

CHAPTER 8

THE NEW NATION, 1786–1800

8–1 The Secretary of State and the Secretary of the Treasury Battle about the Constitution, 1791

Political and personal enemies, Thomas Jefferson and Alexander Hamilton were often at odds, both philosophically and on a more practical plane. Hamilton favored the formation of a national bank, and Jefferson opposed it. Both men claimed constitutional grounds as the foundation of their arguments. Jefferson favored a more literal interpretation of the constitution, while Hamilton argued for a broader reading of implied powers. The following excerpts outline some of their respective arguments. SOURCE: Melvin J. Wrofsky, ed., Documents of American Constitutional and Legal History (Philadelphia: Temple University Press, 1989).

Thomas Jefferson

I consider the foundation of the Constitution as laid on this ground that 'all powers not delegated to the U.S. by the Constitution, not prohibited by it to the states, are reserved to the states or to the people.' To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.

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

I. They are not among the powers specially enumerated, for these are

1. A power to lay taxes for the purpose of paying the debts of the U.S. But no debt is paid by this bill, nor any tax laid. Were it a bill to raise money, it's origination in the Senate would condemn it by the constitution.
2. '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, and 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.
3. 'to regulate commerce with foreign nations, and among the states, and with the Indian tribes.' To erect a bank, and to regulate commerce, are very different acts. He who erects a bank creates a subject of commerce in its bills: 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 erect a thing which may be bought and sold, is not to prescribe regulations for buying and selling. Besides; if this was an exercise of the power of regulating commerce, it would be void, as extending as much to the internal commerce of every state, as to its external. For the power given to Congress by the Constitution, does not extend to the internal regulation of the commerce of a state (that is to say of the commerce between citizen and citizen) which remains exclusively with its own legislature; but to its external commerce only, that is to say, its commerce with another state, or with foreign nations or with the

Indian tribes. Accordingly the bill does not propose the measure as a 'regulation of trade,' but as 'productive of considerable advantage to trade.'

Still less are these powers covered by any other of the special enumerations.

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

1. To lay taxes to provide for the general welfare of the U.S.' that is to say 'to lay taxes for the purpose of providing for the general welfare'. For the laying of taxes is the power and the general welfare the purpose for which the power is to be exercised. They 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. In like manner they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose....

2. The second general phrase is 'to make all laws necessary and proper for carrying into execution the enumerated powers.' But they can all be carried into execution without a bank. A bank therefore is not necessary, and consequently not authorised by this phrase...
...It must be added however, that unless the President's mind on a view of every thing which is urged for and against this bill, is tolerably clear that it is unauthorised by the constitution, if the pro and the con hang so even as to balance his judgment, a just respect for the wisdom of the legislature would naturally decide the balance in favour of their opinion. It is chiefly for cases where they are clearly misled by error, ambition, or interest, that the constitution has placed a check in the negative of the President.

Alexander Hamilton

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

In entering upon the argument, it ought to be premised that the objections of the Secretary of State and the 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 anything in the bill which is not warranted by the Constitution, it is the clause of incorporation.

Now it appears to the Secretary of the Treasury that this general principle is inherent in the very definition of government, and essential to every step of the progress to be made by that of the United States, namely: That every power vested in a 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 and 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 show 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 circumstance 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 and 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 Federal Government, as to *its objects*, were 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 and 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....

...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 regulating trade—to that of providing for the common defence—and that, as the bill under consideration contemplates the government in the light in 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 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.

1. What constitutional issues are at stake in this essay? What are Hamilton and Jefferson arguing about? What is Jefferson's central argument? What is Hamilton's rebuttal?

2. Why would a central federal bank have been needed at the time? Why was it necessary and desirable? What would the arguments against its existence be?
