercised in any collective sense. But that observation does not settle the meaning of the phrase “the people” when used in the Second Amendment. For, as we have seen, the phrase means something quite different in the Petition and Assembly Clauses of the First Amendment. Although the abstract definition of the phrase “the people” could carry the same meaning in the Second Amendment as in the Fourth Amendment, the preamble of the Second Amendment suggests that the uses of the phrase in the First and Second Amendments are the same in referring to a collective activity.”).

86 *Heller*, 554 U.S. at 582 (“The phrase ‘keep arms’ was not prevalent in the written documents of the founding period that we have found, but there are a few examples, all of which favor viewing the right to ‘keep Arms’ as an individual right unconnected with militia service.; *Id.* (quoting 4 Commentaries on the Laws of England 55 (1769)) (“William Blackstone, for example, wrote that Catholics convicted of not attending service in the Church of England suffered certain penalties, one of which was that they were not permitted to ‘keep arms in their houses.’”).

87 See *id.* at 616 (“Every late-19th-century legal scholar that we have read interpreted the Second Amendment to secure an individual right unconnected with militia service.”); *Id.* at 618-19 (quoting J. ODRONAUX, CONSTITUTIONAL LEGISLATION IN THE UNITED STATES 241-242 (1891)) (“All other post-Civil War 19th-century sources we have found concurred with Cooley. One example from each decade will convey the general flavor: . . . ‘The right to bear arms has always been the distinctive privilege of freemen. Aside from any necessity of self-protection to the person, it represents among all nations power coupled with the exercise of a certain jurisdiction. . . .[I]t was not necessary that the right to bear arms should be granted in the Constitution, for it had always existed.’”.

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IV. THE ORIGINAL PUBLIC MEANING OF THE NECESSARY AND PROPER CLAUSE

A. Three Original Meanings of The Necessary and Proper Clause

Let us now take stock of where we stand on the New Originalism and the Necessary and Proper Clause and also on the dilemma that we face in reconciling them with one other. In constitutional argument, original public meaning is one of those independent, reason-providing values which, at least potentially, enables argument to get beyond the “looking for one’s friends” level. But the strength of the reason this value can provide is greatly dissipated in a particular situation when, as is the case here, original public meaning gives ambiguous and conflicting counsel, thus raising the “looking for one’s friends” danger all over again. However, it would seem that the strength of the reason that original public meaning potentially provides can be restored to the extent that the conflict of counsel can be resolved in some principled, non-tendentious manner. This can be done, I will now argue, by moving beyond original public meaning itself and demonstrating larger continuities and consistencies among the several conflicting meanings. The Necessary and Proper Clause will provide the context for this demonstration.

The conflicting meanings of the Necessary and Proper Clause presented by the Court in Comstock have been discussed above. They run from absolute necessity at the narrowest end

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88 For an argument in support of this contention, see RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 109-113 (2004).
of the meaning spectrum\textsuperscript{89} to a middle position which holds that congressional power is not unlimited, but must be telically connected to the means in question,\textsuperscript{90} and lastly to the rationally related test at the broadest end of the meaning spectrum.\textsuperscript{91} Only two of these three meaning candidates are actually affirmed by any of the Justices; none of them holds that “necessary” in the clause means “absolutely necessary.”

An examination of the original public meaning candidates for the clause also breaks down into the same three categories, but with some important variations and one significant difference. Roughly the same three meaning candidates are suggested and again only two of the three are affirmed--but not the same two as in \textit{Comstock}. In the founding period, some framers held the “absolutely necessary” view of the clause and others argued for the middle, telically related interpretation, but none argued that the clause be interpreted so as to give Congress unlimited power (although some saw a danger that it might be so interpreted and raised this possibility as an argument against the ratification of the Constitution).

This exposition here seeks only to classify, rather than to collect, original meanings—the collection has already been done by Randy Barnett and others.\textsuperscript{92} Because Barnett writes on both the methodology of the New Originalism and on the original public meaning of the Necessary and Proper Clause, I will focus on his writing, to the relative exclusion of the writings of others, in my discussion of these two topics.

\textsuperscript{89} See \textit{supra}, note 25 and accompanying text.
\textsuperscript{90} See \textit{supra}, note 38-41 (stating, in different ways, that the Necessary and Proper Clause give Congress only a limited power to enact legislation).
\textsuperscript{91} \textit{Supra}, note 29 (“the Court goes on to take its current doctrine from more contemporary cases which ‘look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.’”).
\textsuperscript{92} See, e.g. Randy E. Barnett, \textit{supra} note 88 at 153-90; \textit{see also} 3 \textsc{The Founders’ Constitution} 238-277 (Philip Kurland and Ralph Lerner, eds., 1987).
Barnett draws a line between founders like Jefferson, Madison and Randolph, who held that “necessary” here means “absolutely necessary”\(^93\) (or, as Barnett puts it, “really necessary”\(^94\)), and figures like Hamilton and Marshall, who, less demandingly, said that “necessary” instead means “conducive to” or “convenient.”\(^95\) The crucial difference between the two views is that while Jefferson and company drew a sharp distinction between that which is necessary and that which is merely convenient,\(^96\) Hamilton and his later followers treated “necessary” and “convenient” effectively as synonyms.\(^97\) In this way, they inaugurated the perpetual constitutional debate over the nature of the means-ends connection required by the Necessary and Proper Clause, a debate which has continued to the present day, and two important positions in it.

But there is a third position in this debate, one which is neglected by Barnett, perhaps because those who spoke of it feared it rather than embraced it. Anti-Federalist opponents of the proposed Constitution reserved special scorn for provisions of that document such as the Necessary and Proper Clause which, they feared, might be interpreted to give Congress and the national government virtually unlimited powers. Two examples of this worry from the largely pseudonymous ratification literature convey the essential position taken by the Anti-Federalists on this question. Old Whig described the power granted under the clause as

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93 See id. at 158-166.
94 Id. at 158.
95 See id. at 166-173.
96 See, e.g., Thomas Jefferson, *Opinion of Thomas Jefferson, Secretary of State, on the Same Subject* (February 15, 1791), in *Legislative and Documentary History of the Bank of the United States, Including the Original Bank of North America* 93 (M. St. Claire Clarke and D.A. Hall, eds, 1832) (“[T]he constitution allows only the means which are ‘necessary,’ not those which are merely convenient for effecting the enumerated powers.”).
“undefined, unbounded and immense.” More specifically, Brutus worried that the clause “may operate to do away all idea of confederated states, and to effect an entire consolidation of the whole into one general government.”

Why doesn’t Barnett discuss this third founding era position on the meaning of “necessary”? Given his background with the relevant historical sources, he must know of those who expressed this worry. One reason may be that some of those expressing the fear of unlimited congressional power were the same people who argued for an “absolutely necessary” reading of the word “necessary” in the clause, so that while there may have been three different definitions of “necessary,” there were only two different groups of definers. Attorney General Edmund Randolph, for example, in the debate over the National Bank bill in the Washington cabinet in 1791, joining Thomas Jefferson in rejecting the constitutionality of the incorporation of the bank, ends his opinion to President Washington with this challenge to supporters of the bank and, more generally, to proponents of a broad reading of the Necessary and Proper Clause, “However, let it be propounded as an eternal question to those who build new powers on this clause, whether the latitude of construction, which they arrogate will not terminate in an unlimited power in Congress.”

Another possible explanation for Barnett’s description of two, rather than three, original meanings of “necessary” is that he sees the original meaning of “necessary” here as some combination of, or mean between, the Jeffersonian and Hamiltonian positions. For, after examining the Jeffersonian and Hamiltonian definitions of “necessary,” Barnett entitles the

98 An Old Whig, No. 2 (Fall 1787), in 3 THE FOUNDERS’ CONSTITUTION 239 (Philip B. Kurland and Ralph Lerner, eds. 1987) (emphasis in original).
99 Brutus, No. 1 (October 18, 1787), in 3 THE FOUNDERS’ CONSTITUTION 240 (Philip B. Kurland and Ralph Lerner, eds. 1987).
100 Edmund Randolph, Opinion of Edmund Randolph, (February 12, 1791), in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES, INCLUDING THE ORIGINAL BANK OF NORTH AMERICA 89 (M. St. Claire Clarke and D.A. Hall, eds. 1832).
next section of his chapter on the Necessary and Proper Clause, “So Who Was Right? Perhaps They All Were.”¹⁰¹ In this section, he does not attempt to choose between the several definitions of “necessary,” despite the fact that reference to a dictionary of the time clearly favors the Jeffersonian approach.¹⁰² Instead, he argues for an understanding of “necessary” somewhere between the two extremes.¹⁰³ This gives us a continuum of necessity with poles of extreme and weak necessity and a middle zone of moderate necessity. It is clear what the two extremes require or permit, but Barnett can give no definite description of the middle position he favors. Unfortunately, the operative word in his account is “somewhere.”

Few would quibble with Professor Barnett’s decision to seek the meaning of “necessary” in the Necessary and Proper Clause somewhere between the twin poles of absolute necessity and mere convenience, either as a matter of original or current meaning. No Justice writing in the Comstock case, for example, argues for either extreme meaning of “necessary.” Nevertheless, there are at least two issues concerning Barnett’s discussion of the original meaning of the clause here which are worth exploring. One involves the fit and consistency between his account of the original public meaning of the Necessary and Proper Clause and his more general New Originalist reasonable person approach to original public meaning. A second is whether the elusive, but crucial, “somewhere” in his explanation of moderate

¹⁰¹ RANDY E. BARNETT, supra note 88, at 173.
¹⁰² Setting this in the context of his reasonable person originalist methodology, Barnett says, “According to….originalist methodology….we must ask what meaning a reasonable person would have attached to the term ‘necessary’ when the Constitution was enacted. The question was addressed at some length by Gary Lawson and Patricia Granger. They note that the 1755 and 1785 editions of Samuel Johnson’s Dictionary of the English Language define ‘necessary’ as ‘1. Needful, indispensibly requisite. 2. Not free; fatal; impelled by fate. 3. Conclusive; decisive by inevitable consequence.’” Id. at 173 (quoting Gary Lawson and Patricia B. Granger, The “Proper Scope” of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 DUKE L. J. 267, 286 (1993).
¹⁰³ See RANDY E. BARNETT, supra note 88, at 178 (“The evidence suggests that, while it is a mistake to equate ‘necessary’ with ‘convenient,’ neither was as stringent a standard as connoted by the terms ‘indispensably’ or ‘absolutely’ necessary. Instead, the original meaning of necessary creates the requirement of a degree of means-ends fit somewhere between these two extremes. Consideration of constitutional construction also argue against a looser standard of ‘convenience.’”).
necessity can be more definitely specified or described or if the fuzziness of the term is, in fact, a virtue, rather than a defect, in his theory.

However appealing Professor Barnett’s account of the original public meaning of the Necessary and Proper Clause, standing alone, might be to his readers, it is a difficult fit with his more general theory of reasonable person originalism. In fact, the combination of the two raises some difficulties which would not be present with other theories of constitutional interpretation. The first difficulty is that the reasonable person is a single, albeit artificially constructed, person.\textsuperscript{104} Yet, according to Barnett’s own exposition, there are at least two original public meanings of the Necessary and Proper Clause and these meanings were held by two opposing groups of people during the founding era. He gives no explanation of how these multiple and conflicting meanings can be contained, let alone reconciled, in the mind of one person. Nor does he tell us how the reasonable person of the founding era, somehow holding contrary meanings in mind, resolves them to the position of moderate necessity he ultimately arrives at. This is perhaps why the reasonable person makes only a fleeting appearance in his discussion of the Necessary and Proper Clause.\textsuperscript{106}

A second difficulty with Barnett’s reasonable person account of the original public meaning of the Necessary and Proper Clause is that in theory it abstracts from the ratification context, while in practice it does not. Please recall that in describing the general methodology, he says, “According to….originalist methodology….we must ask what meaning a reasonable person would have attached to the term ‘necessary’ when the Constitution was enacted.”\textsuperscript{107} One would think that this inquiry could be answered by

\footnotesize
\textsuperscript{104} See supra notes 63-67 and accompanying text.
\textsuperscript{105} And, if my argument is accepted, three.
\textsuperscript{106} See supra note 102.
\textsuperscript{107} See supra note 102.
reference to the meaning provided by a dictionary of the time. But although he notes the
dictionary meaning of “necessary” at the time, he does not take them as dispositive on this
issue and does not even accept their definition as the meaning of “necessary” in the
Necessary and Proper Clause, instead adhering to a notion of moderate necessity.

These problems arise out of a mismatch between New Originalist reasonable person
methodology and the actual, historical ratification debate over the meaning of the Necessary
and Proper Clause. The latter is not the same as the acontextual, everyday meaning of
“necessary” at the time and, in fact, Barnett, does not look at that everyday meaning in
reaching his conclusion concerning the original public meaning of the clause. Quite the
contrary—all the founding era quotations or citations in his chapter here (aside from
Blackstone, the text of the Constitution itself and the dictionary definitions he does not
adopt) come from the constitutional convention, the ratification conventions, The Federalist,
or contemporary statements, written and oral, by important founders, such as Madison and
Hamilton.108

In another article, he consults much the same sources when inquiring into the original
meaning of the Commerce Clause.109 Only when challenged on his conclusions did he then
supplement his earlier evidence with additional confirmatory evidence drawn from every
usage of the word “commerce” in a prominent newspaper (The Pennsylvania Gazette)
between 1728 and 1800.110 In this way, he was able to show that the meaning of “commerce”

108 See supra note 88, at 153-190.
109 See Randy E. Barnett, The Original Meaning of the Commerce Clause, 68 U. CHI. L. REV. 101, 112-
125 (2001).
110 See Randy E. Barnett, New Evidence of the Original Meaning of the Commerce Clause, 55 ARK. L.
REV. 847, 856-862 (2003).
in the particular context of the ratification of the Constitution was consistent with its everyday meaning.\textsuperscript{111}

Why does Barnett, despite his avowed New Originalist interpretive methodology, focus on the constitutional ratification debate here rather than on the everyday meaning of “necessary” at the time? Is he right to do so? Perhaps the reason is that the meaning of “necessary” (and “proper” for that matter) in the constitutional ratification context was greatly affected by that context and, as a result, took on specialized senses which differed from their ordinary, everyday meanings. Even so, this is heresy for New Originalism’s reasonable person approach, which disdains this sort of meaning.\textsuperscript{112} This is not to say, however, that this contextual ratification meaning is a secret meaning, one known only to a small group of framers and ratifiers and unknown to the general citizenry. “We the people” could hardly have ratified meanings they had not heard and did not know. But technical meaning does not necessarily mean secret or unknown meaning. Technical meanings can be generally known (to some degree, at least) and, so, can be adopted. I am arguing that this is what happened with the Necessary and Proper Clause and, although he does put it this way and may not even realize it, so does Professor Barnett!

My argument here is not that constitutional meanings are always technical or special. That assertion is no more true than its opposite—the position that constitutional meanings are always ordinary, general meanings (which is, after all, a fair reading of the reasonable person New Originalist methodology adopted by Barnett and others). Instead, I argue only that some

\textsuperscript{111} He recognizes the difficulty of determining historical meaning, saying, “One practical problem of establishing the historical meaning of a particular term is the inability to discern whether particular examples are aberrational or represent the mainstream use of a term. Language after all is susceptible of many uses, some commonplace, others idiosyncratic or even metaphoric or poetic.” \textit{Id.} at 856.

\textsuperscript{112} \textit{See, e.g., District of Columbia v. Heller}, 554 U.S. 570, 576 (2008) ((quoting United States v. Sprague, 282 U.S. 716, 731 (1931)) (“In interpreting this [constitutional] text, we are guided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.”).
constitutional meanings are more technical or specialized than others and further that the distinction may be a matter of degree rather than a bright line difference. The Constitution, for example, gives Congress the power “To define and punish…Offenses against the Law of Nations.”113 No one argues that we may determine the content of that provision merely by finding the ordinary founding era ordinary meanings or dictionary definitions of the words “law,” “and” and “nations” as Justice Scalia does, for example, with the words “keep,” “bear” and “arms” in the Second Amendment in his opinion of the Court in the *Heller* case.114 This is because the notion of the law of nations was and is clearly a technical legal/philosophical concept rather than an ordinary term;115 the status of the three Second Amendment terms discussed by Justice Scalia, however, is far more debatable.

Despite his methodological commitment to taking terms used in the Constitution according to their ordinary, founding era meaning, Professor Barnett does not do this in his search for the original public meaning of the terms of Necessary and Proper Clause. Instead, he analyzes mainly technical, contextual meanings for these terms, that is, legal meanings relating to and/or arising out of the constitutional adoption and ratification process.116 The individuals whose statements he examines are largely important participants in that process.117 It is no surprise that the conclusion he reaches, one of moderate necessity, rather than one of absolute necessity or mere convenience, departs from the ordinary, dictionary

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113 U.S. Const. art. I, § 8, cl. 10.
114 See *Heller*, 554 U.S. at 581-592. In his survey, Justice Scalia consults a variety of sources including legal and other dictionaries, legal commentaries and treatises, cases, statutes, and constitutions.
115 Coincidentally, in the course of his just mentioned discussion of the original meaning of the phrase “keep and bear arms” Justice Scalia also cites a work which significantly influenced western ideas of the law of nations near the time of the founding—Vattel’s 1792 treatise, *The Law of Nations, or, Principles of the Law of Nature*. See id. at 587 n. 10.
117 In the pages cited in the immediately prior footnote, Professor Barnett focuses most on the statements of prominent Founders such as Thomas Jefferson, James Madison, Alexander Hamilton and Edmond Randolph.
meaning of “necessary” of the time. Yet, Barnett’s conclusion is correct as a matter of the meaning of the Necessary and Proper Clause; what needs to change is his theory of originalism and that is precisely what is proposed in the next section of this article. In this change, Barnett’s reasonable person originalism is transformed into a dialogic originalism and, further, it is argued that original public meaning can sometimes, as it does here, include legal/constitutional meaning. And, as an added bonus, the fuzzy “somewhere” in the definition of Barnett’s moderate necessity, one lying somewhere between absolute necessity and mere convenience,\(^{118}\) will be rendered substantially less indeterminate.

### B. Public Meaning and Legal Meaning

The inquiry concerning the relation of public meaning and legal meaning starts with several related questions. One question is whether original public meaning can ever, under any circumstances, include legal meaning in the New Originalist theory advocated by Randy Barnett and others? Another question is, if legal meaning cannot be so accommodated in original public meaning, whether another cogent account of originalism might be constructed which could encompass legal meaning? A third question, if the first two can be answered satisfactorily, what is the content of the relevant legal meaning?

The answer to the first question is not at all clear simply because of the differing characteristics attributed to the reasonable person in reasonable person originalism by its various proponents. On one hand, for example, Justice Scalia says, “‘The Constitution was written to be understood by the voters; its words and phrases were used in their natural and ordinary as distinguished from technical meaning’….Normal meaning may of course include

\(^{118}\) See supra note 103 and accompanying text.
an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.”119 This definition of the reasonable person largely excludes technical meanings from its cognizance, but does not do so categorically because it would still permit technical meanings that would have been known to the ordinary citizen.120 The greater difficulty here would lie in the proof that ordinary citizens of the era in fact knew and understood the technical meaning in question when those founding generation ordinary citizens left little record of what they actually understood or meant. Extrapolating from the historical record (i.e., assuming that that the historical record-creating economic and political elites had largely the same views and understandings as the general citizenry) is neither completely justifiable nor verifiable, especially given the likelihood that the general citizenry, then as now, suffered from “political ignorance.”121 Yet, it is not at all clear what the alternatives to such an extrapolation might be.

On the other hand, some versions of reasonable person New Originalism include legal as part of the definition or stipulation of what it is that the reasonable person knows.122 This move “solves” the problem directly, but only at the price of highlighting one important worry about the New Originalism’s reasonable person device. This worry is that here one is not

120 This definition would, however, categorically exclude secret meanings simply because a meaning could not simultaneously be both secret and known to ordinary citizens.
121 See, e.g., Ilya Somin, Originalism and Political Ignorance 2-3 (February 2, 2012), Available at SSRN: http://ssrn.com/abstract=2015006 (“This understanding of original meaning makes it essential to try to determine what the public actually knew and understood about the meaning of specific parts of the Constitution at the time they were enacted. If most of the public in fact knew little or nothing about the constitutional provision in question, it may be difficult or impossible to determine its original meaning. At the very least, the original meaning might turn out to be very imprecise, especially in cases where the text is ambiguous enough to admit more than one possible interpretation. The evidence of extensive public ignorance on even very basic political issues suggests that such situations might well be quite common. Yet none of the rapidly growing literature on original meaning has so far grappled with the reality of widespread public ignorance and its implications for originalism.”).
122 See, e.g., Gary Lawson and Guy Seidman, supra note 65, at 73 (“In sum, the hypothetical ‘We the people of the United States’ is a pretty good fit with the reasonable person of law…. This person is familiar with the peculiar language and conceptual structure of the law.”).
merely “looking for one’s friends,” but actually stipulating their presence, i.e., jumping straight to a desired conclusion. This worry is not limited to Lawson and Seidman’s version of the reasonable person originalism, but applies to New Originalism generally. It arises from the doubt that this reasonable person accurately reflects the general understanding. Originalists have a dilemma here. The reasonable person is either a fraud or an unnecessary creation. For if the reasonable person does not accurately reflect the general understanding of the citizens of the founding era, or that understanding cannot be sufficiently determined, then it is a fraud. On the other hand, if the reasonable person does accurately reflect that understanding, it is unnecessary because the general meaning can be directly accessed.

So, the answer to the first question about reasonable person originalism is that legal meaning can be assimilated to it, but only with great practical and theoretical difficulty. This leads next to the second question of whether there might be some alternative version of originalism for which legal meaning is a better and more natural fit. Such a conception of originalism would recognize the possibility, if not likelihood, of multiple and conflicting meanings held by different groups of citizens, as we have found to be present with the Necessary and Proper Clause from the founding era until the present time.

Such an originalism might still take one of a variety of forms. It might use an empirical method to find the predominant or most common meaning among the possible meaning candidates, as Randy Barnett does with respect to the original public meaning of the word “commerce” in the Commerce Clause. \(^{123}\) It might instead select among meanings based upon structural or philosophical factors. Both of these options, however, have the same two different, but related, faults. First, they remain open to the “looking for one’s friends”

\(^{123}\) See supra notes 109-111 and accompanying text.
objection. Second, the meaning they produce is only partial, because they reject, as a methodological necessity, all but one of the conflicting meanings they initially consider.¹²⁴

A dialogic originalism, by contrast, is capable of encompassing and reconciling the multiple and conflicting original public meanings one is likely to find in controversial cases involving open-ended and ambiguous constitutional provisions. It does this by taking the competing meanings as voices in an ongoing conversation or debate (which is how they actually appear in life) rather than as fixed, isolated dictionary-like definitions. It takes this meaning as reciprocal and evolving because it takes law, as life, as a process. In this way, it is different from the New Originalism and most other existing variants of originalism, which, like positivism, see law as a fact.¹²⁵

To give this description a more definite illustration, put it in the context of the adoption and ratification of the Necessary and Proper Clause. Recall that the three main conflicting meanings of “necessary” in that process were “necessary” as absolutely necessary, as moderately necessary, and as merely convenient. To put it in terms of a phrase popularized by Ronald Dworkin, necessity was and is a contested concept.¹²⁶ In this debate competing groups had different conceptions of necessity. These conceptions did not exist in a vacuum, but instead spoke to and competed with one another. In the debate over the meaning of the word “necessary,” political, semantic, historical, textual and other factors interacted to give

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¹²⁴ I have connected this result to the New Originalist adoption of the reasonable person device. See supra notes 104-106 and accompanying text.


¹²⁶ In a passage using chess as an analogue to law in which the chess referee corresponds to the judge, Dworkin describes the play of conventions in this way, “But these conventions will run out, and they may run out before the referee finds enough to decide the case….It is important to see, however, that these conventions run out in a particular way. They are not incomplete, like a book whose last page is missing, but abstract, so that their full force cannot be captured in a concept that admits of different conceptions; that is in a contested concept.” RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 103 (1978) (emphasis in original). Dworkin takes the phrase “contested concept” from an earlier article by W.B. Gallie. See W.B. Gallie, Essentially Contested Concepts, 56 PROC. ARISTOTELIAN SOC'Y 167, 167-168 (1956).
the clause the meaning it took on. This meaning did not cease to be contested, but nevertheless had a continuity and consistency over time deriving from the original dialogue. This continuity and consistency, in turn, set the bounds of argument concerning the clause and created the rhetoric that was used in that argument. Like the gist of a conversation, the meaning of a constitutional provision can be derived (to the extent that it can be derived) from the interplay of statements and understandings that went into it.

Contextual, background facts can also affect textual understanding and meaning. In the case of the Necessary and Proper Clause, the Constitution alters the framework of the Articles of Confederation, which granted Congress only powers expressly delegated by the states.127 By the ratification of the Constitution, Congress acquired implied as well as express powers. The scope of these powers has been128 the question ever since. In addition, textual constitutional meaning can also be affected by intratextual129 considerations. So, in the case of the Necessary and Proper Clause, one reason not to take the word “necessary” in the clause to mean “absolutely necessary” is the fact that the phrase “absolutely necessary” appears elsewhere in the document.130 The presence of the phrase “absolutely necessary” in the Impost Clause demonstrates that the framers were quite capable of clearly indicating absolute necessity when they wished to do so. If the framers had meant “absolutely necessary” when they said only “necessary” in the Necessary and Proper Clause, the Impost Clause indicates that they would have said so. Since they did not do so, from an intratextual

127 ART. CONFEDERATION, art. II (“Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”).
128 As with Edmond Randolph’s “eternal question.” See supra note 100 and accompanying text.
129 That is, by comparison and contrast of the constitutional word or provision in question with like or identical words or phrases appearing elsewhere in the Constitution. For the leading work on intratextualism and the United States Constitution, see Akhil Reed Amar, Intratextualism, 112 HARV. L. REV. 745 (1999).
130 See U.S. CONST. art. I, § 10, cl. 2 (“No State shall, without the consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws[,]”).
perspective, it seems that the framers meant instead to invoke a lesser degree of necessity by merely saying “necessary.” John Marshall famously makes this argument in *McCulloch*. Marshall also cites intratextual uses of “necessary” and its synonym, “needful,” elsewhere in the Constitution to buttress his point. This intratextual inference is reinforced by the acquisition by Congress of implied as well as express powers in the change from the Articles of Confederation to the Constitution. Neither factor, though, suggests that the Constitution, in general, or the Necessary and Proper Clause, in particular, gives Congress unlimited power.

This background, like the setting of a conversation, helps us to better ascertain and understand the meaning of “necessary” in the Necessary and Proper Clause and, in this way, specify the somewhere between absolute necessity and mere convenience in which moderate necessity lies, but it does not standing alone, accomplish that specification. The obvious and most productive place to that is the ratification debate itself. In that debate, as was recounted above, there were three main original meanings given of the word “necessary” in the Necessary and Proper Clause—absolute necessity, moderate necessity and mere convenience. The more contentious question is what to do with these three meanings. The reasonable person device of the New Originalism tells us to pick the one that reasonable person of the founding era would select. But how can this be done, other than by “looking for one’s friends,” when reasonable real persons of the founding era were of three minds as to this meaning? Unless the New Originalists have some convincing decision procedure to select among these meanings, which they do not, any selection is arbitrary.

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131 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414-415 (1819) (“It is, we think, impossible to compare the sentence which prohibits a State from laying ‘imposts, or duties on imports and 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.’”) (emphasis in original).

132 For a discussion of these buttressing uses, see Akhil Reed Amar, *supra* note 129, at 756-758.

133 *See supra* notes 92-99 and accompanying text.
The mistake of New Originalism is to assume that we must select one of the several conflicting public meanings of the founding era and then ignore the others. The better course would be to take in the fullness and diversity of meaning in this debate in order to understand the meaning that is larger than any single person or any single definition. Federalist Congressman William Smith expressed this idea in an early congressional discussion of constitutional interpretation when he said that finding the meaning of the Constitution required determining “the general sense of the whole nation at the time the Constitution was formed” and that this, in turn, could be found through “the contemporaneous exposition of that instrument.” In order to accomplish Smith’s task of contemporaneous exposition, our search for meaning must encompass the various positions in the debate and their interplay so that we can see the meaning which arises from this process. Originalisms which see meaning as a set, objective fact cannot readily do this.

The difference here is analogous to that between a moving picture and a snapshot. The determination of public meaning involves the explication of synchronic elements, i.e., relating and resolving different meanings found at the same time—here, the ratification period. Especially when it involves old texts like the Constitution, it must also explicate diachronic elements of meaning, i.e., evolution and other changes of meaning over time. New Originalism, like most other forms of originalism in their own ways, “solves” the synchronic problem of constitutional meaning by postulating the reasonable person who can divine the single original public meaning of a constitutional word or phrase, even when the historical evidence, as it does here, belies the existence of a single original public meaning, instead often revealing conflicting and contested meaning. New Originalism and other varieties of originalism “solve” the diachronic problem of constitutional meaning through the fixation

134 4 ANNALS OF CONG. 484, 486 (1796).
thesis, the view that “the original meaning was fixed or determined at the time each provision of the constitution was framed and ratified.” This fixation thesis cannot, however, readily accommodate, because it does not recognize, the fact of evolving constitutional meaning and doctrine over time. New Originalist responses to both synchronic and diachronic constitutional meaning issues involve resolution by fiat in the face of contradictory evidence.

Turning once again to the Necessary and Proper Clause, we see that if we look at the meanings proffered at both extremes in the debate over the meaning of “necessary” in that clause, we find that persons on both extremes were motivated by the same concern that federal power in the proposed Constitution was, as An Old Whig put it, “undefined, unbounded, and immense,” in large part because of the clause. Anti-Federalists opposed the ratification of the Constitution because of their fear and dislike of federal power. The insistence of Thomas Jefferson and others that the word “necessary” in the Necessary and Proper Clause should be read as meaning “absolutely necessary” may initially seem to be diametrically opposed to the Anti-Federalist worry of the federal government having unlimited power. Yet it is, in fact, based upon the belief that the strict “absolutely necessary” definition of “necessary” was required to limit the federal government to its delegated and

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135 Lawrence B. Solum, supra note 6, at 33 (emphasis in original).
136 Further discussion of the admittedly important relation (and conflict) among originalism, doctrine and precedent lies well beyond the scope of this article. For a suggestion of a diachronic cure for originalism’s fixation thesis, see Geoffrey Schotter, Note, 60 CASE W. RES. L. REV. 1241(2010).
137 An Old Whig No. 2 (Fall 1787), in THE FOUNDERS’ CONSTITUTION 239 (Philip B. Kurland and Ralph Lerner, eds. 1987) (emphasis in original).
138 In a major speech during the ratification debate in Pennsylvania, for example, James Wilson (a delegate to the Constitutional Convention which drafted the Constitution and a major force in the ratification of the Constitution by Pennsylvania) listed the omission of a bill of rights and the centralized character of the national government created by the Constitution as two important Anti-Federalist objections to ratification. See James Wilson, Speech at a Public Meeting in Philadelphia, (Oct. 6, 1787), Pennsylvania Herald and General Advertiser, in 13 THE DOCUMENTARY HISTORY OF THE HISTORY OF THE RATIFICATION OF THE CONSTITUTION 339 (John P. Kaminski et al., eds, 1981).
139 See supra notes 93-94 and accompanying text.
enumerated powers.\textsuperscript{140} Both positions, then, arose from concerns about the scope of federal power. In this way, the ratification debate concerning the Necessary and Proper Clause was one of both ends against the middle with the two extremes united in their doubt as to the existence of a realistic limitation on federal power under the proposed Constitution.

The task of Federalist proponents of the Constitution in the ratification debate was to explain and convince the doubters that there were ascertainable limits to federal power. In that debate, it was not enough to simply assert that this power fell “somewhere” between the two extremes of absolute necessity and mere convenience. To that end, the Constitution’s supporters employed familiar notions from agency law and other branches of law of the time to illustrate and specify the limitations on federal power they held that the Constitution contained and, thus, mollify these doubters. As Randy Barnett summarizes it, “Federalist supporters of the Constitution repeatedly denied the charge that all discretion over the scope of its powers effectively resided in Congress. They insisted that the Necessary and Proper Clause was not an additional freestanding grant of power, but merely made explicit what was already implicit in the grant of each enumerated power.”\textsuperscript{141}

The grant of implied power pursuant to the Necessary and Proper Clause was one of powers incidental to the expressly granted enumerated powers.\textsuperscript{142} According to this model,

\begin{itemize}
\item \textsuperscript{140} See, e.g., Thomas Jefferson, \textit{supra} note 96, at 93 (“It has been much urged, that a bank will give great facility, or convenience, to the collection of taxes. Suppose this were true, yet the constitution allows only the means which are “necessary,” not those which are merely convenient for effecting the enumerated powers. If such a latitude of construction be allowed to this phrase, as to give any non enumerated power, it will go to every one; for there is no one which ingenuity may not torture into a \textit{convenience, in some way or other, to some one} of so long a list of enumerated powers: it would swallow up all the delegated powers, and reduce the whole to one phrase, as before observed. Therefore, it was that the constitution restrained them to \textit{necessary} means; that is to say, to those means, without which the grant of the power would be nugatory.”) (emphasis in original).
\item \textsuperscript{141} Randy E. Barnett, \textit{supra} note 88, at 155. Barnett also gives numerous examples to back up this assertion. See id. at 155-157.
\item \textsuperscript{142} See Gary Lawson et al., \textit{The Origins Of The Necessary And Proper Clause} 52 (2010) (“Our conclusion is that the Necessary and Proper Clause granted Congress powers incidental to the powers
“The Constitution should be read through a fiduciary lens.”143 This view of government adopted by the framers was based on sources from Aristotle to John Locke.144 The notion of an “incident” may have been a technical legal notion,145 but it was not a secret or unknown concept during the ratification period by any means.146 These fiduciary notions were used in the ratification debates and in the Constitution itself. Let me give three examples. After voting in favor of ratification of the Constitution, the Virginia convention called for a “declaration or bill of rights” to be added containing the following amendment, “That all power is naturally invested in, and consequently derived from, the people; that magistrates are therefore their trustees and agents, at all times amenable to them.”147 The following month, in the North Carolina ratifying convention, James Iredell said of the proposed Constitution, “It may be considered as a great power of attorney148[,]” The Constitution itself contains a reference to “an Office of Trust.”149

Edward Coke defined an incident as “a thing appertaining to, or following another that is more worthy or principall [sic].”150 A necessary incident in eighteenth-century agency law elsewhere granted in the Constitution, to be exercised in accordance with fiduciary principles—and in particular, in accordance with the principles of agency.”

143 See id.
144 See id. at 52-57.
145 See e.g., Gary Lawson & David Kopel, 121 YALE L. J. ONLINE 267, 273 (2011) (“To determine the scope of an agent’s implied powers, the law employed the doctrine of principals and incidents. An incident, to persons of the Founding era, was ‘a thing necessarily depending upon, appertaining to, or following another thing that is more worthy or principal.’”) (citation omitted).
146 See id. at 272 (“The law of agency was central to legal and economic life in the Founding era. Ordinary citizens often employed agents such as managers and brokers in their business affairs, and citizens frequently themselves acted as agents, such as executors and guardians. Accordingly, the general contours of agency law were familiar to a wide range of eighteenth-century Americans.”) (citation omitted).
147 Virginia Ratifying Convention, Proposed Amendments to the Constitution (June 27, 1788), in 5 THE FOUNDERs’ CONSTITUTION 15 (Philip B. Kurland and Ralph Lerner, eds. 1987) (emphasis in original).
148 James Iredell, North Carolina Ratifying Convention (July 28, 1788), in 1 THE FOUNDERs’ CONSTITUTION 475 (Philip B. Kurland and Ralph Lerner, eds. 1987).
149 U.S. Const., art. II, § 1, cl. 2.s
150 I EDWARD COKE, INSTITUTES OF THE LAWES OF ENGLAND *151b (1628).
described three different cases—where the incident was indispensable,\footnote{See Gary Lawson, Et Al., supra note 142, at 64 (“‘Necessary’ was a term of art, referring to any of three different situations. The first situation was when the putative incident was indispensable to the use of the principal.”) (emphasis in original).} where its absence greatly devalued the principal,\footnote{See id. at 65 (“The second situation in which a subordinate interest was deemed ‘necessary,’ and therefore incident to, the principal was if the absence of the subordinate interest would impair the value of the principal enough that the owner of the principal would suffer ‘great prejudice.’”).} and where it was customarily associated with the principal.\footnote{See id. (“The third kind of situation in which an interest was ‘necessary,’ and therefore incident to, the principal was if it was customary to the use of the principal, even if, objectively considered, there was little actual necessity.”) (emphasis in original).} Seeing the Constitution through this “fiduciary lens” leads to the conclusion that, “the word ‘necessary’ was inserted into the proposed Constitution to communicate that Congress would enjoy incidental powers.”\footnote{Id. at 93.} This conclusion explains Federalist arguments that the Necessary and Proper Clause did not expand federal powers enumerated in the Constitution; it also accords with the reigning political theory of the day.\footnote{See id. at 109 (“‘Requiring laws to accord with fiduciary duty also was consistent with Federalist representations that the Necessary and Proper Clause was without substantive force. It was standard Whig theory that any measure by which a government violated its fiduciary obligations was inherently void. So just as the word ‘necessary’ merely informed the reader of incidental powers Congress would have enjoyed without the Clause, the word ‘proper’ reminded the reader of limitations that would have existed without it.”).} Randy Barnett sums up the idea here posing the constitutional question, “Have not the people surrendered to the national government the powers that were enumerated in Article I and any right inconsistent with the exercise of such powers?” with the answer, “[T]he appropriate legal construct is not the surrender of rights to a master, but the delegations of powers to an agent.”\footnote{Randy E. Barnett, supra note 88, at 186.}

The article closes by coming full circle back to Comstock. What is the significance of the argument here that the original understanding of the Necessary and Proper Clause conceptualized it on a fiduciary model as a recognition of the incidental power possessed by Congress under the Constitution, if, as in Comstock, modern doctrine on the clause derives...
from *McCulloch v. Maryland* rather than from the original public meaning of the clause or some other originalist construct.\(^{157}\) Too much water has passed under the bridge, one might say, to now be bound the eighteenth-century doctrine of principals and incidents, even if it then captured the original public meaning of the Necessary and Proper Clause.\(^{158}\)

But *McCulloch* is almost as old as the Constitution and yet everyone seems to find it to be the fount from which all knowledge of the clause flows.\(^{159}\) Moreover, in *McCulloch* and in his defense of his opinion in the case against subsequent attacks, Chief Justice Marshall relies upon fiduciary arguments derived from eighteenth-century agency law. For example, directly after the important passage in the opinion later quoted in both the opinion of the Court and Justice Thomas’ dissent in *Comstock*,\(^{160}\) Marshall says, “That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a specification than other means, has been sufficiently proved.”\(^{161}\) Shortly after the *McCulloch* was published in 1819, it was attacked in print by pseudonymous writers, especially in Marshall’s home state of Virginia. In his, also pseudonymous, defense of his decision Marshall argues that, “It is the plain dictate of common sense, and the whole political system is founded on

\(^{157}\) See supra notes 21-27 and accompanying text.

\(^{158}\) See, e.g., Andrew Koppelman, *Bad News for Everybody: Lawson and Kopel on Health Care Reform and Originalism* 515, 518 (2012) (“These terms ….may have made sense in the eighteenth century….But it is not obvious how to translate these terms from their then-familiar applications….to the very different context of governmental powers.”).

\(^{159}\) Steven Gardbaum expresses the contemporary view of *McCulloch* when he says that it is “one of the handful of foundational decisions cited as original sources for the propositions of constitutional law they contain. But *McCulloch* has the further (and even rarer) distinction of being treated as providing a full and complete interpretation of a particular clause of the Constitution. Analysis of the Necessary and Proper Clause has historically begun and ended with *McCulloch*[.]”). Steven Gardbaum, *Rethinking Constitutional Federalism* 74 Tex. L. Rev. 795, 814 (1996).

\(^{160}\) See supra notes 26 and 27.

the idea, that the departments of government are the agents of the nation, and will perform,
within their respective spheres, the duties assigned to them.”\(^{162}\)

Fidelity to *McCulloch*, then, also entails fidelity to the agency law view of the Necessary
and Proper Clause, although this may not be widely realized. This is not to say that the
fiduciary view will provide a rule-like, mechanical decision procedure for Necessary and
Proper Clause case determinations. Remember that Marshall also said, echoing Edmond
Randolph, “But the question respecting the extent of powers actually granted, is perpetually
arising, and will probably continue to arise, so long as our system shall exist.”\(^{163}\)

V. CONCLUSION

Constitutional law is plagued by meaning conflict at both the doctrinal and the theoretical
levels. This article has taken up two loci of such conflict and contest of constitutional
meaning—the Necessary and Proper Clause (recently visited by the Supreme Court in the
*Comstock* case) and the reasonable person device in the New Originalism—so that insight
might be gained from the mutual comparison and illumination of their problems. In this
process, dialogue replaces just “looking for one’s friends” in constitutional argument as
various voices are considered and not silenced so that a favored one may be privileged. The
result of this reciprocal examination is a paired argument for a fiduciary, agency law model
of the Necessary and Proper Clause and also for a Dialogic Originalism as a replacement for
the currently fashionable reasonable person New Originalism.


\(^{163}\) *McCulloch* at 405.