The Necessary and Proper Clauses

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The 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.1

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1. U.S. Const. art. I, § 8, cl. 18 (emphasis added).
The main purpose of this Article is to begin to provide a new and more accurate account of the origins of the Necessary and Proper Clauses. I refer to the Necessary and Proper “Clauses” rather than to the Necessary and Proper “Clause” to emphasize that the relevant text of the Constitution is comprised of three distinct provisions, only the first of which refers to the enumerated powers in Article I, Section 8:

1. “Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers”\textsuperscript{2}
2. “Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States.”

3. “Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in . . . any Department or Officer [of the United States].”

James Wilson was probably the most skilled and accomplished lawyer at the constitutional convention, and he appears to have devoted great care and attention to drafting these clauses for the Committee of Detail. Just why he drafted these clauses in this manner and how they influenced the subsequent development of American constitutional law are the primary subjects of this Article and of the broader research project of which it forms a part.

To summarize the main initial findings of this research, this Article contends that the second Necessary and Proper Clause is particularly important for understanding the basic design of the Constitution. Unless it is treated as surplusage, this second clause indicates that the Constitution vests powers in the Government of the United States that are not merely identical or coextensive with the powers vested in Congress or other Departments or Officers of the United States. Because these additional powers are not specified or enumerated in the Constitution, they must be understood to be implied or unenumerated powers. The existence of implied or unenumerated powers is thus explicitly recognized by the precise text of the Constitution, much like the existence of unenumerated rights. Moreover, these “other powers” are distinct from the powers encompassed by the first Necessary and Proper Clause, which by its terms are limited to whatever instrumental powers are necessary and proper to carry into effect the “foregoing powers” vested in Congress by Article I, Section 8.

The second Necessary and Proper Clause was intended to achieve precisely this objective: to declare and to incorporate into the Constitution the doctrines of implied and inherent powers that Wilson, Robert Morris, Gouverneur Morris, Alexander Hamilton, and other prominent nationalists at the constitutional convention had advocated throughout the previous decade, and that Wilson, in

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3. Id.
4. Id.
5. See, e.g., 2 The Records of the Federal Convention of 1787, at 151 (Max Farrand ed., 1911) (Wilson’s first draft of the Constitution for the Committee of Detail, including instructions “[t]o treat the Powers of the legislat[ure],” “except from those Powers certain specified Cases,” and to assign other “Powers which may, with Propriety be vested in it”); id. at 168 (Wilson’s later draft, which includes all three Necessary and Proper Clauses, the first of which is crossed out); id. at 182 (the Committee of Detail’s August 6 draft, which includes all three Necessary and Proper Clauses).
6. See U.S. Const. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).
7. For useful histories that examine the activities of Wilson and the nationalists during the Confederation period, see generally E. James Ferguson, The Power of the Purse: A History of American Public
particular, had defended on behalf of the Bank of North America in 1785.8
Recent scholarship on the origins of the Necessary and Proper Clause has tended to skip over this preconvention history, focusing instead on various public statements made by Wilson and other Federalists during the campaign to ratify the Constitution,9 along with relatively arcane subjects such as the scope of discretionary grants of power in eighteenth-century English legislation,10 the common law doctrine of principal and incidents,11 and the frequency with which “necessary and proper” and similar phrases appear in early American corporate charters.12 Although these are valuable sources of evidence, they are less helpful for understanding the genesis of what the founders called the “Sweeping Clause” than an accurate historical grasp of why Wilson and the other leading nationalists at the convention were so committed to the doctrine of implied powers, and of how they managed to guarantee that the Constitution delegated both express and implied powers to the United States.

During the contentious decade leading up to the convention, Wilson and the nationalists often relied on implied and inherent powers in order to justify the exercise of the sovereign authority of the United States over the war effort,

8. See James Wilson, Considerations on the Bank of North America (1785), in 1 Collected Works of James Wilson 60 (Kermitt L. Hall and Mark David Hall eds., 2007).
12. See Geoffrey P. Miller, The Corporate Law Background of the Necessary and Proper Clause, in Origins, supra note 9, at 144–76.
public finance, foreign affairs, and western lands. Perhaps the most notable of these efforts were made in connection with the Bank of North America, along with the Indiana Company, Illinois-Wabash Company, and other early American land companies, whose legal strategies Wilson had a major hand in directing. As his essay on the Bank of North America illustrates, Wilson rarely missed an opportunity to strengthen the hand of Congress during this critical period. Yet recent commentaries on the Necessary and Proper Clause have neglected to consider the relationship between the “powers vested . . . in the Government of the United States” to which this clause refers and Wilson’s defense of implied and inherent national powers in his bank essay. Indeed, the most prominent recent studies of the Necessary and Proper Clause virtually ignore the fact that it was Wilson, one of the founding era’s most sophisticated constitutional and corporate lawyers, and perhaps its most aggressive advocate of unenumerated powers, who composed this particular clause for the Committee of Detail. As a result, these commentaries neglect to consider why Wilson employed such unusually capacious language in drafting the Necessary and Proper Clause and what purposes he sought to achieve by doing so. Once these issues are properly understood, the precise syntax and semantics of all three Necessary and Proper Clauses and the specific controversies generated by the second clause during the

13. See generally, e.g., Abernethy, supra note 7; Ferguson, supra note 7; Henderson, supra note 7; Jensen, The Articles of Confederation, supra note 7; Rakove, supra note 7; Banning, supra note 7.

14. See Jensen, The Articles of Confederation, supra note 7, at 120–22, 211–18 (describing the land companies’ appeals to the inherent sovereignty of the United States over the western territories); Livermore, supra note 7, at 106–11, 113–19 (describing the activities of the owners and agents of the Indiana Company and Illinois and Wabash Companies, including Wilson); Lindy G. Robertson, Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands 3–27 (2005) (describing the history and affairs of the Illinois and Wabash Companies, which Wilson led from 1781 to 1798); Jensen, The Creation, supra note 7, at 325–35 (describing how the land companies, including Wilson, countered unfavorable restrictions attached to Virginia’s cession of western lands by seeking to establish Congress’s inherent authority over these lands).

15. See, e.g., Wilson, supra note 8, at 66 (“The United States have general rights, general powers, and general obligations, not derived from any particular states, nor from all the particular states, taken separately; but resulting from the union of the whole . . . . To many purposes, the United States are to be considered as one undivided, independent nation; and as possessed of all the rights, and powers, and properties, by the law of nations incident to such.”); see also, e.g., Jensen, The Articles of Confederation, supra note 7, at 168 (observing that “during the writing of the Articles of Confederation, [Wilson] made repeated efforts to give Congress powers which would make it superior to the states . . . . Congress, he said, did not represent the states, but the people of the United States”); id. at 173 (relating that Wilson objected to a meeting of New England states on the ground that “since continental business was involved, the approval of Congress was required”); id. at 175 (recounting that Wilson led the opposition to Thomas Burke’s proposal to add a reserved powers clause to the Articles of Confederation).


17. See, e.g., Gary Lawson & Patricia B. Granger, The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267, at 274–326 (1993) (discussing the origins and original understanding of the Necessary and Proper Clause without special emphasis on Wilson); see also Amar, supra note 7, at 110–14 (2005) (same); Barnett, supra note 9, at 155–57 (same); Lynch, supra note 9, at 8–49 (same); Miller, supra note 12, at 149 (same); Natelson, supra note 9, at 86–89 (same).
founding era are much more intelligible. Indeed, as this Article will demon-
strate, many surprising facts about the framing and ratification of the Constitu-
tion can be adequately explained only if these matters are viewed in their proper
light.

Part I introduces the central theme of the Article by distinguishing the two
main components of the Necessary and Proper Clause—which I refer to as the
Foregoing Powers Provision and the All Other Powers Provision—and by
recalling some of the distinct roles these provisions played during the formative
era of American constitutional law. As this Part recounts, the most significant
controversies surrounding the Necessary and Proper Clause in the first decades
of the Republic did not rest primarily on the former provision, which gives
Congress the express authority to carry into execution its “foregoing powers” in
Article I, Section 8. Instead, they were related to the latter provision, which
refers inter alia to “all other powers vested by this Constitution in the Govern-
ment of the United States.” On the most natural and plausible reading of this
second provision, the “other” government powers to which it refers cannot be
equated either with the enumerated Article I powers of Congress or with the
other powers vested by the Constitution in any Department or Officer of the
United States, as many astute observers recognized at the time. Instead, this
second provision necessarily refers to certain implied or unenumerated powers
that the Constitution vests in the Government of the United States itself. This
natural and straightforward interpretation of the “Sweeping Clause” was one of

18. Because some of the terminology utilized in this Article is novel, it may be helpful to clarify it
here. For the purposes of this Article, I refer to the first Necessary and Proper Clause, see supra note 2
and accompanying text, as the “Foregoing Powers Provision.” Collectively, I refer to the second and
third clauses, see supra notes 3–4 and accompanying text, as the “All Other Powers Provision.” The
Foregoing Powers Provision thus refers to Congress’s authority “[t]o make all Laws which shall be
necessary and proper for carrying into Execution the foregoing Powers.” The All Other Powers
Provision refers to Congress’s authority “[t]o make all Laws which shall be necessary and proper for
carrying into Execution...all other Powers vested by this Constitution in the Government of the
United States, or in any Department or Officer thereof.” In this Article, I also adhere to the convention
introduced into American law by Justice Brandeis in Lambert v. Yellowley, 272 U.S. 581, 596 (1926),
by using the singular term, “Necessary and Proper Clause,” to refer to the full text of Article I,
Section 8, Clause 18 (along with the first five words of Article I, Section 8). See supra note 1. Because
one of the main goals of the Article is to draw attention to the different parts of the Necessary and
Proper Clause and their distinct origins, meanings, and implications, I also occasionally refer to one or
more of these subclauses as the “Necessary and Proper Clauses.” Finally, unless otherwise indicated, I
also follow the convention of most recent historical scholarship by using the term “Sweeping Clause”
to refer to the full text of the Necessary and Proper Clause. As I note in Parts I and IV, however, a
plausible case can be made that the founders often employed the term “Sweeping Clause” more
restrictively, to refer only to the All Other Powers Provision. See infra notes 47, 338–67 and
accompanying text.

19. See infra notes 20–21, 51–57 and accompanying text. See also, e.g., Letter from Thomas
Jefferson to James Madison (December 20, 1787), reprinted in THE DEBATE ON THE CONSTITUTION
210–11 (Bernard Bailyn, ed., 1993) (explaining that Wilson’s contention that everything which is not
given, is reserved by the Constitution was merely artful propaganda, which was “opposed by strong
inferences from the body of the instrument, as well as from the omission of the clause of our present
confederation, which declared that in express terms”).
the major reasons why three delegates to the convention (George Mason, Edmund Randolph, and Elbridge Gerry) refused to sign the Constitution. Together with the absence of a reserved powers clause in the Constitution, it was also one of the principal reasons why Brutus, An Old Whig, Federal Farmer, and other leading Antifederalists warned of the uncertain and potentially dangerous implications of the final enumerated power in Article I, Section 8.  

Part II turns to a closer examination of the intellectual origins of the Necessary and Proper Clause. The central proposition it seeks to establish is that Wilson’s 1785 essay on the Bank of North America was the most likely proximate source of, or at least an important antecedent to, the critical language of Resolution VI of the Virginia Plan, which would have enabled Congress “to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.” An amended version of this proposal was adopted by the convention and given to the Committee of Detail, which later produced the list of enumerated powers that later became Article I, Section 8. Consequently, historians have long recognized the significance of Resolution VI for interpreting the conceptions of federalism that motivated the founders and that informed their understanding of Congress’s powers under the Necessary and Proper Clause. In recent years, these topics have been given renewed attention in important work by Jack Rakove, Joseph Lynch, Randy Barnett, Alison LaCroix, Jack Balkin,
Robert Cooter and Neil Siegel, Kurt Lash, William Ewald, and other scholars. The origin of this critical language of Resolution VI, however, has received little or no serious attention. Instead, most commentators have simply assumed that, like the rest of the key elements of the Virginia Plan, this provision originated with James Madison. As I explain in Part II, this assumption seems doubtful. The specific language of Resolution VI that would have expressly conferred upon Congress the power “to legislate in all cases to which the States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation” cannot be found in Madison’s preconvention letters to Edmund Randolph, George Washington, and Thomas Jefferson, the primary sources from which historians have inferred Madison’s pivotal role in formulating the Virginia Plan. Nor was vesting this broad legislative authority in Congress an idea that Madison actively embraced during the Confederation period. On the contrary, Madison and other members of the Virginia delegation firmly opposed the application of the Resolution VI principle in at least two important contexts during the preconvention period: the Bank of North America and congressional control over western lands. The critical language of Resolution VI does, however, bear a striking resemblance to the text of Wilson’s bank essay. Furthermore, this critical language also encapsulates the basic political theory advocated by Wilson and other leading nationalists throughout this period, many of whom had endorsed the sovereign authority of the United States to prosecute the war, incorporate a national bank, fund the national debt, administer western lands, and conduct foreign affairs in


25. See, e.g., Douglass Adair, The Authorship of the Disputed Federalist Papers, in Fame and the Founding Fathers: Essays by Douglass Adair 27, 40 (Trevor Colbourn ed., 1974) (discussing the Virginia Plan without explaining the origin of this critical language); Douglass Adair, James Madison, in Fame and the Founding Fathers, supra, at 124, 135 (same); Banning, supra note 7, at 113 (same); Richard Beeman, Plain, Honest Men: The Making of the American Constitution 87 (2009) (same); Irving Brant, James Madison: Father of the Constitution, 1787–1800, at 24–25 (1950) (same); Lynch, supra note 9, at 3–4, 8–15 (same); Rakove, supra note 23, at 60 (same); Wood, supra note 7, at 472, 525–26 (same); Lash, supra note 24, at 2134–35 (same). Banning expresses the conventional wisdom among historians when he writes that Madison “had suggested all the key provisions of the [Virginia] plan in preconvention writings.” Banning, supra note 7, at 115. As this Article suggests, this conclusion appears to be mistaken.

26. See infra section II.C.

27. See Wilson, supra note 8, at 66–67 (explaining that “[w]henever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in congress assembled” and adding that this principle is “very near the same as in that of several voices collected together, which, by their union, produce a harmony, that was not to be found separately in each”).
strikingly similar terms.28

Taken together, these observations suggest that Wilson or another Pennsylvania delegate was ultimately responsible for adding the critical language of Resolution VI to the Virginia Plan. More importantly, they suggest that when the Committee of Detail debated whether, and if so how, to incorporate the key legislative mandate of Resolution VI in its draft constitution, it was considering a principle to which Wilson was deeply committed. The political theory of Resolution VI was his theory, which he had championed throughout the previous decade. Unless one comes to grips with these facts, the activities of the Committee of Detail and the precise text of the Necessary and Proper Clause risk being misunderstood.

In light of this background, Part III takes a fresh look at the drafting history of the Necessary and Proper Clause in the Committee of Detail, focusing on the contributions of Wilson, which previous historical scholarship has often ignored.29 Taking the detailed scholarly investigation of the Committee of Detail recently published by Professor William Ewald as a starting point,30 I make four principal observations that complement and build upon Professor Ewald’s pioneering analysis. First, the existing records of the Committee of Detail indicate that the original sketch of the first Necessary and Proper Clause, the Foregoing Powers Provision, was written by John Rutledge of South Carolina,31 an aggressive defender of slavery and state sovereignty, whereas the second and third Necessary and Proper Clauses were originally drafted by Wilson,32 a critic

28. For example, Benjamin Franklin’s first draft of the Articles of Confederation, presented to the Second Continental Congress in 1775, called for giving Congress the authority to impose taxes, make war, enter foreign alliances, resolve colonial disputes, form new colonies, and make all laws “necessary to the General Welfare” that local assemblies “cannot be competent” to enact. See Franklin’s Articles of Confederation (July 21, 1775), AVALON PROJECT, http://avalon.law.yale.edu/18th_century/contcong_07-21-75.asp. In a 1780 letter to James Duane, Alexander Hamilton characterized the implied powers of the United States in similarly broad terms, arguing that on behalf of “the public good” Congress “should have considered themselves as vested with full power to preserve the republic from harm,” adding that “many of the highest acts of sovereignty, which were always cheerfully submitted to—the declaration of independence, the declaration of war, the levying an army, creating a navy, emitting money, making alliances with foreign powers, [and] appointing a dictator” were merely implications of “a complete sovereignty” possessed by Congress. Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), FOUNDERS ONLINE, http://founders.archives.gov/documents/Hamilton/01-02-02-0838 (emphasis omitted). In 1781, Robert Morris and his nationalist supporters in Congress argued that the national debt should be paid by taxes imposed and collected by Congress. “Their argument was that the debt represented an obligation of Congress rather than the thirteen states. Morris discerned an implied contract between Congress and the public creditors which could only be validated if Congress had perfect control of the revenue to pay them.” FERGUSON, supra note 7, at 143. In 1783, Pelatiah Webster proposed that the national legislative authority should extend to matters of “a general necessity and utility to all the States, as cannot come within the jurisdiction of any particular State, or to which the authority of any particular State is not competent.” HANNIS TAYLOR, A MEMORIAL IN BEHALF OF THE ARCHITECT OF OUR FEDERAL CONSTITUTION: PELATIAH WEBSTER 43 (1908).

29. See supra note 17 and accompanying text.

30. See Ewald, supra note 24.

31. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 137 n.6, 144; see also infra note 184 and accompanying text.

32. See id. at 168; see also infra notes 217–27 and accompanying text.
of slavery and one of the period’s most outspoken advocates of implied and inherent national powers. Second, these records, at least as they are transcribed in Max Farrand’s *Records of the Federal Convention of 1787*, also suggest that Rutledge’s original sketch of the Foregoing Powers Provision appears to have been accompanied by an instruction from Rutledge to “Insert the II Article,” an apparent reference to the reserved powers clause of the Articles of Confederation, which limited Congress to the exercise of “expressly delegated” powers and reserved all other powers to the states. Third, the available evidence indicates that it was Wilson who added the qualification “and proper” to the text of Rutledge’s draft, thereby introducing the phrase “necessary and proper” to the report produced by the Committee of Detail, and thus to the constitutional text itself. Finally, the documentary records also suggest that after adding the second and third Necessary and Proper Clauses to the Committee of Detail’s draft, Wilson actively considered deleting the first Necessary and Proper Clause, which Rutledge had composed at an earlier stage of the Committee’s proceedings. If this deletion had survived, it would have simplified the last clause of what became Article I, Section 8 by making it consist of only the All Other Powers Provision. In the draft returned by the Committee of Detail on August 6, however, there was no such deletion. Instead, the full text of the Necessary and Proper Clause in the Committee of Detail’s August 6 draft included both the Foregoing Powers and All Other Powers Provisions. All of these observations tend to confirm and reinforce the conclusion that the Necessary and Proper Clause has a complex internal structure and complicated drafting history that cannot be accurately summarized as merely the reflection of a simple desire to grant Congress the incidental authority to carry into effect its own enumerated powers.

A careful study of the origins and drafting history of all three Necessary and Proper Clauses raises many new questions about the original understanding of these clauses that have not been adequately addressed by existing scholarship. Most importantly, of course, it requires us to ask just how the Constitution vests implied or unenumerated powers in the United States that go beyond the enumerated powers, and to identify what these “other powers” consist of. Because this Article is but the first of a series of projected articles on this topic, I do not try to answer this question or other questions of a similar nature comprehensively here. Nor do I attempt to engage systematically with the academic literature on constitutional originalism or seek to elaborate my own theory of constitutional interpretation. Instead, I limit my attention in this

33. *Id.* at 144; *see also infra* note 200 and accompanying text.
34. *See id.* at 168.
35. *See id.* at 182.
Article primarily to exploring two preliminary historical issues or “threshold questions” about Wilson’s final draft for the Committee of Detail (what Professor Ewald labels “Draft IX”)37 and, by extension, the Committee’s August 6 draft. First, what are the origins of “necessary and proper” and from what sources did Wilson derive this phrase? Second, what are the origins of the All Other Powers Provision and why did Wilson and the Committee of Detail include this provision in the draft they returned to the convention on August 6? Because these are complex issues, for which the relevant historical evidence is often fragmentary or equivocal, any answers one gives must be tentative and based in part on educated guesses. Bearing in mind these and other familiar caveats and qualifications, I propose the following provisional answers in Part IV.

First, the best interpretation of the available evidence suggests that Wilson added the phrase “and proper” to the original text of the Necessary and Proper Clause primarily in order to provide a basis for the judicial review of federal laws that violated the natural rights of individuals. As a secondary matter, Wilson probably had in mind enforcing certain structural principles of the Constitution, such as the separation of powers. The specific language he used to demarcate the boundary of permissible legislation—“necessary and proper”—was neither novel nor unfamiliar at the time, however, despite what many commentators have assumed. Nor was it exclusively or even primarily a technical concept, which only a lawyer or someone with specialized knowledge could use or interpret correctly. Wilson—and virtually all of the founders—had encountered this language in a wide variety of contexts before the convention. Drawing on archival research, as well as newly available electronic databases, I present evidence in Part IV that clearly establishes these propositions. Among other things, these findings should begin to correct certain prevalent misconceptions about the novel, inscrutable, or technical nature of the phrase “necessary and proper” to the founding generation.

Second, it seems plausible to infer that Wilson drafted the All Other Powers Provision primarily to vest Congress with all of the residual instrumental power it might need to provide for the common defense, promote the general welfare, and fulfill the other ends for which the Government of the United States was established. Put differently, Wilson’s main objective in drafting this clause was to vest Congress with the explicit authority to carry into effect certain implied and unenumerated powers of the United States, and thereby to cancel the inference that Congress’s other enumerated powers were exhaustive. In so doing, Wilson sought to provide the United States with an indirect textual confirmation of the implied and inherent authority to which he and the other leading nationalists had often appealed during the critical years leading up to

37. See Ewald, supra note 24, at 259. In a forthcoming article, I delve more deeply into the Committee of Detail’s August 6 draft, the Committee of Style’s September 12 draft, and the impact of the Necessary and Proper Clause on what transpired during final weeks of the convention.
the convention. In addition, Wilson presumably intended to give Congress whatever instrumental power it needed to organize and regulate the other branches and agencies of the government. In each case, the key language with which Wilson sought to achieve these objectives—“all other powers”—would have been familiar to all of the founders. Many well-known legal instruments included sweeping clauses of the “all other” variety at the time, including the Declaration of Independence and the Pennsylvania, Delaware, and Vermont state constitutions.38

If the foregoing explanations and the main thrust of this Article are correct, then many other questions naturally arise and demand convincing answers. Some of these questions relate mainly to the drafts prepared by the Committee of Detail, but, since the language of the Necessary and Proper Clause remained essentially unchanged in the final text of the Constitution, they also bear directly on our understanding of the Constitution itself. For example, how representative were Wilson and the nationalists in their desire to vest the United States with implied powers? Was Wilson acting alone or on behalf of a small group of ultra-nationalist delegates when he first drafted the Necessary and Proper Clause, or did the sweeping language he employed instead reflect the dominant opinion and the balance of power at the convention? If Wilson’s views were idiosyncratic, how much weight should we give them? Further, how can this new account of the origins of the Necessary and Proper Clause be squared with the public defenses of that clause given by Wilson, Hamilton, Madison, and other Federalists during ratification? More broadly, how can this account be reconciled with the familiar idea that the Government of the United States is a government of limited and enumerated powers?

Finally, and most importantly, what are the unenumerated powers vested by the Constitution in the Government of the United States, to which the second Necessary and Proper Clause refers? Do they include all of the incidents of national sovereignty, such as an inherent authority of the federal government over national security and immigration?39 Do they include all of the incidental powers that are attached tacitly to any legal corporation, such as the right to acquire property, the right to operate under a common seal, the

38. See The Declaration of Independence para. 32 (U.S. 1776) (“all other acts and things which Independent States may of right do”); Del. Const. art. 1, § 5 (1776) (“all other powers necessary for the legislature of a free and Independent state”); Pa. Const. ch. 2, § 9 (1776) (“all other powers necessary for the Legislature of a free State or Common-Wealth”); Vt. Const. ch. 2, § 8 (1777) (“all other powers necessary for the legislature of a free State”); see also infra notes 353–57 and accompanying text.

39. See, e.g., Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (recognizing “incident[s] of sovereignty belonging to the government of the United States as part of those sovereign powers delegated by the constitution”); Theodore Roosevelt, Legislative Actions and Judicial Decisions, in 18 Works of Theodore Roosevelt 82–85 (1923–1926) (arguing that Wilson and Marshall were correct to insist that “an inherent power rested in the nation, outside of the enumerated powers conferred upon it by the Constitution, in all cases where the object involved was beyond the power of the several States and was a power ordinarily exercised by sovereign nations”).
right to make bylaws, and the right to sue and be sued? 40 Perhaps most significantly, do these additional powers include the implied power to promote the general welfare and to fulfill the other broad purposes set out in the Preamble of the Constitution, as many progressive thinkers have held, and as President Franklin Delano Roosevelt proclaimed at the height of the New Deal? 41 If so, could the Necessary and Proper Clause become the driving force in a progressive revitalization of the Constitution? What then would become of the cherished ideals of federalism and limited government?

These questions do not admit of easy answers, and they must be addressed in a patient and systematic fashion in light of all the available evidence, arguments, and counterarguments, as well as the competing values and interests at stake. In a companion article that takes up where this Article leaves off, I present the next part of the history of the Necessary and Proper Clauses by tracing their influence during the final weeks of the convention, as the delegates debated the Committee of Detail and Committee of Style drafts, and during the ensuing campaign to ratify the Constitution. The Conclusion of this Article lays the groundwork for that forthcoming discussion by highlighting a number of puzzling observations about the Necessary and Proper Clauses that can be gleaned from a careful review of the relevant documentary records. These observations include the fact that South Carolina delegate Pierce Butler tried unsuccessfully to delete the second Necessary and Proper Clause from the Constitution in the final weeks of the convention; that Madison’s original defense of the “Sweeping Clause” in Federalist No. 44 misquoted that clause by omitting the third Necessary and Proper Clause altogether; that at the Virginia ratifying convention Patrick Henry drew attention to the import of the third Necessary and Proper Clause for interpreting the implied powers presupposed by the second clause; and that when Charles Pinckney sent Secretary of State John Quincy Adams a copy of his “Pinckney Plan” in 1818, the last clause in his list of enumerated powers was an abridged version of the Necessary and Proper Clause, which consisted of only the Forgoing Powers Provision. 42

Together with the other evidence presented in this Article, all of these curious facts reinforce the essential argument of this Article that the precise text of the Necessary and Proper Clause presupposes that the Constitution vests the Government of the United States with implied or unenumerated powers, which go beyond the enumerated powers. They also suggest that these “other powers”

40. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES *463–64 (enumerating these and other powers that are necessarily incident to every corporation); see also JAMES WILSON, Of Corporations, in 2 COLLECTED WORKS OF JAMES WILSON, supra note 8, at 1035–37 (same).
41. See, e.g., George Creel, Roosevelt’s Plans and Purposes, COLLIER’S MAGAZINE, Dec. 26, 1936, at 7, 40 (explaining the basis of FDR’s view that the provision of the Constitution that refers to “‘all other powers vested by this Constitution’ carries with it explicit authorization to enact laws to ‘promote the general welfare,’ so specifically mentioned in the Preamble and again in Article I, Section 1”).
42. See infra notes 370–76 and accompanying text.
delegated to the United States were part of an original understanding of the Constitution that has been neglected or forgotten over the course of the past 225 years.

I. FOREGOING POWERS VS. ALL OTHER POWERS

The Necessary and Proper Clause authorizes Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” 43 Most recent Supreme Court decisions involving this clause focus attention exclusively on the first part of the clause, which ties the “Necessary and Proper” power directly to the foregoing powers enumerated in Article I, Section 8. 44 The Necessary and Proper Clause is comprised of three distinct provisions, however, only the first of which refers to these enumerated powers. Only the first part of the clause thus directly supports the assumption that the powers of the federal government are tightly circumscribed. Put differently, there are three Necessary and Proper clauses, not merely one or two. Commentators who ignore or overlook this fact tend to misconceive the legitimate scope of federal power by treating an entire provision of the Constitution as surplusage or by simply assuming that it does not exist.

One can begin to grasp the force of these observations by examining the distinct components of the Necessary and Proper Clause—the Foregoing Powers Provision and the All Other Powers Provision—and by recalling the different roles they played in the drafting, ratification, and early interpretations of the Constitution.

Foregoing Powers: “Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.” 45

All Other Powers: “Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” 46

43. U.S. CONST. art. I, § 8, cl. 18.
46. Id.
The All Other Powers Provision is what the founders generally had in mind when they referred to the last clause of Article I, Section 8 as the “Sweeping Clause.” On the surface, at least, it appears to be the only part of the Necessary and Proper Clause quoted by Alexander Hamilton in *The Federalist No. 33* and by James Madison in his first speech to Congress on the need for a Bill of Rights. Likewise, the All Other Powers Provision appears to be the only part of the Necessary and Proper Clause that James Wilson quotes in his *Lectures on Law* in the course of explaining the powers of Congress. On all three occasions, Hamilton, Madison, and Wilson appear to ignore the Foregoing Powers Provision and to focus instead on the All Other Powers Provision.

The complex All Other Powers Provision, not the simpler and more transparent Foregoing Powers Provision, was the main reason critics objected to the “undefined, unbounded, and immense power” delegated to the national government by the Constitution. As the ratification debates got underway, An Old Whig objected to the sweeping clause in *The Federalist No. 33*, at 203.

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47. *See, e.g., The Federalist No. 33,* at 203 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (using the term “sweeping clause” to refer to the provision authorizing Congress “to make all laws which shall be necessary and proper for carrying into execution the powers by that Constitution vested in the government of the United States, or in any department or officer thereof”); 12 *Papers of James Madison* 194, 205 (Charles F. Hobson & Robert A. Rutland eds., 1979) (notes and text of James Madison’s June 8, 1789 speech in Congress) (using the phrase “Sweeping Clause” to refer to the provision “granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the government of the United States, or in any department or officer thereof”); 10 *Documentary History of the First Federal Congress* 1789–1791, at 468–81 (Charlene Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds., 1992) (text of Elbridge Gerry’s May 6, 1789 speech in Congress) (invoking “The sweeping clause” with “reference to this power, ‘And all other powers vested—in government of United States’”); cf. *Supplement to the Records of the Federal Convention,* supra note 20, at 249 (listing as one of George Mason’s objections to the Constitution that “[t]he sweeping Clause absorbs every thing almost by Construction,” a criticism that lends itself most naturally to the All Other Powers Provision).


49. *See The Congressional Register, 8 June 1789* (Mr. Madison), reprinted in *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* 82 (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., 1991) (hereinafter CREATING THE BILL OF RIGHTS) (explaining that although the powers of the federal government are directed toward particular objects, Congress “has certain discretionary powers with respect to the means . . . because in the constitution of the United States there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the Government of the United States, or in any department or officer thereof; this enables them to fulfill every purpose for which the government was established”).

50. *See James Wilson, Of the Constitutions of the United States and of Pennsylvania—Of the Legislative Department,* in 2 *Collected Works of James Wilson,* supra note 8, at 434–35 (“The powers of congress are, indeed, enumerated; but it was intended that those powers, thus enumerated, should be effectual, and not nugatory. In conformity to this consistent mode of thinking and acting, congress has the power to make all laws, which shall be necessary and proper for carrying into execution every power vested by the constitution in the government of the United States, or in any of its officers or departments.”)

Whig, 52 Brutus, 53 and other Antifederalists54 drew attention to this second half of the Necessary and Proper Clause to warn of this immense power. An Old Whig asked:

[W]hat is the meaning of the latter part of the clause which vests the Congress with the authority of making all laws which shall be necessary and proper for carrying into execution ALL OTHER POWERS;—besides the foregoing powers vested, &c. &c. Was it thought that the foregoing powers might perhaps admit of some restraint in their construction as to what was necessary and proper to carry them into execution? Or was it deemed right to add still further that they should not be restrained to the powers already named?55

Drawing the most plausible inference, An Old Whig concluded that “besides the powers already mentioned, other powers may be assumed hereafter as contained by implication in this constitution.”56

Brutus agreed, warning in the first of his influential essays that it was impossible to determine how far the All Other Powers Provision might operate to consolidate the confederated states into one general government:

The powers given by this article are very general and comprehensive, and it may receive a construction to justify the passing almost any law. A power to make all laws, which shall be necessary and proper, for carrying into execution, all powers vested by the constitution in the government of the United States, or any department or officer thereof, is a power very comprehensive and [indefinite] . . . . 57

The distinction An Old Whig and Brutus perceived between the Foregoing Powers and All Other Powers Provisions is reflected in the drafting history of the Constitution. Both provisions originated in the Committee of Detail, but they were inserted into the Committee’s draft at different times, by different individuals, for what appear to be quite different purposes. The first draft of the Foregoing Powers Provision was written by John Rutledge of South Carolina,58 who had previously objected to the vagueness of the power given to Congress

52. Id.
54. See, e.g., Letters of Centinel, INDEP. GAZETTER (Dec. 29, 1787), in 2 THE COMPLETE ANTI-FEDERALIST 130 (Herbert J. Storing ed., 1981); Federal Farmer, No. 4, (Oct. 12, 1787), in 3 THE FOUNDERS’ CONSTITUTION, supra note 51, at 240; cf. The Republican Federalist, No. VI, 8 MASS. CENTINEL 161, 161 (Feb. 2, 1788) (referring to “the omnipotent clause” and highlighting the word “all” in “all other powers”).
55. An Old Whig, No. 2, supra note 51, at 239.
56. Id.
57. Brutus, No. 1, supra note 53, at 261.
58. See supra note 31.
by the Virginia Plan “to legislate in all cases to which the separate States are incompetent” and had demanded “an exact enumeration of the powers comprehended by this [proposal].” By contrast, the All Other Powers Provision was the later handiwork of James Wilson of Pennsylvania, who opposed any attempt to exhaustively enumerate the powers of Congress on the grounds that “it would be impossible to enumerate the powers which the federal Legislature ought to have.”

Like many southern delegates, Rutledge was wary of giving Congress the power to interfere with the states’ authority over slavery, particularly in light of the antislavery provision of the Northwest Ordinance and the gradual abolition statutes enacted by Pennsylvania and several other northern states. Nonetheless, he recognized that the exercise of expressly delegated powers must often depend on other powers for their execution. It seems likely, therefore, that Rutledge drafted the Foregoing Powers Provision to incorporate into the Constitution this relatively uncontroversial doctrine of incidental means.

Wilson was an outspoken champion of a different, more robust conception of implied powers, rooted primarily in the law of nations. Two years earlier, he had publicly defended the implied power of the Continental Congress to incorporate a national bank on these grounds, despite the absence of any obvious basis in the Articles of Confederation and despite a clear reservation to the states, in Article II, of all powers not expressly delegated. The language of the All Other Powers Provision closely tracks the language and logic of Wilson’s bank essay and probably was meant to encompass its most dramatic principle: that the United States is vested with all the powers of any other nation, including the power to legislate in all cases in which the states are incompetent or in which the harmony or general interests of the nation are at stake.

The All Other Powers Provision has played a critical role throughout the nation’s history. In general, it was the main weapon of early American judges and politicians who maintained the existence of implied or unenumerated

59. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 21.
60. Id. at 53.
61. See supra note 32.
62. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 60.
63. See AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES, NORTH-WEST OF THE RIVER OHIO art. 6 (1787) (“There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes whereof the party shall have been duly convicted . . . .”). For background and critical discussion of this provision, see DON E. FEHRENBACKER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 74–89 (1978); GEORGE WILLIAM VAN CLEVE, A SLAVEHOLDERS’ UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC 153–68 (2010).
64. See VAN CLEVE, supra note 63, at 63.
65. See ARTICLES OF CONFEDERATION OF 1781, 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.”).
66. See WILSON, supra note 8, at 66.
powers of government under the Constitution.\textsuperscript{67} When Hamilton and his supporters affirmed Congress’s power to incorporate the Bank of the United States, for example, they drew on the All Other Powers Provision.\textsuperscript{68} A close paraphrase of the All Other Powers Provision was also the only part of the Necessary and Proper Clause quoted by Chief Justice Marshall in \textit{United States v. Fisher}, the Supreme Court’s first case decided under that clause.\textsuperscript{69} Although the point is open to dispute, this provision also appears to be the ultimate ground of the Court’s holding in \textit{McCulloch v. Maryland},\textsuperscript{70} a point Marshall left somewhat opaque in \textit{McCulloch}, but clarified five years later in \textit{Osborn v. Bank of the United States}.\textsuperscript{71} And when Wilson’s former law student and future Attorney

\textsuperscript{67} See generally \textit{Lyn\textsuperscript{ch}}, supra note 9. According to Lynch, “government by implication soon became the modus operandi” of the first Congress. \textit{Id.} at 51. For another systematic survey of the exercise of implied government power during this period, see generally DAVID P. CURRIE, \textit{The Constitution in Congress: The Federalist Period, 1789–1801} (1997).

\textsuperscript{68} “The expressions [of the Necessary and Proper Clause] have peculiar comprehensiveness. They are—‘to make all laws, necessary and proper for carrying into execution the foregoing powers & all other powers vested by the constitution in the government of the United States, or in any department or officer thereof.’” ALEXANDER HAMIL\textsuperscript{TON}, \textit{Opinion on the Constitutionality of the Bank} (Feb. 23, 1791), in \textit{9 The Papers of Alexander Hamilton} 103 (Harold C. Syrett & Jacob E. Cooke eds., 1965); cf. Editorial Note, in \textit{The Papers of George Washington} 422 (Theodore J. Crackle ed., digital ed. 2008), available at http://rotunda.upress.virginia.edu/founders/default.xqy?keys=GEWN-print-05-07-02-0090-0001 (observing that Hamilton “sought not simply to refute the arguments of Randolph and Jefferson but to assert the broad authority of Congress to legislate on the basis of Article I, Section 8 of the Constitution, which empowered the legislature ‘To make all Laws which shall be necessary and proper for carrying into Execution’ all ‘Powers vested by this Constitution in the Government of the United States’”)

\textsuperscript{69} See \textit{6 U.S. (2 Cranch) 358, 396 (1805)} (Marshall, C.J.) (observing that the policy of giving the United States a preference over other creditors “is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the constitution in the government of the United States, or in any department or officer thereof”); cf. \textit{1 JAMES KENT, Commentaries on American Law} 244–45 (2d ed. 1826) (noting that the bankruptcy law in Fisher was upheld under “a power founded on the authority to make all laws which should be necessary and proper to carry into effect the powers vested by the Constitution in the government of the United States”).

\textsuperscript{70} See \textit{22 U.S. (9 Wheat.) 738, 860 (1824)} (“The whole opinion of the Court, in the case of \textit{M’Culloch v. The State of Maryland}, is founded on, and sustained by, the idea that the Bank is an instrument which is ‘necessary and proper for carrying into effect the powers vested in the government of the United States.’”); \textit{see also id.} at 861 (“Why is it that Congress can incorporate or create a Bank? This question was answered in the case of \textit{M’Culloch v. The State of Maryland}. It is an instrument which is ‘necessary and proper’ for carrying on the fiscal operations of government.”); \textit{id.} (discussing the bank with references to “the purposes of government”); \textit{id.} at 864–65 (same). The precise ground of \textit{M’Culloch} is controversial, of course, because there are other passages in the opinion which suggest that the Court relied more narrowly on the Forgoing Powers Provision. Nevertheless, it seems clear that at a minimum Marshall sought to maintain a strategic ambiguity on this question. What is perhaps most notable in this regard is the frequency with which Marshall quotes or paraphrases the full Necessary and Proper Clause or refers to the powers and purposes of “government” rather than to the enumerated powers of Congress. Moreover, a careful review of the Marshall Court’s Necessary and Proper jurisprudence suggests that it systematically downplays the Forgoing Powers Provision and seeks wherever possible to appeal to the All Other Powers Provision. All told, the Marshall Court relied on the latter provision on at least five occasions in the course of its effort to shape the Constitution into
General Caesar Rodney defended the constitutionality of the Louisiana Purchase, he also placed reliance on the “all other powers” language.72

For their part, following a path first marked out by Madison, Jefferson, Randolph, and other prominent Virginians, the defenders of states’ rights in the early Republic frequently sought to counteract or eliminate the force of the All Other Powers Provision,73 particularly in the aftermath of the much-reviled Alien and Sedition Acts, the legitimacy of which was often defended with reference to that provision.74 One year after Fisher was decided, for example, John Clopton, a Republican congressman from Virginia, whom John Marshall had narrowly defeated in his own race for Congress in 1799, introduced a constitutional amendment on the House floor that would have left the substance of the Foregoing Powers Provision more or less intact but would have fundamentally altered the meaning of the All Other Powers Provision. The text of the Clopton amendment read:

a viable charter for American nationalism, whereas there appear to be no cases which rest squarely and unambiguously on the former provision. In addition to Fisher, Osborn, and McCulloch, see Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51, 53–54 (1825) (resting the power “to carry into complete effect the judgments of the Courts” on Congress’s authority “to make all laws which shall be necessary and proper for carrying into execution all the powers vested by the constitution in the government of the United States, or in any department or officer thereof”); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 22–23 (1825) (upholding Congress’s power to delegate to the federal judiciary the power to prescribe rules of judicial procedure under the authority of the second half of the All Other Powers Provision).

72. See, e.g., 13 ANNALS OF CONG. 474 (1803) (Statement of Rep. Caesar Rodney) (“Have we not also vested in us every power necessary for carrying such a treaty into effect, in the words of the Constitution, which gives Congress the authority 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?’ It, therefore, appears very clearly to my mind that, according to the Constitution, the United States have a right to acquire territory. If they possess this right according to the Constitution, this measure cannot be said to be unconstitutional . . . .”). Although Rodney quotes the full Necessary and Proper Clause, his appeal to the treaty power and to the right to acquire territory implies a more particular reliance on the All Other Powers Provision.


74. See, e.g., John Marshall, Report of the Minority on the Virginia Resolutions (Jan. 22, 1799), in 5 THE FOUNDERS’ CONSTITUTION, supra note 51, at 137 (defending the constitutionality of the Sedition Act on the ground that “[t]he power of making all laws which shall be necessary and proper for carrying into execution all powers vested by the constitution in the government of the United States, or in any department or officer thereof, is by the concluding clause of the eighth section of the first article, expressly delegated to congress”). This “Minority Report” has sometimes been attributed to Henry Lee. See, for example, the digital version of the same essay in THE FOUNDERS’ CONSTITUTION, available at http://press-pubs.uchicago.edu/founders/documents/amendI_speechs20.html (last visited Dec. 15, 2013). Kurt Lash and Alicia Harrison make a persuasive case, however, that the author was John Marshall. See Kurt T. Lash & Alicia Harrison, Minority Report: John Marshall and the Defense of the Alien and Sedition Acts, 68 OHIO ST. L.J. 435, 439–40 (2007).
The last clause of the 8th section of the 1st article of the Constitution which contains the following words: “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,” shall be construed so as to comprehend only such laws as shall have a natural connexion with and immediate relation to the powers enumerated in the said section, or to such other powers as are expressly vested by this Constitution in the Government of the United States, or in any department or officer thereof.75

Clopton’s amendment was designed to eliminate the doctrine of implied powers reflected in the All Other Powers Provision, while preserving a narrow version of the doctrine of incidental powers reflected in the Foregoing Powers Provision. In effect, the amendment would have revived the paralyzing limitation of the second Article of Confederation, which limited the United States government to those powers “expressly” delegated to Congress and reserved all other powers to the states.76 The Clopton amendment also would have fundamentally altered the meaning of the Tenth Amendment by adjusting the baseline from which the states’ reserved powers would be measured. The First Congress voted down a similar modification of what became the Tenth Amendment on three separate occasions when it approved the Bill of Rights. On August 18, 1789, South Carolina Representative Thomas Tucker moved to add the word “expressly” to Madison’s original version of this amendment so that it would read: “The powers not expressly delegated by this constitution [nor prohibited by it to the States, are reserved to the States respectively].”77 Madison and Roger Sherman firmly opposed the measure.78 Three days later, Elbridge Gerry called again for the word “expressly” to be inserted in the same location of the proposed Tenth Amendment.79 Gerry’s motion was defeated by nearly a two-to-one margin, thirty-two to seventeen.80 Finally, the Senate rejected the same

75. 16 ANNALS OF CONG. 148 (1806) (emphasis added). Apparently, Clopton himself had been threatened with prosecution under the Sedition Act. See JAMES MORTON SMITH, FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 183 (1956). Understandably, then, he may have been alarmed by what he perceived to be the revival of arguments for broad government powers in Fisher. For more background on Clopton, including a vivid account of his 1799 congressional election contest with Marshall, see JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 242–250 (1996) [hereinafter SMITH, JOHN MARSHALL]. Clopton was a member of the Virginia House of Delegates from 1789 to 1791, a member of the U.S. Congress from 1795 to 1799, and a member of the Virginia Privy Council from 1799 to 1801, before returning to Congress and serving seven more terms from 1801 until his death in 1816. See U.S. GOV’T PRINTING OFFICE, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–1989, at 796 (bicentennial ed. 1989). According to Smith, when Marshall died, “John Clopton’s eldest son was one of the eight men who carried the chief justice’s casket to the grave.” SMITH, JOHN MARSHALL, supra, at 599 n.49.
76. See supra note 65.
77. 1 ANNALS OF CONG. 790 (1789) (Joseph Gales ed., 1834) (emphasis added).
78. Id.
79. Id. at 797.
80. Id.
proposal on September 7, 1789.81

It is worth emphasizing that if either the Clopton amendment or the Tucker or Gerry amendments had succeeded, American constitutional law might have been transformed in a manner few observers would recognize. In practice, the Constitution probably would have evolved to operate more like a rigid compact among the states and less like a flexible charter of national incorporation. The implied powers of the Government of the United States would have been curtailed or eliminated, and what commentators have labeled the “Grand Style” of jurisprudence during the formative era of American law might not have come to pass.82 In short, without the precise language of the Constitution firmly in place, famous passages like this one from Chief Justice Marshall’s opinion in *McCulloch* probably could not have been written:

> Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word ‘expressly,’ and declares only that the powers ‘not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;’ thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. . . . A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. . . . In considering this question, then, we must never forget that it is a *constitution* we are expounding.83

Despite its obvious importance, recent commentary on the Necessary and Proper Clause has tended to ignore or marginalize the All Other Powers Provision.84 As a result, debates about the scope of federal regulatory authority often unfold as if this provision did not exist. With only rare exceptions, for

81. *See Creating the Bill of Rights*, *supra* note 49, at 41 n.21 (“On September 7, the Senate disagreed to a motion to insert ‘expressly’ at this point.”).


example, both sides of the historic debate over the constitutionality of the individual-mandate provisions of the Affordable Care Act (ACA) focused their attention on the first Necessary and Proper Clause, and the courts followed suit.\(^{85}\) The All Other Powers Provision was almost entirely neglected.\(^{86}\)

There are many notable examples of this neglect, but one particularly revealing illustration is an amicus brief filed against the government by Professor David Kopel on behalf of three authors of *The Origins of the Necessary and Proper Clause* (Gary Lawson, Robert Natelson, and Guy Seidman) and the Independence Institute.\(^{87}\) Drawing on their specialized knowledge of the Necessary and Proper Clause, the authors claimed that this clause “does not actually grant additional authority beyond that conveyed by the other enumerated powers” in Article 1.\(^{88}\) Instead, they argued, the Necessary and Proper Clause merely gives Congress the incidental authority to implement these enumerated powers.\(^{89}\) The brief’s purpose was to show that these conclusions are well supported by the documentary record. Here is the key historical claim, summarizing what occurred in the Committee of Detail:

\(^{85}\) *See, e.g.*, NFIB v. Sebelius, 132 S. Ct. 2566, 2591–93 (2012) (Roberts, C.J.) (analyzing the constitutionality of the ACA under the first Necessary and Proper Clause only, without reference to the “other powers vested by this Constitution in the Government of the United States”); *see also* Florida v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235, 1279 (11th Cir. 2011) (“Congress has the power ‘[t]o make all Laws which shall be necessary and proper for carrying into Execution’ its enumerated power.”) (emphasis added)); Florida v. U.S. Dep’t of Health & Human Servs., 780 F. Supp. 2d 1256, 1298 (N.D. Fla. 2011) (“The Necessary and Proper Clause cannot be utilized to ‘pass laws for the accomplishment of objects’ that are not within Congress’ enumerated powers.”); Virginia v. Sebelius, 728 F. Supp. 2d 768, 782 (E.D. Va. 2010) (“[The Necessary and Proper Clause] grants Congress broad authority to pass laws in furtherance of its constitutionally-enumerated powers. This authority may only be constitutionally deployed when tethered to a lawful exercise of an enumerated power.”) (emphasis added)).


\(^{87}\) Brief for Authors of *The Origins of the Necessary and Proper Clause* (Gary Lawson, Robert G. Natelson & Guy Seidman) and the Independence Institute as Amici Curiae Supporting Respondents (Minimum Coverage Provision), Florida v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011) (No. 11-11021-HH) (filed on May 9, 2011) (on file with author).

\(^{88}\) *Id.* at xii.

\(^{89}\) *Id.*
The first draft of the Clause, extant in Randolph’s handwriting, expressly referenced the incidental power doctrine as a tool of judicial interpretation. 2 THE RECORDS OF THE FEDERAL CONVENTION 144 (Max Farrand, ed., 1937) (“all incidents without which the general principles cannot be satisfied shall be considered, as involved in the general principle”). The Provision was replaced by one in Rutledge’s handwriting, which substituted the most common legal label for incidental powers: “necessary.” The new Provision read, “a right to make all Laws necessary to carry the foregoing Powers into Execu-.” Id. The Committee then added the words “and proper.” After some polishing, the final result was approved by the Committee and the Convention without significant controversy. Randolph subsequently confirmed publicly that the word “necessary” was a synonym for “incidental.” ORIGINS at 88, n.28 (referencing U.S. Attorney General Randolph’s opinion on the constitutionality of a proposed national bank). 90

This passage describes a history of the Necessary and Proper Clause in which the All Other Powers Provision has simply disappeared. The same crucial elision characterizes The Origins of the Necessary Proper Clause itself, the book upon which the brief relies. Perhaps the most surprising feature of this valuable and informative book is its failure to distinguish the different parts of the Necessary and Proper Clause, and thus to come to grips with the fact that its two main provisions have different origins, meanings, and implications. The dominant impression one gets from reading The Origins of the Necessary and Proper Clause is that the Necessary and Proper Clause was intended to give Congress the incidental authority to carry into effect its enumerated powers. Insofar as this claim is sound, it depends on identifying the Necessary and Proper Clause exclusively with the Foregoing Powers Provision. The most significant controversies surrounding the Necessary and Proper Clause during the formative era of the Republic, however, did not turn on Congress’s authority to carry into effect its other enumerated powers in Article I, Section 8. Instead, the most significant controversies turned on the precise character of the “other Powers vested by this Constitution in the Government of the United States.” 91

Again, it was this provision upon which Madison relied to justify the need for a Bill of Rights, 92 that Hamilton used to justify the constitutionality of a national bank, 93 that Wilson quoted to explain the scope of legislative power in his Law Lectures; 94 and that Marshall quoted to explain his holding in McCulloch. 95 Later, the All Other Powers Provision formed the stated basis of

90. Id. at *5–6.
91. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).
92. See The Congressional Register, supra note 49.
93. See HAMILTON, supra note 68.
94. See WILSON, supra note 50, at 435.
the Supreme Court’s holdings in the Legal Tender Cases and of Congress’s authority in enacting the War Powers Resolution. The critical first half of that provision also appears to be the only part of the Necessary and Proper Clause to which Justice Holmes referred in Missouri v. Holland, the leading case on Congress’s power to implement treaties. Today, the All Other Powers Provision serves as both a pillar of the regulatory state and a cornerstone of the modern law-school curriculum. Indeed, a plausible case can be made that—with the notable exception of the Supremacy Clause—it may be the single most important provision in the entire Constitution, and the key to understanding the basic architecture of American government with respect to federalism, the separation of powers, and individual rights.

And yet, for a variety of reasons, the vast majority of recent commentary on the Necessary and Proper Clause is focused almost entirely on the Foregoing Powers Provision. This generalization applies to a wide spectrum of scholarship, from progressive writers of the 1930s such as Walton Hamilton, Douglass Adair, and Irving Brant to contemporary originalists such as Randy Barnett, David Kopel, and Gary Lawson. Even those comparatively few scholars who

96. See, e.g., Juilliard v. Greenman, 110 U.S. 421, 450 (1884) (“[W]e are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is . . . consistent with the letter and spirit of the constitution, and therefore within the meaning of that instrument, ‘necessary and proper for carrying into execution the powers vested by this constitution in the government of the United States.’”); see also Knox v. Lee, 79 U.S. 457, 535 (1870) (“Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story in his Commentaries on the Constitution, resulting powers, arising from the aggregate powers of the government. He instances the right to sue and make contracts. Many others might be given.”).

97. See 50 U.S.C. § 1541(b) (2006) (“Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer hereof.”).

98. Missouri v. Holland, 252 U.S. 416, 432 (1920) (Holmes, J.) (“If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.”).

99. Cf. Gary Lawson, Geoffrey P. Miller, Robert G. Natelson & Guy I. Seidman, Raiders of the Lost Clause: Excavating the Buried Foundations of the Necessary and Proper Clause, in ORIGINS, supra note 9, at 1–3 (observing that “because the Necessary and Proper Clause is the source of virtually all of the congressional power to structure the federal government, the clause is at the heart of almost any interdepartmental dispute about the separation of powers” and adding that it may be “the most important clause in the Constitution”)

100. See, e.g., Barnett, supra note 9, at 153–90; Lynch, supra note 9, at 8–49; Natelson, supra note 11, at 84–119; see also, e.g., Anthony J. Bellia, Jr., Federalism 279 (2011) (quoting only the Foregoing Powers Provision in the first paragraph of a chapter devoted to “The Enumerated Powers of Congress”); Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 240–41 (3d ed. 2006) (explaining that under the Necessary and Proper Clause “Congress may choose any means, not prohibited by the Constitution, to carry out its lawful authority” (emphasis added)).

101. Compare Walton H. Hamilton & Douglass Adair, The Power to Govern: The Constitution—Then and Now 135 (1937) (analyzing Congress’s Article I powers “in their fullness” but quoting only this part of the Necessary and Proper Clause: “To make all Laws which shall be necessary and proper for carrying into Execution the Foregoing Powers”), and Irving Brant, Storm Over the Constitution
have drawn attention to what Professor Van Alstyne calls “the relatively unexamined second half of the very best known clause in the Constitution.”\textsuperscript{102} have typically emphasized the second half of that provision, which grants Congress the authority to carry into execution the powers vested in any department or officer of the United States.\textsuperscript{103} The critical first half of that provision, which authorizes Congress to carry into execution “all other powers vested by this Constitution in the Government of the United States” itself, has been almost entirely neglected.

In the next Part, I turn to some of the key background events that informed the framing of the Necessary and Proper Clause. Historians have often asserted that the complex language of this clause is “unintelligible” or “enigmatic” and that there is little evidence from which to determine why the Committee of Detail added this clause to the Constitution.\textsuperscript{104} For reasons that will become clear, these assertions appear to be unfounded. The main author of the Necessary and Proper Clause, James Wilson, was one of the best lawyers and legal theorists of his generation.\textsuperscript{105} The documentary records suggest that he drafted


\textsuperscript{103} See, e.g., AMAR, supra note 7, at 110–11 (discussing the first and third Necessary and Proper Clauses, while generally ignoring the second); Lawson & Granger, supra note 17, at 288 (same); Van Alstyne, supra note 102, at 793 (same).

\textsuperscript{104} See, e.g., LYNCH, supra note 9, at 4 (describing the clause as “a masterpiece of enigmatic formulation”); BERNARD H. SIEGEN, THE SUPREME COURT’S CONSTITUTION: AN INQUIRY INTO JUDICIAL REVIEW AND ITS IMPACT ON SOCIETY 1 (1987) (observing that “the accounts of the 1787 Constitutional Convention are silent on the meaning of the necessary and proper power”); Mark A. Graber, Unnecessary and Unintelligible, 12 CONST. COMMENT. 167, 168 (1995) (the Committee of Detail “gave no hint why it chose the language it did”). For the quotation from Siegen, I am indebted to The Origins of the Necessary and Proper Clause, supra note 9, at 2.

\textsuperscript{105} See, e.g., AMAR, supra note 7, at 467 n.* (describing Wilson as early America’s “foremost legal scholar” who was “far more fluent in [the] law” than Madison); Robert Green McCloskey, Introduction, in 1 THE WORKS OF JAMES WILSON 1, 1–2 (Robert Green McCloskey ed., 1967) (“[Wilson] was commonly accepted in a nation already much dominated by lawyers as the most learned and profound legal scholar of his generation.”); CHARLES PAGE SMITH, JAMES WILSON, FOUNDING FATHER: 1742–1798, at 341 (1956) (“As a practical lawyer, Wilson was one of the outstanding legal figures of his day. As a theorist, he had no serious rival.”). Among his other accomplishments, Wilson was the only person in American history to sign the Declaration of Independence, sign the Constitution, and sit on the Supreme Court. Over the course of his career, he also (1) served as Advocate General for France from 1779 to 1783; (2) was the lead attorney for Pennsylvania in the 1782 Wyoming Valley litigation, a border dispute between Pennsylvania and Connecticut that was the only case ever resolved under the elaborate adjudication mechanism created by Article IX of the Articles of Confederation (Wilson
the full text of this clause carefully and attentively while serving on the Committee of Detail. The historical evidence also suggests that Wilson and the other leading nationalists at the convention—George Washington, Benjamin Franklin, Robert Morris, Gouverneur Morris, Alexander Hamilton, and others—were deeply committed to the doctrines of implied and inherent national powers and sought to carry those doctrines into effect in the years leading up to the convention and throughout their careers. The idea later advanced by Madison and Randolph, that the peculiar—and, for them, inconvenient—wording of the Necessary and Proper Clause should be attributed to carelessness or inattention, is therefore unconvincing.

Wilson and the other principal framers of the Constitution knew exactly what they wanted to accomplish by adding a complex and ambiguous sweeping clause to the end of the list of enumerated powers in the Constitution. Indeed, the best reading of the evidence suggests that they probably saw this ambiguity as a virtue rather than a vice. Moreover, the nationalists appear to have accomplished their primary objectives in Philadelphia with great skill and effectiveness. Against fairly long odds, they managed to convince the majority of their colleagues to replace a weak and dysfunctional confederation of states with an immensely powerful and flexible national government, capable of evolving to promote the general welfare of the United States in unknown and unforeseeable circumstances. The story of these events has been told many times, of course, and one can reasonably doubt whether anything new or important can be learned from another look at the historical record. As I shall prevail, and the panel appointed to hear the case held that Connecticut had no right to the lands in controversy; (3) litigated some of the most important treason and admiralty cases of the Revolutionary period; (4) served as president and chief legal officer of the Illinois-Wabash Land Companies, one of the most influential early American land corporations; (5) was among the first named directors of the Bank of North America; and (6) was largely responsible for drafting the 1790 Pennsylvania state constitution. See Mark David Hall, The Political and Legal Philosophy of James Wilson 17–19, 24–25 (1997); Smith, supra, at 119–28, 146–47, 160. As another measure of his reputation, George Washington agreed to pay an unusually high fee to Wilson to train his nephew, future Supreme Court Justice Bushrod Washington. See Hall, supra at 19; Smith, supra, at 170.

106. See supra note 5 and accompanying text; see also infra section III.B.


108. See, e.g., James Madison, Speech in Congress Opposing the National Bank, in Selected Writings of James Madison 486–87 (Ralph Ketcham ed., 2006) (“It is not pretended that every insertion or omission in the constitution is the effect of systematic attention.”); Walter Dellinger & H. Jefferson Powell, The Constitutionality of the Bank Bill: The Attorney General’s First Constitutional Law Opinions, 44 Duke L.J. 110, 127 (1994) (Letter from Attorney General Randolph to President Washington) (Feb. 12, 1791) (suggesting that one “ought to consider” the Necessary and Proper Clause “as among the surplusage which as often proceeds from inattention as caution”).
explain, however, certain key pieces of evidence about what transpired at the convention have not yet been recognized or properly understood.

II. THE ORIGINS OF RESOLUTION VI OF THE VIRGINIA PLAN

A useful place to begin unpacking the intellectual origins of the Necessary and Proper Clause and its key role in the basic design of the Constitution is Resolution VI of the Virginia Plan. The final version of this proposed constitutional provision would have authorized Congress “to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the Harmony of the U[nited] States may be interrupted by the exercise of individual Legislation.”¹⁰⁹ This resolution was adopted by the convention on July 17 and sent to the Committee of Detail,¹¹⁰ which then produced a list of enumerated powers that became Article I, Section 8, in lieu of the broad language of this resolution.¹¹¹ As a result, scholars have long debated the relevance of this treatment of Resolution VI at the Philadelphia convention to the question of federal powers.¹¹²

A standard view is the one expressed by the Supreme Court in 1936—that the framers “declined to confer upon Congress in such general terms”¹¹³ the power to legislate on behalf of the general welfare in the manner envisioned by Resolution VI, and that the convention instead “carefully limited the powers which it thought wise to intrust to Congress by specifying them, thereby denying all others not granted expressly or by necessary implication.”¹¹⁴ Many students of the Constitution have concurred with this viewpoint, assuming that the Committee of Detail made a deliberate decision to reject the general legislative authority called for by the amended language of Resolution VI in favor of a scheme of enumerated powers. I will suggest below, however, that far from rejecting the general grant of legislative authority in Resolution VI, the Committee of Detail seems to have effectively incorporated this broad legislative power into the Constitution by means of the Necessary and Proper Clause. The key framer who exercised the most influence over the precise language of the Constitution in this regard was Wilson, who both drafted the Necessary and Proper Clause for the Committee of Detail and who appears likely to have been at least partly responsible for the critical language of Resolution VI.

In order to understand the relationship between the general legislative authority implied by Resolution VI and the Necessary and Proper Clause, it is first necessary to examine the origins of the former, which until now have received virtually no attention in the literature. Historians have generally assumed that,

¹¹⁰. See id., at 21 (amended language of the resolution adopted by the convention on July 17); id. at 131–32 (text of amended resolution referred to the Committee of Detail).
¹¹¹. See id. at 181–82 (section of Committee of Detail report enumerating legislative powers).
¹¹². See supra note 23 and accompanying text.
¹¹⁴. Id.
like all of the key provisions of the Virginia Plan, this language was either written or directly inspired by James Madison. Yet this appears unlikely, for reasons I will set forth below. As I explain in this Part, it seems more plausible that Wilson or another Pennsylvania delegate was the proximate source of the key legislative proposal of Resolution VI. At a minimum, that proposal reflected a central component of Wilson’s views on national legislative power, and it almost certainly influenced the manner in which he drafted the Necessary and Proper Clause for the Committee of Detail.

A. THE GAP IN MADISON’S PRECONVENTION CORRESPONDENCE

The prevailing assumption that all of the key provisions of the Virginia Plan were written or directly inspired by Madison rests mainly on a series of letters Madison wrote to Thomas Jefferson, Edmund Randolph, and George Washington in March and April 1787. These letters certainly demonstrate that Madison played a leading role in drafting the Virginia Plan. The tight, one-to-one correspondence between the ideas outlined in Madison’s letters and the specific resolutions proposed as part of the Virginia Plan admits of no other plausible explanation. In at least one crucial respect, however, the parallel between Madison’s letters and the key elements of the Virginia Plan is incomplete: the powers of the national legislature. In his April 8 letter to Randolph, Madison sketched his ideas on this topic in these terms:

Let the national Government be armed with a positive & compleat authority in all cases where uniform measures are necessary. As in trade &c. &c. Let it also retain the powers which it now possesses.

Let it have a negative in all cases whatsoever on the Legislative Acts of the States as the K. of G. B. heretofore had. This I conceive to be essential and the least possible abridgement of the State Sovereignties. Without such a defensive power, every positive power that can be given on paper will be unavailing. It will also give internal stability to the States. There has been no moment since the peace at which the federal assent would have been given to paper money &c. &c.

On April 16, Madison sent a revised version of the same proposals to George Washington:

I would propose next that in addition to the present federal powers, the national Government should be armed with positive and compleat authority in

115. See supra note 25 and accompanying text.
116. See, e.g., Editorial Note to the Virginia Plan, in 9 THE PAPERS OF JAMES MADISON, supra note 47, at 12–13 (explaining that while Madison never claimed credit for the Virginia Plan, he “sketched the main features of the plan in letters to Jefferson, Randolph, and Washington”).
117. Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 THE PAPERS OF JAMES MADISON, supra note 47, at 370.
all cases which require uniformity; such as the regulation of trade, including the right of taxing both exports & imports, the fixing the terms and forms of naturalization, &c &c.

Over and above this positive power, a negative in all cases whatsoever on the legislative acts of the States, as heretofore exercised by the Kingly prerogative, appears to me to be absolutely necessary, and to be the least possible encroachment on the State jurisdictions. Without this defensive power, every positive power that can be given on paper will be evaded & defeated. The States will continue to invade the national jurisdiction, to violate treaties and the law of nations & to harass each other with rival and spiteful measures dictated by mistaken views of interest.118

Compare these passages with Resolution VI of the Virginia Plan. Its separate clauses are numbered below for easy reference:

6. [1] Resolved that each branch ought to possess the right of originating Acts; [2] that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation [3] & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; [4] to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and [5] to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof.119

The first clause on the right of originating acts is inapposite to the present discussion. The second clause vesting Congress with the legislative power it possessed under the Articles of Confederation clearly derives from Madison’s letters to Randolph and Washington. So does the fourth clause giving Congress a veto on state laws. The latter provision is also anticipated in Madison’s March 19 letter to Thomas Jefferson, in which he proposes “to arm the federal head with a negative in all cases whatsoever on the local Legislatures.”120 The right of coercion in the fifth clause, which is not mentioned in the excerpts quoted above, also can be found in Madison’s preconvention correspondence. For example, reaffirming a view he had espoused in Congress as early as 1781, Madison wrote to Washington on April 16 that “the right of coercion should be expressly declared.”121

But where does the italicized third clause come from? One possibility is that this clause is a gloss on Madison’s proposal, made in varying forms to Jeffer-

119. 1 The Records of the Federal Convention of 1787, supra note 5, at 21 (emphasis added).
120. Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), in 9 The Papers of James Madison, supra note 47, at 318.
121. Letter from James Madison to George Washington, supra note 118, at 385.
son, Randolph, and Washington, that “the national Government should be armed with positive and compleat authority in all cases which require uniformity.”122 Incompetence and harmony, however, are different concepts than uniformity. They raise distinct problems and would be assessed differently in an actual case or controversy, for example. The precise vocabulary of incompetence and harmony does not occur in Madison’s correspondence in the spring of 1787. How then did this language find its way into the Virginia Plan?

B. WILSON’S ESSAY ON THE BANK OF NORTH AMERICA

There are several possibilities worth considering, but the most likely answer appears to involve Wilson’s 1785 essay, Considerations on the Bank of North America.123 The legal question presented in Wilson’s essay was whether the Continental Congress had the power to incorporate a national bank. The argument that it did not was simple and plausible enough. First, no such power was expressly given by the Articles of Confederation. Second, an implied power to charter a bank was clearly foreclosed by Article II, which limited Congress to those powers “expressly delegated” to it and reserved all other powers to the states.124

Wilson denied this conclusion, supplying a novel argument that exercised a notable influence on many of his contemporaries. The power to incorporate a truly national bank, which would operate with proper legal authority across state lines, he reasoned, is not a power possessed by any individual state. Therefore, it is not a power the states could delegate in the first place. Rather, this power must derive from the union of the individual states. A national power for national purposes, it must be an inherent or implied power that was possessed by the new nation that was declared in 1776.

The six paragraphs in which Wilson outlined this novel theory may be the single most important constitutional argument given during the period leading up to the federal convention. Because it is critical for understanding the precise language of the Necessary and Proper Clause Wilson later drafted for the Committee of Detail, the argument deserves to be quoted in full:

Though the United States in congress assembled derive from the particular states no power, jurisdiction, or right, which is not expressly delegated by the confederation, it does not thence follow, that the United States in congress have no other powers, jurisdiction, or rights, than those delegated by the particular states.

The United States have general rights, general powers, and general obligations, not derived from any particular states, nor from all the particular states, taken separately; but resulting from the union of the whole: and, therefore, it is provided, in the fifth article of the confederation, “that for the

122. Id. at 383.
123. See Wilson, supra note 8.
124. Id. at 65.
more convenient management of the general interests of the United States, delegates shall be annually appointed to meet in congress.”

To many purposes, the United States are to be considered as one undivided, independent nation; and as possessed of all the rights, and powers, and properties, by the law of nations incident to such.

Whenever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in congress assembled. There are many objects of this extended nature. The purchase, the sale, the defence, and the government of lands and countries, not within any state, are all included under this description. An institution for circulating paper, and establishing its credit over the whole United States, is naturally ranged in the same class.

The act of independence was made before the articles of confederation. This act declares, that “these United Colonies,” (not enumerating them separately) “are free and independent states; and that, as free and independent states, they have the full power to do all acts and things which independent states may, of right, do.”

The confederation was not intended to weaken or abridge the powers and rights, to which the United States were previously entitled. It was not intended to transfer any of those powers or rights to the particular states, or any of them. If, therefore, the power now in question was vested in the United States before the confederation; it continues vested in them still. The confederation clothed the United States with many, though, perhaps, not with sufficient powers: but of none did it disrobe them.\(^{125}\)

It is tempting to dwell on the ideas expressed in these paragraphs and the rest of Wilson’s essay and to reflect on how profoundly they anticipate key developments in American constitutional law over the next 225 years. As Robert McCloskey observes in his marvelous introduction to the 1967 edition of Wilson’s collected works, Wilson’s defense of the bank advanced the doctrine that a corporate charter is an inviolable contract between the state and the company, and the doctrine that the national congress (even under the Articles of Confederation) enjoys, in addition to the powers specifically delegated, “general powers . . . resulting from the union of the whole.” The first of these ideas prefigures the holdings of Marshall in *Fletcher v. Peck* and the *Dartmouth College* case; the second certainly anticipates the “implied powers” conception of *McCulloch v. Maryland*, and will further suggest to students of constitutional history the “inherent powers” doctrine of such relatively modern decisions as *Missouri v. Holland* and *United States v. Curtiss-Wright*. In the same tract he set forth what has been called the doctrine of “dual sovereignty”: that while the states are sovereign within their sphere, the nation is sovereign with respect to national affairs—that sovereignty is divisible. This all-important idea, which Wilson himself developed further in

\(^{125}\) Id. at 65–66.
the Federal Convention and in Chisholm v. Georgia, foreshadows Marshall’s words in Cohens v. Virginia: “[the states] are members of one great empire—for some purposes sovereign, for some purposes subordinate.”

To McCloskey’s recital one might add other striking features of Wilson’s essay: for example, its creative use of Burlamaqui’s The Principles of Natural and Politic Law to elucidate the concept of sovereignty and its bold assertion that the birth of the United States as a new nation could be dated to 1776, a controversial account of national origins at the time, which would later prove enormously influential. For example, Abraham Lincoln later drew on this seminal idea in his July 4, 1861 message to Congress and in the Gettysburg Address.

Several of these themes are only loosely related to our topic, but the reference to Burlamaqui is directly on point. Immediately following the six paragraphs quoted above, Wilson invoked the Swiss jurist to support his claim that the United States was authorized to legislate on any subject to which “no particular state is competent.” Wilson wrote:

> It is no new position, that rights may be vested in a political body, which did not previously reside in any or in all the members of that body. They may be derived solely from the union of those members. “The case,” says the celebrated Burlamaqui, “is here very near the same as in that of several voices collected together, which, by their union, produce a harmony, that was not to be found separately in each.”

Burlamaqui’s harmony metaphor can be found in the second volume of The Principles of Natural and Politic Law, in a chapter entitled “Of the immediate source, and foundation of sovereignty.” Read in context, the passage in question appears to be an important source of the radically egalitarian and democratic conception of popular sovereignty that animated Wilson at the constitutional convention and throughout his public career. In Chisholm v. Georgia, Justice Wilson framed this conception in dramatic terms, arguing that whatever authority governments possessed must ultimately be rooted in the

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130. WILSON, supra note 8, at 66.
131. Id. at 66–67 (footnotes omitted).
132. 2 BURLAMAQUI, supra note 127, at 37.
sovereign rights of individuals. Chief Justice Jay and Justice Cushing expressed similar views. The underlying political theory of all three opinions is “Burlamaquian” and is reflected in the same passage from which Wilson drew in his bank essay:

Since every individual has a natural right of disposing of his natural freedom according as he thinks proper, why should he not have a power of transferring to another that right which he has of directing himself? Now is it not manifest, that if all the members of this society agree to transfer this right to one of their fellow-members, this cession will be the nearest and immediate cause of sovereignty? It is therefore evident, that there are, in each individual, the seeds, as it were, of the supreme power. The case is here very near the same as in that of several voices, collected together, which, by their union, produce a harmony, that was not to be found separately in each.

Burlamaqui was not a particularly original thinker, and many of his ideas can be found in earlier writers, such as Hutcheson, Locke, Pufendorf, and Grotius. But he was an effective popularizer, and he exerted a significant influence on many of the founders, including Wilson. On another occasion, when Wilson was just twenty-six years old, he drew from Burlamaqui to compose one of the most influential American statements of popular sovereignty during the revolutionary period, which later may have inspired the Declaration of Independence.

Again, these important themes lie beyond the scope of this Article. Our immediate topic is not the broader reach of Wilson’s political philosophy, but how his bank essay appears to supply the critical missing ingredient in Resolution VI of the Virginia Plan. Wilson wrote:

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133. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 458 (1793) (“The sovereign, when traced to his source, must be found in the man.”). Like much of Wilson’s Chisholm opinion, this remark was lifted from his Law Lectures: “The dread and redoubtable sovereign, when traced to his ultimate and genuine source, has been found, as he ought to have been found, in the free and independent man.” JAMES WILSON, Introductory Lecture: On the Study of the Law in the United States, in 1 COLLECTED WORKS OF JAMES WILSON, supra note 8, at 81.

134. Id. at 471 (Jay, C.J.) (explaining that “the sovereignty of the nation is in the people of the nation.”).

135. Id. at 468 (Cushing, J.) (“The rights of individuals and the justice due to them, are as dear and precious as those of States. Indeed the latter are founded upon the former . . . .”).

136. 2 BURLAMAQUI, supra note 127, at 42.

137. See JAMES WILSON, Considerations on the Nature and Extent of the Legislative Authority of the British Parliament, in 1 COLLECTED WORKS OF JAMES WILSON, supra note 8, at 4–5 (“All men are, by nature, equal and free: no one has a right to any authority over another without his consent: all lawful government is founded on the consent of those who are subject to it: such consent was given with a view to ensure and to increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature. The consequence is, that the happiness of the society is the first law of every government.”).

Whenever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in congress assembled. . . . 

. . . . “The case” . . . “is here very near the same as in that of several voices collected together, which, by their union, produce a harmony, that was not to be found separately in each.”139

By comparison, Resolution VI would have afforded Congress the power to legislate “in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.”140

Based on the language alone, it seems plausible to assume that Wilson’s bank essay may have been a source of this passage. When one considers the corresponding gap in Madison’s letters to Randolph and Washington, the conclusion seems even more likely. Moreover, if one reflects on the makeup of the Pennsylvania and Virginia delegations to the convention, and on what probably transpired between May 3 and May 25, 1787, when Madison and other Virginia delegates arrived in Philadelphia and began conferring with the Pennsylvania delegation while waiting for the other state delegations to arrive,141 it seems highly probable that this passage was a Pennsylvania contribution to the Virginia Plan.

C. POLITICAL DIFFERENCES BETWEEN THE PENNSYLVANIA AND VIRGINIA DELEGATIONS

To see why, it helps to step back and consider some of the political and economic differences between the Pennsylvania and Virginia delegations to the convention. In addition to Wilson, the Pennsylvania delegation was comprised of Benjamin Franklin, Robert Morris, Gouverneur Morris, George Clymer, Thomas Fitzsimons, Jerrold Ingersoll, and Thomas Mifflin. All eight of these men had close ties to the Bank of North America or its predecessor, the Bank of Pennsylvania; to influential land syndicates, such as the Vandalia, Indiana, and Illinois-Wabash companies; to the Continental Army and the Society of the Cincinnati; or to other nationalist organizations and enterprises, the success of which would be promoted by vesting the United States with broad authority over all national and continental affairs. All eight of the Pennsylvania delegates were therefore likely united in their support of the proposition that Congress should be able to legislate on any matter to which the individual states were incompetent, or upon which the harmony or general welfare of the United States might depend. Indeed, if one were to identify a single proposition that summa-

139. Wilson, supra note 8, at 66–67.
140. 1 The Records of the Federal Convention of 1787, supra note 5, at 21.
141. See, e.g., Beeman, supra note 25, at 41–57 (recounting what is generally known about these events in a chapter entitled “The Delay that Produced a Revolution”).
rized the shared convictions of the large Pennsylvania delegation on the eve of
the convention, this would be an excellent candidate.

The four most influential Pennsylvania delegates, Wilson, Franklin, and the
two Morrices, were almost certainly united in their support of this sweeping
legislative proposal. As we have seen, Wilson had publicly affirmed the exis-
tence of broad implied and inherent powers on many occasions, including his
defense of the Bank of North America.142 The same is true of Gouverneur
Morris, Wilson’s co-counsel in defending the bank’s charter, who likewise was
one of the most ardent nationalists of the era.143 Robert Morris, of course, was
the “Financier of the American Revolution,” and one of the most powerful men
in America. During his reign as Superintendent of Finance, he relentlessly
sought to enhance the powers of Congress, often relying on the doctrine of
implied powers to do so.144 For his part, Franklin had also long been associated
with the effort to form a more powerful central government.145 Franklin’s first
draft of the Articles of Confederation called for the “United Colonies of North
America” to enter into a confederation for the purpose of “their common
Defense against their Enemies, for the Security of their Liberties and Propertys,
the Safety of their Persons and Families, and their mutual and general Wel-
fare.”146 On Franklin’s proposal, Congress would have the authority to impose
taxes, make war, enter foreign alliances, form new colonies, and make all laws
“necessary to the General Welfare” that local assemblies “cannot be competent”
to enact.147 The parallel of the last provision to both the language of Wilson’s
bank essay and Resolution VI is striking.148

143. See, e.g., Gouverneur Morris, Address to the Assembly of Pennsylvania, on the Abolition of
the Bank of North America, reprinted in 3 Jared Sparks, The Life of Gouverneur Morris, With
Selections from His Correspondence and Miscellaneous Papers 435 (1832); Jensen, The New Na-
tion, supra note 7, at 43–44, 66, 69–70.
144. See Ferguson, supra note 7, at 143 (“Morris discerned an implied contract between Congress
and the public creditors which could only be validated if Congress had perfect control of the revenue to
pay them. It did not matter that Congress had possessed no power of taxation when the debts were
incurred. The creditors, he said, had trusted the Union, not the states . . . . In short, the existence of the
public debt implied a federal power of taxation.”); see also id. at 140 (“Never for a moment was
[Morris] so submerged in the details of his office as to forget that he was building a system. His every
decision was determined by whether or not a particular policy would yield block or mortar for the
institutional foundations of an effective central government.”); id. at 141 (Morris “fought to establish
exclusive federal control of money raised by the states in compliance with requisitions”); id. at 161
(“Asserting the doctrine of implied powers, [Morris] declared that under the Confederation as it existed,
the states were absolutely obliged to comply with any federal plan for dealing with the debt.”).
Franklin’s Albany Plan of 1754).
146. See Franklin’s Articles of Confederation, supra note 28.
147. Id.
148. Although they are less well-known than Wilson, Franklin, and the Morrices, the other Penn-
sylvania delegates to the convention were also important figures in their day. At the time of the
convention, all of them appear to have been committed nationalists, who had strong ties to Robert
Morris and his circle and who favored strengthening the powers of the United States. Fitzsimons was a
wealthy Philadelphia merchant who, like Wilson, was named as one of the first directors of the Bank of
One of the main reasons Franklin sought to empower Congress to regulate all matters for which local governments “cannot be competent” in his first draft of the Articles of Confederation was to vest control in Congress of western lands. Under its 1609 charter, Virginia claimed jurisdiction over vast territories encompassing modern-day Kentucky, West Virginia, Ohio, Indiana, and Illinois. The Indiana and Vandalia proprietors, affiliated with Franklin, and the Illinois-Wabash Company, led by Wilson, claimed ownership of large parcels of unsettled land in this region based on grants and purchases from Native Americans. Anticipating the argument later made famous by Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*, the land companies and their advocates in Congress argued that no particular state was competent to exercise jurisdiction over these territories because sovereign authority over them had passed directly from Great Britain to the United States. When Wilson later argued that the United States possessed “general rights, general powers, and general obligations” that were not derived from the particular states, but rather “must, of necessity, belong to the United States in congress assembled,” therefore, he was merely amplifying an argument he and other land company agents had already made to establish national sovereignty over the lands in question.

Under the Articles of Confederation, Congress had no explicit authority to resolve territorial conflicts, except through the elaborate arbitration system set forth in Article IX. Even this mechanism was limited to boundary disputes between states or between parties claiming title under grants from different

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149. See Abernethy, supra note 7, at 365.
153. Wilson, supra note 8, at 65–66.
154. Id.
states; hence, it did not clearly apply to the claims of the land companies.\footnote{See ABERNEThY, supra note 7, at 365; ARTICLES OF CONFEDERATION OF 1781, art. IX.} This limitation did not prevent the Wilson and the other land company agents from asking Congress to assert jurisdiction and recognize their land titles, particularly after those claims were rejected by the Virginia legislature in 1779. In the ensuing political controversy, agents of the land companies and politicians from the small “landless” states where their proprietors generally resided—primarily New Jersey, Delaware, and Maryland—vigorously denied the legitimacy of Virginia’s charter claims and sought to establish the countervailing principle that the vast unsettled territories that had been wrested from Great Britain by the “common blood and treasure” of the thirteen states should be considered a national domain, to be administered by Congress. Maryland went so far as to refuse to ratify the Articles of Confederation until Virginia ceded authority of these territories to Congress on these terms.\footnote{See, e.g., JENسن, THE ARTICLES OF CONFEDERATION, supra note 7, at 198–238; ROBERTSON, supra note 14, at 14–18; Jensen, The Creation, supra note 7, at 323–29.}

Naturally, Virginia’s political leadership aggressively defended the state’s charter boundaries against what they perceived to be the unjust encroachments of the land companies. George Mason was Virginia’s main advocate on this issue, due in part to his longstanding connection to the Ohio Company, which possessed rival claims to many of the territories in question.\footnote{See, e.g., JEFF BROADWaTER, GEORGE MASON: FORGOTTEN FOUNDER 123–31 (2006) (chronicling Mason’s efforts to counteract the land companies); ROBERTSON, supra note 14, at 14–18 (same).} The flavor of Mason’s deep antagonism toward the land companies and their agents can be given by a 1781 letter Mason wrote to Thomas Jefferson, who as Governor of Virginia also kept close tabs on the companies and viewed them with suspicion. Writing to Jefferson, Mason castigated the companies for claiming an implied power in Congress to administer territories held by Virginia:

You have, no Doubt, been informed of the factious, illegal, & dangerous Schemes now in Contemplation in Congress, for dismembering the Common-wealth of Virginia, & erecting a new State or States to the Westward of the Alleghany Mountains. This power, directly contrary to the Articles of Confed-eration, is assumed upon the Doctrine now industriously propagated ‘that the late Revolution has transferred the Sovereignty formerly possessed by Great Britain, to the United States, that is to the American Congress.’ A Doctrine which, if not immediately arrested in it’s progress, will be productive of every Evil; and the Revolution, instead of securing, as was intended, our Rights & Libertys, will only change the Name & place of Residence of our Tyrants. This that Congress who drew the Articles of Union were sensible of & have provided against it, by expressly declaring in Article the 2d that “Each State retains it’s Sovereignty, freedom, & Independence, & every Power, Jurisdic-
tion, & right, which is not by this Confederation \textit{expressly delegated} to the United States in Congress assembled . . . . \footnote{158}

Mason and Jefferson were hardly the only Virginians who resented the activities of the land companies and who sought to defend its charter against their ingenious legal theories. Although this part of his biography is not generally well-known, the issue also occupied Madison to a great extent during the period of the nationalists’ ascendancy. According to Lance Banning, nowhere was Madison’s attachment to states’ rights more pronounced than in his “determined struggle to defend the Old Dominion’s western claims, the issue that distinguished him most clearly in the minds of the majority in Congress.”\footnote{159} Jack Rakove concurs, observing that the conflict with the land companies was “Madison’s greatest concern during his first year in Congress.”\footnote{160} Madison was also one of only four delegates in Congress to vote against Robert Morris’s plan for a national bank, arguing that the Articles of Confederation did not authorize Congress to charter a corporation.\footnote{161} While serving in Congress, both Madison and Randolph questioned the bank’s legitimacy and actively sought to minimize its interference with state sovereignty.\footnote{162}

In contrast to the Pennsylvania delegation to the convention, then, the extent to which the Virginia delegation was committed to the key legislative proposal of Resolution VI before arriving in Philadelphia seems doubtful for many reasons. For much of the previous decade, at least three of the most influential Virginia delegates—Mason, Madison, and Randolph—had challenged the application of the Resolution VI principle to two of the issues—a national bank and control over western lands—that mattered most to Wilson, Franklin, Robert Morris, and the other Pennsylvania delegates, along with many like-minded investors in the small “landless” states. The respective constituencies of the Virginia and Pennsylvania delegations were sharply divided on these issues, and it seems plausible to think that the “proper correspondence of sentiments”\footnote{163} that the two delegations sought to produce in the days leading up to the convention turned in large measure on these competing interests that were discussed and negotiated.

These facts do not prove, of course, that Madison or the Virginia delegation

\footnote{158. Letter from George Mason to Thomas Jefferson (Sept. 27, 1781), \textit{reprinted in Contexts of the Constitution} 367 (Neal H. Cogan ed., 1999) (emphasis original).}

\footnote{159. \textit{Banning}, supra note 7, at 26.}

\footnote{160. \textit{Jack N. Rakove, James Madison and the Creation of the American Republic} 21 (1990).}

\footnote{161. \textit{Banning}, supra note 7, at 22.}

\footnote{162. \textit{See, e.g.}, \textit{Lewis}, supra note 148, at 29 (recounting that Madison was “bitterly opposed” to the bank and argued “that Congress was quite overstepping its powers”); \textit{John J. Reardon, Edmund Randolph: A Biography} 50–51 (1974) (explaining that Randolph “doubted the constitutional authority of Congress to grant such a charter” and was part of a committee that sought to “acquaint Morris with the constitutional limitations under which Congress was forced to operate”).}

\footnote{163. \textit{Beeman}, supra note 25, at 53 (quoting from a letter written by George Mason to his son on May 20, 1787, reporting on developments in Philadelphia prior to the convention).}
did not propose the critical language of Resolution VI on their own without encouragement or pressure from Wilson and the Pennsylvanians. Together with the notable gap in Madison’s correspondence and the striking similarities between the language of Resolution VI and the language of Wilson’s bank essay, however, they do strongly point in this direction. In light of all these considerations, it seems reasonable to assume that the key legislative proposal of Resolution VI was, directly or indirectly, a Pennsylvania contribution to the Virginia Plan. If this is correct, then one should probably interpret the weeks before the convention as a period in which the Virginia and Pennsylvania delegations sought to bury the hatchet, find common ground on the issues that divided them, and formulate a general plan for the convention. It seems likely that Wilson or another delegate from Pennsylvania proposed adding the key language of Resolution VI to the Virginia Plan at some point during this process.

Even if Madison was not indebted to anyone else for the critical language of Resolution VI, the close parallels between this language and the doctrines Wilson frequently advocated prior to the convention have important consequences for our understanding of what transpired in the Committee of Detail. Perhaps the main question that must be addressed in this regard is whether the Committee “rejected” or “abandoned” the amended language

164. Washington’s decision to accept Robert Morris’s invitation to stay with him for the duration of the summer may have helped set the tone for this rapprochement, as did the celebrated dinner Franklin hosted for the two delegations on May 16. See BEEMAN, supra note 25, at 34–35, 52–53.

165. To be sure, a reasonable case could be made that Madison did not need Wilson or anyone else to fill in the gap in his preconvention correspondence with Randolph and Washington when he drafted the Virginia Plan. For one thing, the key concepts of Resolution VI—“competence” and “harmony”—were widely used throughout the period. See, e.g., TAYLOR, supra note 28 (Congress can legislate in all cases “to which the authority of any particular state is not competent” (emphasis added)); Franklin’s Articles of Confederation, supra note 28 (Congress can legislate whenever local assemblies “cannot be competent” to act (emphasis added)); see also, e.g., Report of the Annapolis Convention, 31 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 687 (Gallard Hunt ed., 1912) (considering how far uniform commercial regulations among the states “might be necessary to their Common interest and permanent harmony” (emphasis added)); “Remonstrance of the General Assembly of Virginia to the delegates of the United American States in Congress Assembled (Dec. 14, 1779),” in From Samuel Huntington, Enclosing Papers Relating to Western Claims by the States (Sept. 10, 1780), FOUNDERS ONLINE, http://founders.archives.gov/documents/Jefferson/01-03-02-0722 (expressing the General Assembly’s wish to “promote that mutual confidence and harmony between the different States so essential to their true Interest and Safety” (emphasis added)). Furthermore, Madison sometimes used these concepts in his other preconvention writings and letters. See, e.g., James Madison, Vices of the Potential System of the United States (1787), in SELECTED WRITINGS OF JAMES MADISON, supra note 108, at 37 (objecting to commercial practices of the States that “are destructive of the general harmony.” (emphasis added)). As I explain in the text, however, the primary issue that ultimately must be addressed is whether Madison authored the critical language of Resolution VI, but whether the deep attachment to this principle by Wilson and the nationalists influenced how the Committee of Detail drafted the Necessary and Proper Clauses.

166. BARNETT, supra note 9, at 155.

167. Lash, supra note 24, at 2164.
of Resolution VI (the Bedford Resolution)\textsuperscript{168} in favor of a system of enumerated powers. The scholars who make these claims typically do not consider whether there are independent reasons why the Committee of Detail decided to enumerate the powers of Congress. Put differently, these scholars usually do not consider whether the Committee of Detail decided not only to enumerate the powers of Congress, but also to vest Congress with the power to legislate in all cases in which the states are incompetent or in which the harmony or general interests of the nation are at stake. Instead, they often tacitly assume that these two alternatives are mutually exclusive. A careful examination of the exact language of the Necessary and Proper Clause calls this assumption into question.

It is important to recognize that most of the legislative powers enumerated by the Committee of Detail were already held by Congress under the Articles of Confederation. By enumerating these powers, then, the Committee was not fulfilling the key legislative provision of Resolution VI to which we have drawn attention. Instead, the Committee was fulfilling a different mandate of Resolution VI, namely, the provision calling for the national legislature to possess all of “the Legislative Rights vested in Congress by the Confederation.”\textsuperscript{169} The new powers the Committee of Detail added to this list comprise important federal powers indeed, including the power:

\begin{quote}
to lay and collect taxes, regulate interstate and foreign commerce, establish a uniform rule of naturalization, subdue rebellion within individual states, raise an army without relying on the states for the recruitment of soldiers, and “to call forth” the militia to enforce national laws and treaties and to “suppress insurrections, and repel invasions.”\textsuperscript{170}
\end{quote}

Yet one must argue, and not merely assume, that these additional powers exhausted the domain of new powers embraced by the convention when it adopted the Bedford Resolution. In Wilson’s case, it seems clear that he would have understood the general powers encompassed by the Bedford Resolution to include a host of additional capacities, such as the power to buy, sell, and administer national lands, and the power to incorporate a national bank. But

\begin{footnotesize}
\begin{footnotes}
\footnotetext[168]{On July 17, the day after the small states secured equal representation in the Senate, Gunning Bedford of Delaware moved that the original language of Resolution VI be expanded to authorize Congress “to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the Harmony of the U. States may be interrupted by the exercise of individual Legislation.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 26 (emphasis added). In response, Randolph, who had originally proposed Resolution VI, objected that Bedford’s proposal was “a formidable idea indeed” that “involves the power of violating all the laws and constitutions of the States, and of intermeddling with their police.” Id. Despite Virginia’s opposition, the Bedford Resolution was adopted by the convention and later transmitted to the Committee of Detail. Id. at 27, 131–32; see also BARNETT, supra note 9, at 155–57; LYNCH, supra note 9, at 17–18.}
\footnotetext[169]{1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 21.}
\footnotetext[170]{RAKOVE, supra note 23, at 178–79.}
\end{footnotes}
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where in the Committee of Detail’s list of enumerated powers can one find the authority of Congress to legislate on these matters? The Necessary and Proper Clause provides one obvious answer.

In short, when the Committee of Detail sat down and considered how to fulfill the mandate of the Bedford Resolution, they were confronting language with which Wilson was intimately acquainted, and to which he and the other leading nationalists at the convention were deeply committed. To a large extent, it was essentially the same proposal that Franklin had made in 1775, and that John Dickinson had made in his own draft of the Articles of Confederation in 1777. In Wilson’s case, the underlying political theory of the Bedford Resolution was also his theory, which he had deployed on behalf of the Bank of North America and the land companies on many occasions. This theory had a special status for him, and we can be confident that one of his highest priorities while serving on the Committee of Detail was to incorporate it into the Constitution in some manner. Moreover, Wilson was hardly alone in this regard. On the contrary, other members of the Committee of Detail and a powerful bloc of nationalist delegates from Pennsylvania and the “landless” states, among others, would have actively supported him. All these background facts must

171. See Franklin’s Articles of Confederation, supra note 28 (proposing that Congress be given the authority to legislate whenever local assemblies “cannot be competent” to act); see also Crosskey & Jeffrey, supra note 7, at 100–01 (explaining the similarities between the Franklin and Dickinson drafts with respect to federal powers).

172. Compare 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 26 (authorizing Congress “to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent”), with Wilson, supra note 8, at 65–66 (arguing that Congress may legislate on behalf of “the general interests of the United States” and also in all those cases in which “no particular state is competent”). See also, e.g., Livermore, supra note 7, at 119 (noting that Wilson was given 300 shares of the Indiana Company for legal services rendered in 1781); Jensen, The Creation, supra note 7, at 327 (relating that the Indiana Company argued in a 1781 memorial that only Congress could render “a proper and competent Decision” on its territorial claims).

173. Six states voted for the Bedford Resolution when it was first adopted on July 17. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 27 (listing affirmative votes by Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, and North Carolina). Virginia and Connecticut subsequently joined them, id., leaving only South Carolina and Georgia opposed, presumably because of the implications of the Bedford Resolution for slavery. For a variety of reasons, individual delegates at the convention who, like Wilson, had a special connection or strong attachment to the language of the Bedford Resolution presumably included inter alia George Washington, John Langdon, Nicholas Gilman, Nathaniel Gorham, Rufus King, and Alexander Hamilton, along with virtually all of the delegates from Pennsylvania, Delaware, Maryland, and New Jersey. This group formed the core of the nationalist bloc that would likely have supported any effort by Wilson to incorporate the powers envisioned by the Bedford Resolution into the Constitution. An intriguing letter Wilson received from New Jersey Congressman Lambert Cadwalader while Wilson was serving on the Committee of Detail sheds some light on this issue:

It is said that a Committee of the Convention is preparing some very important Business, which is in a few Days to be reported to the House—and that it is probably it will be adopted without any material Alteration. I hope it may be strongly marked with the Features which some of the Members wish to give it.

be kept in mind when considering what happened to the Bedford Resolution in the Committee of Detail and the precise manner in which the Committee drafted the Necessary and Proper Clause.

III. THE DRAFTING HISTORY OF THE NECESSARY AND PROPER CLAUSES

Many scholars have concluded that there is little or no evidence in the documentary record that explains why the Committee of Detail drafted the Necessary and Proper Clauses.174 Except for a few stylistic edits, the version of the clause that appeared in the Committee’s August 6 draft is identical to that found in the final version of the Constitution. Although three delegates who refused to sign the Constitution were evidently concerned with its sweeping language, there is no direct evidence that the Necessary and Proper Clause generated any significant or extensive debate between August 6 and September 17, when the convention drew to a close. Nonetheless, during ratification the Necessary and Proper Clause quickly became a focal point for opposition to the Constitution. These controversies carried over to the first Congress; indeed, as Professor Lynch relates, these ratification debates had a major impact on “whether the enumerated powers constituted limits upon the actions of the national government or whether they were merely specific examples of how the government might act in the general interests of the nation.”175

All of these facts confront us with a set of intriguing historical puzzles. Why does the Constitution contain a Necessary and Proper Clause? What did the framers intend to accomplish by adding this complex final power to the list of enumerated powers in Article I, Section 8, and what light does it shed on the overall design of the Constitution? What is the relationship between the Necessary and Proper Clause and Resolution VI of the Virginia Plan? Why did this clause become so controversial during ratification, particularly after it had passed through the convention with little or no recorded debate?

This Part seeks to make headway on these questions by taking a fresh look at the drafting history of all three parts of the Necessary and Proper Clause. Although recent studies of the origins of this clause contain a wealth of interesting detail, their attention is focused almost entirely on the first part of the clause, which authorizes Congress to carry into effect its other enumerated powers in Article I, Section 8.176 In this Part, I examine the drafting history of the full Necessary and Proper Clause, focusing not only on the Foregoing

174. See, e.g., Barnett, supra note 9, at 155 (“The Necessary and Proper Clause was added to the Constitution by the Committee on Detail without any previous discussion by the Constitutional Convention. Nor was it the subject of any debate from its initial proposal to the Convention’s final adoption of the Constitution.”); Graber, supra note 104, at 168 (the Committee of Detail “gave no hint why it chose the language it did”).

175. Lynch, supra note 9, at 41. According to Professor Lynch, “[b]y any standard, the debate in the state ratifying conventions over the meaning and implications of the Necessary and Proper Clause had the greatest political and constitutional effect on the operations of the new government.” Id.

176. See, e.g., Natelson, supra note 9, at 84–93; see also Barnett, supra note 9, at 155–57.
Powers Provision, but also on the All Other Powers Provision, which previous studies have tended to ignore.

A. RANDOLPH’S DRAFT

The germ of the Necessary and Proper Clause makes its first appearance in the records of the Committee of Detail in an early draft of the Constitution written by Edmund Randolph, with alterations by John Rutledge. At the end of a long list of proposed legislative powers, Randolph first attempted to address the need for Congress to organize the government’s own internal operations. He thus gave Congress the power “[t]o organize the government in those things, which,”—a passage that was subsequently crossed out.

Randolph next drafted a complex passage which, as Professor Natelson observes, seems designed to serve simultaneously as a supremacy clause, a jurisdictional grant to federal courts to resolve conflicts between state and national authorities, and a rule of construction directing the judiciary to recognize incidental powers when resolving such conflicts. The passage read:

All laws of a particular state, repugnant hereto, shall be void, and in the decision thereon, which shall be vested in the supreme judiciary, all incidents without which the general principles cannot be satisfied shall be considered, as involved in the general principle.

This passage, too, was subsequently crossed out of Randolph’s draft. In the place of both deletions, one finds two key insertions, both written by Rutledge. The first has received attention by constitutional scholars, but the second has not. In what follows, I examine each in turn.

1. “. . . all Laws necessary to carry the foregoing Powers into Execution”

Rutledge’s first edit is clearly a sketch of what became the Foregoing Powers Provision. Underneath Randolph’s complex jurisdictional paragraph, which

177. See generally 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 137–50. The Randolph draft was discovered in the late nineteenth century among the papers of George Mason, leading one early commentator to suggest that Mason may have had a hand in composing it. See WILLIAM M. MEIGS, THE GROWTH OF THE FEDERAL CONSTITUTION OF 1787, at 4 (1900). Although this is possible, it seems more likely that Randolph originally composed the draft on his own, or with input from other members of the Committee of Detail, and then gave the draft to Mason sometime during the last weeks of the convention, when Randolph and Mason began coordinating their objections to the constitution and considering how to respond. For essential background to the existing records of the Committee of Detail, including full digital reproductions of the records themselves, see generally William Ewald and Lorianne Updike Toler, Committee of Detail Documents, 135 PA. MAG. OF HIST. & BIOGRAPHY 239 (2011); see also Ewald, supra note 24.
178. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 144.
179. See Natelson, supra note 9, at 88.
180. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 144.
181. Id.
182. Id.
someone, presumably Rutledge, deleted. Rutledge first wrote “That Trials for Crim[i[nal] Offences be in the State where the Off[ence] was com[mitte][d—by Jury],” and then added:

—and a right to make all Laws necessary to carry the foregoing Powers into Execu—. 184

In drafting this clause, Rutledge evidently sought to improve on Randolph’s initial attempt to have the Constitution recognize a doctrine of incidental powers. On its face, Randolph had drafted inter alia a rule of construction, instructing the supreme judiciary to construe federal authority to include incidental powers. Rutledge sought to achieve a similar result by granting Congress the express power to make laws necessary to execute its enumerated powers. Based on their experiences of the past decade, both Randolph and Rutledge would have understood the need for the national government to exercise incidental powers, even if its primary powers were expressly enumerated. In particular, both men had served in the Continental Congress and were familiar with many occasions in which the federal government had felt the need to exercise implied powers to carry into effect its delegated powers, despite the restrictions of Article II of the Articles of Confederation.

For example, on March 6, 1781, just five days after the Articles of Confederation were finally ratified and went into effect, Congress appointed a three-person committee to devise a plan for giving the government additional powers to coerce the states to comply with their federal obligations. The committee consisted of James Varnum, James Duane, and James Madison. 185 The committee’s report, written by Madison, argued that Congress was vested with “a general and implied power” under the Articles “to enforce and carry into effect all the Articles of the said Confederation against any of the States which shall refuse or neglect to abide by such their determinations, or shall otherwise violate any of the said Articles.” 186 Later, this report was referred to another three-person committee, made up of Edmund Randolph, Oliver Ellsworth, and James Varnum. Recognizing the need for vesting Congress with additional powers, this second committee wrote its own report, which listed twenty-one

183. Id.
184. Id. Both this statement and the previous one are enclosed in angle brackets (“< >”) in Farrand’s Records. If Farrand is correct, then, they are properly attributed to Rutledge. See id. at 137, n. 6. See also Figure 1, which reproduces the relevant part of the Randolph Draft as it appears in Meigs, supra note 177, at 316–17, VI.
185. See 3 THE PAPERS OF JAMES MADISON, supra note 47, at 19 n.1.
186. Id. at 17–18 (footnote omitted). Because the Articles lacked such a Provision, the Committee recommended an amendment declaring that if any state refused to comply with its obligations, Congress was “authorized to employ the force of the United States as well by sea as by land to compel such State or States to fulfill their federal engagements.” Id. at 18. For example, Congress could seize the property of delinquent states or regulate their trade with other states or with foreign nations. Id.
means by which “the Confederation requires execution.” It also proposed an enumeration of seven additional powers that Congress ought to be given by the states. The committee’s report was scheduled for discussion on August 23, but there is no evidence it was ever considered. When composing his draft

187. 21 JOURNALS OF THE CONTINENTAL CONGRESS, supra note 165, at 894. In its report, the Committee first explained that it had decided not to produce “an Exposition of the Confederation” and protested that it “ought to be discharged” from doing so. Id. The first reason given was that such an exposition “would be voluminous if coextensive with the subject.” Id. The second reason was that “the omission to enumerate any Congressional powers [will] become an argument against their existence, and it will be [easy] enough to insist upon them, when they shall be exercised and disputed.” Id. Having thus anticipated the objection to exhaustively enumerated powers that Wilson would later press at the convention, see supra note 62 and accompanying text, the Committee turned to its main piece of business. The Committee held “that the Confederation requires execution in the following manner” and listed twenty-one ways and means:

1. By adjusting the mode and proportions of the Militia aid to be furnished to a sister State labouring under Invasion.
2. By describing the privileges and immunities to which the citizens of one State are entitled in another.
3. By setting forth the conditions upon which a criminal is to be deliv[ere]d up by one State upon the demand of the executive of another.
4. By declaring the method of exemplifying records and the operation of the Acts and judicial proceedings of the Courts of one State contravening those of the States in which they are asserted.
5. By a form to be observed in the notification of the appointment or suspension of Delegates.
6. By an oath to be taken by every Delegate against secret trusts of salaries.
7. By specifying the privileges of delegates from arrests, imprisonments, questioning for free speech and debates in Congress saving as well their amenability to their constituents, as protesting against the authority of individual legislatures to absolve them from obligations to secrecy.
8. By instituting an oath to be taken by the Officers of the U.S. or any of them against presents, emoluments, office or title of any kind from a King Prince or Foreign State.
9. By one universal plan of equipping, training and governing the Militia.
10. By a scheme for estimating the value of all land within each State granted to or surveyed for any person or persons together with the buildings and improvements thereon: and the appointment of certain periods at which payment shall be made.
12. By ascertaining the jurisdiction of Congress in territorial questions.
13. By erecting a mint.
14. By fixing a Standard of weights and measures throughout the U.S.
15. By appointing a Com[mittee] for Indian affairs.
16. By regulating the Post-Office.
17. By establishing a Census of white Inhabitants in each State.
20. By liquidation of old accounts against the U.S.: and

Id. at 894–95.

188. The seven new powers were (1) “[t]o lay Embargoes in time of war”; (2) “[t]o prescribe rules for impressing property”; (3) “[t]o appoint . . . Collectors and direct the mode of accounting for taxes”; (4) to admit new states carved out of old ones; (5) to enter into consular treaties; (6) “[t]o destrain the property of [delinquent] States”; and (7) “[t]o vary the rules of suffrage in Congress.” Id. at 895.
189. Id. at 894–95 (making no reference to this committee’s report).
for the Committee of Detail in 1787, however, Randolph borrowed some of the language of this committee report, which he and another member of the Committee of Detail, Oliver Ellsworth, had helped to write six years earlier.190

Another illustration of the need for incidental powers that was very familiar to Randolph and Rutledge involved the seizure of goods as enemy contraband from the ship Amazon by a group of Pennsylvanians in 1782. As Professor Calvin Johnson recounts, the ship’s objective was to carry supplies to British and Hessian prisoners of war being held in Lancaster, Pennsylvania. For this purpose, the ship traveled under a federal passport issued by General Washington.191 On the recommendation of a three-person committee, comprised of Rutledge, Madison, and Oliver Wolcott, Congress objected to the seizure “on the ground that the Amazon’s passport had been a valid exercise of war by the Commander in Chief.”192 In a May 1782 letter to Madison, Randolph confirmed that his own view of these events coincided with that of the committee: the power to issue passports, Randolph explained, was “an obvious and direct consequence” of the general war powers given by the Articles of Confederation.193 Six years later, at the Virginia ratification convention, Randolph re-

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190. See Charles Warren, The Making of the Constitution 365 (1993) (“This Committee, consisting of Edmund Randolph, Oliver Ellsworth, and James M. Varnum, had recommended that ‘the Confederation requires execution in the following manner’; and it is interesting to see how many of the recommendations were now embodied, six years later in the Report of the Committee of Detail . . . .”).


192. Id. at 40.

193. Letter from Edmund Randolph to James Madison (May 21–24, 1782), Founders Online, http://founders.archives.gov/documents/Madison/01-04-02-0122 (“The arguments against the power of congress were first drawn from the non-enumeration of it in the confederation. . . . I affirmed my opinion to be, that the 2d. article ought not to be understood literally: but that the words ‘expressly delegated’ meant an obvious and direct consequence from the general powers, briefly sketched in the confederation: that the exclusive right of determining on war and peace, and the direction of military operations obviously and directly led to the power of granting passports . . . .” (footnotes omitted)).
counted the *Amazon* affair, pointing to the general passport system created by Congress as an example of the valid exercise of incidental powers given by the Necessary and Proper Clause.\(^\text{194}\)

It is important to recognize that Rutledge’s Foregoing Powers Provision was unexceptional. It seems unlikely to have been opposed by Randolph or any other member of the Committee of Detail. For that matter, it seems unlikely to have been opposed by any delegate at the constitutional convention. The provision simply rendered explicit the doctrine of incidental powers that is a corollary to the act of vesting a legislature with certain express powers. Once these express powers are given, the necessary means of carrying them into execution must also be assumed as a matter of course. As Madison later explained in *Federalist No. 44*, “Without the *substance* of this power, the whole Constitution would be a dead letter.”\(^\text{195}\) Madison wrote:

> Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government by unavoidable implication. No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.\(^\text{196}\)

Hamilton made a similar argument in *Federalist No. 33*, which he later repeated at the New York ratifying convention. Every express grant of power carries with it an implied power to carry into execution the express power.\(^\text{197}\) The power to regulate trade, for instance, means Congress “must do a thousand things”\(^\text{198}\) that are not expressly enumerated. Robert Yates, a leading Antifederalist in New York, agreed with Hamilton on this particular issue, conceding that whenever one grants general powers, “the powers to execute are implied.”\(^\text{199}\) In sketching his draft of what became the Foregoing Powers Provision, therefore, it seems probable that Rutledge sought to make this necessary principle explicit out of an abundance of caution. He may also have seen that there was a simpler and more elegant way to rewrite the convoluted incidental powers principle Randolph had drafted. Alternatively, or in addition, Rutledge may have wanted to undercut the need for a broader statement of implied government powers, which the convention had approved over South Carolina’s objection when it adopted the amended language of Resolution VI. From this perspective, Rut-

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196. *Id.* at 285.
199. *Id.*
ledge’s draft of the Foregoing Powers Provision could be viewed as the result of his attempt to acknowledge the need for incidental powers, while continuing to insist that all of Congress’s powers should be clearly defined and enumerated.

2. “Insert the II Article”

Rutledge made another revision to Randolph’s draft, which bears on the foregoing issues and may have far-reaching implications for our understanding of what transpired in the Committee of Detail. To the best of my knowledge, this second revision has not received any attention in the scholarly literature. On the center of the page, immediately below Randolph’s reference to the power to organize the government, and right above his sweeping passage involving national supremacy, federalism, and incidental powers, both of which were subsequently crossed out, Rutledge wrote the simple instruction, “Insert the II Article.” This comment appears to be a reference to the second article of the Confederation, which held that “[e]ach 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.” As we have seen, this reserved powers clause was a major fault line in the competing conceptions of federalism that divided the founders during

200. SUPPLEMENT TO THE RECORDS OF THE FEDERAL CONVENTION, supra note 20, at 189; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 144. Again, this edit to Randolph’s draft is enclosed in angle brackets in Farrand’s Records; thus, if Farrand is correct, it is properly attributed to Rutledge. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 137 n.6.

201. ARTICLES OF CONFEDERATION OF 1781, art. 2. I emphasize “appears” for the following important reason. The facsimile of Randolph’s draft that first appeared in Meigs appears to be properly transcribed as “Insert the II Article” and thus supports the transcription supplied by Farrand and Hutson, on which my description in the text is based. See MEIGS, supra note 177, at 316–17, VI (reproducing the relevant part of Randolph’s draft on the twelfth page between pages 316 and 317). By contrast, the facsimile that appears in the more recent collection of Committee of Detail documents and images produced by William Ewald and Lorianne Updike Toler appears to be properly transcribed, and is transcribed, by the authors as “Insert the 11th Article.” See Ewald & Toler, supra note 177, at 276–77. Professor Ewald has kindly shared with me the digital image of the original from which he and Toler worked, and it does seem to support the transcription given by them in their article. With the assistance of Ms. Julie Miller of the Manuscript Division at the Library of Congress, I have confirmed that the library’s microfilm and digital images of the Randolph draft also support the transcription provided by Ewald and Toler. Because access to the original Randolph manuscript is generally restricted, I have not yet been able to determine why the Meigs image, which presumably was used by Farrand and Hutson in making their transcriptions, differs from the Ewald and Toler image. One reason for thinking that the transcription given by Farrand and Hutson is accurate and that Rutledge really did seek to insert the second article of the Articles of Confederation into the Randolph draft is that there does not seem to be a plausible account of what an instruction to “insert the [eleventh] article” might mean in this context. By contrast, “insert the [second] article” makes perfect sense in light of many considerations, including the consistent efforts by the South Carolina delegation to maintain a reserved powers clause in the federal constitution, not only during the convention, but also before and after it. For the purposes of this Article, I assume that the earlier image reproduced by Meigs and transcribed by Farrand and Hutson is an accurate reflection of what Rutledge actually wrote in 1787. This assumption may be mistaken, however, and more research is needed to clarify this issue.
the period leading up to the convention. Its appearance in this context is therefore noteworthy for several reasons.

To begin, Rutledge’s proposed edit suggests that, at this juncture of the proceedings, he may have wished to foreclose the exercise of at least some implied powers in the new constitution by limiting the national government to expressly delegated powers and by reserving all other powers to the states. His likely reasons for doing so would almost certainly include protecting his state’s interests in slavery. In a more powerful national government, should each state retain its exclusive authority to regulate slavery within its own borders? On this question, Rutledge and the other South Carolina delegates spoke with one voice in Philadelphia, and what they said was clear and unmistakable.

Recall some of the key events related to this issue that occurred at the convention before the Committee of Detail was appointed near the end of July. At the start of the proceedings, Charles Pinckney proposed a plan of government, which later was referred to the Committee of Detail. Pinckney’s plan included a reserved powers clause that distilled the essence of Article II: “Each State retains its Rights not expressly delegated.” When the sweeping legislative proposal of Resolution VI, giving Congress the authority “to legislate in all cases to which the States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation,” was first discussed on May 30, both Rutledge and Pierce Butler immediately objected to the vagueness of the word “incompetent” and demanded “an exact enumeration of the powers comprehended by” this term. Later that summer, after this proposal had been widened even further to include the power “to legislate in all cases for the general interests of the Union” and this broad language had been adopted by a lopsided majority, with only South Carolina and Georgia dissenting, a motion was made to refer this resolution and the other measures that had been adopted to a committee charged with drafting a constitution. At that point, Charles Cotesworth Pinckney stood and warned the delegates that “if the Committee should fail to insert some security to the Southern States agst. an emancipation of slaves, and taxes on exports, he shd. be bound by duty to his State to vote agst. their Report.”

On the basis of this and similar evidence, it seems clear that if Rutledge sought to add an Article II-like reserved powers clause to the Constitution while

202. See Jensen, The Articles of Confederation, supra note 7, at 168–70; Rakove, supra note 7, at 164–76.
203. 2 The Records of the Federal Convention of 1787, supra note 5, at 135 (emphasis added).
204. 1 id. at 53.
205. 1 id. at 21, 26.
206. Id. at 21, 24, 27.
207. Id. at 95 (footnote omitted).
208. Pinckney’s warning about slavery, which he issued on July 23, merely repeated concerns he and other South Carolina delegates had expressed throughout the convention. On July 12, for example, Pinckney insisted that “property in slaves should not be exposed to danger under a Govt. instituted for the protection of property.” 1 id. at 594. The next day, Butler made the point crystal clear: “The security
serving on the Committee of Detail, then he did so at least partly to protect the slaveholding interests of South Carolina and the Deep South. If so, then what is perhaps most striking about this episode is that Rutledge’s effort was unsuccessful. A popular narrative about the Committee of Detail assumes that Rutledge, on behalf of the slaveholding interests of the Deep South, practically dominated the proceedings of this Committee, managing to pressure his colleagues into drafting a constitution that “gave the big slaveholding states everything they wanted,” a turn of events that “altered the course of the Convention.” This narrative comes in several varieties, but all of them credit Rutledge with achieving all of South Carolina’s primary objectives with respect to slavery.

What these interpretations appear to overlook is that the most significant objective was not a prohibition on export taxes, a supermajority requirement for navigation acts, or protection of the slave trade—all of which are included in the Randolph draft, as well as in the draft returned by the Committee of Detail on August 6—but the protection against abolition. Because no specific provision of the Constitution prevented the United States from abolishing slavery, historians have often assumed that the essential character of the government as one of limited and enumerated powers fulfilled this goal. Short of an explicit protection against abolition, however, what Rutledge and the other slaveholders from South Carolina wanted in order to satisfy this goal was a reserved powers clause, such as Article II of the Articles of Confederation. Yet this objective was eluded them. The draft constitution returned by the Committee of Detail on August 6 did not contain a reserved powers clause. Nor did it contain any other explicit reference to the rights, sovereignty, or reserved powers of the states. Instead, it enumerated the powers of Congress and included a broadly worded sweeping clause at the end of that list.

Rutledge’s apparent effort to insert a reserved powers clause into the Randolph draft also points to a number of more interesting dynamics and tensions in the Committee of Detail that have not been adequately investigated by constitutional scholars. Going to the heart of the division of powers under the Constitu-
tion, the main dispute essentially reduced to this issue: Would the Constitution explicitly recognize state sovereignty and affirm that all powers not expressly delegated to the United States would be retained by the states? Or would the document avoid any mention of state sovereignty and perhaps even include an express recognition of the implied and inherent powers of the general government? Under the Articles of Confederation, certain enumerated powers and no others were given to the United States in Congress assembled. All other powers were retained by the states. The sovereignty of the states was also explicitly affirmed and protected. Should the Constitution follow suit? Although the available evidence appears sketchy and incomplete, the best inference seems to be that the Committee was probably split on this issue, three to two, along regional lines.

At this juncture of the proceedings, Rutledge, and perhaps also Randolph, probably favored a careful enumeration of government powers, along with a reserved powers clause affirming state sovereignty and clearly stating that all powers not expressly delegated to the government were reserved to the states. Like virtually every delegate to the convention, they were not opposed to giving Congress significant additional powers beyond those it held under the Articles of Confederation, such as the power to tax or to regulate commerce. Nor did they oppose granting Congress whatever incidental authority it needed to implement its enumerated powers. Beyond these explicit grants of authority, however, the two southern governors of the region’s most powerful states were probably inclined to prefer that any additional or residual powers would fall within the exclusive jurisdiction of the states.

By contrast, the three northern delegates on the Committee—Wilson of Pennsylvania, Ellsworth of Connecticut, and Gorham of Massachusetts—probably saw things differently. They were prepared to argue, and insist if need be, that the new government should not be encumbered by a highly restrictive reserved powers clause, such as Article II. Wilson almost certainly would have opposed any such language. In 1777, he had led the opposition in Congress to Thomas Burke’s original proposal to add Article II to the Articles of Confedera-

213. Randolph is an interesting and difficult case because although there is evidence that suggests he would have resisted adding a reserved powers clause to the Constitution, there is other evidence that implies he would have supported such a proposal. Compare Letter from Edmund Randolph to James Madison, supra note 193 (explaining that Article II should not be interpreted so literally as to preclude the power to issue passports), and Letter from Edmund Randolph to James Madison (Feb. 29, 1788), in 10 THE PAPERS OF JAMES MADISON, supra note 47, at 543 (describing Article II as “among the rocks on which the old [Confederation] has split”), with Gutzman, Edmund Randolph and Virginia Constitution金融业, supra note 73, at 490–96 (documenting Randolph’s efforts at the Virginia ratifying convention to persuade wavering delegates to vote for ratification by arguing that the “expressly delegated” restriction of Article II of the Articles of Confederation was implicit in the unamended Constitution). At this point in the convention, after it was clear that Virginia would no longer be able to control the national legislature in the manner contemplated by Madison, Randolph, and other delegates when the Virginia Plan was first proposed, it seems likely, although not certain, that Randolph would have aligned himself with Rutledge on this issue.
tion, and he consistently regarded this provision as a vice rather than a virtue of that instrument. The fact that Rutledge’s apparent proposal to insert Article II into the Committee’s draft failed suggests that at least two other members of the Committee agreed with Wilson. Although the evidence is limited, the best inference would seem to be that Ellsworth and Gorham would have supported Wilson in rejecting this proposal. Although Ellsworth is sometimes characterized as a strong advocate of states’ rights, after the “Great Compromise” was achieved on July 16—giving large states proportional representation in the House but protecting Connecticut and other small states by providing for equal state representation in the Senate—Ellsworth appears to have become a zealous nationalist, a position maintained for the rest of his career. For his part, Gorham was also “a consistent advocate of national power,” who sought to protect the federal government from threats from the states. Their activities both during and after the convention make it unlikely that Ellsworth or Gorham would have been receptive to the proposal to add a reserved powers clause such as Article II to the Constitution.

B. WILSON’S DRAFT

Until now, our attention has been mainly focused on the Randolph Draft and genesis of the Foregoing Powers Provision. The All Other Powers Provision has a separate drafting history in the Committee of Detail, a process in which Wilson took center stage. Most likely working alone at first, surrounded by his library of books, constitutions, and corporate charters, Wilson first sketched an early draft of what became the Preamble to the Constitution and a vesting clause delegating the legislative power of the United States to a bicameral legislature. He then outlined a brief “Continuation of the Scheme,” indicating his plan to “treat... the Powers of the legislat[ure],” “except from those Powers certain specified Cases,” and to assign other “Powers which may, with Propriety

214. See Jensen, The Articles of Confederation, supra note 7, at 174–75; Rakove, supra note 7, at 170–72.

215. See, e.g., William R. Casto, Oliver Ellsworth: “I Have Sought the Felicity and Glory of Your Administration,” in Seriatim: The Supreme Court Before John Marshall 292, 297–300 (Scott Douglass Gerber ed., 1998). As Casto recounts, in his later years, Madison famously remarked that “from the day when every doubt of the right of the smaller states to an equal vote in the senate was quieted... Ellsworth became one of [the general government’s] strongest pillars.” Id. at 298 (alteration in original).


217. For background on the Wilson drafts for the Committee of Detail, see generally Ewald, supra note 24; see also Ewald & Toler, supra note 177. Other than the Randolph draft, all of the handwritten drafts of the Committee of Detail that have survived are principally in Wilson’s handwriting, with occasional edits by Rutledge. Ewald, supra note 24, at 227.

218. See Max Farrand, The Framing of the Constitution of the United States 126 (1913) (suggesting that Wilson may have worked alone at this stage); Ewald, supra note 24, at 271 (same).

be vested in it.”220 These instructions suggest that Wilson gave considerable thought to how to enumerate and vest legislative powers. Wilson’s brief outline anticipates three distinct features of the Constitution: the enumerated powers of Article I, Section 8; the restrictions on legislative power in Article I, Section 9; and the All Other Powers Provision.

The last of these features is our primary focus here. In a subsequent draft written for the Committee of Detail and labeled Draft IX by Farrand and Ewald, Wilson added the All Other Powers Provision to the text of Rutledge’s Foregoing Powers Provision, tying these provisions together into the single, complex authorization that became the Necessary and Proper Clause.221 Wilson’s first draft of this clause appears at the end of a paragraph in which the powers of Congress are enumerated in accordance with the instructions of Resolution VI and the Bedford Resolution. The paragraph lists all of the powers given to Congress by the Articles of Confederation, to which are added three sets of additional powers: (1) the power to tax and the power to regulate naturalization and commerce (appended to the start of the list); (2) the power to appoint a Treasurer and the power to constitute inferior tribunals (located after the power “to borrow Money, and emit Bills on the Credit of the United States”); and (3) the powers to declare what shall be Treason against the United States, to regulate the state militias, and to subdue internal rebellions (located after the power to punish offenses against the Law of Nations). At the end of this list of powers, Wilson added the Necessary and Proper Clause:

The Legislature of the United States shall have the (Right and) Power to lay and collect Taxes, Duties, Imposts and Excises; to regulate (Naturalization and) Commerce <with foreign Nations & amongst the several States>; to establish an uniform Rule for Naturalization throughout the United States; to coin Money; to regulate (the Alloy) and Value of <foreign> Coin; to fix the Standard of Weights and Measures; to establish Post-offices; to borrow Money, and emit Bills on the Credit of the United States; to appoint a Treasurer by Ballott; to constitute Tribunals inferior to the Supreme (national) Court; to make Rules concerning Captures on Land or Water; to declare the Law and Punishment of Piracies and Felonies committed on the high Seas, and the Punishment of counterfeiting the <Coin> (and) <of the U.S. &> of Offences against the Law of Nations; (to declare what shall be Treason against the United States;) <& of Treason agst the U:S: or any of them; not to work Corruption of Blood or Forfeit except during the Life of the Party;> to regulate the Discipline of the Militia of the several States; to subdue a Rebellion in any State, on the Application of its Legislature; to make War; to raise Armies; to build and equip Fleets, to (make laws for) call(ing) forth the Aid of the Militia, in order to execute the Laws of the Union, (to) enforce Treaties, (to) suppress Insurrections, and repel invasions; and to make all

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220. Id. at 151.
221. Id. at 168; see Ewald & Toler, supra note 177, at 321–65 (“Document IX: Wilson’s Final Draft”).
Laws that shall be necessary and proper for carrying into (full and complete) 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 . . . 222

The foregoing passage, including all of its unusual spellings and markings, reproduces Wilson’s paragraph exactly as it appears in Max Farrand’s Records of the Federal Convention of 1787. A photographic reproduction of the pertinent part of the original document in Wilson’s handwriting is given in Figure 2, which is reproduced here courtesy of the Historical Society of Pennsylvania. As Farrand relates, the parts of this passage in parentheses were crossed out in the original. The parts in italics represent additions by Wilson, while the edits by Rutledge are given in angel brackets.223 Reconstructing how Wilson actually composed the Necessary and Proper Clause on the basis of these fragmentary records, the process can be usefully divided into three stages.

Figure 2: The Necessary and Proper Clause in the Wilson Draft for the Committee of Detail

222. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 167–68.
223. Id. at 163.
1. “... that shall be necessary and proper ...”

First, Wilson modified Rutledge’s instrumental powers clause by inserting the phrase “that shall be” before “necessary” and by adding the words “and proper” after “necessary”—two significant amendments, to which I will return. Wilson also inserted the phrase “full and complete” before “Execution.” Finally, he rearranged the syntax of Rutledge’s language to enable the main verb and preposition of the sentence (“to carry into execution”) to handle a compound object (“the foregoing powers, and all other powers”). Highlighting just these edits, Wilson’s initial revision of the Foregoing Powers Provision read as follows:

and to make all Laws that shall be necessary and proper for carrying into full and complete Execution the foregoing Powers ...

2. “... for carrying into Execution the foregoing powers, and all other Powers ...”

Next, continuing on without apparent interruption, Wilson added the language of the All Other Powers Provision:

and all other powers vested, by this Constitution, in the Government of the United States, or in any Department or Officer thereof ...

As I elaborate in section IV.B, this complex provision was probably meant to accomplish at least two main objectives. First, the provision was meant to function as an ordinary sweeping clause, canceling any inference that the foregoing enumerated powers were exhaustive. Like many of the founders, Wilson believed that it was impossible to enumerate all of the legitimate powers of government. He held the same belief with respect to individual rights. When Wilson was given the chance to do so, he appended a sweeping clause to the list of enumerated powers he drafted for the Committee of Detail to cancel this inference. In effect, the clause Wilson composed was the mirror image of Article II of the Articles of Confederation, which limited the United States to “expressly delegated” powers and reserved all other powers to the States. Wilson’s ostensible purpose was to make clear and declare that, in addition to the foregoing enumerated powers, there were other powers vested in the Government of the United States and its Departments and Officers, which

224. See infra section IV.A.
225. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 168 (emphasis added).
226. See Ewald, supra note 24, at 271–72.
227. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 168.
228. See infra notes 341–67 and accompanying text.
229. See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 60 (arguing that “it would be impossible to enumerate the powers which the federal Legislature ought to have”).
230. See, e.g., JAMES WILSON, Remarks in the Pennsylvania Convention to Ratify the Constitution of the United States (1787), in 1 COLLECTED WORKS OF JAMES WILSON, supra note 8, at 212 (“Enumerate all the rights of men! I am sure, sir that no gentleman in the late convention would have attempted such a thing.”).
Congress could carry into effect by necessary and proper means. These other powers are not specified in Wilson’s draft, but it seems plausible to suppose that the second article of that draft, which states that the Government of the United States “shall consist of supreme legislative, executive, and judicial powers,” served as one important antecedent to Wilson’s reference to “other powers vested by this Constitution in the Government of the United States.” Read together, these “intratextual” grants of power gave Congress the express authority to carry into execution all of the “supreme legislative, executive, and judicial powers” that were vested “in the Government of the United States.”

Second, based in part on his tenure in Congress, where he had led the movement for the creation of independent executive and judicial departments, Wilson probably also wanted to assign Congress the express power to make whatever laws were necessary and proper to carry into execution the powers vested in the other branches and agencies of government. Although this background is not well-known, Wilson came to the convention with more practical experiences in the separation of powers and interdepartmental affairs than most of the other delegates. For example, he had served on the United States’ first “Court of Appeals” for prize cases, the predecessor to the Supreme Court; he had conducted an extensive admiralty practice before that court; he had occasionally worked as a de facto U.S. Attorney under the supervision of Robert Morris; and he had represented Pennsylvania in the Wyoming Valley

231. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 163.
233. In a letter to Robert Morris, dated January 14, 1777, Wilson welcomed the fact that the Continental Congress had finally agreed to create independent departments and officers of the United States. Interestingly, Wilson used the terms “necessary” and “propriety” to describe these developments:

Congress [has seen], at last, the Propriety of distributing the executive business of the Continent into different Departments, managed by Gentlemen not Members of Congress, and whose whole time and attention can be devoted to the Business committed to their Charge. Measures were adopted, when I left Baltimore, for making the necessary Arrangements.

2 KONKLE, supra note 173, at 101 (emphasis added).
236. For example, in a 1782 letter, Morris asked Wilson to prosecute an admiralty case for the United States:

I am not a Judge how far the Interest of the United States is affected by the Decree in Question but relying entirely on your Candor and Judgment I rest it with you to prosecute the said Appeal if you are of the Opinion that the United States are really interested in the Matter and the Justice is due thereon in the Case before us. And should you under all Circumstances be of judgment that the Appeal ought to be prosecuted by the United States, I will pay your Fees for so doing.
litigation, the only federal case ever adjudicated under the complex arbitration system outlined in Article IX of the Articles of Confederation. In addition, Wilson had worked closely with Robert Morris to create the first national bank during Morris’s tenure as Superintendent of Finance. All these activities undoubtedly led Wilson to recognize the need to authorize Congress to organize the internal workings of the federal government and to carry into effect the executive and judicial powers of the United States.

3. “. . . for carrying into Execution all other Powers . . .”

Wilson’s first complete draft of the Necessary and Proper Clause now read as follows:

and to make all Laws that shall be necessary and proper for carrying into full and complete 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 . . . 237

This version of the Necessary and Proper Clause is virtually identical to the version that appears in the draft constitution that the Committee of Detail reported to the convention on August 6. The only substantive difference between them is the fact that the phrase “full and complete” does not appear in the latter version.238 In addition, the Committee’s August 6 draft does not capitalize any of the following words: Laws, Execution, Government, Department, and Officer. Otherwise, the two versions are identical.239

Despite this, Wilson was not finished. Instead, he made another revision, which students of the convention have overlooked, but which merits close attention. In his next modification to the Necessary and Proper Clause, Wilson crossed out the phrase “the foregoing Powers, and,” thereby deleting Rutledge’s Forgoing Powers Provision.240 As indicated, he also made one further edit, crossing out “full and complete.” As a result of these edits, Wilson’s revised draft of the Necessary and Proper Clause was comprised, for the moment, of only the All Other Powers Provision:

And to make all Laws that shall be necessary and proper for carrying into execution all other powers vested, by this Constitution, in the government of the United States, or in any department or officer thereof . . . 241

2konkle, supra note 173, at 225.
237. See 2 the records of the federal convention of 1787, supra note 5, at 168.
238. Id. at 182.
239. Wilson’s first draft of the clause is also virtually identical with the version that appears in the final text of the Constitution. The only differences are that in the Constitution, (1) the phrase “full and complete” is omitted, and (2) the word “which” is exchanged for “that” in the phrase “that shall be necessary and proper.”
240. See Ewald, supra note 24, at 272 (noting that the deletion appears to be made by Wilson’s hand).
241. See 2 the records of the federal convention of 1787, supra note 5, at 182.
At first glance, this version of the clause appears to be identical to the one Hamilton quoted in *Federalist No. 33*,\(^{242}\) Madison quoted in his first Bill of Rights speech,\(^{243}\) and Marshall quoted in his opinion in *Fisher*.\(^{244}\) Had Wilson made a few minor edits, in fact, this version would be identical to the one quoted in *Fisher*.\(^{245}\) Likewise, only minor differences distinguish it from the versions produced by Hamilton and Madison. These surface similarities, however, are deceptive.

On all three occasions, Hamilton, Madison, and Marshall manage to preserve the full meaning and extension of the original clause, even though they rely on two clauses rather than three. The same point is illustrated by Wilson’s own gloss on the Necessary and Proper Clause in his *Law Lectures*. On that occasion, he, too, showed how the full clause could be accurately paraphrased by two provisions instead of three.\(^{246}\) By contrast, Wilson’s version of the Necessary and Proper Clause in the foregoing paragraph differs from these other formulations in just this respect. In Wilson’s amended version, due to the placement of the word “other,” Congress is *not* clearly authorized to carry into execution its previously enumerated powers by means of necessary and proper laws.

Did Wilson notice this problem? Perhaps, but even if so, it seems unlikely to have troubled him. Wilson probably took for granted the arguments later given by “Publius” in *The Federalist Papers*—and by John Marshall in *McCulloch*—concerning the gratuitous character of the first part of the Necessary and Proper Clause.\(^{247}\) This may help to explain why Wilson initially felt inclined to remove this unnecessary provision. The All Other Powers Provision Wilson left intact in

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\(^{242}\) *See The Federalist No. 33, supra* note 47, at 201 (“The last clause of the eighth section of the first article authorizes the national legislature ‘to make all laws which shall be necessary and proper for carrying into execution the powers by that Constitution vested in the government of the United States, or in any department or officer thereof . . . ’”).

\(^{243}\) *See Creating the Bill of Rights, supra* note 49 (explaining that even though the powers of the general government are circumscribed, Congress “has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent . . . because in the constitution of the United States there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the Government of the United States, or in any department or officer thereof”).

\(^{244}\) *See United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805) (Marshall, C.J.) (referring to the power of Congress “to make all laws which shall be necessary and proper to carry into execution the powers vested by the constitution in the government of the United States, or in any department or officer thereof”).

\(^{245}\) Three revisions would have sufficed: (1) “the” for “all other,” (2) “the” for “this,” and (3) “that” with “which.”

\(^{246}\) *See Wilson, supra* note 50.

\(^{247}\) *See, e.g., The Federalist No. 33, supra* note 47, at 202 (Alexander Hamilton) (explaining that the clause was “only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government and vesting it with certain specified powers”); *The Federalist No. 44, supra* note 47, at 285 (James Madison) (explaining that if the Constitution had been “silent on this head, there can be no doubt that all the particular powers requisite as means of executing the [enumerated] powers would have resulted to the government by unavoidable implication”); cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 409 (1819) (“It is not denied, that the powers given to the government imply the ordinary means of execution.”).
this draft was a different matter, however, because the implication that the enumerated powers were exhaustive could only be counteracted by means of this or another similar provision.

\[
\begin{align*}
&\text{To build and equip fleets;} \\
&\text{To call forth the aid of the militia, in order to execute the laws of the Uni-} \\
&\text{on, enforce treaties, suppress insurrections, and repel invasions;} \\
&\text{And to make all laws that shall be necessary and proper for carrying into exe-} \\
&\text{cution the foregoing powers, and all other powers vested, by this Constitution,} \\
&\text{in the government of the United States, or in any department or officer thereof.}
\end{align*}
\]

Figure 3: The Necessary and Proper Clause in the Committee of Detail’s August 6 Draft

C. THE COMMITTEE OF DETAIL’S AUGUST 6 DRAFT

Whether on Wilson’s initiative or that of another Committee member, the Committee of Detail ultimately decided against deleting the Foregoing Powers Provision. The text of the Necessary and Proper Clause that appeared in the Committee of Detail’s August 6 draft thus included both the revised version of Rutledge’s Foregoing Powers Provision and the original text of Wilson’s All Other Powers Provision. The draft read as follows:

And to make all laws that 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 . . . 248

Except for stylistic edits, this version of the Necessary and Proper Clause is identical to the version which appears in the final text of the Constitution. The only differences involve capitalization, the placement of commas, and the substitution of “which” for “that” in the phrase “that shall be necessary and proper.” Otherwise, the two versions are identical.

The Committee of Detail’s August 6 draft did include at least two new features that were not present in Wilson’s draft. First, the enumerated powers were no longer compressed into a single paragraph. Instead, each group of enumerated powers was listed separately on its own line of text, in the same manner as the final Constitution. In addition, two items from Wilson’s original paragraph were struck from that list: the power “to declare what shall be Treason against the United States” 249 and the power “to regulate the Discipline

248. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 182; see also Figure 3, which reproduces the relevant part of the Committee of Detail’s draft, courtesy of the Historical Society of Pennsylvania.
249. Id. at 168.
of the Militia of the several States.”  

Apart from these changes, the list of powers given to Congress was identical to the list in Wilson’s draft. The Necessary and Proper Clause remained the last enumerated power, and the most plausible textual antecedent to the “other powers vested by this Constitution in the Government of the United States” remained the “supreme legislative, executive, and judicial powers” declared in the second article of the Committee’s draft. The Committee of Style later deleted this second article, while also specifying the objects of that government in the Preamble, thus making it more evident how these “other powers” were to be construed; however, for the time being these further powers were left undefined and open-ended. The entire scheme of legislative authority can be grasped most easily by examining the operative language of the Committee’s draft, beginning with the Preamble, and including Articles I, II, III, and VI:

We the people of the States of New Hampshire, Massachusetts . . . do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.

Article I

The stile of this Government shall be “The United States of America.”

II

The Government shall consist of supreme legislative, executive, and judicial powers.

III

The legislative power shall be vested in a Congress to consist of two separate and distinct bodies of Men, a House of Representatives, and a Senate . . . ;

VI

The Legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises;
To regulate commerce with foreign nations, and among the several States;
To establish an uniform rule of naturalization throughout the United States;
To coin money;
To regulate the value of foreign coin;
To fix the standard of weights and measures;
To establish Post-offices;

250. Id. In the Committee’s August 6 draft, the Treason Clause was converted into its own paragraph, which appears immediately after the list of enumerated powers. Id. at 182. The Militia Clause was struck altogether, but it reappeared in a revised form in the final text of the Constitution. See U.S. CONST. art I., § 8, cl. 16 (“To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”). For the debate in the convention that led to this outcome, see 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 330, 384.  

251. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 163.
To borrow money, and emit bills on the credit of the United States;
To appoint a Treasurer by ballot;
To constitute tribunals inferior to the Supreme Court;
To make rules concerning captures on land and water;
To declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offenses against the law of nations;
To subdue a rebellion in any State, on the application of its legislature;
To make war;
To raise armies;
To build and equip fleets;
To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions;
And to make all laws that 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.\(^{252}\)

In this legislative scheme, the powers Congress did not already possess under the Articles of Confederation are italicized in order to illustrate how the Committee of Detail fulfilled both mandates of the Bedford Resolution. That resolution, it will be recalled, first required that the Committee delegate to Congress all the powers it possessed under the Articles of Confederation.\(^{253}\) In addition, the resolution called upon the Committee to vest Congress with the power “to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the exercise of individual legislation.”\(^{254}\)

As we have seen, an influential theory of federalism contends that the Committee of Detail elected to enumerate the powers of Congress instead of granting it general legislative powers.\(^{255}\) The Committee’s August 6 draft, however, does not strongly support this interpretation, and it certainly does not compel it. On the contrary, it suggests that in addition to the other enumerated powers, Congress was given a general legislative power to accomplish certain unenumerated objects. The chief difficulty with interpreting this draft and resolving this issue, of course, lies with the Necessary and Proper Clause. How should it be construed? One customary answer is given by Professor Rakove, who contends that “[t]here is no reason to think that the framers believed that the necessary-and-proper clause would covertly restore the broad discretionary conception of legislative power in the Virginia Plan.”\(^{256}\) Along with other commentators, how-

\(^{252}\) Id. at 177–182 (emphasis added).

\(^{253}\) See supra note 119 and accompanying text.

\(^{254}\) 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 26.

\(^{255}\) See, e.g., BARNETT, supra note 9, at 155; Lash, supra note 24, at 2147–49. See also BRANT, supra note 25, at 132–39; RAKOVE, supra note 23, at 84, 177–80.

\(^{256}\) RAKOVE, supra note 23, at 180.
ever, Rakove does not draw the connection between Resolution VI and Wilson’s bank essay. More importantly, he also appears to overlook the fact that there are three Necessary and Proper Clauses, rather than two. If Chief Justice Marshall is correct that it “cannot be presumed that any clause in the constitution is intended to be without effect,” then one must assign a meaning to the second Necessary and Proper Clause that is not simply duplicative of the meaning given to the first and third clauses.

IV. Two Threshold Questions about the Committee of Detail’s Draft

Our review of the drafting history invites many new questions about what occurred in the Committee of Detail. Even if we limit our attention to the Wilson draft (Draft IX) and make the simplifying assumption that Wilson originally composed this draft on his own, many interpretive problems arise that do not admit of obvious answers. For example, why did Wilson add the phrase “and proper” to his first draft of the Necessary and Proper Clause? Did he do so to promote the principle of state sovereignty, as Printz v. United States might lead one to infer, or did he have other objectives in mind? Furthermore, why did Wilson draft the All Other Powers Provision? Did he seek to vest Congress with additional powers beyond those that were incidental to the enumerated powers, such as those general legislative powers that he identified in his bank essay, and that the convention had authorized when it approved the Bedford Resolution? If so, why didn’t Wilson simply incorporate into his draft constitution the precise language of the Bedford Resolution? Did the language Wilson employed manage to achieve the same ends in a less direct or obvious fashion? Finally, why did Wilson actively consider, but then reject, a simpler and more condensed version of the Necessary and Proper Clause, which would have deleted the Foregoing Powers Provision? Was it Wilson who decided to reinstate this provision, or was another Committee member responsible for this development?

Providing satisfying answers to questions like these is not easy. The discussion that follows is meant merely to be provisional, and it focuses only on two threshold questions about Wilson’s draft and, by extension, about the Committee of Detail’s August 6 draft: (a) What were the origins of “necessary and proper” and from where did Wilson derive this phrase, and (b) Why did Wilson draft the All Other Powers Provision and what were the origins and intended function of this clause? In a companion article, I will examine some additional features of the Committee of Detail’s draft, together with important revisions by

257. See supra notes 23–25 and accompanying text.
258. See, e.g., RAKOVE, supra note 23, at 179 (observing that the Necessary and Proper Clause “authorized the national legislature...to enact ‘all laws that shall be necessary and proper’ to execute its powers and those vested in the other branches of government”).
260. See 521 U.S. 898, 923–24 (1997) (Scalia, J.) (striking down a provision of the Brady Act that required state and local law enforcement officials to run background checks on persons attempting to purchase handguns because it violated the principle of state sovereignty, and thus was not a “proper” execution of the Commerce Clause).
the Committee of Style, all of which help to clarify how “this Constitution” vests “other powers” in the Government of the United States and to indicate what those powers are.

A. THE ORIGINS OF “NECESSARY AND PROPER”

Ever since James Madison and Thomas Jefferson made its meaning an issue in the debates over the first Bank of the United States, much effort has been spent on determining the original meaning of the phrase “necessary and proper” in the Necessary and Proper Clause. In recent years, this trend has accelerated, as a Supreme Court inclined toward originalism and textualism has begun to ask whether federal legislation is “proper” under the terms of the Necessary and Proper Clause.261 Despite this, few scholars have paused to investigate where Wilson drew this particular language from or what he originally meant by this phrase when he drafted it for the Committee of Detail. Before attempting to discover answers to more complex interpretive questions, such as what “the framers” as a group meant by “necessary and proper” or what a reasonable English speaker would have taken it to mean in 1787, it seems useful to focus on two simpler questions. First, setting aside the meaning of “necessary” for the moment because it is generally settled and uncontested, what did Wilson mean when he wrote “necessary and proper” for the Committee of Detail? Second, from what sources did he derive this particular phrase?

1. Wilson’s Commitment to Judicial Review

With respect to the first question, one point that seems reasonably clear is that this language was not simply meant to vest Congress with unqualified legislative discretion, but was instead intended to establish a criterion against which others—including federal judges—could evaluate whether Congress had overstepped. Wilson did not write “that shall seem necessary and proper” or “that Congress shall deem necessary and proper,” but rather “that shall be necessary and proper”—strong language that connotes an objective and independent standard. On this basis alone, it seems plausible to conclude that Wilson did not intend to give Congress unreviewable discretion to decide which laws are necessary and proper.

This conclusion draws support from the fact that Wilson was one of the most consistent and outspoken advocates of judicial review in the founding era.262 He clearly anticipated and relished the fact that federal courts would have the authority to declare both state and federal laws unconstitutional.263 As Professor

262. See, e.g., HALL, supra note 105, at 134–38.
263. See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 5, at 95, 98 (proposing to give the national judiciary a share of the power to negative state laws); 2 id. at 73 (“The Judiciary ought to have an opportunity of remonstrating agst projected encroachments on the people as well as on themselves.”); id. at 391 (“The firmness of Judges is not of itself sufficient. . . . It will be
Ewald observes, “even in his earliest writings on parliamentary sovereignty, and subsequently in his opposition to the Pennsylvania Constitution of 1776, [Wilson] repeatedly warned that legislatures could be as tyrannical as Kings.” 264 Wilson’s bank essay also supports this interpretation of the intended function of “proper” in the Necessary and Proper Clause. Although he explained that he was “far from opposing the legislative authority of the state,”265 Wilson nonetheless argued, in effect, that it was improper for Pennsylvania to rescind the charter of the Bank of North America. 266 Finally, the same basic thesis is reinforced by Justice Wilson’s later opinion in Hayburn’s Case,267 along with cases such as Chisholm v. Georgia268 and Ware v. Hylton.269

Collectively, these reflections suggest that Wilson may have added the phrase “and proper” to the Necessary and Proper Clause in order to provide an explicit textual basis for declaring that certain federal laws were unconstitutional. Yet the widespread popularity of the phrase “necessary and proper” and closely related language during the founding era, which I shall discuss in a moment,270 militates against this interpretation, which may need to be qualified in some respects in any case. Although it may seem unlikely, this pair of terms appearing together was such a common occurrence that Wilson may simply have written this phrase out of habit or because it sounded more natural and appropriate than leaving “necessary” standing alone.271

Furthermore, even if Wilson did add a separate “proper” requirement to the Necessary and Proper Clauses in order to support judicial review of federal
laws, it does not follow that he would have endorsed every aspect of the
influential “jurisdictional” interpretation of the Necessary and Proper Clause
advanced by Professor Gary Lawson and Patricia B. Granger and later em-
braced by Justice Scalia in Printz, according to which “proper” laws “must be
consistent with principles of separation of powers, principles of federalism, and
individual rights.”272 Though the first and third requirements identified by
Lawson and Granger fit very comfortably with Wilson’s legal philosophy, the
second does not. Wilson embraced a version of federalism, to be sure, but there
is no convincing evidence to support the conclusion that when he drafted the
Necessary and Proper Clause, he anticipated or would have sanctioned its use to
strike down federal laws on the grounds that they invaded state sovereignty. At
the very least, it seems clear that Wilson would have regarded any such appli-
cations of the Necessary and Proper Clause with considerable skepticism.273

2. Professor Miller’s Corporate Law Thesis and Wilson’s Corporate Law
Practice

Turning to the second question, what are the proximate origins of the phrase
“necessary and proper”? In his contribution to The Origins of the Necessary and
Proper Clause, Professor Geoffrey Miller explores this topic by investigating
what he calls “[t]he Corporate Law Background of the Necessary and Proper
Clause.”274 Beginning from the premise that many of the founders held that
the Constitution itself was an act of incorporation and that “‘[n]ecessary and
proper’ feels like a lawyer’s clause—a standard provision that, despite its
importance, is not usually the subject of negotiation or debate,”275 Professor
Miller suggests that the origin of this phrase might be located in founding-era
corporate charters. Building on this insight, Miller collected hundreds of eigh-
teenth-century and nineteenth-century corporate charters, seeking evidence of
how words such as “necessary” and “proper” and couplets such as “necessary
and proper” were used in these charters. His impressive database included
colonial charters, acts of incorporation for the first and second Banks of the
United States, and a set of corporate charters granted by two states, Connecticut
and North Carolina, beginning in the colonial period and extending through
1819, the year McCulloch was decided.276

Examining these sources, Professor Miller found that “necessary and proper”
and similar language were ubiquitous throughout this period. On this basis, he
concluded that founding-era corporate practice can assist us with interpreting
this particular language of the Constitution. For a law “to be ‘necessary,’”
Miller writes, “there must be a reasonably close connection between constitution-

272. Lawson & Granger, supra note 17, at 297.
273. See, e.g., Chisholm, 2 U.S. at 457 (Wilson, J.) (“As to the purposes of the Union, therefore,
Georgia is NOT a sovereign State.”).
274. Miller, supra note 12, at 144–76.
275. Id. at 144.
276. See id.
ally 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.”

Although Professor Miller’s central insight about the corporate law background of the Necessary and Proper Clause seems plausible, his study also suffers from some significant limitations. For example, most of the corporate charters on which he relies originated after 1787. Therefore, they could not have influenced the actual drafting of the Necessary and Proper Clause. In addition, Miller neglects to note that it was Wilson who wrote the phrase “necessary and proper” for the Committee of Detail. He thus fails to connect the dots and ask whether Wilson’s own background as a corporate lawyer may have influenced this choice of language. When one investigates this issue, the results are revealing and tend to confirm Miller’s thesis.

By any measure, Wilson’s corporate law practice and related investment activities were extraordinarily extensive. To begin with, he was a major shareholder and the primary legal architect of the Illinois-Wabash Company, one of the most significant corporate enterprises in eighteenth-century America. The company’s vast land claims were a major factor in the political controversies that held up the ratification of the Articles of Confederation until 1781 and delayed the creation of the national domain until 1784. Other prominent shareholders of this company included Robert Morris, Thomas Johnson, Charles Carroll, and Samuel Chase. Incredibly, the company claimed title to roughly thirty million acres in present-day Ohio, Indiana, and Illinois, of which Wilson’s personal share has been estimated at 600,000 acres. The company’s legal claims to these parcels wound their way through Congress and the courts for decades, until they were finally decided against the company in the landmark case of Johnson v. M’Intosh. Wilson served as the company’s president from around 1780 until his death in 1798.

Wilson also owned significant shares of the Indiana Company, another of the

277. Id. at 145.
279. See Jensen, The Creation, supra note 7, at 324–27.
280. For background and figures, see generally Robertson, supra note 14; Witt, supra note 278. Charles Page Smith gives even larger estimates, suggesting that the company’s holdings “embraced” some 60,000,000 acres” and that Wilson’s own shares amounted to “over a million acres.” Smith, supra note 105, at 160.
282. See Jensen, The Creation, supra note 7, at 327. See generally Smith, supra note 105, at 159–68. The company was formed in 1778 by the merger of two independent land companies, the Illinois Company and the Wabash Company. It held titles to choice parcels located at the forks of the Illinois, Mississippi, Missouri, Ohio, and Wabash rivers. See Robertson, supra note 14, at 14–23.
most important land companies of the era. The Indiana Company claimed title to 1,800,000 acres of land in present day West Virginia under a deed given to Sir William Johnson by Indian tribes at the Treaty of Fort Stanwix. Like the Illinois-Wabash claims, the Indiana Company claims were a major source of political disagreement in the years leading up to the constitutional convention. As we have seen, both companies argued that the United States, not Virginia, had jurisdiction over their claims, arguments that Virginia strenuously resisted. Two years after the Constitution was ratified, shareholders of the Indiana Company announced their intention to prosecute their claims in a federal court, and in 1792, the company sued Virginia in the Supreme Court of the United States. The ensuing litigation, Hollingsworth v. Virginia, was one of the key cases, along with Chisholm v. Georgia, which led to the adoption of the Eleventh Amendment.

In addition, Wilson was a principal shareholder of the Canaan Company, a joint venture with William Bingham that Wilson helped to establish and organize with the aim of purchasing land on the Susquehanna River in southern New York. Wilson helped to manage the company’s legal and business affairs throughout the 1780s, efforts that ultimately helped to create the city of Binghamton. Together with his brother-in-law, Mark Bird, Wilson also was a principal of Delaware Works, a large manufacturing enterprise that owned several mills, forges, and furnaces on land adjacent to the Delaware River. The two men planned to build the company into one of the largest nail manufacturers in the country.

The list of other land companies, banks, and business ventures with which Wilson was associated is long and varied. It includes the Vandalia Company, the Holland Company, the Georgia Land Company, and the Great Dismal Swamp Company. In addition, Wilson was an original investor in the Insurance Company of North America. Perhaps most significantly, from 1780 onwards, Wilson was actively involved in the creation, design, and operation of the Bank of North America, the nation’s first national bank. Finally, Wilson was also

283. See 5 The Documentary History of the Supreme Court of the United States, 1789–1800: Suits Against States 282 n.50 (Maeva Marcus ed., 1994) (documenting that Wilson owned 300 shares in the company, as confirmed by a 1781 list of shareholders).
284. Id. at 274.
285. Id. at 281–82.
286. 3 U.S. (3 Dall.) 378 (1798).
287. See generally 5 The Documentary History of the Supreme Court of the United States, 1789–1800: Suits Against States, supra note 283, at 274–351.
288. SMITH, supra note 105, at 161–62.
289. Id.
290. Id. at 159–68.
291. See CHARLES A. BEARD, An Economic Interpretation of the Constitution of the United States 147 (1913).
292. See SMITH, supra note 105; see also GEOFFREY SEED, JAMES WILSON 36–41 (1978).
intimately involved with that bank’s predecessor, the Bank of Pennsylvania.293

All of these activities appear to confirm Professor Miller’s basic insight that whoever drafted the Necessary and Proper Clause was immersed in “the conventions and usages of corporate law.”294 Moreover, there is also significant evidence which suggests that Wilson’s use of the phrase “necessary and proper” could have been influenced directly by his professional experiences as a lawyer for these companies. Consider just five illustrations.

Wilson’s Plan for the Bank of Pennsylvania. On July 5, 1780, Wilson and his partners published a “Plan for the Bank of Pennsylvania” in the Pennsylvania Gazette. The draft plan, dated June 25, and written in Wilson’s handwriting, authorized a Board of Inspectors to “have full Access at all reasonable hours to the Books and Papers of this Bank . . . and, if they think it necessary or proper, [to] hold a general meeting of the Sureties, in order to lay the Proceedings before them, to ask their Advice, or to propose any new Regulations, a Change of Officers, or any other Matter or Thing they shall judge fit.”295 The draft plan also called for subscribers inter alia “to give their Bonds to the Director of the Bank, in such sums as each shall think proper, binding himself for the Payment thereof, if it shall become necessary in order to fulfill and discharge the Notes or Contracts of the Bank.”296

Morris’s Letter to Congress on the Bank of North America. On May 17, 1781, after consulting with Wilson and his other advisors,297 Robert Morris submitted his plan to Congress for incorporating the Bank of North America.298 In his cover letter to the President of Congress (Samuel Huntington), Morris asked “whether it may not be necessary and proper that Congress should make immediate application to the several States to invest them with the powers of incorporating a bank, and for prohibiting all other banks or bankers in these States, at least during the war.”299

Morris’s Plan for the Bank of North America. On May 26, 1781, Congress took up and debated Morris’s proposal to incorporate the Bank of North America. The eighth and ninth articles of the proposed charter, which Wilson probably had a hand in drafting, enumerated the powers of the Board of Directors as follows:

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293. Seed, supra note 292, at 37–38.
294. Miller, supra note 12, at 145.
296. Id. at 109–10 (emphasis added).
297. See Smith, supra note 105, at 146.
298. 20 Journals of the Continental Congress, supra note 165, at 519 (recording that a May 17 letter “from R. Morris, enclosing a plan of a bank” was read in Congress).
299. Letter from Robert Morris to Samuel Huntington, President of Congress (May 17, 1781), reprinted in 4 The Revolutionary Diplomatic Correspondence of the United States 421 (Francis Wharton ed., 1888) (emphasis added).
VIII. That the Board of Directors determine the manner of doing business, and the rules and forms to be pursued, appoint the various officers which they may find necessary, and dispose of the money and credit of the Bank for the interest and benefit of the proprietors, and make, from time to time, such dividends, out of the profits, as they may think proper.

IX. That the Board be empowered, from time to time, to open new subscriptions, for the purpose of increasing the capital of the Bank, on such terms and conditions as they shall think proper.300

Act of Incorporation for the Bank of North America. On December 31, 1781, Congress passed an ordinance incorporating the subscribers to the Bank of North America. The ordinance designated Thomas Willing as the first president of the bank, and it named Willing and eleven others, including Wilson, as its first directors.301 A preamble to the ordinance held that “it is proper and necessary that the Subscribers to this Bank should be incorporated in order to carry into full effect the good ends proposed by it.”302 After enumerating several of the bank’s powers, the ordinance concluded with this sweeping clause:

And be it further ordained, That the said corporation may make, ordain, establish and put in execution, such laws, ordinances and regulations, as shall seem necessary and convenient to the government of the said corporation . . . . And be it further ordained, That the said corporation shall have full power and authority to make, have, and use a common seal, with such device and inscription as they shall think proper.303

Willing’s Letter to Wilson. On May 12, 1785, the president of the Bank of North America, Thomas Willing, wrote to Wilson to update him on some of the bank’s recent activities and to enlist his assistance to protect its corporate charter, which was then under attack by the Pennsylvania legislature. Willing instructed Wilson to take whatever appropriate steps were needed to promote the bank’s interests in Congress: “As to the business of the bank, the whole must be left to your prudence to take such steps in Congress as the magnitude of the question and the complexion of that body may render necessary and proper.”304

300. 20 JOURNALS OF THE CONTINENTAL CONGRESS, supra note 165, at 545 (emphasis added).
301. 21 id. at 1187.
302. Id. (emphasis added).
303. 3 KONKLE, supra note 173, at 205-c (emphasis added) (Appendix to Wilson’s Considerations on the Bank of North America). Several parallels between this language and Wilson’s first draft of the Necessary and Proper Clause for the Committee of Detail are particularly noteworthy. The bank’s sweeping clause authorizes it to “put into execution . . . laws . . . as shall seem necessary and convenient to the government of the said corporation,” along with the “full power” to use a common seal “as they shall think proper.” Id. By comparison, Wilson’s first draft of the Necessary and Proper Clause authorizes Congress to “make all Laws that shall be necessary and proper for carrying into full and complete Execution . . . all other powers vested . . . in the Government of the United States,” 2 The Records of the Federal Convention of 1787, supra note 5, at 168.
304. Letter from Thomas Willing to James Wilson (May 12, 1785), reprinted in 2 KONKLE, supra note 173, at 308 (emphasis added).
All of these examples demonstrate that Wilson was intimately acquainted with the phrase “necessary and proper” and similar language before he incorporated this phrase into the Constitution while serving on the Committee of Detail. Do these findings also prove that Wilson’s corporate law practice actually led directly to his use of this language when he drafted the Necessary and Proper Clause? This inference is tempting, but a closer look at the full record suggests that any such conclusion may be overdrawn. Although it does seem likely that the basic function of the Necessary and Proper Clause was influenced by Wilson’s understanding of legal corporations, the “necessary and proper” phrase itself may or may not have derived from his experiences as a corporate lawyer. The primary reason for resisting this conclusion derives from the fact that the evidence we have just reviewed is merely the tip of the iceberg. On balance, the weight of the evidence appears to point in a different direction, as I shall now explain.

3. Founding-era Uses of “Necessary and Proper” and Similar Phrases

Constitutional scholars often assume that the phrase “necessary and proper” was novel and “conjured out of thin air” at the constitutional convention, without any direct precedents. As we have just seen, this assumption seems clearly erroneous. A different assumption but one that is also misleading in many respects is that the phrase “necessary and proper” embodied highly technical legal concepts at the time, which only a trained lawyer or someone with specialized legal knowledge would be able to use or interpret correctly. Both of these conventional theories appear to lend at least indirect support to the Supreme Court’s recent Necessary and Proper jurisprudence, insofar as they reinforce the assumption that the original meaning of “necessary and proper” was either highly opaque or highly technical. On either alternative, the natural tendency is for ordinary language drawn from “the common affairs of the

305. See Gerard Magliocca, Bingham on the Necessary and Proper Clause, CONCURRING OPINIONS (May 2, 2013, 12:43 PM), http://www.concurringopinions.com/archives/2013/05/bingham-on-the-necessary-and-proper-clause/ (“It would appear that ‘necessary and proper’ was a phrase that was conjured out of thin air at the Constitutional Convention.”); see also, e.g., Ewald, supra note 24, at 272 (“It should be remembered that the specific ‘necessary and proper’ terminology was novel . . . .”); Graber, supra note 104, at 168 (“[N]o one, including the constitutional framers, knows the point of the phrase ‘necessary and proper.’”).

306. See, e.g., ORIGINS, supra note 9, at 7 (“Professors Lawson and Seidman see in the words ‘necessary and proper’ a vehicle for incorporating into Article I fundamental background principles of eighteenth-century administrative law.”); id. at 10 (“[Professor Natelson] concludes that the language ‘necessary and proper for carrying into Execution’ neatly incorporates these two principles of agency law: A ‘necessary law’ is one that conforms to the doctrine of principals and incidents, and a ‘proper’ law is one that conforms to fiduciary norms appropriate for public actors.”); id. at 11 (“[Professor Miller’s research] suggests that ‘necessary’ requires a moderately close connection between means and ends. He finds the word ‘proper’ suggestive of an obligation on the part of corporate managers to take account of the effects of their actions on all stakeholders in the corporation—a conclusion that reinforces the idea that the word ‘proper’ conveys a fiduciary idea of nondiscrimination.”); see also Natelson, supra note 9, at 119 (claiming that “necessary” as it is used in the Necessary and Proper Clause is a legal “term of art”).
world” to become unduly refined and artificial.

Because I was skeptical of both conventional theories, I decided to examine every occurrence of “necessary and proper” and three related phrases—“proper and necessary,” “necessary or proper,” and “proper or necessary” (the target phrases)—that I could locate in various historical archives, documentary records, and electronic databases. These resources included the James Wilson Papers at the Historical Society of Pennsylvania; the Robert Morris Papers; the records of the Ohio, Indiana, Illinois-Wabash, and other early American land companies; the Journals of the Continental Congress; the Letters of Members of the Continental Congress; the Avalon Project at Yale Law School; and the Founders Online project of the National Archives, a searchable database of the collected papers of six prominent founders (George Washington, Benjamin Franklin, Alexander Hamilton, John Adams, Thomas Jefferson, and James Madison).

What emerged from this investigation was a powerful confirmation of the fact that both of the foregoing accounts of the origins of “necessary and proper” appear to be fundamentally misguided. On the basis of this initial study, in fact, at least three countervailing lessons can be drawn with reasonable confidence. First, all of the leading framers, not just Wilson, were almost certainly acquainted with uses of the phrase “necessary and proper” and the other target phrases prior to the Philadelphia convention. Second, far from being technical or inscrutable, this language seems to have been perfectly ordinary and comprehensible to normal English speakers at the time. “Necessary and proper” does not seem to have been primarily “a lawyer’s clause” or a legal “term of art” in 1787, but rather a common feature of ordinary English. Third, the sheer number and variety of occasions in which these target phrases were used appears to cast doubt on any attempt to identify a single or distinctive source or ideological origin—such corporate law, agency law, or federalism—of the phrase “necessary and proper,” as it functions in the Constitution. Briefly, here are some of the findings that support these conclusions.

The Founders Online Project. The Founders Online project alone yielded 252 occurrences of the four target phrases in the correspondence and papers of the six leading founders: Washington, Franklin, Hamilton, Adams, Jefferson, and Madison. Although most of these entries occur after 1787, dozens of them appear in letters or other documents that were written before the Philadelphia convention. Specifically, I discovered twenty-eight preconvention uses of the phrases “necessary and proper” (or “necessary & proper”) in these sources. In addition, there were thirty-two occurrences of “proper and necessary” (or “proper & necessary”), five occurrences of “proper or necessary,” and eight

308. Miller, supra note 12, at 2.
309. Natelson, supra note 9, at 119.
310. Cf. Barnett, supra note 9, at 158–89 (investigating the original public meaning of “necessary and proper”).
occurrences of “necessary or proper” in the papers of these six founders during the same time frame.

George Washington. George Washington was exceedingly fond of the phrase “necessary and proper,” and he often used it and the other target phrases in his correspondence, both before and after the convention. The online database of the Washington Papers includes twenty-one occurrences of the phrases “necessary and proper” (or “necessary & proper”) during the preconvention period alone. In addition, this collection includes fifteen occurrences of “proper and necessary” (or “proper & necessary”), two occurrences of “proper or necessary,” and two occurrences of “necessary or proper” during the same period. Two occasions on which Washington used the phrase “necessary and proper” in his correspondence are particularly noteworthy in light of the controversies that later emerged in connection with the first and second Bank of the United States. In a March 18, 1784 letter to Edmund Randolph, who was serving as his personal attorney at the time, Washington instructed Randolph to “be so good as to do what shall appear necessary & proper in my behalf.”311 In an April 5, 1789 letter to John Marshall, who succeeded Randolph as Washington’s attorney, Washington referred to taking “the necessary and proper steps to recover” a debt he was owed.312

Robert Morris. Like his friend George Washington, Robert Morris was also extremely fond of the phrase “necessary and proper” and the other target phrases and often used them in his papers and correspondence. The Robert Morris Papers, which are limited to the years 1781–1784, include at least twelve occurrences of these phrases during this period alone. This language appears both in Morris’s private diary and personal letters and in his official correspondence as Superintendent of Finance. For example, in a June 8, 1781 letter to Benjamin Franklin, Morris wrote: “I do not however wish to give you any trouble that is not proper and necessary.”313 In a July 20, 1781 letter to the President of Congress (Thomas McKean), Morris remarked that “it is evidently necessary and proper that judicious regulations shou’d be adopted in the distribution of Rations on this occasion.”314 In a private diary entry dated February 7, 1782, Morris recorded a conversation with two directors of the Bank of North America, Jonathan Nesbitt and Thomas Fitzsimmons, in which Morris informed them that “Weekly or Monthly Accounts might do very well at present but hereafter daily Accounts may become necessary and proper.”315

313. Letter from Robert Morris to Benjamin Franklin (June 8, 1781), in 1 THE PAPERS OF ROBERT MORRIS 124 (E. James Ferguson ed., 1975) (emphasis added).
314. Letter from Robert Morris to Thomas McKean, President of Congress (July 20, 1781), in 1 THE PAPERS OF ROBERT MORRIS, supra note 313, at 345 (emphasis added).
315. Diary of Robert Morris (Feb. 7, 1782), in 4 THE PAPERS OF ROBERT MORRIS, supra note 313, at 178 (emphasis added).
Finally, in his official “Instructions to the Receivers of Continental Taxes,” written on February 12, 1782, and published one week later in the *Pennsylvania Packet*, Morris publicly announced the first government regulations on how tax receipts should be transmitted to the Treasury of the United States, explaining that it was “*proper and necessary* that, in a free Country the People should be as fully informed of the Administration of their Affairs as the Nature of things will admit.”316

The Continental Congress. Many uses of “necessary and proper” and the other target phrases can be found in the records and proceedings of the Continental Congress.317 Moreover, many of these phrases appear in committee reports or documents with which Wilson and other framers of the Constitution would likely have been familiar.

For example, on September 25, 1776, the Second Continental Congress established a committee responsible for supplying clothing, blankets, and other equipment to the Continental Army. The committee was assigned a set of powers, including the authority “to make regulations for the hospitals in the northern department, and to remove or suspend any person employed therein, and to employ such as they may think necessary and proper.”318 Wilson was a member of Congress at the time.

On June 24, 1782, the legal representatives of Pennsylvania and Connecticut presented their credentials to Congress in connection with the Wyoming Valley litigation. James Wilson represented Pennsylvania. Connecticut appointed Eliphalet Dyer, William Samuel Johnson, and Jesse Root to serve as its advocates. The papers presented by the Connecticut agents called upon them “to do every thing necessary and proper for the vindication and defence of the claim and right of this State to the said lands in controversy.”319

Finally, on September 20, 1785, Secretary of Foreign Affairs John Jay reported to Congress on establishing consuls throughout Europe. His report proposed the creation of five Consuls General to reside in Amsterdam, London, Paris, Madrid, and Lisbon, and he recommended “that each of the said Consuls General should be directed to nominate such and so many Consuls, for Ports within his District, as he may from Time to Time think necessary and proper.”320 Again, Wilson was a member of Congress at the time, as were Gunning Bedford, Rufus King, and several other individuals who later served as del-


317. See, e.g., 31 *Jour. of the Continental Congress*, supra note 165, at 376 (report filed with the state of Pennsylvania is deemed “highly necessary and proper” to promote “the harmony and confidence so necessary for the common interests of this and the United States” (emphasis added)); 31 *Jour. of the Continental Congress*, supra note 165, at 753 (draft address to the state legislatures refers to “such laws as are necessary and proper to the well being of the federal government” (emphasis added)).

318. 5 *Jour. of the Continental Congress*, supra note 165, at 823 (emphasis added).

319. 22 *Jour. of the Continental Congress*, supra note 165, at 347 (emphasis added).

320. 29 *Jour. of the Continental Congress*, supra note 165, at 723 (emphasis added).
legates to the constitutional convention.

State Constitutions, Laws, and Resolutions. Many state constitutions, state laws, and other resolutions promulgated by the states included the target phrases or broadly similar language. Some of these were relatively obscure, but others were highly prominent and would surely have been familiar to Wilson and other framers. For example, on May 15, 1776, Virginia became the first colony to declare its independence from Great Britain, giving “the assent of this Colony to such declaration, and to whatever measures may be thought proper and necessary by the Congress for forming alliances, and a Confederation of the Colonies, at such time and in the manner as to them shall seem best.”321 The 1780 Massachusetts state constitution included a provision authorizing the legislature to enact such emergency measures “as may be necessary and proper for insuring continuity of the government of the commonwealth.”322 On December 28, 1784, the Virginia Assembly passed a resolution appointing commissioners to work with agents from neighboring states in order to connect the waters of the Potomac and Ohio Rivers and “to render these Waters navigable as far as may be necessary and proper.”323 And on February 17, 1787, the New York Assembly adopted a resolution in favor of a federal convention to revise the Articles of Confederation, calling for “such alterations and amendments to the said Articles of Confederation, as the representatives met in such Convention, shall judge proper and necessary, to render them adequate to the preservation and support of the Union.”324

Hamilton’s Bank of New York and Mason’s Ohio Company. Finally, in line with Professor Miller’s thesis, it seems worth pointing out that the Bank of Pennsylvania and the Bank of North America were not the only commercial corporations designed or led by important founders whose corporate charters used the target phrases prior to the constitutional convention. The Constitution of the Bank of New York, drafted by Hamilton in 1784, also included a “necessary and proper” clause. It authorized the bank’s president and directors to petition the legislature for an act of incorporation and laws that would punish counterfeiters in a manner “as they shall judge necessary and proper for the Security of the Stockholders and the Public.”325 Likewise, the 1751 Articles of Agreement of the Ohio Company, for which George Mason served as a founding partner and treasurer, included a provision that granted broad authority to its committee of managing partners “to order & transact all matters & things which

322. See Lawson & Seidman, An Ocean Away, supra note 10, at 43 (emphasis added) (quoting MASS. CONST. OF 1780, art. LXXXIII).
they shall judge proper & necessary for the carrying on the said Company’s Affairs.”

The foregoing examples are only a fraction of the evidence that appears to prove beyond any reasonable doubt that Wilson and virtually all of the other founders were well acquainted with the phrase “necessary and proper” and similar language before this phrase was first inserted into the Necessary and Proper Clause. Just sticking to the most obvious sources, the papers of the nation’s most powerful military leader (Washington), its most important financial officer (Morris), and its most influential foreign diplomats...
(Adams, Jay, Jefferson, and Franklin)\textsuperscript{329} are full of occasions in which this language is used. So are the letters of the members of the Continental Congress.\textsuperscript{330} Other prominent illustrations that would have been well-known to many or all of the founders include the Townshend Act of 1767,\textsuperscript{331} the
Massachusetts Government Act of 1774, the Quebec Act of 1774, the Mecklenburg Resolves of 1775, the 1782 Contract between France and the United States, and George Washington’s 1783 Circular Letter to the States. The popular assumption that this language was novel, unfamiliar, or incomprehensible at the time, therefore, seems completely untenable. So, too, does the thesis that “necessary and proper” was a precise term of art, which only lawyers or legally sophisticated individuals could accurately comprehend. Instead, “necessary and proper” appears to have functioned more like boilerplate language at the founding, signaling little more than an informal and flexible standard for exercising appropriate discretion in various contexts. If so, then one must look elsewhere to discover why the Necessary and Proper Clause became so controversial during the campaign to ratify the Constitution.

B. THE ORIGINS OF THE ALL OTHER POWERS PROVISION

1. The Function of a Sweeping Clause

These remarks lead directly to our next question, which concerns the origins and function of the All Other Powers Provision. Although the full answer is complex, one initial conclusion that seems reasonably clear in light of the available evidence is that this provision was intended to function partly as an ordinary sweeping clause, canceling any implication that the previous enumeration of powers was exhaustive. This was the well-established function of sweeping clauses in wills, contracts, corporate charters, and other legal instruments at the time, both in England and in the United States, and it remains an entrenched practice today. To negate the inference that a given list of items is exhaustive, the draftsman provides a clear indication to that effect at the end of

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332. See Great Britain: Parliament—The Massachusetts Government Act, art. 23 (May 20, 1774), AVALON PROJECT, http://avalon.law.yale.edu/18th_century/mass_gov_act.asp (enacting “that it will be proper and necessary that the jurors who are to try the issues in any such actions, should have the view of the messuages, lands, or place in question” (emphasis added)).

333. See Great Britain: Parliament—The Quebec Act, art. 17 (Oct. 7, 1774), AVALON PROJECT, http://avalon.law.yale.edu/18th_century/quebec_act_1774.asp (appointing the judges and officers “as his Majesty, his Heirs and Successors, shall think necessary and proper” (emphasis added)).

334. See Resolves Adopted in Charlotte Town, Mecklenburg County, North Carolina (May 31, 1775), AVALON PROJECT, http://avalon.law.yale.edu/18th_century/charlott.asp (“To provide in some Degree for the Exigencies of the County in the present alarming Period, we deem it proper and necessary to pass the following Resolves . . . .” (emphasis added)).

335. See Contract Between the King and the Thirteen United States of North America, signed at Versailles (July 16, 1782), AVALON PROJECT, http://avalon.law.yale.edu/18th_century/fr-1782.asp (“The King . . . having had the goodness to support them, not only with his forces by land and sea, but also with advances of money . . . it has been judged proper and necessary to state exactly the amount of those advances . . . .” (emphasis added)).

336. See George Washington, Circular Letter Addressed to the Governors of all the States on Dismounting the Army (June 14, 1783), in 10 THE WRITINGS OF GEORGE WASHINGTON 254, 258 (Worthington Chauncey Ford ed., 1891) (inquiring whether “it may not be necessary or proper for me, in this place, to enter into a particular disquisition on the principles of the Union” (emphasis added)).
the list. In a 1774 opinion, Lord Mansfield described the essential function of such clauses clearly and succinctly, explaining that in legal documents “[i]t is very common to put in a sweeping clause; and the use and object of it in general is, to guard against any accidental omission.”337 In a companion case, Mansfield reiterated the point, observing that “by [means] of sweeping clauses, conveyancers often take in every thing relative to what had been before recited, and which it was possible they might have omitted to enumerate precisely.”338

Perhaps the most common formula for sweeping clauses was the phrase “and all other”—a clear indication that additional, unmentioned items of an appropriate type are to be “swept in” to an incomplete list. Another common formula was “all the rest.”339 As Mansfield’s opinions illustrate, the term “sweeping clause” was commonly utilized during this period, but other terms were used as well, including “general clause,” “residual clause,” “residuary clause,” “savings clause,” “general sweeping clause,” and other comparable phrases.340 Whatever the name, this category itself was familiar and commonplace. The Judiciary Act of 1789, for example, utilizes a sweeping clause when it gives power to United States courts “to issue writs of scire facias, habeas corpus,... and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.”341 Founding-era legal texts are full of comparable clauses.

As we have seen, in Wilson’s first draft of the Necessary and Proper Clause, the All Other Powers Provision appears at the end of a paragraph in which the powers of Congress are enumerated in accordance with the instructions of the Bedford Resolution. The paragraph lists all of the powers given to Congress by the Articles of Confederation, along with some important new powers, including the power of taxation, naturalization, and commerce; the power to create inferior federal courts; the power to declare what shall be treason against the United States; and the power to regulate the state militias and suppress internal rebellions. To this enumeration Wilson added the Necessary and Proper Clause, the last provision of which seems to function as an ordinary sweeping clause.

338. Lessee of Moor v. Moor, (1774) 98 Eng. Rep. 714, 714 (K.B.). In this case, Mansfield also characterized an “all other” clause in a will as a “sweeping clause.” Id.
339. See, e.g., Herndon v. Carr, Jeff. 132, 132–33 (Va. 1772) (quoting the phrase “all the rest of my estate, both real and personal, not herein particularly mentioned” (emphasis added)). The defendant’s lawyer in this 1772 Virginia case called this clause a “sweeping residuary clause,” and the plaintiff’s lawyer called it “the residuary clause.” Id. at 135.
340. A Westlaw search of all United Kingdom cases before 1790 yields 149 cases that contain either “sweeping clause,” “residuary clause,” or “general clause,” including 21 cases that contain “sweeping clause” dating back to 1744, 72 cases that contain “residuary clause” dating back to 1604, and 71 cases that contain “general clause” dating back to 1506. There are also various combinations, including a 1789 case that uses the phrase “general sweeping residuary clause.” See Gale v. Gale, (1789) 30 Eng. Rep. 63, 67–68, 71 (Ch.). In the United States, a search of “All State and Federal Cases” yields seven cases prior to 1790 and many others from 1790 to 1840 that use one or more of these phrases. A systematic examination of these cases must be left for another occasion.
341. The Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 (1789).
To grasp this point clearly, a useful exercise is to construct a list of only the new enumerated powers that were given to Congress on account of the Bedford Resolution. After taking into account his deletion of the Foregoing Powers Provision, Wilson would have perceived this list to include the power:

- to lay and collect Taxes, Duties, Imposts and Excises;
- to regulate Naturalization and Commerce;
- to appoint a Treasurer by Ballot;
- to constitute Tribunals inferior to the Supreme national Court;
- to declare what shall be Treason against the United States;
- to regulate the Discipline of the Militia of the several States;
- to subdue a Rebellion in any State, on the Application of its Legislature and;
- to make all Laws that shall be necessary and proper for carrying into Execution all other powers vested, by this Constitution, in the Government of the United States, or in any Department or Officer thereof.  

Examining this list of powers, it seems probable that Wilson’s primary purpose in drafting the All Other Powers Provision was to ensure that the Constitution would expressly recognize the implied and inherent powers of the United States that he and the nationalists had labored so extensively to defend under the Articles of Confederation. It was in this context that the provision may also have functioned as “the language of an essential compromise” on how to fulfill the key mandates of Resolution VI and the Bedford Resolution without using the precise language that Rutledge and the other South Carolina delegates had found objectionable. To enumerate the most obvious and important powers of Congress and then to give it the further authority “to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the Harmony of the U. States may be interrupted by the exercise of individual Legislation” would have been to raise a red flag. Doing so might have forced the state ratification conventions to confront a host of difficult and controversial questions (What subjects are the individual states incompetent to address on their own? What are the issues in which the harmony or general interests of the United States are implicated?) that were better left unarticulated, if the effort to create a strong central government were to succeed. By adding a sweeping clause to the other enumerated powers, however, Wilson and the other framers laid the groundwork for ensuring that the Government of the United States would possess all of the other necessary and proper powers it needed to provide for the general interests of the United States at any point in the future, as unforeseen circumstances and new contingencies arose. Moreover, the open-ended language they used meant that

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343. Lynch, supra note 9, at 25.
the precise scope and limits of these other powers could be determined at a later date, thereby avoiding for the time being tense conflicts that might have prevented the Constitution from being adopted.

2. Antecedents to “all other powers”

Finally, let us look more carefully at the language Wilson used to cancel the inference that the enumerated powers were exhaustive (“and all other powers”). This phrase would have been salient to Wilson and other framers for many reasons, including the fact that it had been used in many legal documents with which they were familiar. For example, the 1701 Pennsylvania Charter of Privileges contains a sweeping clause of the “and all other” variety, as does the 1776 state constitution. So, too, does the 1781 Act of Congress incorporating the Bank of North America. Along with other activities he undertook as a lawyer, Wilson’s representation of Pennsylvania’s claims in the Wyoming Valley case in 1782 and his defense of the Bank of North America’s charter in 1785 would have made him an expert on these and other American state papers. The Delaware and Vermont state constitutions also contain sweeping clauses of a comparable nature, as does the Declaration of

344. See Pennsylvania Charter of Privileges (Oct. 28, 1701), reprinted in A Collection of Charters and Other Publick Acts Relating to the Province of Pennsylvania 44 (Philadelphia, B. Franklin 1741) (declaring that the general assembly shall have the power to choose a speaker and other officers, serve as judges of the qualifications and elections of their own members, sit upon their own adjournments, appoint committees, prepare bills, impeach criminals and redress grievances, and “shall have all other Powers and Privileges of an Assembly, according to the Rights of the free-born Subjects of England, and as is usual in any of the King’s Plantations in America” (emphasis added)). The “Franklin” in this bibliographic reference is Benjamin Franklin, who was responsible for printing William Penn’s Charter of Privileges for Pennsylvania. Franklin was also actively involved in the formation of the 1776 Pennsylvania constitution; thus, the connection between the two documents is even more evident. See, e.g., Wright & MacGregor, supra note 148, at 154 (noting that Franklin served as President of Pennsylvania’s constitutional convention in 1776).

345. See infra note 353 and accompanying text.

346. See An Ordinance to Incorporate the Subscribers to the Bank of North America, 3 The Works of the Honourable James Wilson, L.L.D. 429, 430 (Bird Wilson ed., 1804) (“And be it further ordained, That the said corporation be, and shall be for ever hereafter, able and capable in law to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended, in courts of record, or any other place whatsoever, and to do and execute all and singular other matters and things, that to them shall or may appertain to do.” (emphasis added)). The similarity of the italicized clause to the “all other acts and things” clause of the Declaration of Independence is notable. See infra note 356 and accompanying text.


348. See Smith, supra note 105, at 140–58 (recounting Wilson’s legal activities on behalf of the bank).

349. See infra note 352.

350. See infra note 355.
By comparing the relevant passages from these texts with the sweeping clause that Wilson drafted for the Committee of Detail, one can recognize their similarities and can see how they could have influenced Wilson.

Delaware. Delaware was the first state to convene a constitutional convention in the aftermath of the Declaration of Independence. The 1776 Delaware constitution created a bicameral legislature, the basic powers of which were listed in a single, short paragraph. This list culminated in a sweeping clause, giving each legislative branch “all other powers necessary for the Legislature of a free and Independent State.”

Pennsylvania. Pennsylvania also drafted a new constitution in 1776. The basic powers of its unicameral legislature were listed in a single, long sentence, near the end of which is a sweeping clause giving the assembly “all other powers necessary for the Legislature of a free State or Common-Wealth.”

Vermont. Vermont’s first constitution, adopted in 1777, was modeled on the 1776 Pennsylvania constitution. Like the latter, the Vermont constitution added a sweeping clause to its basic enumeration of legislative powers: “The members of the House of Representatives . . . shall have all other powers necessary for the legislature of a free State . . .”

Declaration of Independence. Although it is easy to overlook, the Declaration of Independence also includes a sweeping clause of the “and all other” variety, which presumably inspired the comparable language found in the Delaware, Pennsylvania, and Vermont state constitutions. The clause appears at the end of the Declaration’s famous penultimate paragraph:

We, therefore, the representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name, and by authority of the good people of these colonies, solemnly publish and declare, That these United

351. See infra note 356.
353. Pa. Const. ch. 2, § 9 (1776) (emphasis added). Wilson was a prominent critic of the “radical” Pennsylvania constitution. Along with John Dickenson, Robert Morris, Benjamin Rush, and other members of Philadelphia’s merchant community, he helped to organize an opposition party that sought to replace it with one constructed on sound “Republican” principles. See Smith, supra note 105, at 107–115. I am not aware of any evidence, however, that his opposition to this constitution extended to its sweeping clause per se. The Pennsylvania Constitution of 1790, which has been claimed to be Wilson’s handiwork in large measure, concludes its enumeration of legislative powers in the same way as its predecessor: “Each house . . . shall have all other powers necessary for a branch of the Legislature of a free State.” Constitution of the Commonwealth of Pennsylvania—1790, reprinted in 10 Pennsylvania Archives, Third Series: Printed Under Direction of Frank Reeder, Secretary of the Commonwealth 737, 739 § 13 (William Henry Engle ed., 1896).
354. One of the principal authors of the Vermont Constitution, Dr. Thomas Young, proposed the Pennsylvania constitution to residents of Vermont “as a model, which, with very little alteration, will, in my opinion, come as near perfection as anything yet concocted by mankind.” See Robert F. Williams, The State Constitutions of the Founding Decade: Pennsylvania’s Radical 1776 Constitution and its Influences on American Constitutionalism, 62 Temp. L. Rev. 541, 570 (1989) (quoting M. Jones, Vermont in the Making, 1750–1777, at 379 (reprint ed., 1968)).
Colonies are, and of right ought to be, Free and Independent States; that they are absolved from all allegiance to the British crown, and that all political connexion between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as Free and Independent States, they have full power to levy War, conclude peace, contract alliances, establish commerce, and to do all other acts and things which Independent States may of right do.\(^{356}\)

During the period leading up to the convention, Wilson often claimed that this paragraph not only constituted a declaration of independence from Great Britain but also a “first constitution” of the United States, vesting the Government of the United States with all of the powers of any other nation.\(^{357}\) This constitution was short and sweet, affirming that the United States had all of the necessary power to make war and peace, establish alliances, regulate commerce, and do anything else (“all other acts and things”) that independent nations may rightfully do. Wilson also argued that the Continental Congress did not, in fact, represent the states individually but rather the people of the United States in their corporate or collective capacity.\(^{358}\) Finally, as we have seen, Wilson held that for many purposes, the United States should “be considered as one, undivided, independent nation,” which possessed all of the rights, powers, and properties incident to any sovereign nation, as recognized by the law of nations. All of these ideas presumably informed Wilson’s understanding of the “powers vested by this Constitution in the Government of the United States” to which the Necessary and Proper Clause refers.\(^{359}\)

\(^{356}\) The Declaration of Independence para. 32 (U.S. 1776) (emphasis added).

\(^{357}\) See, e.g., Wilson, supra note 8, at 66 (“The act of independence was made before the articles of confederation. This act declares, that ‘these United Colonies,’ (not enumerating them separately) ‘are free and independent states; and that, as free and independent states, they have the full power to do all acts and things which independent states may, of right, do.’”); see also id. (“To many purposes, the United States are to be considered as one undivided, independent nation; and as possessed of all the rights, and powers, and properties, by the law of nations incident to such.”); cf. 1 Konkle, supra note 173, at 212 (suggesting that Wilson conceived of the United States as “a nation with the full powers assumed in the last paragraph of the Declaration of Independence” and referring to that paragraph as a “first constitution of the United States”).

\(^{358}\) See, e.g., Jensen, The Articles of Confederation, supra note 7, at 168 (statement of James Wilson in Congress on Aug. 1, 1776) (“It has been said that Congress is a representation of states; not of Individuals. I say that the objects of its care are all the individuals of the states . . . . As to those matters which are referred to Congress, we are not so many states, we are one large state. We lay aside our individuality, whenever we come here.”).

\(^{359}\) Wilson’s broad conception of the inherent sovereign powers of the United States during the revolutionary period was later partly affirmed by the Supreme Court on several occasions. See, e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316 (1936) (“By the Declaration of Independence, ‘the Representatives of the United States of America’ declared the United (not the several) Colonies to be free and independent states, and, as such to have ‘full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.’”); Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (recognizing “incident[s] of sovereignty belonging to the government of the United States as part of those sovereign powers delegated by the constitution”); see also Penhallow v. Doane’s Adm’rs, 3 U.S. (3 Dall.) 54, 91 (1795) (Iredell, J., concurring) (“The powers of Congress at first were indeed little more than advisory; but, in proportion as the danger increased, their powers were gradually enlarged, either
In short, the prevalence of sweeping clauses of the “and all other” variety in court opinions, state constitutions, and other legal texts during the period leading up to the convention helps to counteract any lingering impression that this particular language of the Necessary and Proper Clause was somehow novel, mysterious, or unintelligible. These precedents also suggest that when George Mason referred to the All Other Powers Provision as a “Sweeping Clause,” he was not coining a novel term or saying anything strange or controversial. In addition to Pennsylvania, Delaware, and Vermont, at least two other state constitutions had similar clauses at the time, as did the 1780 Constitution of New Ireland. Even if one counts conservatively, over half of the delegates who signed the Constitution represented states whose constitutions included a sweeping clause of the “all other powers” variety. Many of these delegates were influential politicians who held key positions of authority or who had actively participated in drafting their own state constitutions. Furthermore, all of the framers undoubtedly were acquainted with the Declaration of
Independence. Consequently, all of them would have readily understood how an enumeration of specific powers (“to levy War, conclude Peace, contract Alliances, establish Commerce”) followed by a sweeping clause (“and to do all other Acts and Things which Independent States may of right do”) were meant to work in tandem to grant powers beyond those expressly enumerated.

**CONCLUSION**

The Necessary and Proper Clause is a precise constitutional text, the full and accurate statement of which carries implications that are lost or obscured when certain parts of the clause are misstated or ignored. What Hamilton called the “peculiar comprehensiveness” of the clause appears to have been designed by the framers with great skill and ingenuity to achieve several different objectives. The most significant of these goals was to incorporate directly into the text of the Constitution the recognition that the Government of the United States is vested with implied or unenumerated powers—an objective to which Wilson and the other nationalists at the convention were deeply committed. By carefully dissecting the underlying semantic structure of all three Necessary and Proper Clauses, it becomes apparent that these clauses refer to no fewer than six different powers or sets of powers, including the foregoing enumerated powers of Article I, Section 8; the implied or unenumerated powers vested in the Government of the United States; the other powers vested in any Department or Officer of the United States; and three relationally subordinate sets of powers given to Congress to carry the former powers into effect. The key element of this complex semantic scheme is the set of other government powers to which the second Necessary and Proper Clause refers—that is, the implied or unenumerated powers that the Constitution recognizes are vested in “the Government of the United States” itself. If one assumes that Wilson and the other framers were intelligent draftsmen, and attends carefully to the language and structure of the second Necessary and Proper Clause, the simple conclusion to which one is led is that the Constitution vests unenumerated powers in the Government of the United States—and that Congress in turn is assigned the legislative authority to carry those powers into execution, by enacting laws “necessary and proper” to that end.

Carefully distinguishing all three Necessary and Proper Clauses provides a useful analytic framework for taking a fresh look at what transpired during the final weeks of the convention and during the campaign to ratify the Constitution. Many famous episodes connected with the framing and ratification of the Constitution look different once these distinctions are properly made. The scales

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368. *Hamilton, supra* note 68.
fall from one’s eyes, and many new pieces of evidence come to light. This evidence goes well beyond the specific events and circumstances highlighted by this Article, such as the fact that the first Necessary and Proper Clause was originally drafted by Rutledge, a defender of slavery and states’ rights, whereas the second and third Necessary and Proper Clauses were drafted by Wilson, an opponent of slavery and a well-known advocate of implied and inherent powers. It also includes the following little-known or underappreciated facts, which can be discovered by a close look at the documentary records:

- Near the end of the convention, Pierce Butler of South Carolina apparently tried to delete the second Necessary and Proper Clause from the text of the Constitution; 369
- At the Pennsylvania ratifying convention, Wilson repeatedly directed his listeners’ attention to the first Necessary and Proper Clause and consistently avoided discussing the second and third clauses; 370
- In other state ratifying contests, Oliver Ellsworth, Alexander Contee Hanson, and other Federalist spokesmen likewise focused attention on the first Necessary and Proper Clause when responding to prominent Antifederalists’ objections to the “Sweeping Clause”; 371
- In *Federalist No. 33*, Hamilton’s paraphrase of the “Sweeping Clause” effectively ignored the first Necessary and Proper Clause and omitted

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369. *See Supplement to the Records of the Federal Convention, supra* note 20, at 231 ("And to make all Laws, not repugnant to this Constitution that may be necessary for carrying into execution the foregoing powers and such other powers as may be vested by this Constitution in the Legislature of the United States."). As this text indicates, Butler also sought to delete the “proper” requirement and to limit the scope of the third Necessary and Proper Clause. *Id.*

370. *See, e.g., 2 Documentary History of the Ratification of the Constitution* 454 (Dec. 1, 1787) ("The gentleman in opposition . . . strongly insists, that the general clause at the end of the eighth section, gives to Congress a power of legislating generally; but I cannot conceive by what means he will render the word susceptible of that expansion. Can the words, the Congress shall have power to make all laws which shall be necessary and proper to carry into execution the foregoing powers, be capable of giving them general legislative power?"); *id.* at 482 (Dec. 4, 1787) (rejecting the criticism that “‘the powers of Congress are unlimited and undefined, and that they will be the judges, in all cases, of what is necessary and proper for them to do’” because “when it is said, that Congress shall have the power to make all laws which shall be necessary and proper, those words are limited, and defined by the following, ‘for carrying into execution the foregoing powers.’ It is saying no more than that the powers we have already particularly given shall be effectually carried into execution.”).

371. *See, e.g., A Landholder (Essay V), in 14 Documentary History of the Ratification of the Constitution* 334–339 (defending the Necessary and Proper Clause by explaining that Congress “must have authority to enact any laws for executing their [sic] own powers, or those powers will be evaded by the artful and unjust’’); Alexander Contee Hanson, *Remarks on the Proposed Plan of a Federal Government by Aristides, in Pamphlets on the Constitution of the United States: Published During Its Discussion by the People* 217, 233–34 (Paul Leicester Ford ed., 1888) (responding to the charge that the Necessary and Proper Clause would “afford pretext, for freeing congress from all constitutional restraints” by observing: “Consider the import of the words. I take the construction of these words to be precisely the same, as if the clause had preceded further and said, ‘No act of congress shall be valid, unless it have relation to the foregoing powers, and be necessary and proper for carrying them into execution.’”).
the three words—“and all other”—that set the second and third clauses off from the first clause;372

- Madison’s original published defense of the “Sweeping Clause” in Federalist No. 44 quoted only the first two Necessary and Proper Clauses and omitted the third clause—an omission Madison did not correct until the Gideon edition of The Federalist was published in 1818;373
- At the Virginia ratifying convention, Patrick Henry drew attention to the significance of the third Necessary and Proper Clause for interpreting the implied powers given by the second clause;374
- When John Marshall decided the Supreme Court’s first case falling squarely under the Necessary and Proper Clause, he quoted the second and third clauses, even though the case could have been easily decided under the first clause.375
- When South Carolina’s Charles Pinckney sent Secretary of State John Quincy Adams a copy of his “Pinckney Plan” on December 30, 1818, the last clause that appeared in his list of congressional powers contained only the first Necessary and Proper Clause and omitted the second and third clauses.376

All of these curious facts and others like them can be best explained by assuming that many of the founders understood that the precise text of

372. See supra note 48.
373. In many standard editions of The Federalist, all three Necessary and Proper Clauses are quoted accurately in Federalist No. 44. See, e.g., The Federalist, No. 44, supra note 47, at 283 (James Madison) (“Of these the first is the ‘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 office thereof.’”). According to Professor Jacob Cooke’s definitive edition, however, Madison quoted only two of the three Necessary and Proper clauses in the original newspaper edition of Number 44 when it appeared in the New-York Packet on January 25, 1788, the Independent Journal on January 26, and the Daily Advertiser on January 29. See The Federalist No. 44, at 302 (James Madison) (Jacob E. Cooke ed., 1961) [hereinafter Cooke] (“The sixth and last class [of powers lodged in the general government] consists of the several powers and provisions by which efficacy is given to all the rest. ‘Of these the first is the 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.’”). On January 19, 1818, Jacob Gideon, a Washington, D.C. publisher, wrote to Madison to propose coming out with a new edition of The Federalist. Madison agreed and sent Gideon a copy of the first edition of The Federalist, together with a list of edits and corrections. Among the corrections supplied by Madison was to insert “Or in any department or officer thereof” after “United States” in the revised text of Federalist No. 44. See Cooke, supra, at xvi–xvii, 632.

374. See 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, at 439 (Jonathan Elliot ed., 1836) (explaining that a construction according to which Congress would be “vested with supreme power of legislation” and “would not be confined to the enumerated powers” was implied “by the addition of the word department, at the end of the clause, and that they could make any laws which they might think necessary to execute the powers of any department or officer of the government”).
375. See supra note 69 and accompanying text.
376. 3 The Records of the Federal Convention of 1787, supra note 5, at 598 (“And to make all laws for carrying the foregoing powers into execution.—”).
Necessary and Proper Clauses gives rise to an inference that the Government of the United States is vested with implied or unenumerated powers, which Congress is authorized to carry into effect by any necessary and proper means.

In sum, the basic design of the Constitution and the great debates over the scope of federal powers that occurred during ratification and the first decades of the Republic cannot be understood properly unless one recognizes that there are three Necessary and Proper Clauses in the Constitution, not merely one or two. The framers of the Constitution could easily have drafted a Necessary and Proper Clause that gave Congress the authority “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 any Department or Officer of the United States.” The fact that they did not do so requires us to come to grips with the exact language they did adopt and to ask a simple but penetrating question that goes to the heart of the framers’ constitutional design: What powers are vested by the Constitution in the Government of the United States? Whatever answer is given to this question, it cannot be adequate or sufficient merely to point to the enumerated powers of Congress in Article I, Section 8; to the other powers vested by the Constitution in the Departments or Officers of the United States; and to the instrumental powers to carry all of these express powers into execution, which are given to Congress by the Necessary and Proper Clause. One must also provide a convincing account of the “other powers” vested by the Constitution in the Government of the United States to which the second Necessary and Proper Clause refers.

In Printz, the Supreme Court held that even with all of the other powers at its disposal, the United States did not have the power to require state and local law enforcement officials to run background checks on individuals attempting to purchase handguns. Writing for the Court, Justice Scalia dismissed the idea that this authority could be found in the Necessary and Proper Clause:

The dissent of course resorts to the last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause. It reasons that the power to regulate the sale of handguns under the Commerce Clause, coupled with the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers,” conclusively establishes the Brady Act’s constitutional validity, because the Tenth Amendment imposes no limitations on the exercise of delegated powers but merely prohibits the exercise of powers “not delegated to the United States.” What destroys the dissent’s Necessary and Proper Clause argument, however, is not the Tenth Amendment but the Necessary and Proper Clause itself. When a “La[w] . . . for carrying into Execution” the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, it is not a “La[w] . . . proper for carrying into Execution the Commerce Clause,” and is thus, in the words of The Federalist, “merely [an] ac[t] of usurpation” which “deserve[s] to be treated as such.” The Federalist No. 33. . . . See Lawson & Granger, The “Proper” Scope of Fed-
The research presented in this Article suggests that the Court was correct to assume that the Necessary and Proper Clause was meant in part to require federal laws to be “proper” and that laws failing to meet this requirement could be invalidated. It also suggests that commentators such as Lawson and Granger are generally correct to conclude that for a law to be “proper,” it must comport with essential principles of constitutional design and individual rights.

Nevertheless, the more significant thesis of this Article is that the very method of deciding whether government power is authorized by the Necessary and Proper Clause presupposed by the Supreme Court in *Printz* may be misconceived. Both Justice Scalia and the dissenting Justices in *Printz* restricted their analysis to the first Necessary and Proper Clause: the Foregoing Powers Provision. The best argument on behalf of those who wish to defend the federal government’s regulatory authority over the nation’s welfare in all of its dimensions, however, does not appear to rest on such an inadequate foundation. The power to pass necessary and proper laws incidental to Congress’s other enumerated powers is hardly the “last, best hope” of those who seek to achieve the purposes for which the Constitution was established. There are other powers given to the United States by the Constitution for achieving these ends. Nor would federal laws adopted pursuant to these other powers be *ultra vires*. On the contrary, they would merely carry into effect the objects of the Constitution and comport with the design of its principal draftsmen.

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