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FINAL VERSION OF AN OPINION ON THE CONSTITUTIONALITY OF AN ACT TO ESTABLISH A BANK, [23 FEBRUARY 1791]

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The Secretary of the Treasury having perused with attention the papers containing the opinions of the Secretary of State and Attorney General concerning the constitutionality of the bill for establishing a National Bank⁶ proceeds according to the order of the President to submit the reasons which have induced him to entertain a different opinion.

It will naturally have been anticipated that, in performing this task he would feel uncommon solicitude. Personal considerations alone arising from the reflection that the measure originated with him would be sufficient to produce it: The sense which he has manifested of the great importance of such an institution to the successful administration of the department under his particular care; and an expectation of serious ill consequences to result from a failure of the measure, do not permit him to be without anxiety on public accounts. But the chief solicitude arises from a firm persuasion, that principles 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.⁷

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 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 principle in its application to Government in general would be admitted as an axiom. And it will be incumbent upon those, who may incline to deny it, to *prove* a distinction; and to shew that a rule which in the general system of things is essential to the preservation of the social order is inapplicable to the United States.

The circumstances that the powers of sovereignty are in this country divided between the National and State Governments, does not afford the distinction required. It does not follow from this, that each of the *portions* of powers delegated to the one or to the other is not sovereign *with regard to its proper objects*. It will only *follow* from it, that each has sovereign power as to *certain things*, and not as to *other things*. To deny that the Government of the United States has sovereign power as to its declared purposes & trusts, because its power does not extend to all cases, would be equally to deny, that the State Governments have sovereign power in any case; because their power does not extend to every case. The tenth section of the first article of the constitution exhibits a long list of very important things which they may not do. And thus the United States would furnish the singular spectacle of a *political society* without *sovereignty*, or of a people *governed* without *government*.

If it would be necessary to bring proof to a proposition so clear as that which affirms that the powers of the foederal government, *as to its objects*, are sovereign, there is a clause of its constitution which would be decisive. It is that which declares, that the constitution and the laws of the United States made in pursuance of it, and all treaties made or which shall be made under their authority shall be the supreme law of the land. The power which can create the *Supreme law* of the land, in any case, is doubtless sovereign *as to such case*.

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.

Here then as far as concerns the reasonings of the Secretary of State & the Attorney General, the affirmative of the constitutionality of the bill might be permitted to rest. It will occur to the President that the principle here advanced has been untouched by either of them.

For a more complete elucidation of the point nevertheless, the arguments which they have used against the power of the government to erect corporations, however foreign they are to the great & fundamental rule which has been stated, shall be particularly examined. And after shewing that they do not tend to impair its force, it shall also be shewn, that the power of incorporation incident to the government in certain cases, does fairly extend to the particular case which is the object of the bill.

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.

The main proposition here laid down, in its true signification is not to be questioned. It is nothing more than a consequence of this republican maxim, that all government is a delegation of power. But how much is delegated in each case, is a question of fact to be made out by fair reasoning & construction upon the particular provisions of the constitution—taking as guides the general principles & general ends of government.

It is not denied, that there are *implied*, as well as *express* powers, and that the former are as effectually delegated as the latter. And for the sake of accuracy it shall be mentioned, that there is another class of powers, which may be properly denominated *resulting* powers. It will not be doubted that if the United States should make a conquest of any of the territories of its neighbours, they would possess sovereign jurisdiction over the conquered territory. This would rather be a result from the whole mass of the powers of the government & from the nature of political society, than a consequence of either of the powers specially enumerated.

But be this as it may, it furnishes a striking illustration of the general doctrine contended for. It shews an extensive case, in which a power of erecting corporations is either implied in, or would result from some or all of the powers, vested in the National Government. The jurisdiction acquired over such conquered territory would certainly be competent to every species of legislation.

To return—It is conceded, that implied powers are to be considered as delegated equally with express ones.

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 authorised 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*.

A strange fallacy seems to have crept into the manner of thinking & reasoning upon the subject. 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 end of peculiar magnitude & moment; whereas it is truly to be considered as a *quality*, *capacity*, or *mean* to an end. Thus a mercantile company is formed with a certain capital for the purpose of carrying on a particular branch of

business. Here the business to be prosecuted is the *end*; the association in order to form the requisite capital is the primary mean. Suppose that an incorporation were added to this; it would only be to add a new *quality* to that association; to give it an artificial capacity by which it would be enabled to prosecute the business with more safety & convenience.

That the importance of the power of incorporation has been exaggerated, leading to erroneous conclusions, will further appear from tracing it to its origin. The roman law is the source of it, according to which a *voluntary* association of individuals at *any time* or *for any purpose* was capable of producing it. In England, whence our notions of it are immediately borrowed, it forms a part of the executive authority, & the exercise of it has been often *delegated* by that authority. Whence therefore the ground of the supposition, that it lies beyond the reach of all those very important portions of sovereign power, legislative as well as executive, which belong to the government of the United States?

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*.⁸ Nay so far does he go in his restrictive interpretation of the word, as even to make the case of *necessity* which shall warrant the constitutional exercise of the power to depend on *casual & 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 & invariable—the same to day, as to morrow.

All the arguments therefore against the constitutionality of the bill derived from the accidental existence of certain State-banks:⁹ institutions which *happen* to exist to day, & for ought that concerns the government of the United States, may disappear to morrow, 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 expressions have peculiar comprehensiveness. They are—“to make *all laws*, necessary & proper for *carrying into execution* the foregoing powers & all *other powers* vested by the constitution in the *government* of the United States, or in any *department* or *officer* thereof.” 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 *indispensibly* had been prefixed to it.

Such a 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.

It may be truly said of every government, as well as of that of the United States, that it has only a right, to pass such laws as are necessary & proper to accomplish the objects intrusted to it. For no government has a right to do *merely what it pleases*. Hence by a process of reasoning similar to that of the Secretary of State, it might be proved, that neither of the State governments has a right to incorporate a bank. It might be shewn, that all the public business of the State, could be performed without a bank, and inferring thence that it was unnecessary it might be argued that it could not be done, because it is against the rule which has been just mentioned. A like mode of reasoning would prove, that there was no power to incorporate the

Inhabitants of a town, with a view to a more perfect police: For it is certain, that an incorporation may be dispensed with, though it is better to have one. It is to be remembered, that there is no *express* power in any State constitution to erect corporations. ¹⁰

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. ¹¹ 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. This rule does not depend on the particular form of a government or on the particular demarkation of the boundaries of its powers, but on the nature and objects of government itself. The means by which national exigencies are to be provided for, national inconveniencies 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 & application of those means. Hence consequently, the necessity & propriety of exercising the authorities intrusted to a government on principles of liberal construction.

The Attorney General admits the *rule*, but takes a distinction between a State, and the foederal constitution. The latter, he thinks, ought to be construed with greater strictness, because there is more danger of error in defining partial than general powers. ¹²

But the reason of the *rule* forbids such a distinction. This reason is—the variety & extent of public exigencies, a far greater proportion of which and of a far more critical kind, are objects of National than of State administration. The greater danger of error, as far as it is supposable, may be a prudential reason for caution in practice, but it cannot be a rule of restrictive interpretation.

In regard to the clause of the constitution immediately under consideration, it is admitted by the Attorney General, that no *restrictive* effect can be ascribed to it. He defines the word necessary thus. “To be necessary is to be *incidental*, and may be denominated the natural means of executing a power.” ¹³

But while, on the one hand, the construction of the Secretary of State is deemed inadmissible, it will not be contended on the other, that the clause in question gives any *new* or *independent* power. But it gives an explicit sanction to the doctrine of *implied* powers, and is equivalent to an admission of the proposition, that the government, *as to its specified powers and objects*, has plenary & sovereign authority, in some cases paramount to that of the States, in others coordinate with it. For such is the plain import of the declaration, that it may pass *all laws* necessary & proper to carry into execution those powers.

It is no valid objection to the doctrine to say, that it is calculated to extend the powers of the general government throughout the entire sphere of State legislation. The same thing has been said, and may be said with regard to every exercise of power by *implication* or *construction*. The moment the literal meaning is departed from, there is a chance of error and abuse. And yet an adherence to the letter of its powers would at once arrest the motions of the government. It is not only agreed, on all hands, that the exercise of constructive powers is indispensable, but every act which has been passed is more or less an exemplification of it. One has been already mentioned, that relating to light houses &c. ¹⁴ That which declares the power of the President to remove officers at pleasure, ¹⁵ acknowledges the same truth in another, and a signal instance.

The truth is that difficulties on this point are inherent in the nature of the foederal constitution. They result inevitably from a division of the legislative power. The consequence of this division is, that there will be cases clearly within the power of the National Government; others clearly without its power; and a third class, which will leave room for controversy & difference of opinion, & concerning which a reasonable latitude of judgment must be allowed.

But the doctrine which is contended for is not chargeable with the consequence imputed to it. It 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. There is also this further criterion which may materially assist the decision. Does the proposed measure abridge a preexisting right of any State, or of any individual? If it does not, there is a strong presumption in favour of its constitutionality; & slighter relations to any declared object of the constitution may be permitted to turn the scale.

The general objections which are to be inferred from the reasonings of the Secretary of State and of the Attorney General to the doctrine which has been advanced, have been stated and it is hoped satisfactorily answered. Those of a more particular nature shall now be examined.

The Secretary of State introduces his opinion with an observation, that the proposed incorporation undertakes to create certain capacities properties or attributes which are *against* the laws of *alienage, descents, escheat and forfeiture, distribution and monopoly*, and to confer a power to make laws paramount to those of the States.¹⁶ And nothing says he, in another place, but a *necessity invincible by other means* can justify such a *prostration of laws* which constitute the pillars of our whole system of jurisprudence, and are the foundation laws of the State Governments.¹⁷

If these are truly the foundation laws of the several states, then have most of them subverted their own foundations. For there is scarcely one of them which has not, since the establishment of its particular constitution, made material alterations in some of those branches of its jurisprudence especially the law of descents. But it is not conceived how any thing can be called the fundamental law of a State Government which is not established in its constitution unalterable by the ordinary legislature. And with regard to the question of necessity it has been shewn, that this can only constitute a question of expediency, not of right.

To erect a corporation is to substitute a *legal or artificial* to a *natural* person, and where a number are concerned to give them *individuality*. To that legal or artificial person once created, the common law of every state of itself *annexes* all those incidents and attributes, which are represented as a prostration of the main pillars of their jurisprudence. It is certainly not accurate to say, that the erection of a corporation is *against* those different *heads* of the State laws; because it is rather to create a kind of person or entity, to which *they* are inapplicable, and to which the general rule of those laws assign a different regimen. The laws of alienage cannot apply to an artificial person, because it can have no country. Those of descent cannot apply to it, because it can have no heirs. Those of escheat are foreign from it for the same reason. Those of forfeiture, because it cannot commit a crime. Those of distribution, because, though it may be dissolved, it cannot die. As truly might it be said, that the exercise of the power of prescribing the rule by which foreigners shall be naturalised, is *against* the law of alienage; while it is in fact only to put them in a situation to cease to be the subject of that law. To do a thing which is *against* a law, is to do something which it forbids or which is a violation of it.

But if it were even to be admitted that the erection of a corporation is a direct alteration of the State laws in the enumerated particulars; it would do nothing towards proving, that the measure was unconstitutional. If the government of the United States can do no act, which amounts to an alteration of a State law, all its powers are nugatory. For almost every new law is an alteration, in some way or other of an old *law*, either *common*, or *statute*.

There are laws concerning bankruptcy in some states—some states have laws regulating the values of foreign coins. Congress are empowered to establish uniform laws concerning bankruptcy throughout the United States, and to regulate the values of foreign coins. The exercise of either of these powers by Congress necessarily involves an alteration of the laws of those states.

Again: Every person by the common law of each state may export his property to foreign countries, at pleasure. But Congress, in pursuance of the power of regulating trade, may prohibit the exportation of commodities: in doing which, they would alter the common law of each state in abridgement of individual rights.

It can therefore never be good reasoning to say—this or that act is unconstitutional, because it alters this or that law of a State. It must be shewn, that the act which makes the alteration is unconstitutional on other accounts, not *because* it makes the alteration.

There are two points in the suggestions of the Secretary of State which have been noted that are peculiarly incorrect. One is, that the proposed incorporation is against the laws of monopoly, because it stipulates an exclusive right of banking under the national authority. The other that it gives power to the institution to make laws paramount to those of the states. ¹⁸

But with regard to the first point, the bill neither prohibits any State from erecting as many banks as they please, nor any number of Individuals from associating to carry on the business: & consequently is free from the charge of establishing a monopoly: for monopoly implies a *legal impediment* to the carrying on of the trade by others than those to whom it is granted.

And with regard to the second point, there is still less foundation. The bye-laws of such an institution as a bank can operate only upon its own members; can only concern the disposition of its own property and must essentially resemble the rules of a private mercantile partnership. They are expressly not to be contrary to law; and law must here mean the law of a State as well as of the United States. There never can be a doubt, that a law of the corporation, if contrary to a law of a state, must be overruled as void; unless the law of the State is contrary to that of the United States; and then the question will not be between the law of the State and that of the corporation, but between the law of the State and that of the United States.

Another argument made use of by the Secretary of State, is, the rejection of a proposition by the convention to empower Congress to make corporations, either generally, or for some special purpose. ¹⁹

What was the precise nature or extent of this proposition, or what the reasons for refusing it, is not ascertained by any authentic document, or even by accurate recollection. As far as any such document exists, it specifies only canals. If this was the amount of it, it would at most only prove, that it was thought inexpedient to give a power to incorporate for the purpose of opening canals, for which purpose a special power would have been necessary; except with regard to the Western Territory, there being nothing in any part of the constitution respecting the regulation of canals. It must be confessed however, that very different accounts are given of the import of the proposition and of the motives for rejecting it. Some affirm that it was confined to the opening of canals and obstructions in rivers; others, that it embraced banks; and others, that it extended to the power of incorporating generally. Some again alledge, that it was disagreed to, because it was thought improper to vest in Congress a power of erecting corporations—others, because it was thought unnecessary to *specify* the power, and inexpedient to furnish an additional topic of objection to the constitution. In this state of the matter, no inference whatever can be drawn from it.

But whatever may have been the nature of the proposition or the reasons for rejecting it concludes nothing in respect to the real merits of the question. The Secretary of State will not deny, that whatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual & established rules of construction. Nothing is more common than for laws to *express* and *effect*, more or less than was intended. If then a power to erect a corporation, in any case, be deducible by fair inference from the whole or any part of the numerous provisions of the constitution of the United States, arguments drawn from extrinsic circumstances, regarding the intention of the convention, must be rejected.

Most of the arguments of the Secretary of State which have not been considered in the foregoing remarks, are of a nature rather to apply to the expediency than to the constitutionality of the bill. They will however be noticed in the discussions which will be necessary in reference to the particular heads of the powers of the government which are involved in the question.

Those of the Attorney General will now properly come under review.

His first observation is, that the power of incorporation is not *expressly* given to congress. ²⁰ This shall be conceded, but in *this sense* only, that it is not declared in *express terms* that congress may erect a *corporation*. But this cannot mean, that there are not certain *express* powers, which *necessarily* include it.

For instance, Congress have express power “to exercise exclusive legislation in all cases whatsoever, over such *district* (not exceeding ten miles square) as may by cession of particular states, & the acceptance of Congress become the seat of the government of the United states; and to exercise *like authority* over all places purchased by consent of the legislature of the State in which the same shall be for the erection of forts, arsenals, dock yards & other needful buildings.”

Here then is express power to exercise *exclusive legislation in all cases whatsoever over certain places*; that is to do in respect to those places, all that any government whatever may do: For language does not afford a more complete designation of sovereign power, than in those comprehensive terms. It is in other words a power to pass all laws whatsoever, & consequently to pass laws for erecting corporations, as well as for any other purpose which is the proper object of law in a free government. Surely it can never be believed, that Congress with *exclusive power of legislation in all cases whatsoever*, cannot erect a corporation within the district which shall become the seat of government, for the better regulation of its police. And yet there is an unqualified denial of the power to erect corporations in every case on the part both of the Secretary of State and of the Attorney General. The former indeed speaks of that power in these emphatical terms, that it is *a right remaining exclusively with the states*.²¹

As far then as there is an express power to do any *particular act of legislation*, there is an express one to erect corporations in the cases above described. But accurately speaking, no *particular power* is more than *implied* in a *general one*. Thus the power to lay a duty on a *gallon of rum*, is only a *particular implied* in the general power to lay and collect taxes, duties, imposts and excises. This serves to explain in what sense it may be said, that congress have not an express power to make corporations.

This may not be an improper place to take notice of an argument which was used in debate in the House of Representatives. It was there urged, that if the constitution intended to confer so important a power as that of erecting corporations, it would have been expressly mentioned.²² But the case which has been noticed is clearly one in which such a power exists, and yet without any specification or express grant of it, further than as every *particular implied* in a general power, can be said to be so granted.

But the argument itself is founded upon an exaggerated and erroneous conception of the nature of the power. It has been shewn, that it is not of so transcendent a kind as the reasoning supposes; and that viewed in a just light it is a mean which ought to have been left to *implication*, rather than an *end* which ought to have been *expressly* granted.

Having observed, that the power of erecting corporations is not expressly granted to Congress, the Attorney General proceeds thus....

“If it can be exercised by them, it must be

1. because the nature of the federal government implies it.
2. because it is involved in some of the specified powers of legislation or
3. because it is necessary & proper to carry into execution some of the specified powers.”²³

To be implied in the *nature of the federal government*, says he, would beget a doctrine so indefinite, as to grasp every power.

This proposition it ought to be remarked is not precisely, or even substantially, that, which has been relied upon. The proposition relied upon is, that the *specified powers* of Congress are in their nature sovereign—that it is incident to sovereign power to erect corporations; & that therefore Congress have a right within the *sphere & in relation to the objects of their power, to erect corporations*.

It shall however be supposed, that the Attorney General would consider the two propositions in the same light, & that the objection made to the one, would be made to the other.

To this objection an answer has been already given. It is this; that the doctrine is stated with this express *qualification*, that the right to erect corporations does *only* extend to *cases & objects* within the *sphere* of the *specified powers* of the government. A general legislative authority implies a power to erect corporations *in all cases*—a particular legislative power implies authority to erect corporations, in relation to cases arising under that power only. Hence the affirming, that as an *incident* to sovereign power, congress may erect a corporation in relation to the *collection* of their taxes, is no more than to affirm that they may do whatever else they please; than the saying that they have a power to regulate trade would be to affirm that they have a power to regulate religion: or than the maintaining that they have sovereign power as to taxation, would be to maintain that they have sovereign power as to every thing else.

The Attorney General undertakes, in the next place, to shew, that the power of erecting corporations is not involved in any of the specified powers of legislation confided to the National government.²⁴

In order to this he has attempted an enumeration of the particulars which he supposes to be comprehended under the several heads of the *powers* to lay & collect taxes &c—to borrow money on the credit of the United States—to regulate commerce with foreign nations—between the states, and with the Indian Tribes—to dispose of and make all needful rules & regulations respecting the territory or other property belonging to the United States; the design of which enumeration is to shew *what is* included under those different heads of power, & *negatively*, that the power of erecting corporations is not included.

The truth of this inference or conclusion must depend on the accuracy of the enumeration. If it can be shewn that the enumeration is *defective*, the inference is destroyed. To do this will be attended with no difficulty.

The heads of the power to lay & collect taxes, he states to be

1. To ascertain the subject of taxation &c
2. to declare the quantum of taxation &c
3. to prescribe the *mode of collection*.
4. to ordain the manner of accounting for the taxes &c²⁵

The defectiveness of this enumeration consists in the generality of the third division “*to prescribe the mode of collection*”; which is in itself an immense chapter. It will be shewn hereafter, that, among a vast variety of particulars, it comprises the very power in question; namely to *erect corporations*.

The heads of the power to borrow money are stated to be

1. to stipulate the sum to be lent.
2. an interest or no interest to be paid.
3. the time & manner of repaying, unless the loan be placed on an irredeemable fund.²⁶

This enumeration is liable to a variety of objections. It omits, in the first place, the *pledging* or *mortgaging* of a fund for the security of the money lent, an usual and in most cases an essential ingredient.

The idea of a stipulation of *an interest or no interest* is too confined. It should rather have been said, to stipulate *the consideration* of the loan. Individuals often borrow upon considerations other than the payment of interest. So may government; and so they often find it necessary to do. Every one recollects the lottery tickets & other douceurs often given in Great Britain, as collateral inducements to the lending of money to the Government.

There are also frequently collateral conditions, which the enumeration does not contemplate. Every contract which has been made for monies borrowed in Holland includes stipulations that the sum due shall be *free from taxes*, and from sequestration in time of war, and mortgages all the land & property of the United States for the reimbursement.

It is also known, that a lottery is a common expedient for borrowing money, which certainly does not fall under either of the enumerated heads.

The heads of the power to regulate commerce with foreign nations are stated to be

1. to prohibit them or their commodities from our ports.
2. to impose duties on *them* where none existed before, or to increase existing duties on them.
3. to subject *them* to any species of custom house regulation
4. to grant *them* any exemptions or privileges which policy may suggest.²⁷

This enumeration is far more exceptionable than either of the former. It omits *every thing* that relates to the *citizens vessels* or *commodities* of the United States. The following palpable omissions occur at once.

1. Of the power to prohibit the exportation of commodities which not only exists at all times, but which in time of war it would be necessary to exercise, particularly with relation to naval and warlike stores.
2. Of the power to prescribe rules concerning the *characteristics & priviledges* of an american bottom—how she shall be navigated, as whether by citizens or foreigners, or by a proportion of each.
3. Of the power of regulating the manner of contracting with seamen, the police of ships on their voyages &c of which the act for the government & regulation of seamen in the merchants service is a specimen.²⁸

That the three preceding articles are omissions, will not be doubted. There is a long list of items in addition, which admit of little, if any question; of which a few samples shall be given.

1. The granting of bounties to certain kinds of vessels, & certain species of merchandise. Of this nature is the allowance on dried & pickled fish & salted provisions. ²⁹
2. The prescribing of rules concerning the *inspection* of commodities to be exported. Though the states individually are competent to this regulation, yet there is no reason, in point of authority at least, why a general system might not be adopted by the United States.
3. The regulation of policies of insurance; of salvage upon goods found at sea, and the disposition of such goods.
4. The regulation of pilots.
5. The regulation of bills of exchange drawn by a merchant of *one state* upon a merchant of *another state*. This last rather belongs to the regulation of trade between the states, but is equally omitted in the specification under that head.

The last enumeration relates to the power “to dispose of & make *all needful rules and regulations* respecting the territory or *other property* belonging to the United States.”

The heads of this power are said to be

1. to exert an ownership over the territory of the United States, which may be properly called the property of the United States, as in the Western Territory, and to *institute a government therein*: or
2. to exert an ownership over the other property of the United States. ³⁰

This idea of exerting an ownership over the Territory or other property of the United States, is particularly indefinite and vague. It does not at all satisfy the conception of what must have been intended by a power, to make all needful *rules and regulations*; nor would there have been any use for a special clause which authorised nothing more. For the right of exerting an ownership is implied in the very definition of property.

It is admitted that in regard to the western territory some thing more is intended—even the institution of a government; that is the creation of a body politic, or corporation of the highest nature; one, which in its maturity, will be able itself to create other corporations. Why then does not the same clause authorise the erection of a corporation in respect to the regulation or disposal of any other of the property of the United States? This idea will be enlarged upon in another place.

Hence it appears, that the enumerations which have been attempted by the Attorney General are so imperfect, as to authorise no conclusion whatever. They therefore have no tendency to disprove, that each and every of the powers to which they relate, includes that of erecting corporations; which they certainly do, as the subsequent illustrations will more & more evince.

It is presumed to have been satisfactorily shewn in the course of the preceding observations

1. That the power of the government, *as to* the objects intrusted to its management, is in its nature sovereign.
2. That the right of erecting corporations is one, inherent in & inseparable from the idea of sovereign power.
3. That the position, that the government of the United States can exercise no power but such as is delegated to it by its constitution, does not militate against this principle.
4. That the word *necessary* in the general clause can have no *restrictive* operation, derogating from the force of this principle, indeed, that the degree in which a measure is, or is not necessary, cannot be a *test* of *constitutional* right, but of expediency only.
5. That the power to erect corporations is not to be considered, as an *independent & substantive* power but as an *incidental & auxiliary* one; and was therefore more properly left to implication, than expressly granted.
6. that the principle in question does not extend the power of the government beyond the prescribed limits, because it only affirms a power to *incorporate for purposes within the sphere of the specified powers*.

And lastly that the right to exercise such a power, in certain cases, is unequivocally granted in the most *positive & comprehensive* terms.

To all which it only remains to be added that such a power has actually been exercised in two very eminent instances: namely in the erection of two governments, One, northwest of the river Ohio, and the other south west—the *last, independent of any antecedent compact*. ³¹

And there results a full & complete demonstration, that the Secretary of State & Attorney General are mistaken, when they deny generally the power of the National government to erect corporations.

It shall now be endeavoured to be shewn that there is a power to erect one of the kind proposed by the bill. This will be done, by tracing a natural & obvious relation between the institution of a bank, and the objects of several of the enumerated powers of the government; and by shewing that, *politically* speaking, it is necessary to the effectual execution of one or more of those powers. In the course of this investigation, various instances will be stated, by way of illustration, of a right to erect corporations under those powers.

Some preliminary observations maybe proper.

The proposed bank is to consist of an association of persons for the purpose of creating a joint capital to be employed, chiefly and essentially, in loans. So far the object is not only lawful, but it is the mere exercise of a right, which the law allows to every individual. The bank of New York which is not incorporated, is an example of such an association. The bill proposes in addition, that the government shall become a joint proprietor in this undertaking, and that it shall permit the bills of the company payable on demand to be receivable in its revenues & stipulates that it shall not grant privileges similar to those which are to be allowed to this company, to any others. All this is in controvertibly within the compass of the discretion of the government. The only question is, whether it has a right to incorporate this company, in order to enable it the more effectually to accomplish *ends*, which are in themselves lawful.

To establish such a right, 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 authorises 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.

To designate or appoint the money or *thing* in which taxes are to be paid, is not only a proper, but a necessary *exercise* of the power of collecting them. Accordingly congress in the law concerning the collection of the duties on imports & tonnage, have provided that they shall be payable in gold & silver.³² But while it was an indispensable part of the work to say in what they should be paid, the choice of the specific thing was mere matter of discretion. The payment might have been required in the commodities themselves. Taxes in kind, however ill judged, are not without precedents, even in the United States. Or it might have been in the paper money of the several states; or in the bills of the bank of North America, New York and Massachusetts, all or either of them: or it might have been in bills issued under the authority of the United States.

No part of this can, it is presumed, be disputed. The appointment, then, of the *money* or *thing*, in which the taxes are to be paid, is an incident to the power of collection. And among the expedients which may be adopted, is that of bills issued under the authority of the United States.

Now the manner of issuing these bills is again matter of discretion. The government might, doubtless, proceed in the following manner. It might provide, that they should be issued under the direction of certain officers, payable on demand; and in order to support their credit & give them a ready circulation, it might, besides giving them a currency in its taxes, set apart out of any monies in its Treasury, a given sum and appropriate it under the direction of those officers as a fund for answering the bills as presented for payment.

The constitutionality of all this would not admit of a question. And yet it would amount to the institution of a bank, with a view to the more convenient collection of taxes. For the simplest and most precise idea of a bank, is, a deposit of coin or other property, as a fund for *circulating a credit* upon it, which is to answer the purpose of money. That such an arrangement would be equivalent to the establishment of a bank would become obvious, if the place where the fund to be set apart was kept should be made a receptacle of the monies of all other persons who should incline to deposit them there for safe keeping; and would

become still more so, if the Officers charged with the direction of the fund were authorised to make discounts at the usual rate of interest, upon good security. To deny the power of the government to add these ingredients to the plan, would be to refine away all government.

This process serves to exemplify the natural & direct relation which may subsist between the institution of a bank and the collection of taxes. It is true that the species of bank which has been designated, does not include the idea of incorporation. But the argument intended to be founded upon it, is this: that the institution comprehended in the idea of a bank being one immediately relative to the collection of taxes, *in regard to the appointment of the money or thing* in which they are to be paid; the sovereign power of providing for the collection of taxes necessarily includes the right of granting a corporate capacity to such an institution, as a requisite to its greater security, utility and more convenient management.

A further process will still more clearly illustrate the point. Suppose, when the species of bank which has been described was about to be instituted, it were to be urged, that in order to secure to it a due degree of confidence the fund ought not only to be set apart & appropriated generally, but ought to be specifically vested in the officers who were to have the direction of it, and in their *successors* in office, to the end that it might acquire the character of *private property* incapable of being resumed without a violation of the sanctions by which the rights of property are protected & occasioning more serious & general alarm, the apprehension of which might operate as a check upon the government—such a proposition might be opposed by arguments against the expediency of it or the solidity of the reason assigned for it, but it is not conceivable what could be urged against its constitutionality.

And yet such a disposition of the thing would amount to the erection of a corporation. For the true definition of a corporation seems to be this. It is a *legal* person, or a person created by act of law, consisting of one or more natural persons authorised to hold property or a franchise in succession in a legal as contradistinguished from a natural capacity.

Let the illustration proceed a step further. Suppose a bank of the nature which has been described with or without incorporation, had been instituted, & that experience had evinced as it probably would, that being wholly under public direction it possessed not the confidence requisite to the credit of its bills—Suppose also that by some of those adverse conjunctures which occasionally attend nations, there had been a very great drain of the specie of the country, so as not only to cause general distress for want of an adequate medium of circulation, but to produce, in consequence of that circumstance, considerable defalcations in the public revenues—suppose also, that there was no bank instituted in any State—in such a posture of things, would it not be most manifest that the incorporation of a bank, like that proposed by the bill, would be a measure immediately relative to the *effectual collection* of the taxes and completely within the province of the sovereign power of providing by all laws necessary & proper for that collection?

If it be said, that such a state of things would render that necessary & therefore constitutional, which is not so now—the answer to this, and a solid one it doubtless is, must still be, that which has been already stated—Circumstances may affect the expediency of the measure, but they can neither add to, nor diminish its constitutionality.

A Bank has a direct relation to the power of borrowing money, because it is an usual and in sudden emergencies an essential instrument in the obtaining of loans to Government.

A nation is threatened with a war. Large sums are wanted, on a sudden, to make the requisite preparations. Taxes are laid for the purpose, but it requires time to obtain the benefit of them. Anticipation is indispensable. If there be a bank, the supply can, at once be had; if there be none loans from Individuals must be sought. The progress of these is often too slow for the exigency: in some situations they are not practicable at all. Frequently when they are, it is of great consequence to be able to anticipate the product of them by advances from a bank.

The essentiality of such an institution as an instrument of loans is exemplified at this very moment. An Indian expedition is to be prosecuted.³³ The only fund out of which the money can arise consistently with the public engagements, is a tax which will only begin to be collected in July next.³⁴ The preparations, however, are instantly to be made. The money must therefore be borrowed. And of whom could it be borrowed; if there were no public banks?

It happens, that there are institutions of this kind, but if there were none, it would be indispensable to create one.

Let it then be supposed, that the necessity existed, (as but for a casualty would be the case) that proposals were made for obtaining a loan; that a number of individuals came forward and said, we are willing to accommodate the government with this money; with what we have in hand and the credit we can raise upon it we doubt not of being able to furnish the sum required:

but in order to this, it is indispensable, that we should be incorporated as a bank. This is essential towards putting it in our power to do what is desired and we are obliged on that account to make it the *consideration* or condition of the loan.

Can it be believed, that a compliance with this proposition would be unconstitutional? Does not this alone evince the contrary? It is a necessary part of a power to borrow to be able to stipulate the consideration or conditions of a loan. It is evident, as has been remarked elsewhere, that this is not confined to the mere stipulation of a sum of money by way of interest—why may it not be deemed to extend, where a government is the contracting party, to the stipulation of a *franchise*? If it may, & it is not perceived why it may not, then the grant of a corporate capacity may be stipulated as a consideration of the loan? There seems to be nothing unfit, or foreign from the nature of the thing in giving individuality or a corporate capacity to a number of persons who are willing to lend a sum of money to the government, the better to enable them to do it, and make them an ordinary instrument of loans in future emergencies of the state.

But the more general view of the subject is still more satisfactory. 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 Attorney General opposes to this reasoning, the following observation. “To borrow money presupposes the accumulation of a fund to be lent, and is secondary to the creation of an ability to lend.”³⁵ This is plausible in theory, but it is not true in fact. In a great number of cases, a previous accumulation of a fund equal to the whole sum required, does not exist. And nothing more can be actually presupposed, than that there exist resources, which put into activity to the greatest advantage by the nature of the operation with the government, will be equal to the effect desired to be produced. All the provisions and operations of government must be presumed to contemplate things as they *really* are.

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. Money 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.

It cannot therefore be admitted with the Attorney General, that the regulation of trade between the States, as it concerns the medium of circulation & exchange ought to be considered as confined to coin. It is even supposeable in argument, that the whole, or the greatest part of the coin of the country, might be carried out of it.

The Secretary of State objects to the relation here insisted upon, by the following mode of reasoning—“To erect a bank, says he, & to regulate commerce, are very different acts. He who erects a bank, creates a subject of commerce,³⁶ so does he, who makes a bushel of wheat, or digs a dollar out of the mines. Yet neither of these persons regulates commerce thereby. To make a thing which may be bought & sold is not to *prescribe* regulations for *buying & selling*: thus making the regulation of commerce to consist in prescribing rules for *buying & selling*.

This indeed is a species of regulation of trade; but is one which falls more aptly within the province of the local jurisdictions than within that of the general government, whose care must be presumed to have been intended to be directed to those general political arrangements concerning trade on which its aggregate interests depend, rather than to the details of buying and selling.

Accordingly such only are the regulations to be found in the laws of the United States; whose objects are to give encouragement to the enterprise of our own merchants, and to advance our navigation and manufactures.

And it is in reference to these general relations of commerce, that an establishment which furnishes facilities to circulation and a convenient medium of exchange & alienation, is to be regarded as a regulation of trade.

The Secretary of State further argues, that if this was a regulation of commerce, it would be void, *as extending as much to the internal commerce of every state as to its external*.³⁷ But what regulation of commerce does not extend to the internal commerce of every state? What are all the duties upon imported articles amounting to prohibitions, but so many bounties upon domestic manufactures affecting the interests of different classes of citizens in different ways? What are all the provisions in the coasting act,³⁸ which relate to the trade between district and district of the same State? In short what regulation of trade between the States, but must affect the internal trade of each State? What can operate upon the whole but must extend to every part!

The relation of a bank to the execution of the powers, that concern the common defence, has been anticipated. It has been noted, that at this very moment the aid of such an institution is essential to the measures to be pursued for the protection of our frontier.

It now remains to shew, that the incorporation of a bank is within the operation of the provision which authorises Congress to make all needful rules & regulations concerning the property of the United States. But it is previously necessary to advert to a distinction which has been taken by the Attorney General.

He admits, that the word *property* may signify personal property however acquired. And yet asserts, that it cannot signify money arising from the sources of revenue pointed out in the constitution; because, says he, “the disposal & regulation of money is the final cause for raising it by taxes.”³⁹

But it would be more accurate to say, that the *object* to which money is intended to be applied is the *final cause* for raising it, than that the disposal and regulation of it is *such*. The support of Government; the support of troops for the common defence; the payment of the public debt, are the true *final causes* for raising money. The disposition & regulation of it when raised, are the steps by which it is applied to the *ends* for which it was raised, not the ends themselves. Hence therefore the money to be raised by taxes as well as any other personal property, must be supposed to come within the meaning as they certainly do within the letter of the authority, to make all needful rules & regulations concerning the property of the United States.

A case will make this plainer: suppose the public debt discharged, and the funds now pledged for it liberated. In some instances it would be found expedient to repeal the taxes, in others, the repeal might injure our own industry, our agriculture and manufactures. In these cases they would of course be retained. Here then would be monies arising from the authorised sources of revenue which would not fall within the rule by which the Attorney General endeavours to except them from other personal property, & from the operation of the clause in question.

The monies being in the coffers of the government, what is to hinder such a disposition to be made of them as is contemplated in the bill or what an incorporation of the parties concerned under the clause which has been cited.

It is admitted that with regard to the Western territory they give a power to erect a corporation—that is to institute a government. And by what rule of construction can it be maintained, that the same words in a constitution of government will not have the same effect when applied to one species of property, as to another, as far as the subject is capable of it? or that a legislative power to make all needful rules & regulations, or to pass all laws necessary & proper concerning the public property which is admitted to authorise an incorporation in one case will not authorise it in another? will justify the institution of a government over the western territory & will not justify the incorporation of a bank, for the more useful management of the money of the nation? If it will do the last, as well as the first, then under this provision alone the bill is constitutional, because it contemplates that the United States shall be joint proprietors of the stock of the bank.

There is an observation of the secretary of state to this effect, which may require notice in this place. Congress, says he, are not to lay taxes *ad libitum for any purpose they please*, but only to pay the debts, or provide for the *welfare* of the Union.⁴⁰ Certainly no inference can be drawn from this against the power of applying their money for the institution of a bank. It is true, that they cannot without breach of trust, lay taxes for any other purpose than the general welfare but so neither can any other government. The welfare of the community is the only legitimate end for which money can be raised on the community. Congress can be considered as under only one restriction, which does not apply to other governments—They cannot rightfully apply the money they raise to any purpose *merely* or purely local. But with this exception they have as large a discretion in relation to the *application* of money as any legislature whatever. The constitutional *test* of a right application must always be whether it be for a purpose of *general* or *local* nature. If the former, there can be no want of constitutional power. The quality of the object, as how far it will really promote or not the welfare of the union, must be matter of conscientious discretion. And the arguments for or against a measure in this light, must be arguments concerning expediency or in expediency, not constitutional right. Whatever relates to the general order of the finances, to the general interests of trade &c being general objects are constitutional ones for *the application of money*.

A Bank then whose bills are to circulate in all the revenues of the country, is *evidently* a general object, and for that very reason a constitutional one as far as regards the appropriation of money to it. Whether it will really be a beneficial one, or not, is worthy of careful examination, but is no more a constitutional point, in the particular referred to; than the question whether the western lands shall be sold for twenty or thirty cents P acre.

A hope is entertained, that it has by this time been made to appear, to the satisfaction of the President, that a bank has a natural relation to the power of collecting taxes; to that of borrowing money; to that of regulating trade; to that of providing for the common defence: and that as 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.

Under a conviction that such a relation subsists, the Secretary of the Treasury, with all deference conceives, that it will result as a necessary consequence from the position, that all the specified powers of the government are sovereign as to the proper objects; that the incorporation of a bank is a constitutional measure, and that the objections taken to the bill, in this respect, are ill founded.

But from an earnest desire to give the utmost possible satisfaction to the mind of the President, on so delicate and important a subject, the Secretary of the Treasury will ask his indulgence while he gives some additional illustrations of cases in which a power of erecting corporations may be exercised, under some of those heads of the specified powers of the Government, which are alledged to include the right of incorporating a bank.

1. It does not appear susceptible of a doubt, that if Congress had thought proper to provide in the collection law,⁴¹ that the bonds to be given for the duties should be given to the collector of each district in the name of the collector of the district A. or B. as the case might require, to enure to him & his successors in office, in trust for the United States, that it would have been consistent with the constitution to make such an arrangement. And yet this it is conceived would amount to an incorporation.
2. It is not an unusual expedient of taxation to farm particular branches of revenue, that is to mortgage or sell the product of them for certain definite sums, leaving the collection to the parties to whom they are mortgaged or sold. There are even examples of this in the United States. Suppose that there was any particular branch of revenue which it was manifestly expedient to place on this footing, & there were a number of persons willing to engage with the Government, upon condition, that they should be incorporated & the funds vested in them, as well for their greater safety as for the more convenient recovery & management of the taxes. Is it supposeable, that there could be any constitutional obstacle to the measure? It is presumed that there could be none. It is certainly a mode of collection which it would be in the discretion of the Government to adopt; though the circumstances must be very extraordinary, that would induce the Secretary to think it expedient.
3. suppose a new & unexplored branch of trade should present itself with some foreign country. Suppose it was manifest, that, to undertake it with advantage, required an union of the capitals of a number of individuals; & that those individuals would not be disposed to embark without an incorporation, as well to obviate that consequence of a private partnership, which makes every individual liable in his whole estate for the debts of the company to their utmost extent, as for the more convenient management of the business—what reason can there be to doubt, that the national government would have a constitutional right to institute and incorporate such a company? None.

They possess a general authority to regulate trade with foreign countries. This is a mean which has been practiced to that end by all the principal commercial nations; who have trading companies to this day which have subsisted for centuries. Why may not the United States *constitutionally* employ the means *usual* in other countries for attaining the ends entrusted to them?

A power to make all needful rules & regulations concerning territory has been construed to mean a power to erect a government. A power to *regulate* trade is a power to make all needful rules & regulations concerning trade. Why may it not then include that of erecting a trading company as well as in the other case to erect a Government?

It is remarkable, that the State Conventions who have proposed amendments in relation to this point, have most, if not all of them, expressed themselves nearly thus—“Congress shall not grant monopolies, nor *erect any company* with exclusive advantages of commerce;” thus at the same time expressing their sense, that the power to erect trading companies or corporations, was inherent in Congress, & objecting to it no further, than as to the grant of *exclusive* priviledges.

The Secretary entertains all the doubts which prevail concerning the utility of such companies; but he cannot fashion to his own mind a reason to induce a doubt, that there is a constitutional authority in the United States to establish them. If such a reason were demanded, none could be given unless it were this—that congress cannot erect a corporation; which would be no

better than to say they cannot do it, because they cannot do it: first presuming an inability, without reason, & then assigning that *inability* as the cause of itself.

Illustrations of this kind might be multiplied without end. They shall however be pursued no further.

There is a sort of evidence on this point, arising from an aggregate view of the constitution, which is of no inconsiderable weight. The very general power of laying & collecting taxes & appropriating their proceeds—that of borrowing money indefinitely—that of coining money & regulating foreign coins—that of making all needful rules and regulations respecting the property of the United States—these powers combined, as well as the reason & nature of the thing speak strongly this language: That it is the manifest design and scope of the constitution to vest in congress all the powers requisite to the effectual administration of the finances of the United States. As far as concerns this object, there appears to be no parsimony of power.

To suppose then, that the government is precluded from the employment of so usual as well as so important an instrument for the administration of its finances as that of a bank, is to suppose, what does not coincide with the general tenor & complexion of the constitution, and what is not agreeable to impressions that any mere spectator would entertain concerning it. Little less than a prohibitory clause can destroy the strong presumptions which result from the general aspect of the government. Nothing but demonstration should exclude the idea, that the power exists.

In all questions of this nature the practice of mankind ought to have great weight against the theories of Individuals.

The fact, for instance, that all the principal commercial nations have made use of trading corporations or companies for the purposes of *external commerce*, is a satisfactory proof, that the Establishment of them is an incident to the regulation of that commerce.

This other fact, that banks are an usual engine in the administration of national finances, & an ordinary & the most effectual instrument of loans & one which in this country has been found essential, pleads strongly against the supposition, that a government clothed with most of the most important prerogatives of sovereignty in relation to the revenues, its debts, its credit, its defence, its trade, its intercourse with foreign nations—is forbidden to make use of that instrument as an appendage to its own authority.

It has been stated as an auxiliary test of constitutional authority, to try, whether it abridges any preexisting right of any state, or any Individual. The proposed incorporation will stand the most severe examination on this point. Each state may still erect as many banks as it pleases; every individual may still carry on the banking business to any extent he pleases.

Another criterion may be this, whether the institution or thing has a more direct relation as to its uses, to the objects of the reserved powers of the State Governments, than to those of the powers delegated by the United States. This rule indeed is less precise than the former, but it may still serve as some guide. Surely a bank has more reference to the objects entrusted to the national government, than to those, left to the care of the State Governments. The common defence is decisive in this comparison.

It is presumed, that nothing of consequence in the observations of the Secretary of State and Attorney General has been left unnoticed.

There are indeed a variety of observations of the Secretary of State designed to shew that the utilities ascribed to a bank in relation to the collection of taxes and to trade, could be obtained without it, to analyse which would prolong the discussion beyond all bounds.⁴² It shall be forborne for two reasons—first because the report concerning the Bank⁴³ may speak for itself in this respect; and secondly, because all those observations are grounded on the erroneous idea, that the *quantum* of necessity or utility is the test of a constitutional exercise of power.

One or two remarks only shall be made: one is that he has taken no notice of a very essential advantage to trade in general which is mentioned in the report, as peculiar to the existence of a bank circulation equal, in the public estimation to Gold & silver. It is this, that it renders it unnecessary to *lock* up the money of the country to accumulate for months successively in order to the periodical payment of interest. The other is this; that his arguments to shew that treasury orders & bills of exchange from the course of trade will prevent any considerable displacement of the metals, are founded on a partial view of the subject. A case will prove this: The sums collected in a state may be small in comparison with the debt due to it. The balance of its trade, direct & circuitous, with the seat of government may be even or nearly so. Here then without bank bills, which in that state answer the purpose of coin, there must be a displacement of the coin, in proportion to the difference between the sum collected

in the State and that to be paid in it. With bank bills no such displacement would take place, or, as far as it did, it would be gradual & insensible. In many other ways also, would there be at least a temporary & inconvenient displacement of the coin, even where the course of trade would eventually return it to its proper channels.

The difference of the two situations in point of convenience to the Treasury can only be appreciated by one, who experiences the embarrassments of making provision for the payment of the interest on a stock continually changing place in thirteen different places.

One thing which has been omitted just occurs, although it is not very material to the main argument. The Secretary of State affirms, that the bill only contemplates a re-payment, not a loan to the government.⁴⁴ But here he is, certainly mistaken. It is true, the government invests in the stock of the bank a sum equal to that which it receives on loan. But let it be remembered, that it does not, therefore, cease to be a proprietor of the stock; which would be the case, if the money received back were in the nature of a repayment. It remains a proprietor still, & will share in the profit, or loss, of the institution, according as the dividend is more or less than the interest it is to pay on the sum borrowed. Hence that sum is manifestly, and, in the strictest sense, a loan.

Philadelphia February 23d. 1791.

5. Copy, Mr. John R. Dillard, Philadelphia.

6. Both Edmund Randolph's and Thomas Jefferson's opinions were enclosed in a letter from George Washington to H, February 16, 1791, which is found in the George Washington letter book, Library of Congress.

7. Randolph stated: "It must be acknowledged, that, if any part of the bill does either encounter the Constitution, or is not warranted by it, the clause of incorporation is the only one."

8. Jefferson stated: "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 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."

9. Jefferson stated: "Besides, the existing banks will without a doubt, enter into arrangements for lending their agency: & the more favorable, as there will be a competition among them for it; whereas the bill delivers us up bound to the National bank, who are free to refuse all arrangement, but on their own terms, & the public not free, on such refusal, to employ any other bank. That of Philada., I believe, now does this business, by their post notes, which by an arrangement with the Treasury are paid by any State collector to whom they are presented: this expedient alone suffices to prevent the existence of that *necessity*, which may justify the assumption of a non-enumerated power as a means for carrying into effect an enumerated one. The thing may be done, and has been done, and well done, without this assumption: therefore it does not stand on that degree of *necessity* which can honestly justify it."

10. Jefferson stated:

"But let us examine this *convenience*, & see what it is, the report on subject (page 3) states the only *general* convenience to be the preventing the transportation & re-transportation of money between the States and the Treasury, (for I pass over the increase of circulating medium, ascribed to it as a merit, and which, according to my ideas of paper money, is clearly a demerit.) Every State will have to pay a sum of tax-money into the Treasury; and the Treasury will have to pay, in every State, a part of the interest on the public Debt, & Salaries to the officers of government resident in that state. In most of the States there will still be a surplus of tax-money to come up to the seat of government for the officers residing there: the payments of interest & Salary in each State may be made by Treasury-orders on the State-collector; this will take up the greater part of the money he has collected for his State, & consequently prevent the great mass of it from being drawn out

of the State. If there be a balance of commerce in favor of that State against the one in which the government resides, the surplus of taxes will be remitted by the bills of exchange drawn for that commercial balance: and so it must be if there was a bank: but if there be no balance of commerce, either direct or circuitous, all the banks in the world, could not bring up the surplus of taxes but in the form of money. Treasury orders then, and Bills of exchange may prevent the displacement of the main mass of the money collected, without the aid of any Bank: and where these fail, it cannot be prevented even with that aid.

“Perhaps indeed bank bills may be a more *convenient* vehicle than treasury-orders, but a little *difference* in the degree of *convenience*, cannot constitute the *necessity* which the constitution makes the ground for assuming any non-enumerated power....

“It may be said that a bank, whose bills would have a currency all over the states, would be more convenient than one whose currency is limited to a single State: so it would be still more convenient that there should be a Bank whose bills should have a currency all over the world: but it does not follow from this superior conveniency that there exists any where a power to establish such a bank; or that the world may not go on very well without it.”

11. “An Act for the establishment and support of Lighthouses, Beacons, Buoys, and Public Piers” (1 Stat. 53–54 [August 7, 1789]).

12. Randolph stated:

“There is a real difference between the rule of interpretation, applied to a law & a Constitution. The one comprises a summary of matter, for the detail of which numberless Laws will be necessary; the other is the very detail. The one is therefore to be construed with a discreet liberality; the other with a closer adherence to the literal meaning.

“But when we compare the modes of construing a state, and the federal, constitution, we are admonished to be stricter with regard to the latter, because there is a greater danger of Error in defining partial than general powers.

“The rule therefore for interpreting the specified powers seems to be, that, as each of them includes those details which properly constitute the whole of the subject, to which the power relates, the details themselves must be fixed by reasoning. And the appeal may on this occasion be made to common sense & common language.”

13. Randolph stated:

“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 enquiry, 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 powers 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 restrictive effect: both ought to consider it, as among the surplusage, which as often proceeds from inattention, as caution.”

14. See note 11.

15. The President was given the power “to remove officers at pleasure” in the following acts establishing the departments of the Federal Government: Section 2 of “An Act for establishing an Executive Department, to be denominated the Department of Foreign Affairs” (1 Stat. 29 [July 27, 1789]); Section 2 of “An Act to establish an Executive Department, to be denominated the Department of War” (1 Stat. 50 [August 7, 1789]); Section 7 of “An Act to establish the Treasury Department” (1 Stat. 65–66 [September 2, 1789]); Section 1 of “An Act to provide for the Government of the Territory Northwest of the river Ohio” (1 Stat. 52–53 [August 7, 1789]).

16. Jefferson stated:

“The Bill for establishing a national bank undertakes among other things,

- "1. To form the subscribers into a Corporation.
- "2. to enable them, in their corporate capacities to receive grants of Land; and so far is against the laws of *Mortmain*....
- "3. to make *alien* subscribers capable of holding lands, & so far is against the laws of *Alienage*.
- "4. to transmit these lands, on the death of a proprietor, to a certain line of successors: & so far changes the course of *Descents*.
- "5. to put the lands out of the reach of forfeiture or escheat: & so far is against the laws of *Forfeiture & Escheat*.
- "6. to transmit personal chattels to successors, in a certain line; and so far is against the laws of *Distribution*.
- "7. to give them the sole & exclusive right of banking under the National authority: and so far is against the Laws of *monopoly*.
- "8. to communicate to them a power to make laws paramount to the laws of the States: for so they must be construed, to protect the institution from the controul of the state Legislatures: & so probably they will be construed.

"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."

17. Jefferson stated: "Nothing but a necessity invincible by any other means, can justify such a prostration of Laws, which constitute the pillars of our whole System of jurisprudence. Will Congress be too strait-laced to carry the Constitution into honest effect, unless they may pass over the foundation-laws of the state-governments for the slightest convenience to theirs?"

18. See note 16.

19. Jefferson stated:

"It is known that the very power now proposed as *a means*, was rejected as *an end* by the Convention which formed the Constitution: a proposition was made to them to authorise Congress to open canals: & an amendatory one to empower them to incorporate: but the whole was rejected, & one of the reasons of rejection urged in debate was that then they would have a power to erect a bank, which would render the great Cities where there were prejudices or jealousies on this subject, adverse to the reception of the Constitution."

On September 14, 1787, in the Constitutional Convention the following debate took place:

"Docr. Franklin moved to add after the words 'post roads' Art I. Sect. 8. 'a power to provide for cutting canals where deemed necessary'

"Mr. [James] Wilson 2ded. the motion

"Mr. [Roger] Sherman objected. The expence in such cases will fall on the U. States, and the benefit accrue to the places where the canals may be cut.

"Mr. Wilson. Instead of being an expense to the U. S. they may be made a source of revenue.

"Mr. Madison suggested an enlargement of the motion into a power 'to grant charters of incorporation where the interest of the U. S. might require & the legislative provisions of individual States may be incompetent.' His primary object was however to secure an easy communication between the States which the free intercourse now to be opened, seemed to call for. The political obstacles being removed, a removal of the natural ones as far as possible ought to follow. Mr. Randolph 2ded. the proposition

"Mr. [Rufus] King thought the power unnecessary.

"Mr. Wilson. It is necessary to prevent *a State* from obstructing the *general* welfare.

"Mr. King. The States will be prejudiced and divided into parties by it. In Philada. & New York, It will be referred to the establishment of a Bank, which has been a subject of contention in those Cities. In other places it will be referred to mercantile monopolies.

"Mr. Wilson mentioned the importance of facilitating by canals, the communication with the Western Settlements. As to Banks he did not think with Mr. King that the power in that point of view would excite the prejudices & parties apprehended. As to mercantile monopolies they are already included in the power to regulate trade.

"Col. [George] Mason was for limiting the power to the single case of Canals. He was afraid of monopolies of every sort, which he did not think were by any means already implied by the Constitution as supposed by Mr. Wilson.

"The motion being so modified as to admit a distinct question specifying & limited to the case of canals,

"N. H. no. Mas. no. Ct. no. N. J. no. Pa. ay. Del. no. Md. no. Va. ay. N.C. no. S. C no. Geo. ay." (Hunt and Scott, Debates, 563–64.)

20. Randolph stated: "That the power of creating Corporations is not *expressly* given to Congress, is obvious."

21. Jefferson stated: "The negative of the President is the shield provided by the Constitution to protect against the invasions of the legislature. 1st. the rights of the Executive 2, of the Judiciary. 3. of the States & State-Legislatures. The present is the case of a right remaining exclusively with the States, & is consequently one of those intended by the Constitution to be placed under his protection."

22. On February 2, 1791, during the debate on the Bank Bill in the House of Representatives, Madison stated: "From this view of the power of incorporation exercised in the bill, it could never be deemed an accessory or subaltern power, to be deduced by implication, as a means of executing another power; it was in its nature a distinct, an independent and substantive prerogative, which not being enumerated in the Constitution, could never have been meant to be included in it, and not being included, could never be rightfully exercised.... 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.... It appeared on the whole, he concluded, that the power exercised by the bill was condemned by the silence of the Constitution ..." (Annals of Congress, II, 1950–52.)

23. This is a direct quotation.

24. Randolph stated:

"Those powers, then, which bear any analogy to that of incorporation, shall be examined separately in their constituent parts; and afterwards in those traits, which are urged to have the strongest resemblance to the favorite power.

"1. Congress have power to lay & collect taxes &c—the heads of this power are,

1. to ascertain the subject of taxation &c.
2. to declare the quantum of taxation &c.
3. to prescribe the mode of collection, &
4. to ordain the manner of accounting for the Taxes &c:

"2. Congress have also power to borrow money on the credit of the United States—the heads of this power are,

1. to stipulate a sum to be lent
2. " " an interest, or no interest to be paid, &
3. " " the time & manner of repayment, unless the Loan be placed on an irredeemable fund.

"3. Congress have also power to regulate commerce with foreign Nations, among the several states, and with the Indian tribes.

"The heads of this power with respect to foreign nations, are,

1. to prohibit them or their commodities from our ports.
2. to impose duties on them, where none existed before, or to increase existing Duties on them.
3. to subject them to any species of Custom house regulations: or
4. to grant them any exemptions or privileges which policy may suggest.

"The heads of this power with respect to the several States, are little more, than to establish the *forms* of commercial intercourse between them, & to keep the prohibitions, which the Constitution imposes on that intercourse, undiminished in their operation: that is, to prevent taxes on imports or Exports; preferences to one port over another by any regulation of commerce or revenue; and duties upon the entering or clearing of the vessels of one State in the ports of another.

"The heads of this power with respect to the Indian tribes are

1. to prohibit the Indians from coming into, or trading within, the United States.
2. to admit them with or without restrictions.
3. to prohibit citizens of the United States from trading with them; or
4. to permit with or without restrictions.

"4. Congress have also power to dispose of & make all needful rules and regulations, respecting the territory or other property belonging to the United States: the heads of this power are:

1. to exert an ownership over the territory of the United States, which may be properly called the property of the United States, as is the western Territory; and to institute a government therein; or
2. to exert an ownership over the other property of the United States. "This property may signify,
 1. Personal property of the United States howsoever acquired; or
 2. real property, not aptly denominated territory, acquired by cession or otherwise.

"It cannot signify,

1. *Debts* due from the United States.
2. Nor money, arising from the sources of revenue, pointed out in the Constitution. The disposal and regulation of money is the final cause for raising it by taxes &c."

25. For this list, see note 24.

26. For this list, see note 24.

27. For this list, see note 24.

28. "An Act for the government and regulation of Seamen in the merchants service" (1 Stat. 131-35 [July 20, 1790]).

29. Section 4 of "An Act making further provision for the payment of the debts of the United States" provided a bounty of ten cents per quintal on dried fish and ten cents per barrel on pickled fish and other salted provisions (1 Stat. 181-82 [August 10, 1790]).

30. For this list, see note 24.

31. "An Act to provide for the Government of the Territory Northwest of the river Ohio" (1 Stat. 50-53 [August 7, 1789]); "An Act for the Government of the Territory of the United States, south of the river Ohio" (1 Stat. 123 [May 26, 1790]).

32. This was provided in Section 56 of "An Act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of ships or vessels" (1 Stat. 145-78 [August 4, 1790]).

33. On January 27, 1791, Washington sent to the Senate and the House the following message:

"In order that you may be fully informed of the situation of the frontiers, and the prospect of hostility in that quarter, I lay before you the intelligence of some recent depredations, received since my message to you, upon this subject, of the twenty-fourth instant." (Journal of the House, I, 364.)

The papers which he enclosed described an Indian attack on Big Bottom near Fort Harmer and Marietta in the Northwest Territory (ASP, *Indian Affairs*, I, 121–22).

Congress then took steps to prepare for an expedition against the Indians, and on February 12, 1791, the Senate received the following message from the House of Representatives:

"The House of Representatives have passed a Bill, entitled, 'An Act for raising and adding another regiment to the military establishment of the United States, and for making further provision for the protection of the frontiers.'" (*Journal of the Third Session of the Senate of the United States of America* [Philadelphia, 1791], 95.)

This bill was passed on March 3, 1791 (1 Stat. 222–24).

34. This increase in the military establishment for the protection of the frontier was to be paid for from funds obtained under the terms of "An Act repealing, after the last day of June next, the duties heretofore laid upon Distilled Spirits imported from abroad, and laying others in their stead; and also upon Spirits distilled within the United States, and for appropriating the same" (1 Stat. 199–214 [March 3, 1791]).

35. This is a direct quotation.

36. At this point Jefferson wrote "in its bills," which H omitted.

37. This is a direct quotation.

38. "An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes" (1 Stat. 55–65 [September 1, 1789]) and "An Act to explain and amend an Act, intituled 'An Act for registering and clearing Vessels, regulating the Coasting Trade, and for other purposes'" (1 Stat. 94–95 [September 29, 1789]).

39. See note 24.

40. This is a direct quotation.

41. "An Act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of ships or vessels" (1 Stat. 145–78 [August 4, 1790]).

42. See note 10.

43. "Second Report on the Further Provision Necessary for Establishing Public Credit (Report on a National Bank)," December 13, 1790.

44. Jefferson stated: "'To borrow money.' But this bill neither borrows money, nor ensures the borrowing it. The proprietors of the bank will be just as free as any other money holders, to lend or not to lend their money to the public; the operation proposed in the bill, first to lend them two millions, & then borrow them back again, cannot change the nature of the latter Act, which will still be a payment, and not a loan, call it by what name you please."

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