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THE SUPREME COURT  
2013 TERM

FOREWORD:  
THE MEANS OF CONSTITUTIONAL POWER

*John F. Manning*

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The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

— *McCulloch v. Maryland*<sup>1</sup>

INTRODUCTION

The Supreme Court has always had a lot to say about the means used to implement the Constitution. I do not refer to headline-grabbing topics such as the freedom of speech, the right to bear arms, or the prohibition against cruel and unusual punishments.<sup>2</sup> Instead, I mean the mundane but important task of constituting the government — delegating power; setting up agencies; structuring their relationship to the President; establishing rules of administrative procedure; setting up the federal courts; creating rights of action, burdens of persuasion, and statutes of limitations; instituting cooperative (or not-so-cooperative) federal-state partnerships; and the like. One might think that, by

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\* Bruce Bromley Professor of Law and Deputy Dean, Harvard Law School. I thank Janet Alexander, Lucian Bebchuk, Wesley Campbell, Sergio Campos, Bradford Clark, Mariano-Florentino Cuéllar, Susan Davies, David Engstrom, Richard Fallon, Allen Ferrell, Jeffrey Fisher, Charles Fried, Abbe Gluck, John Goldberg, Jack Goldsmith, James Greiner, Andrew Kaufman, Brett Kavanaugh, William Kelley, Richard Lazarus, Sanford Levinson, Elizabeth Magill, Daniel Meltzer, Gillian Metzger, Bernadette Meyler, Frank Michelman, Martha Minow, Henry Monaghan, Nate Persily, Intisar Rabb, Jack Rakove, Matthew Rowen, Jane Schacter, David Shapiro, David Sklansky, Carol Steiker, Matthew Stephenson, David Strauss, Cass Sunstein, George Triantis, Larry Tribe, Mark Tushnet, and Adrian Vermeule for insightful comments. I am grateful to the participants in the faculty workshops at Harvard Law School and Stanford Law School for their wise and clarifying questions. I am indebted to Erin Cady, Stanley Chen, Michael Decker, Katie McCarthy, Sean Mirski, and Rachel Siegel for excellent research assistance and advice.

<sup>1</sup> 17 U.S. (4 Wheat.) 316, 409–10 (1819).

<sup>2</sup> Hence, I do not speak about implementing the Constitution in the same sense as did my colleague Professor Richard Fallon, who wrote with wisdom about the challenges faced by the judiciary when it devises doctrinal tests to flesh out open-ended constitutional texts. See Richard H. Fallon, Jr., *The Supreme Court, 1996 Term — Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997).

virtue of the Necessary and Proper Clause, primary responsibility for all such questions would lie at Congress's door.<sup>3</sup> But the Supreme Court, too, exercises great influence over the means of implementing constitutional power — in no small part because the Court itself establishes the rules of statutory and constitutional interpretation that structure the allocation of decisionmaking authority. Consider two examples.

First, without the benefit of any express direction from the Constitution or from federal statutes, judge-made rules of statutory construction deeply affect how federal power is carried out and by whom.<sup>4</sup> In particular, such rules tell us how much authority the judiciary (or executive) has to smooth out, or even supplement, the means specified by statutory texts when the courts think a tweak or two is necessary to effectuate the purposes of legislation.<sup>5</sup> Important things turn on this question — issues such as the judicial power to enforce the spirit over the letter of the law, the availability of implied rights of action, and the scope of federal preemption, just to name a few.<sup>6</sup>

Second, in the exercise of *Marbury*-style judicial review, the Court directly passes judgment on the validity of the governmental arrangements Congress establishes.<sup>7</sup> Again, since the particulars of the American doctrine of judicial review are entirely judge-made, the Court's approach to such cases profoundly affects the distribution of power to compose the federal government. If the Court acts like a gentle Thayerian in structural constitutional cases, deferring to Congress's judgment about the uncertain contours of principles such as federalism or the separation of powers, then Congress rather than the Court will have broad latitude to configure the government.<sup>8</sup> If, however, the Court exercises independent judgment about the often open-ended reach of those principles, the Court itself will have the final say about many important questions concerning the shape of American government.

<sup>3</sup> See U.S. CONST. art. I, § 8, cl. 18.

<sup>4</sup> See *infra* sections I.B–C, pp. 15–30.

<sup>5</sup> See *infra* pp. 15–17.

<sup>6</sup> See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 614–44, 685–715 (6th ed. 2009) [hereinafter HART & WECHSLER]. The Court has also decided a number of cases addressing the unspecified scope of inherent executive power to complete a federal statutory scheme. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

<sup>7</sup> The Court has adopted a strong presumption in favor of the justiciability of structural questions. See Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 300–17 (2002).

<sup>8</sup> Professor James Bradley Thayer famously argued that courts should disturb a duly enacted statute only in cases of clear error. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); see also *infra* pp. 51–52.

Novel approaches to both statutory interpretation and structural constitutional law, more generally, have become signatures of the Rehnquist and Roberts Courts. A central but overlooked paradox of contemporary structural constitutional law is that the Court has moved in sharply different directions in these two contexts. In matters of statutory interpretation, the Court has shifted toward a new textualism, which has sought (though not with perfect consistency) to promote Congress's ability to specify with precision the means of constitutional power.<sup>9</sup> In the past, the Court itself had asserted judicial power to reshape the letter of the law to make it cohere better with broader legislative purposes.<sup>10</sup> By adhering, instead, to the words of the statute as written, today's Court enables Congress more predictably to express its preference for outcomes that may not be so coherent — that include rough accommodations, take only baby steps toward some broader purpose, or adopt crisp rules that favor certainty over achieving a perfect means-ends fit. This regime thus gives Congress greater control over the implementation of its constitutional power.

In constitutional adjudication, by contrast, the Court has asserted greater power than before to second-guess Congress's judgments about the composition of the federal government and the implementation of federal power. The Rehnquist and Roberts Courts have repeatedly invalidated statutory programs,<sup>11</sup> but not because those programs violated some particular constitutional provision, settled course of constitutional practice, or specific line of judicial precedent.<sup>12</sup> Rather, its "new structuralism" rests on freestanding principles of federalism and separation of powers.<sup>13</sup> In cases involving questions as diverse as the commandeering of state officials, state sovereign immunity, presidential removal power, and standing (to name a few), the Court has moved from high levels of constitutional generality to granular prohibitions on the exercise of legislative power.<sup>14</sup> Because those cases turn on abstract and often conflicting structural policies, their outcomes

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<sup>9</sup> See *infra* section I.C, pp. 22–30.

<sup>10</sup> See *infra* section I.B, pp. 15–22.

<sup>11</sup> See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010); *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002); *Alden v. Maine*, 527 U.S. 706 (1999); *Clinton v. City of New York*, 524 U.S. 417 (1998); *Printz v. United States*, 521 U.S. 898 (1997); *Raines v. Byrd*, 521 U.S. 811 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *New York v. United States*, 505 U.S. 144 (1992).

<sup>12</sup> See *infra* pp. 34, 45–46; see also *infra* pp. 40–41 (discussing *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012)).

<sup>13</sup> See John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2052–57 (2009) [hereinafter Manning, *Federalism*]; John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1978 (2011) [hereinafter Manning, *Separation of Powers*].

<sup>14</sup> See *infra* Part II, pp. 30–48.

almost always involve large interpretive discretion and fall within a range in which reasonable people can easily disagree. By exercising independent judgment in those cases, the Court gives itself, rather than Congress, the final say about how to implement federal power.

This Foreword argues that the constitutional text itself favors an approach to both statutory and structural constitutional law that defers, within broad bounds, to congressional authority to determine how to implement constitutional power. In several important contexts, the Constitution grants implementation powers to Congress. These include the Necessary and Proper Clause,<sup>15</sup> the Rules of Proceedings Clause,<sup>16</sup> the Full Faith and Credit Clause,<sup>17</sup> and the Enforcement Clauses of the Civil War Amendments and of the subsequent amendments modeled after them.<sup>18</sup> This pattern is telling. It suggests that the people tasked their most immediate agent — Congress — with special powers to implement some but not other parts of the Constitution. In particular, the document gives Congress power to implement *all* federal powers — its own and those of the coordinate branches — but only *specified* federal rights.

If space permitted, one might make a case for judicial deference under any clause that singles out Congress for the special responsibility of constitutional implementation.<sup>19</sup> To sort out the competing impulses

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<sup>15</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>16</sup> *Id.* art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings . . .”).

<sup>17</sup> *Id.* art. IV, § 1 (stating that Congress “may by general Laws prescribe the Manner in which [the] Acts, Records, and Proceedings [of each state] shall be proved, and the Effect thereof,” in sister states).

<sup>18</sup> *See id.* amend. XIII, § 2 (conferring power to “enforce” the amendment “by appropriate legislation”); *id.* amend. XIV, § 5 (same); *id.* amend. XV, § 2 (same). Similar clauses appear in several subsequent amendments dealing with voting rights. *See id.* amend. XIX, cl. 2 (Suffrage Amendment); *id.* amend. XXIII, § 2 (D.C. electoral votes); *id.* amend. XXIV, § 2 (poll taxes); *id.* amend. XXVI, § 2 (eighteen-year-old vote).

<sup>19</sup> Legislative enforcement of the Civil War Amendments, for example, rather directly poses the deference question. *See* Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 226–39 (1971). During the post–New Deal period, the Court frequently deferred to congressional judgments about how best to enforce the rights guaranteed by those amendments, even when legislation went beyond the rights themselves and built buffer zones around them. *See, e.g.,* *City of Rome v. United States*, 446 U.S. 156, 173–80 (1980); *Katzenbach v. Morgan*, 384 U.S. 641, 648–56 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301, 324–37 (1966). In contrast, in an apparent effort to ensure that Congress does not encroach upon judicial power to determine the scope of the rights guaranteed by the amendments, the Rehnquist and Roberts Courts have been considerably less deferential. *See, e.g.,* *City of Boerne v. Flores*, 521 U.S. 507, 529–36 (1997). In particular, the Court now insists that the legislative record demonstrate “congruence and proportionality” between the prescribed legislative remedy and the constitutional injury it purports to address. *See, e.g.,* *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82 (2000). The Court now also gives close scrutiny to the legislative record supporting prophylactic measures designed to enforce the core guarantees of the Fifteenth Amendment. *See* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2625–28 (2013). Though these cases raise many of the same considerations as the ones that

behind the Court's new textualism and new structuralism, it suffices to consider the grounds for such deference under the Necessary and Proper Clause. The new textualism builds on a post-New Deal tradition that treated the Necessary and Proper Clause as a broad source of congressional authority to enact odd, and even silly, laws, as long as they satisfied a very minimal threshold of rationality.<sup>20</sup> By enforcing the statutory text, warts and all, textualism enables Congress to use its words reliably to prescribe — and make stick — rough, awkward, and often ill-fitting solutions to complex and contested social problems. In contrast, the Court's new structuralism transforms the Necessary and Proper Clause into a delegation of power to the courts to define abstract structural policies. In a novel reading of the clause, both the Rehnquist and Roberts Courts have held that a law is not "proper" if it cannot satisfy the Court's own conception of freestanding, and thus indefinite, principles of federalism and separation of powers.<sup>21</sup> This constitutional approach gives the Court primary responsibility for determining what means are "necessary and proper."

The text of the Necessary and Proper Clause cuts decisively in favor of one of these conflicting visions. The clause delegates to Congress broad and explicit (though not limitless) discretion to compose the government and prescribe the means of constitutional power.<sup>22</sup> Hence, the Court should respect reasonable legislative exercises of the discretion that the people delegated to Congress rather than the Court. Two considerations support this conclusion. First, if one were to draw an analogy to administrative law,<sup>23</sup> the phrase "necessary and proper" feels like the sort of classic "empty standard" that lawmakers routinely use to delegate discretion.<sup>24</sup> Indeed, under any of the leading theories of its meaning — the ones presently applied by the Court or the revisionist alternatives that have cropped up in recent years — the "necessary and proper" standard inevitably effects a broad delegation of

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are the focus of this Foreword, full consideration of the text, structure, and history of the Civil War Amendments merits its own paper and, thus, my editors tell me, must await another day.

<sup>20</sup> See *infra* section I.A, pp. 10–15 (discussing post-New Deal constitutional tradition).

<sup>21</sup> See Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2588–93 (2012) (opinion of Roberts, C.J.); *Printz v. United States*, 521 U.S. 898, 923–25 (1997); see also *infra* pp. 32, 39, 42.

<sup>22</sup> See, e.g., BOB ECKHARDT & CHARLES L. BLACK, JR., *THE TIDES OF POWER: CONVERSATIONS ON THE AMERICAN CONSTITUTION* 3–7 (1976); William W. 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*, 40 *LAW & CONTEMP. PROBS.* 102, 118–19 (1976).

<sup>23</sup> Obviously, I do not claim that the founders had access to, or were influenced by, principles of administrative law that modern Americans find familiar. Rather, I use modern administrative principles as an analogy to make the implications of an open-ended grant such as "necessary and proper" more intuitive to the modern reader.

<sup>24</sup> See *infra* p. 54.

interpretive discretion to someone.<sup>25</sup> Second, the clause directs its delegation explicitly to Congress. And in contrast with substantive power grants like the Commerce Clause<sup>26</sup> or the Bankruptcy Clause,<sup>27</sup> the Necessary and Proper Clause is a master provision that allocates decisionmaking responsibility to make laws that implement other constitutional powers. Indeed, the clause empowers Congress to carry into execution not only its own powers, but also “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>28</sup> This breadth indicates that the people not only delegated the implementation power to Congress, but also gave it precedence over the other branches in the exercise of such power.

Again, analogies to administrative law suggest that such a delegation calls for judicial deference.<sup>29</sup> If Congress, for example, delegates power to an administrative agency to promulgate rules for determining “fair and equitable” prices, such open-ended language creates a zone of discretion within which reasonable people can surely disagree.<sup>30</sup> If a reviewing court exercises independent judgment about what is “fair and equitable” — and, in so doing, displaces an agency position that also lies within the margin of interpretive discretion left by the statute — then the court rather than the agency effectively exercises the discretion delegated by the statute.<sup>31</sup> The same logic applies to the Necessary and Proper Clause. When the Court defers to Congress’s reasonable implemental decisions (as it does in today’s statutory cases), the judiciary respects the allocation of power effected by the clause. When the Court asserts independent judgment to determine the content of “necessary and proper” under vague criteria (as it does in structural constitutional cases), the judiciary substitutes itself for Congress as the people’s delegatee contrary to the terms of the constitutional text.<sup>32</sup>

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<sup>25</sup> See *infra* section III.A, pp. 49–54.

<sup>26</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>27</sup> *Id.* art. I, § 8, cl. 4.

<sup>28</sup> *Id.* art. I, § 8, cl. 18.

<sup>29</sup> The closest analogy, of course, is to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which held that reviewing courts must defer to reasonable agency interpretations when Congress has implicitly or explicitly delegated interpretive lawmaking authority. See *id.* at 844.

<sup>30</sup> See *Yakus v. United States*, 321 U.S. 414, 425–27 (1944).

<sup>31</sup> See *Chevron*, 467 U.S. at 843–44.

<sup>32</sup> These claims highlight a frequently overlooked connection between statutory and constitutional interpretation. On the surface, the two contexts seem to involve quite distinct inquiries. In statutory interpretation, the question is generally how to implement congressional power within acknowledged margins of Congress’s constitutional authority. In constitutional adjudication, the question is whether Congress has acted within the margins of that discretion. In both categories, however, the Court’s posture implicates the constitutional balance of power between Congress

This Foreword develops that argument in four parts. After describing a post–New Deal baseline of broad constitutional deference to Congress under the Necessary and Proper Clause, Part I argues that the adoption of a textualist approach to statutes by today’s Court gives effect to that deferential constitutional approach. Both of the approaches emphasize, and seek to protect, congressional power to draw effective lines of inclusion and exclusion, however awkward they might be. Part II contends that in structural constitutional cases, today’s Court has moved in the opposite direction by opening new fronts that forswear deference to Congress. In these cases, as noted, the Court has effectively appropriated the Necessary and Proper Clause by treating it as a delegation to the *judiciary* to flesh out the abstract purposes of federalism and separation of powers. Part III maintains that the Necessary and Proper Clause delegates open-ended implementation power specifically to Congress and that, in statutory and constitutional cases alike, the judiciary must therefore respect Congress’s reasonable judgments under that clause. Part IV briefly considers doctrinal implications.

## I. STATUTORY INTERPRETATION AND CONSTITUTIONAL DEFERENCE

In statutory interpretation, the big story of the past quarter century has been the Court’s shift from a strong purposivism toward a relatively strict textualism. While the terminology in this field is complex and fluid,<sup>33</sup> I use “purposivism” and “textualism” here as a simplified but convenient shorthand to describe one crucial aspect of the Court’s evolving approach: Prior to the Rehnquist-Roberts era, the Court had long held that even the clearest details of the statutory text must yield to the statute’s background policy or purpose when

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and the federal judiciary. The analysis that follows seeks to highlight this common element of statutory and constitutional interpretation, and to suggest that the Necessary and Proper Clause bears importantly on how the Court should approach its work in both types of cases. I am grateful to my colleague Professor Frank Michelman for suggesting this point.

<sup>33</sup> See, e.g., William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 640–56 (1990) (using “new textualism” to refer to the position that judges should not use legislative history to help determine meaning); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1758 (2010) (using “modified textualism” to characterize an approach treating an unambiguous text as a hard limit on judicial discretion); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 129–32 [hereinafter Manning, *The New Purposivism*] (arguing that one might define the Court’s present approach as a “new purposivism” that takes textual constraints more seriously); John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1312–14 (2010) (suggesting that one might describe the same phenomenon as “second-generation textualism”). As the reader can see, I have contributed to the cacophony.

the two conflicted.<sup>34</sup> Nowadays, the Court follows the statutory text and looks no further if it finds the text to be clear.<sup>35</sup> For present purposes, therefore, the distinction between the two approaches comes into play only in cases in which text and purpose apparently conflict.<sup>36</sup>

The Court has defended its two competing approaches to such cases on the essentially empirical ground that one or the other better captures what Congress actually decided or, in the terms of the trade, “intended.”<sup>37</sup> Purposivists believe that when the text deviates from the purpose, a busy Congress just misspoke. Textualists believe that such a mismatch reflects the contemplated results of legislative compromise. On that account, the choice comes down simply to which approach better deciphers the actual outcomes of the legislative process.

Today, however, almost no one really believes that Congress — as a collective body — forms an *actual* intent about the hard questions that preoccupy the law of statutory interpretation. To be sure, interpreters *impute* intent to collective bodies all the time.<sup>38</sup> But the determination of how to do so — like any foundational concept of statutory interpretation — necessarily reflects assumptions about the appropriate institutional roles of Congress and the judiciary in our constitutional structure.<sup>39</sup>

From that starting point, this Part argues that the Court’s recent shift from purposivism to textualism has moved the law of statutory interpretation much closer to important principles of deference to Congress that the Court embraced in its structural constitutional cases following the New Deal.<sup>40</sup> Building on the premises of *McCulloch v. Maryland*,<sup>41</sup> the post–New Deal Court made clear that the Necessary and Proper Clause gives Congress broad authority to adopt awkward, half-a-loaf compromises; write crisp but ill-fitting rules; or adopt

<sup>34</sup> See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892); see also *infra* pp. 15–17.

<sup>35</sup> See, e.g., *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992); see also *infra* pp. 22–24.

<sup>36</sup> Even in the heyday of purposivism, the Court made clear that the conventional meaning of the statutory text was typically “sufficient . . . to determine the purpose of the legislation.” *United States v. Am. Trucking Ass’n*, 310 U.S. 534, 543 (1940). Even with their shift toward textualism, moreover, the Rehnquist and Roberts Courts have not denied that law is purposive or that background legislative policy properly informs the Court’s resolution of *ambiguity*. See, e.g., *Abramski v. United States*, 134 S. Ct. 2259, 2267–68 (2014); *United States v. Fausto*, 484 U.S. 439, 449 (1988).

<sup>37</sup> See *infra* pp. 17–18, 24.

<sup>38</sup> See *infra* note 106 and accompanying text.

<sup>39</sup> See Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) (arguing that “[a]ny theory of statutory interpretation is at base a theory about constitutional law,” which “must at the very least assume a set of legitimate institutional roles”).

<sup>40</sup> The particular forms of deference discussed in this Part have largely survived the Court’s embrace of a new structuralism in other contexts. See *infra* pp. 30–31.

<sup>41</sup> 17 U.S. (4 Wheat.) 316 (1819).

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flexible but vaporous standards. Within that broad range, the post–New Deal Court disclaimed any power to displace those choices through searching judicial review of the fit between the means Congress chose and the ends being pursued.

It is ironic, therefore, that the post–New Deal Court simultaneously doubled down on purposivism as its preferred method of statutory interpretation. Again, the Court viewed itself as merely implementing Congress’s true intent. But if that understanding did not reflect the reality of what the Court was doing — if Congress had no real intent about how to resolve the hard cases at issue — then the Court’s approach necessarily reflected a *legal*, not a *factual*, presumption that mismatches between text and purpose were inadvertent, and not deliberate. Although that presumption made the law more coherent, it also impeded Congress’s ability to exercise — and make stick — its acknowledged constitutional power to enact goofy (but rational) legislation that over- or undershoots its apparent purposes. In contrast, by hewing closely to what Congress has expressed, textualism enables Congress to use words predictably to record whatever outcomes it chooses to enact, however awkward they might seem.

This Part elaborates on that argument. Section I.A frames the argument by describing the baseline set by *McCulloch* and post–New Deal constitutional law. Section I.B lays out post–New Deal statutory purposivism and places it in its constitutional context. Section I.C does the same for the textualism practiced by the Rehnquist and Roberts Courts.

#### A. *Post–New Deal Constitutionalism*

In the period after the New Deal, the Supreme Court enforced what one might think of as the *McCulloch* theory of structural constitutional law. In sustaining Congress’s power to charter a national bank, Chief Justice Marshall’s opinion for the Court in *McCulloch* had emphasized that the Constitution gave Congress, and not the judiciary, primary responsibility to determine how best to implement federal power. Chief Justice Marshall stressed that the constitutional structure came out unfinished.<sup>42</sup> The Constitution was designed to establish a frame of government “intended to endure for ages” and “to be adapted to the various crises of human affairs.”<sup>43</sup> As such, it could not begin to specify “all the means by which [federal powers] may be carried into execution.”<sup>44</sup> The constitutional structure did not prescribe a “legal

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<sup>42</sup> See *id.* at 415.

<sup>43</sup> *Id.* (emphasis omitted).

<sup>44</sup> *Id.* at 407.

code” of “immutable rules” for the implementation of federal power.<sup>45</sup> Instead, it made Congress primarily responsible for filling in the details. The Necessary and Proper Clause gave Congress room, in matters of implementation, “to avail itself of experience, to exercise its reason, and to accommodate its legislation to [such] circumstances” as might arise during the life of the Constitution.<sup>46</sup> Accordingly, if a statute’s end was “legitimate,” Congress could use “all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution.”<sup>47</sup>

*McCulloch*’s wide view of Congress’s implementation power made the Court’s review correspondingly narrow. Certainly, if “Congress, under the pretext of executing its powers, pass[ed] laws for the accomplishment of objects not entrusted to the government,” the Court would strike them down.<sup>48</sup> But in determining whether a law was “appropriate” and “plainly adapted” to a legitimate end, the Court would defer to Congress.<sup>49</sup> In the Court’s words, “where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.”<sup>50</sup> Indeed, “those who contend that [Congress] may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.”<sup>51</sup>

The vision of structural constitutional law articulated in *McCulloch*, which captures an important but not exclusive strain of American judicial thought,<sup>52</sup> defined the post–New Deal approach to congressional power and structural constitutional law. First, in federalism cases, the

<sup>45</sup> *Id.* at 415.

<sup>46</sup> *Id.* at 415–16.

<sup>47</sup> *Id.* at 421.

<sup>48</sup> *Id.* at 423. In *McCulloch*, for example, the Court had to satisfy itself that the means used were “not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them.” *Id.* at 411. For further discussion of the “great substantive and independent power” limitation, see *infra* pp. 58–59, 60.

<sup>49</sup> *McCulloch*, 17 U.S. (4 Wheat.) at 421.

<sup>50</sup> *Id.* at 423.

<sup>51</sup> *Id.* at 410.

<sup>52</sup> See, e.g., *Burroughs v. United States*, 290 U.S. 534, 547 (1934) (“[T]he choice of means to [an] end presents a question primarily addressed to the judgment of Congress.”); *James Everard’s Breweries v. Day*, 265 U.S. 545, 559 (1924) (invoking the “well settled” rule that “this Court may not inquire into the degree of . . . necessity” of legislative means for fear of “pass[ing] the line which circumscribes the judicial department and . . . tread[ing] upon legislative ground”); *Juilliard v. Greenman*, 110 U.S. 421, 438 (1884) (“No question of the scope and extent of the implied powers of Congress under the Constitution [could] be satisfactorily discussed without repeating much of the reasoning of Chief Justice Marshall in the great judgment in *McCulloch v. Maryland*.”). For a contrasting set of attitudes, see *infra* notes 197–198 and accompanying text.

Court used *McCulloch* as a wedge to open up Congress's power to regulate *purely intrastate* activities — something earlier Courts had been loath to permit.<sup>53</sup> Even though the Commerce Clause limits congressional power (in relevant part) to commerce “among the several States,”<sup>54</sup> the post–New Deal Court found that, in an integrated national economy, regulating *intrastate* commerce may supply an “*appropriate means* to . . . the effective execution of the granted power to regulate interstate commerce.”<sup>55</sup> Since wheat, for example, is fungible, Congress might have to regulate intrastate wheat production — including crops meant for a farmer's own consumption — if the national government were to regulate interstate wheat prices effectively.<sup>56</sup> The permissibility of such regulation turned on “what was ‘necessary and proper’ to the exercise by Congress of its granted power.”<sup>57</sup> On questions of that sort, the Court felt it owed Congress *McCulloch* deference, insisting upon nothing more than a “rational basis” for Congress's judgment that the chosen means served a constitutionally legitimate end.<sup>58</sup> Between 1937 and 1992, the Court almost never met an exercise of the commerce power it did not like.<sup>59</sup>

Second, at the same time as the Court embraced a rationality approach to assessing a statute's fit with constitutional ends, it all but renounced previously asserted substantive due process authority to police a statute's *internal* coherence and fit.<sup>60</sup> Though putatively enforcing an external constraint on the Necessary and Proper Clause, these

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<sup>53</sup> Previously, the Court had applied a number of relatively restrictive doctrinal tests to identify the categorical limits of the Commerce Clause. See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548–49 (1935) (holding that Congress may only regulate intrastate activity that has “direct” rather than “indirect” effects on interstate commerce); *United Mine Workers of Am. v. Coronado Coal Co.*, 259 U.S. 344, 407–08 (1922) (differentiating “mining” from interstate commerce); *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) (drawing the same conclusion with respect to “manufacturing”).

<sup>54</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>55</sup> *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) (emphasis added); accord *United States v. Darby*, 312 U.S. 100, 118–19 (1941). Both *Wrightwood* and *Darby* invoked *McCulloch*.

<sup>56</sup> See *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

<sup>57</sup> *Id.* at 121.

<sup>58</sup> *Heart of Atl. Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); see also, e.g., *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276–77 (1981); *Perez v. United States*, 402 U.S. 146, 155–56 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 299–301 (1964).

<sup>59</sup> In that period, the Court struck down precisely one statute on federalism grounds but then quickly rethought its decision. See *infra* note 198.

<sup>60</sup> In particular, the Court abandoned a strong form of substantive due process review associated with the *Lochner* era. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 877–78 (1987); see also *Lochner v. New York*, 198 U.S. 45, 64 (1905) (holding that a state limitation on work hours had an insufficient fit with health or other interests that the state could permissibly regulate). Though most of the *Lochner*-era cases applied to state legislation, the Court extended its approach in *Lochner* to federal legislation as well. See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525, 557–59 (1923); *Adair v. United States*, 208 U.S. 161, 172–73 (1908).

cases reflected a clear judgment about Congress’s implementation power and the scope of judicial review thereof.<sup>61</sup> Again, mere rationality sufficed to sustain legislation against challenges of arbitrariness or unequal treatment.<sup>62</sup> The Court disclaimed the power to decide “whether the Congressional judgment expressed in [a statute] is sound or equitable, or whether it comports well or ill with the purposes” of the legislation as a whole.<sup>63</sup> Instead, the Court stressed that “[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific.”<sup>64</sup> And because line-drawing is “peculiarly a legislative task” for which “[p]erfection . . . is neither possible nor necessary,”<sup>65</sup> Congress could properly draw lines that were “to some extent both underinclusive and overinclusive.”<sup>66</sup> Indeed, it was “irrelevant” whether the Court thought “Congress . . . unwise in not choosing a means more precisely related to its primary purpose.”<sup>67</sup> In short, the Court would sustain statutory classifications as appropriate legislation unless they were “so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature’s actions were irrational.”<sup>68</sup>

Third, the post–New Deal Court’s separation of powers cases followed a similar pattern. Almost all the important ones in this period involved the nondelegation doctrine — the deeply rooted (but rarely enforced) separation of powers principle that Congress may not delegate its Article I powers to the coordinate branches.<sup>69</sup> Although the premise of nondelegation dates back to the early days of the Republic,<sup>70</sup>

<sup>61</sup> Indeed, the Court suggested that the Article I and substantive due process questions were related inquiries; if a statute satisfied Article I requirements, it did not violate due process. *See Heart of Atl. Motel*, 379 U.S. at 258.

<sup>62</sup> *See, e.g., Hodel v. Indiana*, 452 U.S. 314, 331–32 (1981).

<sup>63</sup> *Flemming v. Nestor*, 363 U.S. 603, 611 (1960).

<sup>64</sup> U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 175 (1980) (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)) (internal quotation marks omitted).

<sup>65</sup> *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981) (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) (per curiam)) (internal quotation mark omitted).

<sup>66</sup> *Vance v. Bradley*, 440 U.S. 93, 108 (1979).

<sup>67</sup> *Id.* at 109.

<sup>68</sup> *Id.* at 97.

<sup>69</sup> *See, e.g., Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935) (“The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested [by Article I].”). That official position still holds today. *See, e.g., Loving v. United States*, 517 U.S. 748, 758 (1996); *Touby v. United States*, 500 U.S. 160, 164–65 (1991). For a lively debate on the question of whether such a doctrine properly exists, compare Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003) (answering yes), with Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002) (answering no).

<sup>70</sup> *See, e.g., Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825) (stating that the Constitution imposes some limit on the “discretion” Congress may confer upon the other branches).

the Court had long recognized that Congress can (and inevitably does) pass laws that confer policymaking discretion upon the other branches.<sup>71</sup> As long as the statute supplied an “intelligible principle” to guide an agency or court, that entity merely implemented legislative policy, and did not impermissibly exercise delegated “legislative” power.<sup>72</sup>

After having briefly flirted several years earlier with strict enforcement of the nondelegation doctrine,<sup>73</sup> the Court at the close of the New Deal essentially gave up the pretense of policing the level of generality at which Congress legislated. The Court was able to find “intelligible principles” in statutory standards as vaporous as “fair and equitable,”<sup>74</sup> “just and reasonable,”<sup>75</sup> and “public interest, convenience, or necessity.”<sup>76</sup> And in the leading case that signaled this relaxed approach, the Court invoked *McCulloch* for the proposition that *Congress* may determine, within very wide limits, how much discretion to retain for itself and how much to confer upon others:

Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers. It is free to avoid the rigidity of such a system . . . and to choose instead the flexibility attainable by the use of less restrictive standards. Only if we could say that there is an absence of standards for the guidance of the [agency] action . . . would we be justified in overriding its choice of means for effecting its declared purpose . . . .<sup>77</sup>

Again, *McCulloch* deference supplied the Court’s frame of reference for this important area of structural constitutional law.<sup>78</sup>

As discussed below, the Court in this period did, on occasion, strike down a statute on structural constitutional grounds, but typically only when the statutory arrangement violated some specific constitutional constraint found elsewhere in the text.<sup>79</sup> All told, post–New Deal

<sup>71</sup> Typically, the question arises in the context of grants of open-ended authority to agencies to promulgate regulations. *See, e.g.*, *United States v. Grimaud*, 220 U.S. 506, 521–22 (1911); *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904); *Field v. Clark*, 143 U.S. 649, 692–94 (1892). The principles, however, apply no less to statutes that confer common law powers on courts. *See, e.g.*, *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 455–57 (1957).

<sup>72</sup> *See* *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (noting that if Congress has laid down an “intelligible principle” to which the agency “is directed to conform,” the statute does not effect “a forbidden delegation of legislative power” but rather invites the agency to “carry out [the legislative] purpose”).

<sup>73</sup> *See* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–42 (1935); *Pan. Ref. Co.*, 293 U.S. at 414–30.

<sup>74</sup> *Yakus v. United States*, 321 U.S. 414, 427 (1944) (Emergency Price Control Act of 1942).

<sup>75</sup> *Fed. Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944) (Natural Gas Act of 1938).

<sup>76</sup> *NBC v. United States*, 319 U.S. 190, 225–26 (1943) (Communications Act of 1934).

<sup>77</sup> *Yakus*, 321 U.S. at 425–26 (citations omitted).

<sup>78</sup> Professor Louis Jaffe calls delegation “the dynamo of modern government.” LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 33 (1965).

<sup>79</sup> *See infra* notes 187–190 and accompanying text.

structural constitutional law paints a coherent picture of congressional power and judicial restraint. Congress has broad authority to draw lines in pursuit of legitimate ends. As long as these lines are rational, they do not have to fit tightly either with any constitutional end or with the law's overall purpose. Congress also has the power, within a very wide range, to set the level of statutory generality where it sees fit — to use the sharpest of rules or the loosest of standards. All of that discretion, the post–New Deal Court made clear, is a function of Congress's “necessary and proper” power to implement other constitutional powers.

*B. Statutory Purposivism and Constitutional Deference*

In the same period, the Supreme Court uncritically accepted a different set of constitutional assumptions in statutory cases. In keeping with longstanding prior judicial practice, the post–New Deal Court consistently asserted judicial power to reshape awkward statutory texts to make them more coherent with the statute's background policy or purpose when the two conflicted.<sup>80</sup> While the Court justified this approach as a superior means of identifying what Congress *actually* intended to adopt, the truth is that the Court's approach necessarily reflected a set of constitutional judgments about the respective roles of Congress and the judiciary in specifying the means of implementing federal power.

The story has often been told. By dint of a tradition that stretches deep into our history, the Supreme Court routinely sacrificed the letter of the law to make it fit better with the statute's spirit or purpose. The leading case for this “purposivist” approach was and remains the nineteenth-century landmark, *Church of the Holy Trinity v. United States*.<sup>81</sup> Section 1 of the Alien Contract Labor Act<sup>82</sup> made it a crime to enter contracts with foreign nationals to come to the United States “to perform labor or service of any kind.”<sup>83</sup> Section 5 exempted actors, artists, lecturers, singers, and domestic servants.<sup>84</sup> The Holy Trinity Church contracted with an English national to come to New York to serve as the church's pastor.<sup>85</sup> Although the Court concluded that the pastor fit within the terms of the Act's prohibition and outside its

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<sup>80</sup> See, e.g., *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284 (1987); *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 222 n.20 (1981); *United States v. Pub. Utils. Comm'n*, 345 U.S. 295, 315 (1953).

<sup>81</sup> 143 U.S. 457 (1892).

<sup>82</sup> Alien Contract Labor Act of 1885, ch. 164, 23 Stat. 332 (repealed 1952).

<sup>83</sup> *Id.* § 1, 23 Stat. at 332.

<sup>84</sup> *Id.* § 5, 23 Stat. at 333.

<sup>85</sup> *Holy Trinity*, 143 U.S. at 457–58.

exemptions,<sup>86</sup> the Court also invoked the “familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”<sup>87</sup> It seems that the bill’s legislative history, political context, and title all showed that its purpose was to stem the influx of cheap “manual labor,” not the recruitment of “brain toilers” like the pastor.<sup>88</sup> And when it came to a minister of the cloth, in particular, “no purpose of action against religion [could] be imputed to any legislation, . . . because this is a religious people.”<sup>89</sup> On those grounds, the Court concluded that Congress, in its heart of hearts, must have intended for section 1 to apply only to manual laborers and for section 5, in any case, to exempt ministers of the cloth.<sup>90</sup>

Although the Court had invoked the *Holy Trinity* approach off and on throughout much of our history,<sup>91</sup> the post–New Deal Court embraced it more fully.<sup>92</sup> The Court would always start with the words of the statute.<sup>93</sup> But when “plain meaning” gave rise to “an unreasonable [result] ‘plainly at variance with the policy of the legislation as a whole,’” the Court did not hesitate to “follow[] that purpose, rather than the literal words.”<sup>94</sup> No evidence of purpose, moreover, was off the table.<sup>95</sup> However clearly Congress framed its statutes, the Court

<sup>86</sup> The Court found the language of the operational section to be clear and comprehensive, including all forms of labor or service:

Not only are the general words labor and service both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added “of any kind;” and, further, . . . the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section.

*Id.* at 458–59. One commentator has suggested that a narrower reading of the text — one that is limited to manual labor or service — is available. See William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1517–18 (1998) (book review). Whether or not that narrower reading is available, the important point, for present purposes, is that the Court started from the contrary premise.

<sup>87</sup> *Holy Trinity*, 143 U.S. at 459.

<sup>88</sup> *Id.* at 463–65.

<sup>89</sup> *Id.* at 465.

<sup>90</sup> See *id.* (holding that congressional intent reached no further than “to stay the influx of this cheap unskilled labor”); *id.* at 472 (exempting ministers from the statute).

<sup>91</sup> See, e.g., *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903); *Folsom v. United States*, 160 U.S. 121, 127 (1895); *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486–87 (1868); *Walton v. Cotton*, 60 U.S. (19 How.) 355, 358 (1856); *United States v. Freeman*, 44 U.S. (3 How.) 556, 565 (1845).

<sup>92</sup> See Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266, 280–81 (2013).

<sup>93</sup> See, e.g., *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 543 (1940).

<sup>94</sup> *Id.* (quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922)).

<sup>95</sup> See *id.* at 543–44 (“When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on ‘superficial examination.’” (footnote omitted) (quoting *Helvering v. N.Y. Trust Co.*, 292 U.S. 455, 465 (1934))).

could rework them to fit with the background policies that inspired them. If Congress prescribed a specific public enforcement mechanism for securities law violations, the background remedial purposes of the statute might convince the Court to imply a private right of action going beyond the prescribed remedy.<sup>96</sup> If Congress passed a law requiring polluters to get Environmental Protection Agency (EPA) permits before releasing “radioactive materials” into U.S. waterways, a background purpose of coherent regulatory administration might persuade the Court to exclude specific radioactive materials that also fell within another agency’s jurisdiction.<sup>97</sup> If Congress invited courts to award a “reasonable attorney’s fee,” legislative history might transform that open-ended standard into more concrete rules that the prime movers in Congress endorsed but did not codify.<sup>98</sup> Under this regime, the Court always could exercise discretion to reshape the statutory details to make them better conform to the policy goals that lay behind them.<sup>99</sup>

At least on the surface, neither the Necessary and Proper Clause nor the post–New Deal Court’s deferential reading of that clause has anything to say about the legitimacy of the Court’s use of purposivism in statutory cases. The Court has always justified purposivism (and, as we shall see, textualism) on the essentially empirical ground that it better captures what Congress *genuinely intended*.<sup>100</sup> The notion here is that judges can reconstruct, from all sorts of evidence, the way Congress truly intended (or would have intended) to resolve the issue at bar.<sup>101</sup> Where a statute’s textual detail strayed too far from the policy

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<sup>96</sup> See *J.I. Case Co. v. Borak*, 377 U.S. 426, 431–33 (1964) (holding that the Securities Exchange Act’s proxy requirements, 15 U.S.C. § 78n(a) (1958), gave rise to an implied private right of action because the provision’s stated “purpose[.]” to protect investors “implie[d] the availability of judicial relief where necessary to achieve that result,” *id.* at 432).

<sup>97</sup> See *Train v. Colo. Pub. Interest Research Grp., Inc.*, 426 U.S. 1, 13–23 (1976) (holding that the background purposes of the Federal Water Pollution Control Act made clear that its express grant of authority over “radioactive materials,” 33 U.S.C. § 1362(6) (1970 & Supp. IV 1974), did not extend to such materials that also fell within the Atomic Energy Commission’s jurisdiction).

<sup>98</sup> See *Blanchard v. Bergeron*, 489 U.S. 87, 91 (1989) (emphasis added) (holding that the committees that drafted 42 U.S.C. § 1988 (1988)’s authority to grant a “reasonable attorney’s fee” to a prevailing civil rights plaintiff wished that test to be read in light of specific rules found in lower court cases cited by the committee reports).

<sup>99</sup> The perceived concerns about *Blanchard*, in particular, depend upon one’s view about the special problem of legislative history. For further discussion of that issue, see *infra* section IV.A.2, pp. 74–78.

<sup>100</sup> See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (noting that judicial enforcement of spirit over letter “is not the substitution of the will of the judge for that of the legislator”). While the distinctions become a bit metaphysical around the edges, it is helpful to think of “intent” as “the specific, particularized application which the statute was ‘intended’ to be given” and of “purpose” as “the general aim or policy which pervades a statute but has yet to find specific application.” Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 370–71 (1947).

<sup>101</sup> See *United States v. Klinger*, 199 F.2d 645, 648 (2d Cir. 1952) (Hand, J.) (“[W]hat we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words,

aims that inspired it, the judge simply assumed that Congress, much like any harried and limited speaker, failed to foresee what lay ahead or just plain misspoke — and thus meant something other (and more coherent) than what it said.<sup>102</sup> On that account, purposivism did not outwardly contradict post–New Deal deference, but rather purported to offer a superior way for judges to identify how Congress actually intended to implement its power in the circumstances of the case.

This focus, however, long obscured purposivism’s true grounding in structural constitutional assumptions. Most now believe that while “legislative intent” offers a useful organizing construct, it does not — and could not — describe Congress’s *actual* decision or intention about a litigated issue. In hard cases, the truth is that Congress has made no decision. Professor Max Radin famously wrote that the chances that “several hundred” legislators “will have exactly the same determinate situations in mind . . . are infinitesimally small.”<sup>103</sup> Even if they did, the legislative record does not show the basis on which most legislators cast their votes, making it near impossible to glean the majority’s actual intentions on any given question.<sup>104</sup> And even if it were possible to assemble a complete table of legislators’ preferences, there is no value-neutral way to decide how to weight and aggregate those views, which may not break out cleanly or decisively.<sup>105</sup> Finally, as hard as it may be to imagine finding actual legislative intent in run-of-the-mill cases of statutory ambiguity, the challenge becomes immeasurably more complex when the record sends mixed signals — when text and purpose, for whatever reason, point clearly but in different directions.

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and to impute to them how they would have dealt with the concrete occasion.”), *aff’d per curiam by an equally divided Court*, 345 U.S. 979 (1953); Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) (“The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.”).

<sup>102</sup> See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 268 (1990) (connecting this tradition to the correction of inevitable human miscommunication); Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 625–26 (1949) (same).

<sup>103</sup> Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930); see also JEREMY WALDRON, *LAW AND DISAGREEMENT* 10 (1999) (“[I]n most cases legislation is enacted by and in the name of a large bunch of people who do not share a view about anything except the procedures that for the time being allow them to deliberate together in the assembly.”).

<sup>104</sup> See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 326 (1990) (“The historical record almost never reveals why each legislator voted for (or against) a proposed law, and political science scholarship teaches that legislators vote for bills out of many unknowable motives, including logrolling, loyalty or deference to party and committee, desire not to alienate blocks of voters, and pure matters of conscience.”).

<sup>105</sup> See RONALD DWORIN, *LAW’S EMPIRE* 318–33 (1986); see also *id.* at 321 (“There are many . . . possible ways of combining individual intentions into a group or institutional intention.”).

Accordingly, although the law often imputes intent to collective institutions like Congress,<sup>106</sup> such intent is not just a fact out there in the world, waiting to be discovered by the judge astute enough to find it. Rather, it is a metaphor that structures the way interpreters make sense of Congress's handiwork.<sup>107</sup> It reminds interpreters, at a minimum, that in a system thought to rest on legislative supremacy,<sup>108</sup> any legitimate theory of interpretation must account for Congress's constitutional role as chief policymaker.<sup>109</sup> But the concept of legislative supremacy, like that of intent itself, can mean any number of things.<sup>110</sup> And when purposivists claim a superior way of identifying legislative intent, their claim of superiority is not really an empirical claim but rather a normative one.<sup>111</sup> Like any theory of interpretation, purposivism implicitly reflects a constitutional judgment about the respective roles of Congress and the courts in our system of government.<sup>112</sup>

For the purposivist, legislative supremacy operates at a high level of generality. Congress passes statutes not to engage in a form of

<sup>106</sup> See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 864–65 (1992); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 82 (2012).

<sup>107</sup> See Nourse, *supra* note 106, at 81.

<sup>108</sup> Traditionally, our system of government has reflected the assumption that, since Congress has supreme lawmaking authority, the courts must act as Congress's faithful agents. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989). In earlier writings, Professor William Eskridge and I extensively debated the validity of that premise. Compare William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001) (challenging the faithful agent assumption), with John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) (defending the same assumption). Rather than rehearse that extensive debate, I begin my analysis from the Court's own major premise that it must, in some sense, act as Congress's faithful agent.

<sup>109</sup> See JAMES WILLARD HURST, *DEALING WITH STATUTES* 33 (1982).

<sup>110</sup> See, e.g., William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319 (1989) (exploring alternatives to dominant conceptions of legislative supremacy); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989) (same).

<sup>111</sup> Indeed, the legal academy's most influential purposivists rejected the idea of identifying actual legislative intent in hard cases:

[O]n what basis does a court decide what [the enacting] legislature . . . would have done had it foreseen the problem? Does the court consider the political structure of the . . . legislature? Does the court weigh the strength of various pressure groups operating at the time? How else can the court form a judgment as to what the legislature would have done?

HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1183 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958). Like other leading purposivists, Professors Henry Hart and Albert Sacks believed that in a hard case, "the overwhelming probability [is] that the legislature gave no particular thought to the matter and had no intent concerning it." *Id.* at 1182; see also, e.g., Cox, *supra* note 100, at 371–72 (making a similar point); Harry Willmer Jones, *Extrinsic Aids in the Federal Courts*, 25 IOWA L. REV. 737, 742 (1940) (same).

<sup>112</sup> See Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 593–94 (1995) (arguing that interpretation requires a theory of legislation and of adjudication).

literary composition, but to make policy.<sup>113</sup> The Court's job is thus to determine the background policy at which Congress was driving, and then to read the statute to carry out that purpose.<sup>114</sup> If the details of statutory meaning do not advance the underlying policy, it furthers the constitutional policymaking function of Congress, properly conceived, for the Court itself to substitute new means that achieve the desired end.<sup>115</sup> This approach has the obvious virtue of making the law more coherent with its apparent background policy.<sup>116</sup> It does so, however, by making it harder for Congress to exercise its "necessary and proper" power to choose statutory means — and, in particular, to write incoherent, overbroad, or incomplete legislation.

Recall all of the things that the post-New Deal Court said that Congress can do under *McCulloch*'s deferential view of the Necessary and Proper Clause. Congress can permissibly pass statutes that entail "tradeoffs, compromises, and imperfect solutions."<sup>117</sup> Rather than enact a comprehensive solution to a mischief, Congress can address the problem one step at a time, focusing on the aspect most acute to the legislative mind.<sup>118</sup> It can opt for the certainty and convenience of a crisp rule, even though such rules are invariably over- and under-inclusive relative to their background purposes.<sup>119</sup> Or it can choose a broadly worded standard that allows flexibility, tailoring, and adaptability, even if it transfers vast policymaking discretion to the law's executors.<sup>120</sup> Certainly, an apparent problem of means-ends fit in any given piece of legislation may reflect *either* a drafting error *or* a

<sup>113</sup> See, e.g., HART & SACKS, *supra* note 111, at 1253 ("[T]he enactment of a statute is always a purposive act . . ."); Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 400 (1942) (arguing that Congress chooses words "not for their symbolic or esoteric value, nor even for their logical or aesthetic quality, but primarily to let us know the statutory purpose").

<sup>114</sup> See HART & SACKS, *supra* note 111, at 1374; see also *id.* at 1377–80 (discussing methods of inferring and implementing statutory purpose, including the consultation of legislative history).

<sup>115</sup> See Radin, *supra* note 113, at 407 ("There is little doubt that, if the purpose is clear, the implemental part of the statute should be subordinated to it."). Hart and Sacks famously asserted that interpreters may not give statutory words "a meaning they will not bear," HART & SACKS, *supra* note 111, at 1375, but then equally famously qualified that limitation with the observation that the "meaning of words [could] almost always be narrowed if the context seems to call for [it]," *id.* at 1376.

<sup>116</sup> See T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning*, West Virginia University Hospitals, Inc. v. Casey, and *Due Process of Statutory Interpretation*, 45 VAND. L. REV. 687, 703–04, 708–09 (1992) (explaining why purposivism produces greater policy coherence).

<sup>117</sup> *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 19 (1990).

<sup>118</sup> See, e.g., *Cleland v. Nat'l Coll. of Bus.*, 435 U.S. 213, 219–20 (1978) (per curiam).

<sup>119</sup> See, e.g., *Vance v. Bradley*, 440 U.S. 93, 108 (1979); see also Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 572–76 (1992) (discussing the pros and cons of rules); Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (same).

<sup>120</sup> See, e.g., *Yakus v. United States*, 321 U.S. 414, 425–26 (1944); see also Sullivan, *supra* note 119, at 58–59 (discussing standards).

deliberate exercise of one of those line-drawing powers. But if one cannot meaningfully reconstruct what Congress actually decided in cases in which text and purpose diverge,<sup>121</sup> then neither purposivism nor any other approach can accurately sort between those two possibilities. Purposivism may avoid some interpretive error costs (in cases of misstatement) but introduce others (in cases of deliberate line-drawing), and interpreters will be unable to tell which case is which.<sup>122</sup>

If purposivism cannot accurately sort between these two types of cases, then its real effect is to promote the value of statutory coherence at the expense of Congress's ability to express when it wishes to exercise the "necessary and proper" powers discussed above. How can Congress effectively assert its power to adopt an odd, half-a-loaf compromise if the Court treats a significant disjunction between statutory detail and overarching purpose as a slip of the pen or an oversight? How can Congress predictably use crisp but ill-fitting rules to set hard limits if the Court claims the power to clip back rules that deviate from the perceived statutory purpose? If purposivism rests on a judicially fashioned presumption that a serious problem of means-ends fit reflects a drafting error to be corrected by the courts, then the Court effectively takes away through statutory interpretation the discretion it has ascribed to Congress in its constitutional cases. What good does it do to recognize Congress's constitutional discretion to be ad hoc, incomplete, or overbroad if the Court then uses a judge-made legal presumption to interpret away ad hoc, incomplete, or overbroad legislative judgments? Even if Congress does not always exercise its power to adopt such legislation, a statutory presumption of coherence raises the bar for its doing so without any corresponding assurance that the results better approximate true congressional intentions.

Consider, for example, *Holy Trinity* itself.<sup>123</sup> No one can know why Congress adopted a self-consciously encompassing rule like "no labor or service of any kind" if the bill's true background purpose was to address the narrower problem of "cheap unskilled labor."<sup>124</sup> Perhaps key legislators were willing to embrace an overbroad rule in order to reduce adjudication costs and uncertainty at the margins.<sup>125</sup>

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<sup>121</sup> See *supra* p. 18.

<sup>122</sup> Professor Adrian Vermeule argues, in fact, that the heterogeneity of the main source of statutory purpose or intent — the legislative history — and limitations on judicial cognitive capacities may make the *Holy Trinity* approach less reliable than other approaches as a guide to whatever decision Congress may have made. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 115–17 (2006). For present purposes, the important point is merely that one cannot know whether *Holy Trinity* improves or diminishes the accuracy of interpretation. See *id.* at 116.

<sup>123</sup> See *supra* pp. 15–16.

<sup>124</sup> Compare *Church of the Holy Trinity v. United States*, 143 U.S. 457, 458 (1892) (quoting the relevant statute's language), with *id.* at 465 (summarizing its purpose).

<sup>125</sup> See *supra* p. 20 (discussing the costs and benefits of rules versus standards).

Perhaps crucial elements of the enacting coalition preferred a broader prohibition than the commonly held purpose would support.<sup>126</sup> Or perhaps the drafters just messed up.<sup>127</sup> If, as in *Holy Trinity*, the Court applies a judge-made presumption that the drafters misspoke, then Congress cannot reliably use broad language to adopt an encompassing rule or to strike an imperfect compromise, at least when doing so introduces problems of means-ends fit (as is typically the case).<sup>128</sup> Conversely, if the Court takes Congress at its word, then legislators have at their disposal the full range of options for how to implement their aims. They can predictably use their words to opt *either* for a crisp but overinclusive rule *or* for a softer standard (like “cheap unskilled labor”) that more closely captures the law’s putative background policy. Purposivism thus makes it harder, rather than easier, for Congress to exercise the “necessary and proper” powers that *McCulloch* and the post–New Deal Court ascribed to it.

To be clear, I do not claim here that purposivism *disables* Congress from determining how to carry its powers into effect. The concern identified here does not even come into play in the vast majority of cases — namely, those in which Congress has picked words that come within shooting distance of its goals. Rather, my claim here is that purposivism undermines Congress’s ability to draw reliable lines in the very cases in which that ability matters most — those in which Congress wishes to exercise its “necessary and proper” power to enact legislation that fits poorly or awkwardly with some conception of the policy goals that inspired its passage. In so doing, purposivism effectively reallocates some portion of the discretion conferred by the Necessary and Proper Clause from Congress to the courts.

### C. Statutory Textualism as Structural Constitutional Law

In the Rehnquist-Roberts era, the Court has firmly forsworn its *Holy Trinity* power in favor of a more textualist approach. The Court now states that the judiciary “must presume that a legislature says in a

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<sup>126</sup> As Vermeule points out, the originating committee in the Senate noted the gap between the language of the bill and the apparent purpose of the legislation, but neither the committee nor any of the bill’s managers proposed changes to bring the two into line. See Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1843–44, 1848–51 (1998). From this, Vermeule infers that there may have been some legislative obstacle to reframing the bill in narrower terms. See *id.* at 1849–50.

<sup>127</sup> Professor Carol Chomsky argues that the overwhelming tenor of the Alien Contract Labor Act’s legislative history indicates that the prohibition against “labor or service of any kind” overshoot the bill’s obvious purpose. See Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 938–39 (2000).

<sup>128</sup> See Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 73 (1983) (explaining that enhancing a rule’s clarity increases problems of over- and under-inclusiveness).

statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”<sup>129</sup> Today, a “purposive argument,” it seems, “simply cannot overcome the force of the plain text.”<sup>130</sup> Indeed, where “the statutory language is clear,” the Court has disclaimed the need even “to reach . . . arguments based on statutory purpose[] [or] legislative history.”<sup>131</sup> Equally telling, the Court has not positively cited *Holy Trinity* or claimed the authority to enforce spirit over letter in a quarter century.<sup>132</sup>

The archetype of this shift is *West Virginia University Hospitals, Inc. v. Casey*,<sup>133</sup> a technical but important decision about the administration of federal civil rights laws. At issue was whether a prevailing civil rights plaintiff could recover “expert fees” as part of a “reasonable attorney’s fee” authorized by the Civil Rights Attorney’s Fees Award Act of 1976.<sup>134</sup> A pattern of “usage” in other fee-shifting statutes indicated that, if one went only by the text, the answer was unambiguously no.<sup>135</sup> As in *Holy Trinity*, however, evidence of background purpose pointed strongly the other way. The legislative history revealed that the Act sought to encourage civil rights litigation by making prevailing plaintiffs whole for their legal costs.<sup>136</sup> The political context, moreover, left no doubt that Congress passed the Act to overturn a precedent that had rejected prior equitable discretion to shift *both* attorney’s fees *and* expert fees.<sup>137</sup> And reading the Act to exclude expert fees would create an unexplained incongruity with an earlier Court decision that had allowed recovery of similar nonattorney expenses under the same Act.<sup>138</sup> Yet despite all of this evidence and a long tradition of reading

<sup>129</sup> *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citations omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

<sup>130</sup> *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1710 (2012).

<sup>131</sup> *Boyle v. United States*, 556 U.S. 938, 950 (2009).

<sup>132</sup> The last case in which an opinion of the Court invoked *Holy Trinity* and the power to enforce spirit over letter was *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 452–55 (1989). In recent years, only Justices Stevens and Breyer have claimed authority to deviate from the plain import of the text based on evidence of purpose found in extrinsic materials such as legislative history. *See, e.g.*, *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 107 n.3 (2007) (Stevens, J., concurring) (explicitly invoking *Holy Trinity*); *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 65 (2004) (Stevens and Breyer, JJ., concurring).

<sup>133</sup> 499 U.S. 83 (1991).

<sup>134</sup> 42 U.S.C. § 1988 (1988).

<sup>135</sup> *Casey*, 499 U.S. at 88–91 (identifying a series of statutes that had shifted “attorney’s fees” and “expert fees” as separate items of expense).

<sup>136</sup> *See, e.g.*, H.R. REP. NO. 94-1558, at 1–3 (1976).

<sup>137</sup> *See Casey*, 499 U.S. at 108–11 (Stevens, J., dissenting) (offering evidence that 42 U.S.C. § 1988 was meant to overturn *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975)).

<sup>138</sup> *See Missouri v. Jenkins*, 491 U.S. 274, 285 (1989) (authorizing recovery of paralegal fees under § 1988); *see also Friedrich v. City of Chicago*, 888 F.2d 511, 514 (7th Cir. 1989) (“The

civil rights statutes liberally to fulfill their remedial purposes,<sup>139</sup> the Court deemed itself foreclosed from deviating from an “unambiguous” text.<sup>140</sup> This unbending adherence to a clear text now represents the Court’s standard operating procedure.<sup>141</sup>

As it had with purposivism, the Court has unpersuasively justified its subscription to textualism as a superior way of identifying the decision made by Congress about the case at hand. The Court in *Casey*, for example, stressed that “[t]he best evidence of . . . purpose is the statutory text adopted by both Houses of Congress and submitted to the President.”<sup>142</sup> More frequently, the Court’s textualist opinions avoid referring to concepts like “purpose” or “intent,” but will make the thinly veiled intentionalist argument that the statutory text reflects legislative “compromise.”<sup>143</sup> If, however, Congress has no actual intent on any question that is hard enough to merit attention, textualists have

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time . . . spent by the expert is a substitute for lawyer time, just as paralegal time is . . .”), *vacated mem.*, 499 U.S. 933 (1991).

<sup>139</sup> See, e.g., *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 284 (1987) (Pregnancy Discrimination Act); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520–35 (1982) (Title IX); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 201–07 (1979) (Title VII); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 688 & n.9 (1979) (Title IX).

<sup>140</sup> *Casey*, 499 U.S. at 98.

<sup>141</sup> See, e.g., *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2886 (2010) (holding that the courts’ “function [is] to give [a] statute the effect its language suggests, . . . not to extend it to admirable purposes it might be used to achieve”); *Magwood v. Patterson*, 130 S. Ct. 2788, 2798 (2010) (“We cannot replace the actual text with speculation as to Congress’ intent.”); *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156 (2010) (“We must enforce plain and unambiguous statutory language according to its terms.”); *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (“It is well established that, when the statutory language is plain, we must enforce it according to its terms.”); *Lockhart v. United States*, 546 U.S. 142, 146 (2005) (“The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning.” (quoting *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991)) (internal quotation marks omitted)); *Dodd v. United States*, 545 U.S. 353, 359 (2005) (“[W]e are not free to rewrite the statute that Congress has enacted.”); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004) (“Given the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of [the statute] at all.”).

<sup>142</sup> *Casey*, 499 U.S. at 98; see also, e.g., *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2257 (2013) (articulating “the reasonable assumption . . . that the statutory text accurately communicates the scope of Congress’s pre-emptive intent”); *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009) (invoking “the assumption that the ordinary meaning of that language accurately expresses the legislative purpose” (quoting *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004)) (internal quotation mark omitted)); *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 339 (1994) (“It is not unusual for legislation to contain diverse purposes that must be reconciled, and the most reliable guide for that task is the enacted text.”).

<sup>143</sup> See, e.g., *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94 (2002) (“[A]ny key term in an important piece of legislation . . . [is] the result of compromise between groups with marked but divergent interests in the contested provision. . . . Courts and agencies must respect and give effect to these sorts of compromises.”); *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 29 (1989) (“Giving full effect to the words of the statute preserves the compromise struck by Congress.”); see also Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 348 (2005) (arguing that textualists share the basic interpretive goals of intentionalists but prefer different means of achieving those goals).

no better claim than purposivists to the mantle of actual legislative intent.<sup>144</sup> Again, assertions of fidelity to purpose, intent, or legislative compromise are placeholders for larger theories of legislative supremacy and judicial power under the constitutional structure.

For the textualist, legislative supremacy lies in the details. To today's Court, Congress is not a policymaker in gross, but rather a line-drawer. In one of its earliest articulations of the theme (in the closing days of the Burger Court), the Court explained that "Congress may be unanimous in its intent to stamp out some vague social or economic evil," but "because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises."<sup>145</sup> Or as a unanimous Rehnquist Court later put it, since "no legislation pursues its purposes at all costs," it is too simplistic "to assume that *whatever* furthers [a] statute's primary objective must be the law."<sup>146</sup> In other words, an apparent gap between text and background purpose may reflect *either* a failure of legislative expression *or* a legislative choice. If the Court routinely presumes the latter (as it now does), then it becomes easier for Congress to use its words to craft laws that fall short of or go beyond the policies that animate their passage — that is, to specify not only the law's "ultimate purposes," but also "the means [Congress] has deemed appropriate . . . for the pursuit of those purposes."<sup>147</sup>

Textualism thus seeks to facilitate and protect the very sort of legislative line-drawing authority that the post-New Deal Court ascribed to Congress under the Necessary and Proper Clause. If the Court generally enforces the words of a statute even when they produce awkward results,<sup>148</sup> then Congress can reliably use its words to record

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<sup>144</sup> Like the leading theorists of purposivism, leading textualists are thoroughgoing intent skeptics. See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) (arguing that legislatures, as composites of individual members, do not themselves have intents); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 ("[T]he quest for the 'genuine' legislative intent is probably a wild-goose chase . . .").

<sup>145</sup> *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986).

<sup>146</sup> *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam); accord, e.g., *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646–47 (1990) (quoting *Rodriguez*, 480 U.S. at 525–26).

<sup>147</sup> *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 n.4 (1994).

<sup>148</sup> Consider *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002), which enforced a goofy result because of the mere possibility that the statute in question was the result of a legislative compromise. *Id.* at 460–61. The statute imposed taxes for underfunded coal miner pensions on (a) coal companies that agreed to the pensions and (b) businesses affiliated with the coal companies at the time. 26 U.S.C. §§ 9701(c)(1)–(2), 9706(a) (2000). If, however, both the coal company and affiliated business sold their assets to third parties, only the successors in interest of the *affiliated business* would be on the hook for the taxes. See *id.* § 9701(c)(1)–(2)(A). So if a "coal mine" and an affiliated "dairy farm" each sold its assets to different companies, "the purchaser of the dairy farm [would] be liable for the retired miners' benefits while the purchaser of the coal mine [would]

awkward compromises, whether or not it actually “intended” to do so in the particular case. If the Court generally refuses to read purposive exceptions into broadly worded rules,<sup>149</sup> then Congress can generally use broad language to secure the benefits of rules, whether or not it “intended” to do so in the particular case. So understood, the Court’s new textualism does not preclude judges from promoting a statute’s background policy, administrability, fairness, or coherence,<sup>150</sup> but rather invites Congress to use the relative generality or specificity of its laws as a way of signaling to what degree, and by what means, the law’s executors (including courts) may properly take such considerations into account.<sup>151</sup>

Consider two recent opinions for the Court, each written by Justice Kagan — not an apostolic textualist, but someone whose work typifies the way today’s Court practices the art.<sup>152</sup> In *Milner v. Department of the Navy*,<sup>153</sup> the plaintiff had filed a Freedom of Information Act<sup>154</sup> (FOIA) request for sensitive maps detailing Navy protocols for the storage and handling of explosives. The Navy asserted that these records fell within FOIA Exemption 2,<sup>155</sup> which exempts agency records “related solely to the internal personnel rules and practices of an agency.”<sup>156</sup> In light of FOIA’s background purpose to balance disclosure

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have] no liability.” *Barnhart*, 534 U.S. at 465 (Stevens, J., dissenting). As odd as that outcome would be, the Court nonetheless enforced the statute as written. Without suggesting that the statutory oddity before it *was* the product of compromise, the Court found it decisive that “a change in any individual provision *could have* unraveled the whole,” making it possible that a bill without that oddity “would not have survived.” *Id.* at 461 (majority opinion) (emphasis added). By presuming that a clear but goofy text may have been part of a legislative compromise, the Court makes it possible for Congress to use its words to record just such a compromise — a possibility not as open to Congress under *Holy Trinity*.

<sup>149</sup> See, e.g., Pa. Dep’t of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (“[T]he fact that a statute can be ‘applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.’” (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985))); *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (“[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”).

<sup>150</sup> Some argue that textualism inevitably hampers consideration of such values. See, e.g., Aleinikoff & Shaw, *supra* note 116, at 704–12; Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 763–66 (1995).

<sup>151</sup> See Easterbrook, *supra* note 144, at 546–47; John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 104–08 (2006).

<sup>152</sup> In earlier writing, I also characterized Justice Kagan’s approach as a form of textually constrained purposivism. See Manning, *The New Purposivism*, *supra* note 33, at 132–41. Because my working definition of “textualism” here is that the Court relies on background purpose only insofar as the statutory text permits, the two characterizations of Justice Kagan’s approach are consistent.

<sup>153</sup> 131 S. Ct. 1259 (2011).

<sup>154</sup> 5 U.S.C. § 552 (2012).

<sup>155</sup> See *Milner*, 131 S. Ct. at 1262.

<sup>156</sup> 5 U.S.C. § 552(b)(2).

against the need for workable government, the lower court (and a dissent by Justice Breyer) read Exemption 2 to reach agency staff manuals whose disclosure would circumvent the enforcement of federal law.<sup>157</sup>

In an opinion for eight members of the Court, Justice Kagan concluded that Exemption 2's "12 simple words" precluded that reading.<sup>158</sup> Based on definitions found in multiple dictionaries, Justice Kagan found that "[w]hen used as an adjective, as it is here to modify 'rules and practices,' th[e] term ['personnel'] refers to human resources matters"<sup>159</sup> such as "the selection, placement, and training of employees."<sup>160</sup> The exemption's wording could not be stretched to cover ordinance maps.<sup>161</sup> More importantly, however obvious it might be that Congress would have found the disclosure incompatible with workable government, FOIA's text did not permit such freestanding considerations of policy:

[N]othing in FOIA either explicitly or implicitly grants courts discretion to expand (or contract) an exemption on this basis. In enacting FOIA, Congress struck the balance it thought right — generally favoring disclosure, subject only to a handful of specified exemptions . . . . The judicial role is to enforce that congressionally determined balance rather than, as the dissent suggests, to assess case by case . . . whether disclosure interferes with good government.<sup>162</sup>

In other words, the Court thought its discretion to consider workability was both structured, and bounded, by FOIA's operational text.

This Term's decision in *Abramski v. United States*<sup>163</sup> tells a similar story, but this time one in which the Court found that the text gave it the needed discretion to rely on background legislative purpose. *Abramski* purchased a gun for his uncle, who sent him money to do so on his behalf.<sup>164</sup> On a federal form, *Abramski* falsely answered "yes" when asked whether he was the actual transferee.<sup>165</sup> He was indicted,

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<sup>157</sup> See *Milner*, 131 S. Ct. at 1275–76 (Breyer, J., dissenting) (citing legislative history); *Milner v. U.S. Dep't of the Navy*, 575 F.3d 959, 967–68 (9th Cir. 2009) (citing past cases that analyzed FOIA's legislative history). This argument built on well-settled D.C. Circuit case law dating back to the heyday of post–New Deal purposivism. See *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc). *Crooker* had relied on FOIA's "overall design," its legislative history, and "even common sense" to conclude that Exemption 2 should apply to staff manuals whose disclosure would enable the public to circumvent federal statutes or regulations. *Id.* at 1074.

<sup>158</sup> *Milner*, 131 S. Ct. at 1264.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1687 (1966)) (internal quotation marks omitted).

<sup>161</sup> See *id.* at 1266.

<sup>162</sup> *Id.* at 1265 n.5 (citation omitted).

<sup>163</sup> 134 S. Ct. 2259 (2014).

<sup>164</sup> See *id.* at 2265.

<sup>165</sup> *Id.*

inter alia, for knowingly making a false statement of “fact material to the lawfulness of the sale or other disposition of [a] firearm.”<sup>166</sup> Whether the misstatement was “material” depended entirely on whether Abramski or his uncle was the actual transferee or buyer of the gun. Here is why: A dealer may not, for example, lawfully “transfer” a firearm to a “person” without first seeing identification and doing a background check.<sup>167</sup> Nor may a dealer, except in specified circumstances, “sell a firearm to a person who does not appear in person” at the dealer’s business.<sup>168</sup> Thus, if the uncle, and not Abramski, was the actual transferee or buyer, then the dealer performed the background check on the wrong person, and the real buyer did not purchase the gun “in person.”

In a 5–4 decision, Justice Kagan held for the Court that the uncle was the relevant transferee or buyer.<sup>169</sup> To hold otherwise, she said, would make it too easy to use a “straw purchase[r]” to circumvent a host of regulatory objectives directed at the person who ends up with the gun.<sup>170</sup> Though Justice Scalia wrote a strong dissent contending that the Court’s argument elevated purpose over “plain language,”<sup>171</sup> the Court believed:

[The statutory] language merely raises, rather than answers, the critical question: In a straw purchase, who *is* the “person” or “transferee” whom federal gun law addresses? Is that “person” the middleman buying a firearm on someone else’s behalf (often because the ultimate recipient could not buy it himself, or wants to camouflage the transaction)? Or is that “person” instead the individual really paying for the gun and meant to take possession of it upon completion of the purchase? Is it the conduit at the counter, or the gun’s intended owner?<sup>172</sup>

Justice Scalia thought it obvious that “if I give my son \$10 and tell him to pick up milk and eggs at the store, no English speaker would say that the store ‘sells’ the milk and eggs to me.”<sup>173</sup> Justice Kagan, however, rejoined that “[i]f I send my brother to the Apple Store with money and instructions to purchase an iPhone, and then take immediate and sole possession of that device, am I the ‘person’ (or ‘transferee’) who has bought the phone or is he?”<sup>174</sup> What mattered to the Court — what opened the door to its consideration of purpose — was its conclusion that “[n]othing in ordinary English usage compels an

<sup>166</sup> *Id.* at 2264 (quoting 18 U.S.C. § 922(a)(6) (2012)).

<sup>167</sup> 18 U.S.C. § 922(t)(1).

<sup>168</sup> *Id.* § 922(c).

<sup>169</sup> *Abramski*, 134 S. Ct. at 2262–63.

<sup>170</sup> *Id.* at 2267.

<sup>171</sup> *Id.* at 2277 (Scalia, J., dissenting).

<sup>172</sup> *Id.* at 2267 (majority opinion).

<sup>173</sup> *Id.* at 2277 (Scalia, J., dissenting).

<sup>174</sup> *Id.* at 2267 n.5 (majority opinion).

answer either way.”<sup>175</sup> This analytical structure fits with that of other cases in which today’s Court has given decisive weight to a law’s background purpose, but only after taking pains to verify that the statutory text permits such consideration.<sup>176</sup>

Hence, the Court’s textualism focuses tightly on whether, and to what extent, the statutory text leaves the judiciary room to exercise discretion. In keeping with the *McCulloch* view of legislative power, textualism thus affords Congress effective authority to determine how much to decide and how much to leave to others to decide. It is, in that sense, the *Chevron* doctrine writ large.<sup>177</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>178</sup> of course held that when “Congress has directly spoken to the precise question at issue” in a case, an agency and reviewing court must follow its clear directives.<sup>179</sup> But when the statute is “silent or ambiguous with respect to the specific issue,” then Congress’s chosen interpreter has discretion to fill in the blanks in light of the statute’s overall policy, as long as that interpreter makes “reasonable” or at least “permissible” judgment calls.<sup>180</sup> Put to one side all the subsequent complications that have arisen about *Chevron*’s domain.<sup>181</sup> What makes the core idea of *Chevron* so appealing is its intuitive grasp of how Congress might use precision and indeterminacy to signal how it wants its policies carried into effect. If a statute crisply states “no handguns in the National Parks,” that wording seems to convey relatively little discretion. If the statute instead says “no dangerous weapons,” that signal makes the exercise of broad discretion inevitable. By taking those signals seriously, both *Chevron* and the Court’s textualism enhance Congress’s capacity to determine not only the ends, but also the means, of legislation.

To be sure, the Court has not behaved with perfect consistency in applying textualist principles. As discussed in Part IV, one cannot

<sup>175</sup> *Id.*

<sup>176</sup> See, e.g., *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 94–99 (2007) (carefully exploring why the meaning of “percentile” in the federal Impact Aid Act could accommodate the Court’s consideration of the Act’s background purpose); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 591, 596 (2004) (mining the social usage of the word “age” before concluding that the phrase “discriminat[ion] . . . because of [an] individual’s age,” 29 U.S.C. § 623(a)(1) (2012), reflected the statute’s apparent background purpose to protect older workers against younger).

<sup>177</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); see also *infra* pp. 50–51.

<sup>178</sup> 467 U.S. 837.

<sup>179</sup> *Id.* at 842–43.

<sup>180</sup> *Id.* at 843–44.

<sup>181</sup> These complications relate to the question of when Congress would prefer an agency or a reviewing court to have the final word about how to resolve an indeterminate organic act. See, e.g., *Barnhart v. Walton*, 535 U.S. 212, 222 (2002); *United States v. Mead Corp.*, 533 U.S. 218, 230–31 (2001); see also John F. Manning, *Chevron and the Reasonable Legislator*, 128 HARV. L. REV. 457 (2014). What is important about *Chevron*, for present purposes, is the insight that indeterminacy creates discretion, not who exercises that discretion.

easily reconcile the Court's overall textualist approach with pockets of statutory interpretation doctrine such as implied preemption or clear statement rules.<sup>182</sup> While such exceptions are troubling, they do not negate the Court's more fundamental shift away from *Holy Trinity* and toward textualism in recent years. The bottom line is that, in contrast with the Court's earlier practice, the Rehnquist and Roberts Courts' general reliance on statutory textualism makes it easier for Congress to exercise the particular set of "necessary and proper" powers championed by both the post-New Deal and today's Courts.<sup>183</sup> The Court's present textualist presumption — that Congress means what it says — gives Congress more reliable tools than before to exercise its acknowledged powers to enact the messy, incoherent, overbroad, incomplete, or buck-passing legislation that the Necessary and Proper Clause entitles it to enact.

## II. THE NEW STRUCTURALISM AND INDEPENDENT JUDGMENT

In the past quarter century, the Court's structural constitutional decisions have proceeded on premises contrary to the deferential approach it takes in its statutory interpretation cases. The Rehnquist and Roberts Courts have asserted broad judicial power to determine the appropriateness of Congress's chosen means to implement federal power. It is not that the Court has upended the *particular* doctrines of constitutional deference that it enforced during the post-New Deal period. With tweaks here or there, the Court basically applies a forgiving approach to congressional judgments about the means-ends fit;<sup>184</sup> a narrow view of substantive due process in cases of ordinary legislation;<sup>185</sup> and a

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<sup>182</sup> See *infra* pp. 71–73.

<sup>183</sup> The Court still adheres largely to the particular forms of deference that defined the post-New Deal cases. See *infra* notes 184–186 and accompanying text.

<sup>184</sup> In multiple contexts, the Court has reaffirmed the rational basis test for such questions of means-ends fit. See, e.g., *United States v. Kebodeaux*, 133 S. Ct. 2496, 2502–03 (2013); *United States v. Comstock*, 130 S. Ct. 1949, 1956–57 (2010); *Sabri v. United States*, 541 U.S. 600, 605 (2004). Indeed, despite a revival of federalism-based limitations on congressional power, see *infra* sections II.A–B, pp. 33–42, the Court has reaffirmed the proposition that Congress may regulate intrastate commerce as a means of regulating interstate commerce. See *Gonzales v. Raich*, 545 U.S. 1, 17–22 (2005) (relying on *Wickard v. Filburn*, 317 U.S. 111 (1942), to hold that Congress has the power to criminalize possession and cultivation of a fungible commodity like marijuana). In two famous cases, the Rehnquist Court invalidated federal statutes for trying to reach *noneconomic* intrastate activity under the Commerce Clause. See *United States v. Morrison*, 529 U.S. 598, 612–13, 617 (2000) (invalidating a provision of the Violence Against Women Act of 1994); *United States v. Lopez*, 514 U.S. 549, 566–68 (1995) (invalidating a provision of the Gun-Free School Zones Act of 1990). Whether or not these decisions can be squared with the Court's post-New Deal approach to the commerce power, they did not purport to repudiate the basic framework of those decisions. See *Lopez*, 514 U.S. at 557 (reaffirming the rational basis test).

<sup>185</sup> See, e.g., *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14 (1993) (reaffirming the narrowness of substantive due process review); *Preseault v. Interstate Commerce Comm'n*, 494 U.S.

hands-off posture toward delegation.<sup>186</sup> However, at the same time, the Court has also broken fresh ground by, for example, erecting new buffer zones around state sovereignty, prohibiting affirmative federal mandates on individual behavior, and identifying a heretofore unknown limitation on congressional power to establish independent agencies.

What holds these seemingly disparate cases together — and what qualifies them as a “new structuralism” — is a shared methodology. The Court has shown itself willing time and again to derive specific limitations on congressional power from relatively high-level inferences about federalism and, to a lesser extent, separation of powers. On the rare occasions when the post–New Deal Court invalidated an act of Congress on separation of powers grounds, it did so for (what the Court saw as) fairly specific transgressions of the constitutional text: the creation of congressional power to remove executive officers outside the impeachment process;<sup>187</sup> the authorization of legislative law-making without bicameralism and presentment;<sup>188</sup> the assignment of core Article III business to a non–Article III court;<sup>189</sup> or the adoption of an appointments procedure unsanctioned by the Appointments Clause.<sup>190</sup> In many of the Rehnquist-Roberts era decisions invalidating structural legislation, the Court’s judgment is not ultimately tied to the understood meaning of any particular constitutional text. Nor does any specific constitutional tradition or line of judicial precedent typically speak to the question at issue.

Instead, what underlies all of these cases is a “free-form” version of what Professor Charles Black called the “method of inference from the

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1, 18–19 (1990) (same). As a government lawyer, the author served as counsel to petitioner in *Beach Communications*.

<sup>186</sup> See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474–75 (2001); *Loving v. United States*, 517 U.S. 748, 758 (1996); *Touby v. United States*, 500 U.S. 160, 164–65 (1991). On occasion, the Court has narrowly construed a statute to avoid serious nondelegation concerns. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (deeming it unlikely that Congress would intend to delegate power to the FDA to regulate tobacco unless the legislation did so in explicit terms); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229–31 (1994) (finding it implausible that Congress would use cryptic language to delegate power to an agency to negate key portions of its organic act). In prior writing, I have criticized the Court’s reliance on this nondelegation clear statement rule. See John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 256–60.

<sup>187</sup> See *Bowsher v. Synar*, 478 U.S. 714, 723 (1986) (treating the Constitution’s Impeachment Clauses as exclusive).

<sup>188</sup> See *INS v. Chadha*, 462 U.S. 919, 945 (1983) (holding that a one-House legislative veto contravenes “[e]xplicit and unambiguous provisions of the Constitution [that] prescribe and define the respective functions of the Congress and of the Executive in the legislative process”).

<sup>189</sup> See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83–84 (1982) (plurality opinion) (holding that Congress could not assign state common law claims to non–Article III bankruptcy tribunals).

<sup>190</sup> See *Buckley v. Valeo*, 424 U.S. 1, 135 (1976) (per curiam).

structures and relationships created by the constitution in all its parts or in some principal part.”<sup>191</sup> This free-form structural inference first shifts the Constitution’s level of generality upward by distilling from diverse clauses an abstract shared value — such as property, privacy, federalism, nationalism, or countless others — and then applies that value to resolve issues that sit outside the particular clauses that limit and define the value.<sup>192</sup> When abstracted from particular constitutional provisions or specific historical practices, such broad values leave judges with a great deal of discretion.<sup>193</sup> This phenomenon is especially evident in the Court’s freestanding federalism and separation of powers cases because the purposes underlying those doctrines are diverse, unranked, and often self-contradictory.<sup>194</sup> Hence, such doctrines afford reasonable people plenty of room to strike the balance in different ways between federalism and nationalism or separation and interdependence.

In those types of cases, today’s Court applies independent judgment to determine — in truth, to create — the meaning of federalism and separation of powers doctrine. In the process, it does not defer to Congress’s contrary judgments about how to carry federal power into execution. This approach contrasts sharply with the philosophy of not only the post–New Deal Court’s constitutional cases, but also the current Court’s own statutory cases. When the Court invokes the Necessary and Proper Clause in contemporary structural cases, it is not typically as a font of legislative authority as it was in the post–New Deal constitutional cases (and as it still is in some of the Court’s decisions). Rather, in the new structuralism cases, the Court treats the “propriety” requirement of the Necessary and Proper Clause as a textual hook for the assertion of broad *judicial* power to judge the appropriateness of legislatively prescribed means.<sup>195</sup>

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<sup>191</sup> CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7 (1969). For criticism of free-form interpretation of constitutional text and structure, see Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995), which distinguishes abstract “free-form” interpretation from more precise “dissection of the legal materials.” *Id.* at 1233.

<sup>192</sup> See generally John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 440–43 (2010) (discussing different forms of structural inferences).

<sup>193</sup> See, e.g., Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 833 (2004) (noting that a focus on structure and relationship may give rise to broad discretion); John Harrison, *Review of Structure and Relationship in Constitutional Law*, 89 VA. L. REV. 1779, 1786 (2003) (book review) (noting the indeterminacy of the method).

<sup>194</sup> See *infra* sections IIA–C, pp. 33–48; see also *infra* pp. 55–57.

<sup>195</sup> See generally Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044 (2014) (arguing that the Court, in recent years, has used clauses such as the Necessary and Proper Clause to narrow congressional authority).

Though the Rehnquist and Roberts Courts have offered a number of examples from which to choose, this Part focuses on three that capture the new structuralism particularly well. Section II.A discusses the Court's revival of abstract notions of "state sovereignty" as an external limitation on federal power. Section II.A also introduces the Court's new reading of the Necessary and Proper Clause. Section II.B examines the Court's handling of the so-called "individual mandate" in the Affordable Care Act decision. The reasoning of a majority of the Justices in that case shows that the Court feels no hesitation making an independent judgment under the Necessary and Proper Clause about whether a novel means of doing the government's business somehow goes too far. Section II.C switches to the separation of powers, showing that a similar attitude about judicial power informed the Court's decision to invalidate a statutory restriction on presidential removal power for the first time in four generations. In discussing these cases, I do not address whether alternative grounds might have justified their outcomes; my focus here is on the Court's methodology.

A. *Freestanding Concepts of State Sovereignty: Anticommandeering*

For most of our history, the Court's official position has been that if an act of Congress employed a "necessary and proper" means of implementing an enumerated power, then freestanding notions of reserved state sovereignty posed no obstacle to the exercise of such power.<sup>196</sup> To be sure, during the years roughly associated with the *Lochner* era, the Court occasionally found that a federal regulatory scheme operated as a mere pretext for reaching matters that our system of dual sovereignty reserved to the states.<sup>197</sup> In the post–New Deal cases, however, the Court only once interposed state sovereignty as a freestanding limit on congressional power — and then quickly thought better of its decision.<sup>198</sup>

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<sup>196</sup> See, e.g., *Lambert v. Yellowley*, 272 U.S. 581, 596 (1926) (holding that if a statute satisfied Necessary and Proper Clause requirements, then it did not matter whether the statute addressed matters that properly lay within the "police power" of the states); *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919) (same); *Seven Cases of Eckman's Alterative v. United States*, 239 U.S. 510, 515 (1916) (same).

<sup>197</sup> See, e.g., *United States v. Butler*, 297 U.S. 1, 68 (1936) (holding that Congress may not use the taxing power to regulate agricultural production, which the constitutional structure leaves to the states); *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (holding that Congress may not restrict the interstate shipment of goods made with child labor as a means to regulate the welfare of children, a matter that our system of federalism assigns to the states).

<sup>198</sup> In *National League of Cities v. Usery*, 426 U.S. 833 (1976), a closely divided Court held that it violated the Tenth Amendment to apply the Fair Labor Standards Act's minimum-wage and maximum-hour requirements to traditional governmental functions performed by states qua states. *Id.* at 852. The post–New Deal Court never used *Usery* to invalidate any other statute and quickly overturned the decision on the ground that the "traditional governmental function"

The Rehnquist and Roberts Courts have revived sovereignty-based limitations on otherwise valid exercises of legislative power.<sup>199</sup> The structure of these cases reflects a fairly common pattern. Neither the Court nor the parties question whether the matter being regulated falls within Congress's Article I powers. Rather, the Court identifies an implied limitation on *the means* Congress may use to exercise its acknowledged regulatory power. Typically, that limitation is not grounded in any particular textual or historical source specifying what aspects of state sovereignty remained inviolate after the adoption of our federal system. The Court instead determines for itself what sovereign attributes a state must retain to promote the broad purposes of federalism.

The archetype of the Court's new structuralism is *Printz v. United States*,<sup>200</sup> in which the Court struck down a provision of the Brady Act<sup>201</sup> that enlisted state officials to conduct background checks on firearm purchasers. There was no dispute that Congress had the power to regulate the purchase and sale of firearms. At issue was whether Congress could do so by means of commandeering state officials to implement the law.<sup>202</sup> The Court conceded that "there is no constitutional text speaking to this precise question."<sup>203</sup> To the extent that the Court discussed history, it was only to challenge the contention that comments made in the ratification campaign, not to mention early federal practice, affirmatively supported commandeering.<sup>204</sup> Certainly, none of the opinions cited any specific historical evidence, or even judicial precedent, that *contradicted* enlisting state executive officers to implement federal law.<sup>205</sup>

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test had proven unworkable. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–47 (1985).

<sup>199</sup> See Heather Gerken, *The Supreme Court, 2013 Term — Comment: Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 96–97, 99–101 (2014) (discussing the revival of state sovereignty as a limitation on federal power).

<sup>200</sup> 521 U.S. 898 (1997).

<sup>201</sup> Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. §§ 921–922, 925A (2012)), *invalidated in part by Printz*, 521 U.S. 898.

<sup>202</sup> *Printz*, 521 U.S. at 902.

<sup>203</sup> *Id.* at 905.

<sup>204</sup> Compare, e.g., *id.* at 906–09 (distinguishing early commandeering statutes from the Brady Act), and *id.* at 910–15 (explaining why suggestive passages of *The Federalist* do not in fact support commandeering), with *id.* at 949–52 (Stevens, J., dissenting) (arguing that early federal legislation sometimes impressed state officials to perform federal functions), and *id.* at 971–75 (Souter, J., dissenting) (arguing that *The Federalist* contemplated that state officials would perform federal functions such as tax collection).

<sup>205</sup> The most specific evidence the Court cited came from the fact that the Philadelphia Convention sought to correct a perceived defect of the Articles of Confederation by ensuring that the national government could act directly on the people instead of having to go through the states. See *id.* at 919–20 (majority opinion); *infra* pp. 35–36.

Rather, the Court's major premise was that the constitutional text as a whole established a broad background value of "dual sovereignty"<sup>206</sup> from which the Court could infer a specific prohibition against commandeering:

This [principle] is reflected *throughout* the Constitution's text, including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the "Citizens" of the States; the amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which "presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights." Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment[] . . .<sup>207</sup>

The Court did not identify an anticommandeering principle as a settled attribute of this "dual sovereignty." Nor could it have, given the utter novelty of the American innovation of two overlapping sovereigns operating within the same territory.<sup>208</sup>

The Court instead derived its anticommandeering rule from the broad goals of federalism. Such a rule, for example, would avoid the inefficiency and potential conflict of operating through the states — problems that helped sink the Articles of Confederation and informed the U.S. Constitution's design.<sup>209</sup> An anticommandeering rule also safeguarded liberty by preserving the states as truly independent spheres of political authority, capable of balancing their power against that of the federal government.<sup>210</sup> And it prevented the federal government from shifting costly "financial burden[s]," as well as political "blame" for unpopular programs, onto state governments.<sup>211</sup>

The Court's functional claims are reasonable and well grounded in traditions of American federalism. But at the level of generality at which the Court articulated them, they are inconclusive. Though the founders may have been moved by the design flaws in the Articles of Confederation, they responded by *enabling* Congress to act directly on

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<sup>206</sup> *Printz*, 521 U.S. at 918.

<sup>207</sup> *Id.* at 919 (first omission in original) (emphasis added) (citations omitted) (quoting *Helvering v. Gerhardt*, 304 U.S. 405, 414–15 (1938)).

<sup>208</sup> See *infra* p. 55.

<sup>209</sup> See *Printz*, 521 U.S. at 919–20.

<sup>210</sup> See *id.* at 921–22 ("The power of the Federal Government would be augmented immeasurably if it were able to impress into its service — and at no cost to itself — the police officers of the 50 States." *Id.* at 922.).

<sup>211</sup> *Id.* at 930.

the people, not by *disabling* it from acting on the states. On the latter point, the Constitution says nothing. And while the Court's rule would surely reduce federal-state conflict, it is not clear why that purpose merits special consideration. After all, many clauses — such as the Full Faith and Credit Clause,<sup>212</sup> the Extradition Clause,<sup>213</sup> the Guarantee Clause,<sup>214</sup> and of course the Supremacy Clause itself<sup>215</sup> — presuppose that working out federal-state conflicts that arise from affirmative federal obligations is an element of “Our Federalism.”

Indeed, it is not even clear that the anticommandeering rule is the “pro-federalism” rule. Under the premises of the Madisonian Compromise, for example, Congress's power to invoke *state court* jurisdiction to hear federal claims is the pro-federalism position.<sup>216</sup> Rather than force Congress to rely wholly upon lower federal courts, the structure of Article III and the text of the Supremacy Clause together imply that Congress may call upon the state courts,<sup>217</sup> which presumably handle federal claims with greater sensitivity to state and local interests than do federal courts.<sup>218</sup> Indeed, some numbers of *The Federalist* suggest that similar advantages might accrue to the states if Congress were able to rely on state officials to administer federal law rather than projecting a large federal bureaucracy into the states.<sup>219</sup> But

<sup>212</sup> U.S. CONST. art. IV, § 1.

<sup>213</sup> *Id.* art. IV, § 2, cl. 2.

<sup>214</sup> *Id.* art. IV, § 4.

<sup>215</sup> *Id.* art. VI, cl. 2.

<sup>216</sup> The Madisonian Compromise refers to the decision in the Philadelphia Convention not to compel or leave out inferior federal courts, but rather to assign Congress discretion about whether to create them. See HART & WECHSLER, *supra* note 6, at 6–9.

<sup>217</sup> See, e.g., *Testa v. Katt*, 330 U.S. 386, 389–93 (1947); *Mondou v. N.Y., New Haven & Hartford R.R.*, 223 U.S. 1, 57 (1912); see also U.S. CONST. art. III, § 1 (giving Congress discretion over the creation of lower federal courts); *id.* art. VI, cl. 2 (specifying that “the Judges in every State shall be bound [by federal law], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”). Not everyone, of course, believes that the Supremacy Clause supports congressional power to enlist state courts to adjudicate federal claims. See, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 256 n.165 (1985); Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1163–64 (2013).

<sup>218</sup> See Michael Wells, *Who's Afraid of Henry Hart?*, 14 CONST. COMMENT. 175, 185–86 (1997); Note, *Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism*, 60 HARV. L. REV. 966, 967 (1947).

<sup>219</sup> In response to Antifederalist objections about federal tax collectors, James Madison and Alexander Hamilton raised the possibility of relying on state officers to collect some federal taxes. See *Printz v. United States*, 521 U.S. 898, 946–47 (1997) (Stevens, J., dissenting); see also THE FEDERALIST NO. 36, at 217–18 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (arguing that the federal government will, in some contexts, “make use of the State officers” for collecting taxes, *id.* at 218); THE FEDERALIST NO. 45, *supra*, at 288–89 (James Madison) (contending that “officers . . . appointed by the several States” would likely collect some federal taxes, *id.* at 289). In prior writing, I have argued that individual remarks in *The Federalist* have limited interpretive utility and should be treated not as authoritative evidence of constitutional meaning, but rather as a source of potentially persuasive arguments. See John F. Manning, *Textualism and the Role of*

even if that were not the case, it is far from clear why the more pro-state answer is the “right” one. At that level of generality, the constitutional structure conveys a complex mix of federalist and nationalist purposes.<sup>220</sup> The fact that an anticommandeering rule protects states as independent political actors does not answer how, and to what degree, one should balance that interest against the national one in effective law administration.<sup>221</sup> In light of all this, reasonable people can surely differ about whether commandeering is a permissible means of implementing federal power in our system of government.

This indeterminacy is reflected in the array of positions the Court has taken on different forms of “commandeering.” While Congress may not enlist a state executive to implement federal policy,<sup>222</sup> it may enlist state courts<sup>223</sup> — or even state administrative agencies if they engage in adjudication.<sup>224</sup> Congress may not compel a state legislature to enact a regulatory program,<sup>225</sup> but may require a state legislature to consider such a program.<sup>226</sup> Congress may also conditionally preempt state laws in a field unless the state adopts its own regulatory scheme in conformity with federal standards.<sup>227</sup> Finally, Congress may condition a grant of federal funds on a state’s adopting a regulatory

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The Federalist in *Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1348–50 (1998). Here, I invoke Hamilton and Madison not because their essays somehow demonstrate the founders’ “intent” to permit commandeering, but rather merely because those essays suggest a possible way one might view federal enlistment of state officials as favorable to state interests. For legal scholarship suggesting that the overall tenor of the ratification debates is consistent with the positions taken by Hamilton and Madison, see, for example, Campbell, *supra* note 217, at 1128–33; and Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1995–2004 (1993). For an argument that the evidence is more equivocal, see, for example, Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 136–41.

<sup>220</sup> See *Younger v. Harris*, 401 U.S. 37, 44 (1971) (“The concept [of federalism] does not mean blind deference to ‘States’ Rights’ any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses.”); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 5 (2007) (noting that federalism and nationalism are competing constitutional values); Carlos Manuel Vázquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601, 1604 (2008) (same); see also *infra* p. 56.

<sup>221</sup> See, e.g., Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1081–87 (1995) (discussing the complexities of balancing state and federal interests in the context of anticommandeering doctrine); Vicki C. Jackson, *Federalism and the Use and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2253–54 (1998) (arguing that the Court should explicitly take into account the national interest in relying on state officials).

<sup>222</sup> See *Printz*, 521 U.S. at 935.

<sup>223</sup> See sources cited *supra* note 217.

<sup>224</sup> See *FERC v. Mississippi*, 456 U.S. 742, 759–61 (1982).

<sup>225</sup> See *New York v. United States*, 505 U.S. 144, 166 (1992).

<sup>226</sup> See *FERC*, 456 U.S. at 764–65.

<sup>227</sup> See *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288–91 (1981).

program,<sup>228</sup> but not where the grants loom so large that they “coerce” the state to accept the conditions attached.<sup>229</sup> Where one draws these lines is essentially arbitrary — not in the sense that the Court’s decisions lack grounding in valid functional concerns, but in the sense that the principles of federalism they purport to implement are sufficiently broad and abstract that they support any number of other reasonable outcomes almost equally well.<sup>230</sup>

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<sup>228</sup> See *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987) (upholding Congress’s decision to condition the grant of federal highway funds on a state’s raising the drinking age to twenty-one).

<sup>229</sup> See *NFIB*, 132 S. Ct. 2566, 2601–07 (2012) (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.) (invalidating congressional attempt to condition receipt of Medicaid funds on state compliance with elements of the Affordable Care Act); *id.* at 2661–68 (joint dissent) (same).

<sup>230</sup> The Court’s sovereign immunity case law has a similar structure. This similarity is especially evident in *Alden v. Maine*, 527 U.S. 706 (1999), which barred Congress from subjecting states to suit in state court. See *id.* at 754. Earlier decisions applying state sovereign immunity in federal court had rooted such immunity in a purposive interpretation of the Eleventh Amendment. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71–72 (1996); *Hans v. Louisiana*, 134 U.S. 1, 10–12 (1890). *Alden*, however, forswore any textual basis for state sovereign immunity in state courts and instead considered it “a fundamental aspect of [state] sovereignty.” See 527 U.S. at 713 (holding that immunity against suit in state court “neither derives from, nor is limited by, the terms of the Eleventh Amendment”). And while the Court cited historical evidence that states enjoyed immunity from suit in their courts prior to the Constitution’s adoption, see *id.* at 715–18, its evidence did not (and could not) speak to the more pertinent question of whether such immunity survived the adoption of a novel form of union that made federal law supreme within the (limited) spheres delegated to the national government by the Constitution. See HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 32–33 (1981); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 652–57 (1993). Instead, the Court’s sovereign immunity decisions, much like its anticcommandeering decisions, have reflected its own functional sense of federalism writ large. Subjecting states to suit in their own courts would affront their “dignity” as residual sovereigns, as well as impose “substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States.” *Alden*, 527 U.S. at 749–50. Indeed, subjecting states to suit “would place unwarranted strain on the States’ ability to govern in accordance with the will of their citizens” by constraining their “allocation of scarce resources among competing needs and interests.” *Id.* at 750–51. It would also pit state courts against state legislatures. See *id.* at 751–52.

Again, these judgments cannot be made in the abstract, but rather must be weighed against Congress’s sovereign interest in using monetary liability as an effective means of enforcing federal policy, especially in a world in which the Court has already foreclosed federal courts from granting such relief. See Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1036, 1052–53 (2000). As one consequence of the Madisonian Compromise, state courts play a special role in ensuring the enforcement of federal rights. See *supra* note 216 and accompanying text. So it would hardly be irrational for the Constitution to give states immunity against suit in federal but not state courts. See Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 88–104 (1988).

In addition, the line between permissible and excessive intrusions upon state dignity becomes exceedingly blurry if one considers the contexts in which the Court has deemed suits against states constitutionally permissible. Congress can authorize suits against states, even suits for money damages, even in state court, as long as a federal executive agency files the suit on the injured party’s behalf. See *Alden*, 527 U.S. at 755–56. And if Congress does not want to involve the executive branch, it can still authorize officers’ suits that permit private individuals to get injunctions against state officials who violate federal law. See, e.g., *Verizon Md. Inc. v. Pub. Serv.*

The Court's reasoning in *Printz* also heralded a new attitude toward the Necessary and Proper Clause. In contrast with the post-New Deal Court's almost uniformly deferential approach to Congress's exercise of power under that clause, *Printz* instead characterized the clause as "the last, best hope of those who defend ultra vires congressional action."<sup>231</sup> Relying on scholarship arguing that the founders would have understood "proper" to incorporate federalism and separation of powers limits,<sup>232</sup> the Court announced a new approach to reading the clause:

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."<sup>233</sup>

The requirement of "propriety," in other words, authorized the Court to derive and enforce a zone of inviolable state sovereignty from its own reading of the constitutional structure as a whole.<sup>234</sup>

### *B. Who Defines Federalism?*

A similar approach informed the Roberts Court's handling of the constitutional challenge to the Affordable Care Act<sup>235</sup> (ACA) in *National Federation of Independent Business v. Sebelius*<sup>236</sup> (*NFIB*). At issue was the so-called "individual mandate," which requires Americans to maintain "minimum essential" health insurance or pay a "[s]hared responsibility payment" or "penalty" to the Internal Revenue Service.<sup>237</sup> The government argued that the individual mandate eliminated significant free-rider problems in the interstate health care market — among other things, the perverse incentives created by the Act's requiring insurers to cover preexisting conditions, a duty that made it possible for

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Comm'n of Md., 535 U.S. 635, 645 (2002). As in the case of anticommandeering, the application of abstract federal principles supports any number of reasonable outcomes.

<sup>231</sup> *Printz v. United States*, 521 U.S. 898, 923 (1997).

<sup>232</sup> *Id.* at 924 (citing Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297–326, 330–33 (1993)).

<sup>233</sup> *Id.* at 923–24 (alterations in original) (citation omitted) (quoting THE FEDERALIST NO. 33, at 204 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

<sup>234</sup> See Eugene Gressman, *Some Thoughts on the Necessary and Proper Clause*, 31 SETON HALL L. REV. 37, 43 (2000) (reading *Printz* as holding that "proper," as used by the Necessary and Proper Clause, "means consistency with the structural underpinnings of the Constitution," both federalism and separation of powers).

<sup>235</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

<sup>236</sup> 132 S. Ct. 2566 (2012).

<sup>237</sup> 26 U.S.C. § 5000A(a)–(b) (2012).

individuals to defer buying insurance until they got ill.<sup>238</sup> Though a majority of the Court upheld the individual mandate as a tax,<sup>239</sup> a different majority deemed it an impermissible exercise of legislative power under the Commerce and Necessary and Proper Clauses.<sup>240</sup> Chief Justice Roberts wrote the controlling opinion for both majorities.

The controlling opinion and the joint dissent co-authored by Justices Scalia, Kennedy, Thomas, and Alito focused on the question of whether the individual mandate, which was directed at *non*participants in the health care market, “regulate[d] Commerce” for purposes of the Commerce Clause.<sup>241</sup> In fact, because the statute unquestionably sought to regulate the interstate health insurance market, the more important — and, in reality, the only pertinent — question in the case was whether the individual mandate was a permissible means of implementing the commerce power under the Necessary and Proper Clause.<sup>242</sup> On that question, both the controlling opinion and the joint dissent took a narrow and decidedly undeferential view of Congress’s “necessary and proper” power.<sup>243</sup> As was true of the anti-commandeering principle in *Printz*, nothing in the constitutional text speaks to whether Congress can give free riders a financial incentive, even a negative one, to enter an extant interstate market. Nor does the course of American constitutional practice express any judgment about, much less set its face against, this particular means of regulating interstate commerce.<sup>244</sup> Rather, the controlling opinion found that

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<sup>238</sup> *NFIB*, 132 S. Ct. at 2585 (opinion of Roberts, C.J.). This free-rider effect would skew the insurance pool toward the less healthy and thereby increase premiums for all. *Id.* In addition, because hospitals must provide certain minimum services to individuals without regard to ability to pay, such hospitals end up passing on to insurers some of the costs of treating uninsured patients who cannot fully pay for such services. *See id.*

<sup>239</sup> *See id.* at 2594–95 (majority opinion); *see also infra* note 255.

<sup>240</sup> *NFIB*, 132 S. Ct. at 2585–93 (opinion of Roberts, C.J.); *id.* at 2644–50 (joint dissent).

<sup>241</sup> *See id.* at 2585–91 (opinion of Roberts, C.J.); *id.* at 2647–48 (joint dissent). As the controlling opinion reasoned, “[t]he power to regulate commerce presupposes the existence of commercial activity to be regulated.” *Id.* at 2586 (opinion of Roberts, C.J.). Accordingly, a statute directed at those *not* engaged in commerce fell outside the clause. *See id.* at 2587.

<sup>242</sup> *See id.* at 2591–93 (analyzing Congress’s power under the Necessary and Proper Clause); *id.* at 2646–47 (joint dissent) (same).

<sup>243</sup> Interestingly, the controlling opinion began by invoking principles of judicial restraint. *See id.* at 2579 (opinion of Roberts, C.J.) (“Proper respect for a coordinate branch of the government’ requires that we strike down an Act of Congress only if ‘the lack of constitutional authority to pass [the] act in question is clearly demonstrated.’” (alteration in original) (quoting *United States v. Harris*, 106 U.S. 629, 635 (1883))). The joint dissent, in contrast, insisted upon “careful scrutiny of regulations that do not act directly on an interstate market or its participants.” *Id.* at 2646 (joint dissent).

<sup>244</sup> The closest any opinion came to invoking history was the controlling opinion’s suggestion that the individual mandate qualified as a “great substantive and independent power,” and not the kind of incidental power that *McCulloch* had blessed. *Id.* at 2593 (opinion of Roberts, C.J.) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819)) (internal quotation marks omitted). At the same time, the controlling opinion did not specifically elaborate on what our

“the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent’ for Congress’s action.”<sup>245</sup>

Ultimately, the composite majority’s rejection of the individual mandate as a “necessary and proper” regulation rested, as in *Printz*, on the abstract functional judgment that this regulatory technique gave Congress *too much* power in a system of federalism.<sup>246</sup> None of the opinions denied, nor could have denied, that inducing nonmarket participants to join a national insurance risk pool might address the problem of free ridership in an interstate insurance market. But to allow such regulation, the Chief Justice wrote, would open up a “vast domain” of new federal power:

Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and — under the Government’s theory — empower Congress to make those decisions for him.<sup>247</sup>

If the imposition of externalities could empower Congress to compel the uninsured to buy insurance, it might also empower Congress to address the social costs of unhealthy diets by requiring bad eaters “to buy vegetables.”<sup>248</sup> “That,” the Chief Justice wrote, “is not the country the Framers of our Constitution envisioned.”<sup>249</sup>

Though more than reasonable, the concept of federalism implicit in the analysis above is, again, too abstract to bear the weight placed on it. To say that the founders would not have envisioned such regulation is a given. But neither would they have envisioned the vast and integrated national health insurance that it addresses. Nothing intrinsic to the concept of “federalism” tells us whether this admittedly “substantial expansion of federal authority”<sup>250</sup> somehow goes too far. Indeed, since the Constitution balances interests in state autonomy against those in creating effective federal authority, one cannot conclude that this law is beyond the pale without considering the national regulatory interest it serves<sup>251</sup> — here, perhaps, that of managing a national health care issue that collective action problems might prevent individual

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legal tradition would have understood as a “great power” or what practices had, in the past, counted as such. *See also infra* pp. 58–59, 60.

<sup>245</sup> *NFIB*, 132 S. Ct. at 2586 (opinion of Roberts, C.J.) (alterations in original) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010)).

<sup>246</sup> *See id.* at 2589.

<sup>247</sup> *Id.* at 2587.

<sup>248</sup> *Id.* at 2588.

<sup>249</sup> *Id.* at 2589.

<sup>250</sup> *Id.* at 2592.

<sup>251</sup> *See Gerken, supra* note 199, at 110; *see also infra* p. 56.

states from addressing on their own.<sup>252</sup> Nor is it obvious why an “individual mandate” goes too far when the Court has, in the past, approved as “necessary and proper” such means as the regulation of *intrastate* commerce, the enactment of federal criminal laws, and the incorporation of a national bank.<sup>253</sup> At a minimum, the question of whether the individual mandate cuts too deeply against the federal-state balance struck by American federalism, and the question of where these lines should be drawn in general, turns on functional considerations about which reasonable people can differ.

Perhaps in that light, the controlling opinion squared up to the larger question of whether the Court owed Congress deference under the Necessary and Proper Clause and found that it did not:

As our jurisprudence under the Necessary and Proper Clause has developed, we have been very deferential to Congress’s determination that a regulation is “necessary.” . . . But we have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws, which are not “consist[ent] with the letter and spirit of the constitution,” are not “*proper* [means] for carrying into Execution” Congress’s enumerated powers.<sup>254</sup>

In other words, depending on the element of the Necessary and Proper Clause at issue, two *McCulloch* frameworks apply: questions of necessity (matters of degree) call for judicial deference; questions of propriety (consistency with letter and spirit) warrant independent judicial judgment. On that account, if a case comes down, as in *NFIB*, to a judgment call about the functional aims of federalism, the Necessary and Proper Clause delegates power to the Court, and not Congress, to make the call.<sup>255</sup>

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<sup>252</sup> See *NFIB*, 132 S. Ct. at 2612, 2628 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (explaining that if individual states tried to provide universal health care, they might draw people with preexisting conditions into their borders and thus skew their own risk pools toward the less healthy).

<sup>253</sup> See *id.* at 2627; see also *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (intrastate marijuana cultivation); *United States v. Hall*, 98 U.S. 343, 357 (1878) (criminal law); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 424 (1819) (national bank).

<sup>254</sup> *NFIB*, 132 S. Ct. at 2591–92 (opinion of Roberts, C.J.) (alterations in original) (citation omitted) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).

<sup>255</sup> It is worth saying a word about the Court’s decision to uphold the individual mandate as an exercise of Congress’s power to “lay and collect Taxes,” U.S. CONST. art. I, § 8, cl. 1. See *NFIB*, 132 S. Ct. at 2594–600 (majority opinion); see also *id.* at 2593–94 (opinion of Roberts, C.J.). As the controlling opinion explained, that decision rested on the seemingly deferential impulse to read an act of Congress, if possible, to sustain rather than invalidate it. *Id.* at 2594 (opinion of Roberts, C.J.). The deferential approach to that question by one majority — giving Congress the benefit of the doubt on the taxing power — stands in contrast with the other majority’s simultaneous exercise of independent judgment to determine the scope of Congress’s “necessary and proper” power. See *supra* p. 40 (describing the two majorities).

### C. Separation of Powers

The Rehnquist and Roberts Courts have been less active in separation of powers cases, but a similar approach to the Necessary and Proper Clause comes through there as well. Although some of the separation of powers cases have, as in the post–New Deal era, relied upon specific assignments of federal power or detailed constitutional procedures,<sup>256</sup> a new batch has also invalidated acts of Congress based on the Court’s high-level, functional assessment of what separation of powers requires.<sup>257</sup> In those cases, the Court has exercised independent judgment rather than deferring to Congress’s contrary judgment about the appropriateness of a particular governmental arrangement.

The best illustration comes from the Court’s latest word on presidential removal power.<sup>258</sup> In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,<sup>259</sup> the Roberts Court invalidated a

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<sup>256</sup> See, e.g., *Stern v. Marshall*, 131 S. Ct. 2594, 2608–09 (2011) (relying on the text, structure, and purpose of Article III to conclude that Congress may not “confer the Government’s ‘judicial Power’ on entities outside Article III,” *id.* at 2609 (quoting U.S. CONST. art. III, § 1)); *Clinton v. City of New York*, 524 U.S. 417, 436–40 (1998) (invalidating the Line Item Veto Act on the ground that it violated the Bicameralism and Presentment Clauses). For discussion of analogous decisions by the post–New Deal Court, see *supra* p. 31.

<sup>257</sup> For example, in *Raines v. Byrd*, 521 U.S. 811 (1997), the Court invalidated a provision of the Line Item Veto Act of 1996, Pub. L. No. 104-130, 110 Stat. 1200, that gave legislators standing to challenge the constitutionality of the Act. See *id.* § 3, 110 Stat. at 1211. Although the Court formally grounded its decision in the absence of an Article III “case” or “controversy,” *Raines*, 521 U.S. at 818, its opinion invoked neither the technical legal meaning of those terms nor any affirmative historical practice or precedent restricting congressional power to give legislators the right to sue. Instead, in denying congressional standing, *Raines* relied upon the absence of historical precedent for such litigation and upon functional concerns about generalized judicial supervision of the coordinate branches. See *id.* at 825–29. In so holding, the Court seemed to repudiate the oft-stated premise that Congress has the power to determine cognizable injuries through the legal rights it creates. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 500–01 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972).

In addition, the Court applied general separation of powers principles to bar Congress from reviving statutory rights of action that had gone to final judgment based on (what Congress viewed as) a misinterpretation of the statute of limitations. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 229 (1995) (finding that such legislation “substantially subvert[s] the doctrine of separation of powers”). The Court also relied on generalized principles of separation of powers — rather than the specific terms of the Incompatibility Clause, U.S. CONST. art. I, § 6, cl. 2 — to invalidate a statute that authorized members of Congress to sit on a review board for the Metropolitan Washington Airports Authority. See *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274–77 (1991). Finally, without formally invalidating acts of Congress, the Court has substantially rewritten jurisdiction-stripping statutes in order to implement a powerful, atextual judge-made presumption in favor of judicial review. See *Felker v. Turpin*, 518 U.S. 651, 660–62 (1996); *Webster v. Doe*, 486 U.S. 592, 603–04 (1988). In all of those cases, the Court has derived its rule of decision from high-level, functional conceptions of separation of powers law.

<sup>258</sup> The question of presidential removal power has been a contentious issue since the First Congress. See Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 361 (1927).

<sup>259</sup> 130 S. Ct. 3138 (2010).

provision of the Sarbanes-Oxley Act of 2002<sup>260</sup> that created a new independent agency — the Public Company Accounting Oversight Board (PCAOB) — to regulate the accounting industry in the wake of scandals that had disrupted the financial world. Congress gave the PCAOB broad rulemaking, enforcement, and licensing authority and placed it under the supervision of the SEC.<sup>261</sup> Under the complex arrangement specified by the Act, the SEC had extensive authority to review the PCAOB's decisions, structure its enforcement authority, and take away Board powers as the public interest required;<sup>262</sup> the SEC could not, however, remove PCAOB members unless it could show “good cause” as defined by the statute.<sup>263</sup>

For the first time in four generations, the Court struck down a restriction on removal. Previously, the Court had of course upheld a single-tiered “good cause” restriction on the removal of regulatory commissioners.<sup>264</sup> Two levels of removal restrictions, however, were at issue here. Although the SEC's organic act did not include an explicit removal restriction, the Court assumed (based on party stipulations) that the President could fire SEC Commissioners only for “good cause.”<sup>265</sup> In light of this second tier of restriction, the Court worried that the President could not fire SEC Commissioners for failure to supervise the PCAOB unless the SEC “unreasonabl[y]” decided that it lacked good cause to fire members of the PCAOB.<sup>266</sup> In the Court's view, placing so heavy a burden of justification on the President unconstitutionally interfered with the latter's Article II power to exercise “[t]he executive Power” and duty to “take Care that the Laws be faithfully executed.”<sup>267</sup>

<sup>260</sup> Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of the U.S. Code).

<sup>261</sup> See *Free Enter. Fund*, 130 S. Ct. at 3147–48 (describing the PCAOB's functions).

<sup>262</sup> *Id.* at 3148; see also *id.* at 3172–73 (Breyer, J., dissenting).

<sup>263</sup> *Id.* at 3148 (majority opinion). For purposes of the statute, “good cause” to remove a member of the PCAOB arose only when that official “willfully violated” the Sarbanes-Oxley Act, the Board's own rules, or any of the securities laws; “willfully abused” his or her authority; or, “without reasonable justification or excuse,” failed to enforce the law. 15 U.S.C. § 7217(d)(3) (2012).

<sup>264</sup> See *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

<sup>265</sup> In particular, the Court assumed that the President could remove SEC Commissioners only for “inefficiency, neglect of duty, or malfeasance in office” — the same standards that applied to the Federal Trade Commission and that the Court had sustained as constitutional in *Humphrey's Executor*. *Free Enter. Fund*, 130 S. Ct. at 3148–49 (quoting *Humphrey's Ex'r*, 295 U.S. at 620) (internal quotation marks omitted).

<sup>266</sup> *Id.* at 3154.

<sup>267</sup> *Id.* at 3146 (alteration in original) (first quoting U.S. CONST. art. II, § 1, cl. 1; then quoting *id.* art. II, § 3) (internal quotation marks omitted); see also *id.* at 3147 (stressing that the judgment about whether a PCAOB member “is neglecting his duties or discharging them improperly” is not vested in the President, but rather in “another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply because that officer disagrees with him”).

Although the Court's opinion formally invoked the text of Article II, it made no attempt to ascertain the technical meaning of either "[t]he executive Power" or the Take Care Clause, each of which has a rich and complex historical context that bears rather directly on the removal question.<sup>268</sup> The Court also did not rely on any settled course of historical practice,<sup>269</sup> beyond its quick reference to the famous

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<sup>268</sup> The executive power known to our English forebears assigned the crown limitless power to remove subordinates. See *Myers v. United States*, 272 U.S. 106, 118 (1926). At the same time, however, a familiar common law maxim asserted that the power to remove ran with the power to appoint. See THE FEDERALIST NO. 77, *supra* note 219, at 458–63 (Alexander Hamilton). By dint of the advice-and-consent requirements of the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, the President did not inherit the unilateral appointment power enjoyed by the crown. See Manning, *Separation of Powers*, *supra* note 13, at 2027 n.434. In addition, Professor Edward Corwin tells us that the crown's appointment and removal powers originated in "a much wider [royal] prerogative in the creation of offices." Corwin, *supra* note 258, at 383. However such considerations might or might not ultimately affect the scope of presidential removal power under the U.S. Constitution, invocation of the common law meaning of "[t]he executive Power" at least requires interpreters to take these historical factors into account. See Manning, *Separation of Powers*, *supra* note 13, at 2027; see also *Myers*, 272 U.S. at 119–20 (arguing that the historical differences between royal and presidential powers do not negate the executive character of the removal power).

The meaning of the Take Care Clause is also far from self-evident. Many see in its text and history little evidence of broad presidential supervisory power. For example, some argue that the clause, read in its historical context, merely served to make clear that the President did not inherit the royal prerogative to suspend or dispense with the law. See, e.g., Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 613 (1989); Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 90 & n.151 (1983). Quite apart from that theory, many argue that a clause imposing a duty is a funny place to announce a sweeping grant of presidential authority. See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 61–70 (1994); A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787, 800 (1987). Indeed, Professor Corwin has noted that the Take Care Clause "was taken almost verbatim from the New York constitution of 1777, which none the less gave the executive of that state very little voice in either appointments or removals." Corwin, *supra* note 258, at 385. Conversely, some see in the record of the clause's adoption strong evidence that the founders read it as the broad grant that most scholars now deny. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 616–22 (1994). And some (myself included) think the best reading of the text at least implies a power sufficient to carry out the apparent duty of ensuring faithful execution. See, e.g., Manning, *Separation of Powers*, *supra* note 13, at 2036–37; Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 360–61 (2008). One view even holds that the clause gives the President general authority to promote federal interests as long as he or she does not act *contra legem*. See WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 78 (1916). Whatever the right interpretation of the Take Care Clause (a matter beyond this Foreword's scope), the important point is that the Court in *Free Enterprise Fund* invoked that clause without interpreting it.

<sup>269</sup> No historical practice specifically forecloses Congress's power to establish the arrangement at issue. Indeed, state constitutions at the time of the founding did not always lodge appointment or removal power in the chief executive. See *Myers*, 272 U.S. at 118. At least after the Civil War, moreover, federal statutes subjected a number of administrative offices to good cause limitations. See *id.* at 262–64 (Brandeis, J., dissenting). Finally, Justice Breyer's dissent in *Free Enterprise Fund* catalogued a number of existing administrative arrangements that themselves involve two-tiered removal restrictions. See *Free Enter. Fund*, 130 S. Ct. at 3178–82 (Breyer, J., dissenting).

“Decision of 1789”<sup>270</sup> — the First Congress’s influential (but, it turns out, inconclusive) determination to affirm the President’s power to remove the Secretary of Foreign Affairs.<sup>271</sup> Apart from the Decision of 1789, the historical evidence the Court found “most telling” in *Free Enterprise Fund* was “the lack of historical precedent” for an arrangement like the one at issue.<sup>272</sup>

Most important for present purposes, the Court also said nothing about the relationship between Article II and the Necessary and Proper Clause. Although Justice Breyer’s dissent stressed that the Necessary and Proper Clause empowers Congress “to enact statutes ‘necessary and proper’ to the exercise of its specifically enumerated constitutional authority,”<sup>273</sup> he might have added that the clause also gives Congress the more relevant power to implement “all other Powers vested by this Constitution . . . in any Department or Officer” of the government.<sup>274</sup> That additional text is significant because it gives Congress express authority over the implementation of the coordinate branches’ powers. Hence, the notion that the President is the sole repository of the executive power does not resolve to what degree, and by what means, Congress may regulate the exercise of such presidential power. Congress’s “implementing legislation” regularly prescribes quite confining rules of practice and procedure for the executive and judicial branches,<sup>275</sup> and the line between permissible and impermissible regulation of that type is often a blurry one.

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Although the Court sought to distinguish Justice Breyer’s examples on various grounds, *see id.* at 3159–61 (majority opinion), its attempt to do so, even if persuasive, did not make an affirmative historical case against the scheme Congress chose.

<sup>270</sup> *Free Enter. Fund*, 130 S. Ct. at 3152.

<sup>271</sup> The First Congress’s decision has often been read as a victory for members of Congress who favored illimitable presidential removal power. *See, e.g., Myers*, 272 U.S. at 111–15; *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839). A close reading of the legislative history by prominent legal historians, however, has shown that the House was divided three ways — with roughly equal numbers believing that (a) the President had illimitable removal power; (b) Congress should get to determine the contours of the power to remove federal officers; and (c) the Senate must give advice and consent to the removal of officers appointed with advice and consent. *See* DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 40–41 (1997); Corwin, *supra* note 258, at 361. Hence, even to the most informed of the founding generation, the removal question was unsettled.

<sup>272</sup> *See Free Enter. Fund*, 130 S. Ct. at 3159 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)).

<sup>273</sup> *Id.* at 3165 (Breyer, J., dissenting).

<sup>274</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>275</sup> Congress thus may specify procedures and deadlines that agencies must follow in executing the law. *See generally* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006) (addressing this phenomenon comprehensively). The Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2012), for example, prescribes detailed procedures for agency rulemaking and adjudication, both of which constitute executive functions in a constitutional sense. *See* *Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (characterizing those functions as “executive”). Within broad limits, Congress may prescribe — or determine the criteria and procedures for prescribing — the

As in the federalism cases, the Court in *Free Enterprise Fund* ultimately relied on fairly high-level functional considerations to draw the constitutional line at issue. To be sure, the Court asserted that the Act compromised “the President’s ability to ensure that the laws are faithfully executed.”<sup>276</sup> But, since the Court nowhere identified what it means to “take Care that the Laws be faithfully executed,”<sup>277</sup> its reference to that clause — and its reference to the Vesting Clause — served largely as placeholders for the Court’s own functional assessment of how much accountability executive officers properly owe to the President. In contrast with a one-tiered removal restriction, a two-tiered restriction produced too much “dispersion of responsibility” and, thus, too much “diffusion of power . . . [and] accountability.”<sup>278</sup> It is true that the Court buttressed its conclusions with observations by Hamilton and Madison about the contemplated accountability of federal officers.<sup>279</sup> But those remarks were too general to provide concrete guidance about the validity of the arrangement at hand — or about how to distinguish it from other arrangements that had survived the Court’s scrutiny.<sup>280</sup>

Whatever else one might conclude, the Court’s analysis doubtless left room for reasonable disagreement about the permissibility of the statutory scheme. Put to one side the question of why a one-tiered but not a two-tiered removal restriction leaves intact a constitutionally

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rules of practice and procedure that structure the way the federal courts exercise their judicial power. See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9–10 (1941) (“Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States . . .” (footnote omitted)); *Bank of the U.S. v. Halstead*, 23 U.S. (10 Wheat.) 51, 53–54 (1825) (holding that the Necessary and Proper Clause gives Congress the right “to regulate the proceedings on executions, and direct the mode, and manner, and out of what property of the debtor satisfaction may be obtained,” *id.* at 54).

<sup>276</sup> *Free Enter. Fund*, 130 S. Ct. at 3155.

<sup>277</sup> Even if one ultimately concludes (as I do) that the Take Care Clause gives the President implied power to fulfill the duty it imposes, see *supra* note 268, such a conclusion does not answer the further question of what it means to ensure “faithful” execution of the laws. Does the clause imply that the President must have power to impose upon subordinates his or her views of reasonably contestable legal questions, or merely to correct subordinates’ clear errors of law? See Manning, *Separation of Powers*, *supra* note 13, at 2037 n.483. Or might it even connote some broader presidential control over prosecutorial discretion? See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (suggesting that it does). Because the Court did not attempt to define with particularity what “faithful” execution entails, its reliance on the Take Care Clause necessarily defaulted to the higher-level functional inferences discussed in the text above.

<sup>278</sup> *Free Enter. Fund*, 130 S. Ct. at 3154–55.

<sup>279</sup> See *id.* at 3155.

<sup>280</sup> This concern stands quite apart from the question of whether, and how much, to credit individual remarks by members of the founding generation — even members as prominent as Hamilton and Madison. See Manning, *supra* note 219, at 1348–50.

adequate degree of presidential supervision.<sup>281</sup> The real puzzle in *Free Enterprise Fund* is why the Court thought that the requisite constitutional accountability had to run through the SEC's removal power rather than through the SEC's substantial other means of supervising the PCAOB.<sup>282</sup> If Congress has the constitutional power not to deny, but to structure, the President's means of supervision, then reasonable people might well differ about the sufficiency, to that end, of the SEC's broad statutory power to review, structure, and displace the Board's decisions and powers.<sup>283</sup> On that question, the Court supplanted Congress's judgment with its own independent judgment about both the degree, and the means, of accountability required for subordinate agency officials in our constitutional system.

### III. THE TEXTUAL BASIS FOR JUDICIAL DEFERENCE

As the prior discussion shows, the Court in the Rehnquist-Roberts era has taken two distinct approaches toward Congress's exercise of its powers under the Necessary and Proper Clause. In one set of cases — commerce power, rational basis, nondelegation, and now statutory interpretation cases — the modern Court has mostly maintained and, in crucial ways, extended the post-New Deal Court's deferential posture toward Congress on how to implement federal power. In another set of cases — what I have called freestanding federalism and separation of powers cases — the Court has felt free to displace Congress's implementation strategies on the basis of abstract structural inferences about which reasonable people can doubtless differ. In cases such as *Printz*, the Court seems to have recognized this disjunction and sought to justify it by reading the word “proper” as a delegation to the judiciary to particularize, and then to enforce against Congress, those high-level values the Court has teased from the constitutional structure as a whole.<sup>284</sup>

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<sup>281</sup> If the President had “good cause” to remove an SEC Commissioner in order to ensure the law's faithful execution, then it is unclear why the President would be barred from removing the same Commissioner if that official would not, in turn, remove for “good cause” a PCAOB member who was not (in the President's view) faithfully executing the law. See Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 FORDHAM L. REV. 2541, 2562–65 (2011).

<sup>282</sup> See *Free Enter. Fund*, 130 S. Ct. at 3158 (“Broad power over Board functions is not equivalent to the power to remove Board members.”).

<sup>283</sup> As noted, the SEC has the power to review and revise all Board rules or sanctions, to adopt rules structuring Board investigations, to initiate SEC investigations, and to relieve the Board of some or all of its enforcement authority as the public interest requires. See *id.* at 3148; *id.* at 3172–73 (Breyer, J., dissenting); see also *supra* p. 44.

<sup>284</sup> The Court has several times reaffirmed *Printz*'s jurisdictional reading of that term. See, e.g., *Jinks v. Richland Cnty.*, 538 U.S. 456, 464–65 (2003); *Alden v. Maine*, 527 U.S. 706, 732–33 (1999); see also *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring in the judgment). In addition, it is worth noting that the Court has never explicitly tied its freestanding separation

This Part argues that, in contrast with the Court's approach in the second set of cases, the judiciary owes Congress deference across the board when the latter exercises its powers under the Necessary and Proper Clause. It suggests that given the structure of the clause and the open nature of its terms, the Necessary and Proper Clause inevitably delegates broad interpretive lawmaking power to flesh out the details of constitutional structure — including, by the Court's lights, abstract notions of federalism and separation of powers. Since the clause expressly directs that delegation to *Congress*, it makes little sense to infer that the judiciary, rather than Congress, has the ultimate say on matters of interpretive discretion. Instead, Congress's reasonable view of what is "necessary and proper" should prevail. This conclusion would hold, moreover, even if one substituted the leading revisionist accounts of the clause for the Court's view of its meaning.

#### A. Deference and Delegation

In deciding whether the Court should defer to Congress's judgments under the Necessary and Proper Clause, principles of administrative law provide a useful (though of course not controlling) point of comparison.<sup>285</sup> Just as an organic act delegates and allocates governmental power from Congress, the Constitution delegates and allocates governmental power from the people. Though the two contexts present obvious differences,<sup>286</sup> their analytical structures are often similar

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of powers case law to the "propriety" requirement. But if the Necessary and Proper Clause prescribes jurisdictional limits on Congress's power, *see Free Enter. Fund*, 130 S. Ct. at 3165 (Breyer, J., dissenting), it is difficult to segregate separation of powers constraints from those of federalism.

<sup>285</sup> Others have made such a comparison. *See* Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983); Richard Murphy, *The Brand X Constitution*, 2007 BYU L. REV. 1247; Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2584–85 (2006).

<sup>286</sup> For example, one major difference lies in the presumptive burden of justification for legislative versus administrative policymaking. The American administrative law tradition now requires agencies to justify and lay bare on the record the basis for their policymaking decisions. *See* *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43–44 (1983); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416–20 (1971); *SEC v. Chenery Corp.*, 318 U.S. 80, 87–88 (1943); *see also* MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS?* 15–18 (1988) (explaining the synoptic vision of administrative law). But in cases of ordinary social and economic legislation, modern rationality review suggests that Congress need not justify its decisions on the legislative record. *See* *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314–15 (1993); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). To be sure, the Court has not applied the same premise to Congress's exercise of its enforcement powers under the Civil War Amendments. There, the Court has insisted that Congress create a legislative record sufficient to substantiate the existence and scope of a constitutional problem to be remediated. *See, e.g.,* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2627–29 (2013); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368–74 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89–91 (2000). Justice Breyer has observed that the Court in such cases treats "the congressional record as if it were an administrative agency record." *Garrett*, 531 U.S. at 376 (Breyer, J., dissenting). Consideration of the Court's differential treatment of the two distinct types of legislation is beyond this Foreword's reach. For

enough to make comparisons instructive. One such similarity arises from the relationship between delegation and deference.

Bedrock principles of administrative law teach us that deference, at least in the strong sense, depends on both the existence and the recipient of a delegation. In a famous article, Professor Henry Monaghan notes that *Marbury's* account of the judicial function assumes that when a case turns on the meaning of a canonical text, the judiciary must decide the meaning of that text.<sup>287</sup> But, he adds, that premise does not contradict the longstanding judicial practice of deferring to agency interpretations of law — that is, accepting an agency's *reasonable* interpretation even if the reviewing court disagrees with it.<sup>288</sup> Here is why: Sometimes, an organic act delegates to an *agency* the discretion to choose among reasonably available interpretations of a vague or open-ended statute.<sup>289</sup> In such cases, a reviewing court "interprets" the statute by determining whether the agency has stayed within the bounds of its delegation — whether its interpretation falls among the reasonable alternatives left open to it by the statute's terms. In Monaghan's words:

In this context, the court is not abdicating its constitutional duty to "say what the law is" by deferring to agency interpretations of law: it is simply applying the law as "made" by the authorized law-making entity. Indeed, it would be violating legislative supremacy by failing to defer to the interpretation of an agency to the extent that the agency had been delegated law-making authority.<sup>290</sup>

To make this point more concrete, recall the facts of *Chevron* itself.<sup>291</sup> Congress tasked the EPA with enforcing stringent permit requirements for any "new or modified major stationary source[]" of pollution.<sup>292</sup> Rather than fully defining "stationary source," Congress left it to the agency to flesh out its meaning by regulation.<sup>293</sup> After first interpreting the term to include any piece of polluting equipment, the

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present purposes, it suffices to observe that the default position for justifying ordinary Article I legislation differs from the default position for justifying agency action.

<sup>287</sup> See Monaghan, *supra* note 285, at 6; see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

<sup>288</sup> See Monaghan, *supra* note 285, at 9 ("[T]he judicial duty 'to say what the law is' . . . demands nothing with respect to the *scope* of judicial review . . .").

<sup>289</sup> See *id.* at 25–26.

<sup>290</sup> *Id.* at 27–28.

<sup>291</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 848–50 (1984).

<sup>292</sup> 42 U.S.C. § 7502(c)(5) (2012). A new or modified source had to achieve the "lowest achievable emission rate," *Chevron*, 467 U.S. at 850, and the regulated entity had to show that all of its other sources in the same state as the source met applicable emissions standards, see 42 U.S.C. § 7503(a)(3).

<sup>293</sup> See Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 301(j), 91 Stat. 685, 770 (codified at 42 U.S.C. § 7602(j)) (enabling the EPA Administrator to pass rules concerning the scope of the definition).

EPA later reinterpreted it to mean only an entire factory, a reading that made it less likely that firms would trigger the permit requirement.<sup>294</sup> For two reasons, the Court thought it appropriate to defer to the agency's new position. First, statutory indeterminacy created interpretive discretion; neither the text nor the legislative history spoke directly to the choice between the two distinct approaches reflected in the EPA's shifting positions.<sup>295</sup> Second, in the Court's view, it made more sense to read the organic act to delegate that interpretive discretion to the politically accountable agency charged with defining the term by regulation — and not the court tasked with reviewing it.<sup>296</sup> Had the organic act precluded the agency's position, the reviewing court would of course have had to enforce the clear terms of the statute, despite the act's delegation of implemental rulemaking power to the agency.<sup>297</sup> Where the statute, however, left room for reasonable disagreement, the delegation of law elaboration power to the agency gave *it* the final say.<sup>298</sup>

In constitutional law, the analogue is Professor James Bradley Thayer's "clear mistake rule" — the premise that the judiciary should defer to the judgments of "those who have the right to make laws" unless the latter "have made a very clear [mistake], — so clear that it is not open to rational question."<sup>299</sup> Although much of Thayer's article defends the clear mistake rule as a longstanding rule of judicial administration in both state and federal systems,<sup>300</sup> his analysis also reflects considerations very much like those used to justify *Chevron* deference. Starting from the proposition that the Constitution delegates to Congress the "power, not merely of enacting laws, but of putting an interpretation on the constitution which shall deeply affect the whole country,"<sup>301</sup> Thayer argues that the judiciary must defer to Congress's exercise of constitutional discretion:

In [determining constitutionality] the court was so to discharge its office as not to deprive another department of any of its proper power, or to limit it in the proper range of its discretion. . . . [T]hese questions . . . require an allowance to be made by the judges for the vast and not definable range of legislative power and choice, for that wide margin of considerations

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<sup>294</sup> Compare Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52,676, 52,694–95 (Aug. 7, 1980) (codified at 40 C.F.R. pts. 51, 52, 124), with Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50,766, 50,766 (Oct. 14, 1981) (codified at 40 C.F.R. pts. 51, 52).

<sup>295</sup> See *Chevron*, 467 U.S. at 859–64.

<sup>296</sup> See *id.* at 864–66.

<sup>297</sup> See *id.* at 842–43.

<sup>298</sup> See *id.* at 843–44.

<sup>299</sup> Thayer, *supra* note 8, at 144.

<sup>300</sup> See *id.* at 138–42.

<sup>301</sup> *Id.* at 136.

which address themselves only to the practical judgment of a legislative body. Within that margin, as among all these legislative considerations, the constitutional law-makers must be allowed a free foot. In so far as legislative choice, ranging here unfettered, may select one form of action or another, the judges must not interfere . . .<sup>302</sup>

On Thayer's account, all power grants — the Commerce Clause,<sup>303</sup> the Bankruptcy Clause,<sup>304</sup> the Copyright Clause,<sup>305</sup> and the like — presumably effect such delegations.<sup>306</sup>

However, the foundation for Thayer's presumed delegation is not self-evident. Again, by analogy, relevant principles of administrative law instruct that an organic act may assign power without also delegating interpretive lawmaking discretion to the assignee; the original lawmaker may, for any number of reasons, choose instead to leave the final say with another institution, such as a reviewing court.<sup>307</sup> What Thayer neglected to establish was why one should read the constitutional grants to Congress as necessarily including implicit delegations to resolve indeterminacies in their own meaning.<sup>308</sup> No constitutional text prescribes the scope of judicial review.<sup>309</sup> Nor does the relevant history walk a straight line.<sup>310</sup> And the large and impressive academic

<sup>302</sup> *Id.* at 135.

<sup>303</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>304</sup> *Id.* art. I, § 8, cl. 4.

<sup>305</sup> *Id.* art. I, § 8, cl. 8.

<sup>306</sup> To the extent that constitutionmakers understood the Bill of Rights as but the flip side of the grants — simply affirming limitations implicit in the enumeration of powers — Thayer's theory of delegation might extend to rights as well. See, e.g., Bradford R. Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319, 349–50 (2003) (explaining that theory of rights); Philip A. Hamburger, *Trivial Rights*, 70 NOTRE DAME L. REV. 1, 3 (1994) (same).

<sup>307</sup> See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 231–34 (2001); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492–93 (1947); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

<sup>308</sup> See G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. U. L. REV. 48, 75 (1993). Although Thayer analyzes the U.S. Constitution at various points, see, e.g., Thayer, *supra* note 8, at 135–36, much of his discussion also focuses on, without differentiating, state constitutional practice, see, e.g., *id.* at 140–42, 151.

<sup>309</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 1 (2d ed. 1986).

<sup>310</sup> To be sure, early American judges, including some Justices of the Supreme Court, were known to invoke something very much like Thayer's "clear mistake rule." See, e.g., WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC* 222–27 (1995); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 55–56 (1985). However, the Court had few early opportunities to review the acts of Congress, and neither the Court's rhetoric nor its practice was uniformly Thayerian. See, e.g., F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1459 (2010); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1277–78 (1996). Nor does *Marbury* itself reflect anything resembling the clear mistake rule. See CURRIE, *supra*, at 33 (discussing *Marbury*'s rhetoric); Monaghan, *supra* note 285, at 8–9 (same); see also Akhil Reed Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. CHI. L. REV. 443, 482–83 (1989) (noting that section 13 of the Judiciary Act of 1789 did not obviously violate Article III); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 14–16 (same). More importantly, the overall course of American judicial practice suggests, if anything, that the conception of the

debate over Thayerism often invokes “free-form” structural inferences that endeavor to square the standard of judicial review with large constitutional premises such as democracy, checks and balances, deliberation, relative institutional capacities, and the like.<sup>311</sup> Viewed at that level of generality, the materials leave the judiciary a great deal of discretion to prescribe the scope of judicial review in constitutional cases. For now, at least, the Court has not chosen to make the clear mistake rule its default.<sup>312</sup>

Whatever the merits or demerits of Thayerism in general, I argue here that the text of the Necessary and Proper Clause, read against the constitutional structure as a whole, requires deference to Congress’s reasonable judgments about how to implement not only its own powers, but also those of the coordinate branches. Two considerations, taken in combination, support that conclusion, even if the Court does not defer to Congress in general. First, the phrase “necessary and proper” constitutes the kind of “empty standard” one usually associates with delegation. Indeed, under any of the leading interpretations, the open-ended terms of the clause inevitably delegate interpretive law-making discretion to some entity. The question is to whom. Second, while many familiar clauses also contain open-ended terms, this clause is recognizable as part of a family of constitutional clauses that single out *Congress* for special responsibility to implement *other* specified

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proper judicial role has not been a fixed point, but rather has been a matter of ongoing evolution and contestation. *See, e.g.*, SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 13–102, 109–75 (1990) (discussing shifting attitudes toward judicial review in the early Republic); Larry D. Kramer, *The Supreme Court, 2000 Term — Foreword: We the Court*, 115 HARV. L. REV. 4, 33–130 (2001) (describing changes in the Court’s attitude toward judicial review over time).

<sup>311</sup> With apologies to those omitted, the vastness of this literature permits only a sampling to give a flavor of the debate. *Compare, e.g.*, MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 57–58 (1999) (arguing that independent judicial judgment dilutes the political branches’ incentives to engage in meaningful constitutional deliberation or to exercise self-restraint), *and* WALDRON, *supra* note 103, at 211–81 (arguing that the legislature is where people properly go to resolve moral disagreements for which a “right answer” may exist but about which reasonable people can disagree), *and* Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1178–82 (2001) (examining Congress’s factfinding capacities relative to those of the judiciary), *with* BICKEL, *supra* note 309, at 25–26 (arguing that judges uniquely possess “the leisure, the training, and the insulation” to determine “matters of principle” required by constitutional adjudication, *id.* at 25), *and* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1375–77 (1997) (maintaining that legislative resolution of constitutional meaning will compromise the legal system’s capacity to settle constitutional law in the manner that a well-ordered constitutional system requires), *and* Steven G. Calabresi, *Thayer’s Clear Mistake*, 88 NW. U. L. REV. 269, 272–75 (1993) (contending that Thayerism diminishes checks on Congress by enabling Congress to determine the scope of its own powers).

<sup>312</sup> *See, e.g.*, Barkow, *supra* note 7, at 300–19. *See generally* Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137 (2011) (charting the Court’s increasing supremacy over time).

provisions of the Constitution. Within that family, moreover, the Necessary and Proper Clause uniquely gives Congress express power over the coordinate branches, including the judiciary. In that light, it turns the clause on its head to give the judiciary the final say, in cases of doubt, over what laws are “necessary and proper.” It is to that issue — the delegation of this interpretive power — that this Part now turns.

### B. *The Delegation*

Though people reasonably disagree about the precise content of “necessary and proper,” that phrase unquestionably delegates interpretive lawmaking discretion to some governmental institution. To continue the administrative law analogy, the phrase has the unmistakable feel of an “empty standard” — the kind that Congress routinely uses to signal its delegation of power to agencies.<sup>313</sup> Think of classic delegations that ask agencies to determine what is “fair and equitable,”<sup>314</sup> “just and reasonable,”<sup>315</sup> or in the “public interest, convenience, or necessity.”<sup>316</sup> Though not literally “empty,”<sup>317</sup> these open-ended phrases self-consciously forgo the specification of policy detail and, instead, call upon an agent of Congress’s choosing to supply that detail pursuant to vague criteria.<sup>318</sup> The same holds true of “necessary and proper” not only under the Court’s theory, but also under leading revisionist theories of the clause.

1. *The Court’s Theory of “Proper” Structural Limits.* — Start with the current Court’s take on the clause. On its account, which splits “necessary” from “proper” for purposes of interpretation, the requirement of “necessity” entails scrutiny of means-ends fit — a question of degree that, by the Court’s own lights, invites interpretive discretion and, thus, judicial deference to Congress’s judgments.<sup>319</sup> More complex is the Rehnquist and Roberts Courts’ take on “propriety.” As discussed, the Court now reads the term “proper” as authorization to determine not only whether an act of Congress complies with specified

<sup>313</sup> See Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 472–74, 478–80 (1985) (discussing the use of such standards in administrative law).

<sup>314</sup> *Yakus v. United States*, 321 U.S. 414, 427 (1944) (Emergency Price Control Act of 1942).

<sup>315</sup> *Fed. Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944) (Natural Gas Act of 1938).

<sup>316</sup> *NBC v. United States*, 319 U.S. 190, 225 (1943) (Communications Act of 1934).

<sup>317</sup> To be valid, the standards must be definite enough, at least in theory, to supply an “intelligible principle” to guide the agency’s discretion. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); see also *supra* p. 14.

<sup>318</sup> See Radin, *supra* note 103, at 883–84 (discussing the range of discretion created by open-ended language).

<sup>319</sup> See, e.g., *United States v. Kebodeaux*, 133 S. Ct. 2496, 2503–04 (2013); *United States v. Comstock*, 130 S. Ct. 1949, 1956–57 (2010); *Sabri v. United States*, 541 U.S. 600, 605 (2004).

constitutional limitations,<sup>320</sup> but also whether it fits with background principles of federalism and, presumably, also separation of powers.<sup>321</sup> This approach taps directly into *McCulloch*'s statement that a “necessary and proper” law must satisfy not only the “letter,” but also the “spirit,” of the Constitution.<sup>322</sup>

Let us assume that the Court has “proper” right — that the term invites consideration of freestanding federalism and separation of powers. As the cases in Part II illustrate, when one abstracts those concepts from the particular clauses that define and limit them, specifying the content of federalism and separation of powers demands the exercise of substantial interpretive policymaking discretion. Neither doctrine has a canonical form. And, to the extent one can discern the purposes underlying federalism and separation of powers, those purposes are vague, numerous, unranked, and often self-contradictory. Because neither doctrine provides firm answers in the abstract, the particulars of each almost invariably require the creation, rather than the excavation, of constitutional meaning.<sup>323</sup>

Think about the “spirit” of federalism as a determinant of what is constitutionally “proper.” The very notion of dual federalism — two sovereigns that exercise overlapping jurisdiction in the same territory — is a distinctly American invention.<sup>324</sup> No preexisting principles set a baseline for what “Our Federalism” entails.<sup>325</sup> Nor do the purposes

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<sup>320</sup> See *supra* pp. 31, 43 (discussing such cases).

<sup>321</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 923–24 (1997); see also *supra* p. 39.

<sup>322</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420–21 (1819). A number of recent opinions, including one opinion of the Court, have emphasized that aspect of *McCulloch*, typically in conjunction with the idea that the Court must protect the “spirit” of federalism. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2630 (2013); *Kebodeaux*, 133 S. Ct. at 2507 (Roberts, C.J., concurring in the judgment); *NFIB*, 132 S. Ct. 2566, 2592 (2012) (opinion of Roberts, C.J.); *Comstock*, 130 S. Ct. at 1971–72 (Thomas, J., dissenting).

<sup>323</sup> Some might describe this process as one of constitutional “construction,” rather than “interpretation.” See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 118–30 (2004) (dividing constitutional adjudication into (a) “interpretation” or the excavation of meaning from relatively precise clauses and (b) “construction” or the use of external values to flesh out generally worded clauses); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* 3–9 (1999) (same); see also, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 4–5 (2011) (drawing a similar distinction). For criticism of this dichotomy, see John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 772–80 (2009), which describes that distinction as artificial and foreign to our constitutional tradition.

<sup>324</sup> See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1448–49 (1987); Alpheus Thomas Mason, *The Supreme Court and Federalism*, 44 TEX. L. REV. 1187, 1190 (1966).

<sup>325</sup> See Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 INT’L J. CONST. L. 91, 95–96 (2004); Peter H. Schuck, *Citizenship in Federal Systems*, 48 AM. J. COMP. L. 195, 198 (2000). Subsequent American history shows that the principle of federalism has never hardened into anything too definite, but has remained ever a work in progress. See generally BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998);

of federalism speak with enough determinacy to resolve hard cases. The standard purposes cited by leading theorists include maximizing diverse local preferences, increasing meaningful democratic participation, fostering laboratories of governmental innovation, promoting interstate policy competition, and preserving liberty by ensuring that the federal and state sovereigns maintain sufficient independence to check one another.<sup>326</sup> Even considering those policies in isolation, one could move from such general principles to any number of reasonable conclusions about whether (or, more accurately, to what extent) federalism permits commandeering, individual mandates, or other governmental innovations.<sup>327</sup> Things become more complex still when one accounts for the various policies served by national power — such as protecting local minorities against factions, curbing economic protectionism, addressing interstate externalities, and slowing the “race to the bottom.”<sup>328</sup> As Professor Ernest Young writes, because all such “structural commitments” are “open-textured,” interpreters have no choice but to “develop[] rules to flesh out the allocation and balance of authority.”<sup>329</sup>

The same is true of separation of powers. No canonical version of that doctrine existed in 1789.<sup>330</sup> Nor has one emerged since.<sup>331</sup> Through the Vesting Clauses, the Constitution separates the major governmental powers among three unique branches of government.<sup>332</sup> But that fact alone, as noted, tells us little, if anything, about the central question of how far, and by what means, Congress may structure the exercise of the allocated powers.<sup>333</sup> As with federalism, the purposes of the separation of powers are too general and diverse to offer

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Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995).

<sup>326</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 458–59 (1991); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491–511 (1987) (book review).

<sup>327</sup> See *supra* pp. 35–38, 41–42.

<sup>328</sup> See DAVID L. SHAPIRO, *FEDERALISM* 14–57 (1995).

<sup>329</sup> Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1748–49 (2005).

<sup>330</sup> See, e.g., William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263, 267–68 (1989) (acknowledging the lack of a settled view of separation of powers at the time of the founding); Manning, *Separation of Powers*, *supra* note 13, at 1993–99 (discussing the variety of positions in founding-era separation of powers theory and in state practice).

<sup>331</sup> See M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 608–26 (2001) (discussing the lack of a baseline for measuring separation of powers violations under contemporary standards).

<sup>332</sup> See Akhil Reed Amar, *The Supreme Court, 1999 Term — Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 30 (2000); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237–38 (1994).

<sup>333</sup> See *supra* p. 46.

much concrete guidance. Among other things, the separation of powers and the accompanying checks and balances promote efficiency, energy, stability, limited government, control of factions, deliberation, the rule of law, and accountability.<sup>334</sup> Hence, Justice Brandeis could fairly write that the purpose of the separation of powers was “not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”<sup>335</sup> Justice Jackson, however, could also write, with no less accuracy, that “[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.”<sup>336</sup> Again, in the absence of any specific textual home or pattern of historical practice or judicial precedent, one could reasonably move from these broad and often-conflicting purposes to any number of fair conclusions about the acceptable number of tiers of removal restriction, the permissibility of giving legislators standing, or almost any free-standing separation of powers question.

In short, if “proper” means what the Court now says it means, it is a delegation of power to some institution to define what freestanding federalism and separation of powers mean in circumstances that the founders could not have contemplated. Whoever has the final say will get to balance broad policies of federalism against those of national power and broad purposes of separation against those of interdependence. Whatever one may think about this form of constitutional exegesis, it is quintessentially an exercise of constitutional policymaking discretion.

2. *The Revisionist Theories.* — Though a raft of new originalist scholarship has, in recent years, tried to read fresh content into the Delphic terms of the Necessary and Proper Clause, all of those theories also end up adopting largely open-ended understandings that lead to the delegation of large interpretive discretion. In the most far-reaching of the studies, four public law scholars — Gary Lawson, Geoffrey P. Miller, Robert G. Natelson, and Guy I. Seidman — joined forces in a book that traces the clause’s origins to eighteenth-century sources in the law of trusts, English administrative law, and the law of corporate

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<sup>334</sup> See W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* 127–28 (1965); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 430–37 (1987). One commentator has gone so far as to suggest that a purpose of the separation of powers was to safeguard federalism. See generally Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

<sup>335</sup> *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

<sup>336</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

charters.<sup>337</sup> Tying the clause to the “incidental powers” doctrine of trust law, Natelson argues that “necessary” would have meant “lesser in importance to the principal power” and that “proper” imported the standard fiduciary requirements that a measure “be within constitutional authority, reasonably impartial, adopted in good faith, and with due care — that is, with some reasonable, factual basis.”<sup>338</sup> Lawson and Seidman, in turn, see the clause as a natural vehicle for absorbing English administrative law principles of “reasonableness” — a standard that encompassed values such as fairness, impartiality, proportionality, means-ends fit, and respect for background rights.<sup>339</sup> Finally, Miller painstakingly canvasses the incidental powers clauses in eighteenth-century corporate charters and finds that “necessary” commonly appeared in contexts that suggested a demand for means-ends fit and that “proper,” in contrast, recurred in settings that suggested a need to protect individual shareholders from discriminatory treatment.<sup>340</sup>

Building on this work, another leading revisionist account — that of Professor William Baude — concludes that the Necessary and Proper Clause requires interpreters to distinguish between “incidental powers” (which are authorized) and “great powers” (which are not).<sup>341</sup> This framework presupposes that while Congress may invoke any number of “minor power[s]” that are “incidentally necessary to effectuating some explicit constitutional power,” “some powers are so great, so important, or so substantive, that we should not assume that they were granted by implication, *even if* they might help effectuate an enumerated power.”<sup>342</sup> This framework, Baude argues, is evident in early debates over the Necessary and Proper Clause, such as the one over the first Bank of the United States.<sup>343</sup> The idea, he adds, also appears in *McCulloch*,<sup>344</sup> where Chief Justice Marshall wrote that “[t]he power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them.”<sup>345</sup> According to Baude, such powers “are the kinds of powers

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<sup>337</sup> See GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 5–8 (2010) [hereinafter *ORIGINS*].

<sup>338</sup> *Id.* at 119.

<sup>339</sup> See *id.* at 121–25, 136–43.

<sup>340</sup> See *id.* at 160–74.

<sup>341</sup> See William Baude, *Rethinking the Federal Eminent Domain Power*, 122 *YALE L.J.* 1738, 1749 (2013).

<sup>342</sup> *Id.*

<sup>343</sup> See *id.* at 1750–55.

<sup>344</sup> See *id.* at 1753.

<sup>345</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819).

we would expect the Constitution to mention if they were granted<sup>346</sup> — a category to be fleshed out by common law analogy to previously recognized “great powers.”<sup>347</sup> Several members of the Roberts Court, though not the Court itself, have now endorsed the “great powers” approach as one metric for determining what is “necessary and proper.”<sup>348</sup>

Even taking the revisionists’ historical findings at face value,<sup>349</sup> none of the leading revisionist theories contradict the conclusion that “necessary and proper” creates the sort of interpretive discretion typical of a delegation. The terms identified by Lawson, Miller, Natelson, and Seidman in their book include classic standards such as reasonableness, proportionality, good faith, sufficient factual support, means-ends fit, and respect for background rights.<sup>350</sup> All of the authors,

<sup>346</sup> Baude, *supra* note 341, at 1749.

<sup>347</sup> See *id.* at 1808–11. In a similar vein, Professor J. Randy Beck has indicated that the chosen congressional means must be “consistent with the nature of the power from which the constitutional end derives.” J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 642. Like Baude’s, this account requires comparison of the means of implementation with the nature of the enumerated powers.

<sup>348</sup> See *Bond v. United States*, 134 S. Ct. 2077, 2101 (2014) (Scalia, J., joined by Thomas, J., concurring in the judgment); *United States v. Kebodeaux*, 133 S. Ct. 2496, 2507 (2013) (Roberts, C.J., concurring in the judgment); *NFIB*, 132 S. Ct. 2566, 2592 (2012) (opinion of Roberts, C.J.).

<sup>349</sup> Were one to look more closely at the historical claims in the *Origins* book, one might ask the following question: If the Necessary and Proper Clause traces back to several fields of law (such as trusts, public administration, and corporations), all of which treated the operative terms somewhat differently, then how could a reasonable constitutionmaker have embraced any one of those definitions? See John Harrison, *Enumerated Federal Power and the Necessary and Proper Clause*, 78 U. CHI. L. REV. 1101, 1117 (2011) (reviewing *ORIGINS*, *supra* note 337); John F. Manning, *The Necessary and Proper Clause and Its Legal Antecedents*, 92 B.U. L. REV. 1349, 1372 (2012) (reviewing *ORIGINS*, *supra* note 337). In addition, Professor John Mikhail has now canvassed archives and electronic databases that encode founding-era usage and has determined that variants of the phrase “necessary and proper” were often used in nonlegal and nontechnical contexts, apparently as a boilerplate way of referring, in general, to the appropriate exercise of discretion. See John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1114–21 (2014).

As for Baude’s account, it is worth noting that the “great substantive and independent powers” test was not central to *McCulloch*’s analysis. In addition, between *McCulloch* and the test’s reemergence in the Roberts Court, the Court mentioned that standard in only two opinions, one of them a dissent. See *Luxton v. N. River Bridge Co.*, 153 U.S. 525, 529 (1894) (upholding federal eminent domain power); *R.R. Co. v. Peniston*, 85 U.S. (18 Wall.) 5, 45–46 (1873) (Bradley, J., joined by Field, J., dissenting). In a small number of other Necessary and Proper Clause cases, the Court mentioned the phrase “great powers” in passing, but the decisions in those cases never turned on that concept. See, e.g., *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180, 208 (1921); *Logan v. United States*, 144 U.S. 263, 283 (1892). Indeed, in no case has the Court ever invalidated an act of Congress on the ground that it employed a “great substantive and independent power,” in contravention of the Necessary and Proper Clause.

<sup>350</sup> Along similar lines, Professor Randy Barnett argues that the term “proper” authorizes the judiciary to ensure that Congress does not violate inalienable — but also unenumerated — rights. See BARNETT, *supra* note 323, at 186–89; see also Lawson & Granger, *supra* note 232, at 297 (making a similar claim). As a first cut, including the word “proper” in an Article I grant of legislative power seems like a rather cryptic way to delegate such broad authority to the courts — rather like “hid[ing an] elephant[] in [a] mousehole.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001). And the Court has yet to take up Barnett’s invitation to read “proper” in that

moreover, acknowledge that the eighteenth-century legal concepts upon which they rely were anything but settled or determinate.<sup>351</sup> Baude similarly concedes the lack of any “crisp statement” of his “great powers” standard, other than “the general idea that more important powers are less likely to have been left to implication.”<sup>352</sup> Accordingly, even the strictest approaches embrace discretionary standards that inevitably delegate interpretive lawmaking power to someone.<sup>353</sup>

### C. *The Delegatee*

To say that the Necessary and Proper Clause delegates interpretive lawmaking power is not to say who should exercise it. Although the clause does not explicitly resolve who has the primary responsibility to flesh out its open-ended meaning, the best reading of its text, viewed in the context of the Constitution as a whole, gives *Congress* rather than the judiciary that responsibility. Unlike other constitutional clauses that delegate open-ended authority without specifying to whom, the

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way. While the historical question posed by Barnett’s claim is beyond the scope of this Foreword, it is worth noting that even if he is correct, the putative authority to identify, and to determine how to apply, a host of unenumerated rights would seem to invite the kind of interpretive discretion that the other revisionist theories also entail.

<sup>351</sup> See ORIGINS, *supra* note 337, at 78 (Natelson) (acknowledging that, at the time of the founding, the meaning of “proper” in trust law “seems not to have been defined in reported cases, so we can do no more than deduce it”); *id.* at 137 (Lawson & Seidman) (stating that the administrative law “principle of reasonableness was not at [the founding] specifically articulated as a distinct doctrine” and that there exists “no canonical source from which one can draw the contours of the principle as it stood in the founding era”); *id.* at 145, 175–76 (Miller) (noting that the two key terms had “no definite meaning in corporate practice,” *id.* at 175–76, and that, while the two “terms appear[ed] in reasonably predictable ways,” *id.* at 145, their use was far from uniform or consistent).

<sup>352</sup> Baude, *supra* note 341, at 1809. Professor John Harrison, who himself endorses a version of the great powers doctrine, has a similar assessment of its indeterminacy. Even if the “reasoning is fine in form,” he argues, “filling in the substance is famously difficult.” Harrison, *supra* note 349, at 1125.

<sup>353</sup> Professor Kurt Lash believes that the Tenth Amendment requires strict construction of federal power and thus would defeat any claim of broad delegation. See 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). The conventional wisdom, however, is to the contrary. Article II of the Articles of Confederation had provided 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.” ARTICLES OF CONFEDERATION of 1781, art. II (emphasis added). As the Court noted in *McCulloch*, the Tenth Amendment pointedly left out the word “expressly.” See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406–07 (1819). Lash argues, however, that although the Tenth Amendment omitted the word “expressly,” it tellingly specified that undelegated powers were reserved not only to the states, but also “to the people.” Lash, *supra*, at 1924. He maintains that this phrase would have been understood, under established conventions, to signal that any delegation from the people to its agents must be strictly construed. See *id.* at 1922–26. Had the founders meant to retain the Articles of Confederation’s requirement of “express[ly]” delegation, adding the words “or to the people” seems like an implausibly “oblique way to do so.” Manning, *Federalism*, *supra* note 13, at 2064 n.270.

Necessary and Proper Clause frames its delegation as an express grant of *congressional* power. In contrast with most other power grants, moreover, the Necessary and Proper Clause does not merely confer substantive powers over regulatory topics such as commerce or bankruptcy, but rather grants express power *to implement other constitutional powers*. Indeed, the clause gives Congress authority to implement not only its own powers but also those assigned to all other branches of government. No other part of the Constitution gives one branch explicit authority to implement the powers of a different branch. Taken together, these textual signals suggest that the Necessary and Proper Clause singles out Congress for unique responsibility to determine, in the exercise of its delegated power, what is “necessary and proper” to implement all other federal powers.

Before turning to the substance of the analysis, a word is in order about the interpretive method I use here. As with any statutory or constitutional provision, I look first to the text of the Necessary and Proper Clause. As the prior paragraph suggests, I believe that the clause sends a strong signal about the identity of its preferred delegatee, but only after reading its text in the context of the Constitution as a whole. Reading a text in the context of a surrounding text is a standard form of textual exegesis.<sup>354</sup> To be sure, it is also a sort of structural inference, but not the free-form variety that the Court has used in the federalism and separation of powers cases I criticize here.<sup>355</sup> I am not teasing from a number of disparate clauses free-standing values such as deference, democracy, or any other abstract justification for Thayerism.<sup>356</sup> Those values I find too indeterminate to do the necessary work. Instead, I read a specific text in light of its telling contrasts with otherwise similar texts.<sup>357</sup> Although this technique tends to impose some added coherence upon a document that was surely not drafted with perfect coherence, it does so only within the margins of interpretive discretion permitted by the relevant text.<sup>358</sup> It does so, moreover, not as a way to answer the impossible question of

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<sup>354</sup> See, e.g., *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1707–08 (2012); *Whitman*, 531 U.S. at 466; *Rowland v. Cal. Men’s Colony*, 506 U.S. 194, 199 (1993).

<sup>355</sup> See *supra* Part II, pp. 30–48.

<sup>356</sup> See *supra* pp. 52–53.

<sup>357</sup> That form of holism has prominent adherents across a broad spectrum of interpretive philosophies. See, e.g., DWORKIN, *supra* note 105, at 339–40 (urging that integrity in interpretation requires consideration of how a clause relates to surrounding clauses); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 167–69 (2012) (endorsing the whole-text canon). See generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

<sup>358</sup> See Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CALIF. L. REV. 699, 719–20 (2008). In that sense, my approach here is consistent with the Court’s textualist approach to statutory interpretation, which permits consideration of purpose and coherence in cases in which the text leaves room to do so. See *supra* pp. 26–29.

what constitutionmakers “had in mind,” but rather because even the strictest textualist prefers to read the text, *if possible*, “to make sense rather than nonsense out of the *corpus juris*.”<sup>359</sup>

From that starting point, let me suggest two related textual reasons for concluding that the Court should defer to Congress’s reasonable judgments under the Necessary and Proper Clause, even if the Court exercises independent judgment in constitutional cases more generally.

1. *The Specification of Congress.* — In contrast with the Necessary and Proper Clause, a great many open-ended clauses do not specify the recipient of the power they inevitably delegate. Think of “Privileges and Immunities,”<sup>360</sup> “the freedom of speech,”<sup>361</sup> “unreasonable searches and seizures,”<sup>362</sup> or “cruel and unusual punishments.”<sup>363</sup> Although those clauses delegate interpretive discretion, they say nothing about which institution has primary responsibility for exercising that discretion — an omission that has given rise to a broad-ranging historical and functional debate over the proper allocation of interpretive power.<sup>364</sup> In practice, the Court routinely takes it upon itself to craft doctrinal tests that give content to, and thereby implement, those broadly worded guarantees.<sup>365</sup>

Unlike those clauses, the Necessary and Proper Clause not only creates an open-ended delegation, but also identifies *Congress* as the recipient of that power. As a first approximation, that differential signal at least suggests that Congress has special responsibility to flesh out the content of the clause’s open-ended terms. If the Eighth Amendment does not tell us who decides what is “cruel and unusual,” but Article I tells us that Congress implements the “necessary and proper” power, then that differential at least suggests a preference for congressional discretion.<sup>366</sup>

That consideration alone, however, cannot fully resolve the question here because many constitutional clauses specifically assign broadly

<sup>359</sup> *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100–01 (1991) (Scalia, J.).

<sup>360</sup> U.S. CONST. art. IV, § 2, cl. 1.

<sup>361</sup> *Id.* amend. I.

<sup>362</sup> *Id.* amend. IV.

<sup>363</sup> *Id.* amend. VIII.

<sup>364</sup> See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES* 93–127 (2004); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

<sup>365</sup> See Fallon, *supra* note 2, at 67 (“[T]he Court must craft doctrine in light of judgments about what the Constitution means, but [those] determinations of constitutional meaning do not always, or perhaps even typically, dictate with full precision what constitutional doctrine ought to be.”).

<sup>366</sup> Indeed, as Chief Justice Marshall noted in *McCulloch*, the Constitution makes the “necessary and proper” standard part and parcel of the grants of congressional power under Article I, section 8, rather than incorporating that standard among the limitations on such power under Article I, section 9. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 419 (1819) (“The clause is placed among the powers of Congress, not among the limitations on those powers.”).

worded powers both to Congress and to the President. For example, think of the Commerce Clause or the Copyright Clause of Article I,<sup>367</sup> or the Commander-in-Chief Clause or even the Pardon Clause of Article II.<sup>368</sup> While not all of them use language as self-consciously open-ended as that of the Necessary and Proper Clause,<sup>369</sup> all of those clauses still leave interpreters significant discretion, at least on the margins. Hence, unless the conclusion here is to rest exclusively on some ethereal judgment about *how* open-ended a power-granting clause must be before one should read it as delegating interpretive lawmaking power to its recipient, something more is needed to distinguish the Necessary and Proper Clause from a host of other indeterminate constitutional-power grants.<sup>370</sup> The additional support comes from a second, and related, set of textual cues.

2. *The Nature of the Power Granted.* — In contrast with most constitutional-power grants, the Necessary and Proper Clause assigns Congress explicit power to implement other constitutional powers. The Commerce Clause, the Copyright Clause, and the Bankruptcy Clause grant substantive governmental powers. So too do their Article II counterparts. None of them has anything explicit to say about the assignment of constitutional decisionmaking authority. The Necessary and Proper Clause, however, is a kind of master clause — one that is directed explicitly at the allocation of such decisionmaking authority. Indeed, it is part of a family of such clauses that tell us *both* when Congress has special responsibility to implement the Constitution *and* which parts of the Constitution fall within that authority. The Necessary and Proper Clause is the broadest; it assigns Congress authority to implement all the “Powers” vested by the Constitution anywhere in the government.<sup>371</sup> In addition, the Full Faith and Credit Clause empowers Congress “by general Laws [to] prescribe the Manner” in which one state must give full faith and credit to the public acts, records, and proceedings of another.<sup>372</sup> Each of the Civil War Amendments, in turn, includes an Enforcement Clause that authorizes Congress to “enforce”

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<sup>367</sup> See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (Copyright Clause); *United States v. Lopez*, 514 U.S. 549 (1995) (Commerce Clause).

<sup>368</sup> See, e.g., *Ex parte Grossman*, 267 U.S. 87 (1925) (Pardon Clause); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) (Commander-in-Chief Clause).

<sup>369</sup> See *supra* section III.B, pp. 54–60.

<sup>370</sup> This Foreword takes no position on the question of whether the Court should defer to other branches’ reasonable interpretations of their own powers, either in general or in the context of any particular constitutional provision. As noted, I assume *arguendo* that the default position is no judicial deference but that special features of the Necessary and Proper Clause counsel a different result for judicial review of statutes implementing that clause.

<sup>371</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>372</sup> *Id.* art. IV, § 1.

its substantive guarantees through “appropriate legislation.”<sup>373</sup> And several subsequent amendments — mostly voting-rights guarantees like the Nineteenth Amendment<sup>374</sup> — also include such Enforcement Clauses.<sup>375</sup> When viewed as a whole, the Constitution carefully assigns to Congress express implementation power for *all* federal powers and carefully specified federal rights.

These explicit, and precisely targeted, grants send a strong differential signal. Under ordinary rules of interpretation, such a pattern denotes that Congress has primary responsibility to implement some but not other parts of the Constitution.<sup>376</sup> Where the document assigns Congress such responsibility, the Court must defer to Congress’s reasonable implemental judgments. To return to the administrative law analogy, when Congress grants power to an agency to promulgate rules to carry out a statute, the Court has consistently treated such grants as delegations of interpretive lawmaking power to which reviewing courts must defer.<sup>377</sup> The rationale is straightforward: if Congress tasks an agency with fleshing out a statute by rule, “the determination of the content of the rules should be made by the agency and not by the courts.”<sup>378</sup> To be sure, nothing in a grant of rulemaking power is logically inconsistent with a reviewing court’s exercising *de novo* review of the rules’ legality. Even under a *de novo* regime, the agency would still have formal power to promulgate implementing rules unless the court found them unlawful. In reality, however, the substance of such an arrangement gives little weight to Congress’s choice to vest the rulemaking authority in the agency in the first place. Suppose that Congress tasks the EPA with promulgating rules to determine ambient air quality standards that assure “an adequate margin of safety,”<sup>379</sup> but a reviewing court were free to substitute its judgment for the agency’s view of “adequacy” — even within the broad margins of interpretive discretion that such a standard creates. In that case, the agency would have effective “discretion” to flesh out the statute by rule only so long

<sup>373</sup> *Id.* amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

<sup>374</sup> *See id.* amend. XIX, cl. 2 (Suffrage Amendment); *id.* amend. XXIII, § 2 (D.C. electoral votes); *id.* amend. XXIV, § 2 (poll taxes); *id.* amend. XXVI, § 2 (eighteen-year-old vote).

<sup>375</sup> The Prohibition Amendment was the only other amendment containing an Enforcement Clause. *See id.* amend. XVIII, § 2 (repealed 1933). In contrast with the other clauses, which conferred enforcement authority upon Congress alone, the Eighteenth Amendment stated that “[t]he Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.” *Id.*

<sup>376</sup> *Cf.* *Russello v. United States*, 464 U.S. 16, 23 (1983) (noting that interpreters should treat a pattern of disparate inclusion and exclusion as deliberate).

<sup>377</sup> *See, e.g.,* *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 793 (1978); *Batterton v. Francis*, 432 U.S. 416, 425–26 (1977); *Morton v. Ruiz*, 415 U.S. 199, 231 (1974); *AT&T Co. v. United States*, 299 U.S. 232, 235–37 (1936).

<sup>378</sup> KENNETH CULP DAVIS, *ADMINISTRATIVE LAW* § 249, at 901 (1951).

<sup>379</sup> 42 U.S.C. § 7409(b)(1) (2012).

as it agrees with the reviewing court. In every case in which it matters, the court rather than the agency would have primary authority to flesh out the statute.

By analogy, the Necessary and Proper Clause is a constitutional grant to Congress of implemental rulemaking authority. It instructs Congress to make “necessary and proper” laws for carrying into execution all constitutional powers. Indeed, the clause states that Congress has the power to implement not only its own powers, but also “all other Powers vested by this Constitution . . . in any Department or Officer” of the government.<sup>380</sup> Hence, as long as Congress acts constitutionally, the clause gives it express priority over the coordinate branches as implementer-in-chief.<sup>381</sup> Against that backdrop, if the Court’s judgment could control Congress’s decisions within the margins of reasonable discretion created by the clause’s open-ended terms, then the Necessary and Proper Clause would leave Congress with discretion only insofar as it happens to agree with the Court. Again, this would not disable Congress from exercising its “necessary and proper” power in any formal sense; Congress would still have discretion to specify the means of implementation when its judgments about what is “necessary and proper” coincided with the Court’s. But in the cases that matter, the initiative would lie with the Court rather than Congress. Accordingly, to give meaningful effect to the people’s choice to vest “necessary and proper” constitutional implementation in Congress, the Court should defer to Congress’s reasonable judgments as long as Congress remains within the broad zone of discretion assigned to it by that open-ended clause.<sup>382</sup>

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<sup>380</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>381</sup> Under settled rules of interpretation, a grant of power carries with it implied authority to prescribe sufficient means to carry out the power granted. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 409 (1819) (“[T]he powers given to the government imply the ordinary means of execution.”); *see also, e.g.*, THE FEDERALIST NO. 33, *supra* note 219, at 197–98 (Alexander Hamilton) (making a similar point); THE FEDERALIST NO. 44, *supra* note 219, at 282 (James Madison) (same); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1231–1232, at 109–10 (1833) (same). In the absence of congressional specification or regulation to the contrary, the coordinate branches do enjoy such powers. *See, e.g.*, *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (noting that federal courts have the power to maintain order and enforce judgments through the imposition of contempt orders); *see also, e.g.*, Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 YALE L.J. 2280 (2006) (arguing that unless Congress prescribes contrary means, the President has certain incidental “completion” powers when necessary to execute a legislative scheme). Hence, the inclusion in the Necessary and Proper Clause of the powers of the coordinate branches signals that, as long as Congress acts within constitutional margins, its implemental statutes can displace the implemental preferences of the coordinate branches.

<sup>382</sup> It is worth emphasizing here that the Necessary and Proper Clause does not shield Congress from judicial review entirely. In contrast with that clause, some provisions of the Constitution explicitly make the political branches “judge[s] . . . of their own powers.” Lawson & Moore, *supra* note 310, at 1277. For example, Congress may vest the appointment of “such inferior Officers, as

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This delegation theory of the Necessary and Proper Clause fits neatly with Chief Justice Marshall's take on the clause in *McCulloch* — and, more importantly, with the constitutional structure that his theory reflected. As noted, instead of trying to prescribe a prolix “code” of implementation for a system of government “intended to endure for ages to come” and “to be adapted to the various crises of human affairs,” the Constitution entrusts to Congress broad authority to provide, by legislation, for “exigencies . . . as they occur.”<sup>383</sup> To be sure, the Constitution provides *some* details, including very important ones, about how to carry out the substantive powers it confers. It specifies particular procedures for such key functions as enacting legislation,<sup>384</sup> making treaties,<sup>385</sup> appointing federal officers,<sup>386</sup> and impeaching and convicting such officers.<sup>387</sup> It offers more or less detail about a number of particular functions, such as Congress's powers of self-governance,<sup>388</sup> a host of presidential powers (large and small),<sup>389</sup> and the jurisdiction of the federal courts.<sup>390</sup> But, for all its detail, the Constitution is equally striking for what it leaves blank.<sup>391</sup> It says

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*they think proper*” in specified federal actors. U.S. CONST. art. II, § 2, cl. 2 (emphasis added). Or the President may recommend to Congress “such Measures as *he shall judge* necessary and expedient.” *Id.* art. II, § 3 (emphasis added). Because the predicate for action under those clauses is not (1) whether a specified condition has been met, but rather (2) whether the named actor deems it to have been met, the judiciary has no basis for addressing the first question at all. See Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243, 250 (2004). In that sense, the inquiry into necessity or propriety under this other family of clauses presents a classic political question. See *Nixon v. United States*, 506 U.S. 224, 228–29 (1993) (explaining the political question doctrine).

In contrast, although the Necessary and Proper Clause delegates discretion to Congress, it is not keyed to what Congress *deems* to be necessary and proper. And both text and history support the justiciability of the clause's governing standard. See BARNETT, *supra* note 323, at 179–84. Under the position developed in this Foreword, the judiciary remains free to police the boundaries of the people's delegation of implementation power to Congress by inquiring into whether Congress reasonably interpreted its delegated power or, conversely, made a clear mistake. See *supra* p. 31; see also *infra* pp. 79–81. Accordingly, as noted, the Necessary and Proper Clause invites *Chevron*-like deference to Congress's decisions pursuant to that clause. See *supra* section III.A, pp. 49–53.

<sup>383</sup> *McCulloch*, 17 U.S. (4 Wheat.) at 415 (emphasis omitted).

<sup>384</sup> U.S. CONST. art. I, § 7.

<sup>385</sup> *Id.* art. II, § 2, cl. 2.

<sup>386</sup> *Id.*

<sup>387</sup> *Id.* art. I, § 2, cl. 5; *id.* art. I, § 3, cls. 6–7.

<sup>388</sup> See *id.* art. I, § 5.

<sup>389</sup> See *id.* art. II, §§ 2–3. Some of these grants, such as the pardon power and Commander-in-Chief power, are fairly spare. See *id.* art. II, § 2, cl. 1. Others, such as the Opinions Clause and the adjournment power, offer greater detail. See *id.* art. II, §§ 2–3.

<sup>390</sup> See *id.* art. III, § 2.

<sup>391</sup> See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 597 (1984).

nothing about agency delegations,<sup>392</sup> commandeering,<sup>393</sup> sovereign immunity,<sup>394</sup> presidential removal power,<sup>395</sup> standing,<sup>396</sup> and countless other issues, including many still to be identified.<sup>397</sup> The Necessary and Proper Clause delegates power to *Congress* to fill up the details — and to do so within a broad range of reasonableness articulated by relatively open-ended criteria.<sup>398</sup>

#### IV. IMPLICATIONS

This understanding of the Necessary and Proper Clause has implications for the Roberts Court's approach to both statutory construction and structural constitutional cases. First, it justifies the Court's basic textualist approach to statutory interpretation. As discussed, if the Constitution empowers Congress to draw awkward, uneven, and overinclusive lines, then a textualist approach that focuses on social and linguistic *usage* enables Congress to use its words to draw such lines. In contrast, a purposivist approach that collapses statutory details with their overall purposes dilutes that legislative power. This set of assumptions finds reflection in the Court's new emphasis on semantic cues and its refusal to rely on legislative history when such material conflicts with the clear import of the enacted text.

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<sup>392</sup> See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1729–31 (2002).

<sup>393</sup> See *Printz v. United States*, 521 U.S. 898, 905 (1997).

<sup>394</sup> See *Alden v. Maine*, 527 U.S. 706, 713 (1999).

<sup>395</sup> See *Myers v. United States*, 272 U.S. 52, 109 (1926).

<sup>396</sup> See HART & WECHSLER, *supra* note 6, at 49.

<sup>397</sup> As Justice Holmes wrote for the Court, “when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.” *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

<sup>398</sup> At least where federalism is concerned, it is hardly implausible to think that the founders would have given Congress such responsibility. Recall that the Constitution self-consciously built in structural political protections against federal encroachment on state sovereignty. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). By dint of the Senate's composition, the states' power over selection of senators and presidential electors, and the state-friendly criteria for electing federal lawmakers, the structure was designed to ensure that federalism receives at least fair consideration in the exercise of legislative power, presumably including the “necessary and proper” power. See *id.* at 546–50 (discussing the general structural point). It is true that the Seventeenth Amendment's shift to the direct election of senators did away with one of the key protections. See U.S. CONST. amend. XVII. But that consideration does not alter the fact that when the founders adopted the Necessary and Proper Clause, they did so against a structural backdrop that included significant political safeguards of federalism. At least some commentators, moreover, believe that other systemic features continue to protect state interests. See, e.g., Clark, *supra* note 334, at 1369–72 (discussing the safeguards that remain); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 219 (2000) (refining Wechsler's claim by emphasizing that “federalism in the United States has been safeguarded by a complex system of informal political institutions”).

Conversely, the delegation of implementation power under the Necessary and Proper Clause calls into question the Court's new structuralism. In cases such as *Printz*, *NFIB*, and *Free Enterprise Fund*, the Court needed to identify a firmer basis for concluding that Congress's choice of means lay beyond the discretion conferred upon Congress by this clause. In addition, given the explicit priority that the clause gives to Congress, the Court owes the legislative branch deference when confronted with a constitutional dispute between Congress and either of the coordinate branches.

Though full consideration of such implications must await another day, section IV.A considers briefly the way the Necessary and Proper Clause maps onto the new textualism in statutory interpretation. Section IV.B offers some preliminary thoughts on constitutional burdens of persuasion.

#### A. *The Court's Textualism*

The Court's new textualism, as noted, tries to give Congress the tools it needs to draw lines. This impulse has given rise to two major developments. First, the Court relies more heavily on evidence of usage. If Congress says "no handguns in the National Parks" rather than "no dangerous weapons," the Court takes that signal seriously by trying to determine how a reasonable person would have *used these words* in context. Second, the Court rejects legislative history when it conflicts with the statutory text. If the statute says "no handguns" but a committee report expresses a purpose to ban "dangerous weapons," the Court credits what Congress chose to vote into law under each House's rules of proceeding. This section touches on both developments.

1. *The Emphasis on Usage.* — The institutional goal — and, thus, the constitutional strategy — of the Court's new textualism is to enable Congress to speak with precision. Effective communication depends on the practices of a relevant linguistic community.<sup>399</sup> As legal philosopher Jeremy Waldron has written:

A legislator who votes for (or against) a provision like "No vehicle shall be permitted to enter any state or municipal park" does so on the assumption that — to put it crudely — what the words mean to him is identical to what they will mean to those to whom they are addressed . . . . That such assumptions pervade the legislative process shows how much law depends

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<sup>399</sup> See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 134–42 (G.E.M. Anscombe trans., 3d ed. 1967); see also *Cont'l Can Co. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund*, 916 F.2d 1154, 1157 (7th Cir. 1990) (Easterbrook, J.) ("You don't have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities.").

on language, on the shared conventions that constitute a language, and on the reciprocity of intentions that conventions comprise.<sup>400</sup>

To facilitate legislative communication, today's Court focuses tightly on these shared conventions. For better or worse, the Court now relies more heavily than ever on the dictionary.<sup>401</sup> It has also shown a new interest in rules of grammar, syntax, and punctuation.<sup>402</sup> The Justices frequently try to resolve hard legal issues by transplanting legal terms into literary or workaday contexts that make their usage more intuitive to the reader.<sup>403</sup> And because statutes often use the language of the law, the Court does not hesitate to apply technical terms of art or specialized maxims of construction that, to the layperson, rightly sound like "legalese."<sup>404</sup> In the old days, all such evidence routinely gave way to

<sup>400</sup> Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, in *LAW AND INTERPRETATION* 329, 339 (Andrei Marmor ed., 1995).

<sup>401</sup> See, e.g., *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014) (using dictionaries to define "weapon" for purposes of interpreting a "chemical weapon" statute (internal quotation marks omitted)); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014) (referring to dictionaries to define the word "exceptional" in an attorney's fee-shifting provision (internal quotation marks omitted)); *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876–77 (2014) (using dictionaries to determine the meaning of "clothes" for purposes of a statute that addresses "time spent in changing clothes" (internal quotation marks omitted)). The Court now cites dictionaries at a rate that is orders of magnitude higher than ever before, reflecting a trend that first began in the 1970s and then accelerated in recent years. See Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century*, 94 *MARQ. L. REV.* 77, 85–86 (2010). I say "for better or worse" in the text above as a way to signal that there are good and bad ways to make use of the dictionary and that the Court does both. See Lawrence Solan, *When Judges Use the Dictionary*, 68 *AM. SPEECH* 50, 55–56 (1993) (discussing proper uses of the dictionary); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 *HARV. L. REV.* 1437, 1452–53 (1994) (same).

<sup>402</sup> See, e.g., *Tapia v. United States*, 131 S. Ct. 2382, 2389 (2011) (using "standard rules of grammar" to determine meaning); *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1181 (2011) ("Adjectives typically reflect the meaning of corresponding nouns, but not always."); *Carr v. United States*, 130 S. Ct. 2229, 2236 (2010) ("Consistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach."); *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 80 (1991) (analyzing the omission of commas); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241–42 (1989) (discussing the importance of comma placement).

<sup>403</sup> See, e.g., *Abramski v. United States*, 134 S. Ct. 2259, 2267 n.5 (2014) (using the analogy of sending a relative to buy you an iPhone as a way to clarify who is the real "transferee" or "person" buying a gun in a straw purchase); *Sandifer*, 134 S. Ct. at 881 ("Just as one can speak of 'spending the day skiing' even when less-than-negligible portions of the day are spent having lunch or drinking hot toddies, so also one can speak of 'time spent changing clothes and washing' [for purposes of the Fair Labor Standards Act] when the vast preponderance of the period in question is devoted to those activities."); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596 (2004) (finding ambiguity in the concept of "age" discrimination because of the disparate "meaning[s] that lie behind a sentence like 'Age can be shown by a driver's license,' and the statement, 'Age has left him a shut-in'"); *Muscarello v. United States*, 524 U.S. 125, 129 (1998) (identifying the way "[t]he greatest of writers" have used the term "carry").

<sup>404</sup> See, e.g., *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182, 2186 (2014) (using legal dictionaries to define the distinction between statutes of limitation and statutes of repose); *Rosemond v. United States*, 134 S. Ct. 1240, 1245–48 (2014) (consulting the common law of accomplice liability

background legislative purpose or intent.<sup>405</sup> Nowadays, the Court puts evidence of usage front and center in its search for “plain meaning.”

Of course, no description so brief can do justice to the scope or complexity of the Court’s use of social and linguistic conventions.<sup>406</sup> Nor is it meant to defend or justify the particular set of practices that today’s Court employs to identify usage. Some linguists (and linguistically minded law professors) have questioned whether the Court’s textualism captures the way people speak.<sup>407</sup> On such claims I am, for present purposes, agnostic. If the Court’s practices do not match how English speakers (or English-speaking lawyers) communicate, then the particulars can always be adjusted, if need be.<sup>408</sup> What is important,

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to determine the scope of 18 U.S.C. § 2 (2012), which imposes liability upon one who “aids, abets, counsels, commands, induces, or procures” commission of a federal crime, *id.*); *Air Wis. Airlines Corp. v. Hooper*, 134 S. Ct. 852, 860–61 (2014) (reading a statutory “reckless disregard” standard in light of the actual malice standard for libel against a public figure as defined in the Court’s First Amendment cases). Though somewhat more cautious about its application of semantic or usage canons, the Court has nonetheless grown comfortable with relying on such rules of convenience. *See, e.g.*, *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (relying on a version of the *expressio unius* canon that gives effect to disparate inclusion and exclusion of the same language in different parts of a statute); *Paroline v. United States*, 134 S. Ct. 1710, 1721 (2014) (relying on the *ejusdem generis* canon); *Law v. Siegel*, 134 S. Ct. 1188, 1195 (2014) (applying the canon “that words repeated in different parts of the same statute generally have the same meaning”).

<sup>405</sup> *See, e.g.*, *Moskal v. United States*, 498 U.S. 103, 117 (1990) (explaining that “Congress’ general purpose in enacting a law may prevail over [the] rule of statutory construction” that common law terms take on their common law meaning); *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350–51 (1943) (concluding that technical canons such as *expressio unius* or *ejusdem generis* were to be “subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose”); *Costanzo v. Tillinghast*, 287 U.S. 341, 344 (1932) (“[P]unctuation is not decisive of the construction of a statute. Upon like principle we should not apply the rules of syntax to defeat the evident legislative intent.” (citations omitted)).

<sup>406</sup> For example, the Court is now fond of invoking the grammatical “rule of the last antecedent.” *See, e.g.*, *Barnhart v. Thomas*, 540 U.S. 20, 26–28 (2003). But it is equally fond of emphasizing that the rule of the last antecedent can be overcome by contrary indicia of meaning. *See, e.g.*, *United States v. Hayes*, 555 U.S. 415, 425–26 (2009).

<sup>407</sup> *See, e.g.*, Jill C. Anderson, *Misreading Like a Lawyer: Cognitive Bias in Statutory Interpretation*, 127 HARV. L. REV. 1521, 1563–68 (2014); Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Interpretation — And the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 707–19 (2014); Lawrence M. Solan, *Judicial Decisions and Linguistic Analysis: Is There a Linguist in the Court?*, 73 WASH. U. L.Q. 1069, 1073–79 (1995).

<sup>408</sup> At some level, it may not matter all that much whether the Court always “gets it right,” as long as it is consistent. “What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.” *Finley v. United States*, 490 U.S. 545, 556 (1989). Congress could certainly prescribe the rules of practice it wants the Court to use. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2140 (2002). But, with fairly minor exceptions in the Dictionary Act, 1 U.S.C. §§ 1–8 (2012), Congress has sat on the sidelines. Hence, the Court can serve the necessary coordinating function simply by giving clear notice of how it will read — and, thus, how Congress should draft — laws. *Cf.* Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 232 (discussing how plain meaning coordinates behavior). Such an approach enables Congress to communicate its intentions

for constitutional purposes, is the core textualist idea that if interpreters focus tightly on linguistic conventions, Congress can then predictably use its words to translate its policy precisely into law.<sup>409</sup> It is that aspiration that yokes modern textualism to Congress’s “necessary and proper” power, and it is what distinguishes modern textualism from the *Holy Trinity* approach that it replaced.

Certainly, there remain aspects of the Court’s practice that are hard to square even with the aspirations of textualism. Sometimes, for example, the Court frames its usage conventions to leave itself wiggle room to avoid undesirable outcomes.<sup>410</sup> Such inconstancy denies Congress a predictable baseline against which to pass laws.<sup>411</sup> The

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effectively, whether or not its drafters ultimately choose to do so. See Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF LAW* 249, 267–68 (Robert P. George ed., 1996).

To illustrate, recall that in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), the Court narrowly read the authorization of “attorney’s fees” in 42 U.S.C. § 1988 (2012), because other statutes had authorized “attorney’s fees and expert fees.” 499 U.S. at 88; see also *id.* at 88–90; *supra* pp. 23–24. Such differences in wording are telling if one presumes that Congress ordinarily uses language consistently — one of the Court’s standard semantic canons. See, e.g., *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2004–05 (2012); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995). A survey of congressional staff, however, suggests that, since each committee has its own distinct drafting practices, one cannot empirically assume consistent usage in statutes that emerge from different committees. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) [hereinafter Gluck & Bressman, *Part I*]. Since almost all the contrasting statutes in *Casey* had originated in committees different from the one that drafted § 1988, one might question whether *Casey*’s holding captures actual legislative intent. See Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 781 (2014) [hereinafter Bressman & Gluck, *Part II*]. But, even if correct, this conclusion makes little difference once one abandons the pretense that the object of interpretation is identifying subjective congressional intent. Assume that one cannot know whether members of Congress were aware of the distinctions among the fee authorization formulae. If the Court presumes that Congress uses different words to mean different things, then that empowers Congress to use disparate wording to express distinct policies. If the Court applies no such presumption, then it denies Congress that important tool of expression. Of course, for the presumption to work, it must be used consistently. See *infra* notes 410–411 and accompanying text.

<sup>409</sup> See Gerald C. MacCallum, Jr., *Legislative Intent*, 75 YALE L.J. 754, 758 (1966) (“The words [a legislator] uses are the instruments by means of which he expects or hopes to effect . . . changes [in society]. What gives him this expectation or this hope is his belief that he can anticipate how others (e.g., judges and administrators) will understand these words.”).

<sup>410</sup> See, e.g., *Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S. Ct. 817, 825–26 (2013) (holding that the presumption that disparate inclusion and exclusion of terms is deliberate must yield when a provision is “most sensibly characterized” differently, *id.* at 826); *Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (holding that the presumption of consistent usage gives way to evidence that Congress used the same word “with different intent” in different parts of the statute (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)) (internal quotation mark omitted)). The author served as Court-appointed amicus in *Auburn Regional Medical Center*.

<sup>411</sup> This Term, for example, in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), the Court declined to read the phrase “any air pollutant” to have the same meaning throughout the Clean Air Act because treating greenhouse gases as “air pollutants” for purposes of certain statutory permit programs would impose severe and unanticipated regulatory burdens. See *id.* at

Court also clings to certain federal common law doctrines — such as “obstacles and purposes” preemption or “borrowing” statutes of limitations — that create broad judicial discretion to supplement, or even countermand, signals sent by the statutory text.<sup>412</sup> And, perhaps most problematically, the Court uses an ever-expanding array of clear statement rules that insist upon supernormal levels of statutory clarity before the Court will read a law as intruding upon vaguely defined

2439–44. Because those permit programs were triggered by the amount of an “air pollutant” emitted by particular sources, and because greenhouse gas emissions are orders of magnitude greater in volume than those of traditional pollutants, a decision to treat greenhouse gases as “air pollutants” for all statutory purposes would have triggered permit requirements for countless small sources, such as retail stores, apartment buildings, and schools. *See id.* at 2436, 2446. The EPA estimated, for example, that annual permit applications would “jump from about 800 to 82,000” and increase annual administrative costs from \$12 million to \$1.5 billion. *Id.* at 2443. Noting that the presumption of consistent usage yields to “context,” the Court found no “insuperable textual barrier” to reading “any air pollutant” in some provisions “to exclude . . . atypical pollutants . . . emitted in such vast quantities that their inclusion would radically transform those programs and render them unworkable as written.” *Id.* at 2441–42.

The Court’s qualifying consistent usage in that way undermines Congress’s power to use uniform language to express uniform policy. In *Utility Air*, the Court disregarded Congress’s choice to adopt a single definition of what “air pollutant” means “[w]hen used in [the Clean Air Act].” 42 U.S.C. § 7602(g) (2012). It is true, as the Court noted, that the presumption of consistent usage yields to context. *Utility Air*, 134 S. Ct. at 2441. But that is only because words can convey different meanings when used in distinct surroundings. If I tell a friend that “I was sitting by the bank of the Charles today when I realized I had to go to the bank to deposit a check,” it is perfectly obvious from context that “bank” first meant riverbank and then financial institution. *See* Lessig, *supra* note 325, at 407–08. It is worlds apart to suggest, as *Utility Air* did, that the same phrase, used in the same way, means different things in different parts of a statute because a uniform reading would produce untoward policy results.

<sup>412</sup> Professor Daniel Meltzer has written extensively about the tension between textualism and implied preemption. *See* Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 13–14 (2013); Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343, 376. Long ago, *Hines v. Davidowitz*, 312 U.S. 52 (1941), held that state law is preempted if it stands “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* at 67. Despite the modern Court’s general attachment to textualism, it still applies this doctrine with a vengeance. *See, e.g., Arizona v. United States*, 132 S. Ct. 2492, 2505, 2507 (2012); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748, 1753 (2011); *Chamber of Commerce v. Brown*, 554 U.S. 60, 73 (2008); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000). It does so, moreover, even when Congress has provided an express preemption clause that one might think would supply the rule of decision. *See, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869–74 (2000); *Boggs v. Boggs*, 520 U.S. 833, 841, 844 (1997). Among the Court’s apostolic textualists, only Justice Thomas has noted the inconsistency and declined to apply “obstacles and purposes” preemption. *See Wyeth v. Levine*, 555 U.S. 555, 588 (2009) (Thomas, J., concurring in the judgment).

The Court also continues to assert authority to “borrow” analogous federal or state statutes of limitations when Congress has omitted a limitations period from a federal statute. *See, e.g., Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005) (borrowing a state limitations period); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991) (using a federal one). The Court’s supplying such an omitted term seems to give the judiciary implemental discretion that the Necessary and Proper Clause reserves to Congress.

values, which are often of the Court's own creation.<sup>413</sup> This Term, in fact, the Court took that practice to a new level by clipping back the express statutory definition of a federal crime because applying it literally would invade spheres of criminal authority that the Court thought better left to the states.<sup>414</sup> It must be frankly acknowledged that all of these practices recall at least the flavor of *Holy Trinity* — trimming or expanding the conventional meaning of the text in order to serve extratextual values or purposes, at times identified by the Court rather than Congress. While these exceptions are important, they do not alter the fact that the Court's predominant approach to statutory interpretation has, for the past quarter century, been textualist.<sup>415</sup>

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<sup>413</sup> In some areas, such rules reflect deeply embedded legal assumptions that have formed the backdrop against which Congress legislates. *See, e.g.,* *Reynolds v. M'Arthur*, 27 U.S. (2 Pet.) 417, 434 (1829) (prospectivity of legislation); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (lenity). Some recent cases, however, rest upon fresh judicial assessments of which external values call for extraordinary statutory clarity. *See, e.g.,* *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664–65 (2013) (extending the application of the presumption against extraterritoriality to a “jurisdictional” statute because the policies served by the presumption are implicated by the cases over which the statute creates jurisdiction); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (reading a statute narrowly to avoid interference with state prerogatives over land and water use); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 542–45 (1994) (preserving state discretion to determine the procedures for foreclosure sales). For criticism of this approach, see generally Manning, *supra* note 192.

<sup>414</sup> In *Bond v. United States*, 134 S. Ct. 2077 (2014), the Court refused to apply a federal statute prohibiting the knowing use of “any chemical weapon,” 18 U.S.C. § 229(a) (2012), to conduct that the Court viewed as properly a local crime. Federal prosecutors had indicted a microbiologist for spreading harmful chemicals on surfaces at the home of a romantic rival, meaning to cause the rival injury but not death. *Bond*, 134 S. Ct. at 2085. Ordinarily one would not characterize chemicals used in that way as “chemical weapons,” particularly under a statute that implemented an international convention directed at geopolitical uses of such weapons. *See* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 317 (entered into force Apr. 29, 1997). Here, however, the statute incorporated an especially broad and explicit definition of “chemical weapon” — one that, on its face, left little doubt about its applicability to the case at hand. *See* 18 U.S.C. § 229F(1)(A) (defining “chemical weapon” as “[a] toxic chemical and its precursors”); *id.* § 229F(8)(A) (defining “toxic chemical” as “any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals”). In light of an established federalism clear statement rule, however, the Court concluded that “the statute . . . must be read consistent with principles of federalism inherent in our constitutional structure.” *Bond*, 134 S. Ct. at 2088. Without denying that *Bond*'s conduct fit within the literal terms of the statutory definition, the Court found ambiguity in the “improbably broad reach” of that definition, given “the deeply serious consequences of adopting such a boundless reading[] and . . . the context from which the statute arose.” *Id.* at 2090. In the Court's view, a literal reading would intrude upon “the police power of the States,” *id.*, by establishing a “massive federal anti-poisoning regime that reaches the simplest of assaults,” *id.* at 2092. For the argument that overlapping state and federal jurisdiction over criminal acts promotes rather than upsets the goals of a federal system, see Gerken, *supra* note 199, at 117–19, which argues that such overlap permits the two sovereigns to check each other.

<sup>415</sup> Indeed, in some areas, the Court's textualist approach has led it to cut back on doctrines that at one time gave the Court broad discretion to supplement, or even contradict, statutory directives. For example, the Court has adopted a very strict approach to recognizing implied

2. *Legislative History.* — The Court’s focus on facilitating effective legislative communication also explains its compromise position on legislative history. Rather than accept the strict exclusionary rule urged by some textualists (including me),<sup>416</sup> the Court still consults legislative history as a potential tool for resolving ambiguity.<sup>417</sup> At the same time, the Court has firmly embraced the key textualist position that interpreters cannot use legislative history to contradict the enacted text.<sup>418</sup>

If the Court’s current interpretive approach is designed to give Congress a toolbox for translating its policies into law with precision, the fact that legislative history is unenacted cannot alone justify its exclusion; the Court considers all sorts of extrinsic sources to determine the meaning of the words that Congress has enacted.<sup>419</sup> And to the extent that post–New Deal interpretive conventions singled out some kinds of “high value” legislative history (committee reports and sponsor statements) as authoritative,<sup>420</sup> this practice may have created a

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private rights of action or contribution, treating the question of their existence as one of ordinary statutory interpretation. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 288–93 (2001) (finding no implied right of action); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173–78 (1994) (finding no implied right of contribution). In addition, the Court has recently cut back on the “abstention doctrine,” which gives federal judges discretionary authority to abstain from exercising statutory jurisdiction if doing so would intrude upon some external value, such as federalism or the interest in avoiding unnecessary constitutional adjudication. *See, e.g.*, *Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (limiting the application of the abstention doctrine to cases of a particular kind); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728–31 (1996) (same). *See generally* Richard H. Fallon, Jr., *Why Abstention Is Not Illegitimate: An Essay on the Distinction Between “Legitimate” and “Illegitimate” Statutory Interpretation and Judicial Lawmaking*, 107 NW. U. L. REV. 847 (2013) (describing and assessing the doctrine). Just this Term, moreover, the Court expressed significant doubts about a longstanding assertion of judicial authority to enforce “prudential” standing doctrines that are rooted not in Article III limits on judicial power, but rather in judicial notions of self-restraint. *See Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386–88 (2014); *see also* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2347 (2014) (questioning the legitimacy of prudential requirements for “ripeness”). In *Lexmark*, the Court observed that “[j]ust as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because ‘prudence’ dictates.” 134 S. Ct. 1377, 1388 (2014) (citation omitted).

<sup>416</sup> *See infra* note 421.

<sup>417</sup> *See, e.g.*, *Samantar v. Yousuf*, 130 S. Ct. 2278, 2294 (2010); *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 90–93 (2007); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 598–99 (2004).

<sup>418</sup> *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (“Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.”); *United States v. Gonzales*, 520 U.S. 1, 6 (1997) (“Given the straightforward statutory command, there is no reason to resort to legislative history.”).

<sup>419</sup> The Court, for example, routinely consults obscure common law cases when defining terms of art. *See supra* note 404.

<sup>420</sup> *See, e.g.*, *Garcia v. United States*, 469 U.S. 70, 76 & n.3 (1984) (committee reports); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526–27 (1982) (sponsor statements).

feedback loop in which both courts and legislators came to expect such sources to be used as signals of statutory meaning.<sup>421</sup> When such materials turn out to be cacophonous rather than clarifying, the Court can always dismiss them as unhelpful.<sup>422</sup>

The toolbox theory also helps explain why the Court will not credit legislative history when it contradicts the meaning of the statutory text.<sup>423</sup> When legislators have said one thing in the text of the statute and something different in the legislative history, they have sent a mixed signal. If the statute says “no handguns” but the committee report says “no dangerous weapons” (or, for that matter, vice versa),<sup>424</sup>

<sup>421</sup> See WALDRON, *supra* note 103, at 145–46; William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, in NOMOS XXXVI: THE RULE OF LAW 265, 273 (Ian Shapiro ed., 1994). I have argued that by giving legal effect to the views expressed by subparts of Congress, such a feedback loop violates deeply rooted constitutional norms against legislative self-delegation. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997). The Court has not embraced that theory.

<sup>422</sup> These days, the Court readily dismisses legislative history that it finds to be at all conflicting, murky, ambiguous, or otherwise unhelpful. See, e.g., *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1407–09 (2010); *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 584 n.8 (2008); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 168 (2007); *Exxon Mobil*, 545 U.S. at 570–71; *Small v. United States*, 544 U.S. 385, 393 (2005). If the Court is quicker to dismiss legislative history as internally conflicting, then it will less often be in a position to engage in the proverbial practice of “look[ing] over the heads of the crowd and pick[ing] out [its] friends” from the mass of available legislative materials. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 36 (Amy Gutmann ed., 1997) (invoking Judge Harold Leventhal’s metaphor for the dangers of using legislative history).

<sup>423</sup> See cases cited *supra* note 418.

<sup>424</sup> A conflict arises whenever the Court uses legislative history to shift the statutory level of generality. This is true even in cases in which committee reports or sponsor statements merely purport to flesh out an open-ended standard that is otherwise indeterminate. Imagine a statute that gives employers the right to withdraw from a multiemployer pension fund if “substantially all” of the fund’s assets come from the trucking industry. See 29 U.S.C. §§ 1381, 1383(d)(2), 1391 (2012); see also *Cont’l Can Co. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund*, 916 F.2d 1154, 1155 (7th Cir. 1990). Now imagine that one of the bill’s sponsors explains that “substantially all” really means eighty-five percent. See *id.* at 1156. One might argue that reading the statute in light of the sponsor’s statement does not contradict the statute but rather clarifies its indeterminacy. Such a view, however, takes too narrow a perspective on what it means for text and legislative history to conflict. Congress could easily have enacted eighty-five percent into law but instead adopted a classic empty standard that gives the interpreter significant discretion within a range of plausible meanings. To say that “eighty-five percent” merely clarifies “substantially all” undermines Congress’s ability to use vague language to signal its intention to delegate law-elaboration power to another institution. This conclusion, if correct, would suggest that the Court’s new approach will sharply limit consultation of legislative history, especially when the text is vague or open-ended.

In the case of a genuine “ambiguity” — a word with two distinct meanings, either of which might apply — the Court has been willing to use legislative history to determine which meaning better fits with the statute’s aims. See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 598–99 (2004) (relying on legislative history to determine if the word “age” in the Age Discrimination in Employment Act refers to the number of years since birth or the state of being aged). For discussion of the distinction between ambiguity and open-endedness, see Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 97–98 (2010) (arguing that

then the Court has no choice but to determine which signal to credit. One might say that the committee report merely clarifies what Congress intended when it said “no handguns.” But, in truth, that characterization is just another way of describing the legal conclusion that the committee’s expressed understanding should take precedence over the conflicting one in the enacted text.

From that starting point, one might think that the Court’s position just resolves the conflict in favor of the legislative signal that has cleared bicameralism and presentment rather than the one that has not (for example, the committee report).<sup>425</sup> But if the aim of the Court’s textualism is to facilitate precise legislative communication, further explanation is required. The reason is this: based on a survey of 137 congressional staffers, Professors Abbe Gluck and Lisa Bressman suggest that the legislative history may communicate legislative policy choices more accurately than does the statutory text.<sup>426</sup> In particular, their findings suggest that the choice between text and legislative history may turn out to be a choice between the work product of two sets of legislative staff — and that opting for the text favors the less over the more accountable set of staffers. According to Gluck and Bressman, staff who work for members of Congress formulate the policies that staff who work for each House’s Office of Legislative Counsel later translate into technical statutory text.<sup>427</sup> In contrast with the policy staff, the staff of the nonpartisan Office of Legislative Counsel do not answer to the members of Congress who have framed the policies, nor do they turn over with each new Congress.<sup>428</sup> And while the policy staff give the drafters “bullet points” and outlines from which to work,<sup>429</sup> the complex and technical language of the final drafts often makes it difficult for the policy staff to “confirm[] that the text that the

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ambiguity refers to the availability of alternative meanings while vagueness or open-endedness refers to standards that require judgment calls that cannot be resolved according to semantic meaning); E. Allan Farnsworth, “*Meaning*” in *the Law of Contracts*, 76 YALE L.J. 939, 953 (1967) (making a similar argument). In cases of ambiguity, the Court may feel that consulting legislative history does not alter the statutory level of generality, but rather guides an inevitable choice between two alternative meanings.

<sup>425</sup> Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (“[I]f both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case.”).

<sup>426</sup> See Gluck & Bressman, *Part I*, *supra* note 408, at 967–70, 988–89; Bressman & Gluck, *Part II*, *supra* note 408, at 735–47, 784–85. I assume here that Gluck and Bressman’s sampling techniques produced a sufficiently meaningful snapshot of the views of the larger congressional drafting staff. See generally SHARON L. LOHR, *SAMPLING: DESIGN AND ANALYSIS* (2d ed. 2010) (providing an overview of effective methods of statistical sampling).

<sup>427</sup> Bressman & Gluck, *Part II*, *supra* note 408, at 740–41.

<sup>428</sup> *Id.* at 741.

<sup>429</sup> *Id.* at 740 (internal quotation marks omitted).

Legislative Counsel drafts reflects [the original policy] intentions” behind the legislation.<sup>430</sup>

To these conclusions, Gluck and Bressman add that ordinary staff who draft legislative history also tend to be “tied more closely to elected members” than are the technical drafters who take the lead in drafting the statutory text.<sup>431</sup> And members of Congress and the staff who advise them will more likely learn about the contents of the legislation by reading the legislative history than by reading the text.<sup>432</sup> Based on these findings, Gluck and Bressman conclude that objections to legislative history “boil[] down to a very spare formalism” that makes it harder, rather than easier, for Congress to express its policies with precision.<sup>433</sup>

Assume Gluck and Bressman’s findings capture the legislative dynamic.<sup>434</sup> To accept their position would be to disregard another congressional power to implement the Constitution — namely, Congress’s Article I, section 5 power to structure the way it does business.<sup>435</sup> Because the Constitution privileges as law only that which has been put to a formal vote and submitted to the President for signature or veto,<sup>436</sup> I assume that there is at least some special significance to what members of Congress opt to submit to a final vote. From that starting point, one can see that Congress has effectively made a choice to privilege the dry, formal, and technical statutory text — and to tolerate whatever slack exists between the policy and technical staff. Congress could easily choose to vote on the policy staff’s bullet points, outlines, or committee reports. Or it could (and sometimes does) incorporate any or all such materials, in effect, as glossaries to the statutory text itself.<sup>437</sup> It is Congress’s own procedural choices that lead to the creation of relatively formal final texts to be voted up or down by the body as a whole. To refuse to privilege the text of the statute is thus to disregard *Congress’s* decision, whether wise or unwise, to insist upon the formalization of its policy through prescribed drafting procedures and then to vote upon the results. (Indeed, if staff-generated bullet points and legislative history better capture the intentions of a bill’s chief

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<sup>430</sup> *Id.* at 743.

<sup>431</sup> Gluck & Bressman, *Part I*, *supra* note 408, at 967; *see also* Bressman & Gluck, *Part II*, *supra* note 408, at 741.

<sup>432</sup> *See* Gluck & Bressman, *Part I*, *supra* note 408, at 968–69.

<sup>433</sup> *Id.* at 969.

<sup>434</sup> *But see* Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 863–65 (2014) (arguing that coordination between policy and Legislative Counsel staff is much closer than Gluck and Bressman suggest).

<sup>435</sup> U.S. CONST. art. I, § 5; *see also* NLRB v. Noel Canning, 134 S. Ct. 2550, 2574 (2014) (describing “the Constitution’s broad delegation of authority to the Senate to determine how and when to conduct its business”).

<sup>436</sup> *See* U.S. CONST. art. I, § 7.

<sup>437</sup> *See* Manning, *supra* note 421, at 730 & n.245.

legislative backers, one must wonder why those legislators would choose *not* to put the more informal statements to a vote if they believed that a bill, so framed, would clear the legislative process.<sup>438</sup>) Hence, the Court's current approach facilitates Congress's ability to communicate its policies with precision in the way in which both Houses have chosen to do so. Far from "spare formalism," giving precedence to the text respects Congress's choice about how to implement legislative power.

### B. *Constitutional Deference*

The Necessary and Proper Clause's delegation of implementation power to Congress has two important consequences for constitutional law. First, in structural cases, it counsels in favor of embracing Thayer's "clear mistake" rule.<sup>439</sup> Such a shift would limit, but not eliminate, judicial review. In particular, the Court should displace Congress's judgment only when Congress unreasonably interprets what is "necessary and proper." Second, in clashes between Congress and the President over separation of powers, the Necessary and Proper Clause counsels that the Court give priority to the (again, reasonable) judgments of Congress — the only actor given express power to prescribe the means of implementing *all* constitutional powers, including "[t]he executive Power."<sup>440</sup>

1. *Deference and the Necessary and Proper Clause.* — The allocation of power effectuated by the Necessary and Proper Clause, as discussed, points toward a Thayerian approach to structural constitutional law that parallels the Court's approach to organic acts under the *Chevron* doctrine.<sup>441</sup> If conventional tools of constitutional exegesis yield an answer that clearly precludes a particular structural arrangement, then Congress's "necessary and proper" power cannot save the prohibited arrangement. If, however, those tools do not provide a firm answer to whether an arrangement is "necessary and proper" under the broad criteria associated with that clause, then the Court should accept Congress's reasonable judgment about proper means of execution, even if the Court has a different view. Otherwise, the Court would appropriate the compositional power delegated to Congress by the Necessary and Proper Clause.

Hence, for example, while the Court's interpretation of abstract federalism principles in cases such as *Printz* and *NFIB* certainly reflected a reasonable interpretation of the constitutional structure as a whole, the right question to ask in each case was whether Congress's

<sup>438</sup> See Manning, *The New Purposivism*, *supra* note 33, at 173 n.282.

<sup>439</sup> See *supra* pp. 51–52.

<sup>440</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>441</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

contrary vision was *unreasonable*. Given the level of generality of the Court's analysis, such a finding would be unusual. In the cases that represent the Court's new structuralism, the Court typically operates in a realm in which conventional constitutional materials do not specifically address the challenged constitutional practice. This conclusion holds across a broad spectrum of competing constitutional approaches. Neither the public meaning of the constitutional text,<sup>442</sup> nor original intent,<sup>443</sup> nor subsequent constitutional practice,<sup>444</sup> nor even constitutional common law,<sup>445</sup> for that matter, will typically speak with any specificity to novel statutory arrangements such as commandeering, individual mandates, or two-tiered removal restrictions. Hence, as discussed, the Court's analysis in such cases has necessarily focused, at a high level of generality, on the best way to make sense of the relatively abstract and often cross-cutting purposes of freestanding federalism or separation of powers. The resultant indeterminacy will often leave considerable room for discretion. Within that broad space, the Necessary and Proper Clause tells us that the Court should accept Congress's judgments about how to balance and give concrete form to those broad purposive considerations.

Even under that essentially Thayerian view of the Necessary and Proper Clause, however, much would lie beyond Congress's reach. For instance, there is no express prohibition against the legislative veto, but any plausible reading of the Bicameralism and Presentment Clauses would treat the prescribed process as the exclusive way for *Congress* to change the law.<sup>446</sup> And in a document that carefully specifies limited criteria<sup>447</sup> and strict supermajoritarian procedures<sup>448</sup> for impeaching and removing federal officers, Congress could not reasonably think it proper to assign itself power to remove such officers by simple majority vote.<sup>449</sup> With respect to presidential removal power — something that the Court's precedents treat as a matter of degree<sup>450</sup> — the Court is quite right to say that Congress may not go so far as to prohibit the President from either dismissing or counter-

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<sup>442</sup> See Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1126 (1998); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 348 n.89 (2002).

<sup>443</sup> See RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 9 (2d ed. 1997); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 13 (1971).

<sup>444</sup> See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525–47 (2003).

<sup>445</sup> See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879–80 (1996).

<sup>446</sup> See *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>447</sup> See U.S. CONST. art. II, § 4.

<sup>448</sup> See *id.* art. I, § 2, cl. 5; *id.* art. I, § 3, cls. 6–7.

<sup>449</sup> See *Bowsher v. Synar*, 478 U.S. 714, 723 (1986).

<sup>450</sup> See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3153–54 (2010); *Morrison v. Olson*, 487 U.S. 654, 685–93 (1988).

manding a federal officer who, in the President's judgment, is not "faithfully execut[ing]" federal law.<sup>451</sup> To return to *Free Enterprise Fund*, even if the validity of a two-tiered removal restriction is a judgment call, the exceptionally confining formulation of the statute's second-tier restriction in that case might well have justified the Court's decision had the statute not given the SEC alternative means of supervising the PCAOB.<sup>452</sup>

At this point, federalism may have fewer definite guideposts. But enforceable limits hardly constitute a null set. A government of limited and enumerated powers certainly "presupposes something not enumerated."<sup>453</sup> 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>454</sup> Some believe, moreover, that the constitutional guarantee of a "Republican Form of Government,"<sup>455</sup> though itself quite Delphic, may help mark out at least the outermost limits on permissible federal intrusions into state self-government.<sup>456</sup> Finally, the Court's decision, in *United States v. Lopez*,<sup>457</sup> to invalidate a federal gun possession statute suggests that, even under a deferential approach, the link between the object of federal regulation and the flow of interstate commerce may become so attenuated that it cannot reasonably sustain congressional power.<sup>458</sup> It is not my purpose here to adjudicate the merits of these positions. Rather, it is to suggest that while a deferential approach will make it rare indeed for the Court to invalidate a

<sup>451</sup> If the Take Care Clause means anything, it must mean at least that much. See *supra* note 268.

<sup>452</sup> The statute authorized the SEC to remove members of the PCAOB only for "willfully violat[ing]" the law, "willfully abus[ing] . . . authority," or unreasonably "fail[ing] to enforce compliance with" public accounting laws. 15 U.S.C. § 7217(d)(3) (2012). Whether that restrictive standard violated the Take Care Clause would depend of course on how one interprets the requirement of "faithful" execution. See *supra* note 277.

<sup>453</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

<sup>454</sup> See, e.g., Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817 (2010) (making an exhaustive historical case that the founders specifically understood the constitutional structure to operate only on individuals, and not states); Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819 (1999) (arguing that the historical concept of a "state" provides a basis for inferring minimum attributes of state sovereignty).

<sup>455</sup> U.S. CONST. art. IV, § 4.

<sup>456</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991); Merritt, *supra* note 326, at 50–55. Put another way, some aspects of internal governmental structure may, by tradition, be nonnegotiable attributes of any minimally self-governing sovereignty. Cf. *Coyle v. Smith*, 221 U.S. 559, 565 (1911) ("The power to locate its own seat of government and to determine when and how it shall be changed from one place to another . . . are essentially and peculiarly state powers."). Such a move would require the Court to reconsider a line of doctrine holding that Congress enforces the Guarantee Clause. See *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

<sup>457</sup> 514 U.S. 549 (1995).

<sup>458</sup> See *id.* at 557, 567.

statute on federalism grounds, that approach will not preclude judicial enforcement of clearly identified limits on federal power.

2. *Deference in Interbranch Disputes.* — The Necessary and Proper Clause also instructs the Court where to place its thumb on the scale in cases of interbranch conflict. In his dissent from the Court’s decision in *Morrison v. Olson*<sup>459</sup> to uphold the independent counsel statute, Justice Scalia wrote:

Where a private citizen challenges action of the Government on grounds unrelated to separation of powers, harmonious functioning of the system demands that we ordinarily give some deference, or a presumption of validity, to the actions of the political branches in what is agreed, between themselves at least, to be within their respective spheres. But where the issue pertains to separation of powers, and the political branches are (as here) in disagreement, neither can be presumed correct. The reason is stated concisely by Madison: “The several departments being perfectly coordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers . . . .” The playing field . . . , in other words, is a level one. As one of the interested and coordinate parties to the underlying constitutional dispute, Congress, no more than the President, is entitled to the benefit of the doubt.<sup>460</sup>

When it comes to composing the government, however, the Constitution is not neutral between Congress and the coordinate branches. Rather, the Necessary and Proper Clause, as noted, gives Congress power to implement not only its own powers, but also “all other Powers vested . . . in any Department or Officer” of the federal government.<sup>461</sup> Hence, to put it in the Court’s terms, if the question in *Morrison* was whether the removal restriction was “proper” — whether it complied with the structural underpinnings of the Constitution<sup>462</sup> — then it seems meaningful, to put it mildly, that the Constitution assigns that question explicitly to Congress.<sup>463</sup>

<sup>459</sup> 487 U.S. 654 (1988).

<sup>460</sup> *Id.* at 704–05 (Scalia, J., dissenting) (first omission in original) (citation omitted) (quoting THE FEDERALIST NO. 49, *supra* note 219, at 311 (James Madison)).

<sup>461</sup> U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

<sup>462</sup> See *supra* pp. 39, 42.

<sup>463</sup> This conclusion, moreover, lines up with Justice Jackson’s tripartite framework for assessing claims of presidential authority:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

The Court's decision this Term in *NLRB v. Noel Canning*<sup>464</sup> supports this conclusion. At issue was whether President Obama properly exercised presidential authority to make appointments pursuant to the Recess Appointments Clause, which authorizes the President "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."<sup>465</sup> Among other things, the Court held that the President could exercise such power only during a "recess of substantial length" and that, for complex reasons, a recess of three days or fewer was not substantial enough.<sup>466</sup> That determination framed what turned out to be the case's pivotal question: how to characterize a month-long Senate break that, by Senate resolution, was broken into "a series of brief recesses punctuated [every third day] by 'pro forma session[s],' with 'no business . . . transacted.'"<sup>467</sup> Successfully anticipating the minimum "Recess" required to invoke the Recess Appointments Clause, the Senate had obviously structured its resolution to ensure that it was formally out of session no more than three days at a time.<sup>468</sup>

This set of facts presented the deference question framed by Justice Scalia in *Morrison*. The status of the pro forma sessions pitted a presidential claim of authority to make recess appointments against the Senate's power to structure its proceedings to prevent such appointments. One could easily imagine a decision holding that the Senate's effort to schedule pro forma sessions (with no business) every three days was an obvious attempt to make an end run around the Recess Appointments Clause. The Court, however, held that "the Senate is in session *when it says it is*, provided that, under its own rules, it retains the capacity to transact Senate business."<sup>469</sup> The Court rested its determination on a perceived obligation to defer to the Senate's own delegated implementation power:

The standard we apply is consistent with the Constitution's broad delegation of authority to the Senate to determine how and when to conduct its business. The Constitution explicitly empowers the Senate to "determine the Rules of its Proceedings." And we have held that "all matters of

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Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (footnote omitted).

<sup>464</sup> 134 S. Ct. 2550 (2014).

<sup>465</sup> U.S. CONST. art. II, § 2, cl. 3.

<sup>466</sup> *Noel Canning*, 134 S. Ct. at 2561; *see also id.* at 2566–67.

<sup>467</sup> *Id.* at 2557 (second alteration and omission in original) (quoting S. JOURNAL, 112th Cong., 1st Sess. 923 (2011)).

<sup>468</sup> *See id.* at 2573.

<sup>469</sup> *Id.* at 2574 (emphasis added).

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method are open to the determination” of the Senate, as long as there is “a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained” and the rule does not “ignore constitutional restraints or violate fundamental rights.”<sup>470</sup>

In other words, the Rules of Proceedings Clause operated as a mini-Necessary and Proper Clause for each House to prescribe the means of conducting its own internal business. When the Senate’s exercise of power pursuant to that *explicit* delegation conflicted with the President’s assertion of power under the Recess Appointments Clause, the Court had little difficulty concluding that it owed deference to the Senate.<sup>471</sup>

The argument for deferring to Congress over the President under the Necessary and Proper Clause is, if anything, stronger. The Rules of Proceedings Clause gives each House power over its own procedures but does not specify how that assignment relates to competing authority asserted under other clauses, such as the Recess Appointments Clause. In contrast, the Necessary and Proper Clause gives Congress express power to carry into execution the powers of the coordinate branches. In a dispute between Congress and those branches, the playing field is explicitly not level. The benefit of the doubt goes to Congress.

### CONCLUSION

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. Rather than make us guess who fills in those blanks, the document itself tells us. Congress shall have the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>472</sup> The upshot of that assignment is not hard to describe. Unless it violates some other provision of the Constitution, when Congress specifies a reasonable means of carrying out its own power or the powers of the coordinate branches, the other branches must respect that decision.

The other branches may not evade that assignment of power through interpretive techniques that focus only on the ends, and not the means, that Congress has prescribed for doing the business of the

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<sup>470</sup> *Id.* (citation omitted) (first quoting U.S. CONST. art. I, § 5, cl. 2; then quoting *United States v. Ballin*, 144 U.S. 1, 5 (1892)).

<sup>471</sup> The Court added, however, that its “deference to the Senate cannot be absolute.” *Id.* at 2575. For example, the Court concluded that it would not defer to the Senate’s characterization if a resolution left the Senate “without the *capacity* to act” on nominations. *Id.*

<sup>472</sup> U.S. CONST. art. I, § 8, cl. 18.

federal government. Nor may they claim higher authority to fill in the blanks of the constitutional structure on matters to which the Constitution does not speak clearly. In recent years, the Court has taken it upon itself to displace Congress's implemental judgments based on freestanding notions of separation of powers and federalism. Of the separation of powers, James Madison wrote that "[q]uestions daily occur in the course of practice which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science."<sup>473</sup> Yet as compared with the idea of dual federalism — an idea that Americans invented from scratch — this was firm terrain.<sup>474</sup> When abstracted from the particular texts that create them, these concepts leave an enormous amount of room and thus discretion to determine what arrangements are appropriate. What the Necessary and Proper Clause tells us is that that discretion belongs to Congress.

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<sup>473</sup> THE FEDERALIST NO. 37, *supra* note 219, at 224 (James Madison).

<sup>474</sup> See *supra* pp. 55–56.