INTRODUCTION

Throughout American history, the Necessary and Proper Clause has extended a constitutional basis to some of the most influential acts of federal legislation. The Supreme Court has relied upon the Clause to check the scope of congressional power since *McCulloch v. Maryland*, and as a result its meaning has been the subject of a longstanding debate concerning the appropriate set of limitations on government. Proponents of large and small government alike have built competing theories upon decades of scholarship devoted to the Founders’ discussions on the subject and the progeny of cases following *McCulloch v. Maryland*. Meanwhile, efforts to trace the source of

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1 U.S. CONST. art. I § 8, cl. 18 [hereinafter “the Clause”].

2 See generally The Constitutionality of the Patient Protection and Affordable Care Act’s Individual Insurance Mandate: Hearing before the H. Comm. on the Judiciary, 112th Cong. (2011) [hereinafter Hearing] (statement of Randy E. Barnett, Carmack Waterhouse Professor of Legal Theory, Georgetown University) (discussing the Necessary and Proper Clause cases in the Supreme Court).


4 Recently, challenges to the new health care bill have fueled a renewed interest in this debate, and many are looking to history for guidance. See, e.g., Nathan Koppel, *Parsing the Necessary-and-Proper Clause*, WALL ST. J. L. BLOG (Dec. 29, 2010), http://blogs.wsj.com/law/2010/12/29/parsing-the-necessary-and-proper-clause/ (“By the time the health-care litigation makes its way to the Supreme Court . . . the court’s [sic] decision could turn on the meaning of necessary-and-proper, according to the Times.”); see also Roger Pilon, *Congress Rediscovering the Constitution*, WALL ST. J. (Jan. 4, 2011), http://online.wsj.com/article/SB10001424052748703384504576055632235572362.html (discussing the trajectory of the Necessary and Proper Clause since 1794).

5 See JOSEPH M. LYNCH, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT 42 (1999) (noting that “What was said at that time regarding the scope of the Necessary and Proper Clause therefore had a most important bearing on the future course of political, constitutional, and governmental development”); Hearing, supra
the Clause beyond its 1787 inception have been deemed hopeless, and few have attempted the inquiry. For those that have, the results have been laced with interpretative solutions, and are almost indistinguishable from the political views they represent.

The purpose of this Comment is to undertake the question of the Clause’s source without making any pretense of interpretation. It is intended to contribute to the historical record by providing a more complete and detailed account of how the Clause came to be included in the Constitution. In sum, it will demonstrate that the Clause was taken from some of the most influential documents of the time—the American state constitutions of 1776–1787.

Support for this conclusion is presented in three parts. Part I establishes the foundation for this theory by illustrating the common practice of “constitution-borrowing” in 1787, both among states and in writing the Federal Constitution. The extensive documentation of words, clauses, and ideas taken from state constitutions suggests that they would be natural candidates to consider when looking for the source of the Necessary and Proper Clause.

Part II focuses on the Clause specifically. It does so by looking to the records that first document its appearance in the Constitution—the drafts prepared by the Committee of Detail during the Constitutional Convention. A studied comparison of how the Clause entered and evolved through the committee’s work provides the reader with several clues to the Clause’s provenance that are not available to a reader looking only to the final version of the Clause. In its earliest stages, the Clause bears a great resemblance to similar provisions in

note 2, at 7, 11 (statement of Randy E. Barnett) (noting the need for a “limiting principle” for federal power under the Clause).

6 See Mark A. Graber, Unnecessary and Unintelligible, 12 CONST. COMMENT. 167, 168 (1995) (“The records of the Constitutional Convention provide no help. The Committee of Detail gave no hint why it chose the language it did.”).

7 The only authors to have written on the possible historical origins of the Necessary and Proper Clause entwine their research with recommendations that the Necessary and Proper Clause be read through the “fiduciary lens” of modern agency law and the principles of private business law. GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATelson & GUY I. SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 10–11, 57–60, 120, 154–55 (2010) [hereinafter ORIGINS].

8 See William Ewald, James Wilson and the Drafting of the Constitution, 10 U. PA. J. CONST. L. 901, 992 (2008) (noting that the Committee of Detail provided the first “enumeration of national legislative powers” and articulation of the Necessary and Proper Clause). The original drafts of the Committee of Detail are held at the Historical Society of Pennsylvania in Philadelphia. However, a record of the these drafts, along with Madison’s journals and other records of Constitutional Convention are available in THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., rev. ed. 1966) [hereinafter CONVENTION RECORDS].
state constitutions. Similarly, the first modifications made to its language, syntax, and placement evince a cobbling together of these provisions consistent with the widespread practice of “constitution-borrowing” at the time. This theory is further strengthened in light of the limited materials known to be available to the committee, as well as its members’ express intentions to borrow from state constitutions.

Part III addresses possible counterarguments. In a recent publication by Cambridge Press, The Origins of the Necessary and Proper Clause, several articles are combined to assert two predominant theories as to the source of the Clause—private agency law and corporate law. Though the Origins volume conflates issues of interpretation, origins, and direct source, it is worth drawing the distinction and analyzing these pieces separately. Here, interpretation will be left aside. The Clause’s possible origins will be touched on briefly and only for the limited purpose of addressing corporate law counterarguments. For purposes of this Comment, it is sufficient to undertake only the question of the Clause’s direct source—where the phrase was taken from the moment it was inserted into the constitutional drafts. All things considered, the American state constitutions of 1776–1787 will be shown to provide the most natural and rational answer.

I. THE COMMON PRACTICE OF “CONSTITUTION-BORROWING” AT THE CONVENTION IN 1787

The prominent role of state constitutions in the drafting of a federal counterpart is an established principle of American constitutional scholarship. In drawing this connection, scholars have relied

9 Such materials included the resolutions, the Articles of Confederation, the state constitutions, and the Virginia, New Jersey, and Pinckney Plans. William Ewald & Lorianne Updike Toler, Early Drafts of the U.S. Constitution, 135 PA. MAG. HIST. & BIOGRAPHY 227, 236 (2011).

10 ORIGINS, supra note 7.

11 There is also a third article, Necessity, Propriety, and Reasonableness, which pertains to the “intellectual origins” of the Clause. This article interprets the Clause first, concluding that it represents a principle of “reasonableness” akin to fiduciary duty, and then looks to sources that match this meaning—private agency law, the law of principles and incidents, and public law in England. Because of the article’s reverse methodology, its argument cannot be properly addressed here. Id. at 120, 135.

12 See THE CONSTITUTION AND THE STATES: THE ROLE OF THE ORIGINAL THIRTEEN IN THE FRAMING AND ADOPTION OF THE CONSTITUTION, at x (hereinafter “THE CONSTITUTION AND THE STATES”) (Patrick T. Conley & John P. Kaminski eds., 1988) (“Not only was the role of the states central in framing, ratifying, and revising the Constitution, but the new federal Constitution was permeated with the influence of state constitutions and local precedents.”); James Harvey Robinson, The Original and Derived Features of the Constitution,
both on actual and constructive evidence. Actual evidence is taken directly from the records of the Constitutional Convention, where delegates often stated an intention to use certain portions of state constitutions. As for constructive evidence, it consists of the numerous provisions in the final draft that in form or substance bear a striking resemblance to clauses in state constitutions. As the historian Willi Paul Adams observed:

The state constitutions’ profound influence on the drafting of the federal Constitution and the ratification debates . . . took various shapes and forms, ranging from explicit institutional precedent and reasoning by structural analogy to negative examples of what to avoid . . . . [T]he state constitutions were a natural point of reference in the constitutional debates of 1787–88 because they were the constitutions Americans knew best.

The influence of state constitutions in the period preceding the Constitutional Convention cannot be understated. In 1776, John Adams found himself in Philadelphia serving as a Congressional delegate for independence, and far removed from Boston where the Constitution of Massachusetts was being drafted. In a letter to William Cushing, Adams lamented his absence from the project, describing its potential to affect “the Lives and Liberties of Millions, born and unborn.”

Adams’s sentiments were well reasoned; at the time, the way in which Americans “practiced their sovereignty as a people” and established their independence was by writing state constitutions. In fact,
the decade following the American Revolution was a period of lively experimentation in self-government. Most states drafted and redrafted their constitutions with an eye to neighboring developments, often adopting provisions that seemed to work elsewhere.\footnote{See \textit{id.} at 279 (“The revolutionary-era constitutions of Virginia, North Carolina and Massachusetts, as well as New Hampshire’s second constitution, all underscored the importance of timely reforms,” which were often the result of borrowing from other state’s improvements); \textit{Lutz, supra} note 12, at 12 (noting that many delegates at the 1787 Constitutional Convention had assisted in the writing of state constitutions).}

This practice of “constitution-borrowing” fostered a sense of respect and mutual collaboration that would come to be essential when forging a national document. In May of 1787, delegates to the Constitutional Convention began to trickle into Philadelphia. As they waited for a quorum to convene, plans for the new government were already burgeoning. The Articles of Confederation that had governed the newly independent nation had proven unworkable, and revision or replacement was in order. The nature of the Convention’s purpose called for experienced drafters, and many of the delegates who came to the State House had been involved in the process of making their own state constitutions.\footnote{\textit{Lutz, supra} note 12.}

One such delegate was George Read, a Continental Congressman from Delaware who had previously served as president of Delaware’s own convention, where he helped draft the state’s 1776 constitution.\footnote{\textit{Signers of the Declaration of Independence, UHistory.org, www.ushistory.org/declaration/signers/read.htm} (last visited Feb. 20, 2012).} Having arrived in Philadelphia a few days before John Dickinson, his fellow delegate, Read wrote to apprise him of the situation: “I am in possession of a copied draft of a Federal system intended to be proposed, if something nearly similar shall not precede it. Some of its principal features are taken from the New York system of government.”\footnote{Letter from George Read to John Dickinson (May 21, 1787), \textit{available at} http://teachingamericanhistory.org/library/index.asp?document=1859 (last visited Feb. 20, 2012).} According to Read the proposal would secure the small state of Delaware a single seat on the new legislature, and he urged Dickinson to make haste and attend the Convention, lest the New York proposal pass.\footnote{\textit{Id.}}

Read’s reaction would come to epitomize the Constitutional Convention. In the summer months that ensued, the State House erupted in debate, and delegates brandished their opinions with recourse to not only their own constitutions, but also those of sister
states. Their biases, prejudices and wisdom stemmed from the acute familiarity of having had created these documents. It was these lessons, learned by trial and error, which were to be the great elixir to cure the Articles of Confederation. As Edmund Randolph, the delegate from Virginia, explained, “the Articles of Confederation, drawn up ten years before, [were] the best product which could be expected of a time when the science of constitutions and confederacies was in its infancy.” In 1787, by contrast, the science of constitution-making had advanced appreciably, and the knowledge that had been achieved by a decade of collaborative experimentation would not be wasted.

A. Political Principles Borrowed from State Constitutions

The debates of the Constitutional Convention of 1787 were recorded by James Madison and are contained in his *Journal of the Federal Convention*. These notes record at least thirty instances of delegates referencing examples and lessons learned from state constitutions. Some states, such as Georgia and North Carolina, were cast as negative models of what to avoid. Meanwhile, other states received more favorable treatment and were expressly emulated.

The government of Massachusetts, for instance, was a lodestar throughout the debates, and many delegates called for positive comparisons to its constitution when searching for footing on an issue. In determining whether the legislature or the executive should appoint judges, Delegate Nathaniel Gorham recommended that “[j]udges be

25 G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 46–51 (1998) (discussing the overwhelming practice of constitutional collaboration among states, and also the constitution-makers’ reference to state charters in framing a federal constitution).
26 Robinson, supra note 12, at 237.
27 JOURNAL OF THE FEDERAL CONVENTION KEPT BY JAMES MADISON (E.H. Scott ed., special ed. 1898) [hereinafter JOURNAL OF THE FEDERAL CONVENTION]. The first comprehensive record of the Constitutional Convention of 1787 was assembled in 1911 by the renowned scholar Max Farrand, and included the notes recorded by James Madison during the Convention. See 1 FEDERAL CONVENTION vii–x (Max Farrand ed., 1911).
28 See discussion contained in this section for specific references.
29 JOURNAL OF THE FEDERAL CONVENTION, supra note 27, at 375 (quoting Delegate Gorham) (“Rhode Island is a full illustration of the insensibility to character produced by a participation of numbers in dishonourable measures, and of the length to which a public body may carry wickedness and cabal.”); id. at 519 (quoting Delegate Rutledge) (“The experiment in South Carolina, where the Senate cannot originate or amend money bills, has shown that it answers no good purpose . . .”); id. at 431 (quoting Delegate Morris) (expressing his dislike of the Pennsylvania constitution); id. at 524 (quoting Delegate Williamson) (“He had scarcely seen a single corrupt measure in the Legislature of North Carolina, which could not be traced up to office hunting.”)
appointed by the Executive with the advice and consent of the second branch, in the mode prescribed by the Constitution of Massachusetts."  

Edmund Randolph expressed his agreement with Gorham, and reiterated the benefits of an appointment system like that of Massachusetts. He compared the system to that of states which provided for legislative appointments, stating: "Appointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications."  

Similarly, during a debate about proportional representation in the legislature, Delegate James Wilson of Pennsylvania suggested "that the Committee might consider the propriety of adopting a scale similar to that established by the Constitution of Massachusetts, which would give an advantage to the small States without substantially departing from the rule of proportion."  

Other constitutions varied in influence, and included those of Pennsylvania, Virginia, Rhode Island, Maryland, North Carolina, South Carolina, and New York.  

During the Convention, single issues would be debated with recourse to multiple state constitutions for authority. As an example, when Delegate Gouverneur Morris argued against the election of the executive by the legislature, he recommended the mode of popular election by stating that it had been found to be "superable in New York and in Connecticut, and would, he believed, be found so in the case of an Executive for the United States."  

In propounding the opposite view, Delegate James Mercer of Virginia objected to popular election, reasoning that "[t]he people cannot know and judge of the characters of candidates. The worst possible choice will be made."  

In closing his argument, he quoted the case of the Senate in Virginia as a case in point.  

Not only did delegates cite examples of provisions that had proven successful or unsuccessful in state constitutions, but they also recommended the adoption of clauses on the basis of their appearance in numerous state constitutions because they seemed to indicate con-
sensus on an issue. In defending his stance for eligibility to office, Pinckney argued: “No state has rendered the members of the Legislature ineligible to office. In South Carolina the Judges are eligible into the Legislature. It cannot be supposed, then, that the motion will be offensive to the people.” In the same thread, James Wilson observed that his state, which had “gone as far as any State into the policy of fettering power,” had not made the members of its legislature ineligible to other government positions.

In the absence of uniformity, there was room for creativity. Provisions from different constitutions were often arranged into hybrid clauses in order to produce superior versions. James Madison, in commenting on how often the members of the House and Senate were to be chosen, noted that “it was nothing more than a combination of the peculiarities of two of the State Governments, which separately had been found insufficient. The Senate was formed on the model of that of Maryland. The revisionary check on that of New York.” Madison’s observation was not an isolated incident.

According to historian James Harvey Robinson, the form of the legislative assembly and its two branches, the periodic adjustment of representatives, the method of passing laws, the concrete separation of powers, the executive vested in a single individual, the President’s powers and the executive veto, the characteristics of the Vice President, the rules concerning impeachments, the form of the judiciary, and the method for appointing judges, were all principles cobbled together from state constitutions. Robinson conducted his research by studying the different structures of early state governments and

38 Id. at 399 (quoting Delegate James Madison) (“in all the states”); id. at 468 (quoting Colonel Mason) (“Eight or nine states have . . . .”); id. at 488 (quoting Delegate Randolph) (“the principles laid down in our all our American Constitutions”); id. at 514 (quoting Delegate Wilson) (“in every State where the Constitution had established it”); id. at 518 (quoting Delegate Dickinson) (“Eight States have inserted in their Constitutions the exclusive right of originating money bills . . . .”).

39 Id. at 524–25.

40 Id.

41 Id. at 525–26.

42 Id. at 528 (quoting Delegate Madison) (opining on how often the members of the House and Senate were to be chosen, stating that “[i]t was nothing more than a combination of the peculiarities of two of the State Governments, which separately had been found insufficient. The Senate was formed on the model of that of Maryland. The revisionary check on that of New York.”).

43 Robinson, supra note 12, at 242.
comparing them to the final product of the Constitution. His findings state:

In its chief features, then, we find our Constitution to be a skillful synthesis of elements carefully selected from those entering into the composition of the then existing state governments. The Convention ‘was led astray by no theories of what might be good, but clave closely to what experience had demonstrated to be good.’

Thus it is not only the delegates’ references to state constitutions during the debates, but also the character of the final Constitution itself, that reveal the many connections existing between them.

B. Words and Clauses Borrowed from State Constitutions

The influence of the state constitutions at the Constitutional Convention was not limited to principles of government. Many references to the states extended to the specific language used by their constitutions as well. As was often the case concerning the principles of government, when it came to language, Massachusetts was again a pet state, favored by many. The qualified veto in the federal Constitution was taken directly from the constitutions of Massachusetts (1780) and New York (1777), and included “the very words of the Massachusetts constitution[.]” In refining the language of the provision for originating money bills, Madison noted in his Journal of the Convention that “[i]t was moved to strike out the words ‘and shall be subject to alterations and amendments by the Senate;’ and insert the words used in the Constitution of Massachusetts on the same subject[.]”

The interpretation of language in state constitutions also made its way into the debates. Madison, in complaining that the term “resident” was too vague, called attention to the fact that “[g]reat disputes had been raised in Virginia concerning the meaning of residence as a qualification of representatives, which were determined more accord-

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44 Id.
45 Robinson, supra note 12, at 231.
46 Id. The analogies to state constitutions continued after the Convention and into the ratification debates. This comparison was often struck in an attempt to garner public support for the Constitution. In The Federalist No. 81 (Alexander Hamilton), Hamilton writes, “Contrary to the supposition of those who have represented the plan of the Convention, in this respect, as novel and unprecedented, it is but a copy of the constitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.” See also 2 The Works of the Honourable James Wilson, L.L.D. 199–200 (Philadelphia, Lorenzo Press 1804) (comparing provisions in state constitutions to the federal Constitution).
47 JOURNAL OF THE FEDERAL CONVENTION, supra note 27, at 690.
ing to the affection or dislike to the man in question than to any fixed interpretation of the word." Delegate Mercer agreed, and described similar anecdotes of violent disputes in Maryland over the definition of the term. In addition, scholars have documented numerous instances of technical, linguistic points—such as the definition of treason—that were taken directly from state constitutions.

In sum, the states provided the framework, the language, and the tales of failure and success that would come to shape our nation’s founding document. This connection between state constitutions and the federal Constitution is a path well known to scholars of the convention. According to the calculations of historian Donald Lutz, “the states are mentioned explicitly or by direct implication fifty times in forty-two separate sections of the U.S. Constitution.” Based on the significance and abundance of these contributions, it is only natural to consider the state constitutions as likely sources of the Necessary and Proper Clause moving forward.

II. THE NECESSARY AND PROPER CLAUSE AND THE STATE CONSTITUTIONS

The Necessary and Proper Clause was first introduced to the Constitution by the Committee of Detail. The Committee consisted of five members: James Wilson of Pennsylvania; John Rutledge of South Carolina; Edmund Randolph of Virginia; Oliver Ellsworth of Connecticut and Nathaniel Gorham of Massachusetts. Like many of the delegates at the Constitutional Convention, the members of the committee were ready and willing to borrow from state constitutions and articulated a specific intention to do so. Wilson, who wrote the majority of drafts prepared by the committee, had stated before the Convention:

The same train of ideas which belonged to the relation of the Citizens to their State Govts. were applicable to their relations to the Gnel. [sic]

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48 Id. at 473.
49 Id. at 474.
50 Robinson, supra note 12, at 242.
51 THE CONSTITUTION AND THE STATES, supra note 12, at x.
52 Ewald & Toler, supra note 9, at 234.
54 Ewald, supra note 8, at 983.
Govt., and in forming the latter, we ought to proceed by abstracting as much as possible from the idea of State Govts.  

Similarly, among the documents created by the committee was Edmund Randolph’s draft of the constitution, which he introduced with the following preamble:

In the draught [sic] of a fundamental constitution, two things deserve attention: 1. To insert essential principles only; lest the operations of governments should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events; and 2. To use simple and precise language, and general propositions, according to the example of the . . . constitutions of the several states.

With very few exceptions, every piece of the committee’s final constitutional draft can be traced to the state constitutions, the Articles of Confederation, or one of the three plans given to the committee—the Pinckney, New Jersey and Virginia Plans.

The committee’s extensive borrowing also makes sense in light of its heavy charge, and the short amount of time allotted for completion. After a long summer of debates, the Convention decided to delegate the task of turning its twenty-four general resolutions into a constitution. The task given to the Committee of Detail was to “arrange, and draw into method and form the several matters which had been agreed to by the Convention, as a Constitution for the United States.” As William Ewald and Lorianne Updike Toler explain, the committee’s purpose was a matter “not of creating entirely from scratch, but of selecting, of choosing what to include from the mass of available materials, of filling in details, of formulating appropriate language, and of organizing the whole into a coherent text.” By using these materials, in only ten days’ time the twenty-four general resolutions were transformed into strong, fleshed-out provisions.

Among those general resolutions originally entrusted to the Committee of Detail was Resolution Six, which stated:

That the Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation; and moreover to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the

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56 2 CONVENTION RECORDS, supra note 8, at 137 (emphasis added); Ewald & Toler, supra note 9, at 263–65.
57 Ewald & Toler, supra note 9, at 236.
58 2 CONVENTION RECORDS, supra note 8, at 129 n.1.
59 Diary of George Washington (July 27, 1787), in 3 CONVENTION RECORDS, supra note 8, at 65.
60 Ewald & Toler, supra note 9, at 236.
Harmony of the United States may be interrupted by the Exercise of individual Legislation.\textsuperscript{61} This phrasing had been introduced by Madison in the Virginia Plan, and was described by Randolph as an integral feature of the Constitution.\textsuperscript{62} When Delegate Pierce Butler criticized the resolution as being too vague, particularly with respect to the word “incompetent,” Nathaniel Gorham was quick to explain that “[t]he vagueness of the terms constitutes the propriety of them.”\textsuperscript{63} He reiterated that the purpose of the meeting was only to establish general principles, and that the “[p]recise and explicit” details would be hammered out by the Committee of Detail.\textsuperscript{64} Unconvinced, Rutledge insisted that the resolution be “committed to the end that a specification of the powers comprised in general terms, might be reported[;]”\textsuperscript{65} but his motion failed.\textsuperscript{66} After several other unsuccessful attempts to enumerate legislative powers, the Committee of the Whole adopted Resolution Six and its general grant of power.\textsuperscript{67}

Surprisingly, the final draft presented by the Committee of Detail contained neither the general grant in Resolution Six, nor a pure enumeration of powers.\textsuperscript{68} Instead, it consisted of a list of powers followed by the Necessary and Proper Clause. Some scholars view this result as a compromise,\textsuperscript{69} but because there are no records of the conversations that took place during the meetings of the Committee of Detail, this cannot be confirmed.\textsuperscript{70} Either way, the theory of politi-
cal compromise does not require resolution here, where the question is the Clause’s source. And though no record of the committee members’ discussions exists, the documents and drafts that they produced have been gathered and preserved by the Historical Society of Pennsylvania and the Library of Congress, and are available for review. When these materials are read in succession, they map the sequence of changes that transformed Resolution Six into the Necessary and Proper Clause. They reveal the earliest versions of the Clause and provide important clues for solving the question of its provenance.

A. Tracing the Development of the Necessary and Proper Clause Through the Nine Documents of the Committee of Detail

1. Documents I–III: Assembling the Basic Materials

Document I consists of James Wilson’s copy of the twenty-four general resolutions given to the Committee of Detail by the Committee of the Whole on July 24, 1787.\(^71\) It contains an exact replica of the general grant in Resolution Six, but it is reassigned to the position of Resolution Eight.\(^72\) Document II is a compilation of the resolutions adopted between the writing of the first list and the first meeting of the committee, and does not contain a reference to legislative power.\(^73\) Document III is James Wilson’s copy of an outline of the Pinckney Plan.\(^74\) In this outline, there is no equivalent of a Resolution Six clause, but instead an enumeration of powers.\(^75\) These three documents represent a portion of the materials that the Committee of Detail had been given to work with by the Committee of the Whole. In addition to these materials, the committee had at its disposal the Ar-
articles of Confederation, the state constitutions, and the Pinckney, New Jersey and Virginia Plans.  

2. Document IV: Randolph’s Draft Introduces the “Necessary Clause”

Document IV is a sketch of the constitution written by Edmund Randolph, and appears to be the first substantive draft to be marked up and modified by the committee. The original draft is in Randolph’s handwriting, but it also has emendations by Rutledge and checkmarks by what appears to be Wilson’s hand. The draft begins by setting forth guidelines as to how the Constitution ought to be drafted. As quoted earlier, Randolph writes that he will use “simple and precise language . . . according to the example of the (several) constitutions of the several states.” This intention was clearly followed, as the draft’s description of the executive branch, and the means for the executive’s removal, are provisions that Madison later recognized as being taken directly from the constitution of Virginia.

Next, Randolph’s Draft introduces its section on the legislative branch by what appears to be a summary or checklist, reading: “1. the legislative powers (2. with certain exceptions and) (3. under certain restrictions);” the section then lists exceptions to legislative powers, which are followed by a large paragraph containing nineteen specific, enumerated powers. At the end of the list of powers lies Randolph’s modified version of Resolution Six. However, it is crossed out and replaced with: “and a right to make all Laws necessary for carrying forth these powers into Execu—.” The modification is made in Rutledge’s hand; and since he was the chair of the committee, it can be assumed that it was made in response to a delegate’s recommendation made during the meeting.

Without record of the internal discussions that took place, we cannot know which delegate proposed the new “and a right to make all Laws necessary. . . .” phrasing of Resolution Six. Nevertheless, the clue that the Clause drops off, and that Rutledge does not finish writ-

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76 Ewald & Toler, supra note 9, at 236.
77 Id. at 263–85.
78 Id.
79 2 CONVENTION RECORDS, supra note 8, at 137 (emphasis added).
80 Id. at 145 n.12.
81 Id. at 142–44. Also, the means of accomplishing the first few powers are subject to a few, specific exceptions.
82 Id. at 144 [hereinafter the “Necessary Clause”].
83 Id. at 137 n.6. Since Rutledge was the chair of the Committee, he would have been the delegate to write this change into the document during the meeting, possibly on someone else’s recommendation.
ing the word “execution,” suggests that the clause was already written down in its entirety elsewhere, and the decision to include it here did not require him to repeat it at length. In fact, the second half of this Clause does not appear until Wilson writes it into the committee’s final draft of the Constitution (Document IX). 84


The first outline written by Wilson for the Committee of Detail is Document V. 85 Wilson begins the outline by listing a short description of the qualifications for members of the House and Senate, but then proceeds to list the resolutions that still needed to be written. The first two items on the list are to “treat the powers of the legislative,” 86 and to “except from those Powers certain specified Cases.” 87 This structure is identical to the legislative section in Document IV, and reflects a compromise by Wilson—who favored a general clause over enumeration. 88

The list then ends by stating that it will seek to assign to the legislature “Powers which may, with Propriety be vested in it.” 89 This placement coincides with that of Resolution Six in Randolph’s Draft (Document IV). Wilson would later add his language of “Powers which may, with Propriety be vested in it” to the “and a right to make all Laws necessary for carrying forth these powers into Execu—” to create the Necessary and Proper Clause. 90 However, neither of these component parts resurfaces until Wilson cobbles them together in his composition of the committee’s final draft (Document IX). Instead, the next three drafts were to contain miniature, ancillary versions of the Clause, as language attached to qualify specific powers.

84 See also LYNCH, supra note 5, at 20 (suggesting that the substance of the Clause resembled Wilson’s own position on the limitations on Congress).
85 2 CONVENTION RECORDS, supra note 8, at 150 n.13.
86 Id. at 151.
87 Id. In Draft VI, Wilson provides an example of the kind of specific exception he referred to in Draft V: “[e]ach Houses [sic] of the Legislature shall possess the right of originating (Acts) Bills, except in Cases [of Money Bills, which shall originate in the House of Representatites].”
88 See Ewald, supra note 8, at 991–92 (discussing Wilson’s awareness of the power of a “necessary and proper” clause).
89 2 CONVENTION RECORDS, supra note 8, at 151.
90 Id. at 144 (containing Wilson’s final version of the Clause).
4. Documents VI–VIII: The Clause Disappears

Documents VI and VIII are a rough draft written by Wilson, divided into two parts, and do not contain a general necessary clause like that of Randolph’s Draft (Document IV). Instead, the only semblance of similar, qualifying language is used as an attachment to various specific powers. For example, in Document VI Wilson introduces a clause that states: “The Legislature of the United States shall have Authority to establish such Qualifications of the Members of each House . . . as to the said Legislature shall seem proper and expedient.” These qualifying attachments were not only common among state constitutions, but were also used frequently at the Convention, in the Articles of Confederation, and in various plans before they were stated in these drafts.

Document VII, which consists of Wilson’s excerpts from the New Jersey and Pinckney Plans, also illustrates this practice. It begins with an enumeration of powers, including the authority to use revenue generated by postage, as qualified by: “such foederal [sic] Purposes as they shall deem proper and expedient—to make Rules and Regulations for the Collection thereof . . . .” Similarly, Document VIII contains language stating that the “Constitution ought to be amended whenever such Amendment shall become necessary.” This is an exact replication of the language used by New Hampshire and Massachusetts for the amendment of their constitutions.

Furthermore, the executive veto is written as follows:

[If] it shall appear to him improper for (becoming) being passed into a Law, he shall return it, together with his Objection against it in Writing, to that House (of Representatives or Senate) in which it shall have originated . . . .

This language was also likely taken directly from a state constitution. The 1777 Constitution of New York contained a virtually identical

91 Ewald & Toler, supra note 9, at 295, 311.
92 2 CONVENTION RECORDS, supra note 8, at 155–56.
93 See, e.g., ARTICLES OF CONFEDERATION, art. VI, § 4 (“No vessels of war shall be kept in time of peace . . . except as shall be deemed necessary . . . .”)
94 Ewald & Toler, supra note 9, at 305.
95 2 CONVENTION RECORDS, supra note 8, at 157.
96 Id. at 159.
98 2 CONVENTION RECORDS, supra note 8, at 161.
provision concerning the governor’s veto of legislative acts.\textsuperscript{99} Finally, Document VIII entrusts the legislature with the responsibility of resolving present and future disputes among the several states,\textsuperscript{100} which is the last linguistic resemblance to Resolution Six to be found among the committee’s drafts.

5. Document IX: The Clause is Reassembled in Wilson’s Final Draft

The committee’s final draft was also prepared by James Wilson (Document IX). It is virtually identical to the report presented to the Constitutional Convention by the Committee of Detail on August 6, 1787.\textsuperscript{101} In terms of content, it is the first draft to represent a true synthesis of the material in the committee’s previous drafts. The provision establishing qualifications for the House and Senate is taken from Document VI, and modified to read: “The Legislature of the United States shall have Authority to establish such <uniform> Qualifications of the Members of each House . . . as to the said Legislature shall seem (proper and <fit>) expedient.”\textsuperscript{102} The right of originating bills, as stated in Document VI, is borrowed intact.\textsuperscript{103} The executive veto is taken directly from Document VIII, and preserves the same language used by the 1777 Constitution of New York: “[I]f . . . it shall appear to him improper for being passed into a Law[.]”\textsuperscript{104} The basis for Constitutional amendments, “whenever such . . . become necessary” is also carried over from Draft VIII,\textsuperscript{105} which borrowed the provision from the Massachusetts and New Hampshire constitutions.

As for Resolution Six, it is pinned to the end of an enumeration of powers, and reworded as the Necessary and Proper Clause.\textsuperscript{106} This result was a combination of at least two earlier versions of the Clause. First, Wilson took the beginning of the “necessary clause” just as it had been recorded by Rutledge on Randolph’s Draft (Document IV), which stated: “and a right to make all Laws necessary to carry the

\textsuperscript{99} N.Y. CONST. of 1777, art. III.
\textsuperscript{100} 2 CONVENTION RECORDS, supra note 8, at 161.
\textsuperscript{101} Ewald & Toler, supra note 9, at 321.
\textsuperscript{102} 2 CONVENTION RECORDS, supra note 8, at 165.
\textsuperscript{103} Id. at 167.
\textsuperscript{104} Id.
\textsuperscript{105} Id. at 159.
\textsuperscript{106} See MASS. CONST. of 1780, ch. 6, § 10, reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, supra note 97, at 1911; see also N.H. CONST. of 1784, reprinted in 4 FEDERAL AND STATE CONSTITUTIONS, supra note 97, at 2470.
\textsuperscript{107} See Hueston, supra note 53, at 770 (explaining that the fate of Resolution Six as determined by the Committee of Detail was to reduce the power of Congress by turning a general legislative grant into an enumeration and Necessary and Proper Clause).
foregoing powers into Execu—\textsuperscript{108} and completed the Clause where it had dropped off. Then, he added the word “proper,”\textsuperscript{109} which he likely took from the earlier version of the “Powers which may, with Propriety be vested in [the Government]”\textsuperscript{110} language in his own rough draft (Document V),\textsuperscript{111} to create the final version of the Clause:

\begin{quote}
[A]nd to make all Laws that shall be necessary and proper for carrying into (full and complete) Execution (the foregoing Powers, and) all other powers vested, by this Constitution, in the Government of the United States, or in any Department or Officer thereof.\textsuperscript{112}
\end{quote}

Finally, he placed it in the same position as it had been in Documents IV and V—at the end of an enumeration of powers.

In doing so, Wilson’s final draft abandoned the model of ancillary necessary clauses with respect to enumerated powers.\textsuperscript{113} For example, Document VII included an ancillary clause attached to the postage revenue spending power, which stated “such foederal [sic] Purposes as they shall deem proper and expedient,”\textsuperscript{114} but the postage clause of the final draft was shortened to read: “to establish Post-offices.”\textsuperscript{115} It is possible then, that for the sake of stylistic concision, the missing part of the provision was moved down to the end of the paragraph and subsumed by the Necessary and Proper Clause. In any case, it is introduced into the Constitution as an independent clause at this point.\textsuperscript{116}

In sum, when the Committee of Detail departs from Resolution Six, it seems to do so in one of two ways. Either it is present in the form adopted by Documents VI–VIII, and attached as qualifying language to a specific power, or it is present in the form adopted by Documents IV, V, and IX, which state it as an independent “necessary clause” that hangs at the end of a paragraph of enumerated powers. The earliest version of the new Clause that replaced Resolution Six is

\begin{footnotes}
\item \textsuperscript{108} 2 CONVENTION RECORDS, supra note 8, at 144. Since Rutledge was the chair of the Committee, he would have been the delegate to write this change into the document during the meeting, likely at the behest of someone else’s recommendation.
\item \textsuperscript{109} LYNCH, supra note 5, at 19–20.
\item \textsuperscript{110} 2 CONVENTION RECORDS, supra note 8, at 151.
\item \textsuperscript{111} Id. at 150 n.13.
\item \textsuperscript{112} Id. at 168.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Id. at 157. It is also interesting to consider the New Jersey Plan, which provided that postage revenues were “to be applied to such federal purposes as they shall deem proper & expedient; to make such rules & regulations for the collection thereof; and the same from time to time, to alter & amend in such manner as they shall think proper.” Variant Texts of the Plan Presented by William Patterson, THE AVALON PROJECT (Feb. 18, 2012), http://avalon.law.yale.edu/18th_century/patexta.asp.
\item \textsuperscript{115} 2 CONVENTION RECORDS, supra note 8, at 167–68.
\item \textsuperscript{116} Ewald, supra note 8, at 991.
\end{footnotes}
in Document IV, where it is written as an independent “necessary clause” that does not include the word “proper.” This prototype not only provides clues as to the Clause’s source, but also furnishes the reader with an original version of the Clause unadulterated by any later revisions.117 It is the best starting point from which to address the question of the Clause’s pedigree because it should share the closest resemblance to the previous document from which it was taken. This Comment will demonstrate that in both of these developmental stages—the earliest “necessary clause” and the later ancillary clauses—the Clause was created and revised by reference to the several examples of the state constitutions.

B. Matching the Different Versions of the Necessary [and Proper] Clause to Provisions in State Constitutions

At a lecture at the college that was to become the University of Pennsylvania Law School, Wilson explained the committee’s reason for inserting the Clause at the end of the enumeration of powers. He compared the federal Constitution to that of Pennsylvania, and pointed out the “striking difference” between the two—namely that the Constitution of Pennsylvania did not contain an equivalent to the Necessary and Proper Clause.118

The reason for this difference was plain. According to Wilson, the Constitution of Pennsylvania did not require a similar clause because it endowed its legislature with general powers.119 By contrast, the federal Constitution, he pointed out, enumerated the legislature’s powers.120 Instead, the insertion of this Clause could be compared to the state constitutions of Vermont, New Hampshire, and Massachusetts, which enumerated the powers of their legislatures and contained similar “necessary clauses” at the end of their lists of powers.121

Wilson’s explanation to his law students is especially significant because it was he himself who penned the complete version of the Clause in the final draft.122 Though Wilson had already stated a gen-

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117 ORIGINS, supra note 7, at 89.
118 2 Id. 119 Id. 120 Id.
122 See LYNCH, supra note 5, at 20 (“[T]he committee adopted the substance of Wilson’s suggestion [of a Necessary and Proper Clause] and recommended it to the convention.”).
eral intention to rely on state constitutions, his lecture revealed that he specifically had the state constitutions in mind when writing the Necessary and Proper Clause. However, one need not rely solely on his narrative account. There is a clear connection between the earliest versions of the Clause and state constitutions that can be mapped independently of his anecdotal evidence.

1. Variations of the Clause as Attached to a Specific Power

In Documents VI through VIII, where a general Clause is absent, qualifying language is attached to specific powers. This ancillary language has identical analogs in several of the state constitutions. The following examples, taken from 1776–1787 state constitutions, resemble the “as they shall deem proper and expedient” language used in Documents VI and VII as attached to the authority to create post offices and the authority to establish qualifications for members of the House.

For example, the 1780 Constitution of Massachusetts allows for the increase of salaries of its representatives as the legislature “shall judge proper,” and authorizes it to “erect and constitute municipal or city governments . . . as [they] shall deem necessary or expedient for the regulation and government thereof[.]” The 1776 Constitution of New Jersey authorizes its legislature to alter the number of representatives as it “shall, at any time or times hereafter, judge it equitable and proper[.]” Also, the 1777 Constitution of New York provides that “it shall be in the discretion of the legislature to naturalize all persons, and in such a manner, as they shall think proper.”

Similarly, the Constitution of Vermont of 1786 provides that “[a] future legislature may, when they shall conceive the same to be expedient and necessary, erect a Court of Chancery,” while an earlier version of Vermont’s constitution authorized its legislature to enact “proper regulations” pertaining to the right to hunt and fowl.


\[124\] Mass. Const. of 1780, art. II, reprinted in 3 Federal and State Constitutions, supra note 97, at 1911.

\[125\] N.J. Const. of 1776, art. 3, reprinted in 5 Federal and State Constitutions, supra note 97, at 2595.

\[126\] N.Y. Const. of 1777, art. XLII, reprinted in 5 Federal and State Constitutions, supra note 97, at 2637.


1778 Constitution of South Carolina reads that “the whole State shall, as soon as proper laws can be passed for these purposes, be divided into districts and counties . . . .”\textsuperscript{129} Lastly, Massachusetts, New Hampshire, and Vermont each provide for the revision of their constitutions as “shall be found necessary,”\textsuperscript{130} and as “shall be found proper,” respectively.\textsuperscript{131}

Clearly the provision in Document VIII of the Committee of Detail, which states the “Constitution ought to be amended whenever such Amendment shall become necessary[,]” was language taken directly from these state constitutions of Massachusetts and New Hampshire.\textsuperscript{132} Furthermore, these examples demonstrate the states’ common practice of attaching qualifying adjectives to specific powers.

Documents VI through VIII employ this same pattern. They lack a general “necessary clause” and contain a list of specific powers, with only some powers stated in terms of qualifying language. In conclusion, Documents VI through VIII use the same words that are used in state constitutions (necessary, proper, expedient), place them in the same position (attached to the same sentence describing the specific power), and use them within the same context (restricting its legislature’s authority to pass laws) as state constitutions.

Finally, although the decision to insert “proper” in Document IX reflects Wilson’s use of the term in Document V, it also appears to be in line with the terminology used by state constitutions. Indeed, some scholars have credited the addition of “proper” to Wilson on the basis of his use of “proper and expedient” in the language of the post office clause in his New Jersey Plan;\textsuperscript{133} but whether or not Wilson took “proper” from his provision in Document V is of no moment. Its insertion marks a firm adherence to the language used by state constitutions when qualifying specific powers, and does not mark a departure from the manner in which it had previously been inserted in legislative provisions.

\textsuperscript{129} S.C. CONST. of 1778, § 39, reprinted in 6 FEDERAL AND STATE CONSTITUTIONS, supra note 97, at 3257.

\textsuperscript{130} MASS. CONST. of 1780, ch. 6, § 10, reprinted in 3 FEDERAL AND STATE CONSTITUTIONS, supra note 98, at 1911; N.H. CONST. of 1784, reprinted in 4 FEDERAL AND STATE CONSTITUTIONS, supra note 97, at 2470.

\textsuperscript{131} VT. CONST. of 1786, reprinted in 6 FEDERAL AND STATE CONSTITUTIONS, supra note 97, at 3749.

\textsuperscript{132} 2 CONVENTION RECORDS, supra note 8, at 159.

\textsuperscript{133} ORIGINS, supra note 7, at 89.
2. Independent Necessary Clauses and the Enumeration of Powers

The original version of the independent “Necessary Clause” in Document IV and its revision in the final draft (Document IX) may also be traced to state constitutions. Several of the 1776–1787 state constitutions contain general clauses granting their legislatures the authority to pass all laws necessary for carrying into execution the powers with which they have been vested. These clauses closely resemble the original language of the provision as stated in Document IV: “and a right to make all Laws necessary to carry the foregoing powers into Exec—. . . .”

One such example is the 1786 Constitution of Vermont, which entrusts its legislature with the responsibility of “making and executing such laws as are necessary for the good government of the State.”

This language is also used in the 1776 Constitution of Pennsylvania, which states that the people ought to expect their legislature to cleave to those fundamental principles, necessary to preserve the blessings of liberty and free government, “in the making and executing such laws as are necessary for the good government of the state.”

Without accomplishing the concision of Vermont and Pennsylvania, both the 1784 Constitution of New Hampshire, and the 1780 Constitution of Massachusetts iterate a similar standard:

[F]ull power and authority are hereby given and granted to the said general court, from time to time, to make, ordain and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, for the necessary support and defence [sic] of the government thereof. . . .

In addition to containing language akin to that of the Necessary and Proper Clause, the states’ “necessary clauses” are often placed at the end of an enumeration of powers.

In the 1777 and 1786 constitutions of Vermont, the powers of the legislature are listed with specificity. They include the power to

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134 2 CONVENTION RECORDS, supra note 8, at 144.
135 VT. CONST. of 1786, ch. 1, § 20, reprinted in 6 FEDERAL AND STATE CONSTITUTIONS, supra note 97, at 3754.
136 PA. CONST. of 1776, art. 14, reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, supra note 97, at 3083–84.
choose necessary officers of the house, prepare and enact bills, judge the qualifications of their members, administer oaths, redress grievances, impeach state criminals, and grant charters of incorporation for towns, boroughs, cities and counties. At the end of the paragraph enumerating these powers, there is a clause that states that the legislature of Vermont "shall have all other powers necessary for the legislature of a free State." Similarly, the beginning of the chapter on legislative power in the 1780 Constitution of Massachusetts contains a paragraph listing several of the powers of its legislature; Articles II–III describe the authority of the legislature to pass laws and to erect and constitute judicatories and courts of record. Though this not an exclusive list of the powers of its legislature, the paragraph is followed by a general clause invoking the authority to pass all manner of laws wholesome and reasonable for the government of the commonwealth, and “necessary [for the] support and defence [sic] of the government.” Without pausing, the sentence containing this clause goes on to list a number of additional powers assigned to the legislature—including the levying of taxes and the naming of civil and military officers. In accordance with the principles of “constitution-borrowing” discussed in Part I, the 1784 Constitution of New Hampshire contains an exact replica of the language of the 1780 Constitution of Massachusetts outlining the responsibilities of its legislature, and attaching a general “necessary clause” pinned to the end of its list of duties.

As a final example, the 1776 Constitution of Pennsylvania outlines some of the responsibilities of the legislature such as redressing grievances, impeaching state criminals, and granting charters of incorporations to create towns, boroughs, cities and counties. Though this outline is not a restrictive enumeration of powers, but a list stating some of its responsibilities, it still shares the same format as that used by the constitutions of New Hampshire, Massachusetts and Vermont in that the list is concluded by a clause stating “and shall

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141 Id.
142 Id.
have all other powers necessary for the legislature of a free state or commonwealth."\textsuperscript{144}

It seems clear from these examples that the “necessary clause” recommended in Document IV, and later amended in Document IX, was borrowed from the state constitutions of Vermont, New Hampshire, and Massachusetts. First, the states’ clauses share a remarkable resemblance in language, syntax, and placement with that of the Necessary and Proper Clause. Second, the Clause is first introduced in Document IV, which is the only draft that begins by stating explicitly that it will borrow language from “the example of the constitutions of the several states.” This is especially significant considering the fact that Document IV’s version of the Clause bears the closest resemblance to that of state constitutions.\textsuperscript{145} Third, not only did several members of the Committee of Detail express an intention to rely on state constitutions, but actual reliance was demonstrated by the other examples of similar, qualifying language borrowed to create the executive veto and the right to make amendments to the Constitution. Also, Wilson, the delegate who penned the final version of Clause, lectured about the Clause’s language and purpose by reference to a state constitution. Last, the established practice of “constitution-borrowing,” and the stark similarities between the earliest versions of the Clause to that of similar provisions in state constitutions, confirm the logical conclusion that the state constitutions were the likeliest and most natural source of the Necessary and Proper Clause.

III. COUNTERARGUMENTS

In drawing the conclusion that state constitutions provided the immediate basis for the Necessary and Proper Clause, it is important to consider the possibility of the Clause being drawn from other documents. There are two possible courses of inquiry that one can undertake here. First, one can search for clauses that resemble the final form of the Necessary and Proper Clause in its entirety, and do so with an eye to earlier, developmental drafts of the Clause for reference and guidance. This approach is the method that has been implemented by this Comment, and it has demonstrated a clear connection to state constitutions.

\textsuperscript{144} PA. CONST. of 1776, § 9, reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, supra note 97; VT. CONST. of 1786, ch. 2, § 9, reprinted in 6 FEDERAL AND STATE CONSTITUTIONS, supra note 97, at 3085.

\textsuperscript{145} 2 CONVENTION RECORDS, supra note 8, at 137.
The second method emphasizes the precise couplet “necessary and proper,” without reference to the aforementioned factors. The *Origins* volume adopts this latter approach, and in doing so, dismisses the possibility of the state constitutions as the source of the Clause by stating that the words “necessary and proper” appear but once in a state constitution. It depends exclusively on citing instances of the couplet “necessary and proper,” and does not take into account the bulk of other language remaining in the Clause, or earlier versions of the Clause.

Concededly, the Clause has come to be known as the Necessary and Proper Clause, but it is unreasonable to assume that the rest of the language in the provision is without historical significance. The original version of the Clause did not contain the word “proper,” and the question at present is that of locating the source of the phrase, not of deciphering its final meaning. Since the delegate who recommended the Clause’s adoption in Document IV was the first committee member to recommend the new language as a departure from Resolution Six, it is his version that would provide the best clue as to the Clause’s direct source. He would have been the delegate looking to the antecedent source at that point in time—at the crucial moment of the Clause’s inception—when the word “proper” was nowhere to be found. If the delegate were borrowing from a state constitution when the Clause was first introduced in Document IV, the later addition of “proper” would not reverse that fact. Therefore, it is this original, “proper-less” version of the phrase that is most helpful in locating the Clause’s direct source.

As a result, this Comment has adopted the view that it is the original version of the Clause, and the Clause as a whole, that should be analyzed—not the magical properties of its subsequent nomenclature. By using the Clause’s earliest stages of development as a starting point, this Comment has revealed its striking resemblance to state constitutions, and has argued that this resemblance, along with the delegates’ stated and proven practice of borrowing from state constitutions, establishes these documents as the Clause’s likeliest predecessors. However, in order to cast any remaining doubt aside, this Comment will undermine the *Origins* authors’ arguments on their own terms, using the same “couplet” methodology, despite its stated criticism of their approach.

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146 *Origins, supra* note 7, at 43, 50 (noting that the couplet “necessary and proper” is found in a provision of the Massachusetts Constitution of 1780).
A. The “Private Agency Law” Argument

In his article The Legal Origins of the Necessary and Proper Clause, Robert Natelson argues that the drafters took the Clause from private agency law. In support of this theory, Natelson cites five private agency law publications that use the couplet “necessaria and opportuno.” These examples are unpersuasive, however, because the couplet permeates the legal language of the time, and is found in many different documents—most of them pertaining to public governance. It was used over a dozen times during the Continental Congress alone. It was a pet phrase used by courts in handing

147 ORIGINS, supra note 7, at 6, 88 (arguing specifically that the phrase was taken from the area of fiduciary duty involving the law of principals and incidents, and on one occasion inserting a “sic” to change a statement in the RECORDS OF THE FEDERAL CONVENTION to read “principals” instead of “principles” simply to further his theory). See also Robert G. Natelson, The Agency Law Origins of the Necessary and Proper Clause, 55 CASE W. RES. L. REV. 243, 272 (2004) (referencing the same quote, but not taking the same liberty of inserting a “sic”).

148 ORIGINS, supra note 7, at 69, 75–77 (citing the SCRIVNER’S GUIDE of 1724 and 1740); ORIGINS at 73–74 & n.91 (citing EDWARD WOOD, 2 A COMPLEAT BODY OF CONVEYANCING IN THEORY AND PRACTICE 117 (3d ed. 1770)); ORIGINS at 74 n.91 (citing WILLIAM NEWMAN, 1 THE COMPLEAT CONVEYANCER 154 (1786)); ORIGINS at 77 n.114 (citing GILBERT HORSEMAN, 1 PRECEDENTS IN CONVEYANCING 243 (1744)); ORIGINS (citing JOB MILL, THE PRESENT PRACTICE OF CONVEYANCING 238 (1745)). The rest of Natelson’s citations are to variations of couplets using needful, expedient, and fit—which permeated the legal language of the time, and can in no reasonable manner be said to belong to the realm of agency law.

149 ORIGINS, supra note 7, at 70 (citing ANTHONY STOKES, A VIEW OF THE CONSTITUTION OF THE BRITISH COLONIES 156 (1783) (setting forth a form for a royal governor’s commission)). In 1705, the parliamentary right of election was a subject of frequent debate. In this case, the petitioner’s claim of suffrage was assessed by determining whether the town’s mayor had the power to pass laws limiting elections that he considered “necessary and proper.” HENRY ALWORTH MEREWETHER & ARCHIBALD JOHN STEVENS, 2 A HISTORY OF BOROUGHS AND MUNICIPAL CORPORATIONS OF THE UNITED KINGDOM, FROM THE EARLIEST TO THE PRESENT TIME: WITH AN EXAMINATION OF RECORDS, CHARTERS, AND OTHER DOCUMENTS, ILLUSTRATIVE OF THEIR CONSTITUTION AND POWERS 197 (Stevens and Sons, 1835).

150 ORIGINS, supra note 7, at 71; 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 636 (1904) (quoting from the South Carolina legislature’s authorization to the governor to do all things “as may be judged expedient and necessary to secure the Liberty, Safety and Happiness of this State”); id. (in 1787, Congress, giving instructions from New York to move for a federal convention to recommend changes in the Articles of Confederation “as the representatives met in such convention shall judge proper and necessary”); id. at 72 (in 1776, empowering a committee to employ such persons as they may think necessary and proper); id. at 222 (in 1778, directing the board of war to “give such orders as they may judge necessary and proper”); id. at 71 (in 1776, suggesting that each consul general be directed to nominate so many Consuls, for Ports within his District, as he may from Time to Time think necessary and proper); id. (in 1775, granting postmaster general the power to appoint “so many deputies as to him may seem proper and necessary”); id. at 1032 (in 1776, creating a committee with powers to execute such continental business
down instructions to lower courts,\textsuperscript{151} and was a staple in legal correspondence.\textsuperscript{152} Most importantly, the Clause is stamped all over several of the laws passed by pre-Revolutionary American colonies, and post-Revolutionary states, all prior to the Constitutional Convention.\textsuperscript{153}

The groundwork for Natelson’s claim is also unpersuasive. In laying the foundation for his theory, Natelson points to the delegates’ repeated characterizations of government “officials as the people’s servants, agents, guardians or trustees,” arguing that these characterizations implied recourse to private agency law.\textsuperscript{154} However, in 1787, these terms were not unique to private agency law; they had for centuries been used to describe government officers. The terms “agents,” “guardians,” and “trustees” were language identical to that used in England since the sixteenth century to illustrate the relationship between the Crown, parliament and British subjects.\textsuperscript{155}
words were not introduced at the Convention to invoke any sort of business or agency perspective—they were used in precisely the same manner they had been employed for years in England and the colonies. Natelson misconstrues their usage, however, and insists that they lay a foundation for the invocation of private law documents. Not only is this connection erroneous, it also buckles under the weight of evidence demonstrating the prolific use of the couplet in public, governmental documents of the period.

Finally, Natelson dismisses the fact that British statutes of the era were teeming with instances of “necessary and proper” by stating that these documents were “far less influential on the American public than other instruments.” However, he fails to provide any support for this claim apart from stating it. On the contrary, there is reason to think that British statutes were very much a part of mainstream colonial life. These statutes were in full force before the Revolution, and about half the states’ constitutions provided that the English common law and its statutes would remain active after the Revolution, unless later repealed. It is unlikely that the abundant use of the couplet in public statutes that were in force in the colonies was outweighed by a couple of references to private law. Therefore, even if one were to pursue the question of the Clause’s direct source by following the use of the couplet alone, the couplet’s prevalence in colonial laws and British statutes eclipses its cameo appearance in private agency documents.

Rex v. Dr. Purnell, (1748) 95 Eng. Rep. 595 (stating “the Attorney-General, or Solicitor, or agent on behalf of the Crown”); Rex v. Dr. Purnell, (1748) 96 Eng. Rep. 20, 22 (describing the entreaty of King for records and information as one made “not as a visitor, but as guardian of the public peace”); Rex v. Mayor of London, (1692) 89 Eng. Rep. 930, 932 (quoting “the King is the head and original of all corporations’); Rex v. Mayor of London, (1691) 88 Eng. Rep. 1135, 1136 (stating “the liberty, privilege, and franchise of the mayor and commonalty, and citizens, being a politic body, and corporate, should be seized into the King’s hands”).

156 O R I G I N S , supra note 7, at 52. See also id. at 20–34 (citing dozens of examples of “necessary and proper” in British statutes, before dismissing their influence).

157 At least four post-Revolutionary constitutions explicitly state that “all British laws will remain in force,” unless they are later altered or repealed. N.J. CONST. of 1776, art. 22, reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, supra note 97, at 2598 (“That the common law of England, as well as so much of the statute law, as have been heretofore practiced in this Colony, shall still remain in force, until they shall be altered by a future law of the Legislature.”); MASS. CONST. of 1780, ch. 6, art. 6, reprinted in 3 FEDERAL AND STATE CONSTITUTIONS, supra note 97, at 1910; N.Y. CONST. of 1777, Art. 35, reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, supra note 97, at 2635–36; S.C. CONST of 1776, art. 29, reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, supra note 97, at 3247.
B. The “Corporate Charters of the Era” Argument

In Origins, Geoffrey P. Miller suggests that corporate law might have been the source of Clause. In making this argument, Miller relies on the couplet’s appearance in post-1787 laws passed by North Carolina and Connecticut—some of which were made for purposes of incorporating towns, schools, banks, poorhouses, asylums, and professional guilds.\(^ {158}\)

There are a couple of issues with this approach. Instead of addressing this problem of post-dating, Miller refers to these documents as “charters of the era,” and implies succession. However, it is unlikely that documents that were written after the Clause—most of which were written in the nineteenth century—were the source of the Clause. It has already been demonstrated that the couplet was a popular term prior to 1787, and its usage in all sorts of legal documents only increased after 1787\(^ {159}\)—possibly as a result of the intense publicity it received following the Convention.

Second, Miller’s article uses the “whole context of the Clause” approach recommended by this Comment to trace its language to similar provisions in colonial charters.\(^ {160}\) However, only three of the colonial charters were corporate charters, the others were royal charters or proprietorships—yet the same “necessary” language was used in all. Even if Miller is correct in implying some sort of a connection between the Clause and the charters—corporate or otherwise—he is incorrect in skipping the stage of American constitutions that connects them. As renowned historian Donald Lutz explained:

We can usefully view the development of American constitutionalism as proceeding within a series of nested frames of influence. The outer frame was defined by the charters that provided for local self-government and the transmission of the common law to America. Within the charter framework, colonists wrote their own foundation documents, legal codes, and bills of rights.\(^ {161}\)

\(^ {158}\) Origins, supra note 7, at 152.

\(^ {159}\) Ga. Const. of 1789, § 317 (“The General Assembly shall have the power to make all laws and ordinances which they shall deem necessary and proper for the good of the State, which shall not be repugnant to this constitution.”); 3 Convention Records, supra note 8, at 302 (quoting Roger Sherman delivering a speech in the House of Representatives: “[I]t was not thought necessary or proper to insert it in the Constitution[.]”); id. at 177, (quoting Luther Martin’s “Genuine Information” delivered to the Maryland Legislature on Nov. 19, 1787 (“[A]nd that they would always prevent the other States from making any laws, however necessary and proper . . .”).

\(^ {160}\) Origins, supra note 7, at 151 (detailing “as they shall see fit” clauses in various colonial charters).

\(^ {161}\) Lutz, supra note 12, at 67.
This succession would imply that the language in the charters, which closely resembles that of the state constitutions of 1776–1787, was possibly borrowed by the states. This analysis, however, speaks only to the Clause’s possible origins, not to its direct source—which is the present concern.

The science of “constitution-borrowing” that developed over the course of the post-Revolutionary period in America was sufficient to divorce the Clause from these prior charters. The debates at the Constitutional Convention did not make reference to the examples in the charters, and the members of the Committee of Detail stated an express intention to rely on state constitutions, not charters. So if similar versions of the “necessary clause” are present in both colonial charters and in state constitutions, this only implies a chronological continuation of their usage. It does not displace the state constitutions as the direct sources of the Clause.

Last, Miller uses the Clause’s possible origins in “corporate law” to launch into a discussion under Implications for Interpretation. Though this Comment does not dispute the possibility of the Clause having corporate origins, the term should here be qualified. It may be helpful to the modern reader to first clarify the meaning of corporate law in 1787 by undertaking a brief review of the subject. This history will help explain the presence of similar provisions in royal charters, corporate charters and proprietorships, and further confirm the likelihood of the Clause being taken from state constitutions.

The practice of incorporation during the sixteenth through eighteenth centuries was almost exclusively used for purposes of creating boroughs, towns, and municipalities. The method dates back to the fire and brimstone of medieval canon law, where the analogy of a group of people to a body was taken from the Apostle Paul’s characterization of the church as a body (corpus in Latin). Practically speaking, the church needed to own land that did not belong to any one member, and it needed to own this land in perpetuity—so that it would survive the death of a bishop. In addition, the nominative term suggested the Christian concept that the church, like a head, could not “take certain actions without the ‘advice and consent’ of a consultative body,” and was closely linked to the “constitutional stan-

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162 ORIGINS, supra note 7, at 154.
dards for locating and limiting [sovereignty], for allocating governmental powers within it, and for determining basic right and duties of its members.  

As governance of towns shifted from the church to secular leaders, the practice of incorporating towns moved alongside. European cities of the eleventh and twelfth centuries replaced the function of the church in the sense that their corporate charters gave them “full legislative, executive, and judicial power and authority, including the power and authority to impose taxes, coin money, establish weights and measures, raise armies, conclude alliances, and make war.” This delegation of authority enabled kings to conquer towns with greater ease, as they could specify that the town was ultimately subject to the laws of England while still allowing for limited self-governance in the form of local by-laws. In addition, the corporate form helped monarchs deal deftly with specified groups of people—enabling the Crown to tax all, and punish all, in one fell swoop.

For centuries preceding American colonization, references to the word “corporate” in English cases were made almost exclusively with regard to challenges made to the laws passed by towns. The towns’ charters were marked by variant forms of “necessary clauses” that described the kinds of local laws they could pass, and stipulated that they could not be repugnant to the laws of England. As a result,  

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165 Berman, supra note 163, at 530.  
166 Id. at 362 (stating that the cities and towns of Europe “derived much of their spirit and character from the church” including its nature of legal association—incorporation).  
167 Id. at 396.  
168 Id. at 567, 571.  
169 Laski, supra note 164, at 565 (“The county can be fined; and it seems like enough that it kept a common purse against such misfortune. It will defend itself and hire a champion to the purpose. It has a court which is thoroughly representative in character. It seems to make by-laws; and it is a natural unit of parliamentary representation.” (footnotes omitted)).  
170 Case of Merton College in Oxford, (1347) 145 Eng. Rep. 16, 17 (referring to the city of Oxford as a “body corporate”); Anonymous, (1487) 145 Eng. Rep. 115 (quoting “[j]judgments given in a court of record held by charter in cities or towns corporate, or before judges of assise . . .”); Anonymous, (1488) 145 Eng. Rep. 118 (“Where an action is brought in corporate towns . . .”); Anonymous, (1522) 145 Eng. Rep. 134 (“A mayor and commonalty cannot infeoff [sic] the mayor . . . for the head cannot be severed from the corporation; it is not a corporation without the head: but they may infeoff [sic] one of the commonalty; for the corporation remains without him.”); see also Mereweather & Stevens, supra note 148, at 197 (describing a 1705 voting rights case in the borough of St. Albans, and using the phrase “discretion of the corporation” to refer to the power of the borough).  
171 Mary Sarah Bilder, The Corporate Origins of Judicial Review, 116 Yale L.J. 502, 534 (2006) (explaining the common law principle that corporations could make ordinances that seemed “necessary and convenient” and were not repugnant to English laws); see also
the litigation of corporate matters often related to whether the local laws were in harmony with those of the sovereign.  

Approximately two centuries later, the corporate form began to expand into the private world of British commerce.  

In *The Early History of the Corporation in England*, Harold Joseph Laski describes the first appearances of private corporations, stating:

> We may not surely deny that this corporateness is inherited from burghal organization. These merchants have learned the value of their fellowships from the gilds of towns; and not seldom they strive, in all the bitterness of a novel rivalry, with the older crafts and mysteries of the towns.  

In 1600, the corporate form was granted to the first English joint-stock venture—its very own East India Trading Company. Due to the difficulty of controlling far-reaching foreign territories, the corporate form—and the ability to promulgate local by-laws—was entrusted to the company, along with Queen Elizabeth I’s blessing and protection. With good sense, the charter language was replicated from the model of the cities and churches that had come before, and the species of by-laws to be promulgated would govern the civil and criminal lives of the persons living in the foreign territory under the company’s control.

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172 See generally Bilder, *supra* note 171, at 534–35 (noting that by the colonial era “English law had developed a well-established practice of voiding corporate ordinances that were repugnant to the laws of the nation,” and explaining that the “particular privileges of town and companies” were heavily litigated) (citation omitted).

173 Laski, *supra* note 164, at 518 (dATING THE FIRST APPEARANCE OF A PRIVATE CORPORATE COMPANY AS APPEARING IN 1391 WHEN KING RICHARD II GRANTED A CHARTER, OR COMMUNITAS, TO THE MERCHANTS OF PRUSIA).

174 *Id.* at 581.

175 *Id.* at 582–83 (“The patents of monopoly which [Queen Elizabeth I] granted with so royal a hand were a definite and systematic attempt after industrial unity... [s]o that if Elizabeth was somewhat hard in her dealings with inventors, she was apparently woman enough to make the road that led to her favorites’ hearts a gilded one. Little by little the recipient of her bounty becomes a group rather than an individual... The East India Company becomes ‘a body corporate and politic’ because only in such fashion can it cope with problems so vast as that of an eastern civilization.”).

176 William Burge, Colonial Laws and Courts: With a Sketch of the Legal System of the World and Tables of Conditions of Appeal to the Privy Council 45–46 (Alexander Renton & George Phillimore, eds., 1907) (explaining how the East Indian Company’s Charter of 1726 was used to introduce the common and statute law of England to the Presidency of...
In this way, the charter empowered the company to pass criminal statutes that were applicable to local conditions, and served the same local-legislative function it had provided towns. Because these by-laws played a purely governmental role, the corporate law cases of the sixteenth through eighteenth centuries involved determinations of whether the laws passed were repugnant to those of England. They served as a check against the scope of local power delegated by the charter, and reaffirmed the Crown’s sovereignty over foreign territories while protecting the basic rights granted to British citizens abroad.

In sum, corporate law of the era did not concern business issues of fiduciary responsibility between directors and shareholders. Such notions would have been hopelessly anachronistic, if not impossible, at the time. Despite this major incongruity, Miller suggests that:

The corporate law background provides information about how the Necessary and Proper Clause might have been understood at the time of its drafting. In particular, contemporary corporate practice suggests that the Necessary and Proper Clause does not create independent lawmaking competence, does not confer general legislative power, and does not grant Congress unilateral discretion to determine the scope of its authority. The corporate law background also suggests something about how to interpret the key constitutional terms [“necessary” and “proper”].

Along this vein, the *Origins* volume states in its introduction that the Clause “imposes fiduciary obligations of reasonableness on Congress when it passes laws implementing federal powers.” Although all are free to propound modern theories of how our Constitution should limit Congress, these theories should not be based on an incorrect account of the history of the Necessary and Proper Clause. Unlike the modern understanding of corporate law, eighteenth century corporate law was an entirely different creature. The appearance of similar language in the colonies’ charters stems from a long tradition of

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177 Laski, *supra* note 164, at 587 (“The king has heard with displeasure that the ‘companies corporate’ have used their rule and governance to make ‘among themselves many unlawful and unreasonable ordinances . . . for their own singular profit and to the common hurt and damage of the people.’”); see generally Bilder, *supra* note 170, at 560 (positing that the tradition of judicial review developed from the “well-established and long-practiced idea of limited legislative authority” that came from the much litigated relationship between corporate ordinances and English laws).


179 *Origins*, *supra* note 7, at 11.
limiting the rule-making authority of towns and municipalities—boomeranging the Clause back within the ambit of public government. Any comparison to modern business practices is painfully inaccurate.180

Finally, the possible corporate origins further confirm the likelihood of the state constitutions being the Clause’s direct source. The states crafted their constitutions after they had operated under the Crown’s charters, and were likely influenced by the language and provisions contained therein. If these clauses were taken from the charters, however, they were made into something uniquely American when they became part of the state constitutions. In the end, the Origins private law and corporate law arguments are cast at the expense of a simpler and more reasonable explanation: the Necessary and Proper Clause was taken from the same state constitutions that provided so many other contributions to our founding document.

CONCLUSION

After having considered multiple, possible sources of the Clause, the state constitutions remain its likeliest antecedents. These early American documents did not summon the phrase from the clay of the earth. The ancient words were inherited from a rich history of trans-continental legal dialect—with roots that begin as far back as medieval canon law, and then proceed through centuries of British statutes to finally arrive as charters of the Crown to the colonies.

Yet, for purposes of understanding in what form—and by what means—the phrase entered the Constitution, the inquiry is answered once it is traced to the first degree. As far as the direct source may be ascertained, the state constitutions continue to provide the most natural, unforced solution to this question. It is a conclusion supported by the common practice of “constitution-borrowing” among states, actual reliance upon state constitutions at the Convention, and statements by members of the Committee of Detail expressing an intention to rely upon these documents.

Lastly, the striking resemblance of the Clause’s language, syntax, and placement to that of similar provisions contained in the Ameri-

180 It is surprising that Miller points to “contemporary corporate law” practice as an interpretive guidepost, since his own article concedes the public nature of the corporate charters. Id. at 147 (“The distinction we perceive today between public and private entities was not developed during the colonial and early federal periods. Corporate charters of those days were not private contracts; they were public acts, usually embodied in legislation. Many corporations established during this period were actual governmental bodies—towns given charters to operate in corporate form.”).
can state constitutions of 1776–1787 confirms that they were the Clause’s predecessors. In sum, though many Constitutional scholars have for centuries recognized the influence of early American state constitutions, here it may once again be stated, but with specificity, that the Necessary and Proper Clause was taken from these texts and joined to our federal experiment.