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The Corporate Law Background of the Necessary and Proper Clause

Geoffrey P. Miller[1]

Abstract: This paper investigates the corporate law background of the Necessary and Proper Clause. It turns out that corporate charters of the colonial and early federal period bristled with similar clauses, often attached to grants of rulemaking power. Analysis of these corporate charters suggests that the Necessary and Proper Clause does not create independent lawmaking competence; does not confer general legislative power; does not grant Congress unilateral discretion to determine the scope of its authority; requires that there be a reasonably close connection between constitutionally recognized ends and the legislative means chosen to accomplish those ends; and requires that federal law may not, without adequate justification, discriminate against or otherwise disproportionately affect the interests of particular citizens vis-à-vis others.

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The Necessary and Proper Clause is perplexing. Perhaps the single greatest source of congressional power, a cornerstone of the modern administrative state, a trump card authorizing federal domination over many issues of national life, a symbol, for some, of the power of governments to improve the life of their citizens – it is all these, and more. Yet its terms are anything but pellucid. What does "necessary" mean? What about "proper"? What is the relationship between these words? The Constitution itself offers little clue. The phrase emerged from the Committee of Detail without clarification.[2] The records of the Constitutional Convention provide scant evidence as to

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[2] See Mark A. Graber, Unnecessary and Unintelligible, 12 Const. Commentary 167, 168 (1995) (Committee of Detail "gave no hint" on why it chose the language it did).

how the framers understood the clause,[3] and the ratifying debates are not illuminating. Prior to the Supreme Court's 1819 decision in *McCulloch v. Maryland* the clause appeared to have been nearly forgotten.[4]

The odd contrast between the importance of the clause and the lack of attention given to it during the founding era suggests that its terms must already have been in common usage. "Necessary and proper" feels like a lawyer's clause – a standard provision which, despite its importance, is not usually the subject of negotiation or debate. If the clause was indeed one commonly found in legal practice, it would be understandable why so few people found it worthy of analysis or attention at the time of its drafting.

The hypothesis that the Necessary and Proper Clause was part of the standard repertoire of attorneys at the time suggests a possible line of research: information about the provenance and meaning of the Necessary and Proper Clause might be found in legal practice.[5] In particular, such information might be gleaned by examining the conventions and usages of corporate law. The Constitution, after all, is *itself* a corporate charter – a document creating a body corporate and defining its powers. It would not be surprising, therefore, if terminology such as "necessary and proper" turned up in other, more quotidian charters. And if such terminology is indeed found in ordinary charters, we

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[3] See Bernard H. Siegan, The Supreme Court's Constitution: An Inquiry into Judicial Review and Its Impact on Society 1 (1987) ("the accounts of the 1787 Constitutional Convention are silent on the meaning of the necessary and proper power").

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

[5] To date, commentators on constitutional law have not fully appreciated the importance of the private law background of this and other constitutional provisions. *See* Seth Barrett Tillman, Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause, 4 Duke Journal of Constitutional Law & Public Policy, 107, 117 n.26 (2009) ("private law linguistic and intellectual traditions are not widely known to those immersed in modern public and administrative law.").

might be able to draw on these documents as a guide to interpreting the meaning of similar language in the Constitution.

This paper pursues that line of inquiry by analyzing corporate charters from the colonial and early federal periods: instruments establishing the colonies, statutes creating the First and Second Banks of the United States, and charters granted by Connecticut and North Carolina from the colonial period through 1819 (the date of the Supreme Court's opinion in *McCulloch*). It turns out that terms such as "necessary," "proper" and "necessary and proper" were indeed ubiquitous in corporate practice. Hundreds of such provisions are found in the charters I reviewed – often modifying grants of rulemaking powers that directly parallel the Constitution's grant of legislative authority to Congress. As described below, an analysis of these charters yields some information about the possible meaning of the term "necessary and proper" in corporate practice at the time the clause was inserted into the Constitution.

This article is structured as follows. The first part explores the parallel between the Constitution and corporate charters. Part II reports the historical data. Part III considers how corporate attorneys of the time might have understood the Necessary and Proper Clause and the grant of legislative power within which it is embedded.

I. The Constitution as a Corporate Charter

I start by developing the analogy between the Constitution and corporate charters of the day. The analysis here draws on prior work by Robert Natelson, who observed in 2004 that the language of the Necessary and Proper Clause has roots in English agency practice.[6] In this article I wish to explore a related but slightly different hypothesis: it is

[6] Robert Natelson, The Agency Origins of the Necessary and Proper Clause, 55 Case Western Reserve Law Review 243 (2004). *Cf.* Evan J. Criddle, Fiduciary Foundations of Administrative Law, 54 UCLA L.

not agency principles in general but rather one specific *application* of those principles – the corporate charter – that provides the most immediate parallel and best general framework for understanding the legal background of the Necessary and Proper Clause.[7]

The Constitution of the United States is a corporate charter. It establishes – to quote corporate language of the times – a "body politic and corporate."[8] It endows that body with attributes of corporations: a name; continuity of existence; succession of leadership; the power to sue and be sued. It specifies the purposes for which the body is established -- to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty.[9] It sets forth powers of the institution and establishes limits on the exercise of those powers. It grants exclusive privileges and rights. It delegates authority to agents and specifies rules of governance. All of these functions are commonly found in corporate charters of the late Eighteenth and early Nineteenth Centuries.

The Constitution is no less a corporate charter because it establishes a *government* body rather than a private association. The distinction we perceive today between public and private entities was not well 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. Even when the

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REV. 117, 117 (2006) (outlining an "interpretivist model of administrative law based on the concept of fiduciary obligation in private legal relations such as agency, trust, and corporation").

[7] For an interesting deriving the principle of judicial review from the corporate law background, *see* Mary Sarah Bilder, The Corporate Origins of Judicial Review, 116 YALE L.J. 502 (2006).

[8] E.g., An Act to Establish the Davidson Academy, North Carolina Laws of 1785, ch. XXIX (Davidson Academy). Technically, since the United States was already in existence under the Articles of Confederation, albeit in a different form, it might be more accurate to say that the Constitution of 1787 re-established the United States as a corporate body rather than creating it.

[9] U.S. Constitution, Preamble.

institutions were privately owned, they were often conceived of as serving a public purpose. Poorhouses and orphanages received charters to perform social services for persons in need;[10] navigation companies cleared out streams;[11] canal companies cut passages for boat traffic;[12] bridge companies raised spans over rivers and streams;[13] water companies dug and maintained aqueducts;[14] road companies built and operated turn-pikes[15] – all actions serving the general welfare. Schools also served public purposes; statutes incorporating academies in North Carolina were often justified on the ground that "the good education of youth has the most direct tendency to promote virtue and ensure happiness and prosperity in the community."[16] Although business corporations in the modern sense were chartered during this period without an explicit bow to public purposes, legal practice did not sharply distinguish between public and private corporations.

There is direct evidence that the Framers of the Constitution were aware of the parallel between the federal government and a corporation. Eric Enlow observes that one of the proposals to the Committee of Detail provided that "[t]he United States shall be

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[10] E.g., An Act to Establish the Fayetteville Orphan Asylum, North Carolina Laws of 1813, ch. XLIV; An Act to Erect a Poor House in the County of Lincoln, North Carolina Laws of 1818, ch. CXX.

[11] See, e.g., An Act to Incorporate the Broad River Navigation Company, and also the Inhabitants of Rutherfordton, of the County of Rutherford, and for Other Purposes, North Carolina Statutes of 1811, ch. XXXII.

[12] See, e.g., An Act to Incorporate Two Companies for the Purpose of Cutting a Navigable Canal from Roanoak River to Nerherrin River, and Another Navigable Canal from Bennet's Creek, in this State, to Nansemond River, in the State of Virginia, North Carolina Laws of 1804, ch. XXXIV.

[13] See, e.g., An Act to Incorporate a Company to Build a Bridge Across the Yadkin River, North Carolina Laws of 1816, ch. XXXIX.

[14] E.g., An Act to Incorporate an Aqueduct Company in the City of Norwich, Connecticut Laws, October Session, 1808, ch. VIII.

[15] See, e.g., An Act to Establish A Turnpike Road from Mattamuskeet Lake to the Main Public Road on the East side of Pungo River, North Carolina Laws of 1818, ch. LXXI I (Pungo River Turnpike Company).

[16] An Act to Erect an Academy at the Town of Edenton, in the County of Chowan, North Carolina Laws of 1800, ch. XXXIX.

forever considered as one body corporate and politic in law."[17] This language is taken directly from corporate charters of the era.[18] During the debates at the Convention, Madison argued that that legislation in a limited government was related to that government's constitution in the same way that a "corporation's bye laws [sic] [were related] to the supreme law within a State."[19] Madison was here alluding to the nearly universal practice of including in corporate charters clauses explicitly subordinating the rule-making authority of a corporation to the laws and constitutions of the political jurisdiction within which the corporation was formed.[20]

The corporate concept of the state remained salient to the early United States Supreme Court. In *Chisholm v. Georgia*,[21] Justice Iredell observed that "[t]he word 'corporations,' in its largest sense, has a more extensive meaning than people generally are aware of. Any body politic (sole or aggregate) whether its power be restricted or transcendent, is in this sense 'a corporation.' . . . . In this extensive sense, not only each State singly, but even the United States may without impropriety be termed 'corporations.'"[22] Justice Marshall, the author of *McCulloch*, voiced the same view in

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[17] Eric Enlow, The Corporate Conception of the State and the Origins of Limited Constitutional Government, 6 Wash. U. J.L. & Pol'y 1, 11 (2001).
[18] See note __, supra.
[19] Eric Enlow, The Corporate Conception of the State and the Origins of Limited Constitutional Government, 6 Wash. U. J.L. & Pol'y 1, 12 (2001), quoting James Madison, Journal of the Federal Convention 297 (E.H. Scott ed., special ed. 1898).
[20] See, e.g., An Act to Incorporate the Trustees of the Missionary Society of Connecticut, Connecticut Acts & Laws 602 (1802) ("provided they are not contrary to the laws of this State, or of the United States"); An Act to Incorporate the Thames Insurance Company at New London, Connecticut Laws, October Session, 1818, ch. VIII ("not being contrary to this charter, the laws of this State, or of the United States"); An Act to Incorporate Chauncy Gleaford, Elias Cowles, and their Associates, Connecticut Acts & Laws 583 (1801) ("not being contrary to this Act, to the laws of this State, or of the United States"); An Act Incorporating the Middletown Manufacturing Company, Connecticut Laws, October Session, 1810, ch. I ("not being contrary to this charter, or to the laws of the United States, or of this State"). For discussion of these clauses as a basis of the principle of judicial review, see Mary Sarah Bilder, The Corporate Origins of Judicial Review, 116 YALE L.J. 502 (2006).
[21] 2 U.S. (2 Dall.) 419 (1793).
[22] Id. at 447. For discussion, *see* Eric Enlow, The Corporate Conception of the State and the Origins of Limited Constitutional Government, 6 Wash. U. J.L. & Pol'y 1, 12-13 (2001).

1823: "The United States is a government, and, consequently, a body politic and corporate, capable of attaining the objects for which it was created . . . . This great corporation was ordained and established by the American people . . . ."[23]

There is every reason to suppose the members of the Committee of Detail who drafted of the Necessary and Proper Clause were aware of this corporate law background. Four of the five members of the committee were lawyers: Edmund Randolph served as Attorney-General of Virginia for ten years and would later serve as the first Attorney-General of the United States;[24] John Rutland trained at London's Middle Temple and was a drafter of South Carolina's 1776 Constitution as well as a future Justice of the United States Supreme Court;[25] James Wilson was a prominent Pennsylvania lawyer and future Supreme Court Justice;[26] Oliver Ellsworth sat as a Connecticut judge and later became Chief Justice of the United States.[27] Each of these men was not only a prominent public lawyer but also an active practitioner involved in a wide range of legal matters, including business law issues.[28] Given all this expertise, it would not be surprising if these men, when drafting the Necessary and Proper Clause, had employed concepts that were also current in corporate law practice of the time.

II. The Data

I reviewed a sample of Eighteenth Century and early Nineteenth Century corporate charters. These included the federal charters of the First and Second Banks of

[23] United States v. Maurice, 26 F. Cas. 1211 (C.C.D. Va. 1823) (Marshall, C.J.). *See* Eric Enlow, The Corporate Conception of the State and the Origins of Limited Constitutional Government, 6 Wash. U. J.L. & Pol'y 1, 15-16 (2001).
[24] Robert Natelson, The Agency Origins of the Necessary and Proper Clause, 55 Case Western Reserve Law Review 243, 270 (2004).
[25] Id.
[26] Id.
[27] Id.
[28] Id.

the United States, the crown charters for the American colonies, the charter of the Massachusetts Bay Company, and charters issued by two states – North Carolina and Connecticut – from the colonial period through 1819, the date of Justice Marshall's decision in *McCulloch v. Maryland*. The choice of North Carolina and Connecticut was based partly on considerations of tractability, given the enormous volume of laws which even then were being adopted by colonial and state legislatures. To reduce the possibility of bias I selected two states which presented contrasting situations: Connecticut, a northern and industrializing state with a substantial financial sector, including banks and insurance companies; and North Carolina, a southern, agricultural state with a less developed financial sector.[29] This review identified 144 charters in Connecticut and 230 charters in North Carolina. The principal recipients of charters in the North Carolina were towns, schools, and lodges, whereas Connecticut chartered substantial numbers of banks and insurance companies. This difference was not clear-cut, however: Connecticut issued charters to towns and schools and North Carolina chartered banks and insurance companies. Other recipients of charters in one or both states included poorhouses, asylums, bible societies, library societies, missionary societies, aqueduct companies, turnpike companies, fishing companies, medical societies, canal companies, and manufacturing concerns. Overall, my investigation revealed an extraordinary incidence of clauses which, like the Constitution's Necessary and Proper Clause, serve to limit or define the discretion of persons charged with managing the corporate entities (I refer to these clauses as "scope" clauses because they modify the scope of agency).

[29] Connecticut presented the added advantage that it was the home of Oliver Ellsworth, one of the members of the Committee of Detail.

Scope clauses appear even in early colonial charters. The 1663 crown charter to the organizers of the colony of Carolina confers authority to bestow titles of honor "as they shall think fit;" to make laws "as often as need shall require;" to appoint judges in such manner as "shall seem most convenient;" and to do all things "necessary" to provide for food and clothing to the colonists.[30] A 1665 restatement of that charter authorizes the governor and council to make laws "as shall be necessary for the present good and welfare" and "as shall be necessary" for well government.[31]

The 1609 charter of the Virginia colony authorizes the grantees to build forts "according to their best discretion" and to erect habitations "where they shall think fit and convenient."[32] The Virginia charter of 1611-1612 authorizes the grantees to appoint officers "as they shall think fit and requisite" and to make laws "as to them from Time to Time, shall be thought requisite and meet."[33]

The Pennsylvania charter of 1681 gives William Penn and his successors the power to sell property "as they shall thinke fitt."[34] The Pennsylvania charter of liberties of 1682 similarly grants Penn and his successors the power to pass laws "that they shall think fit."[35]

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[30] Francis Newton Thorpe, Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States (1909), 2743-2753.
[31] Francis Newton Thorpe, Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States (1909), 2756-2761.
[32] Francis Newton Thorpe, Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States (1909), 3783-3789.
[33] Francis Newton Thorpe, Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States (1909), 3806.
[34] Francis Newton Thorpe, Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States (1909), 3042.
[35] Francis Newton Thorpe, Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States (1909), 3051.

The 1662 Connecticut charter authorizes the grantees to make laws "as they shall think Fit, and Convenient," to elect officers "as they shall think fit and requisite," and to import goods "that are or shall be useful or necessary for the Inhabitants."[36]

The 1669 charter of the New Plymouth Colony authorizes the grantees to take certain actions "from tyme to tyme as shall be necessary for their strength and safety."[37]

The Massachusetts Bay Company charter of 1629 authorized the grantees to appoint officers "as they shall thinke fitt and requisite" and to make laws and ordinances "as to them from tyme to tyme shalle be thought meete."[38]

The Rhode Island charter of 1663 authorizes the grantees to appoint officers and grant commissions "as they shall thinke fitt and requisite" and to adopt laws which "as to them shall seeme meete for the good and welfare of the sayd Company."[39]

The Maryland charter of 1632 authorizes the Baron of Baltimore and his successors to "make and constitute fit and Wholesome Ordinances," to sell lands "as they shall think convenient," and to "do all and singular other Things in the Premises, which to him or them shall seem fitting and convenient."[40]

The Georgia charter of 1732 gives the grantees the power to adopt laws as "shall seem necessary and convenient for the well ordaining and governing of the said

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[36] Francis Newton Thorpe, Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States (1909), 529-536.
[37] Francis Newton Thorpe, Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States (1909), 1845.
[38] Francis Newton Thorpe, Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States (1909), 1846-1860.
[39] Francis Newton Thorpe, Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States (1909), 3215.
[40] Francis Newton Thorpe, Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States (1909), 1677-1686.

corporation," to appoint officers "as shall by them be thought fit and needful," and to act "in such manner and ways and by such expenses as they shall think best."[41]

Scope terms also appear in the charters of the First and Second Banks of the United States. The First Bank's directors are empowered to establish offices "wheresoever they shall think fit," to employ such officers "as shall be necessary for executing the business of the said corporation," to deal with the corporate seal "at their pleasure," and to "ordain, establish, and put in execution, such by-laws, ordinances and regulations, as shall seem necessary and convenient for the government of the said corporation." [42]

Relevant terms for the Second Bank are similar: the directors are authorized to establish branches "wheresoever they shall think fit," to manage the corporate seal "at their pleasure," and to "put in execution, such by-laws, and ordinances, and regulations, as they shall deem necessary and convenient for the government of the said corporation."[43]

Scope terms are ubiquitous in corporate charters from North Carolina and Connecticut. The drafters of these statutes utilized an impressive vocabulary of such terms. "Necessary" and "proper" are the most common, but "expedient,"[44] "fit,"[45]

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[41] Francis Newton Thorpe, Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States (1909), 767-775.
[42] 1 Cong. ch. 10, 1 Stat. 191; 1 Cong. ch. 11, 1 Stat. 196.
[43] 14 Cong. ch. 44, 3 Stat. 269.
[44] E.g., an Act to Incorporate the Town of Plymouth, North Carolina Laws of 1807, ch. XLVIII (town of Plymouth).
[44] North Carolina Laws of 1808, ch, LXV (town of Jamestown); An Act to Establish Pike Academy in the County of Tyrrell, North Carolina Laws of 1818, ch. XLVIII (Pike Academy); An Act to Establish an Academy on or Near the Lands of Stephen S. Snowdon, in Camden County, North Carolina Laws of 1818, ch. LV (Camden Academy).
[45] E.g., An Act to Incorporate the North River and Adams Creek Canal Company, Laws of North Carolina, 1816, ch. XL; An Act Incorporating the Humpreysville Manufacturing Company, Connecticut Laws, May Session, 1810, ch. II.

"convenient,"[46] "at pleasure"[47] and "appertaining"[48] are also observed with reasonable frequency. Less common are "beneficial,"[49] "advisable,"[50] "reasonable,"[51] "meet,"[52] "conducive to,"[53] "for the benefit of,"[54] and "according to their discretion."[55] Doublets, like the Constitution's "necessary and proper," are also attested: examples are "expedient and necessary,"[56] "necessary and expedient,"[57] "necessary or expedient,"[58] "fit and expedient,"[59] "proper and necessary,"[60] "necessary and proper,"[61] "necessary and

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[46] E.g., An Act to Incorporate the American Geological Society, Connecticut Laws, May Session, 1819, ch. XXXII.
[47] E.g., An Act to Incorporate the Derby Bank, Connecticut Laws, October Session, 1809, ch. 1; An Act to Incorporate the Eagle Bank, Connecticut Laws, October Session, 1811, ch. I.
[48] E.g., An Act to Incorporate the Derby Fishing Company, Connecticut Acts & Laws 737 (1806).
[49] E.g., An Act to Establish a Town on John Strother's Land, on the North-East Side of French Broad River, in Buncombe County, North Carolina Laws of 1802, ch. XXXIV (town of Spaightville).
[50] E.g., An Act to Establish an Academy in the County of Buncombe, North Carolina Laws of 1801, ch. XLIII (Union Hill Academy); An Act to Incorporate the Middlesex Fishing Company, Connecticut Acts & Laws 776 (1807).
[51] E.g., An Act to Incorporate the New Haven Bank, Connecticut Acts & Laws 431 (1792); An Act to Incorporate the Bridgeport Bank, Connecticut Acts & Laws 742 (1806); An Act to Incorporate the Ocean Insurance Company of New-Haven, Connecticut Laws, October Session, 1818, Ch. VI.
[52] E.g., An Act to Erect an Academy at the Town of Edenton, in the County of Chowan, North Carolina Laws of 1800, ch. XLVII (Edenton Academy); An Act to Establish a Seminary of Learning at Spring-Hill, in the County of Lenoir, North Carolina Laws of 1802 XXXVI (Spring Hill Seminary); Connecticut Public Records, Vol. 4, p. 370 (1701) (Collegiate School).
[53] Connecticut Public Records, Vol. 4, p. 370 (1701) (Collegiate School).
[54] An Act to Incorporate the Middlesex Fishing Company, Connecticut Acts & Laws 776 (1807).
[55] An Act to Incorporate the Trustees of the Missionary Society of Connecticut, Connecticut Acts & Laws 602 (1802).
[56] An Act to Establish a Town and Inspection of Tobacco and Flour in Caswell County, North Carolina Laws of 1796, ch. XLVIII (town of Milton).
[57] An Act to Establish a Seminary of Learning in the Town of Salisbury, North Carolina Laws of 1798, ch. LIV (Salisbury Academy); An Act to Establish an Academy in the County of Duplin, North Carolina Laws of 1798, ch. XXX (Grove Academy).
[58] An Act to Amend an Act, entitled "An Act to Establish a Seminary of Learning in the Town of Fayetteville", North Carolina Laws of 1809, ch. LXXXI (Fayetteville Academy).
[59] An Act to Incorporate a Company to Build a Bridge Across the Yadkin River, North Carolina Laws of 1816, ch. XXXIX (Yadkin Toll Bridge Company).
[60] An Act to Establish a Town at the Confluence of the Yadkin and Uharee Rivers in the County of Montgomery, North Carolina Laws of 1794, ch. XCVI (town of Henderson); An Act to Establish an Academy in Mecklenberg County, North Carolina Laws of 1811, ch. XLIV (New Providence Academy); An Act to Establish an Academy in the town of Wadesborough, in Anson County, North Carolina Laws of 1802, ch. XXXV (Wadesborough Academy); An Act to Establish an Academy in Mecklenberg County, North Carolina Laws of 1811, ch. XLIV (New Providence Academy).
[61] An Act to Establish an Academy at Smithville, in the County of Brunswick, North Carolina Laws of 1798, Ch. LX; An Act to Establish an Academy in the Town of Wilmington, North Carolina Laws of 1803, ch. XXXVII (Wilmington Academy); An Act to Incorporate a Company to Improve, Clear Out and Render Navigable Tranter's Creek, North Carolina Laws of 1818, ch. LI (Tranter's Creek Navigation Company);

convenient,"[62] "fit and proper,"[63] "suitable and necessary,"[64] and "necessary or convenient."[65]

III. Implications for Interpretation

Although the evidence presented so far establishes an unmistakable parallel between corporate charters and the Necessary and Proper Clause, the diversity of scope terms in these charters and the lack of explicit definitions interfere with the task of deriving clear meaning from the corporate law background. The words appear in a fantastic jumble, like a bed of fossilized dinosaur bones disordered by an ancient stream. Daniel Webster, in his brief to the Supreme Court in *McCulloch v. Maryland*, suggested that the Justices should simply give up trying to make much sense of the relevant terms: "[t]hese words, 'necessary and proper,' . . . are probably to be considered as synonymous. Necessary powers must here intend such powers as are suitable and fitted to the object; such as are best and most useful in relation to the end proposed."[66] Excellent advocate that he was, Webster here seeks to elide any differences between "necessary" and "proper," and then to equate them both with other scope terms such as "fit," "best"

An Act to Incorporate the Trustees of Springfield Academy, in the County of Halifax, North Carolina Laws of 1810, ch. LXII (Springfield Academy); An Act to Incorporate the Trustees of the Milton Female Academy, North Carolina Laws of 1818, ch. CIV (Milton Female Academy); An Act to Incorporate the Newbern Marine Insurance Company, North Carolina Laws of 1804 ch. XXII (Newbern Marine Insurance Company); An Act Incorporating the Humpreysville Manufacturing Company, Connecticut Laws, May Session, 1810, ch. II; An Act to Incorporate the New Haven Insurance Company, Connecticut Acts & Laws 478 (1797); An Act to Incorporate the Union Insurance Company at New-London, Connecticut Acts & Laws 709 (1805); An Act to Incorporate the Ocean Insurance Company of New-Haven, Connecticut Laws, October Session, 1818, Ch. VI.

[62] An Act to Incorporate the Newbern Marine Insurance Company, North Carolina Laws of 1804 XXII, ch. (Newbern Marine Insurance Company).

[63] Connecticut Public Records, Vol. 9, p. 117 (1745) (Yale College); An Act Incorporating the Humpreysville Manufacturing Company, Connecticut Laws, May Session, 1810, ch. II.

[64] An Act for Incorporating Part of the Town of Guilford, Connecticut Laws, October Session, 1815, ch. XVII.

[65] An Act to Incorporate the Bridgeport Bank, Connecticut Acts & Laws 741 (1806); An Act to Incorporate the Connecticut Assylum [sic] for the Education and Instruction of DEAF and DUMB Persons, Connecticut Laws, May Session, 1816, ch. III.

[66] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 324-25 (1819).

and "useful" – a strategy that served the interests of his client, McCulloch, who claimed that the federal government had the authority to charter the Bank of the United States notwithstanding the lack of express constitutional authority to do so.

Despite Webster's skepticism, however, a little paleontology can uncover information pertinent to the meaning of "necessary and proper" in the Constitution:

1. There is no evidence in the corporate law background that the Necessary and Proper Clause, standing by itself, confers any authority on the Congress. Scope clauses in colonial and early federal charters do not convey independent authority. They are adjectival: they modify authority otherwise granted. It is evident that the same is true of the Necessary and Proper Clause. By its own terms it grants no authority to enact legislation: that power is conferred elsewhere in Art. I, § 8, cl. 18, granting Congress power to make "laws . . . for carrying into execution" the powers of the national government. The Necessary and Proper Clause of the Constitution, like scope clauses in corporate charters, is inserted as a means of modifying this basic authority.[67]

2. The corporate law background suggests that the Necessary and Proper Clause does not confer general legislative power on Congress. This conclusion can be derived by negative implication from the many grants of legislative authority found in corporate charters of the times. Those grants are almost always general in form: the board members are given authority, in the words of a 1798 North Carolina charter, to make laws and regulations "for the government of the Academy and preservation of religion,

[67] Lawson and Granger make the same observation about the lack of independent force to the Necessary and Proper Clause, although they base their conclusion on evidence other than corporate charters. See Gary Lawson and Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267, 274 (1993).

order and good morals therein."[68] To like effect, an 1802 Connecticut statute incorporating the Hartford Insurance Company authorized the company to "ordain and put in execution, such By-Laws and regulations as shall be deemed necessary and convenient, for the well ordering and governing said Corporation."[69] These and many other grants conferred rulemaking power in the broadest terms, covering all matters having to do with the welfare of the institution. That the breadth of these grants is not accidental is demonstrated by the fact that such clauses were typically accompanied by qualifications requiring that any such regulations not be otherwise contrary to law.[70] The Necessary and Proper Clause, in contrast, does not grant general legislative authority: it limits Congress's lawmaking authority to actions which are necessary and proper for carrying into execution the powers expressly granted.[71] The contrast between the general legislative power found in corporate charters and the restricted grant found in the Constitution suggests that Congress is not given any general lawmaking power.

3. The corporate law background also suggests that the Constitution does not grant Congress unilateral discretion to define whether a given action is within its legislative power.[72] Most corporate law charters of the era contained language recognizing the discretion of the corporate managers to judge for themselves whether the

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[68] An Act to Establish the Smithville Academy, North Carolina Laws of 1798, ch. LV.
[69] An Act to Incorporate the Hartford Insurance Company, Connecticut Acts and Laws 650 (1802).
[70] See, e.g., An Act to Incorporate a Company for the Purpose of Clearing Out and Rendering Navigable Newport River, North Carolina Laws of 1811, ch XXXX (Newport Navigation Company); An Act to Erect a Poor House in the County of Lincoln, North Carolina Laws of 1818, ch. CXX; An Act to Incorporate the Middletown Insurance Company, Connecticut Acts & Laws 654 (1802); An Act to Incorporate the Union Insurance Company at New-London, Connecticut Acts & Laws 709 (1805); An Act to Incorporate the Middletown Fire Insurance Company, Connecticut Laws, May Session, 1813, ch. I.
[71] The Constitution makes this even clearer by stating that the Congress shall possess "all legislative powers *herein granted*." U.S. Const., Art. I, § 1.
[72] This point is also stressed by Lawson and Granger, although on grounds other than an analysis of corporate charters. See Gary Lawson and Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267, 276 (1993) ("the clause does not explicitly designate Congress as the sole judge of the necessity and propriety of executory laws".)

conditions of the scope clause are satisfied. Thus, we observe phrases such as "as to them shall seem necessary,"[73] "as to them shall seem meet,"[74] "which they may deem necessary,"[75] "as they shall think proper,"[76] "as they shall judge most convenient,"[77] "as to them may seem most convenient,"[78] "as they shall deem necessary and convenient,"[79] "as shall be deemed necessary and convenient,"[80] "as they may deem proper and necessary,"[81] "in such manner as shall best appear,"[82] "when they shall think fit,"[83] "as

[73] E.g., An Act to Incorporate the Town of Plymouth, North Carolina Laws of 1807, ch. XLVIII; An Act to Incorporate the Town of Charlotte, North Carolina Laws of 1815, ch. XLVI; An Act for the Governance of Elizabeth City, North Carolina Laws of 1816, ch. XLIII.

[74] E.g., An Act to Establish an Academy at the Town of Edenton, in the County of Chowan, North Carolina Laws of 1800, ch. XLVII (Edenton Academy); An Act to Establish a Seminary of Learning at Spring Hill, in the County of Lenoir, and to Incorporate the Same, North Carolina Laws of 1802, ch. XXXVI.

[75] E.g., An Act to Establish a Seminary of Learning in the County of Montgomery, at or Near the Town of Henderson, North Carolina Laws of 1797, ch. XLVII (Stokes Academy); An Act to Incorporate the Connecticut Assylum [sic] for the Education and Instruction of DEAF and DUMB Persons, Connecticut Laws, May Session, 1816, ch. III; An Act to Incorporate the American Geological Society, Connecticut Laws, May Session, 1819, ch. XXXII.

[76] E.g., An Act to Establish a Town at the Place Fixed Upon for the Court House in the County of Surrey, North Carolina Laws of 1789, ch. LVIII (town of Rockford); An Act to Erect an Academy at the Town of Edenton, in the County of Chowan, North Carolina Laws of 1800 ch. XLVII (Edenton Academy); An Act to Incorporate a Company for the Purpose of Rendering Navigable Great and Little Contentnea Creeks, North Carolina Laws of 1815, ch. XVI; An Act to Establish A Turnpike Road from Mattamuskeet Lake to the Main Public Road on the East Side of Pungo River, North Carolina Laws of 1818, ch. LXXI; An Act to Incorporate the New Haven Insurance Company, Connecticut Acts & Laws 479 (1797); An Act to Incorporate the Bridgeport Bank, Connecticut Acts & Laws 741 (1806); An Act to Incorporate the Middletown Fire Insurance Company, Connecticut Laws, May Session, 1813, ch. I; An Act to Incorporate the New-Haven Fire Insurance Company, Connecticut Laws, May Session, 1813, ch. XVIII; An Act to Incorporate the Ocean Insurance Company of New-Haven, Connecticut Laws, October Session, 1818, Ch. VI; An Act to Incorporate the Thames Insurance Company at New London, Connecticut Laws, October Session, 1818, ch. VIII.

[77] An Act to Establish a Town at the Place Fixed Upon for the Court House in the County of Surrey, North Carolina Laws of 1789, ch. LVIII (town of Rockford).

[78] An Act to Establish a Town at the Confluence of the Yadkin and Uharee Rivers in the County of Montgomery, North Carolina Laws of 1794, ch. XCVI (town of Henderson).

[79] An Act to Establish a Town at the Confluence of the Yadkin and Uharee Rivers in the County of Montgomery, North Carolina Laws of 1794, ch. XCVI (town of Henderson); An Act to Incorporate the Trustees of the Missionary Society of Connecticut, Connecticut Acts & Laws 602 (1802); An Act to Incorporate the Derby Fishing Company, Connecticut Acts & Laws 737 (1806). The same phrase occurs in the charter of the Second Bank of the United States. 14 Cong. ch. 44, 3 Stat. 269.

[80] An Act for Incorporating a Company to clear the Channel of Connecticut River, Connecticut Acts & Laws 542 (1800).

[81] An Act to Establish a Town at the Confluence of the Yadkin and Uharee Rivers in the County of Montgomery, North Carolina Laws of 1794, ch. XCVI (town of Henderson); An Act to Establish an Academy in Mecklenberg County, North Carolina Laws of 1811, ch. XLIV (New Providence Academy).

[82] An Act to Establish the Fayetteville Library Society, North Carolina Laws of 1794, ch. XCV.

they . . . may think most beneficial,"[84] "as they judge necessary,"[85] "as to them may appear necessary,"[86] "as they may deem expedient,"[87] and so on. Similar language is found in the charters of the First and Second Banks of the United States: the directors of the First Bank were empowered to "to ordain, establish, and put in execution, such by-laws, ordinances and regulations, *as shall seem* necessary and convenient for the government of the said corporation,"[88] while the directors of the Second Bank were authorized to "ordain, establish, and put in execution, such by-laws, and ordinances, and regulations, *as they shall deem* necessary and convenient for the government of the said corporation."[89]

In contrast with the common practice in corporate charters of recognizing the authority of the institution or its managers to determine the scope of their own authority,

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[83] An Act to Incorporate the Newbern Steam Boat Company, North Carolina Laws of 1817, ch. XCIII (Newbern Steam Boat Company) (timing of dividends).
[84] An Act to Establish a Town on John Strother's Land, on the North-East Side of French Broad River, in Buncombe County, North Carolina Laws of 1802, ch. XXXIV (town of Spaightville).
[85] An Act to Incorporate the Bridgeport Bank, Connecticut Acts & Laws 741, 743 (1806).
[86]An Act to Establish an Academy in the County of Wilkes, North Carolina Laws of 1801, ch. XLII (Philomathia Academy); An Act to Establish an Academy in the Town of Wadesborough, in Anson County, North Carolina Laws of 1802, ch. XXXV (Wadesborough Academy); An Act to Establish an Academy at the Court-House in Caswell County, North Carolina Laws of 1802, ch. XXXVII (Caswell Academy); An Act to Establish an Academy in the County of Greene, North Carolina Laws of 1804, ch. XLIII (Greene Academy); An Act to Establish an Academy in Trenton, in the County of Jones, North Carolina Laws of 1807, ch. LXVI (Trenton Academy); An Act to Establish an Academy on Richland Swamp, in Robeson County, North Carolina Laws of 1808, ch. LXXIV (Zion Parnassus Academy); An Act for the Promotion of Learning and Scientific Knowledge in the County of Stokes, North Carolina Laws of 1809, ch. LXXX (Germantown Academy); An Act to Incorporate the Trustees of Springfield Academy, in the County of Halifax, North Carolina Laws of 1810, ch. LXII (Springfield Academy); An Act to Revive and Amend an Act to Establish an Academy in the County of Currituck, North Carolina Laws of 1810, ch. LXX (Currituck Academy); An Act to Establish a Seminary of Learning in the County of Moore, by the Name of "Euphronean Academy," North Carolina Laws of 1811, ch. XLIII (Euphronean Academy); An Act to Establish a Seminary of Learning in Robeson County, by the Name of Philadelphus Academy, North Carolina Laws of 1812, ch. CV (Philadelphus Academy); An Act to Incorporate the Town of Oxford in the County of Granville, North Carolina Laws of 1816, ch. XLV (town of Oxford); An Act to Establish Wayne Academy, North Carolina Laws of 1818, ch. CXI (Wayne Academy); An Act to Establish a Seminary of Learning in the Town of Hertford, In Perquimons County, North Carolina Laws of 1818, ch. XLVIII (Hertford Academy).
[87] An Act to Incorporate the New-London Bank, Connecticut Acts & Laws 781, 783 (1807).
[88] 1 Stat. 192 (emphasis added).
[89] 3 Stat. 269 (emphasis added).

the Constitution is conspicuously silent on this point. The Necessary and Proper Clause does not say, as it easily could have said, that Congress shall have power to "make all Laws which *as to it shall seem* necessary and proper" to carry into execution the powers of the federal government, or which "*it shall judge* necessary and proper," or which "*it may deem* necessary and proper." Instead, the language is simply "which *shall be* necessary and proper." Judged by the corporate law background, the omission of language conferring authority to self-determine the scope of legislative power appears unlikely to have been accidental. It implies that Congress does not have sole or unilateral authority to determine the scope of its own legislative power, and rather that some other body (i.e., the Supreme Court) can reject congressional judgment on this score.

4. Inferences about the use of the doublet "necessary and proper" can be drawn from the corporate law background. The combination of these terms in the constitutional clause poses an interpretive dilemma. If "necessary" is simply a heightened form of "proper" – that is, if everything that is necessary is, by logical implication, also proper – then there would be no reason to include the word "proper" in the clause; all the work would be done by "necessary". The problem cannot be avoided by interpreting "and" to mean "or": "necessary *or* proper" would also involve superfluity because then "necessary" would add nothing. Other things equal, it appears undesirable to interpret constitutional terms in a way that makes any of them superfluous.

Daniel Webster's approach to this problem was to see "necessary" and "proper" as synonyms.[90] Essentially, his suggestion to the Supreme Court was to view the doublet as a sort of rhetorical flourish – a phrase that sounds attractive but has little content. Webster's idea of seeing the terms as synonymous makes it irrelevant whether "and" or

[90] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 324-25 (1819).

"or" is used, since either would convey the same information. But it fails to resolve the scandal of superfluity. If "necessary" and "proper" mean the same thing, the framers could have been content with either. Even worse, by conflating the terms Webster discounted the meaning of both. "Necessary" and "proper" seem different as a matter of ordinary speech, but if they mean the same thing in the Constitution, then it appears that they can't mean much at all. This of course was Webster's intention, but it is not a satisfactory solution to the problem of interpretation.

In considering the implications of the corporate law background, we can begin with the fact that the clause in question is a *doublet* – a combination of two scope words. Corporate practice frequently used doublets. A close investigation reveals that the use of such terms is not randomly distributed. Doublets are uncommon or absent in ordinary grants of corporate authority – determining times for meeting, declaring a dividend, acting with respect to the corporate seal, hiring employees, setting salaries, defining terms and conditions of employment, purchasing property, erecting buildings, appointing or electing trustees, raising money by lotteries, paying dividends, or increasing the capital stock. But doublets *are* often observed in clauses granting legislative powers to directors, commissioners or trustees – the very clauses most analogous to the grant of legislative authority associated with the Necessary and Proper Clause. The heavy use of doublets in grants of corporate rulemaking power suggests that the presence of a doublet in the Constitution is not accidental: the concentration of this trope in one specific type of corporate law provision seems to have meaning.

What distinguishes legislative grants from other authority-conferring clauses? A possible answer is that legislative power clauses in corporate charters, in contrast with

most other grants of authority, confer very broad power both as to means and ends. When the legislators wished to impose a meaningful scope limitation on the exercise of such broad-ranging authority, therefore, they may have included a doublet so as to emphasize that the restriction being imposed was to apply comprehensively to all aspects of the decision being taken. Even if the particular terms in the doublet have no independent meaning – if, as Webster argued, "necessary" and "proper" are mere synonyms – the fact that the Committee of Detail chose to include them both could still have significance: a rhetorical flourish, perhaps, but one that conveys information all the same (consider John Hancock's signature of the Declaration of Independence!).

5. We wish, however, to find in the corporate law background more useful information about "necessary" and "proper" – information that would give these terms some degree of distinctive meaning and defend the Necessary and Proper Clause against the accusation of superfluity.

Consider first the term "necessary". This word is not defined in corporate charters, and it is clear that it was not used with a precise, definite, and generally understood meaning. But it does not follow that we should throw up our hands. While the term displays substantial variance in application, it also manifests a reasonably discernible average meaning.

Colonial and early federal lawmakers employed a substantial but limited number of scope terms when modifying grants of agency authority. Although these terms are not precisely defined, we can line them up in some rough order of the severity of the restriction. That way we can get a sense, if not of their *cardinal* meaning, at least of their *ordinal* meaning: their placement vis-à-vis other words on a scale of severity of

restriction. If we do this, it is obvious that the term "necessary" is the most restrictive of all the terms we observe in the lexicon: more restrictive, certainly, than terms such as "at pleasure" or "according to their discretion," which recognize nearly unchecked freedom of action; but more restrictive also than terms like "expedient," "fit," "convenient," "beneficial," "reasonable," "meet," or "advisable", which appear to require only that the means undertaken have a tendency to advance the objects of the institution. Whatever "necessary" means, it clearly requires more by way of means-end connection than other scope words found in corporate charters of the day. This fact suggests that the word "necessary," although it did not have a definite meaning, at least had a central tendency which is more demanding than other terms which were readily available to the framers.

Further information on the meaning of "necessary" can be gleaned from an examination of the context in which this term is used in corporate law charters. These charters contain a number of standardized provisions which can be associated with common scope terms. For example, many charters set forth rules for *when* the managers of a corporation must undertake certain actions such as setting a meeting time or declaring a dividend. The term "necessary" is almost never associated with such timing rules. Instead, we find: "[when] convenient,"[91] when they "shall judge proper,"[92] "when they shall think proper,"[93] "when they may think it expedient,"[94] "as they may think proper,"[95] "at any time or times they may think proper,"[96] "as they may judge

[91] An Act to Establish a Seminary of Learning in the County of Montgomery, North Carolina Laws of 1797, ch. XLVII (Stokes Academy).
[92] An Act to Incorporate the Bridgeport Bank, Connecticut Acts & Laws 742 (1806).
[93] An Act to Erect an Academy at the Town of Edenton, in the County of Chowes, North Carolina Laws of 1800, ch. XXXIX.
[94] An Act for the Government of Elizabeth City, North Carolina Laws of 1816, ch. XLIII.
[95] An Act to Establish an Academy in the County of Buncombe, North Carolina Laws of 1801, Ch. XLIII (Union Hill Academy).
[96] An Act for the Government of Elizabeth City, North Carolina Laws of 1816, ch. XLIII.

expedient,"[97] "when they shall think fit,"[98] and "as they shall deem most convenient."[99] It is evident that the use of scope terms in these timing rules is not accidental. They are employed for the purpose of conveying a broad degree of discretion to agents over matters that are not fundamental to the achievement of the enterprise's goals.

Another example concerns actions undertaken with respect to the corporate seal. Many charters of the era give the company being formed the right to a common seal and specifying a wide range of actions that the managers may undertake with respect to the seal, including changing, altering, breaking, or recreating it. The charters almost never use the scope term "necessary" with respect to these actions, instead specifying that the managers may act at "pleasure"[100] or as they shall think "proper"[101] or "fit."[102] Here

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[97] An Act to Incorporate the Aetna Insurance Company, Connecticut Laws, May Session, 1819, ch. XXXIV.

[98] An Act to Incorporate the Newbern Steam Boat Company, North Carolina Laws of 1817, ch. XCIII (Newbern Steam Boat Company) (timing of dividends).

[99] An Act to Incorporate the American Geological Society, Connecticut Laws, May Session, 1819, ch. XXXII. In the rare cases where the term "necessary" is used in this context its effect is usually to enlarge rather than reduce the agent's scope of discretion – the company may be instructed, for example, to publish notice of a meeting in newspapers other than the one specified in the statute if "necessary." An Act to Incorporate the New Haven Bank, Connecticut Acts & Laws 431 (1792); An Act to Incorporate the Middletown Fire Insurance Company, Connecticut Laws, May Session, 1813, ch. I; An Act to Incorporate the New-Haven Fire Insurance Company, Connecticut Laws, May Session, 1813, ch. XVIII.

[100] An Act to Incorporate the Newbern Marine Insurance Company, and to Establish a Bank in Said Town, North Carolina Laws of 1804, ch. XXII (Newbern Marine Insurance Company); An Act to Incorporate the Newbern Marine Insurance Company, and to Establish a Bank in Said Town, North Carolina Laws of 1804, ch. XXII (Bank of Newbern); An Act to Incorporate the New Haven Bank, Connecticut Acts & Laws 431 (1792); An Act to Incorporate the Norwich Bank, Connecticut Acts & Laws 443 (1796); An Act to Incorporate the New Haven Insurance Company, Connecticut Acts & Laws 478 (1797); An Act to Incorporate the Trustees of the Missionary Society of Connecticut, Connecticut Acts & Laws 602 (1802); An Act to Incorporate the Hartford Insurance Company, Connecticut Acts & Laws 650 (1802); An Act to Incorporate the Middletown Insurance Company, Connecticut Acts & Laws 654 (1802); An Act to Incorporate the Union Insurance Company at New-London, Connecticut Acts & Laws 709 (1805); An Act to Incorporate the Hartford Fire Insurance Company, Connecticut Laws, May Session 1810, ch. I; An Act to Incorporate the New-Haven Fire Insurance Company, Connecticut Laws, May Session, 1813, ch. XVIII; An Act for Incorporating Part of the Town of Guilford, Connecticut Laws, October Session, 1815, ch. XVII; An Act to Incorporate the Ocean Insurance Company of New-Haven, Connecticut Laws, October Session, 1818, ch. VI; An Act to Incorporate the American Geological Society, Connecticut Laws, May Session, 1819, ch. XXXII; An Act to Incorporate a Saving Society in the City of Hartford, Connecticut Laws, May Session, 1819, ch. XXXIII.

[101] An Act to Erect an Academy at the Town of Edenton, in the County of Chowan, North Carolina Laws of 1800, ch. XXXIX; An Act to Establish an Academy at Williamston, in the County of Martin, North Carolina Laws of 1816, ch. XLV (Williamston Academy).

again, the use of scope terms is not accidental. Actions with respect to the seal are ministerial, technical, and not fundamental to the realization of the institution's goals or purposes. It is not surprising, therefore, that the scope terms used with respect to such actions convey a broad degree of freedom on the part of the corporation and its managers.

We may also consider clauses going to conditions or employment or salaries of officers. Charter provisions conferring these authorities typically employ terms such as "as they may deem proper,"[103] "if they think proper,"[104] as they "shall think fit,"[105] "as they may think proper,"[106] as they may or shall "judge reasonable,"[107] "as shall appear to them reasonable,"[108] "as they may think proper,"[109] or "as they judge reasonable."[110] Again, it appears that the omission of the term "necessary" from such clauses is not accidental. Decisions setting terms and conditions of employment for officers or

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[102] Connecticut Public Records, Vol. 9, p. 115 (1745) (Yale College).

[103] An Act to Establish an Academy in the Upper Part of Pasquotank County, North Carolina Laws of 1809, ch. LXXVIII (Newland Academy); An Act to Establish an Academy in Camden County, North Carolina Laws of 1810, ch. LXXIV (Jonesborough Academy); An Act to Establish an Academy at Plymouth, in Washington County, North Carolina Laws of 1810, ch. LXXIII (Plymouth Academy).

[104] An Act to Establish a Seminary of Learning in Elizabeth Town, in Bladen County, North Carolina Laws of 1810, ch. LXXII (Elizabeth Town Academy).

[105] An Act to Incorporate the North River and Adams Creek Canal Company, Laws of North Carolina, 1816, ch. XL.

[106] An Act to Establish an Academy in the Town of Snow-Hill, in the County of Greene, North Carolina Laws of 1812, ch. CIV (Snow-Hill Academy).

[107] An Act to Incorporate the New Haven Bank, Connecticut Acts & Laws 431 (1792); An Act to Incorporate the Bridgeport Bank, Connecticut Acts & Laws 742 (1806); An Act to Incorporate the Ocean Insurance Company of New-Haven, Connecticut Laws, October Session, 1818, ch. VI; An Act to Incorporate the Middlesex Fishing Company, Connecticut Acts & Laws 774 (1807); An Act to Incorporate the Derby Bank, Connecticut Laws, October Session, 1809, ch. 1; An Act to Incorporate the Eagle Bank, Connecticut Laws, October Session, 1811, ch. I; An Act to Incorporate the Phoenix Bank, Connecticut Laws, May Session, 1814, ch. II.

[108] An Act to Incorporate the Norwich Bank, Connecticut Acts & Laws 443 (1796).

[109] An Act to Incorporate the Union Insurance Company at New-London, Connecticut Acts & Laws 709 (1805); An Act to Incorporate the Ocean Insurance Company of New-Haven, Connecticut Laws, October Session, 1818, ch. VI; An Act to Incorporate the Thames Insurance Company at New London, Connecticut Laws, October Session, 1818, ch. VIII.

[110] An Act Incorporating the Humpreysville Manufacturing Company, Connecticut Laws, May Session, 1810, ch. II; An Act Incorporating the Middletown Manufacturing Company, Connecticut Laws, October Session, 1810, ch. I.

establishing salaries are obviously ones that need to be committed to the broad discretion of the managers of a company.

Consider also actions by corporate directors with respect to dividends. Charters of this period typically authorize directors to declare dividends "as they shall think proper,"[111] "as shall appear to the directors advisable,"[112] "as to them shall appear fit and proper,"[113] "as shall appear to them proper,"[114] and as they "may judge proper."[115] Once again, the omission of the term "necessary" from these clauses appears to have been intentional. Like the other powers just discussed, the decision whether to declare a dividend is a matter requiring judgment, but not one that is fundamental to achieving the goals of the enterprise (it would be odd to say that the directors found it "necessary" to declare a dividend).

What about clauses conferring general executive authority on directors, commissioners or trustees? Here again, the scope clauses only rarely contain the term "necessary."[116] Instead, terms used in this context include: "to do all other acts matters and things proper to be done,"[117] to exercise "such other powers, as shall be by them

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[111] An Act to Incorporate the New Haven Insurance Company, Connecticut Acts & Laws 479 (1797); An Act to Incorporate the Bridgeport Bank, Connecticut Acts & Laws 741 (1806); An Act to Incorporate the Middletown Fire Insurance Company, Connecticut Laws, May Session, 1813, ch. I; An Act to Incorporate the New-Haven Fire Insurance Company, Connecticut Laws, May Session, 1813, ch. XVIII; An Act to Incorporate the Ocean Insurance Company of New-Haven, Connecticut Laws, October Session, 1818, ch. VI; An Act to Incorporate the Thames Insurance Company at New London, Connecticut Laws, October Session, 1818, ch. VIII.

[112] An Act to Incorporate the Middlesex Fishing Company, Connecticut Acts & Laws 776 (1807).

[113] An Act Incorporating the Humpreysville Manufacturing Company, Connecticut Laws, May Session, 1810, ch. II.

[114] An Act Incorporating the Middletown Manufacturing Company, Connecticut Laws, October Session, 1810, ch. I.

[115] An Act to Incorporate the Eagle Bank, Connecticut Laws, October Session, 1811, ch. I; An Act to Incorporate the Phoenix Bank, Connecticut Laws, May Session, 1814, ch. II.

[116] For an exception, see An Act to Incorporate the Trustees of the Missionary Society of Connecticut, Connecticut Acts & Laws 602 (1802) ("to transact all business necessary to attain the ends of the society").

[117] An Act to Incorporate a Company for Mutual Assurance Against Fire, Connecticut Acts & Laws 550 (1801).

deemed for the best interest of the company,"[118] to act "according to their best discretion,"[119] to do that "which to them shall or may appertain to do,"[120] to "do and execute all acts and things to them appertaining,"[121] to "put in execution whatever they may judge to be for the benefit of the Company,"[122] "to do and cause to be executed all such acts and things as to them may appertain,"[123] "to do and execute all and singular the matters, and things, which to them shall or may appertain,"[124] and to "do and act in all things whatever that may tend to the profit" of the corporation.[125] We may infer that the omission of "necessary" from these clauses sprang from a wish, on the part of the drafters, not to unduly saddle the ability of the managers to undertake useful but unforeseeable actions on behalf of their organizations.[126] At least for these charters, the drafters apparently felt that the word "necessary" would impose undesirable limitations on the exercise of executive discretion.

Contrast the foregoing powers with ones where the word "necessary" *does* appear in corporate charters. The most prominent example is the decision whether to hire employees. When power to hire employees is conferred, it is typically qualified by the

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[118] An Act to Incorporate the Aetna Insurance Company, Connecticut Laws, May Session, 1819, ch. XXXIV.
[119] Connecticut Public Records, Vol. 4, p. 370 (1701) (Collegiate School).
[120] An Act to Incorporate the New Haven Bank, Connecticut Acts & Laws 431 (1792); An Act to Incorporate the Middletown Insurance Company, Connecticut Acts & Laws 654 (1802); An Act to Incorporate the Union Insurance Company at New-London, Connecticut Acts & Laws 709 (1805).
[121] An Act to Incorporate the Derby Fishing Company, Connecticut Acts & Laws 737 (1806).
[122] An Act to Incorporate the Middlesex Fishing Company, Connecticut Acts & Laws 776 (1807).
[123] An Act to Incorporate the New-London Bank, Connecticut Acts & Records 781 (1807); An Act to Incorporate the Eagle Bank, Connecticut Laws, October Session, 1811, ch. I.
[124] An Act to Incorporate the Middletown Fire Insurance Company, Connecticut Laws, May Session, 1813, ch. I; An Act to Incorporate the Thames Insurance Company at New London, Connecticut Laws, October Session, 1818, ch. VIII.
[125] An Act Establishing an Academy at Laurel Hill, in Richmond County, North Carolina Laws of 1809, ch. LXXVII (Laurel Hill Academy).
[126] The word "necessary" is used An Act Concerning Library Companies, Connecticut Laws, October Session, 1818, ch. IX (granting general executive authority to "do all acts necessary and proper for the well ordering of the affairs of such corporation.")

scope terms such as: "as they may deem necessary,"[127] "as they shall judge necessary,"[128] "which shall be necessary,"[129] "as shall be necessary,"[130] as they may or shall "find necessary or convenient,"[131] "as to them shall appear necessary,"[132] "as to them shall appear necessary and proper,"[133] "as to them shall deem necessary,"[134] "as to them shall appear necessary,"[135] "as shall be necessary for executing the business of said corporation,"[136] or "as shall appear necessary."[137]

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[127] An Act to Establish a Seminary of Learning in the County of Montgomery, North Carolina Laws of 1797, ch. XLVII (Stokes Academy).

[128] An Act to Incorporate the Bridgeport Bank, Connecticut Acts & Laws 743 (1806); An Act to Incorporate the Hartford Fire Insurance Company, Connecticut Laws, May Session, 1810, ch. I; An Act to Incorporate the New-Haven Fire Insurance Company, Connecticut Laws, May Session, 1813, ch. XVIII; An Act to Incorporate The Aetna Insurance Company, Connecticut Laws, May Session, 1819, Ch. XXXIV; An Act Incorporating the Humpreysville Manufacturing Company, Connecticut Laws, May Session, 1810, ch. II; An Act Incorporating the Middletown Manufacturing Company, Connecticut Laws, October Session, 1810, ch. I.

[129] An Act for Incorporating Part of the Town of Guilford, Connecticut Laws, October Session, 1815, ch. XVII.

[130] An Act to Incorporate the Phoenix Bank, Connecticut Laws, May Session, 1814, ch. II.

[131] An Act to Incorporate the Connecticut Assylum [sic] for the Education and Instruction of DEAF and DUMB Persons, Connecticut Laws, May Session, 1816, ch. III; An Act to Incorporate the American Geological Society, Connecticut Laws, May Session, 1819, ch. XXXII.

[132] An Act to Incorporate a Saving Society in the City of Hartford, Connecticut Laws, May Session, 1819, Ch. XXXIII.

[133] An Act to Establish the Smithville Academy, North Carolina Laws of 1798, ch. LV (Smithville Academy); An Act to Incorporate the Trustees of the Springfield Academy, in the County of Halifax, North Carolina Laws of 1810, ch. LXII (Springfield Academy); An Act to Incorporate the Trustees of the Milton Female Academy, North Carolina Laws of 1818, ch. CIV (Milton Female Academy).

[134] An Act to Establish a Seminary of Learning at Spring-Hill, in the County of Lenoir, North Carolina Laws of 1802, ch. XXXVI (Spring Hill Seminary).

[135] An Act to Establish an Academy in Nixonton, in the County of Pasquotank, North Carolina Laws of 1803, ch. XXVI (Nixonton Academy); An Act to Establish an Academy in Beaufort County, North Carolina Laws of 1808, ch. LXXV (Washington Academy); An Act to Establish an Academy in the Upper Part of Pasquotank County, North Carolina Laws of 1809, ch. LXXVIII (Newland Academy); An Act to Establish an Academy at Plymouth, in Washington County, North Carolina Laws of 1810, ch. LXXIII (Plymouth Academy); An Act to Establish an Academy in Camden County, North Carolina Laws of 1810, ch. LXXIV (Jonesborough Academy); An Act to Establish an Academy at Plymouth, in Washington County, North Carolina Laws of 1810, ch. LXXIII (Plymouth Academy); An Act to Establish an Academy in the Town of Snow-Hill, in the County of Greene, North Carolina Laws of 1812, ch. CIV (Snow-Hill Academy); An Act to Incorporate the Town of Clinton and to Appoint Commissioners for the Said Town, North Carolina Laws of 1818, ch. LXXXIV (town of Clinton).

[136] An Act to Incorporate the Newbern Marine Insurance Company, and to Establish a Bank in Said Town, North Carolina Laws of 1804, ch. XXII (Bank of Newbern).

[137] An Act to Incorporate the Town of Plymouth, North Carolina Laws of 1807, ch. XLVIII (town of Plymouth). Even when "necessary" is not used in grants of hiring authority, the scope term employed tends to indicate a demanding standard: "as they may deem proper," An Act to Establish an Academy in Onslow County, North Carolina Laws of 1809, ch. LXXXIII (Onslow Academy); An Act to Establish an Academy

The pattern here is too strong to be accidental. Why is the scope term "necessary" heavily favored in the employment context while being absent or virtually absent in the other contexts just discussed? We may surmise that for a small corporation – one just being formed – the decision on whether to hire an employee and who to hire *is* fundamental to achieving the goals of the enterprise.

The other context in which the word "necessary" frequently appears is the one most analogous to the Necessary and Proper Clause of the Constitution – clauses conferring general lawmaking or rulemaking power on the corporation or its directors, commissioners or trustees. This context displays a wide variance of scope terms, but the word "necessary" appears more frequently than any other.[138] Typical usages here

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in Cataret County, North Carolina Laws of 1810, ch. LXIV (Cartaret Academy); An Act to Establish an Academy at Enfield, North Carolina Laws of 1818, ch. LI (Enfield Academy), or "as they shall judge requisite," An Act to Incorporate the North River and Adams Creek Canal Company, Laws of North Carolina, 1816, ch. XL; An Act to Incorporate the Newbern Steam Boat Company, North Carolina Laws of 1817, ch. XCIII (Newbern Steam Boat Company).

[138] The second most common scope term found in grants of rulemaking authority is "proper." See text accompanying notes __-__ infra. Other scope terms evidenced in this context include: as to them may or shall "seem meet," An Act to Erect a Poor House in the County of Lincoln, North Carolina Laws of 1818, ch. CXX; An Act to Erect an Academy at the Town of Edenton, in the County of Chowan, North Carolina Laws of 1800, ch. XLVII (Edenton Academy); An Act to Establish a Seminary of Learning at Spring-Hill, in the County of Lenoir, North Carolina Laws of 1802 ch. XXXVI (Spring Hill Seminary); "as the directors may deem fit and expedient," An Act to Incorporate a Company to Build a Bridge Across the Yadkin River, North Carolina Laws of 1816, ch. XXXIX (Yadkin Toll Bridge Company); "as they shall judge most convenient," An Act to Establish a Town at the Place Fixed Upon for the Court House in the County of Surry, North Carolina Laws of 1789, ch. LVIII; "as they may deem expedient," An Act to Incorporate the Town of Plymouth, North Carolina Laws of 1807, ch. XLVIII (town of Plymouth); An Act to Establish an Academy in Waynesborough, North Carolina Laws of 1810, ch. LXVIII (Waynesborough Academy); An Act to Incorporate a Company for the Purpose of Clearing Out and Rendering Navigable Newport River, North Carolina Laws of 1811, ch. XXX (Newport Navigation Company); "as may be deemed expedient," An Act to Incorporate the New-London Bank, Connecticut Acts & Laws 781 (1807); An Act to Incorporate the Derby Bank, Connecticut Laws, October Session, 1809, ch. 1; An Act to Incorporate the Eagle Bank, Connecticut Laws, October Session, 1811, ch. I; An Act to Incorporate the New-Haven Fire Insurance Company, Connecticut Laws, May Session, 1813, ch. XVIII; "as shall be convenient," An Act to Incorporate the New Haven Bank, Connecticut Acts & Laws 431 (1792); "as to them shall seem meet and most conducive to the aforesaid end thereof," Connecticut Public Records, Vol. 4, p. 370 (1701) (Collegiate School); and "as are usually made" in such institutions, An Act to Incorporate the Trustees of the Milton Female Academy, North Carolina Laws of 1818, ch. CIV (Milton Female Academy).

include: as may "appear necessary,"[139] "as to them shall appear right and necessary,"[140] as they may or shall "deem proper and necessary,"[141] which or as "they may deem necessary,"[142] as they "may consider necessary and proper,"[143] "necessary and proper;"[144]

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[139] An Act to Establish the Smithville Academy, North Carolina Laws of 1798, ch. LV (Smithville Academy); An Act to Establish an Academy in the County of Wilkes, North Carolina Laws of 1801, ch. XLII (Philomathia Academy); An Act to Establish an Academy in the Town of Wadesborough, in Anson County, North Carolina Laws of 1802, ch. XXXV (Wadesborough Academy); An Act to Establish an Academy at the Court-House in Caswell County, North Carolina Laws of 1802, ch. XXXVII (Caswell Academy); An Act to Establish an Academy in the County of Greene, North Carolina Laws of 1804, ch. XLIII (Greene Academy); An Act to Establish an Academy in Trenton, in the County of Jones, North Carolina Laws of 1807, ch. LXVI (Trenton Academy); An Act to Establish an Academy on Richland Swamp, in Robeson County, North Carolina Laws of 1808, ch. LXXIV (Zion Parnassus Academy); An Act for the Promotion of Learning and Scientific Knowledge in the County of Stokes, North Carolina Laws of 1809, ch. LXXX (Germantown Academy); An Act to Incorporate the Trustees of the Springfield Academy, in the County of Halifax, North Carolina Laws of 1810, ch. LXII (Springfield Academy); An Act to Revive and Amend an Act to Establish an Academy in the County of Currituck, North Carolina Laws of 1810, ch. LXX (Currituck Academy); An Act to Establish a Seminary of Learning in the County of Moore, by the Name of the "Euphronean Academy," North Carolina Laws of 1811, ch. XLIII (Euphronean Academy); An Act to Establish a Seminary of Learning in Robeson County, by the Name of Philadelphus Academy), North Carolina Laws of 1812, ch. CV (Philadelphus Academy); An Act to Incorporate the Town of Oxford in the County of Granville, North Carolina Laws of 1816, ch. XLV (town of Oxford); An Act to Establish Wayne Academy, North Carolina Laws of 1818, ch. CXI (Wayne Academy); An Act to Establish a Seminary of Learning in the Town of Hertford, in Perquimons County, North Carolina Laws of 1818, ch. XLVIII (Hertford Academy); An Act to Establish Pike Academy in the County of Tyrrell, North Carolina Laws of 1818, ch. XLVIII (Pike Academy); An Act to Establish an Academy on or Near the Lands of Stephen S. Snowdon, in Camden County, North Carolina Laws of 1818, ch. LV (Camden Academy); An Act to Establish an Academy at Swainsborough, in Onslow County, North Carolina Laws of 1810, ch. LXVII (Swainsborough Academy); An Act to Incorporate the Town of Charlotte in the County of Mecklenberg, North Carolina Laws of 1815, ch. XVII (town of Charlotte); An Act to Establish a Seminary of Learning on the Lands of James Hilliard in the County of Nash by the Name of Hilliardston Academy, North Carolina Laws of 1818, ch. CVIII (Hilliardston Academy); An Act to Establish a Seminary of Learning on the Lands of John Martin, in the County of Wake, by the Name of Forest Hill Academy, North Carolina Laws of 1818, ch. CVII (Forest Hill Academy).

[140] An Act to Establish a Turnpike Road from Mattamuskeet Lake to the Main Public Road on the East Side of Pungo River, North Carolina Laws of 1818, ch. LXXI I (Pungo River Turnpike Company).

[141] An Act to Establish an Academy in the Town of Wadesborough, North Carolina Laws of 1802, ch. XXXV (Wadesborough Academy); An Act to Establish an Academy in Mecklenberg County, North Carolina Laws of 1811, ch. XLIV (New Providence Academy).

[142] An Act to Incorporate the Connecticut Assylum [sic] for the Education and Instruction of DEAF and DUMB Persons, Connecticut Laws, May Session, 1816, ch. III; An Act to Incorporate the American Geological Society, Connecticut Laws, May Session, 1819, ch. XXXII; An Act to Authorize the Trustees of the Lumberton Academy, to Raise a Certain Sum by Way of Lottery to Complete the Building of Said Academy, North Carolina Laws of 1802, ch. XXXIX (Lumberton Academy); An Act to Establish an Academy in Nixonton, in the County of Pasquotank, North Carolina Laws of 1803 XXVI (Nixonton Academy); An Act to Establish an Academy in Beaufort County, Adjoining Washington, North Carolina Laws of 1808 LXXV (Washington Academy); An Act to Establish an Academy at Plymouth, in Washington County, North Carolina Laws of 1810, ch. LXXIII (Plymouth Academy); An Act to Establish an Academy in the Town of Snow-Hill, in the County of Greene, North Carolina Laws of 1812, ch. CIV (Snow-Hill Academy); An Act to Establish a Female Academy in the County of Orange, Laws of North

as may or shall be necessary and proper;"[145] as shall "seem necessary,"[146] as shall or may "be necessary,"[147] as shall seem "necessary and convenient,"[148] "as they shall judge necessary and convenient;"[149] "as shall be necessary or convenient;"[150] "as shall be deemed necessary and convenient,"[151] "as they shall deem necessary and convenient;"[152]

Carolina, 1818, ch. CX (Female Academy in County of Orange); An Act to Incorporate the Camden Bible Society, Laws of North Carolina of 1819, ch. CXXVIII.

[143] An Act to Establish an Academy in the Town of Wilmington, North Carolina Laws of 1803, ch. XXXVII (Wilmington Academy).

[144] An Act to Incorporate a Company to Improve, Clear Out and Render Navigable Tranter's Creek, North Carolina Laws of 1818, ch. LI (Tranter's Creek Navigation Company).

[145] An Act to Incorporate the New Haven Insurance Company, Connecticut Acts & Laws 478 (1797); An Act to Incorporate the Hartford Insurance Company, Connecticut Acts & Laws 650 (1802); An Act to Incorporate the New Haven Insurance Company, Connecticut Acts & Laws 479 (1797); An Act to Incorporate the Union Insurance Company at New-London, Connecticut Acts & Laws 709 (1805); An Act to Incorporate the Ocean Insurance Company of New-Haven, Connecticut Laws, October Session, 1818, Ch. VI.

[146] An Act to Incorporate the Norwich Bank, Connecticut Acts & Laws 443 (1796); An Act to Incorporate the Town of Plymouth, North Carolina Laws of 1807, ch. XLVIII (town of Plymouth); An Act to Incorporate the Town of Charlotte in the County of Mecklenberg, North Carolina Laws of 1815, ch. XVII (town of Charlotte); An Act for the Governance of Elizabeth City, North Carolina Laws of 1816, ch. XLIII (town of Elizabeth City); An Act to Incorporate the Trustees of the Milton Female Academy, North Carolina Laws of 1818, ch. CIV (Milton Female Academy).

[147] An Act to Incorporate an Aqueduct Company in the City of Norwich, Connecticut Laws, October Session, 1808, ch. VIII; An Act Establishing an Academy in the County of Granville, For Appointing Trustees, and for Other Purposes, North Carolina Laws of 1779, Ch. XXV; An Act to Incorporate the Town of Williamsborough in the County of Granville, North Carolina Laws of 1808, ch. LXVII (town of Williamsborough); An Act to Establish an Academy in Onslow County, North Carolina Laws of 1809, ch. LXXXXIII (Onslow Academy); An Act to Establish an Academy in Cataret County, North Carolina Laws of 1810, ch. LXIV (Cartaret Academy); An Act to Establish an Academy in the Town of Haywood in Chatham County, and to Incorporate the Trustees Thereof, Laws of North Carolina, 1818, ch. CIX (Haywood Academy); An Act to Establish the Laurencville Academy [sic] in the County of Montgomery, North Carolina Laws of 1818, ch. XXXIV (Laurenceville Academy); An Act to Incorporate the Leaksville Male and Female Academies, North Carolina Laws of 1818, ch. XLIX; An Act to Establish an Academy at Enfield, North Carolina Laws of 1818, ch. LI (Enfield Academy).

[148] An Act to Incorporate the Newbern Marine Insurance Company, and to Establish a Bank in Said Town, North Carolina Laws of 1804, ch. XXII (Bank of Newbern).

[149] An Act to Incorporate the Thames Insurance Company at New London, Connecticut Laws, October Session, 1818, ch. VIII.

[150] An Act to Incorporate the Bridgeport Bank, Connecticut Acts & Laws 741 (1806).

[151] An Act for Incorporating a Company to Clear the Channel of Connecticut River, Connecticut Acts & Laws 542 (1800); An Act to Incorporate a Company for Mutual Assurance Against Fire, Connecticut Acts & Laws 550 (1801); An Act to Incorporate the Hartford Insurance Company, Connecticut Acts & Laws 650 (1802); An Act to Incorporate the Middletown Insurance Company, Connecticut Acts & Laws 654 (1802); An Act to Incorporate the Hartford Fire Insurance Company, Connecticut Laws, May Session 1810, Ch. I ; An Act to Incorporate the Middletown Fire Insurance Company, Connecticut Laws, May Session, 1813, ch. I; An Act to Incorporate the New-Haven Fire Insurance Company, Connecticut Laws, May Session, 1813, ch. XVIII; An Act to Incorporate the Ocean Insurance Company of New-Haven, Connecticut Laws, October Session, 1818, Ch. VI; An Act Incorporating the Humpreysville Manufacturing Company, Connecticut Laws, May Session, 1810, ch. II ("as shall be deemed necessary and convenient");

"as shall appear necessary or expedient,"[153] "as shall be thought necessary;"[154] "suitable and necessary,"[155] and "by them deemed necessary."[156]

Why does the term "necessary" appear so frequently in grants of rulemaking authority? It appears likely that the scope restriction, where it appears in these clauses, was a response to the perceived breadth of the authority being conferred. Legislatures commonly manifested misgivings about broad grants of rulemaking power, often stipulating that the exercise of such powers could not be repugnant to state or federal law.[157] Because the authority conferred by a grant of rulemaking power was so extensive, legislatures also appear, in many cases, to have imposed relatively stringent limits on the exercise of that authority by utilizing "necessary" as a scope term.

The term "necessary," when used as a limitation on legislative authority in corporate charters, thus apparently required that rules enacted for the governance of the institution be reasonably closely adapted to achieving the goals for which the institution was formed. As applied to the Constitution's Necessary and Proper Clause, the analysis suggests that, to be "necessary," there must be a reasonably close connection between

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An Act Incorporating the Middletown Manufacturing Company, Connecticut Laws, October Session, 1810, ch. I ("as shall be deemed necessary and convenient").

[152] An Act to Incorporate the Trustees of the Missionary Society of Connecticut, Connecticut Acts & Laws 602 (1802); An Act to Incorporate the Derby Fishing Company, Connecticut Acts & Laws 737 (1806); An Act to Incorporate the New Haven Insurance Company, Connecticut Acts & Laws 478 (1797); An Act to Incorporate Chauncy Gleaford, Elias Cowles, and their Associates, Connecticut Acts & Laws 583 (1801); An Act to Incorporate the Union Insurance Company at New-London, Connecticut Acts & Laws 709 (1805).

[153] An Act to Amend an Act, Entitled "an Act to Establish a Seminary of Learning in the Town of Fayetteville, and to Amend the Law for the Regulation of the Towns of Fayetteville and Hillsborough," North Carolina Laws of 1809, ch. LXXXI (Fayetteville Academy).

[154] An Act to Incorporate the Windham Aqueduct Company, Connecticut Acts & Laws 778 (1807).

[155] An Act For Incorporating Part of the Town of Guilford, Connecticut Laws, October Session, 1815, ch. XVII.

[156] An Act to Incorporate the Aetna Insurance Company, Connecticut Laws, May Session, 1819, Ch. XXXIV.

[157] See note xx, supra.

constitutionally recognized legislative ends and the means chosen to accomplish those ends.

6. Finally, the corporate law background may provide information about the meaning of the term "proper." We have already seen that "necessary" and "proper" had different meanings in corporate charters: the former is used within contexts that do not perfectly coincide with the usage of "proper." We now investigate whether the term "proper" has a distinctive context of its own independent of other scope terms.

"Proper" is the second most common scope term (after "necessary") in general grants of legislative authority to corporations or their directors, commissioners or trustees. In addition to the usages together with "necessary" just described, these include: "as to them may appear proper,"[158] as they may or shall "deem proper,"[159] "as to them may seem proper,"[160] "as they shall think fit and proper;"[161] as they shall or may "think proper;"[162] as they may "think expedient and proper;"[163] "as may seem requisite and proper;"[164] and "as to them may appear just and proper."[165]

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[158] An Act to Establish a Seminary of Learning in the County of Montgomery, at or Near the Town of Henderson, North Carolina Laws of 1797, ch. XLVII (Stokes Academy).

[159] An Act to Incorporate the Middletown Insurance Company, Connecticut Acts & Laws 656 (1802); An Act to Establish an Academy in the Town of Wadesborough, North Carolina Laws of 1802, ch. XXXV (Wadesborough Academy); An Act to Establish an Academy in Nixonton, in the County of Pasquotank, North Carolina Laws of 1803, ch. XXVI (Nixonton Academy).

[160] An Act to Incorporate the Trustees of the Nutbush Mineral Springs Academy, on the Land of John Simms, in the County of Warrren, North Carolina Laws of 1810, ch. LXV (Mineral Springs Academy).

[161] Connecticut Public Records, Vol. 9, p. 117 (1745) (Yale College).

[162] An Act to Incorporate a Company for the Purpose of Rendering Navigable Great and Little Contentnea Creeks, North Carolina Laws of 1815, ch. XVI (Great and Little Contentnea Creeks Navigation Company); An Act to Establish a Turnpike Road from Mattamuskeet Lake to the Main Public Road on the East Side of Pungo River, North Carolina Laws of 1818, ch. LXXI I (Pungo River Turnpike Company); An Act to Establish an Academy on the Land of William M. Sneed, in the County of Granville, North Carolina Laws of 1810, ch LXVI (Montpelier Academy); An Act to Establish an Academy on the Lands of Thomas B. Littlejohn, Adjoining the Court-house in Granville County, North Carolina Laws of 1811, ch. XLVI (Oxford Academy); An Act to Incorporate the Broad River Navigation Company, and Also the Inhabitants of Rutherfordton, of the County of Rutherford, North Carolina Laws of 1811, ch. XXXII (Broad River Navigation Company); An Act to Establish a School by the Name of New Prospect in Perquimons County, North Carolina Laws of 1817, ch. LXXIV (New Prospect Academy); An Act to Appoint Commissioners

The term "proper" also appears distinctively in several scope clauses where the term "necessary" is largely absent. It is the dominant term conditioning grants of authority to declare a dividend: "as they shall think proper,"[166] "as to them shall appear fit and proper,"[167] "as shall appear to them proper,"[168] and as they "may judge proper."[169] The term "proper" appears in clauses authorizing managers to determine salaries or conditions of employment; usages here include "as they may deem proper,"[170] and if or as "they think proper."[171] The term also appears in grants of authority for discretionary

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for the Town of Chapel Hill, in Orange County, North Carolina Laws of 1818, ch. LXXX (town of Chapel Hill).

[163] An Act to Incorporate the Allemance Library Society in the County of Guilford, North Carolina Laws of 1819, ch. CVII.

[164] An Act to Incorporate a Company to Build a Bridge Across the Yadkin River, North Carolina Laws of 1816, ch. XXXIX (Yadkin Toll Bridge Company); An Act to Incorporate the Leaksville Toll Bridge Company, and For Other Purposes, North Carolina Laws of 1818, ch. LXXXIII (Leaksville Toll Bridge Company); An Act to Incorporate the Clinton Toll Bridge Company, and to Appoint Commissioners for the Same, North Carolina Laws of 1818, ch. LXXIII (Clinton Toll Bridge Company).

[165] An Act to Incorporate the Town of Hookerton in Greene County, North Carolina Laws of 1817, ch. LII (town of Hookerton); An Act to Incorporate the Town of Clinton and to Appoint Commissioners for the Said Town, North Carolina Laws of 1818, ch. LXXXIV (town of Clinton).

[166] An Act to Incorporate the New Haven Insurance Company, Connecticut Acts & Laws 479 (1797); An Act to Incorporate the Bridgeport Bank, Connecticut Acts & Laws 741 (1806); An Act to Incorporate the Middletown Fire Insurance Company, Connecticut Laws, May Session, 1813, ch. I; An Act to Incorporate the New-Haven Fire Insurance Company, Connecticut Laws, May Session, 1813, ch. XVIII; An Act to Incorporate the Ocean Insurance Company of New-Haven, Connecticut Laws, October Session, 1818, ch. VI; An Act to Incorporate the Thames Insurance Company at New London, Connecticut Laws, October Session, 1818, ch. VIII.

[167] An Act Incorporating the Humpreysville Manufacturing Company, Connecticut Laws, May Session, 1810, ch. II.

[168] An Act Incorporating the Middletown Manufacturing Company, Connecticut Laws, October Session, 1810, ch. I.

[169] An Act to Incorporate the Eagle Bank, Connecticut Laws, October Session, 1811, ch. I; An Act to Incorporate the Phoenix Bank, Connecticut Laws, May Session, 1814, ch. II.

Only rarely do we find other scope terms in grants of dividend authority: "as shall appear to the directors advisable," An Act to Incorporate the Middlesex Fishing Company, Connecticut Acts & Laws 776 (1807), or as the directors "shall judge necessary," An Act to Incorporate the North River and Adams Creek Canal Company, Laws of North Carolina, 1816, ch. XL.

[170] An Act to Establish an Academy in the Upper Part of Pasquotank County, North Carolina Laws of 1809, ch. LXXVIII (Newland Academy); An Act to Establish an Academy in Camden County, North Carolina Laws of 1810, ch. LXXIV (Jonesborough Academy); An Act to Establish an Academy at Plymouth, in Washington County, North Carolina Laws of 1810, ch. LXXIII (Plymouth Academy).

[171] An Act to Amend an Act to Establish a Seminary of Learning in Elizabeth Town, in Bladen County, North Carolina Laws of 1810, ch. LXXII (Elizabeth Town Academy); An Act to Incorporate the Union Insurance Company at New-London, Connecticut Acts & Laws 709 (1805); An Act to Incorporate the Ocean Insurance Company of New-Haven, Connecticut Laws, October Session, 1818, ch. VI; An Act to

acts such as setting a meeting time, declaring dividends, or levying a tax. Usages here include: as they may or shall "think proper,"[172] as they "judge proper,"[173] or as they "deem proper."[174]

Each of these contexts where "proper" plays a distinctive role is one affecting the interests of corporate stakeholders. The decision to declare a dividend affects the interest of shareholders; the decision as to when to call a meeting or levy a tax affects the interests of those who are supposed to attend or pay the tax; the decision to set salaries or

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Incorporate the Thames Insurance Company at New London, Connecticut Laws, October Session, 1818, ch. VIII.

Scope terms other than "proper" found in this context include "fit," An Act to Incorporate the North River and Adams Creek Canal Company, Laws of North Carolina, 1816, ch. XL, and "reasonable, " An Act to Incorporate the New Haven Bank, Connecticut Acts & Laws 431 (1792); An Act to Incorporate the Bridgeport Bank, Connecticut Acts & Laws 742 (1806); An Act to Incorporate the Ocean Insurance Company of New-Haven, Connecticut Laws, October Session, 1818, Ch. VI; An Act to Incorporate the Middlesex Fishing Company, Connecticut Acts & Laws 774 (1807); An Act to Incorporate the Derby Bank, Connecticut Laws, October Session, 1809, ch. 1; An Act to Incorporate the Eagle Bank, Connecticut Laws, October Session, 1811, ch. I; An Act to Incorporate the Phoenix Bank, Connecticut Laws, May Session, 1814, ch. II; An Act to Incorporate the Norwich Bank, Connecticut Acts & Laws 443 (1796); An Act Incorporating the Humpreysville Manufacturing Company, Connecticut Laws, May Session, 1810, ch. II; An Act Incorporating the Middletown Manufacturing Company, Connecticut Laws, October Session, 1810, ch. I.

[172] An Act to Incorporate the New-London Bank, Connecticut Acts & Laws 782 (1807); An Act to Incorporate the Eagle Bank, Connecticut Laws, October Session, 1811, ch. I; An Act to Incorporate the Phoenix Bank, Connecticut Laws, May Session, 1814, ch. II; An Act to Incorporate the Derby Bank, Connecticut Laws, October Session, 1809, ch. 1; An Act to Establish an Academy in the Town of Buncombe, North Carolina Laws of 1801, ch. XLIII (Union Hill Academy); An Act to Establish an Academy at Williamston in the County of Martin, North Carolina Laws of 1816, ch. XLV (Williamston Academy); An Act for the Governance of Elizabeth City, North Carolina Laws of 1816, ch. XLIII (Elizabeth City) (when to levy a tax).

[173] An Act to Incorporate the Bridgeport Bank, Connecticut Acts & Laws 745 (1806).

[174] An Act to Incorporate the Eagle Bank, Connecticut Laws, October Session, 1811, ch. I; An Act to Incorporate the Phoenix Bank, Connecticut Laws, May Session, 1814, ch. II.

Other scope terms associated with discretionary timing authority include "shall judge necessary," An Act to Incorporate the New Haven Bank, Connecticut Acts & Laws 431 (1792); An Act to Incorporate the Middletown Fire Insurance Company, Connecticut Laws, May Session, 1813, ch. I; An Act to Incorporate the New-Haven Fire Insurance Company, Connecticut Laws, May Session, 1813, ch. XVIII, "as they may judge expedient," An Act to Incorporate the Aetna Insurance Company, Connecticut Laws, May Session, 1819, ch. XXXIV, "as they shall deem most convenient," An Act to Incorporate the American Geological Society, Connecticut Laws, May Session, 1819, ch. XXXII, "when they may think it expedient," An Act for the Governance of Elizabeth City, North Carolina Laws of 1816, ch. XLIII (Elizabeth City), "when they shall think fit," An Act to Incorporate the Newbern Steam Boat Company, North Carolina Laws of 1817, ch. XCIII (Newbern Steam Boat Company) (timing of dividends), "convenient," An Act to Establish a Seminary of Learning in the County of Montgomery, at or Near the Town of Henderson, North Carolina Laws of 1797, ch. XLVII (Stokes Academy), and "as often as circumstances shall render it necessary,") An Act to Incorporate the Town of Hamilton, North Carolina Laws of 1804, ch. XLV (town of Hamilton).

conditions of employment affects the interests of the employee; the decision to adopt rules for the governance of an institution affects the interests of everyone who is subject to the rules. Where the term "proper" is absent or rare – contexts such as hiring employees, purchasing property and erecting buildings, appointing or electing new trustees, or general spending authority – the relevant relationships are not between the corporation and its stakeholders but rather between the corporation and a third party acting at arms length (job candidates, people who might sell property or provide services to the company, nominees for managerial positions, vendors).

The term "proper" might therefore convey the idea that in carrying out a given authority, the company or its managers should design the actions taken so as to consider the effect on stakeholders in the firm. As applied to the Constitution's Necessary and Proper Clause, the message could be that laws must not only serve the general interest of the country as a whole, but must also into account the individual interests of particular citizens. Thus, even if a law qualifies as "necessary," it could still be outside congressional authority if, without adequate justification, it discriminates against or disproportionately affects the interests of individual citizens vis-à-vis others.[175]

Conclusion

This article has investigated the corporate law background of the Necessary and Proper Clause. The remarkable incidence of scope clauses in corporate charters of the

[175] This interpretation of "proper" advanced here has points of similarity with the view expounded by Gary Lawson and Patricia Granger in their insightful article, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267 (1993). Based on historical, linguistic, and structural analysis, Lawson and Granger argue that the term "proper" requires that laws must be "peculiarly within Congress's domain or jurisdiction" and must not infringe the retained rights of the states or of individuals. The results of Lawson's and Granger's analysis are potentially congruent with the view expressed here since legislation that interferes with retained rights of individuals is also likely to discriminate against or disproportionately affect the interests of particular people without adequate justification or excuse.

era – including many using the terms "necessary," "proper," and "necessary and proper" – suggests that these documents could have been a source of the constitutional provision, or at least that similar interpretative principles might apply in both contexts. Justice Marshall, for one, appears to have understood the analogy. When he famously pronounced that "we must never forget that it is a *constitution* we are expounding,"[176] he was contrasting the appropriate methodology for interpreting the Constitution with an approach that would be appropriate for another, unnamed type of legal document. The obvious candidate is the corporate charter. Although Marshall rejected the salience of the parallel, his apparent reference to corporate charters highlights the importance of these instruments as part of the legal background of America's fundamental law.

An examination of corporate charters of the founding era provides guidance on questions of interpretation. The corporate law background suggests that the Necessary and Proper Clause does not grant independent rulemaking authority, does not grant general legislative power, and does not delegate unilateral discretion to Congress to define whether a given action is or is not constitutionally authorized. The use of the doublet "necessary and proper" is probably meaningful, and suggests that Congress must stay within the scope of delegated power across all dimensions of the decision being taken. For a law to be "necessary," the analysis suggests that there must be a reasonably close connection between constitutionally recognized legislative ends and the means chosen to accomplish those ends. To be "proper," the analysis suggests that a law must

[176] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819) (emphasis in original).

not without adequate justification discriminate against or otherwise disproportionately affect the interests of individual citizens.[177]

These results should be viewed with appropriate caution. The key terms "necessary" and "proper" have no definite meaning in corporate practice, although I have argued that that a rough or approximate meaning can be attributed to them. Even if the data I have examined – principally North Carolina and Connecticut corporate charters of the colonial and early federal periods – are representative of early American legal practice, there is no proof that the wording of the Necessary and Proper Clause was borrowed from corporate charters or that the corporate law background had any influence on the members of the Committee of Detail, much less on the other delegates at the Convention or the participants in the ratifying debates. The interpretation of the Constitution, moreover, is not necessarily constrained by how similar words would be understood in a different legal context – a point stressed in the clearest possible terms in *McCulloch v. Maryland*. And the meaning of the Necessary and Proper Clause today is not necessarily governed by inferences about original understanding. These caveats notwithstanding, the analysis presented here offers perspective and adds texture to the historical understanding of this most important constitutional phrase.

[177] This interpretation of the term "necessary and proper," derived from the corporate law background, appears to be generally consistent with Gary Lawson and Guy Seidman's account of the clause as referring to a principle of reasonableness requiring delegated authority to be exercised in a measured, proportionate, and rights-regarding fashion. *See* Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 48-54.