

The Necessary and Proper Clause Grants Congress No Power

In a recent post, I pointed out that, despite superficial appearances, the Constitution's Necessary and Proper Clause—clarifying that Congress has authority to make laws “necessary and proper” to carrying out its other enumerated powers—actually grants Congress no power.

The Necessary and Proper Clause is representative of one of four related kinds of provisions found in 18th century grants of authority. Some of these provisions granted powers, but others merely clarified how their documents were to be interpreted. The Necessary and Proper Clause was one of the latter kind. For that reason it is what lawyers call a “rule of construction”—that is, a guideline for interpretation.

During the debates over the Constitution, advocates of the document repeatedly outlined to the ratifying public the purely explanatory role of the Necessary and Proper Clause. James Wilson, for example, probably the second-most influential framer after James Madison and the most influential Pennsylvania ratifier, made this point at his state's ratifying convention. He stated that the Clause did not “in any degree, go beyond the Particular enumeration It is saying no more than that the powers we have already particularly given, shall be effectually carried into execution.” His ally at the convention, Thomas McKean, echoed this position.

At the North Carolina ratifying convention, another spokesman for the Constitution stated the same thing this way:

This clause specifies that they shall make laws to carry into execution all the powers vested by this Constitution; consequently, they can make no laws to execute any other power. This clause gives no new power, but declares that those already given are to be executed by proper laws.

Even John Marshall, the Chief Justice often accused of taking an overly-expensive view of the Clause, concurred with this reading.

In a recent [posting](#), an [anonymous blogger](#) with perhaps more enthusiasm than knowledge argued that this was incorrect. Among that person's claims were that the *Federalist Papers* showed that the Clause was an affirmative grant rather than a rule of construction.

No one who reads the *Federalist* carefully could come to such a conclusion. Madison's *Federalist* No. 33 is absolutely clear that the Necessary and Proper Clause grants no power, but is purely explanatory:

[[I]t may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same, if [the Necessary and Proper and Supremacy] clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers. . . . The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless.

Similarly in *Federalist* No. 44 Madison explained what would have happened if the Clause had been omitted.



Rob at James Madison's home in Virginia

Had the Constitution been silent on this head, 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. No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.

In 2012, Chief Justice John Roberts agreed:

[T]he Clause is “merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant.”

All the Founding-Era quotations for this posting are found in my [article on the origins of the Necessary and Proper Clause, which is available here](#). Those who wish more detail can consult [the book I co-authored](#) on the Clause with three other scholars. The publisher forbids me to post that work free of charge. I receive no royalties from it, but the publisher needs to recover costs of production.

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