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The Corporate Law Background of the Necessary and Proper Clause

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The Necessary and Proper Clause is perplexing. Perhaps the single greatest source of congressional power, a cornerstone of the modern administrative state, a trump card authorizing federal domination over many issues of national life, a symbol, for some, of the power of governments to improve the life of their citizens — it is all these, and more. Yet its terms are anything but pellucid. What does “necessary” mean? What about “proper”? What is the relationship between these words? The Constitution itself offers little clue. The phrase emerged from the Committee of Detail without clarification. The records of the Constitutional Convention provide scant evidence as to how the framers understood the clause, and the ratifying debates are not illuminating. Prior to the Supreme Court’s 1819 decision in McCulloch v. Maryland, the clause appeared to have been nearly forgotten.

The odd contrast between the importance of the clause and the lack of attention given to it during the founding era suggests that its terms must already have been in common usage. “Necessary and proper” feels like a lawyer’s clause — a standard provision that, despite its importance, is not usually the subject of negotiation or debate. If the clause was indeed one commonly found in legal practice, it would be understandable why so few people found it worthy of analysis or attention at the time of its drafting.

1 See Mark A. Graber, Unnecessary and Unintelligible, 12 Const. Commentary 167, 168 (1995) (Committee of Detail “gave no hint” on why it chose the language it did).

2 See Bernard H. Siegan, The Supreme Court’s Constitution: An Inquiry into Judicial Review and Its Impact on Society 9 (1987) (“the accounts of the 1787 Constitutional Convention are silent on the meaning of the necessary and proper power”).

The Corporate Law Background

In addition to explaining the curious absence of controversy during the founding era, the hypothesis that the Necessary and Proper Clause was part of the standard repertoire of attorneys at the time suggests a possible line of research: Information about the provenance and meaning of the Necessary and Proper Clause might be found in legal practice. In particular, such information might be gleaned by examining the conventions and usages of corporate law. The Constitution, after all, was itself a corporate charter—a document creating a body corporate and defining its powers. It would not be surprising, therefore, if terminology such as “necessary and proper” turned up in other, more quotidian charters. And if such terminology is indeed found there, we might be able to draw on these documents as a guide to interpreting the meaning of similar language in the Constitution.

This chapter pursues that line of inquiry by investigating the corporate law background of the Necessary and Proper Clause. I do so by analyzing corporate charters from the colonial and early federal periods: instruments establishing the colonies, statutes creating the First and Second Banks of the United States, and charters granted by Connecticut and North Carolina from the colonial period through 1819 (the date of the Supreme Court’s opinion in McCulloch). It turns out that terms such as “necessary,” “proper,” and “necessary and proper” were indeed ubiquitous in corporate practice. Hundreds of such provisions are found in the charters I reviewed—often modifying grants of rulemaking powers that directly parallel the Constitution’s grant of legislative authority to Congress.

The corporate law background provides information about how the Necessary and Proper Clause might have been understood at the time of its drafting. In particular, contemporary corporate practice suggests that the Necessary and Proper Clause does not create independent lawmaking competence, does not confer general legislative power, and does not grant Congress unilateral discretion to determine the scope of its authority. The corporate law background also suggests something about how to interpret the key constitutional terms: to be “necessary,” there must be a reasonably close connection between constitutionally recognized ends and the means chosen to accomplish those ends; to be “proper,” a law must not, without adequate justification, discriminate against or otherwise disproportionately affect the interests of particular citizens vis-à-vis others.

These conclusions should be viewed with caution. Terms such as “necessary” and “proper” were not defined in colonial or early federal charters. Corporate practice was not uniform, and although the terms appear in reasonably predictable ways, there is also plenty of variation. Despite
remarkable similarities in language and function, moreover, there is no proof that the Necessary and Proper Clause was in fact taken from corporate charters. Even if the framers of the Constitution did borrow from corporate charters, they may not have intended that the constitutional words be interpreted in the same way (none of the attorneys who presented arguments in *McCulloch v. Maryland* relied on corporate practice). And, of course, inferences from the corporate law background of the Necessary and Proper Clause say little, if anything, about interpretations not based on original intent. These caveats notwithstanding, an understanding of the corporate law background provides perspective and adds texture to our understanding of this important provision.4

This chapter is structured as follows. The first part explores the parallel between the Constitution and corporate charters. Part II reports the historical data. Part III considers how corporate attorneys of the time might have understood the Necessary and Proper Clause and the grant of legislative power within which it is embedded.

I. THE CONSTITUTION AS A CORPORATE CHARTER

I start by developing the analogy between the Constitution and corporate charters of the day. The analysis here draws on work by Robert Natelson, who observed in 2004 that the language of the Necessary and Proper Clause has roots in English agency practice.5 In this chapter I wish to explore a related but slightly different hypothesis: It is not agency principles in general but rather one specific application of those principles— the corporate charter—that provides the most immediate parallel and best general framework for understanding the legal background of the Necessary and Proper Clause.6

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4 To date, commentators on constitutional law have not fully appreciated the importance of the private law background of this and other constitutional provisions. See Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 Duke J. Constitutional L. Public Policy 107, 117 n.26 (2009) (“private law linguistic and intellectual traditions are not widely known to those immersed in modern public and administrative law.”).
