
Chapter 1

The Bank of the United States: A Case Study

I. Early Background

"There is nothing in the Constitution about banks and banking, though there might well have been, for the subject was already of both economic and political importance when the Constitution was being written."¹ In 1781, the Continental Congress chartered the Bank of North America. Probably few members of that Congress disputed James Madison's assertion that this exceeded Congress' authority under the Articles of Confederation.² Rather, the bank was justified by its sheer necessity in helping finance the war for independence against Great Britain.

At the Philadelphia Convention in 1787, Madison himself proposed that Congress be authorized "to grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent."³ Rufus King of Massachusetts objected to the proposal on the ground that the "States will be prejudiced and divided into parties by it"; King referred specifically to the concerns of the New York and Philadelphia banking and business communities that

1. Bray Hammond, *Banks and Politics in America from the Revolution to the Civil War* 103 (1957).

2. Madison initially opposed incorporation of the bank because of "the absence within the Articles of Confederation of any authority, even that of 'inferred necessity,' to create a bank to carry on the war." 3 *Papers of James Madison* 175 n.16 (1963). When the ordinance of incorporation came to a vote, he cast what he later termed "an acquiescing rather than an affirmative vote." See 4 *id.* at 19, 21 nn.7, 23 (1965).

3. 2 *Records of the Federal Convention of 1787*, at 615-16 (Farrand ed., 1937) (hereinafter *Farrand*). No general corporation laws existed in the eighteenth and early nineteenth centuries. Corporate charters, typically giving exclusive rights to quasi-public entities, were tailor-made for the occasion. See Lawrence Friedman, *A History of American Law* 166-69 (1973).

Congress might charter a competing banking institution.⁴ “Other advocates of the power held back from putting the question to a vote lest it be lost and the record be definitely against it, whereas if not acted on it could be held . . . that the power existed.”⁵ Gouverneur Morris of Pennsylvania dissuaded his colleague, Robert Morris, from proposing a national bank lest such a provision in the Constitution jeopardize its ratification.⁶ The only related proposal brought to a vote — a motion to authorize Congress to charter corporations for the construction of canals — was defeated eight to three.⁷

II. *The First Bank of the United States*

In the late 18th and early 19th centuries, banks served two main functions. First, they were depositories for money. Second, they issued bank notes, on deposits or on other security, which served somewhat the same function as paper money in the absence of a national currency.⁸ In December 1790, soon after ratification of the Constitution, Secretary of the Treasury Alexander Hamilton submitted a plan for a national bank to be chartered by Congress and owned jointly by private shareholders and the United States. The bank would strengthen the national government: It would aid in the collection of taxes and administration of the public finances and could provide loans to the government.⁹ The Senate, half of whose 20 members had attended the Philadelphia Convention, unanimously adopted Hamilton’s proposal.¹⁰

A. Madison’s View

James Madison, elected to the first Congress from Virginia, opened the debate in the House of Representatives by denouncing the bank as beyond Congress’ constitutionally delegated authority.¹¹

Madison had entertained this opinion from the date of the Constitution. His impression might, perhaps, be the stronger, because he well recollected that a power to grant charters of incorporation had been proposed in the general convention and rejected.

Is the power of establishing an incorporated Bank among the powers vested by the Constitution in the Legislature of the United States? This is the question to be examined. After some general remarks on the limitations of all political power, he took notice of the peculiar manner in which the Federal Government is limited. It is not a general grant, out of which particular powers are excepted; it is a grant of particular powers only, leaving the general mass in other hands. So it has been understood by its friends and its foes, and so it was to be interpreted.

4. 2 Farrand, *supra* note 3, at 615-16.

5. Hammond, *supra* note 1, at 104-05.

6. *Id.* at 105.

7. 2 Farrand, *supra* note 3, at 615-16.

8. Article I, §10 prohibits states from coining money or emitting bills of credit. Article I, §8 authorizes Congress to coin money (though not in terms to issue bills of credit). Not until after the Civil War did Congress authorize the issuance of paper money.

9. Hammond, *supra* note 1, at 114-15.

10. R.K. Moulton, *Legislative and Documentary History of the Banks of the United States* 13 (1834).

11. James Madison’s Speech to the House of Representatives (1791), in James Madison, *Writings* 480-90 (Jack Rakove ed., 1999).

As preliminaries to the right interpretation, he laid down the following rules:

An interpretation that destroys the very characteristic of the Government cannot be just.

Where the meaning is clear, the consequences, whatever they may be, are to be admitted — where doubtful, it is fairly triable by its consequences.

In controverted cases, the meaning of the parties to the instrument, if to be collected by reasonable evidence, is a proper guide.

Contemporary and concurrent expositions are a reasonable evidence of the meaning of the parties.

In admitting or rejecting a constructive authority, not only the degree of its incidentality to an express authority is to be regarded, but the degree of its importance also; since on this will depend the probability or improbability of its being left to construction.

Reviewing the Constitution with an eye to these positions, it was not possible to discover in it the power to incorporate a Bank. The only clauses under which such a power could be pretended, are either:

1. The power to lay and collect taxes to pay the debts, and provide for the common defence and general welfare: Or,
2. The power to borrow money on the credit of the United States: Or,
3. The power to pass all laws necessary and proper to carry into execution those powers.

The bill did not come within the first power. It laid no taxes to pay the debts, or provide for the general welfare. It laid no tax whatever. It was altogether foreign to the subject.

No argument could be drawn from the terms "common defence, and general welfare." The power as to these general purposes was limited to acts laying taxes for them; and the general purposes themselves were limited and explained by the particular enumeration subjoined. To understand these terms in any sense, that would justify the power in question, would give the Congress an unlimited power; would render nugatory the enumeration of particular powers; would supercede all the powers reserved to the State Governments. . . .

The cases of the Bank established by the former Congress has been cited as a precedent. This was known, he said, to have been the child of necessity. It never could be justified by the regular powers of the articles of Confederation. . . .

The second clause to be examined is that which empowers Congress to borrow money.

Is this bill to borrow money? It does not borrow a shilling. Is there any fair construction by which the bill can be deemed an exercise of the power to borrow money? The obvious meaning of the power to borrow money, is that of accepting it from, and stipulating payment to those who are able and willing to lend. . . .

The third clause is that which gives the power to pass all laws necessary and proper to execute the specified powers.

Whatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress.

Its meaning must, according to the natural and obvious force of the terms and the context, be limited to means necessary to the end, and incident to the nature of the specified powers.

The clause is in fact merely declaratory of what would have resulted by un[ho]avoidable implication, as the appropriate, and, as it were, technical means of executing those powers. In this sense it has been explained by the friends of the Constitution, and ratified by the State Conventions.

The essential characteristic of the Government, as composed of limited and enumerated powers, would be destroyed, if instead of direct and incidental means, any means could be used which, in the language of the preamble to the bill, "might be conceived to be conducive to the successful conducting of the finances, or might be conceived to tend to give facility to the obtaining of loans. . . ."

If, proceeded he, Congress, by virtue of the power to borrow, can create the means of lending, and, in pursuance of these means, can incorporate a Bank, they may do any thing whatever creative of like means. . . .

If, again, Congress by virtue of the power to borrow money, can create the ability to lend, they may, by virtue of the power to levy money, create the ability to pay it. The ability to pay taxes depends on the general wealth of the society, and this, on the general prosperity of agriculture, manufactures, and commerce. Congress then may give bounties and make regulations on all these objects. . . .

Mark the reasoning on which the validity of the bill depends. To borrow money is made the end, and the accumulation of capitals implied as the means. The accumulation of money is then the end, and the Bank implied as the means. The Bank is then the end, and a charter of incorporation, a monopoly, . . . &c. implied as the means.

If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.

The latitude of interpretation required by the bill is condemned by the rule furnished by the Constitution itself.

Congress have power "to regulate the value of money;" yet it is expressly added, not left to be implied, that counterfeiters may be punished.

They have the power "to declare war," to which armies are more incident, than incorporated banks to borrowing; yet the power "to raise and support armies" is expressly added; and to this again, the express power "to make rules and regulations for the government of armies;" a like remark is applicable to the powers as to the navy.

The regulation and calling out of militia are more appurtenant to war than the proposed Bank to borrowing; yet the former is not left to construction.

The very power to borrow money is a less remote implication from the power of war, than an incorporated monopoly Bank from the power of borrowing; yet the power is not left to implication.

It is not pretended that every insertion or omission in the Constitution is the effect of systematic attention. This is not the character of any human work, particularly the work of a body of men. The examples cited, with others that might be added, sufficiently inculcate, nevertheless, a rule of interpretation very different from that on which the bill rests. They condemn the exercise of any power, particularly a great and important power, which is not evidently and necessarily involved in an express power.

It cannot be denied that the power proposed to be exercised is an important power.

As a charter of incorporation, the bill creates an artificial person previously not existing in law. It confers important civil rights and attributes, which could not

otherwise be claimed. It is, though not precisely similar, at least equivalent, to the naturalization of an alien, by which certain new civil characters are acquired by him. Would Congress have had the power to naturalize, if it had not been expressly given?

He here adverted to a distinction, which he said has not been sufficiently kept in view, between a power necessary and proper for the Government or Union, and a power necessary and proper for executing the enumerated powers.

In the latter case, the powers included in each of the enumerated powers were not expressed, but drawn from the nature of each. In the former, the powers composing the Government were expressly enumerated. This constituted the peculiar nature of the Government, no power, therefore, not enumerated could be inferred from the general nature of Government. Had the power of making treaties, for example, been omitted, however necessary it might have been, the defect could only have been lamented, or supplied by an amendment of the Constitution.

But the proposed Bank could not be called necessary to the Government; at most could be but convenient. Its uses to the Government could be supplied by keeping the taxes a little in advance; by loans from individuals; by other Banks, over which the Government would have equal command; nay greater, as it might grant or refuse to these the privilege (a free and irrevocable gift to the proposed Bank) of using their notes in the federal revenue.

He proceeded next to the contemporary expositions given to the Constitution [in various ratification conventions, which supported the conclusion] that the terms necessary and proper gave no additional powers to those enumerated. . . .

With all this evidence of the sense in which the Constitution was understood and adopted, will it not be said, if the bill should pass, that its adoption was brought about by one set of arguments, and that it is now administered under the influence of another set. . . . [?]

Most of the other participants in the House debate argued for a broader notion of congressional power, along the lines later articulated by Hamilton in his memorandum to President Washington (excerpted *infra*). The House adopted the bill chartering the bank by a vote of 39 to 20. Of the seven Representatives who had attended the Philadelphia Convention, four voted for the measure and three against it.

Passage of the bill did not end the debate over its constitutionality. George Washington, who had been President of the Philadelphia Convention before becoming the first President under the new Constitution, asked his cabinet to prepare memoranda on the constitutional questions. Edmund Randolph, the Attorney General, thought the bill unconstitutional, as did Secretary of State Thomas Jefferson. Hamilton, as already noted, supported the measure.

B. The Attorney General's Opinion

Section 16 of the Judiciary Act of 1789, one of the first major pieces of legislation passed by the First Congress, created the office of Attorney General. In addition to having the duty "to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned," the Attorney General must also "give his advice and opinion upon question of law when requested by the President of the

United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments."¹²

Fulfilling his duty, Randolph informed President Washington of the reasons that he found the Bank bill unconstitutional. "To be implied in the nature of the federal government would," Randolph argued, "beget a doctrine so indefinite as to grasp every power." He then moved on to a second question, "whether, upon any principle of fair construction, the specified powers of legislation involve the power of granting charters of incorporation?" Randolph noted that some proponents of the Bank "relied" on the Preamble to the Constitution. "To this, it will be here remarked, once for all, that the Preamble if it be operative is a full constitution of itself; and the body of the Constitution is useless; but that it is declarative only of the views of the convention, which they supposed would be best fulfilled by the powers delineated and that such is the legitimate nature of preambles." Randolph then moved on to specific powers listed in Article I, §8, including the taxation, borrowing, commerce powers, as well as the Article IV authority given Congress "to dispose and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

The Attorney General finds all such arguments fruitless:

[T]he serious alarm is in the concentered force of these sentiments. If the laying and collecting of taxes brings with it every thing which, in the opinion of Congress, may facilitate the payment of taxes; if to borrow money sets political speculation loose, to conceive what may create an ability to lend; if to regulate commerce is to range in the boundless mazes of projects for the apparently best scheme to invite from abroad, or to diffuse at home, the precious metals; if to dispose of or so to regulate property of the United States, is to incorporate a bank, that stock may be subscribed to it by them, it may without exaggeration be affirmed that a similar construction on every specified federal power, will stretch the arm of Congress into the whole circle of state legislation.

The general qualities of the federal government, independent of the Constitution and the specified powers, being thus insufficient to uphold the incorporation of a bank, we come to the last inquiry, which has been already anticipated, whether it be sanctified by the power to make all laws which shall be necessary and proper for carrying into execution the powers vested by the Constitution. To be necessary is to be incidental, or in other words, may be denominated the natural means of executing a power.

The phrase, "and proper," if it has any meaning, does not enlarge the power of Congress, but rather restricts them. For no power is to be assumed under the general clause, but such as is not only necessary but proper, or perhaps expedient also. But as the friends to the bill ought not to claim any advantage from this clause, so ought not the enemies to it; to quote the clause as having a restricting effect; both ought to consider it among the surplusage which as often proceeds from inattention as caution.

C. Jefferson's Critique of the Bank

Jefferson referred to the Philadelphia Convention's rejection of the congressional power to incorporate canals: "[O]ne of the reasons for rejection urged in the debate was, that then they would have a power to erect a bank, which would render the

12. See H. Jefferson Powell, *The Constitution and the Attorneys General* xv (1999). Randolph's entire opinion, excerpts of which are found below, can be found at pp. 3-9.

great cities, where there were prejudices and jealousies on the subject, adverse to the reception of the Constitution." Continuing in a more general vein he wrote:¹³

I consider the foundation of the Constitution as laid on this ground: 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." 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.

The incorporation of a bank, and the powers assumed by this bill, have not, in my opinion, been delegated to the United States, by the Constitution. . . .

It has been urged that a bank will give great facility or convenience in the collection of taxes. Suppose this were true: yet the Constitution allows only the means which are "necessary"; not those which are merely "convenient" for effecting the enumerated powers. If such a latitude of construction be allowed to this phrase as to give any non-enumerated power, it will go to every one, for there is not one which ingenuity may not torture into a *convenience* in some instance *or other*, to *some one* of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one power, as before observed. Therefore it was that the Constitution restrained them to the *necessary* means, that is to say, to those means without which the grant of power would be nugatory. . . .

The negative of the President is the shield provided by the Constitution to protect against the invasions of the legislature: 1. the right of the Executive. 2. of the Judiciary. 3. of the States and State legislatures. The present is the case of a right remaining exclusively with the States, and consequently one of those intended by the Constitution to be placed under its protection.

It must be added, however, that unless the President's mind on a view of everything which is urged for and against this bill, is tolerably clear that it is unauthorized by the Constitution; if the pro and the con hang so even as to balance his judgment, a just respect for the wisdom of the legislature would naturally decide the balance in favor of their opinion. It is chiefly for the cases where they are clearly misled by error, ambition, or interest, that the Constitution as placed a check in the negative of the President.

D. Hamilton's Defense

ALEXANDER HAMILTON, OPINION ON THE CONSTITUTIONALITY OF AN ACT TO ESTABLISH A BANK (1791)¹⁴

. . . [P]rinciples of construction like those espoused by the Secretary of State and the Attorney General would be fatal to the just & indispensable authority of the United States. In entering upon the argument it ought to be premised, that the objections of the Secretary of State and Attorney General are founded on a general denial of the authority of the United States to erect corporations. The latter indeed expressly admits, that if there be any thing in the bill which is not warranted by the constitution, it is the clause of incorporation.

Now it appears to the Secretary of the Treasury, that this *general principle* is *inherent* in the very *definition* of *Government* and *essential* to every step of the progress to be made by that of the United States; namely—that every power vested in a

13. Opinion on the Constitutionality of the Bill for Establishing a National Bank, in 19 Papers of Thomas Jefferson 275, 279-80 (1974).

14. 8 Papers of Alexander Hamilton 97 (1965)

Government is in its nature *sovereign*, and includes by *force of the term*, a right to employ all the *means* requisite, and fairly *applicable* to the attainment of the *ends* of such power; and which are not precluded by restrictions & exceptions specified in the constitution; or not *immoral*, or not *contrary* to the essential ends of political society. . . .

This general & indisputable principle puts at once an end to the *abstract* question—Whether the United States have power to *erect a corporation*? that is to say, to give a *legal* or *artificial capacity* to one or more persons, distinct from the natural. For it is unquestionably incident to *sovereign power* to erect corporations, and consequently to *that of the United States*, in *relation to the objects* intrusted to the management of the government. The difference is this—where the authority of the government is general, it can create corporations in *all cases*; where it is confined to certain branches of legislation, it can create corporations only in those cases. . . . It is not denied, that there are *implied*, as well as *express* powers, and that the former are as effectually delegated as the latter. . . .

Then it follows, that as a power of erecting a corporation may as well be *implied* as any other thing; it may as well be employed as an *instrument* or *mean* of carrying into execution any of the specified powers, as any other instrument or mean whatever. The only question must be, in this as in every other case, whether the mean to be employed, or in this instance the corporation to be erected, has a natural relation to any of the acknowledged objects or lawful ends of the government. Thus a corporation may not be erected by congress, for superintending the police of the city of Philadelphia because they are not authorized to *regulate* the *police* of that city; but one may be erected in relation to the collection of the taxes, or to the trade with foreign countries, or to the trade between the States, or with the Indian Tribes, because it is the province of the federal government to regulate those objects & because 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 & greatest advantage*. . . .

To this mode of reasoning respecting the right of employing all the means requisite to the execution of the specified powers of the Government, it is objected that none but *necessary* & proper means are to be employed, & the Secretary of State maintains, that no means are to be considered as *necessary*, but those without which the grant of the power would be *nugatory*. . . . All the arguments therefore against the constitutionality of the bill derived from the accidental existence of certain State-banks: institutions which *happen* to exist today, & for ought that concerns the government of the United States, may disappear tomorrow, must not only be rejected as fallacious, but must be viewed as demonstrative, that there is a *radical* source of error in the reasoning.

It is essential to the being of the National government, that so erroneous a conception of the meaning of the word *necessary*, should be exploded.

It is certain, that neither the grammatical, nor popular sense of the term requires that construction. According to both, *necessary* often means no more than *needful*, *requisite*, *incidental*, *useful*, or *conducive to*. It is a common mode of expression to say, that it is *necessary* for a government or a person to do this or that thing, when nothing more is intended or understood, than that the interests of the government or person require, or will be promoted, by the doing of this or that thing. The imagination can be at no loss for exemplifications of the use of the word in this sense.

And it is the true one in which it is to be understood as used in the constitution. The whole turn of the clause containing it, indicates, that it was the intent of the convention, by that clause to give a liberal latitude to the exercise of the specified powers. . . .

[The alternative] construction would beget endless uncertainty & embarrassment. The cases must be palpable & extreme in which it could be pronounced with certainty, that a measure was absolutely necessary, or one without which the exercise of a given power would be nugatory. There are few measures of any government, which would stand so severe a test. To insist upon it, would be to make the criterion of the exercise of any implied power a *case of extreme necessity*; which is rather a rule to justify the overleaping of the bounds of constitutional authority, than to govern the ordinary exercise of it. . . .

The *degree* in which a measure is necessary, can never be a test of the *legal* right to adopt it. That must ever be a matter of opinion; and can only be a test of expediency. The *relation* between the *measure* and the *end*, between the *nature* of the *mean* employed towards the execution of a power and the object of that power, must be the criterion of constitutionality not the more or less of *necessity* or *utility*.

The practice of the government is against the rule of construction advocated by the Secretary of State. Of this the act concerning light houses, beacons, buoys & public piers, is a decisive example. This doubtless must be referred to the power of regulating trade, and is fairly relative to it. But it cannot be affirmed, that the exercise of that power, in this instance, was strictly necessary; or that the power itself would be *nugatory* without that of regulating establishments of this nature.

This restrictive interpretation of the word *necessary* is also contrary to this sound maxim of construction namely, that the powers contained in a constitution of government, especially those which concern the general administration of the affairs of a country, its finances, trade, defence &c ought to be construed liberally, in advancement of the public good. . . .

[T]he doctrine which is contended for . . . does not affirm that the National government is sovereign in all respects, but that it is sovereign to a certain extent: that is, to the extent of the objects of its specified powers.

It leaves therefore a criterion of what is constitutional, and of what is not so. This criterion is the *end* to which the measure relates as a *mean*. If the end be clearly comprehended within any of the specified powers, & if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution — it may safely be deemed to come within the compass of the national authority. . . .

To establish [the National government's power to charter a corporation.] it remains to shew the relation of such an institution to one or more of the specified powers of the government.

Accordingly it is affirmed, that it has a relation more or less direct to the power of collecting taxes; to that of borrowing money; to that of regulating trade between the states; and to those of raising, supporting & maintaining fleets & armies. To the two former, the relation may be said to be *immediate*.

And, in the last place, it will be argued, that it is, *clearly*, within the provision which authorizes the making of all *needful* rules & *regulations* concerning the *property* of the United States, as the same has been practiced upon by the Government.

A Bank relates to the collection of taxes in two ways; *indirectly*, by increasing the quantity of circulating medium & quickening circulation, which facilitates the

means of paying — *directly*, by creating a *convenient species* of *medium* in which they are to be paid.

The legislative power of borrowing money, & of making all laws necessary & proper for carrying into execution that power, seems obviously competent to the appointment of the organ through which the abilities and wills of individuals may be most efficaciously exerted, for the accommodation of the government by loans. . . .

The institution of a bank has also a natural relation to the regulation of trade between the States: in so far as it is conducive to the creation of a convenient medium of *exchange* between them, and to the keeping up a full circulation by preventing the frequent displacement of the metals in reciprocal remittances, is the very hinge on which commerce turns. And this does not mean merely gold & silver, many other things have served the purpose with different degrees of utility. Paper has been extensively employed. . . .

[A]s the bill under consideration contemplates the government in the light of a joint proprietor of the stock of the bank, it brings the case within the provision of the clause of the constitution which immediately respects the property of the United States.

Discussion

On February 25, 1791, President Washington signed the act incorporating the Bank of the United States. Note that of the three persons whose opinions he solicited, two believed it unconstitutional. Unlike Randolph, Jefferson, and Hamilton, Washington was not a lawyer. Is this relevant to assessing the legitimacy of Washington's conclusion as to the constitutionality of the Bank? Is it relevant that one of these negative opinions was provided by the Attorney General of the United States? Does the Judiciary Act suggest that the Chief Executive (or anyone else within the Executive Branch) is bound by the Attorney General's opinion, or is it, indeed, *merely* "advice and opinion," to be accepted or rejected only insofar as the recipient, whether or not a lawyer, finds it persuasive?