

Article 1, Section 8, Clause 18

The "Elastic Clause"

Thomas Jefferson,

Opinion on the Constitutionality of the Bill for Establishing a National Bank

From *The Founders' Constitution*: <http://press-pubs.uchicago.edu/founders/documents>



15 Feb. 1791 *Papers* 19:275--80

The bill for establishing a National Bank undertakes, among other things

1. to form the subscribers into a Corporation....
7. to give them the sole and 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; and 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, not prohibited by it to the states, are reserved to the states or to the people" [XIIth. Amendmt.].¹ 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 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... 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....

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

¹ The Bill of Rights had not yet been ratified at the time that Jefferson wrote this. What he refers to as the Twelfth Amendment was ratified as the Tenth Amendment to the Constitution.

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. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the U.S. and as they would be the sole judges of the good or evil, it would be also a power to do whatever evil they pleased....

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 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....

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 anywhere a power to establish such a bank; or that the world may not go on very well without it....

The Negative of the President is the shield provided by the constitution to protect against the invasions of the legislature 1. the rights of the Executive 2. of the Judiciary 3. of the states and state legislatures. The present is the case of a right remaining exclusively with the states and is consequently one of those intended by the constitution to be placed under his protection.

QUESTIONS TO CONSIDER:

1. Why does Jefferson believe that the establishment of a national bank would violate the principles of the Constitution?
2. What danger does Jefferson see in Congress adopting Hamilton's plans for a national bank?
3. How does Jefferson's interpretation of the Elastic ("Necessary and Proper") Clause reflect his strict constructionist beliefs regarding the Constitution?

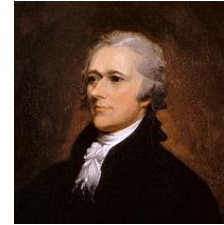
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Alexander Hamilton,

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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 Bank proceeds according to the order of the President to submit the reasons which have induced him to entertain a different opinion....

...principles of construction like those espoused by the Secretary of State and the Attorney General would be fatal to the just and 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...

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....

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....

It is not denied, that there are *implied*, as well as *express* [enumerated] *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 and from the nature of political society, than a consequence of either of the powers specially enumerated....

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 *means* 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 means 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... it is incident to a general *sovereign* or *legislative power* to *regulate* a thing, to employ all the means which relate to its regulation to the *best* and *greatest advantage*....

It is essential to the being of the National government, that... the meaning of the word *necessary*, should be explored.

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 and proper for *carrying into execution* the foregoing powers and *all other powers* vested by the constitution in the *government* of the United States, or in any *department* or *officer* thereof." To understand the word as the Secretary of State does, would be to depart from its obvious and popular sense, and to give it a *restrictive* operation; an idea never before entertained. It would be to give it the same force as if the word *absolutely* or *indispensably* had been prefixed to it.

Such a construction would beget endless uncertainty and embarrassment. The cases must be palpable and 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...

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 etc. ought to be construed liberally, in advancement of the public good....

The truth is, that difficulties on this point are inherent in the nature of the federal 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 powers; and a third class, which will leave room for controversy and difference of opinion, and concerning which a reasonable latitude of judgment must be allowed....

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, and 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 pre-existing right of any State, or of any individual? If it does not, there is a strong presumption in favor of its constitutionality; and slighter relations to any declared object of the constitution may be permitted to turn the scale.

QUESTIONS TO CONSIDER:

1. How does Hamilton interpret the Elastic Clause? What kind of construction does this suggest?
2. Why does Hamilton believe that the establishment of a national bank is in accordance with the principles of the Constitution?
3. What danger does Hamilton see in Jefferson's construction of the Constitution?