

Some Thoughts on the Necessary and Proper Clause

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I too would like to commend Joe Lynch's marvelous history of the beginnings of the debates over the Constitution. I think he would have made a good reporter during that period of time, better possibly than Mr. Madison, who made rather sketchy notes. Be that as it may, I was struck at the outset of the book when I got to page four and found a remark that got me all excited. He describes the Necessary and Proper Clause¹ as a "masterpiece of enigmatic formulation."² Well, I have long been a devotee and a pursuer of the Necessary and Proper Clause so I was anxious to get further into this "enigmatic" formulation.

One of the first things I did after reading Joe's book was to look for another authoritative evaluation of the Necessary and Proper Clause and I came upon a seminar, a forum presided over by our friend Professor Levinson five or six years ago, entitled *Constitutional Stupidities*.³ I hope he does not think this is a second session of the *Constitutional Stupidities* forum, but in that forum one of the speakers addressed the subject of the Necessary and Proper Clause under the title of "Unnecessary and Unintelligible."⁴

Chief Justice Marshall also addressed the meaning of the word "necessary." According to Marshall, it does not mean *absolutely* necessary—it means what Congress thinks is proper or appropriate for the occasion, but not absolutely necessary.

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¹ U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have the Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or office thereof.").

² JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT* 4 (1999) ("All the evidence points to the conclusion that in composing the Necessary and Proper Clause, the Committee of Detail drafted a compromise, a masterpiece of enigmatic formulation . . .").

³ See Symposium, *Constitutional Stupidities*, 12 CONST. COMMENT. 139 (Summer 1995).

⁴ See Mark A. Graber, *Unnecessary and Unintelligible*, 12 CONST. COMMENT. 167 (Summer 1995).

Well, that reminded me of when I was serving as a law clerk to Chief Justice John Marshall. He came to me one morning in 1819 and said, "Here's a draft of my opinion in the *McCulloch*⁵ case, which was argued recently. What do you think of it?"

Well I looked at it overnight and the next day I said, "Chief, there's one thing you might want to add in defining the word 'necessary.' Why don't you look at some of the other provisions in the Constitution that use the word 'necessary'."

"What do you mean?" he asked.

I replied, "Look at Article Five, which says that the 'The Congress, whenever two-thirds of both Houses shall deem it *necessary*, shall propose Amendments to the Constitution'⁶ Well, obviously the word 'necessary' there cannot not be construed to mean it's absolutely necessary. If it was, there would be no discretion whatsoever left to the Congress in deciding when to propose amendments."

"Here's another one Chief," I continued, "why can't you point out in Section 3 of Article II, where it says that the 'President shall, from time-to-time, give Congress Information on the State of the Union and recommend to their Considerations such Measures as he shall judge *necessary* and expedient.'⁷ That's another provision of the Constitution that supports the way you're using the word 'necessary' in this *McCulloch* opinion."

"Well, is there anything else you've found?" he asked.

I said, "Yes, Chief. The real clincher comes in Article I, Section 10. If you'd just read down a few sentences beyond the Necessary and Proper Clause, what do you find? This is a good one: "No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports except what may be *absolutely necessary* for executing its inspection law."⁸

"There you have a variety of different meanings that you can give to the word 'necessary.' Obviously, you're right, Chief, just the word 'necessary' standing by itself does not mean absolutely necessary. That fact was proved beyond a shadow of a doubt when the drafters of the Constitution used the words 'absolutely necessary' when they meant 'absolutely necessary.'"

Well, I believe that the Chief followed some of my suggestions about the other constitutional usages of the word "necessary."⁹ In any event, the Chief's opinion was to become the first and the official interpretation of the

⁵ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

⁶ U.S. CONST. art. V (emphasis added).

⁷ U.S. CONST. art. II, § 3 (emphasis added).

⁸ U.S. CONST. art. I, § 10 (emphasis added).

⁹ See *McCulloch*, 17 U.S. (4 Wheat.) at 413-17.

words “necessary and proper.” And let me again put that in the context of the actual language of the Necessary and Proper Clause which says: “Congress shall have the Power . . . to make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers”¹⁰ Now that refers to the vertical or foregoing enumeration of powers in Article 1, Section 8. There are seventeen express enumerated powers of Congress.¹¹ Congress is in the eighteenth clause given the power to “make all Laws which shall be necessary and proper to carry into execution”¹² the foregoing seventeen express powers and “all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.”¹³ That’s the horizontal thrust of the Necessary and Proper Clause—empowering Congress to enact laws to execute the powers that may be granted to the federal government under Article II or under Article III or any other article in the original Constitution.

Now, significantly—and I think Joe Lynch points this out incisively—the great debate during and after the Constitutional Convention was over the extent of this power to enact laws which shall be “necessary and proper for carrying into execution” all of these horizontal and vertical powers. Did that give Congress complete discretion to go far beyond anything anybody ever dreamed of and enact any law, or should they be confined to enacting laws to carry into execution the specific enumerated powers? This was the great debate between Hamilton and the Madison groups and it was never really resolved.¹⁴

There was, as Professor Lynch’s book reports, little discussion or debate on what the limitations are, if any, on the use of the Necessary and Proper Clause to enact appropriate legislation.

There was one effort made by Pierce Butler of South Carolina, one of the original members of the Committee of Detail that actually composed the “necessary and proper” language. At one point he suggested a substitute for the Necessary and Proper Clause.¹⁵ He essentially wanted the words “and proper” eliminated to leave only “necessary,” making the provision read something like: “To make all laws not repugnant to this Constitution that may be necessary for carrying into execution the foregoing powers,” or something like that.¹⁶ Butler’s idea was never

¹⁰ U.S. CONST. art. I, § 8, cl. 18.

¹¹ See U.S. CONST. art. I, § 8.

¹² U.S. CONST. art. I, § 8, cl. 18.

¹³ *Id.*

¹⁴ See LYNCH, *supra* note 2, at 19.

¹⁵ See LYNCH, *supra* note 2, at 20-22.

¹⁶ See *id.* at 20.

formally presented, let alone acted upon by the Convention, but it is significant that somebody at least realized that there must be some limitation to this power to enact “necessary and proper” laws.

Well, I think the Chief recognized all this in his *McCulloch* opinion because he goes on to develop critical limitations on the power of Congress to enact “necessary and proper” laws. He did so, not by limiting the word “necessary” but by creating an independent three-part test for determining what laws are possible under the Necessary and Proper Clause. As you will remember from your constitutional law class, the test is: “Let the end be legitimate, let it be within the scope of the constitution, and 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, are constitutional.”¹⁷

Now, the Court has often utilized that definition in assessing the constitutionality of a given “necessary and proper” statute.¹⁸ They perhaps have not always followed it to the letter, but this *McCulloch* three-part test has placed an important limitation on the power of Congress to enact laws that are “necessary and proper”: Such laws must be “consistent” with all other provisions of the Constitution.

There have been some interpretive changes lately that I want to comment upon, but before I do, there is one additional fact about Chief Justice Marshall’s test that is very interesting. Justice Brennan in *Katzenbach vs. Morgan*,¹⁹ back in 1966, borrowed the “necessary and proper” test that Marshall used in his *McCulloch* opinion and imported it into Section 5 of the Fourteenth Amendment,²⁰ so that when Congress passes a statute to enforce any provision of the Fourteenth Amendment, it too must be consistent with all other provisions of the Constitution.²¹

We’ve seen this proposition in action in the recent case of *City of Boerne v. Flores*,²² which was a “necessary and proper” case through and through. This case dealt with Congress’ enactment of the Religious Freedom Restoration Act (RFRA).²³ The Congress was all for religion, and the bill was practically unanimously adopted in the House and the Senate.²⁴

¹⁷ *McCulloch*, 17 U.S. (4 Wheat.) at 421.

¹⁸ See, e.g., *United States v. Fresno*, 429 U.S. 452 (1977); *Johnson v. Maryland*, 254 U.S. 51 (1920); *United States v. Ferger*, 250 U.S. 199 (1919).

¹⁹ 384 U.S. 641 (1966).

²⁰ U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

²¹ See *Katzenbach*, 384 U.S. at 650-51.

²² 521 U.S. 507 (1997).

²³ Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb-1).

²⁴ See 139 CONG. REC. S14471 (daily ed. Oct. 27, 1993); 139 CONG. REC. H2363 (daily ed. May 11, 1993).

But no consideration was given by either house as to whether it was consistent with other provisions of the Constitution.

Well, the case was argued before the Supreme Court, which decided that this statute was unconstitutional.²⁵ Although the Court never explicitly said so, their analysis mirrors the three prongs of Chief Justice Marshall's test of what is "necessary and proper." The Court found that the Act had an illegitimate end—it was trying to go enforce rights that had not been recognized by the Supreme Court.²⁶ Secondly, the Court found that the Act lacked the proper means; it was not proportionate—there was no congruence between the so-called evil and the action of the Congress.²⁷ Thirdly, the Court found that it violated the principles of separation of powers and federalism, which the Court said—without great elaboration—reflect the ultimate limitation upon the Necessary and Proper Clause.²⁸

It's a remarkable decision in the sense that I had never seen a case before where the Court had found all three prongs of the *McCulloch* test violated in one statute. There is a reason, perhaps, for this. What we are seeing, of course, is that there's a great deal of emphasis in Supreme Court opinions in case after case on the principles of federalism and separation of powers.²⁹ I suggest that there is a reason why there are so many cases of this nature at this time in history. Never before have there been so many opportunities for this Court to utilize its power to strike down legislation, essentially imposed on congressional action by virtue of the necessary and proper analysis.

In the last ten or fifteen years, Congress has passed a lot of social legislation, federalizing or creating federal causes of action for social action for social evils that have long been dealt with, or ignored, at the state or local level. For example, Congress sought to provide a civil cause of action for women victimized because of their gender,³⁰ the Disabilities Act,³¹ and

²⁵ See *City of Boerne*, 521 U.S. at 510. The majority opinion was written by Justice Kennedy and was joined by Chief Justice Rehnquist, and Justices Stevens, Thomas, and Ginsberg, and joined in part by Justice Scalia. See *id.* Justice Stevens filed a concurring opinion, and Justice Scalia, joined by Justice Stevens, concurred in part. See *id.* Justice O'Connor, joined in part by Justice Breyer, filed a dissenting opinion, and Justice Breyer filed a dissenting opinion. See *id.*

²⁶ See *id.* at 527.

²⁷ See *id.* at 532-33.

²⁸ See *id.* at 535.

²⁹ See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999) (finding that the Eleventh Amendment precluded Congressional authorization of suits against a state under the Fair Labor Standards Act); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act as an unconstitutional extension of the Commerce Power).

³⁰ See Violence Against Women Act of 1994, Pub. L. No. 103-322, title IV, § 40302, 108 Stat. 1941 (codified at 42 U.S.C. § 13981).

³¹ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327

a host of others. Now, one of the problems has been that the committees, and the Congress itself, have not seriously considered the constitutional repercussions of this kind of legislation. At the same time, you will notice that for the past ten years in his annual message on the state of the judiciary, Chief Justice Rehnquist has repeatedly said, in essence: "Congress, will you stop federalizing all of these local criminal or civil situations? It's too much of a burden on the federal court system."³²

I think the courts have responded to that feeling by resurrecting some limitations implicit in the Necessary and Proper Clause, and they are doing it in terms of the third prong of the *McCulloch* test—that the laws are not consistent with the other provisions in the Constitution.

What they are saying is some of these laws are not consistent with federalism and separation of powers. Those are structural underpinnings of the Constitution, although they are not specifically mentioned in any clause in the Constitution. The Court is actively engaged in assessing many of these new federal statutes by use of one of these structural propositions that are not expressly mentioned in the Constitution.

Indeed, they are even making some changes in the concept of "necessary and proper." A good example is the recent decision in *Printz v. United States*,³³ a five to four decision written by Justice Scalia. That was the case involving the Brady Act,³⁴ where certain temporary matters were to be assessed and executed by state and local police officers in making background checks for handguns until the federal government could create a computerized check system of its own.³⁵

What is interesting about *Printz* is that the main argument made before the Court on behalf of the government was that there was a national need to engage in this kind of regulation to combat the "national epidemic of handgun violence,"³⁶ a need that satisfies the first prong of the *McCulloch* test. The government then asserted that this regulation was congruent with that end, but that still leaves the third prong of the "necessary and proper test."

(codified in various sections of titles 29, 42, and 47 of the United States Code).

³² See, e.g., WILLIAM H. REHNQUIST, 1999 YEAR-END REPORT ON THE FEDERAL JUDICIARY § 1, available at <http://www.uscourts.gov/ttb/jan00ttb/jan2000.html> (visited Nov. 13, 2000) ("[T]he ultimate safeguard for maintaining our balanced constitutional system must be a principled recognition by Congress for the long range damage . . . to our nation's structure caused by inappropriate federalization.").

³³ 521 U.S. 898 (1997).

³⁴ See Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 42 U.S.C. § 922).

³⁵ See *id.*

³⁶ Brief of Respondent at *10, 14, 28, 37, *Printz v. United States*, 521 U.S. 898 (1997) (Nos. 95-1478, 95-1503, 1996 WL 595005).

But what was the test to be this time? Well, it turned out to be a significant deviation from *McCulloch*'s third requirement of consistency with the provisions of the Constitution. Instead, Justice Scalia said, "When a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty . . . 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.'"³⁷

In other words, what he is saying is we do not need to get to the third prong. We understand "necessary" does not mean *absolutely* necessary. But what does "proper" mean? "Proper," says Justice Scalia, means consistency with the structural underpinnings of the Constitution. In other words—and I await Joe Lynch's next book on this point—a statute is "improper" or "unconstitutional" if it violates the Tenth Amendment or the separation of powers doctrine. The answer of Justice Stevens, who wrote a dissent in *Printz* that was unfortunately rather skimpy,³⁸ was that the operation of the Necessary and Proper Clause fully justifies this provision in the Brady Act because it was an execution of Congress' power over interstate commerce, period.³⁹ He violently objected to the concentration on the federalist proposition, but when it comes to actually referring to the definition of what is a "necessary and proper" law, he effectively says, 'that's it—it's the execution of the power over commerce, end of debate.'

Take another situation that did not get to the Supreme Court but rather had the Eighth Circuit examining the Religious Freedom Restoration Act,⁴⁰ not in the context of state action, but in regard to the federal bankruptcy laws. The bankruptcy laws were involved because RFRA purported to amend every conceivable federal statute on the books, as well as being applicable to the states, which was the situation in the *Boerne* case.

Here was a situation arising under the bankruptcy laws, a power that is expressly given to Congress.⁴¹ What had happened was that a religious person had given certain tithings to his church during the year preceding his bankruptcy, and the bankruptcy trustee sought to recover those tithings from the church. The debtor argued that requiring him to return the tithes would violate RFRA's admonition that "[g]overnment shall not substantially burden a person's exercise of religion even if the rule results

³⁷ *Printz*, 521 U.S. at 924 (quoting U.S. CONST. art. I, § 8; THE FEDERALIST NO. 33, at 204 (A. Hamilton)).

³⁸ See *id.* at 938 (Stevens, J., dissenting).

³⁹ See *id.* at 943 (Stevens, J., dissenting).

⁴⁰ See *In re Young*, 82 F.3d 1407 (8th Cir. 1996).

⁴¹ See U.S. CONST. art. I, § 8.

from a rule of general applicability”⁴² The Eighth Circuit said, this was before the *Boerne* decision, that Congress has the power under the Necessary and Proper Clause to amend the bankruptcy law without any further consideration.⁴³ According to the Eighth Circuit, it was just a proper amendment to the Bankruptcy Act over which Congress has plenary authority.

Although there was a dissent in *Young*,⁴⁴ there was no thought given to understanding, let alone to adjudicating, the fact that there may be certain limitations on enacting or even amending a federal statute that was originally executed in support of an enumerated power. This case leads to the frightening possibility of saying that Congress can pass an unconstitutional amendment to a constitutional law. That just does not make sense. That is not what the Necessary and Proper Clause was ever meant to authorize or permit.

With those few thoughts in mind, I eagerly await Joe Lynch’s answer to this puzzle, and I hope he will do so in the not so distant future because I think this is a significant alteration in the meaning of the Necessary and Proper Clause. The alteration is the shifted emphasis away from the third prong of the *McCulloch* test and the concentration on the word “proper.” It is within the word “proper” that the Court is finding these “structural” propositions of federalism and separation of powers, and this is what is supposedly giving the Court its constitutional base for all these recent federalism and separation of powers decisions striking down legislation.

With those few thoughts in mind, I commend the future to Joe Lynch on this proposition.

⁴² 42 U.S.C. § 2000bb.

⁴³ See *Young*, 82 F.3d at 1417.

⁴⁴ See *id.* at 1421 (Bogue, J., dissenting).