NECESSARY AND PROPER

Randy E. Barnett*

INTRODUCTION

It should go without saying, but often does not, that the framers of the U.S. Constitution believed in "the pre-existent rights of nature,"[1] by which they meant those rights that are "essential to secure the liberty of

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* Austin B. Fletcher Professor, Boston University School of Law. I wish to thank Akhil Amar, David Currie, and Michael Seidman for their thoughtful comments when this paper was presented at the Yale Law School, the University of Chicago School of Law, and the Georgetown University Law Center. An earlier version was also presented at the conference on *The Supreme Court and American Constitutionalism*, held at the John M. Ashbrook Center for Public Affairs, Ashland University, April 12–13, 1996.

1. 1 ANNALS OF CONG. 454 (Joseph Gales ed., 1789) (statement of Rep. James Madison).

the people"[2] from abuses by either minority or majority "factions"[3] operating through representative government. What divided the founding generation was not *whether* such rights existed, but *how* these rights are best protected.

Some, perhaps most Federalists, thought that the structures embodied in the Constitution would adequately protect rights. These structures included the separation of powers, limited and enumerated powers, and the fact that direct democracy played a role, but only a limited one, in each branch of government. Opponents of the Constitution—dubbed "Anti-federalists" by its supporters—argued that more explicit protection of these rights in the form of a bill of rights was needed. Taken together, the constitutional strategy of limited powers (structurally reinforced by separation of powers and federalism) and protected rights was supposed to enable an energetic national government to accomplish certain ends, while ensuring that the liberty of the people would be protected.

The rise in this century of a powerful administrative state at the national level has put a strain on this theory of constitutionalism and the role of the judiciary. Though not every act of the federal administrative state constrains the exercise of liberty, the breadth of its ambitions increases the likelihood of clashes between the will of the government and the liberties of the citizenry. When the powers of the federal administrative state are used to restrict citizens' exercise of their liberty, there are really only three responses the judiciary may make.

First, the judiciary could completely acquiesce to the assumption of power by the other two branches of the national government. This option, though appealing to "judicial conservatives" who advocate "judicial restraint," would amount to a unilateral surrender by the judiciary—supposedly a coequal branch of the federal government—of its powers of judicial review. With this surrender, enumerated powers and enumerated

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2. *Id.* In the passage from which these phrases are taken, Madison is arguing that the right of trial by jury enumerated in the proposed amendments, though a "positive right," is as essential to secure the liberty of the people as any natural right. *See also* Roger Sherman, Draft of the Bill of Rights, *reprinted in Text of Proposal for a Separate Bill of Rights*, N.Y. TIMES, July 29, 1987, at C21, *reprinted in* 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT app. A at 351 (Randy E. Barnett ed., 1989) [hereinafter THE RIGHTS RETAINED BY THE PEOPLE] ("The people have certain natural rights which are retained by them when they enter into Society . . . .").

3. *See* THE FEDERALIST NO. 10, at 57 (James Madison) (Jacob E. Cooke ed., 1961) ("By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the *rights of other citizens*, or to the permanent and aggregate interests of the community." (emphasis added)).

(or unenumerated) rights would no longer provide any constraints on the size and scope of the administrative state. This response would represent a profound change in our theory of constitutionalism from one in which powers are retained by the people unless granted to government to one in which all powers are held by two branches of the national government and it is solely for these branches to decide when and how they should exercise them, subject only to the constraints of democratic electoral processes.

Second, whether the national government is operating within or beyond its enumerated powers, the judiciary could scrutinize legislative restrictions on liberty to ensure that they do not violate the rights retained by the people. This option is the one that the judiciary has all-too-tepidly been pursuing these past sixty years. Elsewhere I have argued that, given its refusal to limit the federal government to its enumerated powers, the judiciary has been overly timid in protecting both enumerated and unenumerated individual rights from infringement by the administrative state.[4]

Third, courts could try to confine the national government to operating within its enumerated powers and thus reduce its opportunity to restrict the liberties of the people. Until the 1995 Supreme Court decision of *United States v. Lopez*,[5] this option was considered antiquated and beyond the bounds of respectable academic discussion. In *Lopez*, the Court struck down a federal statute mandating gun-free school zones around local public schools on the ground that such legislation did not lie within the enumerated powers of Congress, in particular, its commerce power. Significantly, by enforcing this limitation on the scope of federal power in this way, the Court never had to address the question of whether this statute violated the Second Amendment. In this case, stopping the Congress from exceeding its enumerated powers also deprived it of the chance to infringe upon the retained enumerated right to keep and bear arms.[6]

In this Article, I shall maintain that, if the courts are to hold Congress to the exercise of its enumerated powers, then they must come to grips with

4. *See* Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENTARY 93 (1995) [hereinafter Barnett, *Getting Normative*]; Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988) [hereinafter Barnett, *Reconceiving*].

5. 115 S. Ct. 1624 (1995).

6. This is not to say that the statute in *Lopez* did infringe the right to keep and bear arms. I am of the opinion (reflected in an amicus brief to which I was a signatory) that, as applied to minors carrying guns in or near public schools, it did not violate the Second Amendment. *See* Amicus Brief on Behalf of Academics for the Second Amendment, United States v. Lopez, 115 S. Ct. 1624 (1995) (No. 93-1260). As applied to adults transporting guns on public streets, perhaps in their vehicles, within 1000 feet of a public school, however, I have serious qualms about its constitutionality under the Second Amendment.

the congressional power: "To make all Laws which *shall be necessary and proper* for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[7] While the Necessary and Proper Clause has long been used to greatly expand congressional power, I argue that, to the contrary, it provides a two-part standard against which all national legislation should be judged: Such laws shall be "necessary *and* proper." According to this standard, laws that are either unnecessary or improper are beyond the powers of Congress to enact.

In Part I, I consider the meaning of this requirement. First, I identify what I shall call the Madisonian and Marshallian conceptions of necessity. Next, I discuss the meaning of "proper," the other half of the standard that all laws enacted by Congress must meet and discuss how propriety is distinct from necessity. Finally, in Part II, I consider a doctrinal means of implementing the Necessary and Proper Clause. I conclude that a rigorous application of the necessary and proper standard would serve to protect both the enumerated and, especially, the unenumerated rights retained by the people.

I. THE MEANINGS OF "NECESSARY" AND "PROPER"

It is beyond serious question that, by the time of ratification, the framers contemplated judicial review that would nullify unconstitutional legislation[8]—including whatever amendments might be ratified in the future.[9] While a vigorous scholarly debate continues as to whether judicial

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7. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

8. *See, e.g.*, THE FEDERALIST NO. 78, at 526 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("[W]henever a particular statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former. . . . [T]he courts of justice are to be considered as the bulwarks of a limited constitution, against legislative encroachments . . . ."). Hamilton also answered the charge that this would be to advocate judicial supremacy:

> Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

Id. at 525.

9. *See* 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1789) (statement of Rep. James Madison).

> If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an im

review was intended also to protect other unenumerated rights "retained by the people,"[10] in any event, *neither* enumerated nor unenumerated rights received much, if any, consideration from the courts during the first several decades of the United States. Indeed, the first time a federal statute was held to be an unconstitutional violation of the natural right of freedom of speech enumerated in the First Amendment[11] was in the 1965 case of *Lamont v. Postmaster General*.[12]

The courts' early willingness to defer to legislative judgment was the central focus of James Thayer's classic 1893 *Harvard Law Review* article,

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> penetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

Id.

10. For those who say nay, see, for example, Raoul Berger, *Natural Law and Judicial Review: Reflections of an Earthbound Lawyer*, 61 U. CIN. L. REV. 5 (1992); Raoul Berger, *The Ninth Amendment, as Perceived by Randy Barnett*, 88 NW. U. L. REV. 1508 (1994); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993); Thomas B. McAffee, *The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People*, 16 S. ILL. U. L.J. 267 (1992); Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990) [hereinafter McAffee, *Original Meaning*]; Thomas B. McAffee, *Prolegomena to a Meaningful Debate of the "Unwritten Constitution" Thesis*, 61 U. CIN. L. REV. 107 (1992) [hereinafter McAffee, *Prolegomena*]; Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C. L. REV. 421 (1991).

For those who say aye, see, for example, CALVIN R. MASSEY, SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS (1995); Randy E. Barnett, *Introduction: Implementing the Ninth Amendment*, in 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 1 (Randy E. Barnett ed., 1993); Steven J. Heyman, *Natural Rights, Positivism and the Ninth Amendment: A Response to McAffee*, 16 S. ILL. U. L.J. 327 (1992); Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49 (1992); David N. Mayer, *The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAffee*, 16 S. ILL. U. L.J. 313 (1992); Bruce N. Morton, *John Locke, Robert Bork, Natural Rights and the Interpretation of the Constitution*, 22 SETON HALL L. REV. 709 (1992); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987); Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171 (1992); John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967 (1993).

11. That the freedom of speech was considered a natural right is evidenced by James Madison's notes for the congressional speech in which he introduced and explained his proposed amendments to the Constitution. These notes are reprinted in *The Rights Retained by the People: The History and Meaning of the Ninth Amendment*. James Madison, Madison's Notes for Amendments Speech, 1789, *reprinted in* 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1042 (1971), *reprinted in* THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 2, at 64–65 [hereinafter Madison's Notes]. In the section discussing "Contents of Bill of Rhts," the following appears: "3. natural rights retained as speach [sic]." *Id.* at 64.

12. 381 U.S. 301 (1965); *see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-11, at 327 n.18 (2d ed. 1988) ("The federal statute struck down in Lamont [was] the first federal law the Supreme Court ever held to be violative of the first amendment . . . .").

The Origin and Scope of the American Doctrine of Constitutional Law.[13] There he reproduced a goodly number of examples of judicial unwillingness to second-guess legislative judgment, beginning with the 1811 opinion of Chief Justice Tilghman, of Pennsylvania:

> "For weighty reasons, it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this court, and every other court of reputation in the United States, that an Act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt."[14]

What are these "weighty reasons" to which Justice Tilghman alluded? It is not enough to assert separation-of-powers concerns, because the courts are themselves a separate and coequal branch of government whose judgment concerning constitutionality presumably merits a weight at least equal to that of the other branches. Giving courts a voice genuinely equal to that of legislatures means giving no presumption to legislative judgment. Still, judicial deference might have rested upon a factual assumption that the representatives of the people were conscientious enough to consider the constitutional implications of their legislative acts. To question the judgment of the legislature was to question the good faith of a coequal branch, an accusation that should not lightly be made.

Then there was the reason offered by Thayer himself:

> This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional. This is the principle which the rule that I have been illustrating affirms and supports.[15]

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13. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). Recently, on the one-hundredth anniversary of its publication, an entire symposium was devoted to the legacy of this one article. *See One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993).

14. Thayer, *supra* note 13, at 140 (quoting Commonwealth v. Smith, 4 Binn. 117 (1811)).

15. *Id.* at 144.

According to Thayer, constitutional judgments were sufficiently uncertain that a judgment by a legislature that it was acting within its proper powers should be respected unless it is clearly wrong.

Thayer's argument for judicial deference to legislatures, on the grounds that exigency requires and the Constitution permits a range of legislative choices, arises most tellingly when interpreting the Necessary and Proper Clause. With every legislative enactment, this Clause raises the question of how much deference courts owe to a legislative judgment that an act is both "necessary" and "proper." In the next Part, I shall suggest that whether an assessment of a statute's necessity is too uncertain to be decided by courts depends, in important part, on how this constitutionally supplied standard is conceived.

A. The Meaning of "Necessary"

The term "necessary" in the Necessary and Proper Clause immediately raises two questions: (1) how *necessary* is "necessary," and (2) who decides what is and is not necessary? I shall contend that the answer to the second of these questions depends, at least in part, on how one answers the first.

1. Madisonian v. Marshallian Conceptions of "Necessary"

a. Madison's Interpretation of Necessary

When the Constitution says that a law passed by Congress "*shall be necessary*,"[16] what does this require? It might mean *really* necessary in the sense that the end cannot be performed in some manner that does not infringe the retained liberties of the people, as Madison argued in his speech to the first House of Representatives opposing the creation of a national bank:

> But the proposed Bank could not even be called necessary to the Government; at most it could be but convenient. Its uses to the Government could be supplied by keeping the taxes a little in advance; by loans from individuals; by the other Banks, over which the Government would have equal command; nay greater, as it might

16. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

> grant or refuse to these the privilege (a free and irrevocable gift to the proposed Bank) of using their notes in the Federal revenue.[17]

Although he was speaking here in his capacity as a legislator, Madison was not, at this point in his speech, arguing the "policy" issues raised by a national bank, but rather its constitutionality. He had previously addressed the policy issues when, at the start of his speech, he "began with a general review of the advantages and disadvantages of banks."[18] However, "[i]n making these remarks on the merits of the bill, he had reserved to himself the right to deny the authority of Congress to pass it."[19]

Madison was primarily concerned with meaning of the Necessary and Proper Clause:

> Whatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress.
>
> Its meaning must, according to the natural and obvious force of the terms and the context, be limited to means necessary to the end, and incident to the nature of the specified powers.
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> . . . .
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> The essential characteristic of the Government, as composed of limited and enumerated powers, would be destroyed, if, instead of direct and incidental means, any means could be used, which, in the language of the preamble to the bill, "might be conceived to be conducive to the successful conducting of the finances, or might be conceived to tend to give facility to the obtaining of loans."[20]

Madison thought that trying to justify the constitutionality of a national bank as necessary for carrying into execution an enumerated power—in this case the borrowing power—required too great a stretch:

> Mark the reasoning on which the validity of the bill depends! To borrow money is made the end, and the accumulation of capitals implied as the means. The accumulation of capitals is then the end, and a Bank implied as the means. The Bank is then the end, and a charter of incorporation, a monopoly, capital punishments, &c., implied as the means.
>
> If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of

17. 2 ANNALS OF CONG. 1901 (1791).
18. *Id.* at 1894.
19. *Id.* at 1896.
20. *Id.* at 1898. Notice that Madison is not appealing here to original intent.

> legislation, every object within the whole compass of political economy.[21]

In defense of this interpretation of the Necessary and Proper Clause, Madison gave several examples of enumerated powers that were not left to implication, though if a latitudinarian interpretation of the Necessary and Proper Clause were correct, they surely could have been:

> Congress have power "to regulate the value of money;" yet it is expressly added, not left to be implied, that counterfeiters may be punished.
>
> They have the power "to declare war," to which armies are more incident than incorporated banks to borrowing; yet the power "to raise and support armies" is expressly added; and to this again, the express power "to make rules and regulations for the government of armies;" a like remark is applicable to the powers as to the navy.
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> The regulation and calling out of the militia are more appertinent to war than the proposed Bank to borrowing; yet the former is not left to construction.
>
> The very power to borrow money is a less remote implication from the power of war, than an incorporated monpoly [sic] Bank from the power of borrowing; yet, the power to borrow is not left to implication.[22]

Madison did not mean to exaggerate the significance of these sorts of drafting decisions: "It is not pretended that every insertion or omission in the Constitution is the effect of systematic attention. This is not the character of any human work, particularly the work of a body of men."[23] Yet he thought that these examples "with others that might be added, sufficiently inculcate, nevertheless, a rule of interpretation very different from that on which the bill rests. They condemn the exercise of any power, particularly a great and important power, which is not evidently and necessarily involved in an express power."[24]

Perhaps most importantly to those, like me, who wish to draw a connection between the Necessary and Proper Clause and the protection of the rights and powers retained by the people, Madison also cited in support of

21. *Id.* at 1899.
22. *Id.*
23. *Id.*
24. *Id.*

this "rule of interpretation" the Ninth[25] and Tenth[26] Amendments. Of course, in February of 1791, these amendments had yet to be ratified, and on that date were the eleventh and twelfth on the list of amendments then pending before states. Perhaps because he referred to them by these numbers, Madison's only known use of the Ninth Amendment in a constitutional argument had, until recently, largely been ignored.[27]

> The *latitude of interpretation* required by the bill is condemned by the rule furnished by the Constitution itself.
>
> . . . .
>
> The explanatory amendments proposed by Congress themselves, at least, would be good authority with them; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for. . . . He read several of the articles proposed, remarking particularly on the 11th [the Ninth Amendment] and 12th [the Tenth Amendment]; *the former, as guarding against a latitude of interpretation*; the latter, as excluding every source of power not within the Constitution itself.[28]

Thus, for Madison, whether or not a proposed action of government that restricted the liberty of the people was necessary, and therefore within the powers of Congress to enact, required some assessment of whether the means chosen were essential to the pursuit of an enumerated end. Without this assessment, the scheme of limited enumerated powers would unravel.

True, Madison was speaking here as a legislator, not a judge. But he was speaking about the constitutionality, not the wisdom, of a national bank, and other statements by him make it clear that he desired this issue to be justiciable. A few days after his bank speech, Madison replied to those who asserted that necessary meant merely expedient as follows: "[W]e

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25. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

26. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

27. Prior to my discussions of this speech (and reactions thereto), the only reference to it that I had found in the entire corpus of Ninth Amendment scholarship was Eugene M. Van Loan, III, *Natural Rights and the Ninth Amendment*, 48 B.U. L. REV. 1, 15 (1968) ("As evidence that the federal government was restricted to delegated powers and that even the necessary and proper clause was not unlimited, [Madison] pointed to, among other things, the ninth amendment.").

28. 2 ANNALS OF CONG. 1899–1901 (1791) (emphasis added).

are told, for our comfort, that the Judges will rectify our mistakes. How are the Judges to determine in the case; are they to be guided in their decisions by the rules of expediency?"[29] This statement should not be interpreted as a rejection of judicial review, but as a rejection of a standard of constitutionality that would preclude judicial review. As will be seen below,[30] Madison later made clear that he objected to equating "necessary" with mere expedience or convenience because such a standard would place the issue of necessity outside the competence of courts.

It is true as well that Madison did not address in *this* speech whether any benefit of the doubt should be attached to legislative judgment, but, as shall be seen below, Madison himself later argued that whether judicial deference is due legislative judgment depends, at least in part, on one's view of necessity. Moreover, in his speech replying to those who took issue with his initial remarks, Madison denied that the House should "respect" the judgment of the Senate concerning constitutionality, or that the President should "sanction their joint proceedings."[31] Madison "then enlarged on the exact balance or equipoise contemplated by the Constitution, to be observed and maintained between the several branches of Government; and showed, that except this idea was preserved, the advantages of different independent branches would be lost, and their separate deliberations and determinations be entirely useless."[32]

Although I call this conception of necessity Madisonian, I do not contend that it was original to him, nor that he stood alone in asserting it. Secretary of State Thomas Jefferson, for example, drew the same distinction between necessity and convenience:

> [T]he constitution allows only the means which are "necessary," not those which are merely convenient for effecting the enumerated powers. If such a latitude of construction be allowed to this phrase, as to give any non enumerated power, it will go to every one; for there is no one, which ingenuity may not torture into a *convenience, in some way or other, to some one* of so long a list of enumerated powers: it would swallow up all the delegated powers . . . . Therefore it was that the constitution restrained them to the *necessary* means;

29. *Id.* at 1958.
30. *See infra* text accompanying notes 56–57 (discussing Madison's statements as president).
31. 2 ANNALS OF CONG. 1956 (1791).
32. *Id.*

> that is to say, to those means, without which the grant of power would be nugatory.[33]

In Congress, Madison was joined by Representative Stone, who argued that the Necessary and Proper Clause "was intended to defeat those loose and proud principles of legislation which had been contended for. It was meant to reduce legislation to some rule."[34] Representative Jackson observed:

> If the sweeping clause, as it is called, extends to vesting Congress with such powers, and *necessary* and *proper* means are an indispensable implication in the sense advanced by the advocates of the bill, we shall soon be in possession of all possible powers, and the charter under which we sit will be nothing but a name.[35]

And Representative Giles defined necessary as "that mean without which the end could not be produced."[36] He rejected the suggestion that "'*necessary*,' as applicable to a mean to produce an end, should be construed so as to produce the greatest quantum of public utility."[37] That definition,

> if pursued, will be found to teem with dangerous effects, and would justify the assumption of any given authority whatever. Terms are to be so construed as to produce the greatest degree of public utility. Congress are to be the judges of this degree of utility. This utility, when decided on, will be the ground of Constitutionality. Hence *any measure may be proved Constitutional which Congress may judge to be useful.* These deductions would suborn the Constitution itself, and blot out the great distinguishing characteristic of the free Constitutions of America, as compared with the despotic Governments of Europe, which consist in having the boundaries of governmental authority clearly marked out and ascertained.[38]

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33. Thomas Jefferson, Opinion of Thomas Jefferson, Secretary of State, on the Same Subject, *in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES: INCLUDING THE ORIGINAL BANK OF NORTH AMERICA 91, 93 (M. St. Clair Clarke & D.A. Hall eds., Washington, Gales & Seaton 1832); *see also id.* ("Perhaps, indeed, bank bills may be a more *convenient* vehicle than treasury orders; but a little *difference* in the degree of *convenience* cannot constitute the *necessity*, which the constitution makes the ground for assuming any non enumerated power.").

34. 2 ANNALS OF CONG. 1933 (1791).

35. *Id.* at 1916–17 (emphasis added).

36. *Id.* at 1941.

37. *Id.* (emphasis added).

38. *Id.* (emphasis added).

b. Marshall's Interpretation of Necessary

In contrast to Madison's treatment, we might view "necessary" to mean merely *convenient* or useful, as John Marshall argued in his opinion in *McCulloch v. Maryland*,[39] upholding the constitutionality of the national bank.[40] Maryland had asserted the Madisonian conception of necessity in challenging the constitutionality of the bank:

> But the laws which they are authorized to make, are to be such as are *necessary and proper* for this purpose. No terms could be found in the language more absolutely excluding a general and unlimited discretion than these. It is not "necessary *or* proper," but "necessary *and* proper." The means used must have both these qualities. It must be, not merely convenient—fit—adapted—proper, to the accomplishment of the end in view; it must likewise be *necessary* for the accomplishment of that end. Many means may be *proper* which are not *necessary*; because the end may be attained without them. The word "necessary," is said to be a synonyme of "needful." But both these words are defined "indispensably requisite;" and most certainly this is the sense in which the word "necessary" is used in the constitution. To give it a more lax sense, would be to alter the whole character of the government as a sovereignty of limited powers. This is not a purpose for which violence should be done to the obvious and natural sense of any terms, used in an instrument drawn up with great simplicity, and with extraordinary precision.[41]

Marshall rejected the Madisonian conception of necessity in favor of the position that both Madison and Maryland posed as its opposite—"necessary" means convenient:

> If reference be had to its use, in the common affairs of the world, or in approved authors, we find that [the word "necessary"] frequently imports no more than that one thing is convenient, or useful, or

39. 17 U.S. (4 Wheat.) 316 (1819).

40. Though many argued that the bank was constitutional, and though Madison et al. lost their battle against the first national bank, we cannot entirely be sure whether this was because Congress rejected his conception of necessity or because a majority of Congress thought the bank met the more stringent standard. It was not until *McCulloch* in 1819 that the Supreme Court passed on the meaning of the Necessary and Proper Clause in connection with the second national bank, adopting what I am calling the Marshallian conception.

41. *McCulloch*, 17 U.S. at 366–67.

> essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.[42]

Although Marshall's textual and functional defense of this interpretation of "necessary" is both well known and more readily available than Madison's bank speech, I shall briefly summarize it here.

Textually, Marshall contrasted the use of the term "necessary" in this clause with the term "absolutely necessary" used in Article I, Section 10,[43] arguing that it is "impossible to compare the[se] sentence[s] . . . without feeling a conviction that the convention understood itself to change materially the meaning of the word 'necessary,' by prefixing the word 'absolutely.'"[44] Thus it is a mistake, as a textual matter, to equate the term necessary with the term absolutely necessary, as the State of Maryland purportedly did.[45]

Functionally, he argued:

> It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. . . . To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail

42. *Id.* at 413–14.

43. *See* U.S. CONST. art. I, § 10 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . .").

44. *McCulloch*, 17 U.S. at 414–15.

45. In its brief, the State of Maryland did not use this phrase, though it did use the phrase "indispensably requisite." *See supra* text accompanying note 41.

> itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.[46]

Marshall dismissed, almost casually, concerns about how such an open-ended grant of discretionary power squared with the theory of limited and enumerated powers.

> This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.[47]

And, just as Madison gave examples of enumerated powers that were not left to implication, Marshall offered three examples of unenumerated powers that had already been implied, even though they were arguably not "indispensably necessary" to the accomplishment of some enumerated purpose: the implied powers to carry mail between post offices and along post roads,[48] to punish any violations of its laws,[49] and to require congressional oaths of office.[50]

There are any number of quite plausible responses to these examples that someone employing a Madisonian conception of necessity could make.

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46. *McCulloch*, 17 U.S. at 415–16.
47. *Id.* at 405.
48. *Id.* at 417 ("It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post office and post road.").
49. *Id.* ("The several powers of Congress may exist, in a very imperfect state to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.").
50. *Id.* at 416 ("The power to exact this security for the faithful performance of duty, is not given, nor is it indispensably necessary.").

The power to carry mail can surely be considered, in Madison's words, both requisite to and "incident to the nature"[51] of the postal power. Similarly, the power to punish is clearly incident, if not identical, to the nature of the law-making power. For many, a legislative enactment with no sanctions for disobedience can hardly be called a law. In contrast, the power to require congressional oaths of office may well be inessential to the performance of government;[52] let candidates for office challenge their opponents to take such an oath or suffer the electoral consequences. If the inability to require congressional oaths be the price for holding Congress to its enumerated powers, a Madisonian might contend, Justice Marshall's opinion notwithstanding, it is a price well worth paying.[53]

We may summarize Marshall's argument in *McCulloch* as follows: *Because it is absolutely necessary that "necessary" not mean absolutely necessary, and because the word "necessary" does not necessarily mean absolutely necessary, of necessity it does not.* Marshall's functional argument depends upon the fear that the national government will fail without the sort of discretionary powers that his interpretation allows. As important, it assumes that this open-ended grant of discretionary powers will not eventually undermine the enumerated powers scheme as Madison feared.

Although as president Madison had actually signed into law the bill establishing the national bank that Marshall upheld as constitutional,[54] Madison took immediate exception to Marshall's opinion in *McCulloch*,

51. 2 ANNALS OF CONG. 1898 (1791).

52. A mandatory congressional oath might be considered a qualification for holding office in addition to those mandated by Article I, Sections 2 and 3, and thus beyond the powers of Congress to impose. *See* Powell v. McCormack, 395 U.S. 486 (1969) (limiting Congress to judging only the qualifications for membership enumerated in Article I, Section 2). On the other hand, an oath requirement might be considered a procedural rule within the powers of each house to determine for itself rather than a law. On either theory, an oath requirement is either permissible or impermissible independent of the Necessary and Proper Clause.

53. Assuming Marshall was correct in claiming that a Madisonian conception of necessity would mean that a mandatory congressional oath to preserve, protect, and defend the Constitution lies outside the powers of Congress, a Madisonian might respond that a Congress that imposed such a requirement would be violating the terms of such an oath.

54. Madison later justified his decision by citing the precedent established by the long-standing acquiescence to the claimed power as well as by the expediency of the bank: "A veto from the Executive, under these circumstances, with an admission of the expediency and *almost necessity* of the measure, would have been a defiance of all the obligations derived from a course of precedents amounting to the requisite evidence of the national judgment and intention." Letter from James Madison to Mr. Ingersoll (June 25, 1831), *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 183, 186 (Philadelphia, J.B. Lippincott & Co. 1867) (emphasis added) [hereinafter LETTERS].

renewing the argument he had made as a congressman nearly thirty years before:

> [O]f most importance is the high sanction given to a latitude in expounding the Constitution, which seems to break down the landmarks intended by a specification of the powers of Congress, and to substitute, for a definite connection between means and ends, a *legislative discretion* as to the former, to which no practical limit can be assigned. In the great system of political economy, having for its general object the national welfare, *everything is related immediately or remotely to every other thing*; and, consequently, a power over any one thing, if not limited by some obvious and precise affinity, may amount to a power over every other thing. Ends and means may shift their character at the will and according to the ingenuity of the legislative body. . . .
>
> Is there a legislative power, in fact, not expressly prohibited by the Constitution, which might not, according to the doctrine of the court, be exercised as a means of carrying into effect some specified power?[55]

Notice that Madison both acknowledges the supposedly modern insight that the national economy is interconnected and rejects this as a basis for a latitudinarian interpretation of "necessary."

Perhaps most importantly for those who would deny that such issues ought to be justiciable, in the same letter, President Madison makes crystal clear his objection to removing the constitutional determination of necessity from the province of the courts: "Does not the court also relinquish, by their doctrine, all control on the legislative exercise of unconstitutional powers?"[56] Madison objected to interpreting necessary as merely expedient or convenient, in part, because doing so would place the matter "beyond the reach of judicial cognizance. . . . [B]y what handle could the court take hold of the case?"[57]

This view of the judiciary was not limited to Madison; nor was it a view that developed only later when Madison was president. Back during the 1791 bank debate in Congress an interesting exchange occurred between Representatives Stone and Smith. Stone accused Smith of hold-

55. Letter from James Madison to Judge Roane (Sept. 2, 1819), *in* 3 LETTERS, *supra* note 54, at 143, 143–44 (emphasis added).
56. *Id.* at 144.
57. *Id.*

ing the view that "all our laws proceeded upon the principle of expediency—that we were the judges of that expediency—as soon as we gave it as our opinion that a thing was expedient, it became constitutional."[58] To this, Representative Smith replied:

> He had never been so absurd as to contend, as the gentleman had stated, that whatever the Legislature thought expedient, was therefore Constitutional. He had only argued that, in cases where the question was, whether a law was necessary and proper to carry a given power into effect, the members of the Legislature had no other guide but their own judgment, from which alone they were to determine whether the measure proposed was necessary and proper . . . . That, nevertheless, it was still within the province of the Judiciary to annul the law, if it should be by them deemed not to result by fair construction from the powers vested by the Constitution.[59]

In sum, Representative Smith rejected the "absurd" accusation that Congress was the sole judge of a measure's necessity and propriety.

Of course, it was the opinion of Marshall, the Supreme Court Chief Justice, not Madison, that prevailed on this question of how to interpret "necessary." Notwithstanding that Marshall's opinion in *McCulloch* was lambasted at the time as a usurpation,[60] it became, as Stephen Gardbaum has observed,

> one of the handful of foundational decisions of the Supreme Court that are automatically cited as original sources for the propositions of constitutional law that they contain. But *McCulloch* has the further (and even rarer) distinction of being treated as providing a full and

58. 2 ANNALS OF CONG. 1932 (1791).

59. *Id.* at 1936–37. Smith also asserted that members should determine "that the measure was not prohibited by any part of the Constitution, *was not a violation of the rights of any State or individual*, and was peculiarly necessary and proper to carry into operation certain essential powers of Government." *Id.* at 1936 (emphasis added). This statement is interesting for three reasons. First, it refers to individual not collective rights. Second, it was made before the ratification of the Bill of Rights and therefore presumably refers to unenumerated individual rights that constrain the powers of Congress. Finally, by distinguishing between prohibitions in the Constitution and violations of unenumerated individual rights, Smith assumed that unenumerated rights were not, as some have alleged, simply defined "residually" by those powers. *See, e.g.*, McAffee, *Original Meaning*, *supra* note 10, at 1221. Having said this, I should concede that, by distinguishing between a violation of individual rights and a measure's propriety, this statement appears somewhat inconsistent with the theory endorsed below that a law is "improper" if it violates the background rights retained by the people.

60. *See* FRANCIS N. STITES, JOHN MARSHALL: DEFENDER OF THE CONSTITUTION 132–34 (Oscar Handlin ed., 1981) (describing contemporary criticisms of Marshall's opinion in *McCulloch*); 8 G. EDWARD WHITE, THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 552–62 (1988) (same).

> complete interpretation of a particular clause of the Constitution. Analysis of the Necessary and Proper Clause has historically begun and ended with *McCulloch* . . . .[61]

Marshall's latitudinarian conception of necessity survives to this day, largely unchallenged. Yet, while Marshall's fear of impotent government remains a matter of speculation (because he got his way), history seems to have borne out Madison's expressed concern for the integrity of the enumerated powers scheme. With rare exception, such as *Lopez*,[62] the enumeration of powers has largely been vitiated as a limitation on the scope of the national government, due in no small measure to the influence of Justice Marshall's opinion in *McCulloch*.

c. Who Decides What Is Necessary?

The term "necessary" also raises a second question: *Who is to decide the issue of a measure's necessity*? Although it is clear that Marshall's decision in *Marbury v. Madison*[63] was correct in its holding that legislative decisions are not immune from judicial assessment of constitutionality and nullification,[64] the crucial question is how much deference do the courts owe to legislatures. While the degree of deference depends on the perceived competency and good faith of the legislative process to reach knowledgeable, as opposed to merely rent-seeking, decisions, it also depends on how you resolve the first question concerning the requirement of necessity.

For if you take the Madisonian view that "necessary" means *really* necessary, then courts are quite capable of assessing the government's claim that Congress had no way to accomplish this legitimate end other than by restricting the liberties of the people. If, on the other hand, you take the Marshallian view of necessary as merely *convenient*, then making a choice among competing means of accomplishing a legitimate end appears to be a matter of discretion properly left to legislative processes. As Madison himself wrote:

> [T]he expediency and constitutionality of means for carrying into effect a specified power are con[tro]vertible terms; and Congress are admitted to be judges of the expediency. The court certainly cannot be so; a question, the moment it assumes the character of mere

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61. Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 814 (1996).
62. United States v. Lopez, 115 S. Ct. 1624 (1995).
63. 5 U.S. (1 Cranch) 137 (1803).
64. *See, e.g.*, authorities cited *supra* notes 8–9.

> expediency or policy, being evidently beyond the reach of judicial cognizance.[65]

In sum, a Madisonian or *strict* conception of necessity is a matter of constitutional *principle* and *within* the purview of judicial review, whereas a Marshallian or *loose* conception of necessity is a matter of legislative *policy* and *outside* the purview of courts.[66] Thus, the proper role of the courts in protecting the rights retained by the people from unnecessary infringement by government depends *both* on an assessment of legislative competence to assess the constitutionality of its enactments—in particular their necessity (and propriety)—and on which view of necessity one adopts.

Whatever the views of the ratifying generation, by the time of the 1819 Marshall Court, the loose conception of necessity prevailed. From then until today, we can understand the two major swings of attitude concerning judicial deference—the *Lochner* and post-New Deal eras—as reflecting an alternation between a more Madisonian and more Marshallian view of necessity.

(1) The Rise and Fall of Means-End Scrutiny of Necessity

Notwithstanding the triumph of the Marshallian conception of necessity, the assumptions on which early judicial deference to legislatures rested began to be undermined at exactly the time it reached its ascendance. The antebellum concern over slavery eroded the widespread belief that legislatures, particularly state legislatures, were so likely to honor the rights of their citizens that they merited a presumption in their favor. After the Civil War, the enactment of the Fourteenth Amendment was specifically intended to subject state legislation to federal scrutiny to determine whether it violated the privileges or immunities of citizenship or whether it deprived any person of life, liberty, or property without due process of law.[67]

Although the five-to-four decision in the *Slaughter House Cases*[68] precluded the use of the Privileges or Immunities Clause for this purpose, it failed to suppress the growing skepticism of legislatures as deserving of a

65. Letter from James Madison to Judge Roane, *supra* note 55, at 144.

66. *Cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22, 90–94 (1977) (distinguishing between principles and policies).

67. *See generally* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) (discussing the origins of the Fourteenth Amendment).

68. 83 U.S. (16 Wall.) 36 (1873).

presumption of acting in good faith. At first, the skepticism surrounded the treatment of racial minorities. That is, until *Slaughterhouse* cut off one avenue of scrutiny via the Privileges or Immunities Clause, lower courts were less willing to presume that statutes adversely affecting blacks were constitutional simply because they were properly enacted.

Later in the century, sympathy grew among intellectuals and the public for socialism and wealth redistribution grew. As a result, some among the judiciary became increasingly skeptical that state legislation infringing upon the liberties of the people was really being enacted as a necessary means to protect health, safety, and morals. On the national level, they suspected, instead, that arguments of necessity were merely pretexts for transforming the original constitutional scheme of limited and enumerated constitutional powers into one that would make possible the growth of what we now know as the administrative state.

This skepticism of legislative motive culminated in *Lochner v. New York*.[69] In *Lochner* and other such cases, the Court began to require proof that federal and state legislatures infringing the retained liberties of the people were *actually* pursuing a legitimate purpose rather than merely *purporting* to do so. Like Madison, they began requiring of legislation a showing of actual means-end fit, rather than merely deferring to legislative judgment. When judicial deference is based on trust and trust is eroded, increased scrutiny follows.[70]

As anyone who has taken constitutional law knows, this era of means-end scrutiny came to a close as the perceived legitimacy of legislative activism continued to grow and, with it, the administrative state. What is not

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69. 198 U.S. 45 (1905).

70. After evaluating each of the rationales proffered on behalf of a statute limiting the hours a baker could work, the Court in *Lochner* concluded:

> It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. . . .
>
> It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employé, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employés (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employés.

Id. at 64.

well known today is that the vehicle by which the *Lochner*-era precedent was overturned was the renewal of the presumption of constitutionality—an innovation urged by James Thayer in his 1893 *Harvard Law Review* article[71]—and eventually accepted by the Supreme Court due in part to the efforts of Justice Louis Brandeis.[72] Brandeis' opinion in *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*[73] used the presumption of constitutionality to put the burden of proof on those challenging a statute:

> The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute.[74]

One contemporary of Brandeis, Walton Hamilton, writing glowingly in the *Columbia Law Review*, noted that the rejection of means-end scrutiny was accomplished merely by adopting a presumption in favor of the legislature:

> The demand is to find an escape from the recent holdings predicated upon "freedom of contract" as "the rule," from which a departure is to be allowed only in exceptional cases. The occasion calls not for the deft use of tactics, but for a larger strategy. The device of presumptions is almost as old as law; Brandeis revives the presumption that acts of a state legislature are valid and applies it to statutes

71. Thayer, *supra* note 13, at 144 ("[T]here is often a range of choice and judgment [and] in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.").

72. In the *Lochner* case itself, Justice Harlan had, in dissent, asserted the presumption of constitutionality:

> [T]he rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power. . . . If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional. *McCulloch* v. *Maryland* . . . .

Lochner, 198 U.S. at 68 (Harlan, J., dissenting).

73. 282 U.S. 251 (1931).

74. *Id.* at 257–58 (footnote omitted).

> regulating business activity. *The factual brief has many times been employed to make a case for social legislation*; Brandeis demands of the opponents of legislative acts a recitation of fact showing that the evil did not exist or that the remedy was inappropriate. He appeals from precedents to more venerable precedents; reverses the rules of presumption and proof in cases involving the control of industry; and sets up a realistic test of constitutionality. It is all done with such legal verisimilitude that a discussion of particular cases is unnecessary; it all seems obvious—once Brandeis has shown how the trick is done. It is attended with so little of a fanfare of judicial trumpets that it might have passed almost unnoticed, save for the dissenters, who usurp the office of the chorus in a Greek tragedy and comment upon the action. Yet an argument which degrades "freedom of contract" to a constitutional doctrine of the second magnitude is compressed into a single compelling paragraph.[75]

In the passage italicized, it is not clear whether Hamilton was noting or simply missing the irony of the person lauded for bringing "realism" to judicial proceedings via the "Brandeis Brief,"[76] adopting a presumption that would fictitiously impute a rational basis to any legislative decision. And who "realistically" is in the best position to present to a court empirical information for or against the necessity of a statute: agencies of government or an affected individual or company; those who have already succeeded in lobbying Congress to enact legislation or those who lost?

As Hamilton notes, the protests of the dissenters in *O'Gorman* make it clear that the presumption of constitutionality was being used by Brandeis to avoid the means-end scrutiny of the necessity of interfering with a citizen's liberty (albeit at the state level) that had previously been required by the Court. After rejecting the suggestion that "the burden of establishing any underlying disputable fact rests upon the appellant before it can suc-

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75. Walton H. Hamilton, *The Jurist's Art*, 31 COLUM. L. REV. 1073, 1074–75 (1931) (emphasis added) (footnotes omitted).

76. This term refers to the technique, pioneered by Brandeis as counsel in *Muller v. Oregon*, 208 U.S. 412 (1908), of responding to the *Lochner*-era requirement to show means-ends fit by presenting the courts with a variety of empirical evidence purporting to show the necessity of economic legislation. The portion of Brandeis' famous brief in *Muller* devoted to this task ran some 95 pages. *See* John W. Johnson, *Brandeis Brief*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 85 (Kermit L. Hall et al. eds., 1992) [hereinafter OXFORD COMPANION]. In light of Hamilton's gushing praise for Brandeis' use of presumptions and the widespread acceptance of the presumption of constitutionality ever since, it is tempting to view the continuing veneration of Brandeis' "realist" tactics as a lawyer as merely agreement with the outcome it was being used to promote, rather than as a sincere endorsement of this method of evaluating the necessity of legislation.

cessfully challenge the validity of the questioned enactment,"[77] the dissent argued: "In order to justify the denial of the right to make private contracts, some special circumstances sufficient to indicate the *necessity* therefor must be shown by the party relying upon the denial."[78]

We are accustomed to thinking of the issues raised by the *Lochner* era to involve the Due Process Clause of the Fourteenth Amendment with regard to means-end scrutiny of state legislation, and the Commerce Clause with regard to the Congress' power to regulate commercial activity. However, Stephen Gardbaum has recently argued that, with respect to federal powers,

> the New Deal Court's own constitutional justification for its radical expansion of the scope of federal power over commerce was that the congressional measures in question were valid exercises of the power granted by the Necessary and Proper Clause and were not direct exercises of the power to regulate commerce among the several states. That is, the Court did not simply and directly enlarge the scope of the Commerce Clause itself, as is often believed. Rather, it upheld various federal enactments as necessary and proper means to achieve the legitimate objective of regulating interstate commerce.[79]

In this manner, the Court used the long-accepted Marshallian conception of necessity to expand its power to regulate commerce among the states.

Gardbaum offers several examples to support this claim. One is Justice Stone's opinion in the 1941 case of *United States v. Darby*,[80] in which *McCulloch v. Maryland* is cited by Stone in support of the following position:

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See *McCulloch* v. *Maryland* . . . .[81]

Later in this opinion, Stone makes clear that he favors deference to Congress' assessment of a measure's necessity:

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77. *O'Gorman*, 282 U.S. at 265 (Van Devanter, J., dissenting).
78. *Id.* at 269 (emphasis added).
79. Gardbaum, *supra* note 61, at 807–08.
80. 312 U.S. 100 (1941).
81. *Id.* at 118–19 (citations omitted).

> Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government.[82]

Gardbaum also notes that among "the relatively few observers to acknowledge the basis on which the New Deal Court expanded federal power" was Justice O'Connor in her dissent in *Garcia v. San Antonio Metropolitan Transit Authority*:[83]

> The Court based the expansion [of the commerce power] on the authority of Congress, through the Necessary and Proper Clause, "to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." It is through this reasoning that an intrastate activity "affecting" interstate commerce can be reached through the commerce power. . . . [A]nd the reasoning of these cases underlies every recent decision concerning the reach of Congress to activities affecting interstate commerce.[84]

The only thing Gardbaum fails explicitly to note is that using the Necessary and Proper Clause, as interpreted by Marshall's opinion in *McCulloch*, to expand federal power was also facilitated doctrinally by adopting a presumption of constitutionality in favor of congressional judgment.

(2) The Limited Revival of Means-Ends Scrutiny via Footnote 4

When the Court in 1937 finally abandoned entirely the means-end scrutiny of regulation in the economic sphere by employing Brandeis' technique of shifting the presumption of constitutionality to one favoring all such legislation,[85] it immediately became necessary to establish some limits on this burden-shifting technique lest it swallow the entire constitu-

82. *Id.* at 121 (citations omitted).
83. 469 U.S. 528 (1985).
84. *Id.* at 584–85 (O'Connor, J., dissenting) (citations omitted).
85. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

tional practice of judicial review. This feat was accomplished one year later in the 1938 case of *United States v. Carolene Products Co.*,[86] which concerned legislative restrictions on the sale of a milk substitute that competed with the products of dairy farmers.[87] In the text of Justice Stone's opinion that immediately preceded the now-famous "Footnote 4,"[88] the Court clearly asserted the presumption of constitutionality. "[T]he existence of facts supporting the legislative judgment is to be presumed," it said,

> for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[89]

With this in mind, we are now in a better position to appreciate fully the theory of Footnote 4, which began as follows:

> There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.[90]

Thus, in Footnote 4 we have enunciated the modern theory of constitutional rights: Adopt a Marshallian conception of necessity and presume all acts of legislatures to be valid, except when an enumerated right listed in the Bill of Rights is infringed (or when legislation affects the political process or discrete and insular minorities[91]), in which event the Court will

86. 304 U.S. 144 (1938).

87. *See* Geoffrey P. Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. 397.

88. The fame of this footnote is illustrated by the fact it merits its own entry in *The Oxford Companion to the Supreme Court of the United States*. *See* Dean Alfange, Jr., *Footnote Four*, *in* OXFORD COMPANION, *supra* note 76, at 306–07.

89. *Carolene Prods.*, 304 U.S. at 152.

90. *Id.* at 152 n.4.

91. The rest of Footnote 4 adds:

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities . . . ; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be

employ a Madisonian conception of necessity and require of Congress a showing of means-ends fit. And subsequent cases have made the presumption in favor of legislation nearly irrebuttable, except when a fundamental enumerated right is at issue, in which event few statutes will withstand the "strict scrutiny" of both means and ends that will then be applied.

Indeed, the main reason why *Griswold v. Connecticut*[92] and *Roe v. Wade*[93] were so controversial among constitutional scholars when they were decided was because the right to privacy was the first right since *Carolene Products* to be protected as fundamental that was *not* "within a specific prohibition of the Constitution." Thus, the right to privacy was controversial from the very first, not because it ran afoul of the original intent of either the initial Constitution or the Fourteenth Amendment, and not so much because it was used to protect contraceptives or abortion, but because it violated the post–New Deal jurisprudence of *Carolene Products* governing the presumption of constitutionality. Ironically, no group has been more faithful to this twentieth-century innovation than the modern judicial conservative proponents of original intent.[94]

Of course, the *Carolene Products* theory of constitutional rights neglects both the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth. Why is it that only the "specific prohibitions of the Constitution" may shift the presumption of constitutionality, when the Ninth Amendment declares: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"?[95] Disparaging the unenumerable liberties protected by the rights retained by the people by construing a Marshallian conception of necessity whenever government infringes upon them is *exactly* what Footnote 4 attempts to accomplish.

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relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 152–53 n.4 (citations omitted).

92. 381 U.S. 479 (1965).

93. 410 U.S. 113 (1973).

94. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 60 (1990).

One hardly knows what to make of the tentativeness with which Stone suggests that the Court might be less deferential to the legislature if the legislation appears to be specifically prohibited by the Constitution. Of course, review should be more stringent if the Constitution reads on a subject than if it does not. That distinction should spell the difference between review and no review.

Id.

95. U.S. CONST. amend. IX.

B. The Meaning of "Proper"

To this point, I have only addressed one portion of the Necessary and Proper Clause, the requirement of necessity. What about the need to show that a measure is also proper? In what respect could a measure that was shown to be truly necessary to the effectuation of an enumerated purpose ever be *im*proper? Would a meaningful means-end scrutiny of the necessity of a restriction on the liberties of the people make an assessment of its propriety superfluous?

1. Distinguishing Proper from Necessary

In Chief Justice Marshall's opinion in *McCulloch*, he purports to treat the issue of propriety as distinct from that of necessity: "Let the end be legitimate, let it be within the scope of the constitution, and all means *which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution*, are constitutional."[96] Gardbaum agrees with Justice O'Connor's opinion that this passage reflects a distinction between a determination of an act's necessity (which, according to Marshall, is a matter of legislative discretion) and its propriety (which presumably Marshall thought may be reviewable by a court): "It is not enough that the 'end be legitimate'; the means to that end chosen by Congress must not contravene the spirit of the Constitution."[97] Indeed, writing pseudonymously in a newspaper as "A Friend of the Constitution," Marshall defended his opinion in *McCulloch* by emphasizing this point:

> In no single instance does the court admit the unlimited power of congress to adopt any means whatever, and thus to pass the limits prescribed by the Constitution. Not only is the discretion claimed for the legislature in the selection of its means, always limited in terms, to such as are appropriate, but the court expressly says, "should congress under the pretext of executing its powers, pass laws for the accomplishment of objects, not entrusted to the government,

96. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (emphasis added).

97. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 585 (1985) (O'Connor, J., dissenting); *see* Gardbaum, *supra* note 61, at 816 ("as Justice O'Connor correctly points out in her *Garcia* dissent").

> it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land."[98]

This principle leads to the question: *What could make a law that is necessary in the Madisonian sense nonetheless improper?* After an extensive examination of sources from the founding era, Gary Lawson and Patricia Granger proposed the following answer:

> In view of the limited character of the national government under the Constitution, Congress's choice of means to execute federal powers would be constrained in at least three ways: first, an executory law would have to conform to the "proper" allocation of authority within the federal government; second, such a law would have to be within the "proper" scope of the federal government's limited jurisdiction with respect to the retained prerogatives of the states; and third, the law would have to be within the "proper" scope of the federal government's limited jurisdiction with respect to the people's retained rights. In other words, . . . executory laws must be consistent with principles of separation of powers, principles of federalism, and individual rights.[99]

When Stephen Gardbaum considers the propriety of legislation, he focuses his attention on whether such laws are consistent with principles of federalism.[100] My concern here is instead with the last of these three ways by which, according to Lawson and Granger, laws could be improper: Laws are improper if they violate the background rights retained by the people. If we adopt a Marshallian conception of necessity, it is easy to see how the exercise of such a discretionary power might violate the background rights retained by the people—though this reintroduces under the rubric of propriety many of the difficulties Marshall argued attach to a strict

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98. John Marshall, *A Friend of the Constitution*, ALEXANDRIA GAZETTE, July 5, 1819, *reprinted in* JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 184, 186–87 (Gerald Gunther ed., 1969). Madison doubted the effectiveness of this stated constraint: "But suppose Congress should, as would doubtless happen, pass unconstitutional laws, not to accomplish objects not specified in the Constitution, but the same laws as means expedient, convenient, or conducive to the accomplishment of objects intrusted to the government; by what handle could the court take hold of the case?" Letter from James Madison to Judge Roane, *supra* note 55, at 144.

99. Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297 (1993).

100. *See* Gardbaum, *supra* note 61.

construction of necessity.[101] Adopting a Madisonian conception of necessity, however, raises the following potential difficulty: If a restriction of liberty *is* shown to be truly necessary, in the Madisonian sense, to put into execution an enumerated power, in what way can it be considered an "improper" infringement on these background rights? Have not the people surrendered to the national government the powers that were enumerated in Article I and any right inconsistent with the exercise of such powers?[102]

To answer this question we must look to the enumerated power that is most often linked to the Necessary and Proper Clause and used to justify the administrative state. This is the power found in the Commerce Clause, which reads: "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."[103] Special attention needs to be given the words "to regulate." Congress was not given the power *to prohibit* commerce but to regulate it. Unfortunately the power to regulate liberty has for so long been used as a euphemism for the power to prohibit its exercise that we have lost the original sense of the term.

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101. Using either an "originalist" or "constructive" method, we would have to devise a theory of unenumerated rights of sufficient specificity to identify improper exercises of government power, in the way that the First Amendment identifies as improper infringements on the freedom of speech. *See* Barnett, *Reconceiving*, *supra* note 4, at 30–38 (describing the originalist, constructive, and presumptive methods of interpreting unenumerated rights and how they are not mutually exclusive).

102. The answer to this rhetorical question is not as obvious as it may at first seem. For the appropriate legal construct is not the surrender of rights to a master, but the delegation of powers to an agent. *See, e.g.*, Marshall, *supra* note 98, at 211 ("It is the plain dictate of common sense, and the whole political system is founded on the idea, that the departments of government are the agents of the nation, and will perform, within their respective spheres, the duties assigned to them."). When a principal engages an agent, the agent can be empowered to act on behalf of and subject to the control of the principal, while the principal retains all his rights. So, for example, a principal can empower the agent to sell the principal's car, while retaining the right to sell it himself. And the fact that the principal retains the right to sell his car is one reason that the agent can be sued for failing to act on the principal's behalf or refusing to conform her actions to the principal's exercise of control. In normal agency relationships, the fact that an agent is empowered to act on the principal's behalf does not make the agent the sole judge of whether or not she is acting within the scope of her agency, as the Marshallian discretionary conception of necessity seems to do. Moreover, the fact that some rights are inalienable suggests that those who purport to exercise them on behalf of another need justify their assumption of such power. *See* Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL'Y, Autumn 1986, at 179 [hereinafter Barnett, *Contract Remedies*] (defining inalienable rights and providing four reasons why some rights are inalienable); Randy E. Barnett, *Squaring Undisclosed Agency Law with Contract Theory*, 75 CAL. L. REV. 1969, 1981 (1987) [hereinafter Barnett, *Squaring*] ("A principal who authorizes his agent to so act 'on his behalf' consensually empowers the agent to exercise certain rights that the principal alone would normally exercise.").

103. U.S. CONST. art. I, § 8, cl. 3.

To regulate means literally "to make regular." For example, we would regulate the making of a will by requiring that there be two witnesses. One is too few and three are more than enough. Such a "regulation" of wills tells people how they may effectuate their purposes in such a way as to conform to the expectations of other people. It would defeat the intentions of testators and be very bad for heirs to discover after it is too late that a will lacked enough witnesses to make it enforceable. But to regulate or make regular will making in this way is not to prohibit the making of wills or to refuse to honor the intentions they manifest. A power to regulate wills does not imply, for example, a power to tax or confiscate all bequests above a certain amount.

In general usage, eighteenth- and nineteenth-century Americans often used "regulate" not in the sense of legal prohibition but rather in the now less prominent uses given by *Webster's*:

> 2. to adjust to some standard or requirement, as amount, degree, etc.: *to regulate the temperature.* 3. to adjust so as to assure accuracy of operation: *to regulate a watch.* 4. to put in good order: *to regulate the digestion.*[104]

Consistent with this, President James Polk used "well-regulated" to mean operating in good order, correctly or properly, referring to "well-regulated self-government among men."[105]

For this reason, it was not a contradiction for the Second Amendment to defend "the right of the people to keep and bear arms" as instrumental to securing the existence of "a *well-regulated* militia." "In eighteenth century military usage, 'well regulated' meant 'properly disciplined,' not 'government controlled.'"[106] The eighteenth-century usage of "regulate," in the context of the Second Amendment, had the more specialized meaning of practiced in the use of arms, properly trained and/or disciplined. Thus we find Alexander Hamilton, in *The Federalist, No. 29*, referring to "a well-regulated militia" as one that has been sufficiently drilled.[107]

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104. WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1209 (1989).

105. James Polk, Inaugural Address (1845), *in* THE PRESIDENTS SPEAK: THE INAUGURAL ADDRESSES OF AMERICAN PRESIDENTS 90 (Davis Newton Lott ed., 1961).

106. Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 107 n.8 (1987).

107. Hamilton assumes this meaning throughout *Federalist No. 29*, but it is made most explicit when he is discussing his reasons why Congress will not undertake to discipline "all the militia of the United States," pursuant to its powers under Article I, Section 8 ("to provide for organizing, arming, and disciplining the militia, and for governing such parts of them as may be employed in the service of the United States"):

Empowering the national government to see that the militia was "well-regulated" conferred upon it neither the power to prohibit the states from forming militias, nor the power to prohibit the private possession of firearms.[108]

Similarly, in the context of the commerce power, the power to regulate commerce among the states is the power to make such commerce regular; it is not the power to prohibit commerce any more than the power to make regular the flow of water entails the power to shut off the flow. According to this distinction between regulation and prohibition, it is not a violation of the rights retained by the people for government to provide for genuinely necessary regulations of the exercise of liberty.[109] But the power to regulate does not include the power to prohibit the rightful exercise of liberty.[110]

Thus, for a law to be both "necessary and proper" to effectuate the commerce power, it must be a regulation that is truly *necessary*, but it must also be *proper* insofar as it is a regulation of commerce and not a prohibition. A genuine regulation that is unnecessary violates this Clause, and a law that purports to regulate, but is really intended as a prohibition also violates the Clause. Whereas the Ninth Amendment argues against a

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> To oblige the great body of the yeomanry, and of the other classes of the citizens, to be under arms for the purpose of going through military exercises and evolutions, *as often as might be necessary, to acquire the degree of perfection which would entitle them to the character of a well regulated militia*, would be a real grievance to the people, and a serious public inconvenience and loss.

THE FEDERALIST NO. 29, at 184 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added).

108. Citations to the extensive recent scholarship on the Second Amendment can be found in Randy E. Barnett & Don Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. (forthcoming).

109. Of course a regulation will of necessity "prohibit" all actions that do not conform to its requirements and this will unavoidably lead to hard cases where it is difficult to discern whether the real purpose of a law is to regulate as opposed to being a pretext for a prohibition. But easy cases of unconstitutional prohibitions of liberty will exist as well and to address them it is well worth making the effort to distinguish regulation from prohibition.

110. By a "rightful" exercise of liberty I mean an action that does not violate the rights of others. *See infra* p. 787. So, for example, the (enumerated) natural right of freedom of speech does not prevent the legal prohibition of fraud. As natural rights theorist John Locke argued,

> But though this be a *State of Liberty*, yet it is *not a State of Licence*. . . . The *State of Nature* has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.

JOHN LOCKE, TWO TREATISES OF GOVERNMENT 288–89 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). Though more needs to be said about this than can be said here, comparatively few of all governmental interferences with liberty can reasonably be justified as the prohibition of rights-violating or "wrongful" behavior, and few such justifications on their behalf are even offered.

latitudinarian interpretation of a measure's necessity, both the Ninth and Tenth Amendments argue against a latitudinarian interpretation of whether a measure falls within the enumeration of powers and is proper. In this manner, even had no bill of rights ever been enacted, the Necessary and Proper Clause would give the judiciary the power to protect the rights retained by the people.

2. Problems with Professor McAffee's Interpretation of Necessary and Proper

Professor Thomas McAffee has taken issue with Lawson and Granger's interpretation of the Necessary and Proper Clause:

> Lawson and Granger suggest that the word "proper" plays a critical role as the textual source of important, external limitations on congressional authority. Indeed, their interpretation appears to warrant limiting Congress' powers in ways that would seem strained based upon the wording of the grants of power themselves, *especially because it would provide a basis for imposing unwritten limitations on Congress in behalf of unenumerated individual rights.*[111]

In defense of his originalist interpretation,[112] McAffee examines various statements about the Necessary and Proper Clause made during and after the constitutional convention. He pays special attention to the reference to the Clause made by Madison in his speech to the House on June 8, 1979, explaining and defending his proposal for a bill of rights.[113]

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111. Thomas B. McAffee, *Federalism and the Protection of Rights: The Modern Ninth Amendment's Spreading Confusion*, 1996 B.Y.U. L. REV. 351, 369 (emphasis added).

112. McAffee favors the "traditional understanding" that the Necessary and Proper Clause "performs the mundane task of affirming the fundamental idea that Congress has the authority to exercise reasonable discretion in choosing the means by which to implement the goals set forth in the legislative powers granted by Article I, Section 8." *Id.* at 365. To be "improper," according to McAffee, a law deemed necessary by Congress would have to violate "limitations [stated or implied] elsewhere in the Constitution." *Id.* at 370.

113. Because I am not making an originalist argument in this Article, I will not examine the other evidence of framers' intent discussed by McAffee. My thesis is that we ought to choose the Madisonian conception of necessity over the Marshallian conception, and that we ought to adopt a conception of propriety that restricts the government's power to violate the background rights retained by the people, because doing so helps assure that the laws enacted by Congress are not unjust and therefore that they bind the citizenry in conscience. *See* Barnett, *Getting Normative*, *supra* note 4 (explaining how the problem of legitimacy should influence constitutional interpretations). Of course, if Madison did indeed hold to the view I attribute to him, then it is unlikely that his interpretation would *violate* the original understanding of the Necessary and Proper Clause, though this original understanding might be underdeterminate enough to encompass more than one interpretation. By "underdeterminate" I mean that the original understanding

In his bill of rights speech, Madison argues that the proposed amendments were needed notwithstanding the claim widely made by Federalists (including himself) when advocating the ratification of the Constitution, that a bill of rights is unnecessary "because the powers are enumerated, and it follows, that all that are not granted by the constitution are retained; that the constitution is a bill of powers, the great residuum being the rights of the people."[114] His response to this argument focused attention on the Necessary and Proper Clause:

> I admit that these arguments are not entirely without foundation; but they are not conclusive to the extent which has been supposed. It is true, the powers of the General Government are circumscribed, they are directed to particular objects; but even if Government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent, . . . because in the constitution of the United States, there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the Government of the United States . . . . Now, may not laws be considered necessary and proper by Congress, for it is for them to judge of the necessity and propriety to accomplish those special purposes which they may have in contemplation, which laws in themselves are neither necessary nor proper . . . .[115]

By appearing to allow Congress the discretion "to judge the necessity and propriety" of its laws, Madison's reference to the Necessary and Proper Clause in his bill of rights speech appears to undercut the view of the Clause I am suggesting here, though McAffee makes no mention of it. (I shall return to this statement in a moment.)

Instead, McAffee places particular stress on the example Madison uses to illustrate an improper, though arguably necessary, means to effectuating

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might exclude a great many, but still not all, interpretations. *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) ("The law is *underdeterminate* with respect to a given case if and only if the set of results in the case that can be squared with the legal materials is a nonidentical subset of the set of all imaginable results."); *cf.* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985) (describing how the constitutional text provides a "frame" that excludes many, but not all, possible interpretations).

114. 1 ANNALS OF CONG. 455 (Joseph Gales ed., 1789).

115. *Id.* at 455–56.

an enumerated power: the use of general warrants to collect revenue. Madison stated:

> The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for this purpose . . . ? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government.[116]

A general warrant, used widely by the British and reviled by Americans, was one that authorized its bearer to search at his discretion anywhere and anytime he chose.[117] Here is how McAffee interprets this example:

> Madison expressed his belief that without a Fourth Amendment the power to authorize general search warrants would have been available to Congress under the Necessary and Proper Clause. . . . [H]owever, if the key to a limited delegation of powers was to be the requirement that laws be "proper" as well as "necessary," Madison's example would have had no force. Indeed, Madison would have been arguing at most for the value of adding clarity to prior-existing limitations, rather than for the necessity of adding a bill of rights to the Constitution to secure basic liberties.[118]

McAffee's use of this example is misleading. For he well knows that Madison thought that his proposed "Bill of Rhts"[119] included different types of rights. In particular, Madison distinguished between "natural

116. *Id.* at 456. Somewhat oddly, McAffee reads this passage as referring to "a criminal statute that might be enforced with a general search warrant if there were no constitutional guarantee against unreasonable searches and seizures." McAffee, *supra* note 111, at 371. This seems inaccurate on two counts: Madison was referring to a revenue, not a criminal statute; and the use of general warrants is barred by the requirement of particularity, not the prohibition on unreasonable searches. I am not sure, however, that anything of substance turns on this apparent misunderstanding.

117. *See* Jacob Landynski, *Fourth Amendment*, *in* OXFORD COMPANION, *supra* note 76, at 311 ("The Writ of Assistance, a general search warrant authorized by Parliament, granted [British customs officials] virtually unlimited discretion to search and was valid for the lifetime of the sovereign.").

118. McAffee, *supra* note 111, at 371–72.

119. Madison's Notes, *supra* note 11, at 64.

rights retained as speach [sic]"[120] and "positive rights resultg. as trial by jury."[121] "Trial by jury," he said in his speech, "cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community."[122] As Madison made clear in his proposed amendment that was the precursor of the Ninth Amendment, "The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall . . . be . . . construed . . . either as actual limitations of such powers, or as inserted merely for greater caution."[123] A positive right included in the Bill of Rights would be an "actual" or *additional* "limitation" on government powers that would not exist in the absence of enumeration, whereas a natural right, such as a the right of freedom of speech, would have been added "mainly for greater caution." Thus the Fourth Amendment requires that all warrants "particularly describ[e] the place to be searched, and the persons or things to be seized."[124] This mandate created a "positive" constitutional right to be free from general warrants, which operates as an "actual limitation" on the powers of government.

For this reason, to use McAffee's words, Madison was arguing *both* for "adding clarity to prior-existing limitations"[125]—that is, "for greater caution"—*and* for "the necessity of adding a bill of rights to the Constitution to secure basic liberties"[126]—that is, "as actual limitations of such powers." A prohibition on the use of general warrants is an example of the latter, not the former. Thus, Madison could have believed that general warrants would have to be expressly prohibited to be improper, and still believe that interference with the natural right of freedom of speech would have been improper even without the greater caution provided by what became the First Amendment.[127]

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120. *Id.*

121. *Id.*

122. 1 ANNALS OF CONG. 454 (Joseph Gales ed., 1789).

123. *Id.* at 452. I have edited the provision to highlight those portions that are relevant to the point at issue here. The entire proposal read as follows: "The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution."

124. U.S. CONST. amend. IV.

125. McAffee, *supra* note 111, at 372.

126. *Id.*

127. That the Federalists argued repeatedly that a bill of rights was unnecessary because Congress was given no power to infringe upon, for example, the freedom of the press is well recognized by all constitutional scholars. Perhaps the best known statement is by Alexander Hamilton: "[W]hy declare that things shall not be done, which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power

In his bank speech, Madison himself drew attention to the connection between strictly construing governmental powers and protecting unenumerated rights:

> The defense against the charge founded on the want of a bill of rights pre-supposed, he said, that the powers not given were retained; and that those given were not to be extended by remote implications. On any other supposition, the power of Congress to abridge the freedom of the press, or the rights of conscience, &c., could not have been disproved.[128]

Thus for Madison, Congress would have no power to infringe upon the rights of freedom of the press or of conscience whether or not these rights had been enumerated. That the right of freedom of press had been enumerated should not be used to deny or disparage the right of freedom of conscience. And one way to protect both rights was to adopt a restrictive interpretation of necessity.

What of Madison's statement in his bill of rights speech that "it is for them [Congress] to judge of the necessity and propriety to accomplish those special purposes which they may have in contemplation"?[129] Given the imprecise nature of congressional reporting in those days, it is probably unwise to put too much weight on the exact phraseology of a portion of one sentence.[130] While Madison might have been assuming an open-ended legislative discretion of the kind he rejected twenty months later in his bank speeches[131] and correspondence,[132] his example of general warrants suggests that he might have been referring instead to the legislative discretion to pursue enumerated ends by using *means* that do not of themselves violate the rights retained by the people.[133]

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is given by which restrictions may be imposed?" THE FEDERALIST NO. 84, at 579 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *see also* McAffee, *supra* note 111, at 371 (discussing Federalist arguments against the need to add a freedom of press provision to the Constitution). In this sense, adding the protection of the press in what became the First Amendment was merely "for greater caution" as opposed to an "actual limitation." But to say this is to say that the freedom of the press (and other unenumerated rights) was equally protected whether it has been enumerated or not.

128. 2 ANNALS OF CONG. 1901 (1791).

129. 1 ANNALS OF CONG. 455 (Joseph Gales ed., 1789).

130. Madison's notes do not help. They read: "sweeping clause-Genl. Warrants &c." Madison's Notes, *supra* note 11, at 64.

131. *See supra* text accompanying notes 7–9.

132. *See supra* text accompanying notes 55–57.

133. Similarly, the "presumption of liberty" I propose below would apply only when Congress adopts means that infringe the retained liberty of the people. It preserves legislative discretion in its choice of means that do not restrict liberty.

In any case, in his bill of rights speech, Madison was focusing on the need to guard against the danger of "abuse to a certain extent" by Congress using its "discretionary powers" to enact laws that were "neither necessary nor proper." The degree of discretion properly accorded to Congress was not his concern here. If this passing reference were all we knew of his thinking on the subject, we might well believe that Madison assumed that the Necessary and Proper Clause reposed an unlimited discretion in the Congress. Fortunately, in his bank speech to the first Congress, he directly considered at great length the meaning of the Necessary and Proper Clause and advocated the restrictive conception of necessity that I am calling "Madisonian." Moreover, as president some thirty years later, he reaffirmed his adherence to this conception.[134]

While McAffee relies on several of Madison's pre- and postratification statements concerning the Necessary and Proper Clause,[135] he completely omits any reference to the bank speech in which Madison argues against a latitudinarian interpretation of the Necessary and Proper Clause, in part, because it violates the rule of construction furnished by the Ninth Amendment. This omission is especially curious because McAffee is well aware of the speech, having written of it elsewhere.[136] Moreover, he previously wrote that "Madison was contending that the power to incorporate a bank was not sufficiently connected to the enumerated powers relied upon by its proponents to be deemed a 'necessary' means to accomplishing legitimate governmental ends."[137] True, in his bank speech, Madison emphasized

134. *See supra* text accompanying notes 55–56.

135. McAffee concludes: "It is Madison's analysis, however, that comports with the weight of the historical evidence, including evidence of a pattern of design running from the Articles of Confederation to Article I of the Constitution and evidence of the framers' understanding of the enumerated powers scheme in the design of the Constitution." McAffee, *supra* note 111, at 373.

136. *See* McAffee, *Prolegomena*, *supra* note 10, at 159–60 (discussing bank speech). McAffee failed to take any notice of Madison's bank speech until I first raised it in 1991. *See* Randy E. Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 615, 635–40 (1991). *Compare* McAffee, *Original Meaning*, *supra* note 10 (making no reference to the speech in 1990), *with* McAffee, *Prolegomena*, *supra* note 10, at 159 (discussing my interpretation of Madison's speech in 1992). McAffee's most recent summary of the entire debate over the Ninth Amendment also omits any mention of this speech. *See* Thomas B. McAffee, *A Critical Guide to the Ninth Amendment*, 69 TEMP. L. REV. 61 (1996) [hereinafter McAffee, *Critical Guide*]. And McAffee has failed thus far to mention the reference to judicial review in Madison's second bank speech or his later correspondence, *see* discussion *supra* notes 55–57, in which, as president, Madison both reaffirms the view I attributed to his bank speeches and objects to Marshall's interpretation of necessity in *McCulloch* on the ground that it would prevent judicial review.

137. McAffee, *Prolegomena*, *supra* note 10, at 159 n.175. When McAffee wrote these words, he was not concerned with defeating any interpretation of the Necessary and Proper Clause that would restrict federal power. Rather he was attempting to deflect attention from the implication

the limiting nature of the requirement of necessity, in contrast to Lawson and Granger, who McAffee criticizes for stressing the limiting nature of the requirement of propriety.[138] But while replying to Lawson and Granger, McAffee also advocates the Marshallian conception of necessity,[139] so one would think he would consider the speech (and correspondence) in which Madison takes issue with this conception.

McAffee's argument is also curious because he has repeatedly rejected what he calls the "affirmative rights" conception of the Ninth Amendment in favor of one that views the Ninth and Tenth Amendments as efforts to protect "residual rights"[140] by reinforcing the enumerated powers scheme.

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of Madison's use of the Ninth Amendment in his bank speech for McAffee's theory of the Ninth Amendment. McAffee had previously maintained that

> [t]he ninth amendment reads *entirely* as a "hold harmless" provision: *it thus says nothing about how to construe the powers of Congress or how broadly to read the doctrine of implied powers*; it indicates *only* that no inference about those powers should be drawn from the mere fact that rights are enumerated in the Bill of Rights.

McAffee, *Original Meaning*, *supra* note 10, at 1300 n.325 (emphasis added). Clearly, when he wrote these words, McAffee was unaware of the bank speech in which Madison used the Ninth Amendment precisely "to construe the powers of Congress" and thought it directly relevant to "how broadly to read the doctrine of implied powers." As I pointed out:

> Yet when Madison used the Ninth Amendment in his speech concerning the national bank, he was in no manner responding to an argument for expanded federal powers based on the incomplete enumeration of rights, but rather was arguing entirely outside the only context in which, according to McAffee, the Ninth Amendment was meant to be relevant.

Barnett, *supra* note 136, at 639. To date, McAffee has yet to concede that his theory of the Ninth Amendment's original meaning is directly contradicted by Madison's only known use of the Amendment in a constitutional argument. In his most recent statement of his position, McAffee has reasserted his original claim. *See* McAffee, *Critical Guide*, *supra* note 136, at 66 ("[T]he purpose of the Ninth Amendment is to preclude an inference against the rights-protective scheme of limited powers from the enumeration of specific rights . . . ."); *id.* at 83 (The Ninth Amendment means that "the enumeration of limits on government do[es] not imply extended powers."). Nowhere in his article does McAffee even mention Madison's usage, much less that it conflicts with McAffee's theory.

138. Lawson and Granger, though noncommittal, appear to lean towards a more Marshallian conception of necessity. *See, e.g.*, Lawson & Granger, *supra* note 99, at 288.

> To the best of our knowledge, no one . . . has ever doubted that the word "necessary" refers to some kind of fit between means and ends. The only dispute over the term has concerned how tight the means-ends fit must be to comply with the requirements of the [Necessary and Proper] Clause. Although we take no firm position on this dispute, we acknowledge the force of Chief Justice Marshall's claim that something less than strict indispensability is sufficient.

Id.

139. *See* McAffee, *supra* note 111, at 368 (citing with approval Marshall's rejection of "Maryland's argument that the term 'necessary' required a law to be essential or indispensable").

140. McAffee's distinction between affirmative and residual rights, a dichotomy unknown to the founding generation, greatly confuses the issues raised by unenumerated rights. For McAffee, an "affirmative right" is a right that is defined in and directly protected by the Constitution, while a "residual right" is a right defined and protected by the enumeration of powers. *See*

Although in his earlier writings he insisted that this view still leaves the Ninth Amendment with a genuine role to play in constitutional law,[141] he seems here to be denying it any role whatsoever. Not only should the unenumerated rights not be directly or "affirmatively" protected; neither should the enumerated powers be cabined in such a way as to protect unenumerated rights. In this, he parts company from historian Philip Hamburger who, while agreeing with McAffee (and disagreeing with me) that the framers did not contemplate direct judicial protection of those "trivial rights" that were left unenumerated, still thinks that such rights were intended to be protected by rigorously preserving the limited and enumerated powers of Congress. "By specifying powers, [the Constitution] reserved to the people the undifferentiated mass of liberty they did not grant to the federal government—a general reservation of rights confirmed *and preserved* through the Ninth Amendment."[142]

Although McAffee has stated that "the Ninth Amendment's purpose was to preserve whatever amount of security for rights was supplied by the federal system of enumerated powers,"[143] he fails to explain how this purpose can be served if the unenumerated rights retained by the people simply

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McAffee, *Original Meaning*, *supra* note 10, at 1221–22. By this distinction, the trial by jury is an "affirmative" or protected right that qualifies federal power (though it was not a "residual" right), while the freedom of the press is *both* an affirmative and a residual right. It is an affirmative right because it is protected in the First Amendment, but it was also a residual right that Congress was given no power to infringe. But what of the other "residual rights" that remain unenumerated? Are they unenforceable simply because they were residual, as McAffee assumes? Ultimately, his distinction conceals the possibility that, if the enumerated powers scheme is one day breached by a latitudinarian interpretation of federal powers, all the "residual rights" originally defined by the enumeration of powers could also have been "affirmative rights" enforceable against the general government. In sum, calling a right "residual" does not automatically mean that it cannot be "affirmatively" protected whether or not it was enumerated. It would have been far easier to respond to McAffee's arguments and interpret the evidence he presents, had he stuck with the conventional distinctions between enumerated and unenumerated rights on the one hand, and enforceable and unenforceable rights on the other rather than collapsing these two distinctions into a single distinction between affirmative-enforceable and residual-unenforceable rights that often assumes what it purports to be demonstrating.

141. *See, e.g.*, McAffee, *Original Meaning*, *supra* note 10, at 1306–07.

> If the government contended in a particular case that it held a general power to regulate the press *as an appropriate inference from the first amendment restriction on that power*, or argued that it possessed a general police power *by virtue of the existence of the bill of rights*, the ninth amendment would provide a direct refutation.

Id. at 1306 (emphasis added).

However, as noted *supra* note 137, Madison was responding to neither of these arguments when he used the Ninth Amendment in his bank speech. Madison's usage belies McAffee's theory.

142. Philip A. Hamburger, *Trivial Rights*, 70 NOTRE DAME L. REV. 1, 31 (1994) (emphasis added).

143. McAffee, *Critical Guide*, *supra* note 136, at 80.

recede as enumerated powers are given increasingly latitudinarian interpretation. Given his concession that "in the long run the limited powers scheme has failed to restrict federal power significantly,"[144] surely Madison's use of the Ninth Amendment to interpret the Necessary and Proper Clause is truer to this purpose than is McAffee's sterile conception. When McAffee asserts that "the Ninth Amendment does not warrant a search beyond the text for additional limitations on . . . powers [granted by Article I],"[145] he somehow misses its implication for the crucial issue of *how* those powers, particularly the powers delegated by the Necessary and Proper Clause and the Commerce Clause, should be interpreted.

Although McAffee realizes that "[i]n this regard, the Antifederalist proponents of a bill of rights proved to be more prophetic than their Federalist opponents,"[146] he refuses to admit that James Madison's Ninth Amendment prophetically extended the protection afforded by the Bill of Rights to all the rights retained by the people, should the parchment barrier provided by enumerated powers be breached. Madison managed to provide both the weapon against expansive government power that the Antifederalists sought, and a means of avoiding the dangerously limited construction of a bill of rights that Federalists feared.

Madison and McAffee simply disagree about both the need for judges to review the necessity of legislation and the conception of necessity they should employ. Of course, unlike McAffee, neither in his bank speech nor in his presidential correspondence did Madison rely exclusively on the original intent of the framers. Apart from a single sentence in which he references the convention's rejection of a power of incorporation,[147] the only "apparent intention" upon which he relied was the intention to form a government of limited and enumerated powers.[148] Instead, Madison

144. *Id.* at 86.
145. *Id.* at 89.
146. *Id.* at 86.
147. 2 ANNALS OF CONG. 1896 (1791) ("His impression [that Congress lacked the authority to pass the bill] might, perhaps, be the stronger, because he well-recollected that a power to grant charters of incorporation had been proposed in the General Convention and rejected."). Of course, this sentence in the official reports might have summarized a longer oral statement.
148. *See id.* at 1901. Even Madison's limited appeal to evidence of original understanding evinced a sharp reaction from the bill's proponents. Representative Vining, for example, argued that, "granting that the opinion of the gentleman from Virginia had been the full sense of the members of the Convention, their opinion at *that* day, . . . is not a sufficient authority by which for Congress, *at the present time* to construe the Constitution." *Id.* at 2007. Similar was the argument of Representative Gerry: "[A]re we to depend on the memory of the gentleman for a history of their debates, and from thence to collect their sense? This would be improper, because the memories of different gentleman would probably vary, as they had already done, with respect to those facts; and if not, *the opinions of individual members who debated are not to be considered as*

relied primarily on the implications for limited government of choosing one interpretation of the Necessary and Proper Clause over another.[149] "An interpretation that destroys the very characteristic of the Government," he argued, "cannot be just. Where a meaning is clear, the consequences, whatever they may be, are to be admitted—where doubtful, it is fairly triable by its consequences."[150] As Madison realized and explained at length, an effective reservation of rights would not be possible unless the courts have authority to assess the necessity and propriety of legislation purporting to facilitate an enumerated end or power. Madison's view was correct in 1791, in 1819, and is still correct today.

II. EFFECTUATING THE NECESSARY AND PROPER CLAUSE

We are now in a position to see how the Necessary and Proper Clause may be made effectual in a manner that does not require us to enumerate all the enumerable liberties retained by the people. The only doctrine preventing meaningful scrutiny of the necessity and propriety of legislation infringing upon personal or economic liberties (whether or not these liberties are enumerated in the Constitution) is the setting of the background interpretive presumption.

There are at least four distinguishable approaches towards legislation that one may take. First is the laissez-faire approach of complete judicial deference: Adopt a general presumption of constitutionality towards *all* legislation affecting the liberties of the people. Second is the original *Carolene Products* approach: Adopt a presumption of constitutionality to legislation that does not infringe upon only those liberties that are specified in the Bill of Rights. Third is the current approach: Adopt the *Carolene Products* approach, but add protection for the right of privacy and perhaps other selected unenumerated rights deemed to be fundamental. We may

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the opinions of the Convention." *Id.* at 2004 (emphasis added). When Gerry referred to "members" it is not clear whether he meant members *of the convention* or members *of Congress.*

149. The conclusion of Madison's bank speech illustrates his interpretive methodology:

> It appeared on the whole, he concluded, that the power exercised by the bill was condemned by the silence of the Constitution; was condemned by the rule of interpretation arising out of the Constitution; was condemned by its tendency to destroy the main characteristic of the Constitution; was condemned by the expositions of the friends of the Constitution, whilst depending before the public; was condemned by the apparent intention of the parties which ratified the Constitution; was condemned by the explanatory amendments proposed by Congress themselves to the Constitution; and he hoped it would receive its final condemnation by the vote of this House.

Id. at 1902.

150. *Id.* at 1896.

call this third approach "*Carolene Products*-plus." Fourth is my proposal: Adopt a *general presumption of liberty* which places the burden on the government to establish the necessity and propriety of any infringement on individual or associational freedom.

To adopt the laissez-faire approach would be to make Congress the sole judge of its own powers in every dispute between it and a citizen concerning the necessity and propriety of a legislative interference with the citizen's rightful exercise of liberty. Essentially, it would eliminate judicial review of legislation infringing on constitutional liberties, including those enumerated in the Bill of Rights. Consequently, few advocate this position and it has never been accepted as the correct approach to judicial review.

Adopting the original *Carolene Products* approach is also deeply problematic. First, it flies in the face of the many unenumerated rights that have received protection from the Supreme Court for well over a hundred years—such as the right to travel (which had been enumerated in the Articles of Confederation) and the right to provide one's children with religious education or education in one's native language.[151] This approach directly conflicts as well with the unenumerated right to privacy that has been explicitly protected for over thirty years.[152] Finally, the *Carolene Products* approach is undercut by the text of the Ninth and Fourteenth Amendments.

The present *Carolene Products*-plus approach is also objectionable. Because of it, judges now find themselves in the uneasy position of having to pick and choose among the unenumerated liberties of the people to find those that justify switching the presumption and those that do not. This approach places courts in the uncomfortable position of making essentially moral assessments of different exercises of liberty. A liberty to take birth control pills is protected, but a liberty to take marijuana is not. The business of performing abortions is protected, but the business of providing transportation is not. What "protected" means in this context is that a particular exercise of liberty is sufficient to rebut the presumption of constitutionality and that the government then must establish that such legislation is both necessary and proper.

With the 1992 decision in *Planned Parenthood v. Casey*,[153] there is virtually no chance that this Supreme Court will retreat all the way back to a purified *Carolene Products* approach in the near future. (Nor should it.)

151. *See* WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 1083–84 (1986) (listing unenumerated rights that have been recognized by the Supreme Court).

152. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

153. 505 U.S. 833 (1992).

In *Casey*, the Court strongly asserted: "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before."[154] In support of this assertion the Court cited several cases including the two surviving *Lochner*-era cases of *Pierce v. Society of Sisters*[155] and *Meyer v. Nebraska*,[156] each of which scrutinized legislation infringing upon unenumerated rights. The Court in *Casey* explicitly relied upon the Ninth Amendment to justify the protection of unenumerated liberties under the Fourteenth Amendment. As Justices O'Connor, Kennedy, and Souter wrote:

> Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U. S. Const., Amend. 9.[157]

The principled alternative to a consistent presumption of constitutionality or an ad hoc *Carolene Products*-plus approach is to shift the presumption of constitutionality when legislation effects *any* exercise of liberty. Such a *presumption of liberty* would place the burden on the government to show why its interference with liberty is both necessary and proper rather than, as now, imposing a burden on the citizen to show why the exercise of a particular liberty is a fundamental right. Nowhere does the Constitution speak of fundamental (as distinct from nonfundamental) rights,[158] but it does speak of all laws being necessary *and* proper.

As I have explained at greater length elsewhere,[159] whenever government interferes with a rightful exercise of a citizen's liberty, it should have to bear the burden of showing (a) that its objectives are proper and (b) that it cannot accomplish these objectives by means that do not restrict the liberties of the people and, for this reason, its actions are also necessary. If a particular interference with liberty is truly necessary and proper, then this is not too much to ask of government officials. A "rightful exercise of liberty" is one that does not violate the rights of any other citizen. It roughly corresponds to what courts refer to as a "liberty interest," except that, at present, liberty interests are not protected unless they are also

154. *Id.* at 847.
155. 268 U.S. 510 (1925).
156. 262 U.S. 390 (1923).
157. *Casey*, 505 U.S. at 848.
158. Except to note that the enumeration of certain rights "shall not be construed to deny or disparage others retained by the people." *See* U.S. CONST. amend. IX.
159. *See* Barnett, *Getting Normative*, *supra* note 4, at 113–21.

deemed to be fundamental rights. No court today would find an action that violated the rights of others to be a "liberty interest."

Would this not mean, however, that unelected federal judges with lifetime tenure would be asked to speculate about "the rights of man"? What qualifies them to determine what learned philosophers disagree about? Where in their legal education or experience did they gain expertise in distinguishing rightful from wrongful conduct? A moment's reflection should dissipate such concerns. I would not expect federal judges assessing the necessity and propriety of legislation to distinguish ab initio between those actions that are rightful exercises of liberty and those that are not. Rather, in our legal order, distinguishing rightful from wrongful conduct is generally made every working day at the state level—or in federal courts operating in diversity cases in which they try to follow state law. Indeed, at least a quarter of a law student's legal education is devoted to this subject in courses such as contracts, torts, property, agency and partnership, secured transactions, commercial paper, portions of criminal law, etc. Ever since the forms of action were abolished, the concepts provided in these subject areas have been used to assess the merits of claims that one person has violated the rights of another.

I am not suggesting that I agree with all the current rules and principles that currently define a person's rights—that is why I teach and write about contract law[160]—or even the exact process by which such decisions are currently made. Rather, I am only providing an answer to the question of how, as a practical matter, decisions about rightful and wrongful conduct are to be made. My answer: Such decisions should be made, for better or worse, the way these distinctions are made at present. There is today a healthy division of labor between state court processes and federal diversity cases assessing the rights of the people against each other, and federal constitutional adjudication that protects the rights of the people from infringement by government. It is only when federal judges are asked to distinguish protected fundamental rights from unprotected "liberty interests," as they must do under the current *Carolene Products*-plus approach, that they arguably exceed the boundaries of their competence.

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160. *See, e.g.*, Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract*, 78 VA. L. REV. 1175 (1992); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); Barnett, *Contract Remedies*, *supra* note 102; Randy E. Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1022 (1992); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992); Barnett, *Squaring*, *supra* note 102; Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443 (1987).

When assessing the practicality of this proposal, one must keep in mind two facts. First, very little legislation at the federal or state level even purports to be defining and prohibiting wrongful behavior—that is, behavior by one person that violates the rights of another. Rather, legislation is typically claiming to "regulate" the exercise of rightful conduct or to prohibit rightful conduct altogether so as to achieve some "compelling state interest" or social policy. To use the distinction made popular by Ronald Dworkin,[161] legislation rarely concerns matters of principle, and usually concerns matters of policy. Moreover, it simply is not the case that every claim of government power can plausibly be recast in terms of vindicating some individual's rights.

Second, not all legislation restricts the liberties of the people. The many laws that regulate the internal operation of government agencies or the dispensation of government funds, for example, would be unaffected by a presumption of liberty. When the post office sets its hours of operation or the price of its postage stamps, it is not restricting the rightful liberties of the citizenry any more than a private organization that does the same. If heightened scrutiny of the necessity and propriety of such laws is warranted,[162] as it may very well be, it would have to be justified on grounds other than that the laws in question potentially infringe upon the rights retained by the people.[163]

On the other hand, when Congress asserts that to effectuate its power "[t]o establish Post Offices,"[164] it is necessary and proper to grant a legal monopoly to its post office, those companies that wish to carry first-class

161. *See* DWORKIN, *supra* note 66, at 22, 90–94.

162. I do not address in this Article the issue of when, if ever, conditioning the receipt of government benefits or employment on the waiver of one's background rights should be protected by a presumption of liberty. *See generally* RICHARD A. EPSTEIN, BARGAINING WITH THE STATE (1993) (discussing the appropriate limits on the power of government to bargain with its citizens). Whether or not such so-called "unconstitutional conditions" violate the rights retained by the people, however, they may be insidious or "improper" enough in their own right to justify shifting the presumption of constitutionality, thereby placing the burden on the government to show that such conditions are both necessary and proper. So too with laws that unnecessarily or improperly infringe upon principles of federalism or separation of powers, though it is not clear that states or branches of the federal government require the same degree of protection as do individuals. Perhaps it is enough to recognize that such laws may be stricken as unnecessary or improper without shifting the presumption of constitutionality. I take no position on these matters here.

163. For example, heightened scrutiny of the necessity of laws that tell state governments how they are to behave might be justified as infringing the powers reserved to the states or to the people mentioned by the Tenth Amendment. Heightened scrutiny of laws might also be warranted when laws appear to violate the Equal Protection Clauses of the Fifth and Fourteenth Amendments.

164. U.S. CONST. art. I, § 8, cl. 7.

mail are entitled to demand that Congress or the Executive demonstrate the necessity and propriety of such a restriction on liberty. As Madison argued with respect to the national bank: "It involves a monopoly, which affects the equal rights of every citizen."[165] Similarly when Congress asserts that to effectuate its power "[t]o raise and support Armies,"[166] it is necessary and proper to draft young men or women to serve in the military, those who are subject to this form of involuntary servitude are entitled to demand that Congress or the Executive demonstrate to the satisfaction of an independent tribunal of justice that armies cannot be raised by using volunteers.

Perhaps there are times when post offices cannot be provided without granting a monopoly, or when an all-volunteer army is insufficient for the defense of the United States. When Congress seeks to put postal competitors out of business or to draft young men or women, however, a presumption of liberty would put the onus on Congress to demonstrate that now is one of those times. In my view, when pressed with cases of genuine necessity, courts would not hesitate to uphold legislation as necessary. Indeed, even were a presumption of liberty to be adopted, I think government-employed judges are far more likely to uphold unnecessary restrictions on liberty than to strike down a law that is truly necessary.

Using a general presumption of liberty to effectuate the Necessary and Proper Clause can be justified, not only on the grounds that it gets the courts out of the business of picking and choosing among the liberties of the people, and not only on the grounds that it is more harmonious with the text (and original meaning) of the Ninth and Fourteenth Amendments. It can also be justified as a more realistic presumption in light of what we know of legislative behavior. After all, the original justification of the presumption of constitutionality rested, in part, on a belief that legislatures will consider carefully, accurately, and in good faith the constitutional protections of liberty before infringing it. This belief assumes that legislatures really do assess the necessity and propriety of legislation before enacting it. In recent decades, however, we have remembered the problem of faction that at least some of the framers never forgot.[167] We now understand much better (or are more willing to admit) than our post–New Deal

165. 2 ANNALS OF CONG. 1900 (1791); *see also* LYSANDER SPOONER, *The Unconstitutionality of Laws of Congress, Prohibiting Private Mails* (New York, Tribune Printing Establishment 1844), *reprinted in* 1 THE COLLECTED WORKS OF LYSANDER SPOONER (Charles Shively ed., 1971).

166. U.S. CONST. art. I, § 8, cl. 12.

167. *See, e.g.*, *supra* note 3.

predecessors on the left and on the right that both minorities and majorities can successfully assert their interests in the legislative process to gain enactments that serve their own interests rather than being necessary and proper.

In short, our understanding of the facts on which the presumption of constitutionality rests have changed. And, with this change in its factual underpinnings, the presumption—*which appears nowhere in the constitutional text*—must fall. Statutes that emerge from the legislative process are not entitled to the deference they now receive unless there is some reason to think that they are a product of necessity, rather than mere interest. And a statutory *prohibition* of liberty will not be presumed to be an appropriate *regulation*. Statutes do not create a duty of obedience in the citizenry simply because they are enacted. Without some meaningful assurance of necessity and propriety, statutes are to be obeyed merely because the consequences of disobedience are onerous. This is an insidious view of statutes that undermines respect for all law.

The only way that statutes may create a prima facie duty of obedience in the citizenry is if some agency not as affected by interest (or affected by different interests) will scrutinize them to ensure that they are both necessary and proper. However imperfect they may be, only courts are presently available to perform this function. Without judicial review, statutes are mere exercises of will, and are not entitled to the same presumption of respect that attaches to statutes surviving meaningful scrutiny.[168]

This is not to say that scrutiny must be strict. A standard of review that no statute can pass is as hypocritical as a standard of review that every statute can pass. Rather, some form of intermediate means-ends fit indicating *necessity*, and an assessment of a measure's *propriety* to see if the intention is really to regulate rather than prohibit an exercise of liberty, would be an important step towards both restoring legitimacy to legislation and protecting the liberties of the people.

I have previously recommended the presumption of liberty as a means of implementing the Ninth Amendment's protection of unenumerated rights retained by the people.[169] This symmetry is no coincidence. For the Necessary and Proper Clause can and should be viewed as creating a textual limit on congressional power that served to protect these unenumerated rights from infringement. Recall that when this Clause was

168. *See* Barnett, *Getting Normative*, *supra* note 4 (arguing that for laws to bind in conscience, they must not violate the background natural rights retained by the people).

169. *See id.* at 113–21; Barnett, *supra* note 10, at 10–19.

enacted the Bill of Rights had yet to be proposed or ratified.[170] For two years *all* of the natural rights retained by the people were unenumerated rights. The only legal standard protecting them from infringement was that "all Laws . . . for carrying into Execution the . . . Powers" of the national government "shall be necessary and proper."[171]

Further, as Madison argued, the Ninth Amendment can be viewed as precluding a latitudinarian interpretation of the Necessary and Proper Clause.[172] Gary Lawson and Patricia Granger have concluded: "The Ninth Amendment potentially does refer to unenumerated substantive rights, but the [Necessary and Proper] Clause's requirement that laws be 'proper' means that Congress never had the delegated power to violate those rights in the first instance."[173] Therefore, it should come as no surprise that both the Ninth Amendment and the Necessary and Proper Clause can be effectuated at the same time and in the same manner.[174]

CONCLUSION

When establishing government, the people retained the natural rights that protect their liberties. This much is established textually by the Ninth Amendment. When enacted statutes receive the benefit of an extratextual presumption of constitutionality, however, the people have no reason to be confident that their rights have been respected, and therefore the legitimacy of legislation—that is, its ability to bind the citizenry in conscience—is severely undermined. A presumption of liberty, on the other hand, protects these rights from the administrative state by giving effect to the Necessary and Proper Clause in a manner that is consistent with the powers that are granted to the national government. With this presumption in effect, as citizens, we can have increased confidence that because a particular enactment has been shown to be both necessary and proper, it does not constitute an unjust infringement on our liberties, and we owe it at least a prima facie duty of obedience.

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170. *See* Lawson & Granger, *supra* note 99, at 267–70 (discussing whether the Constitution prohibited takings without just compensation prior to the ratification of the Fifth Amendment and suggesting that, because of the Necessary and Proper Clause, it did).

171. U.S. CONST. art. I, § 8, cl. 18.

172. *See supra* note 28.

173. Lawson & Granger, *supra* note 99, at 273.

174. As suggested by the writings of Lawson and Granger and of Gardbaum, however, the Necessary and Proper Clause may go beyond protecting the rights retained by the people to protect against other improper or unnecessary laws.