THE DEBATE OVER THE NATIONAL BANK

Excerpted from: The Documentary History of the First Federal Congress of the United States, March 4, 1789–March 3, 1791: Digital Edition, ed. Charlene Bangs Bickford, Kenneth R. Bowling, William C. diGiacomantonio, and Helen E. Veit. Charlottesville: University of Virginia Press, 2019.

As part of his ambitious economic plan for revitalizing the nation's finances in the wake of the War for Independence, Secretary of the Treasury Alexander Hamilton proposed that Congress charter a national bank. This proposal soon provoked one of the bitterest political and constitutional debates of the 1790s, fracturing the United States along ideological and regional lines.

Speeches in the House of Representatives

Speech of James Madison (Virginia), February 2, 1791

Mr. MADISON began . . .

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 had been understood by its friends and its foes, and so it was to be interpreted.

As preliminaries to a right interpretation, he laid down the following rules: An interpretation that destroys the very characteristic of the government cannot be just. Where a meaning is clear, the consequences, whatever they may be, are to be admitted—where doubtful, it is fairly triable by 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 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 unavoidable implication, as the appropriate, and as it were, technical means of executing those powers. In this sense it had 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." He urged an attention to the diffuse and ductile terms which had been found requisite to cover the stretch of power contained in the bill. He compared them with the terms necessary and proper, used in the Constitution, and asked whether it was possible to view the two descriptions as synonimous, or the one as a fair and safe commentary. . . .

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

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 proceeded next to the contemporary expositions given to the constitution. The defence against the charge founded on the want of a bill of rights, presupposed, he said, that the powers not given were retained; and that those given were not to be extended by remote implications. On any other supposition, the power of Congress to abridge the freedom of the press, or the rights of conscience, &c. could not have been disproved.

The explanations in the state conventions all turned on the same fundamental principle, and on the principle that the terms necessary and proper gave no additional powers to those enumerated. ⟨Here he read sundry passages from the debates of the Pennsylvania, Virginia and North-Carolina conventions, shewing the grounds on which the constitution had been vindicated by its principal advocates, against a dangerous latitude of its powers, charged on it by its opponents.⟩ He did not undertake to vouch for the accuracy or authenticity of the publications which he quoted—he thought it probable that the sentiments delivered might in many instances have been mistaken, or imperfectly noted; but the complexion of the whole, with what he himself and many others must recollect, fully justified the use he had made of them. . . .

The explanatory amendments proposed by Congress themselves, at least, would be good authority with them; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for. These explanations were the more to be respected, as they had not only been proposed by Congress, but ratified by nearly three-fourths of the states. He read several of the articles proposed, remarking particularly on the 11th. and 12th. [the Ninth and Tenth Amendments] the former, as guarding against a latitude of interpretation—the latter, as excluding every source of power not within the constitution itself.

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; and this reproach will have the keener sting, because it is applicable to so many individuals concerned in both the adoption and administration.

In fine, if the power were in the constitution, the immediate exercise of it cannot be essential—if not there, the exercise of it involves the guilt of usurpation, and establishes a precedent of interpretation, levelling all the barriers which limit the powers of the general government, and protect those of the state governments. If the point be doubtful only, respect for ourselves, who ought to shun the appearance of precipitancy and ambition; respect for our successors, who ought not lightly to be deprived of the opportunity of exercising the rights of legislation; respect for our constituents who have had no opportunity of making known their sentiments, and who are themselves to be bound down to the measure for so long a period; all these considerations require that the irrevocable decision should at least be suspended until another session.

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

Speech of Fisher Ames (Massachusetts), February 3, 1791

Mr. AMES: Little doubt remains with respect to the utility of Banks. . . . This however is not a question of expediency, but of duty. We are not at liberty to examine which of several modes of acting is entitled to the preference. But we are solemnly warned against acting at all. We are told that the constitution will not authorise Congress to incorporate the subscribers to the Bank. Let us examine the constitution, and if that forbids our proceeding, we must reject the bill; though we shall do it with deep regret that such an opportunity to serve our country must be suffered to escape, for the want of a constitutional power to improve it. . . .

While the exercise of even the lawful powers of government is disputed—and a jealous eye is fixed on its proceedings; not a whisper has been heard against its authority to establish a bank: Still, however unseasonably, the old alarm of public discontent is sounded in our ears.

Two questions occur: May 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?

The doctrine that powers may be implied which are not expressly vested in Congress has long been a bugbear to a great many worthy persons. They apprehend that Congress by putting constructions upon the constitution, will govern by its own arbitrary discretion; and therefore, that it ought to be bound to exercise the powers expressly given, and those only.

If Congress may not make laws conformably to the powers plainly implied, tho not expressed in the frame of government, it is rather late in the day to adopt it as a principle of conduct: A great part of our two year's 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. Any words but those used in that instrument will be liable to a different interpretation. . . .

The danger of implied power does not arise from its assuming a new principle: We have not only practised it often; but we can scarcely proceed without it: Nor does the danger proceed so much from the extent of the power, as from its uncertainty. While the opposers of the Bank exclaim against the exercise of this power by Congress, do they mark out the limits of

the power which they will leave to us, with more certainty than is done by the advocates of the Bank? Their rules of interpretation by cotemporaneous testimony, the debates of conventions, and the doctrine of substantive and auxiliary powers, will be found as obscure, and of course as formidable, as that which they condemn: They only set up one construction against another. . . .

If therefore some interpretation of the constitution must be indulged, by what rules is it to be governed? The great end of every association of persons or States, is, to effect the end of its institution. . . .

Congress may do what is necessary to the end for which the constitution was adopted, provided it is not repugnant to the natural rights of man, or to those which they have expressly reserved to themselves, or to the powers which are assigned to the States: This rule of interpretation seems to be a safe, and not a very uncertain one, independently of the constitution itself: By that instrument certain powers are specifically delegated, together with all powers necessary and proper to carry them into execution: That construction may be maintained to be a safe one which promotes the good of the society, and the ends for which the government was adopted, without impairing the rights of any man, or the powers of any State. . . .

He then asked, whether it appeared on this view of the subject, that the establishment of a National Bank would be a violent mis-interpretation of the Constitution. He did not contend for an arbitrary unlimited discretion in the government to do every thing: He took occasion to protest against such a mis-conception of his argument. He had noticed the great marks by which the construction of the Constitution, he conceived, must be guided and limited—and these, if not absolutely certain, were very far from being arbitrary or unsafe: It is for the house to judge, whether the construction which denies the power of Congress, is more definite and safe. . . .

He adverted to the preamble of the constitution; which declares that it is established for the general welfare of the Union; this vested Congress with the authority over all objects of national concern or of a general nature; a National Bank undoubtedly came under this idea, and though not specially mentioned, yet the general design and tendency of the constitution proved more evidently the constitutionality of the system, than its silence in this particular could be construed to express the contrary. . . .

He had no desire to extend the powers granted by the constitution beyond the limits prescribed them. But in cases where there was doubt as to its meaning and intention, he thought it his duty to consult his conscience and judgment to solve them, and even if doubts did still remain on two different interpretations of it he would constantly embrace that the least involved in doubt.

Opinions on the Constitutionality of the Bank Bill Solicited by President George Washington

Secretary of States Thomas Jefferson's Opinion, February 15, 1791

I consider the foundation of the Constitution as laid on this ground that, "all powers not delegated to the U.S. by the constitution, nor prohibited by it to the States, are reserved to the states or to the people" (XIIth. Amendmt.) 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, & other powers assumed by this bill, have not in my opinion, been delegated to the U.S. by the Constitution.

I. They are not among the powers specially enumerated . . .

II. Nor are they within either of the general phrases, which are the two following.

. . .The second general phrase is, "to make all laws necessary & proper for carrying into execution the enumerated powers" but they can all be carried into execution without a bank: a bank, therefore, is not necessary, and, consequently, not authorised by this phrase.

It has been much 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 [780] every one, for there is no one which ingenuity may not torture into a convenience, in some way or other, to some one of so long a list of enumerated powers; it would swallow up all the delegated powers, and reduce the whole to one phrase 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 the power would be nugatory.

Secretary of the Treasury Alexander Hamilton's Opinion, February 23, 1791

The Secretary of the Treasury having perused with attention the papers containing the opinions of the Secretary of State and the Attorney General concerning the constitutionality of the Bill for establishing a National Bank, proceeds, according to the order of the President, to submit the reasons which have induced him to entertain a different opinion.

.. .The first of these arguments is, that the foundation of the Constitution is laid on this ground, "that all powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States or to the people," whence it is meant to be inferred that Congress can in no case, exercise any power not included in those enumerated in the Constitution: and it is affirmed that the power of erecting a corporation is not included in any of the enumerated powers. . . .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, and

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. Nay so far does he go in this restrictive interpretation of the word, as even to make the case of necessity, which shall warrant the constitutional exercise of a power, to depend on casual and temporary circumstances; an idea which alone refutes the construction. The expediency of exercising a particular power at a particular time, must indeed depend on circumstances; but the constitutional right of exercising it must be uniform and invariable, the same to day as tomorrow.

. . . It is essential to the being of the National Government that so erroneous a conception of the meaning of the word necessary, shou'd 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 [788] 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 [Federal] Convention, by that clause, to give a liberal latitude to the exercise of the specified powers. The expressions have peculiar comprehensiveness—They are—"To make all Laws necessary & proper for carrying into execution the foregoing powers and all other powers vested by the constitution in the government of the United States, or in any Department, or Officer thereof."2 To understand the word as the Secretary of State does would be to depart from its obvious & popular sense; and to give it a restrictive operation, an idea never before entertained. It would be to give it the same force as if the word absolutely or indispensably had been prefixed to it.

Such a construction would beget endless uncertainty and 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 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, & the object of that power; must be the criterion of constitutionality, not the more or less of necessity or utility.