UNNECESSARY AND UNINTELLIGIBLE

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No constitution produced after much deliberation by reasonably intelligent persons is likely to contain passages that are "stupid" in the sense of being "foolish; dull in intellect; nonsensical."[1] Many constitutional provisions quickly outlived their original purpose (the electoral college)[2] and others are venal (the not-so oblique protections of slavery). Nevertheless, contemporary claims that some constitutional provision is plainly stupid probably overlook the sound reasons the framers had for inserting that particular language into the constitutional text.

Still, if any provision in the constitution merits the appellation "stupid," it is the conclusion of Article I, § 8, which states that "the congress shall have the Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Understood literally, the clause prevents congress from exercising vital constitutional powers. More significantly, the necessary and proper clause satisfies historical tests for stupidity: The framers did not seriously consider its meaning, and prominent defenders of the constitution subsequently confessed that the provision was unnecessary and unintelligible.

The necessary and proper clause apparently establishes a constitutional standard that legislation rarely meets. No necessary means exist in many cases for realizing certain purposes. There is, for example, no necessary way of leaving a room with two doors. Although many policies help further such government goals as reducing poverty, promoting peace or preventing crime, no single legislative strategy seems the necessary means for achieving those ends. The phrase "necessary and proper" also obliterates the distinction between constitutionality and wisdom, a distinction central to the framer's goal of eliminating ba-

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1. *Webster's Scholastic Dictionary* 355 (Airmount Pub. Co., 1966).

2. Such provisions remain in the present constitution because they serve the interest of a minority large enough to block a contrary amendment and not because Americans lack the intelligence to perceive or the energy to repeal stupid constitutional clauses.

sic regime questions from normal political discourse.[3] A measure that is unwise cannot be a necessary means for achieving some important constitutional purpose. Hence, a literal reading of the necessary and proper clause suggests imprudent measures must be unconstitutional.

Better would have been emulation of the Massachusetts constitution and its authorization of "wholesome and reasonable orders, laws, statutes, and ordinances."[4] No one besides John Marshall and Alexander Hamilton, however, seriously contends that "necessary . . . means no more than needful, requisite, incidental, useful or condusive to,"[5] even if one rejects the Jeffersonian argument that "necessary means" are "those means without which the grant of power would be nugatory."[6] Unfortunately, *no* one, including the constitutional framers, knows the point of the phrase "necessary and proper."

The records of the Constitutional Convention provide no help. The Committee on Detail gave no hint why it chose the language it did, and the Convention in turn apparently perceived these particular alterations to prior drafts as merely stylistic, accepting the Committee's handiwork without debate or what a modern analyst might term "republican deliberation."[7] At the least, this suggests that the delegates were unaware of the capacity for controversy contained within the Clause.

Delegates who thought the phrase "necessary and proper" would clearly demonstrate that Congress did not have an unlimited authority to pass laws were quickly disabused of that foolish notion by anti-Federalist commentators. Leading opponents of the Constitution immediately pointed out that as long as Congress retained the power to determine what laws were "necessary and proper," the Clause would not in practice limit congressional

3. See Jeffrey K. Tulis, *The Rhetorical Presidency* 30-32 (Princeton U. Press, 1987).

4. *Constitution of Massachusetts—1780*, William F. Swindler, ed., 5 *Sources and Documents of U.S. Constitutions* 97 (Oceana Publications, Inc., 1975).

5. Alexander Hamilton, *Opinion on the Constitutionality of the Bank, February 23, 1791*, in Jacob E. Cooke, ed., *The Reports of Alexander Hamilton* 88 (Harper & Row, 1964). See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819). See also, William Winslow Crosskey, 1 *Politics and the Constitution in the History of the United States* 392-93 (Chicago U. Press, 1953) (suggesting that the "necessary and proper" clause recognized that the federal government had broad power to legislate for the general welfare).

6. Thomas Jefferson, *Opinion on the Constitutionality of a National Bank* in Merrill D. Peterson, ed., *The Portable Thomas Jefferson* 265 (Penguin, 1975).

7. The convention did quickly vote down as "unnecessary" Madison's proposal to insert "and establish all offices" between "laws" and "necessary." Farrand II, p. 345. No one, however, considered whether the phrase "necessary and proper" or the entire clause was also unnecessary.

discretion in any way.[8] "Necessary and proper" was a stunningly poor candidate for guiding legislative judgment, Brutus pointed out, because it is "utterly impossible fully to define this power."[9] At the least the ambiguity of the Clause belies the founding generation's belief that written constitutions would require "no sophistry; no construction; no false glosses, but simple inferences from the obvious operation of things."[10]

Constitutional defenders proved unable to respond to these anti-Federalist criticisms. When Hamilton claimed that "the national government" would be the "judge of the necessity and propriety of the laws to be passed for executing the powers of the Union,"[11] he was repeating rather than responding to anti-Federalist attacks. More generally, the authors of *The Federalist Papers* attempted to defuse controversy over "necessary and proper" by claiming that the clause was an "unfortunate and calumniated provision" or superfluous.[12] Hamilton "affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same if these clauses were entirely obliterated."[13] "Had the Constitution been silent on this head," James Madison wrote, "there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government by unavoidable implication."[14]

McCulloch v. Maryland apparently neutered the framer's misfeasance by reading the necessary and proper clause out of the constitution. The phrase "necessary and proper," however, still haunts constitutional theory from its perch in interpretive limbo. *McCulloch* is typically one of the first major cases of con-

8. See *Letters of Centinel*, in Herbert Storing, ed., 2 *The Complete Anti-Federalist* 177 (Chicago U. Press, 1981); *Essays of Brutus*, in Herbert Storing, ed., 2 *The Complete Anti-Federalist* 365, 389-91, 421 (Chicago U. Press, 1981); *An Old Whig*, in Herbert Storing, 3 *The Complete Anti-Federalist* 24 (Chicago U. Press, 1981); *Address by Sydney*, in Herbert Storing, ed., 6 *The Complete Anti-Federalist* 113 (Chicago U. Press, 1981); *A Countryman*, in Herbert Storing, ed., 6 *The Complete Anti-Federalist* 86 (Chicago U. Press, 1981).

9. *Essays of Brutus* at 390 (cited in note 8). See *Essays of Brutus* at 421 (cited in note 8); *An Old Whig* at 24 (cited in note 8); *Letters from The Federal Farmer*, Herbert Storing, ed., 2 *The Complete Anti-Federalist* 247 (Chicago U. Press, 1981).

10. Jonathan Elliott, ed., 2 *The Debates in the Several States on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* 285 (Philadelphia, 1836) (quoting John Jay). See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 902-13 (1985).

11. Hamilton, Alexander, Madison, James, and Jay, John, *The Federalist Papers* 203 (New American Library, 1961).

12. Id. at 202.

13. Id.

14. Id. at 285.

stitutional interpretation that law students read. In constitutional English, they learn, "necessary" does not mean necessary. This lesson prepares students to accept without question that in constitutional English "no law" does not have to mean no law, that "interstate commerce" may simply mean commerce and that "due process" may somehow encompass a right to an abortion. By accepting these interpretive sleights of hand from the very beginning most law students and professors never find the occasion to ask why, when resolving basic questions of social justice and institutional structure, Americans should "interpret" a constitution that may contain stupid, outdated or venal passages instead of simply making what in their opinion are the wisest political choices.