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## America's First Great Constitutional Controversy: Alexander Hamilton's Bank of the United States

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ARTICLE

AMERICA'S FIRST GREAT CONSTITUTIONAL  
CONTROVERSY: ALEXANDER HAMILTON'S  
BANK OF THE UNITED STATES

DR. CHARLES J. REID\*

ABSTRACT

This article aims at a careful reconstruction of what has been called America's first great constitutional controversy—the 1791 debate over Alexander Hamilton's Bank of the United States. This article reviews this debate both at the congressional level and within the executive branch. The debate over the bank led to the articulation of theories of constitutional interpretation that are with us still. On the one hand, we find theories of interpretation that stress implied constitutional powers and an expansive role for the federal government. On the other hand, we encounter theories of interpretation that emphasize limited federal authority and a preeminent role for the states. These debates included not only well known figures such as Alexander Hamilton, Thomas Jefferson, and James Madison, but other leading figures of the time less well known today, such as Fisher Ames, Theodore Sedgwick, and Elbridge Gerry.

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#### INTRODUCTION

This Article has a single major focus. It aims at a careful reconstruction of what has been called America’s “first great constitutional controversy”<sup>1</sup>—the 1791 debate over Alexander Hamilton’s Bank of the United States. The controversy unfolded over three stages. It commenced when Alexander Hamilton, who was George Washington’s Secretary of the Treasury, proposed that Congress create the Bank as one part of his larger program for national economic integration and renewal.

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1. Stephen G. Calabresi, *Text, Precedent, and the Constitution: Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311, 334 (2005); Randy E. Barnett, *The People or the State?: Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729, 1739 (2007).

In his proposal to Congress, Hamilton did not reference the Constitution at all. He made the case for the Bank entirely on the grounds of public policy. It would benefit America's commercial classes and thereby benefit the economy as a whole if the United States had a Bank of the sort that could be found in some European capitals. His sources for this claim included the latest developments in banking theory and European experience. One can infer from his silence on the matter that Hamilton must have viewed the constitutional question as unproblematic.

Hamilton's proposal, however, was immediately met with objections over its constitutionality. These objections led to the commencement of stage two of the controversy. A vigorous debate ensued in the House of Representatives between James Madison and a small group of mostly Southern House members, on one side, and, on the other side, a larger number of mostly Northern and Eastern Representatives, many of them allies of Hamilton. The debate caused both sides to advance novel but important theories concerning the application and interpretation of the Constitution.

The House and Senate both eventually enacted the Bill, but the controversy was not yet concluded. It entered its third and final stage when President George Washington requested that three members of his cabinet brief him on the Bank's constitutionality. Washington plainly took his role as constitutional interpreter seriously and thus he sought opinions on the Bank's constitutionality from Edmund Randolph, his Attorney General, his Secretary of State Thomas Jefferson, and from Alexander Hamilton. Having satisfied his own scruples, Washington finally signed the legislation into law.

A careful examination of the three stages of this controversy provides an important window into how the Constitution was understood in its earliest years. Madison and his allies argued that the Constitution must be seen primarily as a restraining document. It was meant to limit the federal government. Consisting as it did of carefully enumerated powers, Madison maintained that Congress could not transgress these carefully-crafted boundaries.

Hamilton and his allies, on the other hand, viewed the Constitution principally as an empowering document. The Constitution was created and ratified so as to preserve the Union from the chaos and disarray of the Articles of Confederation. Consistent with this history and purpose, the federal government, they maintained, possessed broad and extensive powers to build a powerful and unified nation.

In back of these theories was yet another layer of more fundamental ideas about nationhood and sectionalism. Hamilton and his supporters stressed national unity as the Constitution's overarching goal, while Madison, and at a later stage Jefferson, contended for the primacy of the states. After careful deliberation, George Washington, himself a native Virginian, aligned with the Hamiltonian side of this debate.

Throughout, this Article will be sensitive to historical context. And that means chiefly that attention must be paid to the ways in which members of Congress and the executive branch viewed themselves as constitutional interpreters. It must be borne in mind that the debate over the Bank of the United States occurred twelve years before the United States Supreme Court handed down *Marbury v. Madison*.<sup>2</sup> If we view the debate as the participants would have seen it, we must acknowledge that they could not have known whether a subsequent Supreme Court would claim for itself the implied power of judicial review. In that context, Congress was defining for itself what it meant to behave constitutionally, and the debate over the Bank was very much a part of that self-definition.

Indeed, we must also note that the Congress that took up the question of the Bank was the First Congress of the United States. Its work is now revered and has been given near normative significance in some branches of the law,<sup>3</sup> but the question in the back of everyone's mind at the time it met and deliberated was nothing less than whether this experiment in unified government would succeed.<sup>4</sup> Thus it has been observed, concerning this Congress, that "[h]ad it failed in its work, the United States as we know it would not exist."<sup>5</sup> Still, the First Congress did not speak with one mind or one voice. Even at this early date in American history, there were tensions and fault lines already apparent,<sup>6</sup> and the debate over the Bank helped to reveal where some of those fault lines lay.

This Article is divided into four Parts and the conclusion. Part One will examine the economic crisis of the 1780s, which provided impetus for the formation of a tighter Union; Part Two will consider Hamilton's "Report on the Bank," submitted to Congress in December 1790; Part Three will look at the congressional debate on the subject of the Bank; while Part Four reviews the debate George Washington provoked among his cabinet. Part One is meant to provide needed background while Parts Two through Four address each of the stages of the controversy over the Bank. The conclusion will provide a synthetic review of the main themes of this Article in order to come to a clearer understanding of the significance of this debate to constitutional history and early conceptions of American nationhood.

Scholars have long recognized the importance of these events to our understanding of the Constitution. Thus Robert Kaczorowski looked to the debates over the First Bank of the United States to conclude that the Foun-

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2. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

3. See Michael Bhargava, *The First Congress and the Supreme Court's Use of History*, 94 CAL. L. REV. 1745, 1747 (2006).

4. See CHRISTOPHER HOBSON, *THE RISE OF DEMOCRACY: REVOLUTION, WAR AND TRANSFORMATIONS IN INTERNATIONAL POLITICS SINCE 1776*, at 58–73 (2015).

5. FERGUS M. BORDEWICH, *THE FIRST CONGRESS: HOW JAMES MADISON, GEORGE WASHINGTON, AND A GROUP OF EXTRAORDINARY MEN INVENTED THE GOVERNMENT I* (2016).

6. JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT* 4–5 (1999).

ders' vision of federal powers and state/federal relations were more fluid and flexible than is often asserted.<sup>7</sup> Saikrishna Prakash finds in George Washington's instruction to Alexander Hamilton to respond to constitutional objections to the Bank bill a precedent for claiming that the President is affirmatively obliged to veto legislation he or she believes to be unconstitutional.<sup>8</sup> William Eskridge and John Frerejohn see the bill authorizing the Bank of the United States as an early example of what they call a "super-statute," legislation so basic that it "become[s] axiomatic to a state's fundamental law."<sup>9</sup>

In an examination of the constitutionality of the Federal Reserve system, Michael Wade Strong finds in the design and creation of the Bank of the United States evidence for the important role centralized banking played in the early American Republic.<sup>10</sup> Taking as normative Thomas Jefferson's criticisms of the Bank, Congressman Ron Paul used the debate as a means of criticizing what he understood to be federal overreach in monetary policy.<sup>11</sup> Bruce F. Davie, considering the Bank from the perspective of American economic history, concluded that it helped "[lay] the foundation for a highly successful economic policy."<sup>12</sup>

In an important biographical study of Alexander Hamilton, James Willard Hurst found in his drafting and defense of the Bank bill evidence of his "creativity" and his "alert[ness] to ground action in principles of choice that reached beyond the occasion to determine the long run distribution of political and economic power."<sup>13</sup> Judge Richard Arnold, writing about another major actor in this debate, praised James Madison for his opposition to the Bank and asserted that Madison's objections to an expanded interpretation of the necessary and proper clause have largely been vindicated.<sup>14</sup>

7. See Robert J. Kaczorowski, *The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and in Freedom*, 45 U. KAN. L. REV. 1015, 1017 (1997); see also Robert J. Kaczorowski, *Fidelity Through History and To It: An Impossible Dream*, 65 FORDHAM L. REV. 1663, 1667 (1997) (defending a dynamic interpretation of constitutional history and seeing in congressional creation of the First Bank of the United States "the political and constitutional decisions of all three branches of government").

8. See Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81, 84 (2007).

9. William N. Eskridge & John Frerejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1218 (2001); see also *id.* at 1223–1224 (examining the constitutional and executive-branch debate on the Bank).

10. Michael Wade Strong, *Rethinking the Federal Reserve System: A Monetarist Plan for a More Constitutional System of Central Banking*, 34 IND. L. REV. 371, 372–375 (2001).

11. See Ron Paul, *The Banks vs. the Constitution*, 33 HARV. J.L. & PUB. POL'Y 465, 467 (2010).

12. Bruce F. Davie, *Monetizing the Post-Revolutionary American Economy: A Bicentennial View of Hamilton's Reports to the First Congress*, 84 PROC. ANN. CONF. ON TAX'N HELD UNDER AUSPICES NAT'L TAX ASS'N 155, 155 (1991).

13. James Willard Hurst, *Alexander Hamilton, Law Maker*, 78 COLUM. L. REV. 483, 486 (1978).

14. Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267, 274 (1997).

There are three important in-depth studies of the constitutional debate over the Bank. Michael Coblenz revisited the debate over the Bank in the context of contemporary constitutional controversies concerning the Affordable Care Act.<sup>15</sup> Coblenz in particular disagreed with the dissenting opinions in *National Federation of Independent Business v. Sebelius*, which take as normative James Madison's restrictive view of the powers of the federal government.<sup>16</sup> Coblenz conducted an exhaustive review of the congressional debate over the Bank to demonstrate that members of the First Congress, which included a number of participants at the Constitutional Convention, did not treat Madison's interpretation of federal powers as binding on them.<sup>17</sup> More generally, Coblenz concluded that congressional creation of a Bank that became "the largest commercial enterprise in the [United States] . . . [was] hardly an endorsement of limited government."<sup>18</sup>

Less polemically, Benjamin Klubes conducted a careful study of the Bank legislation's progress through Congress.<sup>19</sup> His article contains some important insights. He notes, for instance, that even though eighteen members of the Constitutional Convention participated in congressional deliberations on the Bank bill, only two members of Congress—Elbridge Gerry and James Madison—raised the issue of original intent, thus demonstrating the unimportance of this concept to the founding generation.<sup>20</sup> His article is especially important for its careful reconstruction of Senate deliberations. In the absence of official records of the Senate debate, Klubes combed the correspondence of the senatorial participants for evidence of what was said.<sup>21</sup> He notes that support or opposition to the Bank broke strongly along sectional lines—the South opposing the Bank, the North favoring it.<sup>22</sup> A large portion of Klubes' article is devoted to understanding James Madison's constitutional thought, relating his performance at the Constitutional Convention to his opposition to the Bank to conclude that he was a nationalist who simultaneously believed in a federal government of strictly limited and enumerated powers.<sup>23</sup>

Finally, David Currie, in a law review article and later in his magisterial multi-volume study of the Constitution in the pre-Civil War Congress, provided succinct but important reviews of the debate over the Bank. In his article-length examination of the Constitution in the First Congress, he

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15. Michael Coblenz, *The Fight Goes On Forever: "Limited Government" and the First Bank of the United States*, 39 S. ILL. U. L.J. 391 (2015).

16. *See id.* at 391–392 (citing *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012)).

17. *Id.* at 438–439.

18. *Id.* at 439.

19. Benjamin B. Klubes, *The First Federal Congress and the First National Bank: A Case Study in Constitutional Interpretation*, 10 J. EARLY AM. REPUBLIC 19 (1990).

20. *Id.* at 20.

21. *Id.* at 23–25.

22. *Id.* at 23, 28.

23. *Id.* at 31–35.

presented the debate as one that featured two protagonists: Fisher Ames of Massachusetts, who favored creation of the Bank, and James Madison, who opposed it.<sup>24</sup> Currie's book largely reiterated the points he previously made in his article.<sup>25</sup>

This Article builds on these previous studies but also differs from them and expands upon them in significant ways. First, this Article pays particular attention to Alexander Hamilton's justifications for the Bank of the United States. As Secretary of the Treasury, Hamilton was not a direct participant in the congressional debate, and so his views have largely been omitted from these earlier studies. Still, they are central to an understanding of the controversy, since it was his proposal that initiated the congressional discussions.

Second, this Article pays greater attention to context than previous studies. In particular, the debate over the Bank was a proxy for a different struggle—namely, the type of nation the participants wished to craft and whether the Constitution might be interpreted so as to accommodate it. This concern became especially prominent when the debate over the Bank shifted from Congress to George Washington's cabinet. Was the United States to become Hamilton's tightly-united commercial nation? Or was it to be a loose federation of sovereign states, living out Thomas Jefferson's agrarian ideal?

Third, this Article recognizes and develops a tension that seems hard-wired into the American constitutional tradition. Should the Constitution be seen primarily as a restraining document—a text that limits and confines the exercise of federal power to expressly enumerated goals and means? Or should it be seen as an empowering document—a text that enables and entrusts the federal government with a broad range of powers to achieve socially beneficial objectives?

Finally, this Article acknowledges as a major premise, the realization that every constitutional controversy occurs within a particular moment in time. To be sure, constitutional debates involve abstract arguments over governmental design and purpose which take on lives of their own, especially in a system such as ours, which makes so much of precedent. Still, these arguments are not deployed in a vacuum, but in order to win an argument. The context is always adversarial, the stakes are high, and the particular contingencies that come into play are historically non-repeatable. Hence, careful attention to detail is required to understand the stakes of this debate. But such attention shall be rewarded since the debate over the Bank was among the very first arguments over the nature and purpose of the United States and the Constitution that made it a nation.

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24. See David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 808–812 (1994).

25. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 78–80 (1997).



## I. THE ECONOMIC CRISIS OF THE 1780S

An “acute economic slump” is the way one recent writer on constitutional history described the conditions prevailing in the 1780s.<sup>26</sup> In truth, the political circumstances of the era were chaotic and the fragmented political environment of immediate post-Revolutionary America contributed greatly to the “economic malaise.”<sup>27</sup> It would be out of this malaise and disintegration that calls for constitutional reform emerged in the latter 1780s.<sup>28</sup>

Politically, the new American nation, if one could call it that, remained a radically decentralized project, with innumerable local parties and personages each seeking to advance their own agendas;<sup>29</sup> it was also nearly bankrupt, lacking even the means to satisfy its creditors.<sup>30</sup> The Revolutionary War currency known as the “Continental” had become worthless,<sup>31</sup> the effort to create a central bank known as the “Bank of North America” faltered because of political opposition,<sup>32</sup> and state and regional interests engaged in “beggar-thy-neighbor” policies and practices harmful to other states and regions.<sup>33</sup> The intense economic parochialism of the age is evident in the fact that “seven state governments revived their currency systems in the 1780s.”<sup>34</sup> “Peace,” it has been said, “brought an end to war, but marked only the beginning of America’s economic difficulties.”<sup>35</sup>

26. DAVID BRIAN ROBERTSON, *FEDERALISM AND THE MAKING OF AMERICA* 20 (2012).

27. RUTHANN ROBSON, *DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES* 31 (2013); Linzy A. Brekke, *The “Scourge of Fashion”: Political Economy and the Politics of Consumption in the Early Republic*, 3 EARLY AM. STUD. 111, 123–132 (2005).

28. Marc C. Christie, *Economic Regulation in the United States: The Constitutional Framework*, 40 U. RICH. L. REV. 949, 950 (2006); Cristine de Clercy, *Uncertainty and the General Interest in the American Constitution: Testing the “Veil of Ignorance” Hypothesis in Constitutional Choice*, in *BEHIND A VEIL OF IGNORANCE?: POWER AND UNCERTAINTY IN CONSTITUTIONAL DESIGN* 85, 89 (Louis M. Imbeau & Steve Jacob eds., 2015).

29. JOSEPH J. ELLIS, *THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION, 1783–1789*, at 5–6 (2015).

30. AARON N. COLEMAN, *THE AMERICAN REVOLUTION: STATE SOVEREIGNTY AND THE AMERICAN CONSTITUTIONAL SETTLEMENT, 1765–1800*, at 70 (2016).

31. THOMAS M. DOERFLINGER, *A VIGOROUS SPIRIT OF ENTERPRISE: MERCHANTS AND ECONOMIC DEVELOPMENT IN REVOLUTIONARY PHILADELPHIA* 240 (1986).

32. See CHARLES RAPPLEYE, *ROBERT MORRIS: FINANCIER OF THE AMERICAN REVOLUTION* 393–411 (2010); HOWARD BODENHORN, *STATE BANKING IN EARLY AMERICA: A NEW ECONOMIC HISTORY* 8 (2003).

33. Cathy Matson, *The Revolution, the Constitution, and the New Nation*, in 1 *THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES: THE COLONIAL ERA 378–381* (Stanley L. Engerman & Robert E. Gallman eds., 1996); Mary M. Schweitzer, *The Economic and Demographic Consequences of the American Revolution*, in *A COMPANION TO THE AMERICAN REVOLUTION* 571 (Jack P. Greene & J. R. Pole eds., 2000).

34. Edwin J. Perkins, *Conflicting Views on Fiat Currency: Britain and its North American Colonies in the Eighteenth Century*, in *BANKS AND MONEY: INTERNATIONAL AND COMPARATIVE FINANCE IN HISTORY* 8, 26 (Geoffrey Jones ed., 1991).

35. Brooke Hunter, *The Prospect of Independent Americans: The Grain Trade and Economic Development During the 1780s*, 5 *EXPLORATIONS EARLY AM. CULTURE* 260, 260 (2001).

Contributing to the centrifugal forces of the 1780s, was the reality that economic activity differed quite substantially from one region to the next. New England agriculture had gone through a crisis. "On the eve of the Revolution, New England had the lowest per capita wealth and 'the most dismal outlook' of any colonial region."<sup>36</sup> Matters grew even more difficult after the Revolution.<sup>37</sup> Farming had always been small-scale, and where farming failed to provide an adequate living, one saw the rise of "diversifi[ca]tion" as farmers attempted to timber, fish, and cobble their way to solvency."<sup>38</sup>

The tenuousness of New England agricultural life led to vigorous, class-based political conflict.<sup>39</sup> Unrest had been percolating just beneath the surface from the moment independence from Britain had been won,<sup>40</sup> prompted by widespread insolvency and debt.<sup>41</sup> It is little wonder then that it was in western Massachusetts that Daniel Shays led his short-lived rebellion in 1786 and 1787 against the creditor class.<sup>42</sup>

The mid-Atlantic states also struggled agriculturally. In these states, production of wheat was diminished thanks to blight caused by the so-called "Hessian fly."<sup>43</sup> One further finds in the literature statements such as "the 1780s were a difficult decade in Delaware history [and] were characterized by disturbed economic conditions."<sup>44</sup> Maryland, too, experienced both sluggish economic development and weak population growth.<sup>45</sup> Simi-

36. Winifred B. Rothenberg, *The Emergence of a Capital Market in Rural Massachusetts, 1730–1838*, 45 J. ECON. HIST. 781, 781 (1985) (quoting ALICE HANSON JONES, *WEALTH OF A NATION TO BE: THE AMERICAN COLONIES ON THE EVE OF THE REVOLUTION* 141 (1980)).

37. Gregory Nobles, *The Rise of Merchants In Rural Market Towns: A Case Study of Eighteenth-Century Northampton, Massachusetts*, 24 J. SOC. HIST. 5, 12–13 (1990).

38. PETER DOBKIN HALL, *THE ORGANIZATION OF AMERICAN CULTURE, 1700–1900: PRIVATE INSTITUTIONS, ELITES, AND THE ORIGINS OF AMERICAN NATIONALITY* 16 (1984).

39. VAN BECK HALL, *POLITICS WITHOUT PARTIES: MASSACHUSETTS, 1780–1791*, at 60–62 (1972).

40. See John L. Brooke, *To the Quiet of the People: Revolutionary Settlements and Civil Unrest in Western Massachusetts, 1774–1789*, 46 WM. & MARY Q. 425, 443–462 (1989).

41. DAVID P. SZATMARY, *SHAYS' REBELLION: THE MAKING OF AN AGRARIAN REBELLION* 19–36 (1980).

42. A major study of the causes of Shays's Rebellion answered the question: "What then triggered Shays's Rebellion? . . . The answer is twofold: the new state government—and its attempt to enrich the few at the expense of the many." LEONARD L. RICHARDS, *SHAYS'S REBELLION: THE AMERICAN REVOLUTION'S FINAL BATTLE* 63 (2002); see also MICHAL JAN ROZBICKI, *CULTURE AND LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* 165–177 (2011) (discussing the class-based concept of liberty used by Shays and his supporters).

43. Brooke Hunter, *Creative Destruction: The Forgotten Legacy of the Hessian Fly, in THE ECONOMY OF EARLY AMERICA: HISTORICAL PERSPECTIVES AND NEW DIRECTIONS* 236, 252–253 (Cathy Matson ed., 2006).

44. Harold B. Hancock, *Introduction to PROCEEDINGS OF THE HOUSE OF ASSEMBLY OF THE DELAWARE STATE, 1781–1792*, at 13 (Claudia L. Bushman et al. eds., 1988).

45. Donald R. Adams, Jr., *Prices and Wages in Maryland, 1750–1850*, 46 J. ECON. HIST. 625, 636–637 (1986).

larly, New Jersey underwent an “economic depression” in the mid-1780s that had a “profound effect” on economic relations in that state.<sup>46</sup>

As in New England, the mid-Atlantic states also experienced political unrest. One historian has recently described the “agrarian insurgency” in mid-1780s Pennsylvania as “Wild Yankee resistance.”<sup>47</sup> The region would experience real economic development in the 1790s, but such growth was as yet distant and uncertain.<sup>48</sup>

The Southern states, on the other hand, were already growing dependent on a slave-based plantation system. This was a system, furthermore, which enriched and empowered at least the upper strata of white society. Virginia tobacco was a popular commodity not only among the other former colonies, but throughout much of Europe.<sup>49</sup> Indeed, “tobacco exports rose steadily during the 1780s.”<sup>50</sup> Cotton was also establishing itself as a leading commodity. Thus “[i]n the 1780s, South Carolina and Georgia grew [two] million pounds of [long-staple cotton].”<sup>51</sup> The invention of the cotton gin in 1793 would greatly increase production, including the more profitable short-staple varieties of cotton.<sup>52</sup>

Still, the South also experienced its share of poverty and unrest. South Carolina went through a period of impoverishment caused by the British decision to block access to its Caribbean ports and aggravated by a series of crop failures.<sup>53</sup> Matters were even worse in frontier regions. Kentucky, at this time, has been described as appearing “less like an agrarian paradise and more like a preindustrial purgatory.”<sup>54</sup> Like New England, the Appalachian South was also characterized by political fragmentation and secession movements, as witnessed, for instance, in the rise and sudden fall of the short-lived State of Franklin that was carved out of parts of modern-day North Carolina and Tennessee.<sup>55</sup>

46. Mary R. Murrin, *New Jersey and the Two Constitutions*, in *A NEW JERSEY ANTHOLOGY* 121, 129 (Maxine N. Lurie ed., 1994).

47. Paul B. Moyer, “A *Dangerous Combination of Villains*”: *Pennsylvania’s Wild Yankees and the Social Context of Agrarian Resistance in Early America*, 73 *PA. HIST.* 37, 61 (2006).

48. See MAX L. GRIVNO, *GLEANINGS OF FREEDOM: FREE AND SLAVE LABOR ALONG THE MASON-DIXON LINE, 1790–1860*, at 23–26 (James R. Barrett et al. eds., 2011).

49. BRUCE A. RAGSDALE, *A PLANTER’S REPUBLIC: THE SEARCH FOR ECONOMIC INDEPENDENCE IN REVOLUTIONARY VIRGINIA 252–253* (1996).

50. RACHEL N. KLEIN, *UNIFICATION OF A SLAVE STATE: THE RISE OF THE PLANTER CLASS IN THE SOUTH CAROLINA BACKCOUNTRY, 1760–1808*, at 248 (1990).

51. ANNE SINKLER WHALEY LECLERCQ, *AN ANTEBELLUM PLANTATION HOUSEHOLD: INCLUDING THE SOUTH CAROLINA LOW COUNTRY RECEIPTS AND REMEDIES OF EMILY WHARTON SINKLER* 5 n.13 (2006).

52. David J. Libby, *Short Staple Cotton*, in 1 *SLAVERY IN THE UNITED STATES: A SOCIAL, POLITICAL, AND HISTORICAL ENCYCLOPEDIA* 448, 448 (Junius P. Rodriguez ed., 2007).

53. JAMES W. ELY, JR., *THE SOUTH’S ROLE IN THE CREATION OF THE BILL OF RIGHTS 101* (Robert J. Haws ed., 1991).

54. HONOR SACHS, *HOME RULE: HOUSEHOLDS, MANHOOD, AND NATIONAL EXPANSION ON THE EIGHTEENTH-CENTURY KENTUCKY FRONTIER* 73 (2015).

55. KEVIN T. BARKSDALE, *THE LOST STATE OF FRANKLIN: AMERICA’S FIRST SECESSION* 36–52 (2009).

When one shifts the focus to commerce and manufacture, a picture emerges of activity that both differed significantly from region to region but had yet to generate real wealth. Thus, while New York State displayed enormous economic promise, it was not yet the behemoth it would become. In 1790, its population was only sixth greatest “[a]mong the initial thirteen states.”<sup>56</sup> The Port of New York took second place either to Boston or to Philadelphia throughout this period,<sup>57</sup> while large parts of upstate New York remained uncultivated.<sup>58</sup>

New England, for its part, experienced serious disruptions to its business and trade during the Revolutionary War and recovery was slow.<sup>59</sup> Shipbuilding and fishing, two of its major commercial activities, remained mired in economic stagnation through the 1780s.<sup>60</sup> Still, even in this time of disruption, Boston merchantmen began to explore international commercial opportunities—even in distant locations like China.<sup>61</sup>

In the mid-Atlantic states, thanks to some important innovations in milling,<sup>62</sup> commerce centered around foodstuffs, particularly grain.<sup>63</sup> Still, conditions were difficult. Even though the Port of Philadelphia remained a major hub of commerce, it was not immune to the economic difficulties of the 1780s.<sup>64</sup>

One does not have to espouse Charles Beard’s economic interpretation of constitutional origins<sup>65</sup> to conclude that the Founding period was one of

56. ALAN TAYLOR, *WRITING EARLY AMERICAN HISTORY* 204 (2005).

57. DIANA diZEREGA WALL, *THE ARCHAEOLOGY OF GENDER: SEPARATING THE SPHERES IN URBAN AMERICA* 2 (1994).

58. RYAN K. SMITH, ROBERT MORRIS’S FOLLY: *THE ARCHITECTURAL AND FINANCIAL FAILURES OF AN AMERICAN FOUNDER* 53 (2014).

59. Robert A. McGuire, *The Founding Era, 1774–1791*, in PRICE V. FISHBACK ET AL., *GOVERNMENT AND THE AMERICAN ECONOMY: A NEW HISTORY* 56, 64 (2007); FRANCIS J. LEAZES JR. & MARK T. MOTTE, *PROVIDENCE: THE RENAISSANCE CITY* 29 (2004).

60. JACQUELINE BARBARA CARR, *AFTER THE SIEGE: A SOCIAL HISTORY OF BOSTON, 1775–1800*, at 161 (2005) (discussing economic depression in the shipbuilding industry); REGINALD HORSMAN, *THE NEW REPUBLIC: THE UNITED STATES OF AMERICA, 1789–1815*, at 90 (reprt. ed. 2013) (discussing disruptions in the fishing industry).

61. CARR, *supra* note 60, at 161–62.

62. CARROLL W. PURSELL, *THE MACHINE IN AMERICA: A SOCIAL HISTORY OF TECHNOLOGY* 27–29 (2d ed. 2007).

63. Hunter, *supra* note 35, at 274–286; Elizabeth A. Ramey, *Grains*, in *THE OXFORD ENCYCLOPEDIA OF AMERICAN BUSINESS, LABOR, AND ECONOMIC HISTORY* 307, 307 (Melvyn Dubofsky ed., 2013).

64. See DOERFLINGER, *supra* note 31, at 212.

65. CHARLES BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913). The Beard thesis remains the subject of lively debate. See, for instance, James H. Hutson, *The Creation of the Constitution: Scholarship at a Standstill*, 12 *REV. AM. HIST.* 463, 467–469 (1984) (situating Beard’s work in emerging progressive historiography); Robert A. McGuire & Robert L. Ohsfeldt, *Economic Interests and the American Constitution: A Quantitative Rehabilitation of Charles A. Beard*, 44 *J. ECON. HIST.* 509 (1984) (reasserting the importance of understanding the economic interests at work in the Founding); Jac C. Heckelman & Keith L. Dougherty, *An Economic Interpretation of the Constitutional Convention of 1787 Revisited*, 67 *J. ECON. HIST.* 829 (2007) (a qualified reaffirmation of the Beard thesis); John Patrick Diggins,

economic dislocation, and that a desire for economic stability—if not the achievement of real growth—was an animating concern at the Constitutional Convention.

## II. ALEXANDER HAMILTON AND THE BANK OF THE UNITED STATES

### A. *Alexander Hamilton: Background*

Alexander Hamilton stood out to his contemporaries for his incandescent intelligence.<sup>66</sup> One biographer has described him as an “exuberant genius.”<sup>67</sup> John Marshall once wrote that “‘Hamilton’s reach of thought was so far beyond’ his that, compared to Hamilton’s, it was like a candle ‘before the sun at noonday.’”<sup>68</sup>

In truth, Hamilton had no choice but to be the brightest and most ambitious of his contemporaries, for he had none of the advantages of birth that others enjoyed.<sup>69</sup> Born out of wedlock on the Island of Nevis,<sup>70</sup> he came to New York around the age of nineteen to attend the future Columbia University.<sup>71</sup> With the outbreak of the Revolutionary War, Hamilton enlisted in the new Continental Army and quickly became a captain of artillery.<sup>72</sup>

He developed a close relationship with George Washington, serving as his aide-de-camp,<sup>73</sup> in which capacity he became perhaps Washington’s most important ghost writer.<sup>74</sup> He had a brief falling out with the older man in 1781, but eventually repaired the relationship.<sup>75</sup> In the interim, however,

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*Class, Classical, and Consensus Views of the Constitution*, 55 U. CHI. L. REV. 555, 555–566 (1988) (situating Beard’s work in larger currents of twentieth-century constitutional historiography).

66. James Kirby Martin, *Beyond the Good Guys-Bad Guys Syndrome: Will the Real Alexander Hamilton Please Stand Up?*, 11 REV. AM. HIST. 51, 52 (1983).

67. RON CHERNOW, *ALEXANDER HAMILTON* 5 (2004).

68. Peter R. Henriques, *The Great Collaboration: The Increasingly Close Relationship Between George Washington and Alexander Hamilton*, in *SONS OF THE FATHER: GEORGE WASHINGTON AND HIS PROTÉGÉS* 189, 191 (Robert M.S. McDonald ed., 2013).

69. Douglas Ambrose, *Introduction: The Life and Many Faces of Alexander Hamilton*, in *THE MANY FACES OF ALEXANDER HAMILTON: THE LIFE AND LEGACY OF AMERICA’S MOST ELUSIVE FOUNDING FATHER* 1, 2–3 (Douglas Ambrose & Robert W.T. Martin eds., 2006).

70. Harold Larson, *Alexander Hamilton: The Fact and Fiction of His Early Years*, 9 WM. & MARY Q. 139, 139–151 (1952) (reviewing the facts and circumstances of Hamilton’s birth and early childhood).

71. ROBERT A. MCCAUGHEY, *STAND COLUMBIA: A HISTORY OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, 1754–2004*, at 56 (2003).

72. See MICHAEL E. NEWTON, *ALEXANDER HAMILTON: THE FORMATIVE YEARS 134–152* (2015).

73. Walter Russell Mead, *First Principles*, FOREIGN AFF., July–Aug. 2004, at 133–134.

74. Hamilton continued to serve as Washington’s principal ghost writer during his presidency. JAY M. SHAFRITZ & CHRISTOPHER P. BORICK, *CASES IN PUBLIC ADMINISTRATION: FROM ANCIENT TIMES TO THE PRESENT* 205 (reprint ed. 2016); WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937*, at 142 (1998).

75. Broadus Mitchell, *Hamilton’s Quarrel with Washington, 1781*, 12 WM. & MARY Q. 199, 199–216 (1955).

beginning in 1783, Hamilton practiced law<sup>76</sup> and helped found and manage one of America's most important early banks, the Bank of New York.<sup>77</sup>

In the latter 1780s, Hamilton entered public life as he campaigned for a constitutional convention that might frame a better governing arrangement for the newly-independent states than the clearly inadequate Articles of Confederation.<sup>78</sup> He was a participant in the Constitutional Convention in Philadelphia in the summer of 1787.<sup>79</sup> He offered a proposal for a powerful central government that was soundly defeated.<sup>80</sup> He indicated a preference for the total subordination of the states to the federal government, but realized that this goal could not be achieved.<sup>81</sup> He advocated also for a powerful chief executive serving an unlimited term who could appoint and remove the governors of the individual states.<sup>82</sup> Hamilton was on the losing side of all of these propositions but still reconciled himself to the Constitution's final version.

Indeed, not only did Hamilton make peace with the new Constitution, he became one of its principal champions.<sup>83</sup> He played an indispensable role in securing its ratification.<sup>84</sup> His essays on behalf of ratification, which form an integral part of *The Federalist Papers*, proved to be highly persuasive.<sup>85</sup> With the Constitution ratified, George Washington invited Hamilton to join his Cabinet as Secretary of the Treasury.<sup>86</sup>

76. Paul Finkelman, *Alexander Hamilton, Esq.: Founding Father as Lawyer*, 9 AM. B. FOUND. RES. J. 229, 229 (1984) (book review).

77. BRIAN PHILLIPS MURPHY, *BUILDING THE EMPIRE STATE: POLITICAL ECONOMY IN THE EARLY REPUBLIC* 36–55 (2015).

78. In a series of newspaper essays, Hamilton made the case to replace the Articles of Confederation beginning in the early 1780s. SHELDON D. POLLACK, *WAR, REVENUE, AND STATE BUILDING: FINANCING THE DEVELOPMENT OF THE AMERICAN STATE* 165–167 (2009); Thomas K. McCraw, *The Strategic Vision of Alexander Hamilton*, 63 AM. SCHOLAR 31, 43–44 (1994).

79. JOHN CHESTER MILLER, *ALEXANDER HAMILTON AND THE GROWTH OF A NEW NATION* 151–170 (Transaction Publishers 2004) (1959).

80. *Id.* at 159–161.

81. Alexander Hamilton, *Constitutional Convention. Remarks on the Abolition of the States (June 19, 1787)*, in 4 THE PAPERS OF ALEXANDER HAMILTON 211, 211–212 (Harold C. Syrett, ed., 1962).

82. Alexander Hamilton, *Constitutional Convention. Plan of Government (June 18, 1787)*, in THE PAPERS OF ALEXANDER HAMILTON, *supra* note 81, at 207, 207–211.

83. John Dunn, *Unmanifest Destiny*, in THE FEDERALIST PAPERS 483, 485–486 (Ian Shapiro ed., 2009).

84. See Dan T. Coenen, *A Rhetoric for Ratification: The Argument of The Federalist and Its Impact on Constitutional Interpretation*, 56 DUKE L.J. 469, 477–481 (2006).

85. Brannon P. Denning, *Publius for All of Us*, 26 CONST. COMMENT. 75, 93 (2009) (book review).

86. Michael W. McConnell, *What Would Hamilton Do?*, 35 HARV. J.L. & PUB. POL'Y 259, 265 (2012); Naomi Caiden, *To Build a Nation*, 66 PUB. ADMIN. REV. 291, 291 (2006) (book review).

## B. *Hamilton's Proposal for the Bank of the United States*

As Secretary of the Treasury, President Washington entrusted Hamilton with the task of putting the new nation's economic house in order.<sup>87</sup> But Hamilton saw his role as something even larger; he wished to create an engine of economic growth for the United States.<sup>88</sup> His proposal for the creation of the Bank of the United States was one aspect of this larger ambition.<sup>89</sup>

### 1. *The Sources of Hamilton's Banking Theory*

European models were available for Hamilton to consult. The Bank of England was clearly Hamilton's most immediate model.<sup>90</sup> Founded in 1694 as a means of making more efficient the process of tax collection,<sup>91</sup> the Bank of England was a joint-stock company whose shares were privately owned but subject to substantial parliamentary oversight.<sup>92</sup>

By the late eighteenth century, the Bank had assumed numerous functions, both public and private.<sup>93</sup> It collected taxes and disbursed governmental remittances, thus smoothing and making regular the system of governmental finance.<sup>94</sup> It helped to finance the British war machine, both by its assumption of government debt and by its ability to facilitate payments "to overseas spheres of military operations."<sup>95</sup> Through its extension of credit and its sophisticated use of bank notes and bills of exchange—

87. To that end, he submitted to Congress his *First Report on the Public Credit*, January 9, 1790, in which he drew from the British experience with its national debt to issue government bonds. On December 5, 1791, he submitted to Congress his *Report on Manufactures*, which proposed a system of tariffs and subsidies as means of protecting and building domestic industry. See generally Claire Priest, *Law and Commerce, 1580–1815*, in 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 400, 438 (Michael Grossberg & Christopher Tomlins eds., 2008) (discussing the *First Report on Credit*); Daniel J. Gifford, *Trade and Tensions*, 15 MINN. J. INT'L L. 297, 299 (2006) (discussing the nineteenth-century success of Hamilton's program of tariffs and subsidies).

88. ROBERT E. WRIGHT & RICHARD SYLLA, GENEALOGY OF AMERICAN FINANCE 1 (2015).

89. Alexander Hamilton also submitted to Congress a *Report on Manufactures*, which advocated for the adoption of tariffs and other protectionist policies and which has been called "one of the most impressive pieces of writing in political economy (i.e., economics applied to statecraft) in our literature." ANDREA MANESCHI, COMPARATIVE ADVANTAGE IN INTERNATIONAL TRADE: A HISTORICAL PERSPECTIVE 76 (1998) (quoting Louis M. Hacker, *The Report on Manufacturers*, 19 HISTORIAN 144, 164–165 (1957) (alteration in original)).

90. RICHARD S. GROSSMAN, UNSETTLED ACCOUNT: THE EVOLUTION OF BANKING IN THE INDUSTRIALIZED WORLD SINCE 1800, at 223–224 (2010).

91. GLYN DAVIES, HISTORY OF MONEY 259 (3d. ed. 2002).

92. See J. SAMUEL BARKIN, SOCIAL CONSTRUCTION AND THE LOGIC OF MONEY: FINANCIAL PREDOMINANCE AND INTERNATIONAL ECONOMIC LEADERSHIP 74 (2003).

93. W.T.C. King, *The Bank of England*, 15 ECON. HIST. REV. 67, 68–69 (1945); J. H. Clapham, *The Private Business of the Bank of England, 1744–1800*, 11 ECON. HIST. REV. 77 (1941) (detailing the private role played by the Bank in English financial life).

94. H.V. Bowen, *The Bank of England During the Long Eighteenth Century*, in THE BANK OF ENGLAND: MONEY, POWER, AND INFLUENCE 1694–1994, at 1, 10–11 (Richard Roberts & David Kynaston eds., 1995).

95. *Id.* at 10; HILTON L. ROOT, THE FOUNTAIN OF PRIVILEGE: POLITICAL FOUNDATIONS OF MARKETS IN OLD REGIME FRANCE AND ENGLAND 188–189 (1994); William Roberds & François

which circulated as currency—it greatly increased the money supply.<sup>96</sup> And it was even hoped that the Bank might provide a source of stability in the event of financial panic.<sup>97</sup>

If Hamilton looked to the United Kingdom for examples of successful banks, he also turned to Britain for supportive economic theory, which he found in the work of Adam Smith.<sup>98</sup> In his writing on banking and credit, Smith was concerned in the first instance with explaining how gold and silver related to the larger economic order he envisioned. Smith took a fairly skeptical view of these precious metals' ability to lubricate the engines of economic growth.<sup>99</sup> He knew that they were generally accepted as expressions of value and he did not mean to challenge their primacy, but Smith still chose to emphasize their weaknesses. He argued that gold and silver were inert, dead stock, incapable of growth.<sup>100</sup> They were things, objects, nothing more, and were too inherently expensive, difficult, and cumbersome to use or to circulate as currency in a sophisticated economy.<sup>101</sup>

What Smith sought was a mechanism that might stimulate growth and he found that in the borrowing and lending practices of banks. "A particular banker lends among his customers his own promissory notes," Smith wrote.<sup>102</sup> These notes might be redeemable for gold or silver, though Smith believed that redemption would only rarely happen.<sup>103</sup> Rather, he intended that the largest portion of bank notes circulate as money, and by circulating, they would expand the value of the gold and silver that secure them.<sup>104</sup> The whole system, Smith asserted, depended on trust, but where bankers secured the trust of their users, they might safely lend more than their reserves

R. Velde, *Early Public Banks II: Banks of Issue*, in *MONEY IN THE WESTERN LEGAL TRADITION: MIDDLE AGES TO BRETTON WOODS* 465, 471 (David Fox & Wolfgang Ernst eds., 2016).

96. CHRISTINE DESAN, *MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM* 361 (2014); 1 JOHN CLAPHAM, *THE BANK OF ENGLAND: A HISTORY 1694–1797*, at 221–223 (1945); see generally ULRICH BINDSEIL, *MONETARY POLICY IMPLEMENTATION: THEORY, PAST, PRESENT* 109 (2004).

97. By the latter eighteenth century, the system of public finance had become sufficiently stable that the solvency of the government was no longer doubted. Julian Hoppit, *Financial Crises in Eighteenth-Century England*, 39 *ECON. HIST. REV.* 39, 50 (1986). Still, panics in the private sector occurred. *Id.* at 54–56.

98. M.L. BURSTEIN, *STUDIES IN BANKING THEORY, FINANCIAL HISTORY, AND VERTICAL CONTROL* 122 (1988); CHERNOW, *supra* note 67, at 347.

99. Carl C. Winnerlind, *The Humean Paternity to Adam Smith's Theory of Money*, 8 *HIST. ECON. IDEAS* 77, 90–91 (2000).

100. VINCENT BLADEN, *FROM ADAM SMITH TO MAYNARD KEYNES: THE HERITAGE OF POLITICAL ECONOMY* 59 (1974).

101. WILLIAM FARINA, *THE AFTERLIFE OF ADAM SMITH: THE INFLUENCE, INTERPRETATION, AND MISINTERPRETATION OF HIS ECONOMIC PHILOSOPHY, 1760S–2010S*, at 105 (2015).

102. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 277 (Edwin Cannan ed., 1937).

103. Maria Pia Paganelli, *Adam Smith and the History of Economic Thought: The Case of Banking*, in *ADAM SMITH: HIS LIFE, THOUGHT, AND LEGACY* 247, 249–252 (Ryan Patrick Hanley ed., 2016).

104. *Id.*; ARIE ARNON, *MONETARY THEORY AND POLICY FROM HUME AND SMITH TO WICKSELL: MONEY, CREDIT, AND THE ECONOMY* 38–39 (2011).



in gold and silver.<sup>105</sup> Thus Smith summarized the process by which fractional reserve banking operated.<sup>106</sup> These ideas, some derived from a reading of Smith's *Wealth of Nations*, some independently arrived at, were current in the America of the 1780s.<sup>107</sup>

Hamilton found yet other sources of insight on the European continent. There was Holland, whose banking system for much of the eighteenth century enjoyed the "position [of] the world's trading and financial centre."<sup>108</sup> The Bank of Amsterdam played a crucial role in public finance<sup>109</sup> and was an inspiration even to Adam Smith.<sup>110</sup> This Bank was nearly a century older than the Bank of England and engaged in many of the same practices,<sup>111</sup> although in 1790 and 1791—the years Hamilton made the case for his Bank—Amsterdam had fallen into a short-lived crisis.<sup>112</sup> Hamilton had even read widely in the works of Jacques Necker, the reform-minded French minister of finance.<sup>113</sup>

## 2. *Hamilton's Report on a National Bank*

Hamilton paid due acknowledgment to these sources in his "Report on a National Bank."<sup>114</sup> "Holland, England, and France" all provided examples of successful banks of the sort that Hamilton now proposed.<sup>115</sup> He opened his justification for the Bank by leaning heavily on Adam Smith. "Gold and silver, when they are employed merely as instruments of exchange and

105. MARK BLYTH, *AUSTERITY: THE HISTORY OF A DANGEROUS IDEA* 110 (2013); Michael Mussa, *Adam Smith and the Political Economy of a Modern Financial Crisis*, 44 *BUS. ECON.* 3, 4–5 (2009).

106. JERRY EVENSKY, *ADAM SMITH'S WEALTH OF NATIONS: A READER'S GUIDE* 69 (2015); Hugh Rockoff, *Adam Smith on Money, Banking, and the Price Level*, in *THE OXFORD HANDBOOK OF ADAM SMITH* 307, 308–310 (2013).

107. JOSE R. TORRE, *THE POLITICAL ECONOMY OF SENTIMENTS: PAPER CREDIT AND THE SCOTISH ENLIGHTENMENT IN EARLY REPUBLIC BOSTON* 40–49 (reprt. ed. 2016).

108. YOUSSEF CASSIS & PHILIP L. COTTRELL, *PRIVATE BANKING IN EUROPE: RISE, RETREAT, AND RESURGENCE* 64 (2015).

109. Wantje Fritschy & René van der Voort, *From Fragmentation to Unification: Public Finance, 1700–1914*, in *A FINANCIAL HISTORY OF THE NETHERLANDS* 64, 70–75 (Marjolein 'T Hart et al. eds., 1997).

110. Charles P. Kindleberger, *Was Adam Smith a Monetarist or a Keynesian?*, 19 *BUS. ECON.* 5, 6 (1984).

111. Ned W. Downing, *Transatlantic Paper and the Emergence of the American Capital Market*, in *THE ORIGINS OF VALUE: THE FINANCIAL INNOVATIONS THAT CREATED MODERN CAPITAL MARKETS* 271, 283 (2005).

112. JAN DE VRIES & AD VAN DER WOUDE, *THE FIRST MODERN ECONOMY: SUCCESS, FAILURE, AND PERSEVERANCE OF THE DUTCH ECONOMY, 1500–1815*, at 129–133 (1997).

113. Donald F. Swanson & Andrew P. Trout, *Alexander Hamilton, "the Celebrated Mr. Necker," and Public Credit*, 47 *WM. & MARY Q.* 422, 424–425 (1990). Necker had attempted a thorough-going modernization of French public finance in the years before the Revolution but was attacked for his nonconstitutional overreach. P.M. JONES, *REFORM AND REVOLUTION IN FRANCE: THE POLITICS OF TRANSITION, 1774–1791*, at 111–115 (1995).

114. 2 *ANNALS OF CONG.* 2082–2112 (1790).

115. *Id.* at 2083.

alienation, have been not improperly denominated dead stock . . . .”<sup>116</sup> But if precious metals were deposited in a bank, “to become the basis of a paper circulation . . . they then acquire life, or, in other words, an active and productive quality.”<sup>117</sup>

Hamilton drove the point home with a hypothetical question. Suppose a merchant accumulated gold but kept that gold locked away for safe-keeping “in his chest.”<sup>118</sup> It sits lifeless in the dark. But deposit it in a bank and it will generate a profit.<sup>119</sup>

Why? In answering this question, Hamilton got to the heart of banking practice. He again echoed the language of Adam Smith’s endorsement of fractional reserve banking.<sup>120</sup> A bank issued notes on the basis of the gold and silver deposits it held in reserve.<sup>121</sup> And because of the trust that the holders of these notes had in the solvency of the bank, the general public felt free to exchange these notes as currency.<sup>122</sup>

Certainly, the holders of bank notes could and sometimes did seek to redeem their notes and claim an equivalent in gold or silver.<sup>123</sup> In practice, however, Hamilton recognized that such redemptions rarely occurred;<sup>124</sup> more routinely, holders “pass [notes] . . . to some other hand as an equivalent [for gold].”<sup>125</sup> This, Hamilton explained, was the heart of good banking practice.<sup>126</sup> Banks might thus lend larger sums of money than the reserves they had accumulated. The money supply would thereby be expanded and commercial activity stimulated. And so Hamilton might realize his larger ambition, which was to “create legal and economic institutions congenial to taking [deposits] and investing them in manufacturing and trade.”<sup>127</sup> Hamilton dreamt that the United States might one day become a powerful commercial republic that could compete with the European powers,<sup>128</sup> and the Bank of the United States was central to that larger vision.

116. *Id.* at 2083.

117. *Id.*

118. *Id.*

119. *Id.* at 2083–2084.

120. G. Thomas Woodward, *Money and the Federal Reserve System: Myth and Reality*, in *FEDERAL RESERVE SYSTEM: BACKGROUND, ANALYSES, BIBLIOGRAPHY* 73, 78 (George B. Grey ed., 2002) (explaining the modern practice of fractional reserve banking).

121. 2 *ANNALS OF CONG.* 2084 (1790).

122. *Id.*

123. *Id.*

124. *Id.* (“Though liable to be redrawn at any moment, experience proves, that the money so much oftener changes proprietors than place, and that what is drawn out is generally so speedily replaced as to authorize the counting upon the sums deposited as an effective fund.”).

125. 2 *ANNALS OF CONG.* 2084 (1790) (“And in this manner[,]” Hamilton continued, “the credit keeps circulating, performing in every stage the office of money.”).

126. *Id.*

127. David McGowan, *Ethos in Law and History: Alexander Hamilton, the Federalist, and the Supreme Court*, 85 *MINN. L. REV.* 755, 759 (2001).

128. JOHN KANE, *BETWEEN VIRTUE AND POWER: THE PERSISTENT MORAL DILEMMA OF U.S. FOREIGN POLICY* 37–39 (2008).

Still, Hamilton anticipated an objection. Might not a panic wipe out the Bank? Hamilton's response was to insist that he had put in place the prerequisites to earn and maintain "confidence."<sup>129</sup> He assured Congress that the Bank would not act precipitously. Its lending would be "gradual."<sup>130</sup> Its management would be prudent and guided by "all the maxims of a reasonable circumspection."<sup>131</sup> And finally, Hamilton promised, there would be available to the Bank "auxiliary capital" in the event of crisis.<sup>132</sup>

Having described the basic principles of banking and offered the mandatory assurances, Hamilton shifted focus by attempting to demonstrate the benefits a major national bank would confer on the new United States.<sup>133</sup> Money will not lie idle.<sup>134</sup> There will never be "intermission of demand."<sup>135</sup> Merchants will borrow and invest the funds wisely. Banks will realize a profit through interest and distribute that profit to depositors. "And thus, by contributing to enlarge the mass of industrious and commercial enterprise, banks become nurseries of national wealth—a consequence as satisfactorily verified by experience as it is clearly deducible in theory."<sup>136</sup>

One modern economic commentator has observed, regarding Hamilton's agenda, that "credit [was] a tool for enabling investment for growth."<sup>137</sup> He "wanted to industrialize the country, and he was prepared to borrow money to invest in infrastructure."<sup>138</sup> Nowhere were these propositions better borne out than in Hamilton's economic justifications for the Bank of the United States.

Commercial advantage—an eighteenth-century writer might have used language like this to describe Hamilton's proposal. Hamilton wished to have Congress establish a bank to provide advantages to promote a particular way of life and form of wealth.<sup>139</sup> And such an observer might then ask the next question, where and how in the Constitution could such a use of government power find justification?

And Hamilton would have deflected the question, pointing to yet other compelling reasons that a national bank might serve the public good. Congress should approve the Bank, he argued, because it might prove useful

129. 2 ANNALS OF CONG. 2085 (1790).

130. *Id.*

131. *Id.*

132. *See id.*

133. *Id.*

134. *Id.*

135. 2 ANNALS OF CONG. 2085 (1790).

136. *Id.*

137. ROBERT U. AYRES, *THE BUBBLE ECONOMY: IS SUSTAINABLE GROWTH POSSIBLE?* 78 (2014).

138. *Id.*

139. JAMES WILLARD HURST, *A LEGAL HISTORY OF MONEY IN THE UNITED STATES, 1774–1970*, at 88 (Beard Books 2001) (1973); Andrew Shankman, "A New Thing on Earth": Alexander Hamilton, Pro-Manufacturing Republicans, and the Democratization of the American Political Economy, 23 J. EARLY REPUBLIC 323, 331–334 (2003).

during fiscal crises. Such a Bank, he contended, might provide “[g]reater facility to the Government in obtaining pecuniary aids, especially in sudden emergencies.”<sup>140</sup> There were two reasons Hamilton believed a national bank helpful in such circumstances: first, it would be large, well-capitalized, and trusted.<sup>141</sup> It would therefore enjoy a greater level of confidence than other financial institutions.<sup>142</sup> Secondly, it would enjoy an “intimate connexion of interest [with] the Government,” and so would be well-positioned to act as an instrument of policy where the “public safety and welfare” might otherwise be at risk.<sup>143</sup>

Only after justifying the establishment of a national bank by reference to its importance to commercial expansion and financial stability, did Hamilton come to the question of the services such a bank might provide to the government. A bank with freely circulating bank notes would become an important tool for the payment of taxes from distant locations. “[T]he transportation and re-transportation of the metals [i.e., gold and silver] are obviated, and a more convenient and more expeditious medium of payment is substituted.”<sup>144</sup>

This final justification made sense in light of prevailing taxation practices of 1791. Custom and excise taxes assessed against trade and commercial activities constituted the largest share of the tax burden in 1791,<sup>145</sup> although Congress reserved to itself the right, through constitutional provision, to impose “direct taxation by apportionment” on the States.<sup>146</sup>

In advancing this tax-based argument for the Bank, Hamilton might have invoked the Constitution or the government’s power to tax, but he chose not to. He rather focused, once again, principally on the question of utility: what was the best, most convenient way by which taxes might be paid?

Hamilton then closed his case with a series of additional utilitarian justifications for the Bank, which filled the remainder of his Report. Banks ensured punctuality and predictability in repayment of credit, which redounded to the benefit of merchants.<sup>147</sup> Yes, he conceded, a bank “serves to counteract that rigorous necessity for the metals as a medium of circulation,”<sup>148</sup> but he reiterated that this was a beneficial aspect to banking and not a weakness.<sup>149</sup> And Hamilton repeated and elaborated on his point that

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140. 2 ANNALS OF CONG. 2085 (1790).

141. *Id.*

142. *Id.*

143. *Id.* at 2085–2086.

144. *Id.* at 2086.

145. FREDERIC CLEMSON HOWE, TAXATION AND TAXES IN THE UNITED STATES UNDER THE INTERNAL REVENUE SYSTEM, 1791–1895, at 12 (1896).

146. *Id.* at 11.

147. 2 ANNALS OF CONG. 2087–2088 (1790).

148. *Id.* at 2092.

149. *Id.*

“[t]he support of industry” was of benefit to the whole of society.<sup>150</sup> Again, there was not even a nod in the direction of any express constitutional provisions.

Hamilton prepared a draft of legislation that he planned to submit with the Report.<sup>151</sup> As he intended it, the Bank would be initially capitalized at ten million dollars, eight million dollars provided by private investors, and another two million from the federal government.<sup>152</sup> Its board of directors would consist of twenty-five “private individuals, not public appointees.”<sup>153</sup> A legislative drafting committee, however, was appointed to prepare a final version of the bill that was submitted to Congress for approval. By the terms of the legislation in its final form, the Bank was to take the form of a corporation whose shareholders might be “any person, co-partnership, or body politic.”<sup>154</sup> Only stockholders who were also citizens of the United States were eligible to serve on the board of the directors.<sup>155</sup> The legislation, however, faced an uncertain fate in Congress.

### C. *Hamilton: Commerce, Nationhood, and the Constitution*

In light of the constitutional challenge that Hamilton encountered in Congress, one is entitled to ask why he failed to offer a constitutional defense of his proposal. Did he regard the constitutionality of the Bank as an easy case? Or did he not wish to tip his hand on what he knew would be a bruising battle? Surely, though, as one of the leading lawyers of his day, Hamilton must have known that others would have viewed his proposal as constitutionally problematic.

A clue to how Hamilton must have understood the Bank within the American constitutional framework comes from his activities in the time immediately before and after the Constitutional Convention. A strong, centralized American nation tightly integrated through expanding the possibilities for commerce—these were two of Alexander Hamilton’s principal political goals in the middle 1780s, even before the drafting or the ratification of the Constitution.<sup>156</sup> And Hamilton was eager to promote these twin

150. *Id.* at 2092–2093.

151. Alexander Hamilton, Draft of an Act to Incorporate the Bank of the United States, in 7 *The Papers of Alexander Hamilton*, *supra* note 81, at 399, 399–406.

152. THOMAS K McCRAW, *THE FOUNDERS AND FINANCE: HOW HAMILTON, GALLATIN, AND OTHER IMMIGRANTS FORGED A NEW ECONOMY* 112–113 (2012).

153. *Id.* at 113.

154. 2 *ANNALS OF CONG.* 2375 (1790) (“An Act to Incorporate the Subscribers to the Bank of the United States.”).

155. *Id.* This provision simultaneously aimed at the prevention of two foreseeable problems: foreign domination of the Bank, and the domination of the Banks by either private partnerships or governmental shareholders.

156. Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress’s Power to Regulate Commerce*, 25 *HARV. J.L. & PUB. POL’Y* 849, 863–864 (2002); Christine Margerum Harlen, *A Reappraisal of Classical Economic Nationalism and Economic Liberalism*,

objectives even in the early planning stages for the Constitutional Convention.

One might thus consider Hamilton's activities at the Annapolis Convention of 1786 as an expression of these ambitions.<sup>157</sup> This Convention proved to be an important precursor to the Constitutional Convention, despite its modest attendance.<sup>158</sup> Indeed, had its proceedings not eventuated into something far grander, critics would have dismissed it as one more obscure, failed attempt at national unity.

The Convention consisted of twelve representatives from five states, called together to remedy defects under the Articles of Confederation,<sup>159</sup> especially as they pertained to the "Trade and Commerce of the United States" and the creation of "an uniform System in their Commercial Interest . . . and permanent Harmony."<sup>160</sup>

In preparing the Convention's report and recommendations, Hamilton was particularly insistent on several crucial aspects of their assigned duties—including especially the promotion of unity and harmony among the states and the cultivation of commerce and trade.<sup>161</sup> He also took the opportunity of the Convention to urge the delegates to call on their states to convoke a second convention the following year—an assembly that would transform itself into the meeting we know as the Constitutional Convention.<sup>162</sup>

Hamilton did not abandon his concerns for unity and commerce at the Constitutional Convention or afterwards. Indeed, they count among the central organizing principles of Hamilton's contributions to *The Federalist Papers*. And since these themes played an important role in his subsequent efforts to justify the Bank, it is worth considering them here.

One might begin with Hamilton's conception of national union. While it might seem far-fetched today, Hamilton worried that if the Constitution were not ratified, war would soon follow among the states.<sup>163</sup> "[I]f these states should either be wholly disunited, or only united in partial confedera-

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43 INT'L STUD. Q. 733, 738–742 (1999); see also Robert J. Delahunty, *From Ancient Liberty to the Welfare State*, 1994 PUB INT. L. REV. 181, 181 n.2 (1994) (book review).

157. Harry P. Lawther, *The Making of the Federal Constitution*, 11 TEX. L. REV. 67, 69 (1932).

158. JOHN R. VILE, CONVENTIONAL WISDOM: THE ALTERNATE ARTICLE V MECHANISM FOR PROPOSING AMENDMENTS TO THE U. S. CONSTITUTION 10 (2016).

159. Robert A. Feer, *Shays's Rebellion and the Constitution: A Study in Causation*, 42 NEW ENG. Q. 388, 391–392 (1969).

160. Alexander Hamilton, Appointment as Commissioner to the Annapolis Convention, in 3 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 81, at 666.

161. Louis Ottenberg, *A Fortunate Fiasco: The Annapolis Convention of 1786*, 45 A.B.A. J. 834, 878–879 (1959).

162. KEITH L. DOUGHERTY, COLLECTIVE ACTION UNDER THE ARTICLES OF CONFEDERATION 142 (2001); VILE, *supra* note 158, at 10.

163. See, e.g., THE FEDERALIST NOS. 6, 7, 18 (Alexander Hamilton).

cies,” Hamilton wrote, “the subdivisions into which they might be thrown would have frequent and violent contests with each other.”<sup>164</sup>

Hamilton looked to historical sources to justify this proposition.<sup>165</sup> Drawing deeply from classical antecedents, Hamilton observed that even “commercial republics”—he gave the examples of Athens and Carthage—fought wars with their neighbors.<sup>166</sup> He feared, he confessed, “an infinity of little jealous, clashing, tumultuous commonwealths, the wretched nurseries of unceasing discord, and the miserable objects of universal pity or contempt.”<sup>167</sup> Without a strong union committing them to larger objectives, the leaders of the various states and regions were at risk of descending into just such a cacophony of mayhem and strife.<sup>168</sup>

Only a little less compelling than his fear of internal conflict, was his dread of insurrection. Shays’ Rebellion was never far from his mind.<sup>169</sup> “An insurrection,” Hamilton wrote, “whatever be its immediate cause, eventually endangers all government.”<sup>170</sup> States, with their limited powers, would find it difficult to contend with rebellion: “A turbulent faction in a State,” Hamilton opined, could easily catch fire and threaten the established government, even posing a fair risk of overturning it.<sup>171</sup> If left unchecked, the spirit of rebellion might thus contaminate “the people” and even “taint[ ]” the minds and “spirit” of their duly constituted “representat[ives].”<sup>172</sup>

War between the states and consuming class-based insurrection—these, plainly, were Hamilton’s two greatest fears, and he argued that a centralized, integrated Union was the answer to these concerns. Thus, in the opening paragraph of *Federalist No. 1*, Hamilton declared that the Constitution was intended to support and sustain “the existence of the UNION, the safety and welfare and parts of which it is composed, the fate of an empire in many respects the most interesting in the world.”<sup>173</sup> In *Federalist No. 9*, Hamilton added: “A FIRM Union will be of the utmost moment to the peace and liberty of the States as a barrier against domestic faction and

164. THE FEDERALIST NO. 6 (Alexander Hamilton).

165. “To look for a continuation of harmony between a number of independent, unconnected sovereignties, situated in the same neighborhood, would be to disregard the uniform course of human events, and to set at defiance the accumulated experience of ages.” THE FEDERALIST NO. 6 (Alexander Hamilton).

166. *Id.* The Amphictyonic League, which was a semi-mythical league of pre-classical Greek city-states whose members waged continuous war against one another, was a constant referent point for Hamilton. CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT 105 (1994).

167. THE FEDERALIST NO. 9 (Alexander Hamilton).

168. See Daniel J. Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653, 673–674 (2005) (reviewing LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004)).

169. THE FEDERALIST NOS. 6, 21, 74 (Alexander Hamilton).

170. THE FEDERALIST NO. 28 (Alexander Hamilton).

171. THE FEDERALIST NO. 27 (Alexander Hamilton).

172. THE FEDERALIST NO. 74 (Alexander Hamilton).

173. THE FEDERALIST NO. 1 (Alexander Hamilton).

insurrection.”<sup>174</sup> “Shall the Union be constituted the guardian of the common safety?”<sup>175</sup> Hamilton asked rhetorically. He knew the answer: A strong Union and only a strong Union, Hamilton was confident, would ensure “political safety and happiness.”<sup>176</sup>

But Hamilton believed that more was needed to ensure the Union’s success than political integration. The new Union must also enjoy commercial vitality.<sup>177</sup> Hamilton listed protection, preservation, and expansion of both domestic and international commerce among the purposes the Constitution served.<sup>178</sup> He pointed to prevailing economic conditions to illustrate his point. The United States, governed as it was under the Articles of Confederation, had proven incapable of attracting international trading partners.<sup>179</sup> Indeed, “[n]o nation acquainted with the nature of our political association would be unwise enough to enter into stipulations with the United States, by which they conceded privileges of any importance . . . .”<sup>180</sup> At the same time, Hamilton observed, there were foreign powers who appreciated the United States’ economic potential and sought to exploit the present vacuum to their own advantage:<sup>181</sup> “Spain,” “France,” and “Britain” all had designs on America’s national wealth.<sup>182</sup>

Approval of the Constitution, therefore, and the formation of a tighter Union, were the appropriate responses to these threats. A single American nation would be empowered to deal as an equal with “Great Britain,” the “Dutch,” and the rest of Europe.<sup>183</sup> Furthermore, Hamilton was convinced that in the world of international economic competition, the United States, under the new Constitution, would emerge triumphant: “[T]he natural strength and resources of the country, directed to a common interest, would baffle all the combinations of European jealousy to restrain our growth.”<sup>184</sup> And not only would the Constitution drive success in the international marketplace, it would ensure economic vitality at home: “The prosperity of commerce is now perceived and acknowledged, by all enlightened statesmen, to be the most useful as well as the most productive source of national

174. THE FEDERALIST NO. 9 (Alexander Hamilton).

175. THE FEDERALIST NO. 23 (Alexander Hamilton).

176. THE FEDERALIST NO. 15 (Alexander Hamilton).

177. Amy M. Petragani, Comment, *The Dormant Commerce Clause: On Its Last Leg*, 57 ALB. L. REV. 1215, 1239 (1994); Richard Alexander Izquierdo, *The Architecture of Constitutional Time*, 23 WM. & MARY B. RTS. J. 1089, 1124 (2015).

178. THE FEDERALIST NO. 23 (Alexander Hamilton) (“The principal purposes to be answered by Union are these . . . the regulation of commerce with other nations and between the States; the superintendance of our intercourse, political and commercial, with foreign countries.”).

179. THE FEDERALIST NO. 22 (Alexander Hamilton).

180. *Id.*

181. THE FEDERALIST NO. 11 (Alexander Hamilton).

182. *Id.*

183. *Id.*

184. *Id.*



wealth, and has accordingly become a primary object of their political cares.”<sup>185</sup>

Hamilton conceded that his theory of the Constitution was expansive, but he believed that the “necessary and proper” clause conferred on the federal government the authority to enact the program he outlined.<sup>186</sup> He acknowledged that this was a “sweeping clause,”<sup>187</sup> but it was not without its limits. Laws enacted under the necessary and proper clause still had to be judged by reference to the underlying substantive “powers upon which it is founded.”<sup>188</sup> And where the legislature was deemed to have overstepped its bounds, it belonged to the people to “take such measures to redress the injury done to the constitution, as the exigency may suggest and prudence justify.”<sup>189</sup>

In his Report to Congress, Hamilton made no attempt to justify the Bank of the United States under the necessary and proper clause. Undoubtedly, he did not feel the need to do so. As he elucidated the Constitution, it stood for national unity and the promotion of commerce. Congress, by Hamilton’s reasoning, had the inherent power to facilitate these ends.<sup>190</sup> And since the Bank served these purposes, for Hamilton in December 1790, this surely must have seemed constitutionally sufficient.

### III. CONGRESS DEBATES HAMILTON’S BANK OF THE UNITED STATES

#### A. *The Opposition to the Bank*

##### 1. *The Personalities*

The House of Representatives, unlike the Senate,<sup>191</sup> debated the proposed Bank vigorously, and a record of that debate has been preserved. The opposition to the Bank bill was led by Hamilton’s one-time collaborator on *The Federalist Papers*, James Madison, who stood at the head of a group of Southern representatives united in their views that the Constitution did not permit the federal government to charter a national bank.

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185. THE FEDERALIST NO. 12 (Alexander Hamilton).

186. See THE FEDERALIST NO. 32 (Alexander Hamilton).

187. *Id.* The expression “sweeping clause” originated with anti-Federalist opponents of the Constitution as criticism of the seeming breadth of the necessary and proper clause. Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 270–271 (1993).

188. THE FEDERALIST NO. 32 (Alexander Hamilton).

189. THE FEDERALIST NO. 33 (Alexander Hamilton).

190. John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1047–1048 (2014).

191. On the Senate debate, see Klubes, *supra* note 19, at 23–25.

The personal contrasts between Madison and Hamilton were great. Madison had been born into the Virginia planter aristocracy.<sup>192</sup> Both his mother and his father had substantial holdings of real estate and slaves;<sup>193</sup> by the time Madison reached his maturity, his family had become the largest landowner in Orange County, Virginia.<sup>194</sup>

Madison was also a major slave-owner in his own right. "Between about 1783 and 1801, Madison owned a total of about 150 slaves, and in the early 1780s he was the largest single slave owner in [Orange] county."<sup>195</sup> While he opposed the African slave trade early in his political career,<sup>196</sup> he did little as President or afterwards to threaten the rights and privileges of the slave-holding class.<sup>197</sup>

The political system that Madison would have known, and within which he thrived, consisted of a dense honeycomb of county-wide aristocracies<sup>198</sup> that was governed at its apex by an oligarchy of large plantation owners.<sup>199</sup> Madison blended effortlessly into this hierarchy of caste and privilege even as he advocated for the vitality of republican forms of government.<sup>200</sup> He was further benefitted in career advancement by his large and well-connected extended family, of which Madison made full use to advance his own ambitions.<sup>201</sup>

At the Constitutional Convention of 1787, Madison was quick to promote Virginia's interests. This was especially apparent in Madison's advo-

192. SCOTT J. KESTER, *THE HAUNTED PHILOSOPHE: JAMES MADISON, REPUBLICANISM, AND SLAVERY* 15 (2008).

193. "By 1757 [when the future president was six], the Madison plantation had grown to over 4,000 acres, and James Sr. [Madison's father] was among the most prominent planters in Orange County. By 1782, the family owned at least 118 slaves." JOHN P. KAMINSKI, *THE GREAT VIRGINIA TRIUMVIRATE: GEORGE WASHINGTON, THOMAS JEFFERSON, AND JAMES MADISON* 153 (2010).

194. JACK RAKOVE, *REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA* 345 (2010).

195. DOUGLAS B. CHAMBERS, *MURDER AT MONTPELIER: IGBO AFRICANS IN VIRGINIA* 98 (2005).

196. JOHN P. KAMINSKI, *JAMES MADISON: CHAMPION OF LIBERTY AND JUSTICE* 37–38 (2006).

197. JEFF BROADWATER, *JAMES MADISON: A SON OF VIRGINIA AND A FOUNDER OF THE NATION* 198–201 (2012); Jeff Broadwater, *James Madison and the Dilemma of American Slavery*, in *A COMPANION TO JAMES MADISON AND JAMES MONROE* 306 (Stuart Leibiger ed., 2013). Although, to be sure, Madison revealed himself to be tortured by the threats slavery posed to the integrity of the Union. Thus, his response to the Missouri Compromise was to write an elegant allegory about a white husband and wife. The wife's left arm had become permanently dyed black, and the pair struggled to find ways to remain joined despite their differences. Robert J. Allison, "*From the Covenant of Peace, a Simile of Sorrow*": *James Madison's American Allegory*, 99 *V.A. MAG. HIST. & BIOGRAPHY* 327, 330–333 (1991).

198. RICHARD R. BEEMAN, *THE OLD DOMINION AND THE NEW NATION: 1788–1801*, at 28–55 (1972).

199. John M. Murrin, *In the Land of the Free and the Home of the Slave, Maybe There was Room Even for Deference*, 85 *J. AM. HIST.* 86, 90–91 (1998).

200. Robert A. Dahl, *James Madison: Republican or Democrat?*, 3 *PERSP. ON POL.* 439, 440–441 (2005).

201. RALPH LOUIS KETCHAM, *JAMES MADISON: A BIOGRAPHY* 6 (Univ. Press of Va. 1990) (1971).

cacy of what was known as the “Virginia Plan”—an outline for a new constitution to take the place of the Articles of Confederation.<sup>202</sup> Drafted by Madison and presented to the Convention by his Virginia associate Edmund Randolph,<sup>203</sup> this plan contained many of the elements that would come to make up the final text of the Constitution—coordinate branches of government, a strong executive, and a bicameral legislature.<sup>204</sup> But its use of proportional representation conferred on Virginia outsized political power, and this much at least of the Virginia Plan could not survive scrutiny.<sup>205</sup>

Madison was also, at least initially, not a friend of a strong doctrine of state autonomy. Another feature of the Virginia Plan—which similarly went down to defeat—was a proposal to confer on Congress the power “to negative all laws passed by the States, contravening in the opinion of the National Legislature the articles of Union.”<sup>206</sup> Had it been adopted, this proposal essentially would have given Congress the power to annul state legislation for its failure to conform to the Constitution.<sup>207</sup>

Still, Madison was sufficiently adroit to assume an important role in shepherding the final version of the Constitution through the Convention,<sup>208</sup> and he subsequently played an indispensable part in the drafting and approval of the Bill of Rights.<sup>209</sup> When Madison spoke about the Constitution, his voice carried authority even if, as shall be seen, others were not prepared to defer to his views.

Madison had several important collaborators in his fight against the Bank, all of them hailing from south of the Mason-Dixon Line and all of them members of the slave-owning, planter class. James Jackson (1757–1806) was something of a child prodigy. He arrived in Georgia at the age of fifteen in 1772 and by 1777 he was a member of “the state’s first constitutional convention, an amazing accomplishment for someone only

202. RICHARD J. ELLIS, *THE DEVELOPMENT OF THE AMERICAN PRESIDENCY* 215 (Routledge 2015) (2012).

203. KEVIN R.C. GUTZMAN, *JAMES MADISON AND THE MAKING OF AMERICA* 70–80 (2012).

204. Originally four coordinate branches of government were contemplated, but a proposed council of revision was quickly defeated. GERHARD CASPER, *SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD* 17 (1997).

205. LANCE BANNING, *FOUNDING VISIONS: THE IDEAS, INDIVIDUALS, AND INTERSECTIONS THAT CREATED AMERICA* 111–125 (Todd Estes ed., 2014).

206. Gordon Lloyd & Christopher Burkett, *James Madison and the Grand Convention: “The Great Difficulty of Representation,”* in *A COMPANION TO JAMES MADISON AND JAMES MONROE*, *supra* note 197, at 5, 17.

207. Of course, the Congress retains the power under the Supremacy Clause, which represented a dilution of the Madison position, to supersede state law, though not review it for constitutionality. See David A. Herrmann, Comment, *To Delegate or Not to Delegate—That is the Preemption: The Lack of Political Accountability in Administrative Preemption Defies Federalism Constraints on Government Power*, 28 PAC. L.J. 1157, 1161–1163 (1997).

208. For a balanced, somewhat critical assessment, see Harold S. Schultz, *James Madison: Father of the Constitution?*, 37 Q. J. LIBR. CONG. 215, 222 (1980).

209. Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 303–304 (1990).

twenty years old.”<sup>210</sup> He enjoyed a distinguished combat record during the American Revolutionary War<sup>211</sup> and afterwards grew rich purchasing land confiscated from loyalists.<sup>212</sup> He also practiced law and entered politics.<sup>213</sup>

Jackson spent only a single term in the House of Representatives, but during those two years he established himself as an uncompromising advocate for states' rights. He opposed the creation of inferior federal tribunals, arguing that a judicial system composed of the US Supreme Court working with state judiciaries would be adequate to the nation's needs.<sup>214</sup> He opposed the Bill of Rights<sup>215</sup> and proposed a constitutional amendment limiting the taxing power of the federal government.<sup>216</sup>

In his personal life, Jackson was a combative figure. He fought duels with other leading members of the Georgia bar,<sup>217</sup> and while governor, shot and killed his lieutenant governor.<sup>218</sup> Late in life, he confessed that he was prone to “violent passions,” but still declared that he was “patriotic and zealous for the preservation of those liberties America had so perseveringly obtained.”<sup>219</sup>

There was also Michael Jenifer Stone (1747–1812) of Maryland. He was born on a plantation known as “Equality,” on the southern Eastern Shore of Maryland, where his family had cultivated tobacco since the year 1648.<sup>220</sup> In the seventeenth century, planters in the area made use of a mixed labor force of indentured whites and enslaved African-Americans, but by the time Stone was born the tobacco workforce consisted entirely of slaves.<sup>221</sup>

Stone was a lawyer as well as a planter. He won a seat in Congress in an election in which he made it clear he would represent rural, plantation

210. Marie Sauer Lambremont, *Representative James Jackson of Georgia and the Establishment of the Southern States Rights Tradition in Congress*, in *INVENTING CONGRESS: ORIGINS AND ESTABLISHMENT OF THE FIRST FEDERAL CONGRESS* 191, 191 (Kenneth R. Bowling & Donald R. Kennon eds., 1999).

211. WILLIAM OMER FOSTER, SR., *JAMES JACKSON: DUELIST AND MILITANT STATESMAN, 1757–1806*, at 1–24 (1960).

212. *Id.* at 31–32.

213. George R. Lamplugh, “*Oh the Colossus! The Colossus!*”: *James Jackson and the Jeffersonian Republican Party in Georgia, 1796–1806*, 9 *J. EARLY REPUBLIC* 315, 316–317 (1989).

214. Lambremont, *supra* note 210, at 194; Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 *WISC. L. REV.* 39, 72 n.76 (1995).

215. Lambremont, *supra* note 210, at 195–196.

216. *Id.* at 196.

217. Alfred Holbrook, *James Jackson and Thomas Gibbons: Two Lawyer Statesmen of Georgia*, 15 *GA. B.J.* 309, 310 (1953).

218. JACK K. WILLIAMS, *DUELING IN THE OLD SOUTH: VIGNETTES OF SOCIAL HISTORY* 17 (1980).

219. Lilla M. Hawes, *Miscellaneous Papers of James Jackson, 1781–1798, Part II*, 37 *GA. HIST. Q.* 147, 160 (1953).

220. See generally JOHN G. HOLLANDSWORTH, JR., *PORTRAIT OF A SCIENTIFIC RACIST: ALFRED HOLT STONE OF MISSISSIPPI* 26–27 (2008).

221. See generally GLORIA L. MAIN, *TOBACCO COLONY: LIFE IN EARLY MARYLAND, 1650–1720*, at 105–106 (1982).

interests as against the urban center of Baltimore.<sup>222</sup> Once installed in the House, he proved to be a loyal servant of reactionary interests. Although the Constitution had made provision for the eventual cessation of the importation of slaves, Stone opposed legislative efforts to implement that clause.<sup>223</sup> Like Jackson, he opposed the creation of inferior federal courts, believing that a functioning federal judiciary threatened the independence of state-court judges<sup>224</sup> and was unnecessary to the functioning of the federal government.<sup>225</sup> He had come into Congress as a federalist but left Congress at the end of his single term deeply suspicious of anything that seemed like federal overreaching.<sup>226</sup> He later served as a judge in Charles County, Maryland.<sup>227</sup> He died in 1812, and was interred on the family tobacco plantation.<sup>228</sup>

Finally, there was William Branch Giles (1762–1830). Giles enjoyed an eminent career in Virginia politics. He was a member of the House of Representatives for much of the 1790s;<sup>229</sup> represented Virginia in the United States Senate from 1804 to 1815;<sup>230</sup> and served as governor from 1827 until shortly before his death in 1830.<sup>231</sup>

Like Madison, Giles was born into Virginia's aristocracy.<sup>232</sup> His father's family traced its lineage back to the earliest days of Virginia's settlement in the 1620s.<sup>233</sup> Giles enjoyed a successful law practice,<sup>234</sup> but like his

222. 2 JOHN THOMAS SCHARF, *HISTORY OF MARYLAND FROM THE EARLIEST PERIOD TO THE PRESENT DAY* 572–573 (Tradition Press 1967) (1879).

223. Howard A. Ohline, *Slavery, Economics, and Congressional Politics, 1790*, 46 J. S. HIST. 335, 342 (1980).

224. JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* 33 (2012); MAEVA MARCUS, *ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789*, at 18 (1992).

225. Louis J. Sirico, *Original Intent in the First Congress*, 71 MO. L. REV. 687, 712–713 (2006).

226. DAVID J. SIEMERS, *THE ANTIFEDERALISTS: MEN OF GREAT FAITH AND FORBEARANCE* 240–243 (2003).

227. JOSHUA DORSEY WARFIELD, *THE FOUNDERS OF ANNE ARUNDEL AND HOWARD COUNTIES, MARYLAND: A GENEALOGICAL AND BIOGRAPHICAL REVIEW* 246 (1905).

228. UNITED STATES GOVERNMENT PRINTING OFFICE, *BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–2005*, at 1986 (2005) [hereinafter *BIOGRAPHICAL DIRECTORY CONGRESS*].

229. See DICE ROBINS ANDERSON, *WILLIAM BRANCH GILES: A STUDY IN THE POLITICS OF VIRGINIA AND THE NATION FROM 1790 TO 1830*, at 11, 71 (1914).

230. *Id.* at 93, 205–206.

231. D.R. Anderson, *A Jeffersonian Leader: William Branch Giles*, 21 SEWANEE REV. 65, 77–78 (1913).

232. Mark F. Leep, *Giles, William Branch*, in *THE ENCYCLOPEDIA OF THE WAR OF 1812*, at 300–301 (Spencer Tucker et al. eds., 2012).

233. 1 VIRGIL A. LEWIS, *VIRGINIA AND VIRGINIANS* 153 (1888).

234. Mary A. Giunta, *In Opposition: The Congressional Career of William Branch Giles, 1790–1798*, in *NEITHER SEPARATE NOR EQUAL: CONGRESS IN THE 1790s*, at 130 (Kenneth R. Bowling & Donald R. Kennon eds., 2000).

collaborators Jackson and Stone, he did not thereby cease being a representative of southern agrarian interests.<sup>235</sup>

Giles proved himself in the First Congress to be a zealous defender of the prerogatives of the states. Thus, in December 1790, he objected to a bill requiring state governments to equip their “militia[s] with weapons and related supplies” as a federally-imposed mandate lacking constitutional justification.<sup>236</sup>

Giles quickly became an ardent foe of Alexander Hamilton. He opposed an excise tax proposed by the Secretary arguing that it had a disproportionate impact on Southern states.<sup>237</sup> More significantly, he continuously demanded complete accountings of Hamilton’s financial activities at the Treasury, seeking proof that Hamilton did not abuse his office or misuse funds.<sup>238</sup> It has been credibly speculated that Giles was emboldened in these attacks on Hamilton by Madison’s subtle, off-stage support.<sup>239</sup>

## 2. *The Opposition Case*

Madison, Jackson, and Stone took the lead in presenting the constitutional case against the Bank. Giles’ intervention, on the other hand, would occur late in the deliberations, as he offered a refutation of the main arguments of the Bank’s supporters. Accordingly, only the Madison, Jackson, and Stone arguments will be presented in this section of the Article; Giles’ contentions will be considered in Section III.C, dealing with the rebuttal.

### a. *James Madison*

James Madison launched a two-pronged assault on Hamilton’s Bank bill, wishing to demonstrate that it was both bad public policy and a violation of the constitutional order. Where policy was concerned, Madison had four main objections. First, he contended that the Bank might have the effect of diluting the value of gold without offering a commensurate return of value.<sup>240</sup> Second, he feared the economic interests and forces the Bank represented and served: the Bank, he said, was a symbol of monarchy in the way it “favored the concentration of wealth and influence at the metropolis.”<sup>241</sup> Third, he argued that this convergence of wealth at the center magnified the damaging effects of any future bank panics, since it thereby also

235. ROBERT E. WRIGHT & DAVID J. COWEN, *FINANCIAL FOUNDING FATHERS: THE MEN WHO MADE AMERICA RICH* 35 (2006).

236. Giunta, *supra* note 234, at 133.

237. *Id.* at 134.

238. *Id.* at 136–137; David P. Curtie, *The Constitution in Congress: The Second Congress, 1791–1793*, 90 *Nw. U. L. Rev.* 606, 649–651 (1996); ANDREW BURSTEIN & NANCY ISENBERG, *MADISON AND JEFFERSON* 267 (2010).

239. ROBERT ALLEN RUTLAND, *JAMES MADISON: THE FOUNDING FATHER* 119 (Univ. of Missouri Press 1997) (1987).

240. 2 *ANNALS OF CONG.* 1944 (1791).

241. *Id.* at 1945.

centralized and concentrated risk.<sup>242</sup> Much better, Madison thought, to have a number of smaller, regional banks “properly distributed.”<sup>243</sup> This led to Madison’s final objection: if the Bank was truly meant to aid commerce, then widespread access to its facilities had to be assured. And such access was only possible for most Americans, if there were “several banks” placed in a variety of locations.<sup>244</sup>

Madison, however, was merely warming up. The heart of his case was constitutional. The Bank bill, he claimed, violated the nation’s founding charter and so he “den[ie]d the authority of Congress to pass it.”<sup>245</sup>

Madison was meticulous in attempting to prove this absence of authority. He commenced his analysis by laying down three interpretive principles to guide his analysis. First, he contended that “[a]n interpretation that destroys the very characteristic of the Government cannot be just.”<sup>246</sup>

Secondly, Madison continued, “[i]n controverted cases, the meaning of the parties to the instrument, if . . . collected by reasonable evidence, is a proper guide.”<sup>247</sup> He then added a third principle: “Contemporary and concurrent expositions are a reasonable evidence of the parties.”<sup>248</sup> Did he mean by these interpretive recommendations some concept of original intent? It seems probable that he did.<sup>249</sup>

And since the deliberations of the parties mattered when interpreting the Constitution, Madison introduced his remembrances of the Constitutional Convention as evidence that Congress lacked the power to create the Bank. Hamilton’s Bank bill, if enacted, conferred on Congress the power to charter a corporation. And, Madison insisted, “he well recollected that a power to grant charters of incorporation had been proposed in the General Convention and rejected.”<sup>250</sup>

Still, Madison did not overly dwell on what the Constitutional Convention did or did not say regarding the power to charter a corporation.<sup>251</sup> Indeed, neither here nor elsewhere did the doings and sayings of the

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242. *Id.* (And, Madison warned, “a run on the bank” might be triggered by many causes, such as “false rumors, bad management of the institution, an unfavorable balance of trade from short crops, [etc.]”).

243. *Id.*

244. *Id.*

245. *Id.*

246. 2 ANNALS OF CONG. 1946 (1791).

247. *Id.*

248. *Id.*

249. Donald Burke, *James Madison’s Dystopian Vision: The Failure of Equilibrium*, 43 AM. J. LEGAL HIST. 254, 268 (1999).

250. 2 ANNALS OF CONG. 1945 (1791).

251. Hans W. Baade, “*Original Intent*” in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1022 (1991).

Constitutional Convention play a major part in Madison's interpretation of the Constitution.<sup>252</sup>

Rather, Madison would attempt to show through an analysis of the language and structure of the Constitution that Congress lacked the power to charter the Bank. He began this part of his analysis by distinguishing between "express authority" and "constructive authority," the former referring to the expressly enumerated powers conferred on the government by the Constitution and the latter category consisting of powers implied or derived from those express provisions.<sup>253</sup> Where Congress was considering the exercise of a constructive authority, Madison went on, it must weigh "not only the degree of its incidentality to an express authority . . . but the degree of its importance also."<sup>254</sup>

Put another way, before conceding to Congress the power to act, Madison wished to see both a close connection between an implied power and the text of the Constitution and to know how essential such a power was to the operation of good government.<sup>255</sup> On the whole, Madison was suspicious of implied powers: "The doctrine of implication is always a tender one. The danger of it has been felt in other Governments."<sup>256</sup>

Congress, Madison was convinced, lacked the express power to charter corporations. Still, this did not automatically bring the analysis to a close; he next asked whether a constructive power to do so existed and if it did, from which clause of the Constitution might it fairly be derived.<sup>257</sup> He identified three candidates: "The power to lay and collect taxes,"<sup>258</sup> "[T]he power to borrow money on the credit of the United States;"<sup>259</sup> and "[t]he power to pass all laws necessary and proper to carry into execution those powers."<sup>260</sup>

Madison turned first to the power to tax. The Bank bill "laid no tax whatever. It was altogether foreign to the subject."<sup>261</sup> Still, Madison believed that more must be said. The relevant constitutional provision in its

252. Paul Finkelman, *Intentionalism, the Founders, and Constitutional Interpretation*, 75 TEX. L. REV. 435, 455–456 (1996); Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 353 (1989); *Fidelity Through History: Colloquy*, 65 FORDHAM L. REV. 1693, 1697 (1997).

253. See 2 ANNALS OF CONG. 1946 (1791); see also Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 189 (2003); John O. McGinnis & Michael Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 777–778 (2009).

254. 2 ANNALS OF CONG. 1946 (1791).

255. William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1751–1752; Anna Gotfryd, *The Safeguards of the Constitution: Fundamental Rights, Not Disposable Gifts*, 2016 U. ILL. L. REV. 627, 661 (2016).

256. 2 ANNALS OF CONG. 1948 (1791).

257. *Id.* at 1945.

258. *Id.* at 1946.

259. *Id.*

260. *Id.*

261. *Id.*



entirety authorized Congress to impose taxes and duties “and provide for the common defence and general welfare of the United States.”<sup>262</sup> Did this additional language, joined as it was by the conjunction “and”, confer on Congress any additional power?

Madison thought not, for two reasons. First, if one separated the language about the common defense and general welfare from the congressional power to tax, the result would be to “give to Congress an unlimited power [and] render nugatory the enumeration of particular powers.”<sup>263</sup> The reference to congressional responsibility for the “general welfare” was broad language, Madison acknowledged, but it was “limited and explained by the particular enumeration subjoined.”<sup>264</sup>

There was yet another reason, Madison asserted, a broad interpretation of defense and general welfare provisions failed, and that was the structure of the Constitution itself. The Constitution created a federal government of limited and enumerated powers precisely so as to preserve the powers of the States. And it was the right and responsibility of the States to create and regulate banks. A federal bank “would directly interfere with the rights of the States to prohibit as well as establish Banks and the circulation of bank notes.”<sup>265</sup> Thus, the contention that Congress could charter the Bank, Madison concluded, could not be justified by reference to Congress’s power to tax.<sup>266</sup>

What then of the power to borrow money? Might the Bank bill pass constitutional muster under Article I, Section Eight, Clause Two?<sup>267</sup> Madison asked the simple rhetorical question: “Is this a bill to borrow money?”<sup>268</sup> “It does not borrow a shilling,” Madison swiftly answered his own rhetorical question.<sup>269</sup>

Madison, however, was not yet finished. Was there “any fair construction” by which the Bank bill might be justified under Congress’s power to borrow money?<sup>270</sup> In other words, might the power to borrow be construed so as to embrace the power to charter a bank? Madison thought it impossible. The meaning of the word “borrow” was clear. It is the extension of a loan from one willing to make it to one who agrees to pay it back.<sup>271</sup> The Bank bill did not do this. It merely facilitated the “power” or “ability” to

262. U.S. CONST. art. I, § 8, cl. 1.

263. 2 ANNALS OF CONG. 1946 (1791).

264. *Id.*

265. *Id.*

266. *See id.* at 1946–1947; *see also* Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2083 (2014); Louise Weinberg, *Fear and Federalism*, 23 OHIO N.U. L. REV. 1295, 1314 (1997).

267. U.S. CONST. art. I, § 8, cl. 2 (“[Congress shall have power] . . . To borrow Money on the credit of the United States.”).

268. 2 ANNALS OF CONG. 1947 (1791).

269. *Id.*

270. *Id.*

271. *Id.*

lend and to borrow, and this was to extend the analysis beyond the text's meaning.<sup>272</sup> Large British trading firms like the East India Company were creditors to the English crown, Madison observed.<sup>273</sup> Adopt an expansive construction of the power to borrow clause and soon, Madison predicted, the United States Congress would be incorporating immense manufacturing and trading enterprises on the pretext of the power of lending and borrowing.<sup>274</sup>

What, then, of the necessary and proper clause? By its terms, this clause empowered Congress "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."<sup>275</sup>

Madison insisted upon a narrow interpretation of this clause.<sup>276</sup> Too many had fallen into error when attempting to give this constitutional provision a broad meaning. It did not confer on Congress "a power necessary and proper for the Government or Union."<sup>277</sup> Rather, its scope was limited to effectuating only "the enumerated powers."<sup>278</sup> For Madison, this was the essence of the Constitution: "no power . . . not enumerated could be inferred from the general nature of Government."<sup>279</sup>

Madison was willing to pursue the logic of this insight to extreme lengths. He pointed out first the care with which particular powers had been crafted. Congress was given not only the authority "to regulate the value of money," but the power to ensure "that counterfeiters may be punished."<sup>280</sup> Not only, furthermore, was Congress empowered to declare war, but given the express authority "to raise and support armies" and to "make rules and regulations for the government of armies."<sup>281</sup> Had the treaty power not been conferred by express constitutional provision, Madison was sure, its absence "could only have been lamented or supplied by an amendment of the Constitution."<sup>282</sup> Madison conceded that the Constitution's enumeration of powers was not perfect. Perfection "is not the character of any human work."<sup>283</sup> Nevertheless, Madison stood his ground, "the exercise of any

272. *Id.*; H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651, 659 (1995).

273. 2 ANNALS OF CONG. 1948 (1791).

274. *Id.*

275. U.S. CONST. art. I, § 8, cl. 18.

276. 2 ANNALS OF CONG. 1950 (1791).

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 1949.

281. *Id.*

282. 2 ANNALS OF CONG. 1950 (1791); see also Randy Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 753 (1997); Calvin H. Johnson, *The Dubious Enumerated Powers Doctrine*, 22 CONST. COMMENT. 25, 58–59 (2005).

283. 2 ANNALS OF CONG. 1949 (1791).

power, particularly a great and important power which is not evidently and necessarily involved in an express power” must be condemned.<sup>284</sup> And even if the power could be found, Madison added, “the proposed Bank could not even be called necessary to the Government; at most it could be but convenient.”<sup>285</sup>

Madison reinforced this position with an appeal to the nature and purpose of the Bill of Rights, particularly the Ninth Amendment.<sup>286</sup> The Bill of Rights, he asserted, aimed to strip Congress of certain powers: “the power of Congress to abridge freedom of the press, or the rights of conscience, [et]c”<sup>287</sup> were among the powers taken from Congress. “All of these renunciations of power,” Madison, ever the artful craftsman, explained, “proceeded on a rule of construction” that demanded a narrow interpretation of Congress’s enumerated powers.<sup>288</sup>

This was because the Ninth Amendment provided the interpretive key through which the Bill of Rights and the authority of Congress should be seen.<sup>289</sup> All power not specifically conferred on Congress was retained by the States. “[L]atitude of interpretation” must accordingly be avoided so as to preserve this delicate and finely-wrought constitutional order.<sup>290</sup>

And so for Madison the conclusion was inescapable: “It appeared on the whole . . . 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.”<sup>291</sup>

There was a logic and coherence to Madison’s argument. The Bank bill was a comprehensively unconstitutional piece of legislation on his reasoning. The creation of the Bank could not be justified under any express power; nor could the Constitution be construed to permit its founding on a theory of implied or constructive powers. The structure of the Constitution stood against the Bank, as did Madison’s rules of interpretation, which he claimed were not mere private insights but derived from the logic of the

284. *Id.*; see also H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949, 955–956 (1993).

285. 2 ANNALS OF CONG. 1950 (1791).

286. Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801, 844–848 (2008); Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895, 917 (2008); see also Eugene M. Van Loan, III, *Natural Rights and the Ninth Amendment*, 48 BOS. U. L. REV. 1, 12–15 (1968) (further elucidating Madison’s conception of the Ninth Amendment as reserving to the States all powers not expressly enumerated in the Constitution).

287. 2 ANNALS OF CONG. 1951 (1791).

288. *Id.*

289. *Id.*

290. *Id.*; see also Kurt T. Lash, *Originalism as Jujitsu*, 25 CONST. COMMENT. 521, 530 (2009) (“James Madison saw the Ninth as an enforceable rule of construction which actively constrained the interpretation of Congress’ enumerated powers.”) (book review).

291. 2 ANNALS OF CONG. 1951 (1791).

Constitution and the Bill of Rights, especially the Ninth Amendment. Madison's logic was powerful, but was it unassailable?

*b. James Jackson*

James Jackson of Georgia raised two major objections to the Bank bill. First, he argued that the Bank did not serve the common interests of the nation. It aimed rather "to benefit a small part of the United States, the mercantile interest only."<sup>292</sup> Farmers will not benefit from the Bank, whether they reside in Georgia or New Hampshire.<sup>293</sup> Nor would those citizens who live some distance from the nation's great commercial centers. "[T]he bank bills will not circulate to the extremities of the Union."<sup>294</sup> While he did not cite a particular provision, Jackson believed that this favoritism contributed to its "unconstitutionality."<sup>295</sup>

Also contributing to its constitutional invalidity, in Jackson's estimation, was the monopoly the Bank bill seemed to create.<sup>296</sup> The word "monopoly," in late eighteenth-century political and legal thought, was freighted with significance.<sup>297</sup> It signified oppression and the unjust accumulation of wealth.<sup>298</sup> Monopoly was associated with the British Crown and its economic exploitation of its American colonies.<sup>299</sup> Indeed, English trade with its colonies, in America and India, depended upon the generous granting of monopolies and privileges to favored trading firms, such as the much-despised East India Company.<sup>300</sup> Thus, the Boston Tea Party targeted East India cargoes.<sup>301</sup> The Constitutional Convention debated whether to insert an antimonopoly clause into the text of the Constitution,<sup>302</sup> while several states either adopted antimonopoly clauses or urged Congress to include such a clause among the Bill of Rights.<sup>303</sup>

292. *Id.* at 1941.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 1009 (2013).

298. JAMES R. FICHTER, SO GREAT A PROFIT: HOW THE EAST INDIES TRADE TRANSFORMED ANGLO-AMERICAN CAPITALISM 17 (2010).

299. See Robert E. Wright, *Rise of the Corporation Nation*, in FOUNDING CHOICES: AMERICAN ECONOMIC POLICY IN THE 1790s, at 217, 228 (Douglas A. Irwin & Richard Sylla eds., 2011).

300. HERBERT APTHEKER, THE AMERICAN REVOLUTION, 1763–1783: A HISTORY OF THE AMERICAN PEOPLE 42 (1960); JONATHAN EACOTT, SELLING EMPIRE: INDIA IN THE MAKING OF BRITAIN AND AMERICA, 1600–1836, at 170, 170 n.2 (2016).

301. ARTHUR MEIER SCHLESINGER, THE COLONIAL MERCHANTS AND THE AMERICAN REVOLUTION, 1763–1776, at 281–290 (1939); see also Arthur Meier Schlesinger, *The Uprising Against the East India Company*, 32 POL. SCI. Q. 60, 73 (1917) ("[T]he fear of monopoly was the main-spring of American opposition . . .").

302. Calabresi & Leibowitz, *supra* note 297, at 1009–1016.

303. Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785, 799–801 (1982); STEPHEN M. KRASON, THE TRANSFORMATION OF THE AMERICAN DEMOCRATIC REPUBLIC 187 (2012).

To denounce the Bank as establishing a monopoly was, thus, to invoke strong feelings about the reasons for the American Revolution. Although Jackson did not—and could not—point to a particular clause, he clearly understood the “spirit of the Constitution” to be repugnant to monopolies.<sup>304</sup>

In other respects, Jackson’s criticism of the Bank tracked Madison’s closely. He did not believe it could be justified under the necessary and proper clause,<sup>305</sup> and he viewed it as a threat to the right of the States to charter and regulate banks.<sup>306</sup> The national economy, he observed finally, was recovering nicely and, thus, a Bank was not necessary even if it was constitutionally permissible.<sup>307</sup>

*c. Michael Jenifer Stone*

Stone saw the debate as posing a momentous choice for the participants: did the Constitution confer upon Congress all of the powers of a “General Government” enjoying the rights of unlimited legislative authority?<sup>308</sup> Or did it create a federal government of merely limited powers, vesting instead most governing authority in the States?<sup>309</sup>

Stone’s speech was given to hyperbole. Was the choice really as stark as Stone suggested? Did the Bank bill really force Congress to select between the total abandonment of all constitutional restraint, on the one hand, versus fidelity to a conception of limited government? Stone, for one, thought so. He bolstered this claim with three main arguments.

First, Stone was willing to go even farther than Madison did in criticizing the exercise of implied or constructive or incidental powers. Once the door is opened to this sort of reasoning, all constitutional restraint vanishes: “If gentlemen are allowed to range in their sober discretion for the means, it is plain they have no limits. By the cabalistic word *incident*, your Constitution is turned upside down, and instead of being a grant of particular powers, . . . it is made to imply all powers.”<sup>310</sup>

Stone sought to prove the inappropriateness of implied powers by two quite different supporting contentions. First, he contended that the structure of the Constitution precluded implied powers. He sought to establish this point with some logical propositions. It is impossible, he stated, for a constitution to forbid the exercise of particular powers since the imagination can always maneuver its way around a list of prohibitions.<sup>311</sup> Thus, the only

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304. 2 ANNALS OF CONG. 1983 (1791).

305. *See id.* at 1987.

306. *Id.* at 1981, 1987.

307. *Id.* at 1987.

308. *Id.* at 1983.

309. *See id.*

310. 2 ANNALS OF CONG. 1983–1984 (1791) (emphasis added).

311. *Id.* at 1983.

effective means of forbidding the exercise of general powers was to propose a list of narrowly-defined express powers, “implying a negative to all others.”<sup>312</sup> In this way, Congress is restricted in what it may and may not do. The “discretion of the Legislature,” Stone claimed, far from reigning supreme in Congress, “was the very thing intended to be curbed and restrained by our Constitution.”<sup>313</sup>

The logic of this reasoning was compelling once the premise was accepted: if the Constitution established a government of limited means; if those means are expressly enumerated in the constitutional text; if all powers not expressly enumerated in the text cannot as a matter of definition be exercised by the federal government; then it follows that it is impermissible to resort to implied powers.

Stone believed that resort to implied powers was improper for a second reason also, in that it opposed the popular will.<sup>314</sup> Public opinion was united on this point: “Never did any country more completely unite in any sentiment than America in this, ‘that Congress ought not to exercise, by implication, powers not granted by the Constitution.’”<sup>315</sup> Stone cited no evidence for this sweeping conclusion. It stands today less as evidence of the mood of the public than the willingness of a leading member of Congress to cite public opinion as a valid source of constitutional interpretation.

Stone’s second main argument against the Bank bill was the impact it had on the States. As he understood it, the Bank bill aimed both to disfavor state banking and monetary regimes and to elevate the Bank of the United States as supreme.<sup>316</sup>

Stone reminded his listeners that many states had issued notes which remained important for local business.<sup>317</sup> Not only that, but there were a number of states that had chartered or were preparing to charter local

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312. *Id.*

313. *Id.*

314. *Id.* at 1982.

315. *Id.*

316. 2 ANNALS OF CONG. 1982 (1791).

317. *See id.* at 1981 (“[Stone] took notice of the distinction made by the plan of the bill, between Continental and State paper. The State paper, on account of partial payments of interest still remained in the respective states.”). Stone’s point is that the Bank of the United States challenged the operation of this system. In fact, state-issued currency, although disallowed by the new Constitution, “continued to circulate and dominate market transactions into the early 1790s.” Farley Grubb, *Creating the U.S. Dollar Currency Union, 1748–1811: A Quest for Monetary Stability or a Usurpation of State Sovereignty for Personal Gain?*, 93 AM. ECON. REV. 1778, 1783 (2003).

banks.<sup>318</sup> Stone defended the rights of these states,<sup>319</sup> asserting these efforts could be damaged or destroyed by the Bank of the United States.<sup>320</sup>

Finally, Stone contended that the Bank bill violated a principle of non-discrimination among the States which he believed had been enshrined in the Constitution. “In the fair administration of our Government,” Stone understood the Constitution to declare, “no partial advantages may be given.”<sup>321</sup>

Hamilton’s financial program, in Stone’s opinion, had already begun to corrode national unity. The system of tariffs and duties that Hamilton had already seen through Congress<sup>322</sup> shifted the burden of taxation to “the consumers of manufactures.”<sup>323</sup> The East in particular benefitted from this arrangement, while the Southern states were disadvantaged.<sup>324</sup> The Bank bill would only enhance these sectional divisions.<sup>325</sup>

### 3. *Observations*

Each of these three opponents of the Bank bill brought distinctive insights to bear in their reasoning. In each case, furthermore, the analysis went beyond the mere details of the Bank bill to offer more general points about the Constitution.

For Madison, it was the rigor of his thinking. He articulated an entire theory of the Constitution and used it to frame his opposition to the Bill. The Constitution was one of limited and enumerated powers. This insight might be a truism, but Madison used it not only to explain particular constitutional provisions such as the necessary and proper clause, but as a principle of interpretation (“latitude of interpretation” must be avoided). Indeed, even the Bill of Rights was made to fit this larger vision, with the Ninth Amendment furnishing the main interpretive key.

Jackson, for his part, introduced what amounted to a paradoxical theory of national unity. The position and status of the States within the constitutional order must be shown particular deference since any effort to govern from a national perspective would result in the advantaging of one region or way of life at the expense of another. Not only that, but Jackson’s condem-

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318. See generally Benjamin J. Klebaner, *State-Chartered American Commercial Banks, 1781–1801*, 53 *BUS. HIST. REV.* 529, 530–535 (1979); J. Van Fenstermaker & John E. Filer, *Impact of the First and Second Banks of the United States and the Suffolk System on New England Bank Money, 1791–1837*, 18 *J. MONEY, CREDIT & BANKING* 28, 29–30 (1986).

319. 2 *ANNALS OF CONG.* 1987 (1791) (“The States will institute banks which will answer every purpose.”).

320. See *id.* at 1981.

321. *Id.* at 1987.

322. JOHN M. DOBSON, *BULLS, BEARS, BOOM, AND BUST: A HISTORICAL ENCYCLOPEDIA OF AMERICAN BUSINESS CONCEPTS* 107 (2007) (“On July 4, 1789, the First Session of the First Congress passed the first tariff legislation for the United States.”).

323. 2 *ANNALS OF CONG.* 1981 (1791).

324. *Id.*

325. *Id.*

nation of monopolies suggested an economic understanding of the Constitution that was simultaneously egalitarian and libertarian. Everyone should have the right to make his or her own way in the world, and no one should be the beneficiary of government preference at the expense of someone else.

Stone, finally, showed himself the constitutional radical. While he made common cause with Madison, he did not share Madison's willingness—at least on occasion—to permit the introduction of implied or constructive powers. For Stone, the logic of the Constitution pointed to the exclusion of all implied powers. Like Jackson, Stone wished for a modest federal government exercising limited powers as essential to good constitutional order.

Both Jackson and Stone saw the Bank bill, and Hamilton's other economic reforms, as favoring one form of economic organization—manufacturing and commerce—over another. For Jackson and Stone in particular, the Constitution should not discriminate between modes of making a living. Jackson and Stone would have described themselves as farmers, and their way of life as agrarian. But more honestly they made their living from plantation-based slavery and it is not difficult to see their interest in the preservation of this way of life as the main motive for the positions they took.

## B. *The Supporters of the Bank*

### 1. *The Personalities*

James Madison's counterpart among the proponents of the Bank bill was Fisher Ames (1758–1808) of Massachusetts. Since Hamilton was not a member of the House, he had to turn to House members for support, where Ames established himself as “a leading spokesman for Hamilton.”<sup>326</sup>

Ames' background was fundamentally dissimilar to Madison's. His father was Nathaniel Ames, a lawyer, physician, and writer.<sup>327</sup> Nathaniel died when Fisher was six, causing the family to struggle financially.<sup>328</sup> Ames himself trained as a teacher and a lawyer, and had established himself in practice by the end of the Revolutionary War.<sup>329</sup> Quickly bored with legal practice, Ames sought an outlet in state politics.<sup>330</sup>

326. JOHN F. HOADLEY, *ORIGINS OF AMERICAN POLITICAL PARTIES: 1789–1803*, at 51 (1986).

327. Nathaniel Ames wrote and published the *Ames Almanack*, which was focused on science, skeptical of superstition, and was perhaps even more popular than Benjamin Franklin's *Poor Richard's Almanac*, “selling upwards of 50,000 copies annually at the height of his popularity.” See Peter Eisenstadt, *Almanacs and the Disenchantment of Early America*, 65 *PA. HIST.* 143, 158 (1998); see also Marion Barbara Stowell, *The Influence of Nathaniel Ames on the Literary Taste of His Time*, 18 *EARLY AM. LITERATURE* 127, 143 (assessing Ames's impact on colonial American literature).

328. Ames's mother became a Massachusetts inn-keeper. Elisha P. Douglas, *Fisher Ames, Spokesman for New England Federalism*, 103 *PROC. AM. PHIL. SOC'Y* 693, 696 (1959).

329. See *id.* at 697.

330. *Id.*



His unyielding response to Shays' Rebellion brought him prominence. He wrote to denounce "[t]he crime of levying war against the state" and the "high treason" of Daniel Shays.<sup>331</sup> The rebellion should rouse the American people to action. It was time, he warned his audience, for the American nation such as it was to form tighter bonds of union: "While the bands of union are so loose, we are no more entitled to the character of a nation than the hordes of vagabond traitors."<sup>332</sup> These and other similar strident comments led Ames to join the company of some of the most powerful and conservative figures in New England politics.<sup>333</sup>

Ames quickly developed a "reputation for oratory"<sup>334</sup> and was elected as a Massachusetts representative to the First Congress,<sup>335</sup> where he distinguished himself early by proposing language that eventually became the First Amendment.<sup>336</sup> But if Ames worked well with Madison on the Bill of Rights, on the Bank bill they were opponents.

Ames was joined in opposition by another Massachusetts representative, Theodore Sedgwick (1746–1813). Like Ames, Sedgwick was a lawyer,<sup>337</sup> and had served in the Revolutionary War, seeing action in Canada.<sup>338</sup> Following the War, Sedgwick practiced law in Massachusetts and gained some fame for successfully litigating the freedom of an African-American woman on the principle that all persons are created equal and therefore none should be enslaved.<sup>339</sup> He was active in state government in the 1780s and was elected to the First Congress.<sup>340</sup> Sedgwick went on to a

331. FISHER AMES, *Lucius Junius Brutus*, in *WORKS OF FISHER AMES* 1, 2 (Boston, T.B. Wait 1809).

332. FISHER AMES, *Camillus No. III*, in *WORKS OF FISHER AMES*, *supra* note 331, at 16, 18.

333. See David H. Fischer, *The Myth of the Essex Junto*, 21 *WM. & MARY Q.* 191, 194–195 (1964); see generally John W. Malsberger, *The Political Thought of Fisher Ames*, 2 *J. EARLY REPUBLIC* 1, 1–20 (discussing Ames's Calvinism, his conservatism, and his commitment to a strong national government).

334. JOHN ZVESPER, *POLITICAL PHILOSOPHY AND RHETORIC: A STUDY OF THE ORIGINS OF AMERICAN PARTY POLITICS* 169 (1977).

335. Samuel Eliot Morison, *Squire Ames and Doctor Ames*, 1 *NEW ENG. Q.* 5, 13 (1928).

336. David Reiss, *Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence*, 61 *MD. L. REV.* 94, 141 (2002); DONALD L. DRAKEMAN, *CHURCH, STATE, AND ORIGINAL INTENT* 235 (2010).

337. Sedgwick was expelled from theology studies at Yale College and subsequently apprenticed himself to a prominent Massachusetts lawyer. TIMOTHY KINSLEA, *THE SEDGWICKS IN LOVE: COURTSHIP, ENGAGEMENT, AND MARRIAGE IN THE EARLY REPUBLIC* 4–5 (2006).

338. *BIOGRAPHICAL DIRECTORY CONGRESS*, *supra* note 228, at 1885.

339. GARY B. NASH, *THE UNKNOWN AMERICAN REVOLUTION: THE UNRULY BIRTH OF DEMOCRACY AND THE STRUGGLE TO CREATE AMERICA* 408 (2005); EMILY BLANCK, *TYRANNICIDE: FORGING AN AMERICAN LAW OF SLAVERY IN REVOLUTIONARY SOUTH CAROLINA AND MASSACHUSETTS* 120–121 (2014); Arthur Zilversmit, *Quok Walker, Mumbet, and the Abolition of Slavery in Massachusetts*, 25 *WM. & MARY Q.* 614, 619–620 (1968).

340. Jack N. Rakove, *The Structure of Politics at the Accession of George Washington, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 261, 281 (Richard Beeman et al. eds., 1987).

distinguished career, serving as Speaker of the House from 1799 to 1801<sup>341</sup> and as a justice of the Massachusetts Supreme Judicial Court from 1802 to his death in 1813.<sup>342</sup>

Unlike Ames and Sedgwick, Elias Boudinot (1740–1821) was already an established political figure at the time of his election to the First Congress. He was a lawyer who was named to the College of New Jersey's (the future Princeton University) board of trustees in 1772, a position he retained for life.<sup>343</sup> He was a member of the Continental Congress and had served a term as its president,<sup>344</sup> in 1782 and 1783, during which time he received the British surrender at Yorktown.<sup>345</sup> In his capacity as President, he signed the Treaty of Paris, which acknowledged American independence from Great Britain.<sup>346</sup>

Following the War, Boudinot practiced law prior to his election to the House, a seat he retained until 1795.<sup>347</sup> He would eventually help to organize the American Bible Society and served as its first president until his death.<sup>348</sup> Among the founders, Boudinot was perhaps the most deeply religious, revealing a "warm evangelicalism" during his long tenure in public life.<sup>349</sup>

Finally, there was Elbridge Gerry (1744–1814). Like Ames and Sedgwick, he hailed from Massachusetts and was the son of a merchant.<sup>350</sup> He was active in resistance to Great Britain by 1774<sup>351</sup> and was one of the

341. See generally Patrick J. Furlong, *John Rutledge, Jr., and the Election of a Speaker of the House in 1799*, 24 WM. & MARY Q. 432, 432–436 (1967) (discussing the circumstances of Sedgwick's election as Speaker).

342. See generally William E. Nelson, *The Province of the Judiciary*, 37 J. MARSHALL L. REV. 325, 339 (2004).

343. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES EXECUTIVE BRANCH, 1774–1989, at 34 (Robert Sobel ed., 1990).

344. Rick K. Wilson & Calvin Jillson, *Leadership Patterns in the Continental Congress: 1774–1789*, 14 LEGIS. AFF. Q. 5, 14, 18–19 (1989).

345. JOHN D. GRAINGER, *THE BATTLE OF YORKTOWN, 1781: A REASSESSMENT* 160 (2005).

346. JEAN-RAE TURNER & RICHARD T. KOLES, *NEWARK, NEW JERSEY* 33 (2001); see also JEAN-RAE TURNER & RICHARD T. KOLES, *ELIZABETH: FIRST CAPITAL OF NEW JERSEY* 52 (2003) ("Boudinot is considered by some historians to have been the first president of the United States since he was president of the Continental Congress when the Treaty of Paris was signed . . .").

347. 1 NEW JERSEY BIOGRAPHICAL DICTIONARY 59–60 (Caryn Hannan et al. eds., 2008–2009 ed. 2008).

348. Jonathan J. Den Hartog, *Elias Boudinot, Presbyterians, and the Quest for a "Righteous Republic"*, in FAITH AND THE FOUNDERS OF THE AMERICAN REPUBLIC 253, 258 (Daniel L. Dreisbach & Mark David Hall eds., 2014).

349. JONATHAN J. DEN HARTOG, *PATRIOTISM AND PIETY: FEDERALIST POLITICS AND RELIGIOUS STRUGGLE IN THE NEW AMERICAN NATION* 96 (2015).

350. 2 GUIDE TO THE PRESIDENCY AND THE EXECUTIVE BRANCH 1761 (Michael Nelson ed., 5th ed. 2013).

351. See Christopher P. Magra, "Soldiers . . . Bred to the Sea": *Maritime Marblehead, Massachusetts, and the Origins and Progress of the American Revolution*, 77 NEW ENG. Q. 531, 547 (2004).

signers of the Declaration of Independence in 1776.<sup>352</sup> He participated in the Constitutional Convention, but argued against ratification, objecting that the judiciary it created was too powerful,<sup>353</sup> that the Senate's role in treaty-making was too great,<sup>354</sup> and that there was no bill of rights that might protect individuals from summary government power.<sup>355</sup>

Once elected to Congress, he remained an independent spirit and was criticized even by political allies for his seeming inconsistencies.<sup>356</sup> He sometimes tangled with Hamilton,<sup>357</sup> but nevertheless allied with him on the Bank bill.<sup>358</sup> He became scandalously involved in the XYZ affair, a botched negotiation with the French Revolutionary government, which led to some naval skirmishing between the two countries.<sup>359</sup> Still, he recovered from this embarrassment to be elected Governor of Massachusetts in 1810.<sup>360</sup> He died in office while serving as James Madison's Vice President in 1814.<sup>361</sup>

These four figures presented a significant contrast with Madison and his collaborators. While their names may not be well remembered today, they were substantial figures, including in their number a Revolutionary War statesman, a future Speaker of the House, and a future Vice President. But they inhabited a different region of the country from their Southern opponents, and not only that, they seemed to inhabit a different universe of experience. They were lawyers and merchants who did not own large landed estates and who did not draw a profit from the bondage of others. They were certainly not poor, but they were also not born to great privilege or position. A clash over something as fundamental as the First Bank of the United States, which entailed not only the exercise of federal power but a preferential option for commercial life, seemed almost predestined.

352. Michael J. Kasper, *The Almost Rise and Not Quite Fall of the Political Gerrymander*, 27 N. ILL. U. L. REV. 409, 411 (2007).

353. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 54–55 (1923).

354. John T. Parry, *Congress, the Supremacy Clause, and the Implementation of Treaties*, 32 FORDHAM INT'L L.J. 1209, 1235–1236 (2009).

355. A. E. Dick Howard, *Magna Carta's American Adventure*, 94 N.C. L. REV. 1413, 1419 (2016); John P. Kaminski, *Restoring the Grand Security: The Debate Over a Federal Bill of Rights, 1787–1792*, 33 SANTA CLARA L. REV. 887, 890 (1993).

356. TERRI DIANE HALPERIN, *THE ALIEN AND SEDITION ACTS OF 1798: TESTING THE CONSTITUTION* 42 (2016).

357. See generally Freeman W. Meyer, *A Note on the Origins of the "Hamiltonian System"*, 21 WM. & MARY Q. 579, 584 (1964).

358. S. E. Morison, *Elbridge Gerry, Gentleman-Democrat*, 2 NEW ENG. Q. 6, 21–22 (1929).

359. 1 GUIDE TO U.S. FOREIGN POLICY: A DIPLOMATIC HISTORY 10 (Robert J. McMahon & Thomas W. Zeiler eds., 2012); Nathan Perl-Rosenthal, *Private Letters and Public Diplomacy: The Adams Network and the Quasi-War, 1797–1798*, 31 J. EARLY AM. REPUBLIC 283, 292–294, 305–308 (2011).

360. GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* 3 (2002).

361. JAMES M. RONAN, *LIVING DANGEROUSLY: THE UNCERTAINTIES OF PRESIDENTIAL DISABILITY AND SUCCESSION* 10 (2015).

## 2. *The Proponents' Case*

### a. *Fisher Ames*

Fisher Ames commenced his argument by declaring that banks of the sort contemplated by Hamilton have been almost universally recognized by the nations of the world as not only “useful to trade” but “almost essential to revenue” and “little short of indispensably necessary in times of public emergency.”<sup>362</sup> “In countries whose forms of Government left them free to choose, this institution has been adopted of choice.”<sup>363</sup> “The most orderly governments in Europe have banks.”<sup>364</sup> And banks have proven their value “in times of national danger and calamity,” so much so, in fact, that they have become “a necessary means of self-preservation.”<sup>365</sup>

Ames was engaging in rhetorical flourishes. Who, he seemed to ask, might obstruct America from having a bank of its own? “The gentleman from Virginia,” Ames acidly continued, has raised objections.<sup>366</sup> This gentleman—Ames was referring to Madison—participated in the Constitutional Convention and now insisted “that the meaning of the Constitution is to be interpreted by contemporaneous testimony”—in other words, by the intent of those who drafted it.<sup>367</sup> Ames admired the “felicity” of Madison’s “situation”—a backhanded way of referring to his role in Philadelphia—but he did not believe that this was the proper means of interpreting the Constitution.<sup>368</sup>

Ames did not comment further on the question of what we would call original intent, preferring instead to commence discussion of what he took to be the two important questions the Bank Bill posed: “[M]ay Congress exercise any powers which are not expressly given in the Constitution, but may be deduced by a reasonable construction of that instrument? And, secondly, will such a construction warrant the establishment of the bank?”<sup>369</sup>

Answering the first of these questions, Ames further contended, required Congress to move beyond “the letter of the Constitution.”<sup>370</sup> If Madison wished to be a constitutional literalist—Ames implied but did not directly state—he would demonstrate for Madison the absurdity of that position. Consider, Ames stated, the many acts of legislation the First Congress has already passed into law. Under its authority to regulate trade,

362. 2 ANNALS OF CONG. 1953 (1791).

363. *Id.*

364. *Id.* at 1956.

365. *Id.* at 1953.

366. *Id.*

367. *Id.*

368. 2 ANNALS OF CONG. 1953–1954 (1791); *see also* GUY PADULA, MADISON V. MARSHALL: POPULAR SOVEREIGNTY, NATURAL LAW, AND THE UNITED STATES CONSTITUTION 83 (2001) (further examining Ames’s and Madison’s approaches to constitutional interpretation).

369. 2 ANNALS OF CONG. 1954 (1791).

370. *Id.*

Ames pointed out, Congress “taxed ships, erected light-houses, made laws to govern seamen, [etc.], because we say that they are the incidents to that power.”<sup>371</sup> There are no express clauses in the Constitution authorizing any of these undertakings, Ames noted, and so each of these pieces of legislation required Congress to construe the text and make use of its “discretion.”<sup>372</sup>

Thus, for Ames, the Constitution was neither self-limiting or self-executing. Rather, it was a document that called on the members of Congress to exercise sound judgment as to policy choices. And these choices need not be limited by a rigidly literal application of the constitutional text. Indeed, he declared, an examination of the structure and language of the Constitution revealed it was written so as to maximize the possibility for choice. “[T]he ingenuity of man was unequal to providing, especially beforehand, for all the contingencies that would happen.”<sup>373</sup> The drafters of the Constitution, in other words, could not have foreseen or provided for every possibility. Hence, the Constitution was drafted with an eye towards establishing “the principles which are to govern in making laws.”<sup>374</sup> And these were principles that were flexible and forward-looking and aimed to make the Constitution a document that could serve many and varied legislative agendas.<sup>375</sup>

Thus, Ames demonstrated that although Madison viewed the Constitution as a strict restraint on legislative authority, it should rather be read as an empowering document. It empowered law-makers to use their discretion, acting within broadly-defined principles, to make judgment calls as to the best course of action to take on pressing questions of policy. Law-makers might make mistakes from time to time, Ames conceded, but they should nevertheless always follow their “honest conviction[s]” as to the Constitution’s meaning and the soundness of the legislative acts they wished to undertake.<sup>376</sup>

In truth, Ames argued, the Madisonian reading of the Constitution as a series of limited and enumerated powers did not represent a superior form of analysis. It was simply one choice among competing interpretations of a text and not a very good one.<sup>377</sup> What Madison and his allies did was

371. *Id.*

372. *Id.* Ames added that if Madison’s view were adopted: “A great part of our two years’ labor is lost, and worse than lost to the public, for we have scarcely made a law in which we have not exercised our discretion with regard to the true intent of the Constitution.” *Id.*

373. *Id.*

374. *Id.*

375. 2 ANNALS OF CONG. 1956 (1791) (“That construction may be maintained to be a safe one which promotes the good of society, and the ends for which the Government was adopted.”).

376. *Id.* at 1954; *see also* GARY McDOWELL, THE LANGUAGE OF LAW AND THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 264 (2010) (further developing the contrast between Ames’s and Madison’s approaches to the Constitution).

377. EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 32 (2007).

merely to pit “one construction against another.”<sup>378</sup> “The powers of Congress are disputed,” Ames observed.<sup>379</sup> And, Ames continued, this was in keeping with the Constitution’s design and purpose. It was meant to promote dispute and disagreement. Such is the essential character of a document consisting of broadly-phrased principles.

And if this was so, Ames argued, then restraint is not necessarily the safer course. “The negative, if false, is less safe than the affirmative, if true. Why, then, shall we be told that the negative is the safe side? Not exercising the powers we have, may be as pernicious as usurping those we have not.” To illustrate this point, Ames took one of Madison’s arguments and turned it on its head. Suppose, he said, the Constitution failed expressly to confer on Congress the power to raise an army. Such a power could still “be implied from other parts of the Constitution.”<sup>380</sup> Not to do so would be to invite foreign invaders to lay waste to the country.<sup>381</sup>

How, then, shall the Constitution be interpreted? Ames submitted first that it must be understood to create a government. Government was a special word for Ames. Ames was a believer in good and just government that proceeds according to “a fixed rule and standard of political happiness, and that is the greatest permanent happiness of the greatest number of people.”<sup>382</sup> Furthermore, for Ames, government was not an arbitrary set of rules or the supreme power in a community, but rather the “highest kind of corporation” and as such “has tacitly annexed to its being various powers . . . which are essential to its effecting the purposes for which it was framed.”<sup>383</sup>

Happiness and a government empowered to effectuate it. In speaking thus, Ames was dealing in abstractions that would have been instantly recognizable to an eighteenth-century mind. The word “happiness” as abstract philosophical principle was undergoing transition as it came to signify increasingly the ideas of freedom of action and self-empowerment.<sup>384</sup> Increasingly, the promotion of happiness had come to be seen by at least some writers as a concern of government.<sup>385</sup> And “government,” broadly

378. 2 ANNALS OF CONG. 1955 (1791).

379. *Id.*

380. *Id.*

381. *Id.*

382. AMES, *Camillus*, *supra* note 332, at 19.

383. 2 ANNALS OF CONG. 1955 (1791).

384. JOHN PHILIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 79–80 (1986); Adam Potkay, *Joy and Happiness*, in A COMPANION TO THE EIGHTEENTH-CENTURY ENGLISH NOVEL AND CULTURE 327–334 (Paula R. Backscheider & Catherine Ingrassia eds., 2005).

385. James J. Jones, *Prolegomena to a History of Happiness in the Eighteenth Century*, 6 FRENCH-AM. REV. 283, 290 (1982).

understood, had become the obsessive concern of political philosophy.<sup>386</sup> It was described in the sources as existing “for the common good”<sup>387</sup> and as seeking to serve the interests of the many and not the few.<sup>388</sup> Government was meant ideally both to restrain the passions<sup>389</sup> but also to protect and conserve well-ordered liberty.<sup>390</sup>

Constitutional interpreters, Ames proposed, must have recourse to this larger body of ideas when construing the Constitution. And if they did, he went on, they would know that the powers of government were real and must be used to “promote the good of the society and the ends for which the Government was adopted.”<sup>391</sup>

But, Ames assured his listeners, this did not mean that constitutional limitations were to be disregarded in favor of a potentially limitless philosophical quest for the proper blend of freedom and communal good. Read broadly, the Constitution still imposed three types of restraint on Congress. The legislature must not violate “the natural rights of man;” it must respect the rights which have been “expressly reserved” to the people; and it must preserve “the powers which are assigned to the States.”<sup>392</sup> At the level of general principle, one could find in Ames’ arguments echoes of Madison’s constitutional claims. Still, unlike Madison, Ames did not understand the Bank to infringe on any of the three categories of limitations he identified largely, it seems, because of a half-articulated commitment to the idea of government as protector of the common good.

Ames was now prepared to turn to the question of the Bank Bill, and in doing so, he laid down a guiding principle: “As the bank is founded on the free choice of those who make use of it, and is highly useful to the people and to Government, a liberal construction is natural and safe. This circumstance creates a presumption in favor of its conformity to the Constitution.”<sup>393</sup>

Ames must have sensed the weakness of the arguments he had thus far advanced. After all, he did little more than elevate utilitarianism—a na-

386. Craig Smith, *Forms of Government, in* THE OXFORD HANDBOOK OF BRITISH PHILOSOPHY IN THE EIGHTEENTH CENTURY 530 (James A. Harris ed., 2013) (“One of the chief themes in eighteenth-century British philosophy is the importance of the form of government.”).

387. MASS. CONST. pt. 1, art. 7 (A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts).

388. ALGERNON SIDNEY, DISCOURSES ON GOVERNMENT 451 (1805).

389. RACHEL HAMMERSLEY, THE ENGLISH REPUBLICAN TRADITION AND EIGHTEENTH-CENTURY FRANCE: BETWEEN THE ANCIENTS AND THE MODERNS 56–58 (2010).

390. PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 35–44 (1997).

391. 2 ANNALS OF CONG. 1956 (1791); see also H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION 95 (1993) (seeing Ames as advancing a theory of government’s power “to act for the common good”).

392. 2 ANNALS OF CONG. 1956 (1791); see also Joseph M. Lynch, *The Federalists and the Federalist: A Forgotten History*, 31 SETON HALL L. REV. 18, 21 (2000) (further analyzing this text).

393. 2 ANNALS OF CONG. 1956 (1791).

tional bank was useful to national interests—into an argument for its constitutionality. He needed greater support, and so he next reviewed a series of constitutional powers that might justify Congress' decision to incorporate the bank.

There was the interstate commerce clause—which Ames described as “the power to regulate trade from State to State.”<sup>394</sup> Trade and commerce among the States “can never be on a good footing without a bank, whose paper will circulate more extensively than that of any State bank.”<sup>395</sup> There was also the necessity of collecting and paying the interest on the national debt. Payment transfers can be made much more efficiently through the operation of the bank. Without the bank, Ames asked, “Is it possible to transport the revenue from one end of the Continent to the other?”<sup>396</sup> The federal government cannot rely on state banks since not every state has a bank, and there is no constitutional obligation that they should have one.<sup>397</sup>

Then there was national defense. Suppose the United States were invaded while Congress was not in session. Who would finance an appropriate military response until Congress could be convened?<sup>398</sup> Only a bank could be counted on in such circumstances.<sup>399</sup>

He scoured the Constitution for other possible sources of authority. There was the clause—Article I, Section 8, Clause 17—which conferred on Congress jurisdiction to govern the territory acquired for the new national capital and property acquired for federal purposes, such as “Forts, Magazines, Arsenals . . . and other needful Buildings.”<sup>400</sup> If Congress enjoyed the right of “exclusive legislation” for these territories, “it may establish a bank in those places with corporate powers.”<sup>401</sup>

And this brought Ames to the necessary and proper clause. He acknowledged that the clause did not confer on Congress “any new powers.”<sup>402</sup> Ames nevertheless insisted that the necessary and proper clause should be read broadly, as “establish[ing] the doctrine of implied powers.”<sup>403</sup> Still, he magnanimously conceded, even if one adopted Madison's narrow reading of the necessary and proper clause, banks remained indispensable to the exercise of other constitutional powers and hence Congress possessed the authority to charter one.<sup>404</sup>

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394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.* at 1956–1957.

399. 2 ANNALS OF CONG. 1957 (1791).

400. U.S. CONST. art. I, § 8, cl. 17.

401. 2 ANNALS OF CONG. 1959 (1791).

402. *Id.*

403. *Id.*

404. RALPH A. ROSSUM, FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY 142 (2001).



There is no question that Ames's search for textual support was scattershot. But did that search bespeak the strength of his claim of constitutional authority or its weakness? Was the Constitution seemingly honeycombed with sources of power for the establishment of a bank? Or was Ames grabbing at a chimera? What Ames desperately required was a unifying theory that could explain how these diverse powers fit together in a single constitutional ensemble. His appeals to happiness and government were insufficiently developed to provide the needed framework.

*b. Theodore Sedgwick*

Theodore Sedgwick's analysis consisted of a carefully-wrought series of syllogisms. First, he sought to identify the major purposes served by the Constitution and of all Government. These included most especially "the public good and general welfare"<sup>405</sup> and "the general happiness of the people."<sup>406</sup> If these were the purposes of constitutional government, then the Constitution had to be interpreted as containing within itself "the means of effecting the great purposes for which [it] was designed."<sup>407</sup>

It is worthwhile to contrast this understanding of the Constitution with the view espoused by Madison and his collaborators. They did not speak of the Constitution in these terms. Indeed, the logic of their position would have foreclosed such a vision. For them, the purpose of the Constitution was to impose a minimum degree of consistency and coherence upon a system in which most power and responsibility would be lodged in the states. For Sedgwick, on the other hand, as it had been for Ames, the federal government was charged with the responsibility of ensuring the general welfare and the common good of the new nation and these were open-ended responsibilities that Congress had to zealously fulfill.

Next, Sedgwick conceded that even though the Constitution aimed at the achievement of these broad public purposes, it did not confer on Congress general authority to achieve those lofty ends. Congressional action still had to be justified by reference to particular constitutional provisions.<sup>408</sup>

This recognition led Sedgwick to consider the nature of power as a legal concept. There was a principle, he asserted, "universally acknowledged," that holds "that wherever a power is delegated for express purposes, all the known and usual means for the attainment of the objects expressed are conceded also."<sup>409</sup>

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405. 2 ANNALS OF CONG. 1962 (1791).

406. *Id.* at 1963.

407. *Id.* at 1961.

408. *Id.* ("[I]t would be necessary to reflect on the powers with which Congress are expressly invested.")

409. *Id.*; see also Robert G. Natelson, *Tempering the Commerce Power*, 68 MONT. L. REV. 95, 95, 111 n.83 (2007); Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*,

To apply this principle, however, meant that Sedgwick had to identify particular provisions of the Constitution under which the Bank might be authorized. He had little problem doing so: "Congress was authorized to lay and collect taxes, to borrow money on the credit of the United States, to raise and support armies, provide and maintain navies, to regulate foreign and domestic trade, and to make all laws necessary and proper to carry these and other enumerated powers into effect."<sup>410</sup>

The next step in Sedgwick's reasoning was to connect these substantive grants of power with the necessary and proper clause. On this, he directly challenged Madison. For Madison, the word "necessary" carried a meaning akin to "indispensable." Since he did not view the Bank as necessary but merely as "convenient" to the good functioning of government, Madison condemned it as unconstitutional.<sup>411</sup>

For Sedgwick, however, Madison's equation of "necessary" as equaling "indispensable" was not supported by the Constitution and had not been the way Congress had thus far interpreted its legislative authority.<sup>412</sup> To make this point, Sedgwick held up for inspection many of the First Congress's legislative enactments: "Such a construction would be infinitely too narrow and limited; and to apply the meaning strictly, it would prove perhaps that all the laws which had been passed were unconstitutional; for few, if any, of them could be proved indispensable to the existence of the Government."<sup>413</sup>

Still, Sedgwick was not prepared to endorse an unfettered power of congressional action to pass laws that were merely "convenient" to the accomplishment of one or another of the Constitution's enumerated powers. He sought for a middle ground between Madison's rigorism and a general license to legislate. He located that middle ground in his understanding of power: a grant of power carried "the known and usual means" for effectuating it. And reliance on a bank was undoubtedly a known and usual means employed by many governments for raising taxes, financing armies, and achieving all other constitutional powers.<sup>414</sup>

Where Ames' defense of the Bank attained its objective through brilliant rhetorical embellishment, Sedgwick's reached the same goal through tightly reasoned syllogism. Both, however, arrived at the same destination.

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in THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 52, 60–80 (Gary Lawson et al. eds., 2010) (both articles tracing the source of this universal acknowledgment to the common law's treatment of incidental powers in such areas as agency and the administration of trusts).

410. 2 ANNALS OF CONG. 1961 (1791).

411. *Id.*

412. 2 ANNALS OF CONG. 1961–1962 ("It might be of use to determine with precision what was the meaning of the words *necessary* and *proper*—they did not restrict the power of the Legislature to enacting such laws only as are indispensable.")

413. *Id.* at 1962.

414. *Id.*

c. *Elias Boudinot*

For Boudinot, the primary question was the constitutionality of the Bank Bill. The members of the House could judge for themselves whether a bank was needed, but before reaching that question, the House had to determine whether it possessed power to act under the Constitution.<sup>415</sup>

Boudinot asserted that constitutional analysis had to proceed, in the first instance, from the Preamble. The Preamble “declar[es] the general purposes for which [the Constitution] was formed: ‘the insurance of domestic tranquility, provision for the common defence, and promotion of the general welfare.’”<sup>416</sup> The whole of the Constitution must be seen through the prism of the Preamble. Every grant of power, every authorization, must be evaluated and understood as a means of furthering these great purposes.<sup>417</sup>

Constitutional historians today recognize the crucial role the Preamble has played in the development of ideas about the nature and purpose of the United States even if it has not figured prominently in case law.<sup>418</sup> Scott Douglas Gerber has argued that the Preamble possesses “substantive significance” in the way it summarizes the meaning of the American nation.<sup>419</sup> Akhil Reed Amar declared that the Preamble contained within itself a “geo-strategic vision of union.”<sup>420</sup> Carol Berkin wrote that the Preamble was responsible for forging a distinctive American identity. Its careful choice of words and elegant style caused its readers to think of themselves as citizens first of the United States and only then of the separate states.<sup>421</sup>

A careful lawyer, Boudinot did not find it necessary to advance such far-reaching claims in his invocation of the Preamble, but he almost surely would have agreed with them. Rather, he looked to two phrases of the Preamble in particular that required the financial security that the Bank ensured: “The public defence [and] general welfare” both demanded revenue streams that were predictable and sufficient.<sup>422</sup>

Having identified these large general purposes, Boudinot next searched for the particular enumerated powers that were meant to give them effect. He condensed a number of specific clauses into a tightly phrased sentence that emphasized Congress’s powers to ensure national security, to borrow

415. *Id.* at 1970.

416. *Id.* at 1972 (quoting Preamble of the Constitution).

417. *Id.*

418. Erhard Denninger, *Constitutional Law Between Statutory Law and Higher Law*, in *LAW IN THE MAKING: A COMPARATIVE SURVEY* 103, 113 (Alessandro Pizzarusso ed., 1988).

419. SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 60 (1995).

420. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 106 (2005).

421. Carol Berkin, “*We the People of the United States*”: *The Birth of an American Identity*, *September 1787*, 20 *OAH MAG. HIST.* 53, 53 (2006).

422. 2 *ANNALS OF CONG.* 1973 (1971).

money, and “to make all laws necessary and proper for carrying into execution the foregoing powers.”<sup>423</sup>

Boudinot warned Congress to take his concerns for national security seriously. He subtly reminded the members of his service in the Continental Congress and how the revolutionary cause nearly collapsed for want of adequate funding.<sup>424</sup> “That danger which was then so hardly avoided became a solemn memento to this House to provide against a similar case of necessity.”<sup>425</sup>

The word “necessity” was crucial to Boudinot’s analysis. Unlike Sedgwick, Boudinot viewed the Bank as indispensable and so he proceeded to demonstrate its necessity to the well-being of the nation. Again, Boudinot adverted to the financial crises of the Revolutionary War to stress the indispensability of a bank to any war effort: “To this necessary end it becomes Congress to provide that the necessary means may be always at hand, by being able to arm their citizens and provide their support while engaged in the defense of their common country.”<sup>426</sup>

Still, Boudinot was not finished making the constitutional case for the Bank. He was satisfied that a bank met the constitutional standard of necessity he had set for it, but he still had to resolve the question whether Congress had the authority to grant a corporate charter. Boudinot thought the Bank opponents were unduly dismissive by maintaining Congress had no constitutional power to grant corporate charters.<sup>427</sup> In reply, Boudinot sought to explain precisely what a grant of a corporate charter meant at law.

It was important for Boudinot to take this step since the common law of corporations was then undergoing a major transition. Corporations were a regular feature of medieval law, known to canon,<sup>428</sup> Roman,<sup>429</sup> and English common law.<sup>430</sup> These corporations, however, were typically not business firms but institutions of governance. A bishop and his chapter might

423. *Id.* at 1972.

424. *Id.* at 1975.

425. *Id.*

426. *Id.* at 1973.

427. *Id.* at 1971.

428. JAMES A. BRUNDAGE, *MEDIEVAL CANON LAW* 98–105 (Routledge 2013) (1995).

429. John F. Padgett, *The Emergence of Corporate Merchant-Banks in Dugento Tuscany*, in *THE EMERGENCE OF ORGANIZATIONS AND MARKETS* 121, 122 (John F. Padgett & Walter W. Powel eds., 2012).

430. David J. Seipp, *Formalism and Realism in Fifteenth-Century English Law: Bodies Corporate and Bodies Natural*, in *JUDGES AND JUDGING IN THE HISTORY OF THE COMMON LAW AND CIVIL LAW: FROM ANTIQUITY TO MODERN TIMES* 37, 40 (Paul Brand & Joshua Getzler eds., 2012).

comprise a corporation,<sup>431</sup> as might a town and its governing authorities,<sup>432</sup> or a guild and its members.<sup>433</sup>

Over the course of the seventeenth century, one witnessed the steady emergence of corporations organized expressly for business purposes.<sup>434</sup> Thus, in England, one saw the Crown granting a series of charters to what were called joint-stock companies to raise capital so as to exploit the resources of its ever-expanding colonial reach—such as the Levant Company in 1581, Hudson’s Bay Company in 1670, the Royal African Company in 1672, and the South Sea Company in 1711.<sup>435</sup> Companies such as these (and one must include among them the Bank of England and the East India Company) were the frequent recipients of trading privileges and monopolies.<sup>436</sup> Indeed, by the end of the eighteenth century, a company such as the East India Company could even exercise quasi-governmental authority in parts of India.<sup>437</sup>

Corporations, by 1791, in other words, might assume diverse forms and perform diverse functions. It is little wonder, therefore, that corporate theory remained fluid if not fairly confusing. The seventeenth-century *Case of Sutton’s Hospital* declared corporations to be “invisible, immortal, and resting only in intendment and consideration of the law.”<sup>438</sup> William Blackstone in his *Commentaries on the Laws of England* repeated this conception of a corporation describing it as “a person that never dies” and so capable of retaining its “privileges and immunities . . . estates and possessions” in perpetuity.<sup>439</sup>

431. Kenneth Pennington, *Politics in Western Jurisprudence*, in 7 A TREATISE OF LEGAL PHILOSOPHY AND GENERAL JURISPRUDENCE THE JURISTS’ PHILOSOPHY OF LAW FROM ROME TO THE SEVENTEENTH CENTURY 181–186 (Fred D. Miller et al. eds., 2007).

432. GEORGE SHEERAN, *MEDIEVAL YORKSHIRE TOWNS: PEOPLE, BUILDINGS, AND SPACE* 4 (1998); ALBERTA SBRAGIA, *DEBT WISH: ENTREPRENEURIAL CITIES, US FEDERALISM, AND ECONOMIC DEVELOPMENT* 86–87 (1996).

433. AVNER GREIF, *INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE* 394 (2006); ROBERT HESSEN, *IN DEFENSE OF THE CORPORATION* 6–7 (1979); John Braithwaite & Peter Drahos, *Globalisation of Corporate Regulation and Corporate Citizenship*, in 2 INTERNATIONAL CORPORATE LAW 6 (Fiona Macmillan ed., 2003).

434. RICHARD GRASSBY, *THE IDEA OF CAPITALISM BEFORE THE INDUSTRIAL REVOLUTION* 24–25 (1999); STEPHEN R. BROWN, *MERCHANT KINGS: WHEN COMPANIES RULED THE WORLD, 1600–1900*, at 1–56 (2009).

435. MORTIMER EPSTEIN, *THE ENGLISH LEVANT COMPANY: ITS FOUNDATION AND ITS HISTORY TO 1640*, at 16 (1908); RON HARRIS, *INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720–1844*, at 49 (2000); GEOFFREY POITRAS, *EQUITY CAPITAL: FROM ANCIENT PARTNERSHIPS TO MODERN EXCHANGE TRADED FUNDS* 238 (2016).

436. RALPH DAVIES, *THE RISE OF THE ATLANTIC ECONOMIES* 242 (1973); MANUEL GOTTLIEB, *A THEORY OF ECONOMIC SYSTEMS* 109 (1984).

437. TILMAN W. NECHTMAN, *NABOBS: EMPIRE AND IDENTITY IN EIGHTEENTH-CENTURY BRITAIN* 16–18 (2010).

438. Martin Petrin, *Reconceptualizing the Theory of the Firm: From Nature to Function*, 118 PA. ST. L. REV. 1, 5 n.9 (2013) (citing *Case of Sutton’s Hospital*, 77 Eng. Rep. 937, 973 (1613)).

439. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 456 (1979); see also Reuven S. Avi-Yonah & Dganit Sivan, *A Historical Perspective on Corporate Form and*

Aside from its theoretical immortality, Blackstone offered a sweeping analysis of corporations that brought under that rubric many different types of social organizations. The king was a corporation, as were bishops.<sup>440</sup> “[T]he mayor and commonality of a city, the head and fellows of a college, the dean and chapter of a cathedral church” also counted as corporations.<sup>441</sup> But private individuals might also form corporations for the advancement of knowledge,<sup>442</sup> or for the distribution of alms or other forms of charity,<sup>443</sup> or for economic advantage.<sup>444</sup> Of the last type of corporation, Blackstone gave the examples of “the Bank of England and the society of the British fishery.”<sup>445</sup>

Only the King, Blackstone emphasized, might create a corporation.<sup>446</sup> Corporate powers, as Blackstone understood them, were broad and ill-defined. Corporations were exempt from criminal prosecution for a wide variety of offenses;<sup>447</sup> corporations might also buy and sell property,<sup>448</sup> and they enjoyed a variety of “incidents and powers.”<sup>449</sup> Finally, they also had the power to promulgate “by-laws for their own government, not contrary to the law of the land.”<sup>450</sup>

A review of other sources, such as Sir John Comyns’ *Digest of the Laws of England*, indicates just how broad was the power of corporate rule-making. Corporations, Comyns’ text observed, possessed the inherent power to legislate,<sup>451</sup> and their legislative acts were valid so long as they were “*legi, fidei, rationi consona* (consistent with law, religion, and reason).”<sup>452</sup> By-laws might, furthermore, regulate the fine details of business and trade.<sup>453</sup> Comyns gave examples: archers might be prohibited from making bows; bricklayers might be prohibited from mixing plaster; bakers

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*Real Entity: Implications for Corporate Social Responsibility, in THE FIRM AS ENTITY: IMPLICATIONS FOR ECONOMICS, ACCOUNTING, AND THE LAW 156–157* (Yuri Biondi et al. eds., 2007).

440. BLACKSTONE, *supra* note 439, at 457.

441. *Id.*

442. *Id.* at 459.

443. *Id.*

444. *Id.*

445. *Id.* at 461.

446. BLACKSTONE, *supra* note 439, at 460.

447. *Id.* at 464.

448. *Id.* at 463.

449. *Id.* at 465.

450. *Id.* at 464.

451. 2 JOHN COMYNs, A DIGEST OF THE LAWS OF ENGLAND 148 (4th ed. 1800). Comyns (1667–1740) wrote in Law French. His work was posthumously translated into English, edited, and updated by other hands. H.A. Hollond, *English Legal Authors Before 1700*, 9 CAMBRIDGE L.J. 292, 326–327 (1947).

452. COMYNs, *supra* note 451, at 150 (my translation).

453. *Id.* at 151. Comyns gave examples: archers might be prohibited from making bows; bricklayers may not make plaster; bakers might be regulated on the type of bread they bake; cobblers “may not make boots or shoes, which belong to shoe-makers.”

might be regulated on the type of bread they bake; cobblers “may not make boots or shoes, which belong to shoe-makers.”<sup>454</sup>

One can now appreciate why Madison objected that the Congress lacked the constitutional power to grant corporate charters and why James Jackson so deeply feared the creation of monopolies. Given the reach and scope of corporation law, these were rational concerns. An entity that never dies, enjoying a wide array of exemptions, rights, and privileges including the power to make law to govern entire industries, operating with the full backing of the federal government, must have seemed very threatening indeed.<sup>455</sup> And so Boudinot assumed the responsibility of demystifying what it meant for Congress to charter a corporation.

Boudinot commenced by examining the inherent, natural rights of individuals to engage in commerce.<sup>456</sup> Every person has the right to own property, “both real and personal, to any amount whatever.”<sup>457</sup> And with the right of ownership, came the inherent right to sell or transfer property.<sup>458</sup>

And if persons can take these actions in their individual capacity, they also have the right to organize into groups. Individuals, after all, have the unquestioned right to own property “in joint tenancy or as tenants in common.”<sup>459</sup> And it is but a short step from acknowledging these common-law property rights to admitting that persons might band together into partnerships to enhance their commercial position.<sup>460</sup> Thus parties have the right to organize into “copartnerships” and “no authority in Government” may abridge that right.<sup>461</sup> And if individuals may form partnerships they also have the right to “make by-laws or articles of copartnership for their own government.”<sup>462</sup> And—Boudinot kept building his case—if they have the right to form partnerships for commercial purposes, they might utilize that right to organize a bank.<sup>463</sup> And the Government could, without constitutional objection, “make contracts” with that bank “to all intents and purposes, as great and important as a public bank, would their capital admit of it.”<sup>464</sup>

If all of these actions were already permissible under the Constitution, Boudinot effectively asked, then Congress must think closely about

454. *Id.*

455. Ian Speir, *Corporations, the Original Understanding, and the Problem of Power*, 10 GEO. J.L. & PUB. POL’Y 115, 124 (2012).

456. 2 ANNALS OF CONG. 1971 (1791). On Boudinot’s opinion that the right to engage in commerce was natural in origin, see *id.* at 1972.

457. *Id.* at 1971.

458. *Id.*

459. *Id.*

460. *Id.*

461. *Id.*

462. 2 ANNALS OF CONG. 1971 (1791).

463. *Id.*

464. *Id.* at 1972.

Madison's rejection of the power to grant corporate charters. And if Congress considered this matter carefully, it should begin by asking what problems the grant of a corporate charter solves?

Corporations, Boudinot stated, were meant to solve the problems of doing business on a large scale. It was cumbersome for a "private association" to engage in substantial commerce. There was the "necessity of using each individual's name in all their transactions; suits must be brought in all their names; deeds must be taken in like manner; . . . the death of a member dissolves the partnership."<sup>465</sup> Each partner was fully "liable for the default of the rest."<sup>466</sup>

The corporate form was meant to alleviate these defects. Thus the corporate charter contemplated by the Bank Bill assuaged the cumbersomeness of dealing with a collective of individuals by creating "one legal artificial body, capable by a fictitious name of exercising the rights of an individual."<sup>467</sup> Next, it also limited the financial obligations of its members, absolving them for the debts of the corporation "beyond the joint capital."<sup>468</sup> Boudinot conceded that some individuals might find limited liability problematic, but what mattered was that all persons doing business with the Bank were on notice.<sup>469</sup>

Boudinot also called attention to the restrictions that would be written into the corporate charter. The Bank was limited in its capitalization;<sup>470</sup> furthermore, the Bank charter came with an expiration date. It would not be chartered for an indefinite, potentially perpetual existence, but "for a certain time" only.<sup>471</sup> These restrictions, Boudinot thought, should allay the fears of Bank opponents that the Bank would grow into a dominating force in American life.<sup>472</sup>

Seen in this restrictive light, Boudinot argued the corporate charter did not pose a threat to the national government or the states.<sup>473</sup> He disagreed with Jackson, who viewed the Bank as inimical to an agricultural way of life. Indeed, "he could not bring his mind to comprehend how the commercial interests of a country could be promoted without greatly advancing the interests of agriculture."<sup>474</sup> With commerce came expanding markets, and

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465. *Id.* at 1971.

466. *Id.*

467. *Id.*

468. 2 ANNALS OF CONG. 1971 (1791).

469. *Id.* at 1972.

470. *Id.*

471. *Id.* at 1971.

472. *Id.* at 1971–1972 ("And by political duration their powers and abilities are limited, and their rights restricted, so as to prevent any danger that might arise from the exercise of their joint natural right, not only as to the amount of capital, but as to the by-laws they may make for their government").

473. *Id.* at 1972.

474. 2 ANNALS OF CONG. 1977 (1791).



farmers as much as others were well-positioned to take advantage of that.<sup>475</sup> The Bank, he was confident, “promoted” the “public weal.”<sup>476</sup>

Still, Boudinot confessed, even though he was confident of the rightness of his position, he acknowledged that his analysis might be mistaken.<sup>477</sup> He knew that his responsibilities were awesome—he was “legislating for a nation, and for thousands unborn.”<sup>478</sup> He was comforted, however, to know the judiciary was prepared to intervene to correct any error he or his fellow representatives might make: the courts possessed the power to “constitutionally prevent the operation of such a wrong measure from effecting [sic] his constituents.”<sup>479</sup> He was not alone in expressing these sentiments. John Laurance of New York<sup>480</sup> and William Loughton Smith,<sup>481</sup> a Southern ally of Hamilton’s, also argued that the courts were the ultimate constitutional decision-makers should Congress err in its legislative capacity.<sup>482</sup>

#### d. *Elbridge Gerry*

Reviewing the debate as it had unfolded, Elbridge Gerry indicated that at the heart of the disagreement between the two sides, was a conflict over interpretive method.<sup>483</sup> Madison had proposed a series of interpretive rules,<sup>484</sup> but Gerry rejected them as lacking grounding in law.<sup>485</sup> Gerry did not doubt Madison’s “good intentions,” but he was a long and well-known opponent of the Bank, and Gerry feared he made up his interpretive rules “for the occasion.”<sup>486</sup> These were criteria, Gerry complained, that were “not

475. *Id.* at 1977–1978.

476. *Id.* at 1971.

477. *Id.* at 1978.

478. *Id.* at 1978–1979.

479. *Id.* at 1978.

480. John Laurance (1750–1810) was a lawyer and merchant who served in the Revolutionary War and was active in New York politics in the 1780s, where he became an ally of Hamilton’s. STANLEY ELKINS & ERIK MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800*, at 767 n.66 (1993). While a member of the First Congress, he was the “principal author” of the Collection Act, which sought to eradicate smuggling from the Atlantic seaboard. CHARLENE BANGS BICKFORD & KENNETH R. BOWLING, *BIRTH OF THE NATION: THE FIRST FEDERAL CONGRESS, 1789–1791*, at 32 (1989).

481. William Loughton Smith (1758–1812) was a planter and a lawyer from Charleston, South Carolina. He was educated in London and Geneva, and served in diplomatic posts following his career in Congress. CAROL BERKIN, *THE BILL OF RIGHTS: THE FIGHT TO SECURE AMERICA’S LIBERTIES* 207 (2015).

482. 2 ANNALS OF CONG. 1965 (1791) (John Lawrance); *id.* at 1988 (William Loughton Smith); see also Larry D. Kramer, *The Supreme Court 2000 Term Forward: We the Court*, 115 HARV. L. REV. 4, 78 (2001) (considering the frequency with which judicial review was mentioned in the early congresses); Matthew Steilen, *Judicial Review and Non-Enforcement at the Founding*, 17 U. PA. J. CONST. L. 479, 523 n.235 (2014) (examining the subsequent history of Boudinot’s recommendation of judicial review).

483. 2 ANNALS OF CONG. 1997–1998 (1791).

484. *Id.*

485. *Id.* at 1998.

486. *Id.*

sanctioned by law exposition or approved by experienced judges of the law.”<sup>487</sup> As an *ad hoc* creation fashioned for purposes of temporary expedience, Gerry described Madison’s effort as “an *ignis fatuus* that may lead to destruction.”<sup>488</sup>

Gerry proposed, instead of creating interpretive rules to fit the occasion, it would be more appropriate to follow the well-established precepts of the common law, as found in William Blackstone’s *Commentaries*.<sup>489</sup> Gerry well recognized that a central point of disagreement was the meaning of the noun “necessary” and so he quoted from Blackstone’s guidance on how to derive meaning from words when reading legal texts: “they [words] are generally [sic] understood in their usual and most ordinary [sic] signification, not so much regarding the [sic] grammar as their general and popular use.”<sup>490</sup>

And so Gerry attempted to make sense of the word “necessary” and at once called attention to its multiple meanings. Alas, Gerry pointed out, the word’s meaning appeared to shift based on “the subject and circumstances.”<sup>491</sup> A city under siege and out of supplies might be said to be “under the necessity of surrendering.”<sup>492</sup> A debtor sued by his creditors, on the other hand, was not under a “physical necessity” brought on by long tribulation, but under a necessary legal obligation to make payment.<sup>493</sup> Gerry turned to public finance: a nation short on precious metals might find it necessary to use some other medium of value, while the necessity of providing for the common defense differs greatly depending whether the nation is at peace or under foreign invasion.<sup>494</sup> Clearly, Gerry concluded, there was no single plain meaning to the word necessity, so recourse must be had to other interpretive guides.

Still following Blackstone, Gerry proposed that the interpreter must next consult context: “If words are still dubious, we may establish their meaning by the context; thus, the preamble is often called in to help the construction of an act of Parliament.”<sup>495</sup> Unlike Boudinot, who assumed the importance of the Preamble, Gerry demonstrated its significance through reliance on traditional rules of interpretation.

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487. *Id.*

488. *Id.* (emphasis in original); see also 1 JOHN WILKES, THE CORRESPONDENCE OF THE LATE JOHN WILKES WITH HIS FRIENDS 85 (1805) (“*ignis fatuus* . . . bewilders and leads astray”). *Ignis fatuus*, literally “deceptive fire,” was commonly used in medieval literature to describe playful spirits that were also “potentially malicious.” DOUGLAS GRAY, SIMPLE FORMS: ESSAYS ON MEDIEVAL ENGLISH POPULAR LITERATURE 31 (2015).

489. 2 ANNALS OF CONG. 1998 (1791).

490. *Id.* (quoting BLACKSTONE, *supra* note 439, at 59).

491. *Id.* at 1999.

492. *Id.* at 1998.

493. *Id.*

494. *Id.* at 1999.

495. 2 ANNALS OF CONG. 1999 (1791) (paraphrasing BLACKSTONE, *supra* note 439, at 60).

The Preamble, Gerry continued, had two clauses that stood out: the requirements to provide for the common defense and the general welfare.<sup>496</sup> These obligations were singularly significant in Gerry's estimation because they were repeated in Article I, Section 8.<sup>497</sup> Again echoing Boudinot's recollections about the dire situation of Revolutionary War finance, Gerry stressed that the national defense is best ensured when the government is financially prepared to withstand foreign invasion.<sup>498</sup> And that can only be accomplished through the creation of a national bank capable of financing "sudden emergencies."<sup>499</sup>

Finally, Gerry turned to what Blackstone called "the most universal and effectual way of discovering the true meaning of a law . . . [i.e.], the reason and spirit of it."<sup>500</sup> To come to an understanding of the Constitution's reason and spirit, Gerry asserted, one had to appreciate the political circumstances that preceded it. The union was "imperfect"; there was a "want of public and private justice"; there were "internal commotions, a defenceless community, neglect of the public welfare, and danger to our liberties."<sup>501</sup> The Constitution was intended to have more "energy" than the flaccid Articles of Confederation.<sup>502</sup>

If the Constitution's purpose was to meet these pressing needs, then the necessary and proper clause, Gerry thought, had to receive a "liberal construction."<sup>503</sup> The risk in a more restrictive interpretation, according to Gerry, was a return to the "Union, as it was under the Confederation."<sup>504</sup> Gerry acknowledged that there was the danger of abuse of power in adhering to a liberal interpretation, but "disuse" of legitimate constitutional powers also posed the grave possibility of harm.<sup>505</sup>

In closing, Gerry trained his sights directly on Madison. "[W]hich is most dangerous," Gerry asked, "a liberal or a destructive interpretation?"<sup>506</sup> Gerry was convinced that Madison's interpretive approach would cause chaos. Follow his effort to give an expansive application to the proposed Ninth Amendment, Gerry declared, and "our whole code of laws is unconstitutional."<sup>507</sup>

Gerry could not long maintain his facade of amicability where Madison was concerned. Thus, he accused the Virginian—and the man he

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496. *Id.* at 2000.

497. *Id.*

498. *Id.*

499. *Id.*

500. BLACKSTONE, *supra* note 439, at 61; *see also* 2 ANNALS OF CONG. 2002 (1791).

501. 2 ANNALS OF CONG. 2002 (1791).

502. *Id.*

503. *Id.*

504. *Id.*

505. *Id.* at 2003.

506. *Id.*

507. 2 ANNALS OF CONG. 2003 (1791).

would later serve as vice president—of hypocrisy. In the debate over the president's power to remove executive-branch appointees, Madison took the more liberal position, arguing that the power should be vested exclusively in the president, and rejecting a more literal understanding of the Constitution that required the Senate to approve of the dismissal of any appointee it confirmed to office.<sup>508</sup> Gerry finally mocked Madison's reliance on the intention of the Framers. Memories are faulty, he noted, and one Framer's recollections differed from another's.<sup>509</sup> Furthermore, Gerry once more pretended to the role of obtuse literalist, the Convention's debates were immaterial since the question of creating a national bank, as opposed to the more generic issue of chartering "commercial corporations" was never put before it.<sup>510</sup>

Finally, he took note of the objection that the Bank Bill created a monopoly. This was impossible, he said, since the Bank Bill did not prevent states or private individuals from creating banks. Unlike the Bank of England, which was "founded in monopoly," Hamilton's proposed Bank was free of these "feature[s]."<sup>511</sup>

### 3. *Observations*

These four proponents of the Bank Bill were united in the objective they wished to achieve—approval of Hamilton's plan by Congress. But they offered different paths by which to achieve that goal.

Fisher Ames brought two important insights to bear. First, he proposed that the Constitution could not be interpreted literally. In fact, he argued, the Congress had consistently rejected constitutional literalism, and a return to Madison's rigid doctrine of enumerated powers would mean the invalidation of most of what the First Congress had accomplished. Ames also appreciated that since the Constitution was not self-interpreting, what was needed was a political philosophy. He invoked the abstract noun "Government" in an attempt to arrive at a set of coherent overarching interpretive principles. Still, he did not develop what he meant by "Government" particularly well, and when he turned to the Constitution in an effort to identify the provisions that conferred on Congress the implied power to charter the Bank, the result was little more than a listing of plausible candidates. He knew the Constitution offered open-ended possibilities, but not how to fully exploit that insight.

Theodore Sedgwick provided a neater, more orderly exposition of the grounds for supporting the Bank. The Constitution conferred on Congress the power of ensuring the general welfare and the common good, but Con-

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508. *Id.*

509. *Id.*

510. *Id.*

511. *Id.* at 2006.

gress was limited in its scope of action. It could only legislate within one of its defined powers, using the necessary and proper clause. Sedgwick proposed an expanded interpretation of “necessary,” suggesting that it did not mean “indispensable,” as Madison had argued, but rather conveyed the sense of the routine or usual incidents associated with a particular grant of power.

Elias Boudinot commenced his defense of the Bank bill by focusing on the Constitution’s Preamble. For Boudinot, the Preamble functioned as a kind of axiom; the first, unquestioned premise upon which all subsequent constitutional analysis should be based. The Preamble stood for national unity and for a federal government sufficiently powerful to ensure its own survival in the face of war and invasion. A practical man who knew firsthand from his governmental service during the Revolutionary War how difficult it was to finance a war effort, Boudinot emphasized the Bank’s absolute necessity to national defense. But Boudinot took a further step also, by explaining that the Representatives should not fear the Bank’s corporate charter. He conceded that the prevailing common law conferred potentially large powers on corporations but stressed that the limitations built into the Bank’s charter—as to length of time and amount of capital it could hold—obviated the greatest dangers.

Elbridge Gerry, finally, attacked Madison directly. He challenged Madison’s rules for interpreting the Constitution as unfairly favoring the outcome he longed for. Gerry countered by proposing that William Blackstone’s rules for interpreting acts of Parliament should be used to explicate the Constitution. Gerry, however, never asked the question whether a constitution posed a different set of interpretive issues from duly-promulgated statute law. Rather, he was led by steps to argue that the reason and spirit of the Constitution should prevail and that spirit pointed in favor of the bank legislation.

Each of these representatives offered a different perspective on the power Congress had to enact the Bank bill. They arrived at their conclusions by different routes, even though their reasoning was broadly consistent. Still, their analysis left something to be desired. Exactly where did Congress receive its implied authority to create a national bank? Was it national defense? The regulation of trade? The power to borrow or tax? An expansive view of the necessary and proper clause? Why did they fail to do more with the word “proper” in the necessary and proper clause? It has been observed that “‘proper’ is the more lax term,<sup>512</sup> yet none of these congressional leaders thought to use it to modify the word “necessary.” And these questions are not merely antiquarian concerns. One need only consult modern Supreme Court decisions—William O. Douglas’s opinion in *Gris-*

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512. Samuel L. Bray, “*Necessary and Proper*” and “*Cruel and Unusual*”: *Hendiadys in the Constitution*, 102 VA. L. REV. 687, 734 (2016).

would *v. Connecticut* comes to mind—to see modern jurists struggle to find a principled foundation in the Constitution for a right or power (in *Griswold*, the right of sexual privacy) that is not expressly mentioned in the text.<sup>513</sup>

### C. *Rebuttal*

#### 1. *William Branch Giles*

William Branch Giles, Madison's faithful ally from Virginia, offered a comprehensive rebuttal on February 7, 1791. He began his rebuttal by first making clear his theory of the Constitution. The Constitution exists, he argued, to establish "a proper distribution of all governmental rights between the Government of the United States and the several State governments, and in fixing limits to the exercise of all authorities granted to the Government of the United States."<sup>514</sup>

Giles rejected the claim that governments had certain inherent powers simply in virtue of being the supreme power in a particular society. That might be true in some places and times, where a government presides over a single unitary state or society.<sup>515</sup> But that could not be the situation in the United States, since the central government in America was "composed" of the "people" of the different states.<sup>516</sup> The United States, he proclaimed, was a "Federal, not . . . a consolidated Government."<sup>517</sup> And in a federal arrangement, one must not diminish the authority of "the State governments."<sup>518</sup>

It was wrong, Giles continued, to suggest that the Bank as contemplated did not infringe on the rights of the States. The existence of a national bank infringed even on the rights of states that had not chartered their own local banks. Giles reasoned that since the Constitution conferred only limited powers on the federal government, states retained total freedom to act on all other matters. Thus, by the terms of the Constitution, states retained the liberty to charter their own banks, and should enjoy "the freest exercise of that [liberty]."<sup>519</sup> States, furthermore, need not charter a bank at all to lose their freedom to restrict "the circulation of bank paper within their respective limits."<sup>520</sup> Giles feared that with these infringements on the autonomy of states, "the very existence [of the States might be] radically subverted."<sup>521</sup>

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513. *Griswold v. Connecticut*, 381 U.S. 479, 484–485 (1965).

514. 2 ANNALS OF CONG. 1991 (1791).

515. *Id.* at 1993.

516. *Id.*

517. *Id.* at 1993–1994.

518. *Id.* at 1994.

519. *Id.*

520. 2 ANNALS OF CONG. 1994 (1791).

521. *Id.*

Thus, Giles challenged what he perceived to be a fallacy at the heart of the proponents' case. They presumed the existence of a strong central government that could choose among a variety of means to accomplish its objectives.<sup>522</sup> But, he objected, the Constitution did not contemplate the creation of a government with large and encompassing legislative powers. If it had, "the detail of the Constitution would have been wholly unnecessary, further than to designate the several branches of the Government which were to be entrusted with this unlimited discretionary choice of means."<sup>523</sup>

The enumeration of specific powers must mean something, Giles alleged, and that is the government envisioned by the Constitution was to be one of limited authority. The states, on Giles's reading of the Constitution, were the primary locus of power in the new United States, and the federal government was merely the product of agreement by these "previously existing governments."<sup>524</sup> And given that essentially derivative character, one had to be very careful when attempting to identify implied powers. Giles did not acknowledge—perhaps he never realized—that his case against the Bank also rested on a series of assumptions about the powers of states. Rather, he criticized the Bank's proponents for their quixotic attempts to find authority for the Bank secreted in one or another of the Constitution's clauses. In doing so, they relied on "indistinct confused conceptions."<sup>525</sup> None of the clauses they turned to—national defense, the collection of taxes, the borrowing of money, the regulation of commerce—made explicit mention of the granting of corporate charters or the creation of banks and so, in Giles's judgment, these texts provided no support for the establishment of a Bank.<sup>526</sup>

Still, Giles chose to dissect each of the proponents' more specific claims. "Common defence and general welfare," he asserted, "contain no grant of any specific authority." These were mere goals, objectives, statements of purpose. They did not authorize the means to achieve those ends. On Giles's logic, only those constitutional provisions that employed specific language conferring power on the federal government were to be understood as effective conduits of those powers. Since "common defence" and "general welfare" did not specifically empower their addressees to perform or to refrain from performing clearly expressed and authorized acts, they could not be understood as power-conferring provisions.

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522. *Id.* at 1990 ("It has been remarked that . . . the means to produce the ends are left to the choice of the Legislature, and that the incorporation of a Bank is one necessary mean to produce these general ends.").

523. *Id.* at 1990–1991.

524. *Id.* at 1993.

525. *Id.* at 1992.

526. 2 ANNALS OF CONG. 1940 (1971).

One can criticize Giles for advancing what amounted to a theory of constitutional surplusage. If words failed to convey specific powers, they were essentially without effect. The logical response to Giles's contention is to ask, why would the Constitution's drafters insert ineffective language into the text? The articulation of a purpose, it would seem, implies the means to achieve that purpose. This is what Ames, Boudinot, and their collaborators were arguing. They meant to impute some substantive significance to language that might otherwise avail nothing. Giles would not hear of it.

The "borrow money" clause was the next provision Giles investigated.<sup>527</sup> This clause, he noted, authorized the government to borrow money, not to create the lending institution that will extend the credit.<sup>528</sup> To see the creation of a bank as incidental to the capacity to borrow, Giles said, was to get the relationship of means and ends backwards. The ability to lend is greater than the capacity to borrow, so if the Constitution intended to create the means of financing the government, it would have expressly so declared.<sup>529</sup> Giles found similar difficulties with other clauses the proponents relied on, such as the power to tax or to regulate commerce.<sup>530</sup>

Thus, Giles charged, the proponents simply could not frame a case under the Constitution as drafted and ratified. The power to grant corporate charters was an important power. Had it been included in the Constitution, the way to establish the Bank would have been clear.<sup>531</sup> But its absence was fatal: "I should . . . rather conclude that the right to borrow, if there be a connexion at all, would be incidental to the right to grant charters of incorporation, than the reverse of that proposition."<sup>532</sup>

Giles did not shy from denouncing certain opponents by name. Sedgwick's effort to expand the meaning of the word "necessary," Giles believed, amounted to introducing a utilitarian calculus into constitutional reasoning. "The gentleman's reasoning . . . if pursued, will be found to teem with dangerous effects, and would justify the assumption of any given authority whatever."<sup>533</sup> And Ames' attempt to locate power to charter a corporation in Congress's jurisdiction over a prospective capital district "seems to me to be an ingenious improvement upon sophistical deduction."<sup>534</sup>

The judiciary, Giles lamented, could not provide an effective check on the unconstitutional exertion of power the Bank's proponents were now readying. Consider, Giles proposed, how a judicial challenge to this law

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527. U.S. CONST. art. I, § 8, cl. 2 (conferring on Congress the power "to borrow money on the credit of the United States").

528. 2 ANNALS OF CONG. 1991 (1791).

529. *Id.*

530. *Id.*

531. *Id.*

532. *Id.* at 1991–1992.

533. *Id.* at 1993.

534. 2 ANNALS OF CONG. 1993 (1791).



would arise. It would come under the criminal law. Someone will have counterfeited the Bank's paper.<sup>535</sup> That person will be charged with a crime, and since it is a felony, he will find himself on trial for his life. "Hence a judicial decision will probably be had of the most serious and awful nature; the life of an individual at stake on the one hand, an improvident act of the Government on the other."<sup>536</sup> Given the constitutional risk of chartering the Bank and the ineffectiveness of any constitutional remedy, the legislation should be voted down. It was nothing less than an untoward expression of "the love of dominion"<sup>537</sup> and "an unprovoked advance in [a] scramble for authority."<sup>538</sup>

## 2. *James Madison*

In his rebuttal, James Madison challenged each of the principal ideas offered by his critics. He spoke first to Boudinot's argument about the non-threatening nature of the Bank's corporate charter. Madison frankly did not believe that the Bank's charter would remain limited. Simply "granting the powers," Madison maintained, "is granting them in *perpetuum*."<sup>539</sup> As confirmation, he pointed to the history of corporations in Europe. There, corporations proved to be "powerful machines" unanswerable to popular will and "independent of the people."<sup>540</sup>

He then rejected Fisher Ames' reliance on abstract notions of "government."<sup>541</sup> What Ames said might be true of other forms of government in other nations, but it was not true of the United States.<sup>542</sup> For confirmation, he looked to the Preamble and confessed that he could not understand how the Preamble could serve as "a new mine of power."<sup>543</sup> Madison distinguished between the Preamble, which established the purposes of the "Confederation," and the "subsequent clauses [which] designate the express powers by which those objects are to be obtained."<sup>544</sup> "Was the Union a mere confederation of states or was it a national government?"<sup>545</sup> This was one of the great burning questions of the 1790s and early 1800s,<sup>546</sup> and with his reference to "Confederation," Madison subtly cast his lot with the former camp.

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535. *Id.* at 1996.

536. *Id.*

537. *Id.* at 1989.

538. *Id.* at 1996.

539. *Id.* at 2009.

540. 2 ANNALS OF CONG. 2009 (1791).

541. *Id.*

542. *Id.*

543. *Id.*

544. *Id.*

545. JOHN LAURITZ LARSON, INTERNAL IMPROVEMENT: NATIONAL PUBLIC WORKS AND THE PROMISE OF POPULAR GOVERNMENT IN EARLY UNITED STATES 109 (2001).

546. JEAN-LOUIS HALPÉRIN, FIVE LEGAL REVOLUTIONS SINCE THE SEVENTEENTH CENTURY: AN ANALYSIS OF A GLOBAL LEGAL LEGACY 123–124 (2014).

Madison, furthermore, did not see how the Bank might be justified by reference of Congress's power to collect taxes. He also ridiculed the connection some supporters supposed the Bank Bill had with the regulation of trade. "Would any plain man suppose that this bill had anything to do with trade?"<sup>547</sup> He did not even perceive a necessary connection between the power to borrow and the Bank. Central governments did not need banks, since they could borrow funds from many types of lenders, as was true in England, where the Crown borrowed from "various sources,"<sup>548</sup> including the great trading corporations.<sup>549</sup>

Madison saved his harshest words for Elbridge Gerry, whom he attacked by name. Gerry, he reminded his audience, had once opposed the Constitution, understanding its "powers . . . [as] . . . dark, inexplicable, and dangerous."<sup>550</sup> And now Gerry stood for an almost limitless Constitution. Taking aim at Gerry's reliance on the "reason" and "spirit" language he drew from Blackstone, Madison declared that this amounted "to the subversion of every power whatever in the several States."<sup>551</sup>

Gerry stood and tried to reply to Madison, but it was recorded that the House expressed "impatience" and so the members proceeded to the vote.<sup>552</sup>

### 3. *Observations*

Interpretation requires a starting point, a foundation, an axiom, which need not be the same for everyone or true for all places and times.<sup>553</sup> Indeed, it has been said that "[l]egal history is the history of the rise and fall of different systems of interpretation."<sup>554</sup> Guided by the modesty that attends any historical investigation, I am not interested in determining which school of thought was "right," only in coming to a better historical understanding of their respective starting points and disagreements.

And there one can discern four distinctive approaches to constitutional interpretation embedded in the congressional debate over the Bank. James Madison read the Constitution as a limiting document. The power not given by the text's express clauses and provisions was withheld from the federal government or implicitly conferred on the states. Fisher Ames was quite

547. 2 ANNALS OF CONG. 2010 (1791).

548. *Id.*

549. On the interconnections between Crown, state finance, and the great trading companies, see BRUCE G. CARUTHERS, CITY OF CAPITAL: POLITICS AND MARKETS IN THE ENGLISH FINANCIAL REVOLUTION 138, 148–149, 151 (1996).

550. 2 ANNALS OF CONG. 2010 (1791).

551. *Id.*

552. *Id.* at 2012.

553. This point has been made repeatedly, in many different and sophisticated ways. Compare RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION 45 (2014), with JAROSLAV PELIKAN, INTERPRETING THE BIBLE AND THE CONSTITUTION 48–51 (2004).

554. AHARON BARAK, THE JUDGE IN A DEMOCRACY 92 (2006).

right in saying that this perspective was no more or less privileged than his own approach or anyone else's. It assumed what it wished to prove: the Constitution did not dramatically interrupt the relationship between the states and the central government; and that government was best which was local and exercised at the state level.

Intuitively grasping the difficulties inherent in Madison's position, Ames sought to locate his interpretive approach in abstract ideas about the nature of government. Government, by virtue of its being the supreme political organization in a particular society, possesses an inherent character discernible and deducible through reason and aimed to bring about certain beneficial ends. And while the Constitution may allocate power in particular ways, ideas about government must nevertheless form the appropriate starting point for further inquiry.

Elias Boudinot, on the other hand, addressed the question of interpretation the way a mathematician might. One requires an axiom, an explicitly agreed upon, unquestioned starting point from which all further reasoning flows. For Boudinot, that was the Preamble. Still, standing behind Boudinot's endorsement of the Preamble as the foundation of all constitutional reasoning was his own experiences in the Revolutionary War. He appreciated the dangers of a weak central government in very tangible, first-hand ways. And the Preamble, with its endorsement of unity, served as an antidote to the disunion and disintegration he so deeply feared.

Finally, for Elbridge Gerry, interpretation must commence with language. Gerry well knew, however, that words were elusive and context-dependent in the ways they communicated their meaning. He was comfortable with the ambiguity and indeterminateness that insight represented. Following Blackstone, he endorsed the "context," the "reason," and the "spirit" of the constitutional text as the foundations from which subsequent reasoning should proceed. And, as Madison observed, this led Gerry—the one-time opponent of the Constitution—to propose what amounted to perhaps the most discretionary of all the schools of thought advanced in the debate.

#### 4. *The House Votes on the Bank*

Still, it must be borne in mind that the debate over the Bank was part of a political process and not a mere academic inquiry. It thus moved to a vote on February 8. The bill was enacted by a margin of thirty-nine to twenty on a vote that closely tracked sectional divisions.<sup>555</sup> Only one Northern Representative voted against the Bank. That was Jonathan Grout of Massachusetts.<sup>556</sup> He was a lawyer, a sympathizer with Shays' Rebel-

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555. 2 ANNALS OF CONG. 2012 (1791).

556. *Id.*

lion,<sup>557</sup> and among the strongest voices against the Constitution in western Massachusetts.<sup>558</sup> He was elected to Congress in 1789 on the strength of his associations with populist, anti-federalist ideals.<sup>559</sup>

On the other side, there were five Southern Representatives (defined as states below the Mason-Dixon Line) who voted in favor of the Bill. These included Joshua Seney<sup>560</sup> and William Smith from Maryland;<sup>561</sup> William Loughton Smith, from South Carolina, who was among Hamilton's most effective allies but was also a staunch pro-slavery Federalist;<sup>562</sup> and also John Steele and John Sevier, both from North Carolina.<sup>563</sup>

Commentators have seen the voting pattern on the Bank of the United States as possessing significance for the future political development of the

557. Franklin Pierce Rice, *The Worcester District in Congress, from 1789 to 1857, in WORCESTER SOC'Y OF ANTIQUITY, PROCEEDINGS OF THE WORCESTER SOCIETY OF ANTIQUITY FOR THE YEAR 1889*, at 77, 79 (1890), reprinted in 9 COLLECTIONS OF THE WORCESTER SOCIETY ANTIQUITY (1891). Grout's hometown, Petersham, was the scene of one of the climactic battles in the Rebellion. Richard Peet, *A Sign Taken For History: Daniel Shays' Memorial in Petersham, Massachusetts*, 86 ANNALS ASS'N AM. GEOGRAPHERS 21, 21 (1996).

558. Brooke, *supra* note 40, at 457.

559. JOHN L. BROOKE, *THE HEART OF THE COMMONWEALTH: SOCIETY AND POLITICAL CULTURE IN WORCESTER COUNTY MASSACHUSETTS, 1713–1861*, at 235 (1989).

560. Seney (1756–1798) was a lawyer who served in the Continental Congress and defended the idea of a strong central government. ROBERT J. BRUGGER, *MARYLAND: A MIDDLE TEMPERAMENT, 1634–1980*, at 160 (1988); see also Michael A. Bellesiles, *Book Review: Documentary History of the First Federal Congress, Vol. 14: Debates in the House of Representatives, Third Session, December 1790–March 1791*, 121 PA. MAG. HIST. & BIOGRAPHY 276, 277 (1997).

561. Smith (1728–1814) was a Baltimore merchant, who was active in resistance to Great Britain as early as 1774 and who had, like Seney, served in the Continental Congress. CHARLES G. STEFFEN, *THE MECHANICS OF BALTIMORE: WORKERS AND POLITICS IN THE AGE OF REVOLUTION, 1763–1812*, at 58–59 (1984); JOHN THOMAS SCHARF, *HISTORY OF BALTIMORE CITY AND COUNTY FROM THE EARLIEST PERIOD TO THE PRESENT DAY* 69 (1881). He was also appointed Auditor of the United States Treasury later in 1791. U.S. DEP'T TREASURY, *THE UNITED STATES TREASURY REGISTER*, at ix (1879).

562. Broadus Mitchell, *Alexander Hamilton, His Friends and Foes*, 19 HISTORIAN 132, 139 (1957) ("Smith spoke Hamilton's lines, almost literally, but that did not make him the worse expositor."); see also MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 128–129* n.216 (2006); HUGH THOMAS, *THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE, 1440–1870*, at 518 (1997).

563. On Steele (1764–1815), see William S. West, Steele, John, in 5 *DICTIONARY OF NORTH CAROLINA BIOGRAPHY* 432, 432–434 (William S. Powell ed., 1994). John Sevier (1745–1815) was a military commander on the Appalachian frontier during the Revolutionary War, served as the Governor of the short-lived State of Franklin, and, after a turn representing North Carolina in Congress, relocated to Tennessee, where he took a leading role in that State's politics. On these and other aspects of Sevier's colorful career, see, for example, Ben Allen & Dennis T. Lawson, *The Wataugans and the "Dangerous Example,"* 26 TENN. HIST. Q. 137, 140, 145–147 (1967). On Sevier's revolutionary career on the Appalachian frontier, see Kevin T. Barksdale, *Violence, Statecraft, and Statehood in the Early Republic: The State of Franklin, 1784–1788*, in *BLOOD IN THE HILLS: A HISTORY OF VIOLENCE IN APPALACHIA* 29, 29–46 (Bruce Stewart ed., 2012) (detailing Sevier's career as Governor of the State of Franklin); JOHN R. FINGER, *TENNESSEE FRONTIERS: THREE REGIONS IN TRANSITION* 202–208 (2001) (detailing Sevier's career as Tennessee Governor); Ben Wynne, *Sevier, John*, in *THE ENCYCLOPEDIA OF THE WARS OF THE EARLY AMERICAN REPUBLIC, 1783–1812*, at 600, 600–601 (Spencer C. Tucker ed., 2014) (summarizing the main events of Sevier's career).

American nation. Thus, John Aldrich and Ruth Grant have credited this debate as contributing to the development of party politics in the 1790s.<sup>564</sup> Others have seen this controversy as significant for an emerging sectionalism.<sup>565</sup>

But the debate and subsequent vote signified also the emergence of two rival schools of constitutional thought; one associated with the North and commerce, and one aligned with the South and the plantation economy.<sup>566</sup> On the one hand, there was Hamilton, who believed the Constitution was meant to facilitate “the active promotion of a dynamic, industrial capitalist economy . . . [through the] establishment of sound public finance, public investment in infrastructure, and promotion of new industrial sectors.”<sup>567</sup> On the other side, Madison and a group of Southern allies viewed the Constitution as creating a confederation of states, whose internal economies were slave-based and principally a matter of state concern. The Bank debate was among the first of many constitutional controversies to lay bare these fundamentally different approaches to constitutional interpretation.<sup>568</sup>

#### IV. THE BANK DEBATE IN WASHINGTON’S CABINET

Following its passage by the House of Representatives, the Bank Bill was submitted to President George Washington for his signature. Washington, however, before determining whether to sign the bill into law, polled three of his cabinet officials for their opinions as to the bill’s constitutionality.<sup>569</sup> What was his motive for doing so? Perhaps, he was genuinely unsure

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564. John H. Aldrich & Ruth W. Grant, *The Antifederalists, the First Congress, and the First Parties*, 55 J. POL. 295, 308–309 (1993); see also Lynn E. Uzzell, *Courting Public Opinion: James Madison’s Strategy for Resisting Federal Usurpations*, in WHAT WOULD MADISON DO?: THE FATHER OF THE CONSTITUTION MEETS MODERN AMERICAN POLITICS 181, 181–183 (Benjamin Wittes & Pietro S. Nivola eds., 2015) (describing Madison’s efforts at popular political organizing in the wake of his defeat on the Bank bill).

565. See, e.g., Ralph Ketcham, *James Madison*, in THE PRESIDENTS AND THE CONSTITUTION: A LIVING HISTORY 61, 64 (Ken Gormley ed., 2016); H. Wayne Morgan, *The Origins and Establishment of the First Bank of the United States*, 30 BUS. HIST. REV. 472, 486–487 (1956); Steven Sagarra, *Bank of the United States (1791–1811; 1816–1836)*, in 1 THE ENCYCLOPEDIA OF THE INDUSTRIAL REVOLUTION IN WORLD HISTORY 66 (Kenneth E. Hendrickson, III, ed., 2015); WILLIAM L. RICHTER, HISTORICAL DICTIONARY OF THE OLD SOUTH 45, 45–46 (2d ed. 2013).

566. George William Van Cleve, “*Founding a Slaveholders’ Union, 1770–1797*,” in TESTING SLAVERY: THE POLITICS OF BONDAGE AND FREEDOM IN THE NEW AMERICAN NATION 121, 121–124 (John Craig Hammond & Matthew Mason eds., 2011).

567. Michael Lind, *Hamilton’s Legacy*, 18 WILSON Q. 40, 43 (1994).

568. DAVID BRIAN ROBERTSON, FEDERALISM AND THE MAKING OF AMERICA 45 (2012); GARY JOHN KORNBLITH, SLAVERY AND SECTIONAL STRIFE IN THE EARLY AMERICAN REPUBLIC, 1776–1821, at 36–40 (2010); Kermit L. Hall, *States’ Rights Constitutionalism*, in 10 THE NEW ENCYCLOPEDIA OF SOUTHERN CULTURE: LAW AND POLITICS 71, 71 (James W. Ely & Bradley G. Bond eds., 2008).

569. Paul Finkelman, *Thomas Jefferson, Original Intent, and the Shaping of American Law: Learning Constitutional Law from the Writings of Jefferson*, 62 N.Y.U. ANN. SURV. AM. L. 45, 60 (2006).

as a matter of constitutional law.<sup>570</sup> On the other hand, perhaps he had already made up his mind to sign the bill and wished to give the two Virginians in his cabinet, his Attorney General Edmund Randolph and his Secretary of State Thomas Jefferson, an opportunity to be heard. Perhaps he wished to have in hand the firmest possible constitutional reasoning for a step he knew would cause dissension among the Southerners in Congress. Finally, it is possible that he merely wished to set a good constitutional example, hoping that a fastidious adherence to constitutional norms might oblige his successors to the same strict course.<sup>571</sup>

## A. Edmund Randolph

### 1. Randolph's Background

Edmund Randolph (1753–1813), Washington's Attorney General, was the first to submit an opinion to the President, and in fact submitted not one but two opinions. Randolph was well-equipped for his position as the United States' first Attorney General. He was born to one of Virginia's most important families<sup>572</sup> and as an adult possessed vast holdings of real estate and slaves.<sup>573</sup> His grandfather, Sir John Randolph, had been Speaker of the Virginia House of Burgesses,<sup>574</sup> and his father, also named John Randolph, enjoyed a prosperous legal practice.<sup>575</sup> The son followed the father into the practice of law and was also given a generous assist by Thomas Jefferson, who allowed the young Randolph to assume his legal practice.<sup>576</sup>

The young Edmund Randolph sided with the revolutionaries during the War for Independence, thereby opposing his father, who remained true to the loyalist cause.<sup>577</sup> He was among those who drafted Virginia's first state

570. Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1768 (2015).

571. Richard J. Ellis, *George Washington, in THE PRESIDENTS AND THE CONSTITUTION: A LIVING HISTORY* 17, 20 (Ken Gormley ed., 2016); see also Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 755 (1999) (making the point that Washington's scrupulous respect for constitutional practice mattered greatly to John Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

572. JOHN J. REARDON, *EDMUND RANDOLPH: A BIOGRAPHY* 4–11 (1975).

573. In 1801, it was recorded that Randolph "had 7,000 acres of land, several houses, nearly 200 slaves, and ten or fifteen thousand dollars' worth of public securities." ROBERT ELDON BROWN, *CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF "AN ECONOMIC INTERPRETATION OF THE CONSTITUTION"* 84 (1956).

574. JACK P. GREENE, *THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES, 1689–1776*, at 28 (1963); EMORY G. EVANS, *A "TOPPING PEOPLE": THE RISE AND DECLINE OF VIRGINIA'S OLD POLITICAL ELITES, 1680–1790*, at 90 (2009).

575. REARDON, *supra* note 572, at 4–5.

576. John M. Hemphill, *Edmund Randolph Assumes Thomas Jefferson's Legal Practice*, 67 VA. MAG. HIST. & BIOGRAPHY 170, 170–171 (1959).

577. Eliga H. Gould, *The Laws of War and Peace: Legitimizing Slavery in the Age of the American Revolution*, in *STATE AND CITIZEN: BRITISH AMERICA AND THE EARLY UNITED STATES* 54, 54 (Peter Thompson & Peter S. Onuf eds., 2013).

Constitution in 1776.<sup>578</sup> He served as Attorney General and as Governor of Virginia in the 1780s,<sup>579</sup> and was a major participant in the Constitutional Convention of 1787, where he worked closely with James Madison in crafting the “Virginia Plan.”<sup>580</sup> He was, however, one of “three leading members of the Convention”—the others were Elbridge Gerry and George Mason—who “refused to sign the Constitution on the final day of the Convention.”<sup>581</sup> Randolph raised a number of particular objections, but for the most part they can be reduced to a fear that a “looseness of language . . . would permit if not invite sweeping changes in the expressed intentions of the Constitutional Convention.”<sup>582</sup>

Still, George Washington had confidence in Randolph’s legal abilities and “offered [him] the post of attorney general in late 1789.”<sup>583</sup> The position, as originally conceived, was part-time.<sup>584</sup> It was anticipated that the attorney general would also maintain a private legal practice.<sup>585</sup> George Washington, however, made full use of Randolph’s skills both legal and political, developed a “close relationship” with him, and ensured that he regularly attended cabinet meetings.<sup>586</sup> It was in his capacity as attorney general that Washington now sought his advice.<sup>587</sup>

## 2. *Randolph’s Opinions*

The first of Randolph’s opinions was intended to state his opinion as to the Bank’s constitutionality.<sup>588</sup> The second aimed to criticize views Randolph found constitutionally untenable.<sup>589</sup>

578. A.E. Dick Howard, “*For the Common Benefit*”: *Constitutional History in Virginia as Casebook for the Modern Constitution-Maker*, 54 VA. L. REV. 816, 820 (1968).

579. RICHARD R. BEEMAN, THE VARIETIES OF POLITICAL EXPERIENCE IN EIGHTEENTH-CENTURY AMERICA 31 (2004); George Anastaplo, *The Constitution at Two Hundred: Explorations*, 22 TEX. TECH. L. REV. 967, 1100 (1991).

580. Jonathan Clark, *The Myth of the Consolidating Federalists*, 4 HIST. REFLECTIONS 111, 111 (1977).

581. ROBERT FERGUSON, PRACTICE EXTENDED: BEYOND LAW AND LITERATURE 20 (2016).

582. Edward J. Drake, *The Men Who Didn’t Sign the Constitution*, 49 A.B.A. J. 1101, 1103 (1963).

583. John Garry Clifford, *A Muddy Middle of the Road: The Politics of Edmund Randolph, 1790–1795*, 80 VA. MAG. HIST. & BIOGRAPHY 286, 288 (1972).

584. CORNELL W. CLAYTON, THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY 16 (1992).

585. *Id.*

586. *Id.* at 16–17.

587. On the importance of this step to the development of the Office of Attorney General, see Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General’s First Constitutional Opinions*, 44 DUKE L.J. 110, 110–113 (1994).

588. Edmund Randolph, *Opinion of Edmund Randolph*, in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES: INCLUDING THE ORIGINAL BANK OF NORTH AMERICA 86, 86–89 (M. St. Clair Clarke & D.A. Hall comp. 1832) [hereinafter Opinion 1].

589. Edmund Randolph, *Attorneys General’s Opinion No. 2*, in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES, *supra* note 588, at 89, 89–91 [hereinafter Opinion 2].

Randolph opened his first opinion by clarifying the precise type of constitution he was called upon to interpret. There were unwritten constitutions, he noted, and written ones.<sup>590</sup> Unwritten constitutions, Randolph suggested, might “claim a latitude of power not always easy to be determined.”<sup>591</sup> Under an unwritten constitution, in other words—which might be susceptible to elastic interpretation and organic growth—a bill such as this one might be approved. But it is otherwise with a written constitution. Its language is fixed, and so all analysis must begin and end with the written text.<sup>592</sup>

Randolph found yet other distinctions to draw on the subject matter of constitutions. There were, he said, constitutions that contain general grants of authority, and those whose grants of authority are narrow and express. Where there is lacking “a special demarcation of powers, [the legislature] may, perhaps, be presumed to be left at large as to all authority which is communicable by the people and does not affect any of those paramount rights which a free people cannot be supposed to confide even to their representatives.”<sup>593</sup> On the other hand, there are constitutions “whose powers are described.”<sup>594</sup> Where grants of authority are specific and express, the legislature may not exceed those limits.<sup>595</sup>

Randolph was not yet finished. The first type of written constitution, those lacking defined and demarcated powers, he found characteristic of state governments.<sup>596</sup> The second type of written constitution, on the other hand, with carefully drawn and circumscribed grants of power, characterized the federal government.<sup>597</sup> His interpretation, he proposed, was confirmed by the Tenth Amendment.<sup>598</sup> All “powers which are not delegated to [the federal government],” Randolph wrote, tracking the language of the Tenth Amendment, resides with the states.<sup>599</sup>

Randolph tested these distinctions with a hypothetical question. What of a power “not within the verge of a State constitution,” but which also was not conferred on the federal government by the Constitution?<sup>600</sup> Such a power, Randolph indicated, should properly belong to the states.<sup>601</sup> He elucidated this point by drawing yet another distinction. Yes, he conceded, the

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590. Opinion 1, *supra* note 588, at 86.

591. *Id.*

592. *Id.* (“Those which have written constitutions are circumscribed by a just interpretation of the words contained in them.”).

593. *Id.*

594. *Id.*

595. *Id.*

596. Opinion 1, *supra* note 588, at 86.

597. *Id.*

598. *Id.* (Randolph termed this provision the Twelfth Amendment, but the text he was referring to, as ratified, was the Tenth).

599. *Id.*

600. *Id.* at 86–87.

601. *Id.*



federal government enjoyed the power to “superintend[ ] the general welfare of the States”; but he also admonished that “it ought not to be forgotten . . . that it superintends . . . according to the dictates of the [C]onstitution.”<sup>602</sup>

What are the rules of interpretation, Randolph asked next, that should govern constitutions? His answer was a tacit repudiation of Elbridge Gerry’s reliance on Blackstone’s *Commentaries*. Legislation, he wrote, aims to resolve a particular problem or defect and should “be construed with a discreet liberality.”<sup>603</sup> A grant of power under the Constitution, however, must be applied “with a closer adherence to the literal meaning.”<sup>604</sup> This was because under the Constitution, “each of [the specified powers] includes those details, which properly constitute the whole of the subject to which the power relates.”<sup>605</sup>

To rephrase Randolph’s position: since legislation aims at correcting some identifiable problem, it should be interpreted in a way that actually remedies the matter at hand. Power, on the other hand, is by its nature future oriented and open ended. If power-conferring language is not strictly construed, future legislatures will find ever more creative and elastic applications and so stray ever farther from its original grant and the original restrictions will be lost.

There are, of course, alternative approaches to applying the Constitution. One might productively compare to Randolph’s opinion, Edward Levi’s guidelines for constitutional interpretation, written in 1949.<sup>606</sup> “[A] written constitution,” so Levi declared, “must be enormously ambiguous in its general provisions.”<sup>607</sup> Where Randolph viewed constitutional language as capable of clear and precise meaning, Levi noticed that “[e]ach major concept written into the document embodies a number of conflicting ideals.”<sup>608</sup> Levi illustrated this point by noting the many ways in which the commerce clause was used to regulate American life.<sup>609</sup>

Randolph saw constitutional language as plain and unambiguous because it fit his larger constitutional theory. And that theory above all entailed deference to state power and state authority in all controversial matters.

Still, Randolph wanted to make clear that he did not cling to extreme interpretations of the Constitution. That was the point of his second opinion on the Bank. There are those, he observed, that understand the Constitution

602. Opinion 1, *supra* note 588, at 87.

603. *Id.*

604. *Id.*

605. *Id.*

606. EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING 57–102 (2013).

607. *Id.* at 59.

608. *Id.* at 60.

609. *Id.* at 62–64 (where Levi provides the example of the Mann Act, which prohibits interstate prostitution).

to be self-interpreting.<sup>610</sup> They read each clause narrowly as allowing only for the exercise of expressly granted power and foreclose altogether the possibility of implied powers.<sup>611</sup> This school of thought proposes that “because some incidental powers are expressed, no others are admissible.”<sup>612</sup> It is entirely possible that Randolph had James Jackson or Michael Jenifer Stone in mind when he wrote his lines. His rejection of this perspective, however, was swift. Such a view, “would not only be contrary to the common forms of construction, but would reduce the present Congress to the feebleness of the old one, which could exercise no powers not expressly delegated.”<sup>613</sup> Thus, Randolph recognized that a truly strict and literal interpretation of the Constitution’s power-conferring provisions would render governance impossible.

Randolph also dismissed claims that the deliberations of the Constitutional Convention should carry any normative weight.<sup>614</sup> What was said and done at the “federal convention” regarding the powers of incorporation should have no bearing on constitutional analysis.<sup>615</sup> In reply, Randolph posed a rhetorical question that answered itself: “[O]ught not the constitution to be decided on by the import of its own expressions?”<sup>616</sup> The text, and only the text, was Randolph’s guiding principle.

But, he stressed, none of this meant that the Bank was permissible under any fair reading of the Constitution’s implied powers. The Bank cannot be justified under the taxing power, or the power of Congress to see to the general welfare.<sup>617</sup>

Nor could supporters of the Bank find any refuge in the necessary and proper clause.<sup>618</sup> The word “necessary” must be understood as related to “the natural means of executing a power.”<sup>619</sup> And the word “proper,” “if it has any meaning, does not enlarge the powers of Congress, but rather restricts them.”<sup>620</sup> And so Randolph asked President Washington to remain vigilant where the supporters of the Bank were concerned: “[L]et it be propounded as an eternal question . . . whether the latitude of construction, which they arrogate will not terminate in an unlimited power in Congress.”<sup>621</sup>

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610. Opinion 2, *supra* note 589, at 89.

611. *Id.* at 89–90.

612. *Id.* at 90.

613. *Id.*

614. *Id.*

615. *Id.*

616. Opinion 2, *supra* note 589, at 90.

617. *Id.* at 91.

618. Opinion 1, *supra* note 588, at 89.

619. *Id.*

620. *Id.*

621. *Id.*

## B. Thomas Jefferson

### 1. Notes on the State of Virginia

How does one describe Thomas Jefferson: as a lawyer,<sup>622</sup> political thinker,<sup>623</sup> student of nature (or, as he was known in the eighteenth century, a natural philosopher)?<sup>624</sup> He was, of course, all of these things. And all of these features of Jefferson's thought are on display in his work, *Notes on the State of Virginia*. And while the many facets of Jefferson's capacious mind are evident in his *Notes*, I shall focus in particular on the constitutional theory that is found in its pages.

Originally published in 1785, during Jefferson's residence in Paris,<sup>625</sup> this work is part reflection on the natural abundance of his native Virginia, part speculation on the attributes of a just social order, and part admonition on the role and purpose of law. Throughout this work, furthermore, one can identify arguments, both express and implicit, about the nature and purpose of constitutional government, the leading role of the individual states within the territories so recently liberated from Great Britain, and the transcendent significance of an agrarian way of life to a well-ordered polity.<sup>626</sup>

When Jefferson wrote of Virginia, he had in mind its borders as they existed in the early 1780s, stretching vaguely westward towards the Mississippi River and jutting north into modern-day West Virginia, Pennsylvania, and the Ohio River Valley.<sup>627</sup> And within those borders, nearly everything needed for self-sufficiency might be found. Indeed, a large section of the work was given over to a discussion of the abundance of minerals, fauna, and flora, that could be found within the state's immense boundaries.<sup>628</sup>

622. Jefferson practiced law for a little more than seven years, from February 1767 to August 1774. FRANK DEWEY, *THOMAS JEFFERSON, LAWYER*, at xi (3d. prtg. 1987).

623. LUIGI MARCO BASSANI, *LIBERTY, STATE, & UNION: THE POLITICAL THEORY OF THOMAS JEFFERSON 1* (2010) ("Thomas Jefferson is . . . one of those rare individuals who could . . . go down in history as both a thinker and a politician.").

624. Harlow Shapley, *Notes on Thomas Jefferson as a Natural Philosopher*, 87 *PROC. AM. PHIL. SOC'Y* 234, 234–237 (1943).

625. The *Notes* took shape gradually over several years of composition and editing. Jefferson's own assigned date for the manuscript is 1782. Kevin J. Hayes, *Notes on the State of Virginia*, in *A HISTORY OF VIRGINIA LITERATURE* 124, 124–125 (Kevin J. Hayes ed., 2015).

626. Dustin A. Gish & Daniel P. Klinghard, *Republican Constitutionalism in Thomas Jefferson's Notes on the State of Virginia*, 74 *J. POL.* 35, 38 (2012) ("Read with attention to its coherent governing structure, the *Notes* comes to light as a comprehensive statement on both natural and political science.").

627. These boundaries were temporary and were the result of British withdrawal from the area. The territory would subsequently be ceded to the federal government and parceled out in smaller units among the newly formed states. JEREMY BLACK, *FIGHTING FOR AMERICA: THE STRUGGLE FOR MASTERY IN NORTH AMERICA, 1519–1871*, at 120–123 (2011); Paul A. Demers, *The French Colonial Legacy of the Canada-United States Border in Eastern North America*, 10 *FRENCH COLONIAL HIST.* 35, 46–49 (2009).

628. THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 26–72 (William Peden ed., 1982).

But Jefferson's study of Virginia embraced much more than an account of its natural wonders. He wished to propose as well a system of government for his beloved home state. Thus Jefferson spoke much about the type of constitution he wished Virginia to adopt in an appendix to his *Notes*. He advocated for a form of legislative supremacy, arguing that the chief executive of the state should possess only the powers to "administer the government."<sup>629</sup> He recommended the creation of a "council of state" to advise the executive on important questions that would from time to time arise.<sup>630</sup> He proposed that Virginia should henceforth "be governed as a commonwealth,"<sup>631</sup> that would protect and preserve the rights and liberties of its citizens.<sup>632</sup> The working assumption in all of this was that Virginia would likely remain an autonomous state in association with the other former colonies, which, thanks to the successful Revolution, had become "free, sovereign, and independent States."<sup>633</sup>

In other sections of the *Notes*, Jefferson affirmed as well a vigorous role for state and local government within his idealized vision of Virginia. At the local level, he urged counties to create smaller subdivisions for the purposes of establishing and funding schools open to the general public,<sup>634</sup> a reform that was only fitfully implemented in Jefferson's lifetime and only truly came to fruition a half-century later in New England.<sup>635</sup> He recommended retaining a system of poor relief that depended on local churches and poor houses.<sup>636</sup> He also argued on behalf of a strong role for the state in higher education. He called on the state to hire more professors for the College of William and Mary<sup>637</sup> and he sought the creation of a state-funded library consisting of books as well as works of art.<sup>638</sup> Finally, Jefferson maintained that the State should not be indifferent on the promotion of economic growth. Thus, he pushed the state legislature to be generous in

629. *Id.* at 214; see also R.R. PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION: A POLITICAL HISTORY OF EUROPE AND AMERICA, 1760–1800*, at 208 (2014) (further developing Jefferson's ideas about executive power).

630. JEFFERSON, *supra* note 628, at 215–216.

631. *Id.* at 210.

632. WHITNEY RICHARD DAVID JONES, *THE TREE OF THE COMMONWEALTH, 1450–1793*, at 20 (2000) (discussing conceptions of commonwealth current in eighteenth-century political thought); see generally JONATHAN SCOTT, *COMMONWEALTH PRINCIPLES: REPUBLICAN WRITING OF THE ENGLISH REVOLUTION* (2004).

633. JEFFERSON, *supra* note 628, at 209; see also MARTIN BRÜCKNER, *THE GEOGRAPHIC REVOLUTION IN EARLY AMERICA: MAPS, LITERACY, AND NATIONAL IDENTITY* 134 (2006) ("For Jefferson [at the time of the *Notes*], the semantic application of 'nation' was as dynamic and constitutive a concept as that of 'state.'").

634. JEFFERSON, *supra* note 628, at 146.

635. Samuel A. Pleasants, *Thomas Jefferson-Educational Philosopher*, 111 *PROC. AM. PHIL. SOC'Y* 1, 1–2 (1967).

636. JEFFERSON, *supra* note 628, at 133.

637. *Id.* at 151.

638. *Id.* at 149.

the granting of privileges and charters for the improvement of waterways, “iron-works[,] and mills.”<sup>639</sup>

Still, while Jefferson saw the value of commercial development, the heart of his message was agrarian. In an ironically entitled chapter on “Manufactures,” Jefferson warmly endorsed an agricultural way of life: “Those who labor in the earth are the chosen people of God, if ever he has a chosen people, whose breasts he had made his peculiar deposit for substantial and genuine virtue.”<sup>640</sup> The word virtue was important in Jefferson’s hierarchy of values.<sup>641</sup> It contained within itself ideals of stability,<sup>642</sup> civic commitment,<sup>643</sup> and independence.<sup>644</sup> And, most importantly, it was through virtue that the real spirit of constitutional governance—self-restraint—was actualized.<sup>645</sup> Commerce, on the other hand, at least of the size and scale found in the great European cities, would subvert American independence by creating a class of impoverished laborers dependent on others for their daily bread.<sup>646</sup>

At an intellectual level, in his *Notes* at least, Jefferson appreciated that slavery was inconsistent with the other ideals he had set out to promote. He was no believer in racial equality. After all, he wrote as a “suspicion only” that “the blacks . . . are inferior to the whites in the endowments both of body and mind.”<sup>647</sup> There is little doubt that by contemporary standards the Jefferson of the *Notes on the State of Virginia* should properly be labeled a racist.<sup>648</sup> Still, he favored emancipation even as he suggested that the most appropriate course of action was to send newly liberated African Americans to colonize distant shores.<sup>649</sup>

639. *Id.* at 135.

640. *Id.* at 164–165.

641. DAVID E. SHI, *THE SIMPLE LIFE: PLAIN LIVING AND HIGH THINKING IN AMERICAN CULTURE* 86 (1985) (“Agriculture, [Jefferson] stressed, was not primarily a way to wealth but a way to goodness.”).

642. PAUL B. THOMPSON, *THE AGRARIAN VISION: SUSTAINABILITY AND ENVIRONMENTAL ETHICS* 186–188 (2010).

643. Paul B. Thompson, *Thomas Jefferson’s Land Ethics*, in *THOMAS JEFFERSON AND PHILOSOPHY: ESSAYS ON THE PHILOSOPHICAL CAST OF JEFFERSON’S WRITINGS* 61, 75 (M. Andrew Holowchak ed., 2014).

644. JEFFERSON, *supra* note 628, at 165 (“Dependence begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the designs of ambition.”); see also Mark Sturges, *Enclosing the Commons: Thomas Jefferson, Agrarian Independence, and Early American Land Policy, 1774–1789*, 119 *VA. MAG. HIST. & BIOGRAPHY* 42, 45 (2011) (detailing Jefferson’s support for various plans of universal white male land ownership).

645. LANGDON WINNER, *THE WHALE AND THE REACTOR: A SEARCH FOR LIMITS IN AN AGE OF HIGH TECHNOLOGY* 43 (1986).

646. Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 *N.Y.U. L. REV.* 273, 288–289 (1991).

647. JEFFERSON, *supra* note 628, at 143.

648. PETER ONUF, *THE MIND OF THOMAS JEFFERSON* 205–212 (2007); Paul Finkelman, “*Let Justice Be Done, Though the Heavens May Fall*”: *The Law of Freedom*, 70 *CHI.-KENT L. REV.* 325, 349 (1994).

649. JEFFERSON, *supra* note 628, at 137–138.

How, then, should one characterize the constitutional ideas of the *Notes on the State of Virginia*? First, it was centered on the State, which, as Jefferson conceived it, was not some minimalist, passive, night-watchman-like structure. He saw the State as having real responsibilities—for the education of the broad mass of citizens and for the development of commercial opportunity. The State was also conceived of as an autonomous, self-contained unit. Jefferson thus says little in the *Notes* on Virginia's intricate relationships with its neighboring states. Most importantly, at its heart, Jefferson's constitutional ideal depended upon agrarian principles.<sup>650</sup> Only agrarianism could assure the virtues, self-discipline, and personal independence necessary for the well-ordered state.<sup>651</sup>

## 2. *Jefferson on the Bank of the United States*

The principles and policies that animated Jefferson's *Notes on the State of Virginia* give life and sustenance as well to his analysis of the Bank bill. It was, Jefferson firmly believed, an unconstitutional exercise of Congressional power. Jefferson commenced his analysis with a careful review of what it was the Bank bill authorized.<sup>652</sup> By its terms, Jefferson noted, it permitted the creation of a corporation;<sup>653</sup> it allowed that corporation to own both real and personal property, thus removing goods and lands from state laws of inheritance, "forfeiture, and escheat;"<sup>654</sup> it concentrated power to create a bank under federal authority to the detriment of state banks;<sup>655</sup> and in these authorizations, the bill disregarded the role and responsibility of "State Legislatures" to manage these areas of the law.<sup>656</sup>

Thus commenced Jefferson's first argument against the Bank, which might be described as a strong defense of the primacy of the states vis-a-vis the federal government on the matter of what to Jefferson were strictly questions of private law. He followed this litany of perceived constitutional transgressions with a close paraphrase of the proposed Tenth Amendment, pointing out that "all powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States, or to the people."<sup>657</sup> The conclusion for Jefferson was obvious and very omi-

650. Stephen M. Feldman, *Is the Constitution Laissez-Faire? The Framers, Original Meaning, and the Market*, 81 *BROOK. L. REV.* 1, 32–33 (2015); Izquierdo, *supra* note 177, at 1131–1133.

651. MICHAEL LIENESCH, *NEW ORDER OF THE AGES: TIME, THE CONSTITUTION, AND THE MAKING OF MODERN AMERICAN POLITICAL THOUGHT* 88–89 (1988); James Phillips, *American Agrarianism's Answers to the Nation's (In)Securities*, 9 *CONN. PUB. INT. L.J.* 343, 345–346 (2010).

652. 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*, *supra* note 588, at 91, 91–94 [hereinafter Jefferson Opinion].

653. *Id.* at 91.

654. *Id.*

655. *Id.*

656. *Id.*

657. *Id.* (paraphrasing Tenth Amendment—Jefferson, here, termed this provision the Twelfth Amendment, but the text he was referring to, as ratified, became the Tenth Amendment).

nous: “To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.”<sup>658</sup>

Jefferson next examined the claims of implied powers made by the Bill’s proponents. This was not a bill to raise taxes or to borrow money. The government was being asked, in the first instance, to finance the Bank, and Jefferson was perplexed as to how such an act could possibly constitute a loan.<sup>659</sup> Nor could the Bank Bill be justified as implied under the commerce clause. “To erect a bank, and to regulate commerce, are very different acts.”<sup>660</sup> A bank produces items of value—bank notes—which are freely negotiable. This, Jefferson observed, is akin to miners who extract wealth from the earth.<sup>661</sup> In each case, a valuable object is made “which may be bought and sold.”<sup>662</sup> The creation of value, Jefferson argued, was fundamentally different from its regulation.<sup>663</sup>

Jefferson also related the commerce clause to the question of states’ rights. The commerce clause was intended to regulate commerce among the several states. Yet, banks are fundamentally concerned with “the internal commerce of every State.”<sup>664</sup> “[C]ommerce between citizen and citizen”—by which Jefferson must have meant the citizens of the affected states—“remains exclusively with its own legislature.”<sup>665</sup>

Banking, in other words, was a matter of state law, and, for Jefferson, keeping it that way was not only constitutionally sound, but served utilitarian ends.<sup>666</sup> Banks in different states will compete or cooperate with one another, as their business needs and local conditions required.<sup>667</sup> And such competition, and the flexibility it promoted, proved that the preservation of local banking was not only an “expedient” but a “necessity.”<sup>668</sup>

Jefferson proceeded next to the “general welfare” and “necessary and proper” clauses.<sup>669</sup> The language about “general welfare,” Jefferson noted, was part of a larger clause authorizing Congress to raise taxes. Jefferson looked to “an established rule of construction, where a phrase will bear either of two meanings, to give it that which will allow some meaning to the other parts of the instrument.”<sup>670</sup> If one applied this rule, he asserted, it was clear that the “general welfare” language must be limited, since to read it

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658. Jefferson Opinion, *supra* note 652, at 91.

659. *Id.* at 92.

660. *Id.*

661. *Id.*

662. *Id.*

663. *Id.*

664. Jefferson Opinion, *supra* note 652, at 92.

665. *Id.*

666. *Id.* at 93.

667. *Id.*

668. *Id.*

669. *Id.* at 92–93.

670. Jefferson Opinion, *supra* note 652, at 92.

independent of the power to tax “would reduce the whole instrument to a single phrase, that of instituting a Congress to do whatever would be for the good of the United States, and as they would be the sole judges of the good or evil, it would also be a power to do whatever evil they pleased.”<sup>671</sup>

Jefferson similarly condemned the proponents’ interpretations of the necessary and proper clause. The key to understanding this clause, Jefferson argued, was the word “necessary.”<sup>672</sup> It must be strictly construed. Bank supporters have attempted to equate necessary with “convenient,” but for Jefferson such an equation would open the flood gates.

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 . . .*; it would swallow up all the delegated powers, and reduce the whole to one phrase, as before observed.<sup>673</sup>

In his treatment of both the general welfare and necessary and proper provisions, Jefferson engaged in a classic “parade of horrors” presentation. His opponents had not made the expansive claims Jefferson imputed to them. For Jefferson, however, his world view and way of life seemed to be threatened even by the prospect of a national bank. The states, and he must have had Virginia foremost in mind, were the main repositories of power, and for Jefferson, the Constitution was meant to enshrine that understanding in fundamental law. And this meant also that states were free to maintain their own economic systems. Jefferson’s agrarian vision depended on that. State banks, answerable to local legislatures and political pressures, did not threaten Jefferson’s agrarian Arcadia. But a national bank, whose purpose was to stimulate commercial development on a national scale, was little more than a dagger drawn and had to be resisted at any price.

Jefferson’s arguments, some have suggested, might owe a debt to the anti-federalists,<sup>674</sup> although the boundary lines between federalists and anti-federalists had become blurred in the constitutional controversies of the early 1790s.<sup>675</sup> Of greater significance, probably, for Jefferson’s constitutional theorizing, was his underlying commitment to agrarianism. “Jefferson’s utopia was a farmer’s paradise where all farmers owned land and shared comparable shares of wealth, political power, and stewardship over thriving natural wonders.”<sup>676</sup>

671. *Id.*

672. *Id.* at 92–93.

673. *Id.* at 93.

674. RICHARD S. GROSSMAN, *UNSETTLED ACCOUNT: THE EVOLUTION OF BANKING IN THE INDUSTRIALIZED WORLD SINCE 1800*, at 223 (2010).

675. SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828*, at 221–222 (1999).

676. CARL A. ZIMRING, *CLEAN AND WHITE: A HISTORY OF ENVIRONMENTAL RACISM IN THE UNITED STATES* 11 (2015).



In the Bank, Jefferson contended with what he almost surely perceived to be a mortal enemy. If the Constitution was not meant to actively promote an agrarian way of life, at least it was supposed to ensure its survival. Boudinot's argument that commerce and agriculture augmented one another could not have persuaded Jefferson, given his belief that large-scale commerce sowed the seeds of the political order's destruction. Jefferson well appreciated how deeply at odds Hamilton's vision of a commercial republic was with his own deep commitment to agrarianism. Jefferson's cause was about more than the Constitution. It was about the survival of a particular way of structuring the nation.

### C. Alexander Hamilton

After receiving Randolph's and Jefferson's analyses, President Washington forwarded them to Hamilton for his review. He wished to give Hamilton the last word on the Bank's constitutionality.<sup>677</sup> Washington now expected a prompt reply.<sup>678</sup> Six days later, Hamilton wrote back, asking Washington for his "indulgence" and assuring him that he "has ever since been sedulously engaged in it."<sup>679</sup>

A week after Washington made his request, on February 23, 1791, Hamilton submitted his analysis for the President's review.<sup>680</sup> He began by asserting the need for an "axiom," and that axiom for Hamilton was the concept of sovereignty.<sup>681</sup> Hamilton granted that the United States represented a federation in which sovereignty was divided between the states and a central government.<sup>682</sup> But this recognition did not mean that in those spheres of responsibility allocated to the federal government that its power was incomplete.<sup>683</sup> As proof of this proposition, Hamilton looked to the supremacy clause. The supremacy clause embodied sovereignty, it exuded sovereignty. "The power which can create the supreme law of the land, in any case, is doubtless sovereign as to this case."<sup>684</sup>

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677. Letter of President George Washington to Alexander Hamilton (Feb. 16, 1791), in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES, *supra* note 588, at 94, 94.

678. *Id.*

679. Letter of Alexander Hamilton to George Washington (Feb. 22, 1791), in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES, *supra* note 588, at 113, 113.

680. Opinion of Alexander Hamilton, on the Constitutionality of a National Bank, in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES, *supra* note 588, at 95, 95–113 [hereinafter Hamilton Opinion].

681. *Id.* at 95.

682. *Id.*

683. *Id.* ("To deny that the Government of the United States has sovereign power as to its declared purposes and trusts, because its power does not extend to all laws, would be equally to deny that the State Governments have sovereign power in *any case*, because their power does not extend to *every case*.") (emphasis in original).

684. *Id.* at 96.

One might compare Hamilton's analysis with Fisher Ames. Ames sought an expansive reading of the federal power to act in abstract philosophical speculation about "happiness" and "government." Ames' use of these terms, however, was hopelessly ambiguous. Hamilton was now adding precision and rigor to Ames' analysis. He did so by drawing on a vocabulary of sovereignty with deep roots in the law of nations. For someone of Hamilton's time and place, the law of nations consisted of timeless principles, provable by reason, that defined the quality and character of states in a world of many and competing sovereign powers.<sup>685</sup> It was a body of law Hamilton was fluent in and had recourse to often.<sup>686</sup>

At the time of the Founding, among the most influential treatises on the law of nations in general circulation in the new United States was Emmerich de Vattel's *The Law of Nations*.<sup>687</sup> It is known that Vattel's work exercised strong sway over Hamilton's thinking.<sup>688</sup>

Vattel opened his treatise with an analysis of the concept of sovereignty. There were, for Vattel, three essential characteristics to sovereign power. It had to aim for "[t]he preservation of [the] nation";<sup>689</sup> it embodied "perfection";<sup>690</sup> and it sought the "procure[ment] for the citizens whatever they stand in need of for the necessities, the conveniences, the accommodations of life."<sup>691</sup> Perfection, it must be understood, did not mean "flawless," or "superb," or "something beyond compare." As Vattel used the term it meant unity, or integrity, or completeness. "We know that the perfection of the thing consists, generally, in the perfect agreement of all its constituent parts to the same end."<sup>692</sup>

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685. William J. Moon, *The Original Meaning of the Law of Nations*, 56 VA. J. INT'L L. 51, 70 (2016); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 822–823 (1989).

686. Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1136–1138 (1987); Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CAL. L. REV. 1335, 1339 (2007).

687. CARL OSTROWSKI, BOOKS, MAPS, AND POLITICS: A CULTURAL HISTORY OF THE LIBRARY OF CONGRESS, 1783–1861, at 16–18 (2004) (discussing the use of Vattel by Hamilton, Madison, and Benjamin Franklin); Rafael Domingo, *Gaius, Vattel, and the New Global Law Paradigm*, 22 EUROPEAN J. INT'L L. 627, 633–634 (2011); Richard H. Helmholz, *The Law of Nature and the Early History of Unenumerated Rights in the United States*, 9 U. PA. J. CONST. L. 401, 407 (2007).

688. GERALD STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT 134 (1970); LAWRENCE S. KAPLAN, ALEXANDER HAMILTON: AMBIVALENT ANGLOPHILE 128 (2002); Andrew Tutt, *Treaty Textualism*, 39 YALE J. INT'L L. 283, 296 (2014) ("Esteem for Vattel was even a rare point of common ground for Alexander Hamilton and Thomas Jefferson."); see also Brian Richardson, *The Use of Vattel in the American Law of Nations*, 106 AM. J. INT'L L. 547, 549 (2012) (observing that Hamilton drew from a broad range of thinkers in addition to Vattel when he wrote on the law of nations).

689. EMMERICH DE VATTEL, THE LAW OF NATIONS 4 (1867).

690. *Id.*

691. *Id.*

692. *Id.*

These three elements of sovereign power are apparent in Hamilton's discussion of the Bank Bill. Hamilton illustrated the full range of power the federal government enjoyed by proposing a hypothetical scenario: suppose the United States conquered one of its neighbors.<sup>693</sup> Its governance of the conquered territory would not be limited by the enumerated powers conferred on the federal government in its relations with the states, but would be limited only by the law of nations and prevailing definitions of sovereignty.<sup>694</sup>

The federal government was thus a sovereign power. Over conquered territory, that sovereignty was full and complete. Regarding its relations to the states, however, the federal government's powers were determined by the Constitution. Its sovereignty was complete, but only with respect to the powers that were delegated to it.<sup>695</sup>

With this strong conception of sovereignty as his foundation, Hamilton moved to consider the nature of the enumerated powers conferred by the Constitution on the federal government. The enumerated powers might be express or implied, but the status of an implied power was not diminished simply because they were not directly articulated in the Constitution.<sup>696</sup>

Hamilton realized, of course, that the power to charter the Bank was not expressly granted by the Constitution. Still, he thought it was easy to prove that the federal government might grant charters through the exercise of its implied powers.<sup>697</sup> But before embarking on this proof, Hamilton, like Boudinot before him, wished to demystify the idea of the corporation: "Imagination appears to have been unusually busy concerning it. An incorporation seems to have been regarded as some great independent substantive thing; as a political engine, and of a peculiar magnitude and moment."<sup>698</sup> In fact, corporations were merely a convenience to the proper conduct of business. And corporate charters were not licenses to plunder or pillage but legal documents that restricted corporations in the types of activities they might engage in and the kind and amount of assets they might hold.<sup>699</sup>

If corporations were not a threat to the established political order but merely a means of doing business, Hamilton reasoned, then also the granting of a corporate charter was not really a momentous event. Hamilton illustrated this point with a comparison to Roman law. At Roman law, a corporation was nothing more than "a *voluntary* association of individuals, at any time, or for any purpose."<sup>700</sup> People organizing freely for the pur-

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693. Hamilton Opinion, *supra* note 680, at 96.

694. *Id.*

695. *Id.*

696. *Id.* ("[I]mplied powers are to be considered as delegated equally with express ones.")

697. *Id.* at 97.

698. *Id.*

699. Hamilton Opinion, *supra* note 680, at 97.

700. *Id.*

poses of business, Hamilton seemed to imply, what could be more natural and less threatening than that?

Hamilton's emphasis on the word "voluntary" stressed that he also wished to draw out a lesson by comparing the Roman and common law systems.<sup>701</sup> "In England," Hamilton continued, "whence our notions of [the corporation] are immediately borrowed, [the granting of charters] seems part of the executive authority."<sup>702</sup> And it is this peculiarity, the omission from the Constitution of a particular British practice—Hamilton drove the point home—that was the source of the mistaken belief that the federal government was divested of all powers to grant corporate charters.<sup>703</sup>

For Hamilton, however, it was obvious that the federal government possessed the power to grant corporate charters as an attribute of its status as a sovereign power. Hamilton's logic ran as follows: sovereign power might be delegated, but it was nevertheless "perfect," that is, complete or comprehensive over the subjects that fell within the scope of the delegation. Corporations, furthermore, were not in their origin creatures of the law, but the product of the human impulse to associate for shared purposes. Different legal regimes accommodated this inherent human desire in different ways. Roman law gave great latitude to individual initiative while the English common law tightly controlled the recognition of corporations by its system of charters. But even though the recognition and accommodation of corporate life might differ from one legal system to another, every legal system had to make an allowance for corporations, which was accomplished through an exercise of sovereign authority.<sup>704</sup> Sovereignty thus included as one of its attributes the power to give formal legal status to corporate bodies.

On this analysis, the power to grant corporate charters was inherent in the federal government by reason of its sovereign capacity. Hamilton nevertheless felt the need to reconcile this lofty view of sovereignty with the Constitution. Hamilton turned first to the Tenth Amendment.<sup>705</sup> It was, he said, little more than a restatement of the "republican maxim that all government is a delegation of power."<sup>706</sup> Still, it acknowledged that certain powers belonged uniquely to the states and certain powers to the federal government. Hamilton illustrated what that meant in the case of granting corporate charters. "Thus, a corporation may not be erected by Congress for

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701. Hamilton elided over much history in this deft comparison. In fact, it was medieval canon lawyers who framed and defended the proposition that "the corporation [was] a voluntary association of individuals who remain the source of its authority." LARRY SEIDENTOP, *INVENTING THE INDIVIDUAL: THE ORIGINS OF WESTERN LIBERALISM* 235 (2014).

702. Hamilton Opinion, *supra* note 680, at 97.

703. *Id.*

704. *Id.* (The federal government, Hamilton maintained, possessed "the right of employing all the means requisite to the execution of the specified powers of the Government.")

705. *Id.* at 96.

706. *Id.*

superintending the police of the city of Philadelphia, because they are not authorized to regulate the police of that city.”<sup>707</sup> On the other hand, Congress might charter a corporation to facilitate the collection of taxes, or regulate trade.<sup>708</sup> Why? “[B]ecause it is incident to a general *sovereign* or *legislative* power to regulate a thing, to employ all the means which relate to its regulation, to the best and greatest advantage.”<sup>709</sup> The collection of taxes and the regulation of trade were expressly delegated to the federal government, and so Congress enjoyed complete power to determine the means and methods of performing these functions.

On this theory, it mattered not at all that states chartered their own banks. Indeed, where Hamilton was concerned, to think otherwise was to demonstrate “a radical source of error.”<sup>710</sup> States might take whatever steps they deemed most advantageous in deciding whether or not to charter a bank; in doing so, the states were doing nothing more than addressing local concerns. The federal government, however, was charged with the responsibility to achieve certain national ends, and its actions were rooted in its sovereign authority as confirmed ultimately by the supremacy clause.<sup>711</sup>

Having built a constitutional case for the Bank, Hamilton next turned to a different set of objections voiced particularly by James Madison. It has been contended, Hamilton suggested, that the word “necessary” meant indispensable. “It was essential to the being of the National Government,” Hamilton urged, “that so erroneous a conception of the meaning of the word *necessary* should be exploded.”<sup>712</sup> Indeed, it is often the case that the word “means no more than *needful, requisite, incidental, useful or conducive to*.”<sup>713</sup> “It is a common mode of expression,” Hamilton wrote, to say that some course of action is necessary “when nothing more is intended or understood than that the interest of the Government or the person require, or will be promoted by, the doing of this or that thing.”<sup>714</sup>

And so Hamilton turned patterns of everyday discourse against Madison. He pressed the point home. Suppose the word necessary was construed to mean indispensable; or some such modifying adverb—“absolutely or indispensably”—had been used to qualify the necessary and proper clause.<sup>715</sup> “Such a construction would beget endless uncertainty and embarrassment.”<sup>716</sup> Every act of legislation would require proof of incontestable

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707. *Id.* at 97.

708. Hamilton Opinion, *supra* note 680, at 97.

709. *Id.*

710. *Id.*

711. *Id.*

712. *Id.*

713. *Id.*

714. Hamilton Opinion, *supra* note 680, at 97–98.

715. *Id.*

716. *Id.*

necessity. "There are few measures of any government which would stand so severe a test."<sup>717</sup>

Logically, linguistically, Hamilton argued, the word necessary must not be converted into "*extreme necessity*."<sup>718</sup> Such an interpretation was also consistent with the way Hamilton understood sovereignty. Echoing—though not citing—Vattel, Hamilton pointed out that governments existed to procure certain goods and advantages for their citizens, and the word "necessary" should not therefore be given too restrictive an application. In support of this contention, Hamilton drew upon a "maxim" that held "that the powers contained in a constitution of government . . . ought to be construed liberally in advancement of the public good."<sup>719</sup> A pair of modern writers have emphasized that for Hamilton the flexibility contained in this maxim was a "universal rule" that aimed to address the "variable and unpredictable" problems that arise in the course of governance.<sup>720</sup> Hamilton surely would have agreed.<sup>721</sup>

Consider, Hamilton went on, the way governments actually function. "The means by which national exigencies are to be provided for; national inconveniences obviated; national prosperity promoted; are of such infinite variety, extent, and complexity, that there must, of necessity, be great latitude of discretion in the selection and application of . . . means."<sup>722</sup> A nation forced to follow the course recommended by Madison and his two Virginia allies, Randolph and Jefferson, Hamilton implied, would be paralyzed in the face of each new contingency, should the word "necessary" be construed as they desired.<sup>723</sup> Thus, Hamilton argued that Randolph was wrong to suggest that the federal constitution had to be construed with a special strictness. The federal government was far more likely than state governments to face "public exigencies . . . of a far more critical kind," and

717. *Id.*

718. *Id.*

719. *Id.* The language and idea of liberal construction was current in Hamilton's day, but one is hard pressed to find an example of this language being applied to constitutions. For other usages, see, for example, JOHN IRVING MAXWELL, A POCKET DICTIONARY OF THE LAW OF BILLS OF EXCHANGE, PROMISSORY NOTES, BANK NOTES [AND] CHECKS 70–71 (London, Longman et al., 2d. ed. 1804) (liberal construction of bills of exchange); 2 GILBERT HUTCHESON, TREATISE ON THE OFFICES OF JUSTICE OF THE PEACE, CONSTABLE, [AND] COMMISSIONER OF SUPPLY 9 (Edinburgh, W. Creech, 2d ed. 1809) (liberal construction of provisions for the poor); HUGH HENRY BRACKENRIDGE, LAW'S MISCELLANIES 226 (Philadelphia, P. Byrne 1814) (liberal construction of remedial statutes). It seems probable that Hamilton was responsible for extending well-established private-law maxims of liberal construction into constitutional interpretation. 2 FRANCIS HARGRAVE, JURISCONSULT EXERCITATIONS 125, 158–159 (London, W. Clarke & Sons 1811) (liberal construction of the words of a will to effectuate its purpose); 1 WILLIAM CUSACK SMITH, TRACTS ON LEGAL AND OTHER SUBJECTS 100–101 (London, T. Cadell & W. Davies 1811) (liberal construction of the principle against self-incrimination).

720. Michael Zuckert & Felix Valenzuela, *Constitutionalism in an Age of Terror*, in WHAT SHOULD CONSTITUTIONS DO? 72, 87–88 (Ellen Frankel Paul et al. eds., 2011).

721. Hamilton Opinion, *supra* note 680, at 98.

722. *Id.* at 98–99.

723. *Id.* at 99.

had to have the legal resources at hand to resolve those crises.<sup>724</sup> Sovereignty seeks the preservation of the state. Hamilton had no need to quote Vattel. Again, the influence is palpable.

This form of reasoning about the Constitution, drawn not from the text or language or history of the document but from first principles of sovereignty, has factored in at least one major Supreme Court decision—the *Selective Service Cases* of 1918, which upheld the constitutionality of the draft in World War I. Lacking express foundation in the constitutional text, Chief Justice Edward Douglass White cited Vattel’s *Law of Nations* as authority to conclude that “the very conception of a just government . . . includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it.”<sup>725</sup>

Hamilton subsequently engaged in a detailed analysis of particular clauses of the Constitution to reinforce his major points.<sup>726</sup> He then summarized his conclusions: “The powers of the Government, as to the objects intrusted to its management is, in its nature, sovereign.”<sup>727</sup> “[T]he right of erecting corporations is one inherent in, and inseparable, from the idea of sovereign power.”<sup>728</sup> “[T]he word *necessary*, in the general clause, can have no *restrictive* operation. . . . [I]ndeed, . . . the degree in which a measure is, or is not necessary, cannot be a test of *constitutional* right, but of expediency only.”<sup>729</sup>

Hamilton concluded by bringing his argument back to the enumerated powers of Congress. To be sure, Congress had the power to charter a corporation, but did it have the power to charter a corporation for the purposes which the Bank was intended to serve?<sup>730</sup> Hamilton answered in the affirmative. Hamilton pointed to a series of enumerated powers—the power to tax, to borrow, to spend, to regulate trade, and to ensure the national defense.<sup>731</sup> As further support, Hamilton looked to European experience: “[B]anks are an usual engine in the administration of national finances, and an ordinary, and the most effectual, instrument of loans.”<sup>732</sup> Early American experience with banks concurred with European practice.<sup>733</sup> And so Hamilton concluded, all of the foregoing “pleads strongly against the sup-

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724. *Id.*

725. *Arver v. United States*, 245 U.S. 366, 378 (1918); see also Charles J. Reid, Jr., *A Louisiana Civilian in the Supreme Court: The Selective Service Cases Reconsidered*, in 4 HONOR ALIT ARTES: STUDI PER SETTANTESIMO COMPLEANNO DI MARIO ASCHERI 421, 421–427 (Paola Maffei & Gian Maria Varanini eds., 2014) (reviewing White’s use of Vattel and strong conceptions of sovereignty to uphold the military draft).

726. Hamilton Opinion, *supra* note 680, at 99–105.

727. *Id.* at 105.

728. *Id.*

729. *Id.*

730. *Id.*

731. *Id.* at 105–106.

732. Hamilton Opinion, *supra* note 680, at 111.

733. *Id.*

position that a government clothed with most of the important prerogatives of sovereignty, in relation to its revenues, its debt, its credit, its defence, its trade, its intercourse with foreign nations, is forbidden to make use of that instrument as an appendage of its own authority."<sup>734</sup>

#### CONCLUSION

William Crosskey has written that the proximate cause for the debate over the Bank Bill had little to do with really momentous issues, but was rather a fear on the part of Southern members of Congress that Northerners might renege on a deal that had been struck the previous summer to situate the new nation's capital on the banks of the Potomac River, between Maryland and Virginia.<sup>735</sup> Kenneth Bowling, in his investigation of the subject, has shown that Southerners believed that if the Bank were once located in Philadelphia, it would become impossible practically and politically to move the capitol away from that city for a rough and undeveloped patch of land like the future Washington, DC.<sup>736</sup>

What matters for our purposes, however, are not the motives of the participants but the chain of events and ideas that the controversy over the Bank launched. James Madison grew estranged from Hamilton as a result of the Bank conflict and began to draw closer to "an Anti-Federalist approach to strict construction."<sup>737</sup> "In effect," one historian of the period has written, "Hamilton undermined the assumption upon which Madison's earlier constitutional theory had rested,"<sup>738</sup> and he responded with a heightened level of political activism.<sup>739</sup> If Madison could not prevail on the floor of the Congress, he would take his constitutional case to the public.<sup>740</sup> The division between Federalists and Republicans that would characterize America's first party system was now being born.

The Bank controversy also contributed to shaping the course of American nationhood.<sup>741</sup> It did so in at least two ways. First, Jefferson's dream of an agrarian republic, always at least faintly unrealistic, now appeared unat-

734. *Id.* at 111–112.

735. 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 194 (1953).

736. Kenneth R. Bowling, *The Bank Bill, the Capital City, and President Washington*, 1 *CAP. STUD.* 59, 60 (1972).

737. CORNELL, *supra* note 675, at 190.

738. *Id.* at 191.

739. Thus, Madison participated in establishing Philip Freneau's *National Gazette* and used that newspaper to publish a series of essays in early 1792 that put in motion the nation's first party system. Jeffrey L. Pasley, *The Two National "Gazettes": Newspapers and the Embodiment of American Political Parties*, 35 *EARLY AM. LITERATURE* 51, 69–70 (2000).

740. Alan Gibson, *Veneration and Vigilance: James Madison and Public Opinion, 1785–1800*, 67 *REV. POL.* 5, 16–23 (2005).

741. Paul Finkelman, *Turning Losers into Winners: What Can We Learn, if Anything, from the Antifederalists?*, 79 *TEX. L. REV.* 849, 886 (2001).



tainable.<sup>742</sup> Hamilton, through the Bank legislation and his other financial measures, had put the United States on the path towards becoming the commercial republic he had long wished for.<sup>743</sup> Secondly, sectional differences between North and South had begun to appear. Representatives from these two regions now appreciated that their interests did not converge, and in fact might not even brook compromise in some important respects.<sup>744</sup>

Most significantly, of course, from our perspective, is the emergence of alternative theories of constitutional interpretation. Was the Constitution a restraining text? An empowering text? How should enumerated powers be interpreted? What of implied or constructive powers? How faithful must one be to the text? How literally should the text be read? What was the appropriate role for sources external to the Constitution? What of philosophy? What of the writings of jurists such as Vattel? What was the relationship of the states in contrast to the federal government? None of these questions were definitely answered in 1791. None of them have been definitively answered today. What began in 1791 was a conversation centered on these questions that endures to our own day. What is the Constitution? Is it simply reasoned argument over these essential questions of constitutional interpretation? I raise the question without hope of answering it.

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742. GEORGE MACESICH, *THE UNITED STATES AND THE CHANGING GLOBAL ECONOMY: POLICY IMPLICATIONS AND ISSUES* 16 (1997).

743. Richard Sylla, *Financial Systems and Economic Modernization*, 62 *J. ECON. HIST.* 277, 284 (2002); Shankman, *supra* note 139, at 331–334.

744. LISLE ROSE, *PROLOGUE TO DEMOCRACY: THE FEDERALISTS IN THE SOUTH, 1789–1800*, at 8–18 (1968).