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## SHARING THE NECESSARY AND PROPER CLAUSE

*William Baude\**

Few constitutional clauses have been the focus of so many hopes and fears as the Necessary and Proper Clause.

In his Foreword, Professor John Manning puts forward a powerful vision of the clause, challenging the current approach of the Supreme Court. Focusing on the text, Manning suggests that it “has the unmistakable feel of an ‘empty standard,’” and is therefore a source of great interpretive discretion.<sup>1</sup> Manning further argues that the text gives that interpretive discretion to Congress. Many of the congressional-power decisions of the Roberts and Rehnquist Courts might fail under this critique.<sup>2</sup>

Constitutional text is a natural focal point for those who challenge current judicial practice, and Manning is right to ask whether the Court’s doctrines have transgressed or misread the text. But Manning’s proposed reading of the text is not the only one. To choose between them, we need additional sources or theories of meaning, and at least some of them will point to a different assessment than Manning’s.

In this Response, I argue that historical practice, *McCulloch v. Maryland*,<sup>3</sup> and the text itself all *permit*, though may not require, a less deferential judicial interpretation than Manning advocates.

### I. CONGRESS’S HISTORICAL ROLE

One way to think about the Necessary and Proper Clause is historically — focusing on the principles that were understood to limit it at the Founding and how those principles were worked out in practice afterward. For instance, in a recent article, I argued that the clause should not be construed to include what I called “great powers,” which must be expressly enumerated rather than implied.<sup>4</sup> I suggested that this theory is a current part of our constitutional practice, including

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\* Neubauer Family Assistant Professor of Law, University of Chicago Law School. Thanks to Sam Bray, Jud Campbell, Josh Chafetz, Chad Flanders, Michael McConnell, Richard Re, Mark Shawhan, and David Strauss for quick and insightful advice, and to the Editors of the *Harvard Law Review* for helpful editorial suggestions.

<sup>1</sup> John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 54 (2014).

<sup>2</sup> See *id.* at 30–48, 78–83. Manning also discusses statutory interpretation, which I lack the space to address here.

<sup>3</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>4</sup> William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1749–55 (2013).

many of the cases that Manning criticizes,<sup>5</sup> but the theory draws on neglected or ill-understood arguments from the Founding and the nineteenth century, and so it is fair to call it “revisionist.”<sup>6</sup>

Manning suggests that the “revisionist” theories should also lead to a deferential reading. That may well be right. There is nothing in the “revisionist” account that is inconsistent with a strong role for Congress. There is much to be said for giving Congress the lead in interpreting the Necessary and Proper Clause. It has the sanction of history. And if you read the constitutional debates from that period, they are often impressive.<sup>7</sup>

Sometimes the arguments for congressional power prevailed; sometimes they did not. But it is important to note that Congress did not take charge by treating the clause as an “empty standard.”<sup>8</sup> Rather, members of Congress engaged in substantive legal debates about the scope of the clause as a matter of text, history, structure, and policy. And while Congress’s views were important, that substantive debate was ultimately a shared enterprise.

It was *Representative* James Madison who articulated the “great powers” limits to the Necessary and Proper Clause decades before John Marshall mentioned them in *McCulloch v. Maryland*.<sup>9</sup> Madison argued that it was unconstitutional to create the bank of the United States as a corporation because doing so was “a great and important power” that was not expressly enumerated and therefore could not be implied.<sup>10</sup>

It was *Representative* Philip Barbour who marshalled arguments against the “Bonus Bill” designed to fund internal improvements to infrastructure.<sup>11</sup> Barbour’s arguments ranged over various federal

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<sup>5</sup> Compare Manning, *supra* note 1, at 33–39, 78–81 (criticizing theory applied in *Printz v. United States*, 521 U.S. 898 (1997), and *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012)), and *id.* at 38 n.230 (more obliquely criticizing *Alden v. Maine*, 527 U.S. 706 (1999), as well), with Baude, *supra* note 4, at 1815–18 (providing different assessment and qualified defense of the reasoning in these cases).

<sup>6</sup> Manning, *supra* note 1, at 57–60. The leading “revisionist” theory, which mine builds off of, is put forth in GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (2010).

<sup>7</sup> On whether those debates are, or could be, impressive today, consider J. MITCHELL PICKERILL, *CONSTITUTIONAL DELIBERATIONS IN CONGRESS* (2004), and its review, Keith E. Whittington, *James Madison Has Left the Building*, 72 U. CHI. L. REV. 1137 (2005).

<sup>8</sup> Manning, *supra* note 1, at 6, 53, 54. To be clear, because Manning is writing the *Supreme Court* Foreword, I do not mean to blame him for omitting a discussion of how Congress might implement the Clause; but readers should not infer from its omission that there is nothing to say.

<sup>9</sup> See 17 U.S. (4 Wheat.) 316, 409 (1819).

<sup>10</sup> James Madison, Statement on the Grant of the First Charter of the Bank of the United States (Feb. 2, 1791), in *LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES* 39, 43 (M. St. Clair Clarke & D.A. Hall eds., 1832) [hereinafter *Madison, Statement on the Bank*]; see also Baude, *supra* note 4, at 1751–55.

<sup>11</sup> 30 ANNALS OF CONG. 896–99 (1817).

powers including the Necessary and Proper Clause and the debate started by the bill has been called “one of the most intense and important constitutional controversies in the history of the Republic.”<sup>12</sup>

And it was *Representative* Thaddeus Stevens who aired concerns about Congress’s power to create a railroad corporation that would exercise eminent domain power in the states.<sup>13</sup> (Stevens was not concerned about Congress’s power in the Territories, where the Necessary and Proper Clause was not in play.<sup>14</sup>)

While Congress sometimes took the lead in expounding the scope of the Necessary and Proper Clause, it did not go it alone. For instance, the President was involved over and over again — President George Washington deliberated with his cabinet on the constitutionality of the national bank;<sup>15</sup> President Andrew Jackson resurrected the constitutional objections in his veto message twenty-one years later;<sup>16</sup> then-President Madison vetoed the “Bonus Bill” on constitutional grounds;<sup>17</sup> and President James Monroe<sup>18</sup> and others<sup>19</sup> subsequently exercised internal-improvements vetoes on constitutional grounds.

States have interpreted the clause too, sometimes with important effects. The Kentucky and Virginia Resolutions opposed the Alien and Sedition Acts, in substantial part on federalism grounds.<sup>20</sup> Those resolutions have been described as “a public rallying point . . . ‘an integral part of the Republican national campaign in 1800,’ a campaign that the Republicans won decisively.”<sup>21</sup> Of course there were other famous state resolutions about federalism that were more ill-fated.

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<sup>12</sup> DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1809*, at 260 (2001).

<sup>13</sup> See Baude, *supra* note 4, at 1779 (citing sources).

<sup>14</sup> *Id.*

<sup>15</sup> See LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES, *supra* note 10, at 86–112.

<sup>16</sup> Andrew Jackson, Veto Message (July 10, 1832), in 2 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897*, at 576 (James D. Richardson ed., 1897).

<sup>17</sup> James Madison, Veto Message (Mar. 3, 1817), in 1 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, supra* note 16, at 584; CURRIE, *supra* note 12, at 265–66.

<sup>18</sup> James Monroe, Views of the President of the United States on the Subject of Internal Improvements (May 4, 1822), in 2 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, supra* note 16, at 144; see also Baude, *supra* note 4, at 1769–70.

<sup>19</sup> See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829–1861*, at 9–28 (2005) (collecting examples).

<sup>20</sup> James Madison, Virginia Resolutions of 1798, in 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 528 (Jonathan Elliot ed., 2d. ed. 1891); Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, in 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, supra*, at 540.

<sup>21</sup> Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 *YALE L.J.* 1084, 1111 (2011) (book review) (footnote omitted) (quoting Adrienne Koch & Harry Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson’s and Madison’s Defense of Civil Liberties*, 5 *WM. & MARY Q.* 145, 170 (1948)).

History suggests that Manning is quite right that judicial supremacy is not the original, best, or only approach to the clause. But the historical practice is also not one of congressional supremacy; it is one where different officials have made substantive legal arguments as part of the shared project of interpreting the limits of Congressional power.

## II. *MCCULLOCH*

The courts have shared the task of interpreting the Necessary and Proper Clause too.<sup>22</sup> Take, for instance, the decision in *McCulloch v. Maryland*, which upheld the bank that Representative Madison had opposed. *McCulloch* is now viewed as a canonical statement about the scope of Congress's powers under the Necessary and Proper Clause. (Even Justice Thomas does not maintain that it was wrongly decided.<sup>23</sup>)

But *McCulloch* is subject to revisionism too: *McCulloch* is often taught as a very nationalist opinion, and it was — but not entirely. At the Founding there was a broad spectrum of possible positions about the Necessary and Proper Clause. In *McCulloch*, the Court adopted a generally broad and deferential test, and specifically rejected many of the narrow readings, such as the argument that “necessary” meant “indispensable” or even “most direct and simple,”<sup>24</sup> or the argument that the clause should be read as diminishing Congress's powers compared to what they would have been without the clause.<sup>25</sup> By doing so, the Court picked a point toward the nationalist end of the spectrum.

But it did not go all the way to the end. That is demonstrated by the Court's reassurances that the means chosen by Congress must be “plainly adapted to [their] end,” must “consist with the letter and spirit of the constitution,”<sup>26</sup> and must be “implied as incidental” rather than “a great substantive and independent power.”<sup>27</sup> While those limitations are probably less important than the broad deference adopted by the rest of the opinion, they are still potentially important.

It is worth noting that these limitations echoed similar theories that had been debated in Congress and the executive branch. The previous bank debates between Representative Madison and the various members of Washington's cabinet had also taken as common ground that

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<sup>22</sup> For a survey of early judicial review, see Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257 (2009).

<sup>23</sup> See, e.g., *United States v. Comstock*, 560 U.S. 126, 158–80 (2010) (Thomas, J., dissenting) (relying extensively on *McCulloch*); *Gonzales v. Raich*, 545 U.S. 1, 59–66 (2005) (Thomas, J., dissenting) (same).

<sup>24</sup> 17 U.S. (4 Wheat.) 316, 413 (1819).

<sup>25</sup> *Id.* at 419–21.

<sup>26</sup> *Id.* at 421.

<sup>27</sup> *Id.* at 411.

the Necessary and Proper Clause extended only to incidental powers, and not potentially great ones.<sup>28</sup>

While Manning says that the “great powers” test “was not central to *McCulloch*’s analysis,”<sup>29</sup> it is also worth noting that these limitations provide important support for the *McCulloch* Court’s otherwise broad reading of the clause. The outer limits provide a backstop against what would otherwise be a potentially unacceptable consequence of the broad deference.

For instance, even arch-nationalist Charles Black once conceded that the Constitution would not allow Congress to require state governors to be confirmed by the U.S. Senate.<sup>30</sup> I suspect that most people would make a similar concession. So long as that is true, the limiting principles provide support for an interpretation of the clause that is broader in other ways: If the clause cannot be interpreted to allow certain extreme exercises of power, and if the limiting principles are abandoned, then the clause would instead have to be interpreted to have a tighter connection between means and ends, a review of legislative purpose, or something else.

Hence, while Manning repeatedly notes that his theory of judicial deference has roots in *McCulloch*,<sup>31</sup> he is right to acknowledge that the Court’s less deferential review does too.<sup>32</sup> I would emphasize the point: *McCulloch* contains both a deferential standard and limiting principles. The post–New Deal Court emphasized the deferential standard; the Court’s more recent decisions have also emphasized the limiting principles.

So the most widely accepted case about the Necessary and Proper Clause does not tell us whether to prefer the current era of *Alden v. Maine*, *Printz v. United States*, and *Free Enterprise Fund v. Public Company Accounting Oversight Board*<sup>33</sup> or the earlier era of *Buckley v. Valeo*, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, and *INS v. Chadha*.<sup>34</sup> It may well be that the more recent decisions do reflect a difference in emphasis, in attitude, even in substantive interpretive methodology.<sup>35</sup> It may also be that some of them are

<sup>28</sup> See sources cited *supra* notes 10–12, 15; see also Baude, *supra* note 4, at 1751–53.

<sup>29</sup> Manning, *supra* note 1, at 59 n.349.

<sup>30</sup> Charles L. Black, Jr., *Foreword: The Myth and Reality of Federalism*, 9 U. TOL. L. REV. 615, 616 (1978) (“The subjection of state Governors to confirmation by the United States Senate would have been evidently instrumental to national interest, in the days of the civil rights struggle, but no one even thought of such a step.”). On Black as an arch-nationalist, see Charles L. Black, Jr., *On Worrying About the Constitution*, 55 U. COLO. L. REV. 469, 471–72, 485–86 (1984).

<sup>31</sup> Manning, *supra* note 1, at 9–11, 14, 20, 66.

<sup>32</sup> *Id.* at 42, 54–55.

<sup>33</sup> Criticized in *id.* at 33–39, 43–48.

<sup>34</sup> Defended in *id.* at 31, 79.

<sup>35</sup> See generally *id.* at 30–48.

wrongly decided, by whatever the correct methodology is. But those possibilities are not settled, or even indicated, by *McCulloch*.

### III. DOES THE TEXT CHALLENGE THIS HISTORY?

I have recounted the tradition of the Necessary and Proper Clause in a slightly different way than Manning has, but I am not sure that he would really disagree with the account. While he repeatedly invokes *McCulloch*, the core of his argument is not that the Roberts Court is misreading that case, but rather that the Court is misreading the *text* of the Necessary and Proper Clause. That is an important charge, but I am not sure that it sticks.

Manning's textual argument has two essential moves. First, the Necessary and Proper Clause is an "empty standard," meaning that somebody must exercise significant interpretive discretion. Second, the text of the clause indicates that Congress should be the one to exercise that discretion. For now, let's accept the first move,<sup>36</sup> and ask whether the text necessarily yields the second.

At the outset it is helpful to remember the historical context of the clause. In *The Federalist* both Hamilton and Madison defended the clause as doing nothing more than restating what would have been rightly implied from Congress's other enumerated powers. Hamilton called it "declaratory," "chargeable with tautology or redundancy," and "at least perfectly harmless."<sup>37</sup> Madison said that it was the same as if "the Constitution [had] been silent on this head."<sup>38</sup> And while it has been pointed out that one should use *The Federalist* with "no small degree of caution,"<sup>39</sup> it is nonetheless "a valuable resource for making sense of other evidence of meaning."<sup>40</sup> This suggests that we should not lightly assume that the text of the clause commits us to a historically contested form of judicial deference.

And indeed, the text can be read in multiple ways. Consider first the "vertical" Necessary and Proper Clause, which authorizes Congress to enact "all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."<sup>41</sup> Manning places some weight on

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<sup>36</sup> On whether the Clause is really an empty standard, see *infra* Part IV.

<sup>37</sup> THE FEDERALIST NO. 33, at 158 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

<sup>38</sup> THE FEDERALIST NO. 44, *supra* note 37, at 234–35 (James Madison).

<sup>39</sup> John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1358 (1998).

<sup>40</sup> *Id.* at 1360. For other evidence consistent with *The Federalist's* view, see Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 185–87 (2003); see also Madison, Statement on the Bank, *supra* note 10, at 42.

<sup>41</sup> U.S. CONST. art. I, § 8, cl. 18.

the fact that the clause “identifies *Congress* as the recipient of that power,” though he admits that it is not a decisive point.<sup>42</sup>

I would go further: The fact that one entity *possesses* a power tells us nothing about whether that entity should receive any deference in *interpreting* that power. To be sure, those who exercise power will usually take the first cut at interpreting their own authority, but that tells us nothing about who gets the final say.

For instance, one could reverse Manning’s logic to argue that *states* should be given deference in interpreting the scope of the Tenth Amendment since they are identified as possessors of the reserved power.<sup>43</sup> But because the Tenth Amendment is the flipside of the Necessary and Proper Clause, both views cannot be correct. We need some other argument to decide whose views control.

In between these polar views of deference is the more conventional view, also permitted by the text, that the scope of the Necessary and Proper Clause is simply an ordinary question of constitutional interpretation, subject to the ordinary standard of judicial review. Here is Madison again:

If it be asked what is to be the consequence, in case the Congress shall misconstrue [the Necessary and Proper Clause], and exercise powers not warranted by its true meaning, I answer, *the same as if they should misconstrue or enlarge any other power vested in them*; as if the general power had been reduced to particulars, and any one of these were to be violated; the same, in short, as if the State legislatures should violate the irrelative constitutional authorities. *In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts . . .*<sup>44</sup>

Maybe Madison is wrong, but I do not see how the text says so.

Manning also argues that the specification of Congress is especially relevant because the Necessary and Proper Clause “is a kind of master clause — one that is directed explicitly at the allocation of [constitu-

<sup>42</sup> Manning, *supra* note 1, at 62.

<sup>43</sup> U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). Cf. Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1954 (2008) (discussed in Manning, *supra* note 1, at 60 n.353); Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL’Y 411, 426 (1996) (“[T]he first allocation of the burden of proof always will be on the federal government to prove that it is not acting ultra vires.”).

<sup>44</sup> THE FEDERALIST NO. 44, *supra* note 37, at 235 (emphases added). Madison went on to say “and in the last resort a remedy must be obtained from the people who can, by the election of more faithful representatives, annul the acts of the usurpers.” *Id.* This can be seen as a nod toward what we would now call the “political safeguards of federalism.” See Manning, *supra* note 1, at 67 n.398 (citing sources). But notice that Madison lists it as an adjunct to judicial review, not a replacement. Accord Bradford R. Clark, Essay, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 80 TEX. L. REV. 327, 339–41 (2001).

tional] decisionmaking authority.”<sup>45</sup> Yet one could just as easily see the clause as servant, rather than master, including only incidental powers to effectuate the others. As a “servant clause,” it would authorize Congress to implement other constitutional powers without altering the broad outline of congressional or judicial power. The historical statements about the clause being tautologous and redundant and excluding great powers seem to point to this more modest reading.

The question of whether the Necessary and Proper Clause is to be a master clause or a servant clause arises again in Manning’s supplementary textual argument about the separation of powers. The “horizontal” component of the clause authorizes Congress “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 U.S. government.]”<sup>46</sup> Manning reads it this way: “as long as Congress acts constitutionally, the clause gives it express priority over the coordinate branches as implementer-in-chief.”<sup>47</sup>

But, again, that is not the only reading. One can instead read the requirement that the law be “proper for carrying into execution” the executive power as a requirement that the law be in aid or support of the President’s constitutional judgment about what is proper. As Professors Sai Prakash and Michael Ramsey have put it: “Since it is derivative of the President’s power, it must be exercised in coordination with, and not in opposition to, the President.”<sup>48</sup>

The text can be read to impose similar limits on the scope of Congress’s power to make laws “necessary and proper for carrying into Execution” the power of the federal courts. While the clause has long been read to establish Congress’s power to create procedural rules,<sup>49</sup> the text does not seem to take a position on whether those rules can be valid when in opposition to the Supreme Court’s own judgment about how to implement the judicial power.<sup>50</sup> Again my point is not that these more limited readings of the horizontal Necessary and Proper

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<sup>45</sup> Manning, *supra* note 1, at 63.

<sup>46</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>47</sup> Manning, *supra* note 1, at 65.

<sup>48</sup> Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 256 (2001).

<sup>49</sup> *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

<sup>50</sup> *Cf. Kansas v. Colorado*, 556 U.S. 98, 110 (2009) (Roberts, C.J., concurring) (declaring that Supreme Court, rather than Congress, has ultimate power to set procedures in original jurisdiction cases). For restrictions on the powers of lower courts, as with restrictions on the powers of statutory officers, Congress’s implementing powers might be bolstered by the fact that it is the one that creates them.

Clause are necessarily right.<sup>51</sup> But they are plausible, and the text itself does not tell us how to choose between them.

Ultimately, the text of the Necessary and Proper Clause just does not speak with enough specificity to address the question Manning is interested in. The Court, Manning, and I all agree that ultimately judgments under the clause must be shared: The clause has limits that the Court should enforce. Congress has power to make its own choices within those limits.

Manning's disagreement with the Court rests on his proposed standard of review — that the Court should displace Congress's judgments only when the latter are “unreasonable.”<sup>52</sup> But the choice of that reasonableness standard, as opposed to any other possible standard of review, is more fine-grained than the text. From the text we can infer that Congress has the power to enact, and the Court has the power to judge. It does not say how broad, or how stringently.

#### IV. MUDDLING THROUGH

Manning concludes: “The Constitution came out unfinished. It includes a great many specific clauses that structure, limit, and prescribe procedures for the exercise of the powers it confers. But it also leaves a lot blank.”<sup>53</sup>

True. I would submit that one of those things that the Constitution leaves blank is how the Court should review Congress's exercises of power under the Necessary and Proper Clause. Ultimately, there is no textual bar to simply muddling through interbranch and intergovernmental disputes about constitutional meaning the way we have done for centuries.

At the same time, I am not sure that the process of muddling through is inevitably as formless as Manning sometimes hints it is. Let's return briefly to Manning's first charge, that the clause is an “empty standard.” Many theories of interpretation have the power to put flesh on the bones of the constitutional text. One example, as I've mentioned, is a historical approach. Behind the text lie background principles of law that can inform the meaning of its vague provisions, such as the scope of legislative, executive, and judicial power.<sup>54</sup> And beyond the Founding era, subsequent historical practice, like judicial

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<sup>51</sup> For the classic view, see William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of “The Sweeping Clause,”* 36 OHIO ST. L.J. 788 (1975).

<sup>52</sup> Manning, *supra* note 1, at 79.

<sup>53</sup> *Id.* at 83.

<sup>54</sup> See Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1859–75 (2012).

precedent, can also serve to “liquidate” or fix the meaning of open-textured constitutional phrases.

Manning has put it aptly in previous writing: “the most important factor in assessing the [Necessary and Proper C]lause’s present meaning may be, in Madison’s words, the way it came to be ‘liquidated’ over time.”<sup>55</sup> Liquidation (think “liquidated damages”) was a term for settling the meaning of a contested or vague legal provision through practice.<sup>56</sup> As the founding generation and its successors wrestled with and ultimately coordinated on the text’s meaning, liquidation could give clarity or stability that the bare text might lack.

We just don’t know yet how much that inquiry will yield, and what the answers will be.<sup>57</sup> Much of the post-Founding discussion relevant to these questions will probably be found in congressional and executive materials, not case law, and nobody has yet systematically perused those materials with the relevant “revisionist” lens.<sup>58</sup> And historical inquiry might also tell us how much clarity to demand when the Court is engaged in judicial review.<sup>59</sup>

Of course, there are other substantive methods of constitutional interpretation too, and those could also provide alternative answers to the questions of congressional power or judicial review. But in any event, completing the unfinished Necessary and Proper Clause may just remain a shared project of Congress, the courts, and others.

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<sup>55</sup> John F. Manning, *The Necessary and Proper Clause and Its Legal Antecedents*, 92 B.U. L. REV. 1349, 1375 (2012) (book review).

<sup>56</sup> See Baude, *supra* note 4, at 1811–12; Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 10–14 (2001).

<sup>57</sup> Accord Manning, *supra* note 1, at 80 (“Perhaps support for some of the Court’s holdings remains to be found in parts of the historical record it has yet to explore.”).

<sup>58</sup> One such example, eminent domain, was the focus of Baude, *supra* note 4. The fact that much of the analysis happened outside the courts is a response to Manning’s observation that the concept of great powers does not appear in many Supreme Court cases. Manning, *supra* note 1, at 59 n.349.

<sup>59</sup> Cf. Sachs, *supra* note 54, at 1868; John O. McGinnis, *Is Judicial Deference Part of the Originalist Method?* (unpublished manuscript) (on file with the author).