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## The Federalists and The Federalist: A Forgotten History

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In a series of cases over the last few years, the United States Supreme Court has invalidated as unconstitutional a succession of federal statutes enacted under the Commerce Clause<sup>1</sup> of the United States Constitution. The Court based these decisions, in part, on the authority of *The Federalist*. In *Lopez v. United States*,<sup>2</sup> the first of the cases to invoke *The Federalist*, Chief Justice Rehnquist stated:

We start with first principles. The Constitution creates a Federal Government of enumerated powers . . . . As James Madison wrote, “The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”<sup>3</sup>

The Court subsequently held that Congress could not, under the Commerce Clause, criminalize the mere possession of a firearm in a local school district.<sup>4</sup>

Two years later, in *Printz v. United States*,<sup>5</sup> the Court struck down a federal statute imposing a duty on state and local law enforcement officers to conduct background checks on prospective handgun purchasers, as an unconstitutional imposition upon state sovereignty.<sup>6</sup> The majority dismissed the dissent’s argument that the Commerce Clause, when coupled with the Necessary and Proper Clause,<sup>7</sup> conferred on Congress the power to

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<sup>1</sup> See U.S. CONST. art. I, § 8, cl. 3 (“Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.”).

<sup>2</sup> 514 U.S. 549 (1995).

<sup>3</sup> *Id.* at 552 (quoting THE FEDERALIST NO. 45, at 313 (James Madison) [hereinafter THE FEDERALIST]).

<sup>4</sup> See *Lopez*, 514 U.S. at 561.

<sup>5</sup> 521 U.S. 898 (1997).

<sup>6</sup> See *id.* at 933.

<sup>7</sup> See U.S. CONST. art. I, § 8, cl. 18 (“Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the [enumerated] Powers, and all other Powers vested by this Constitution in the Government of the United States, or

adopt this measure.<sup>8</sup> In so doing, Justice Scalia, writing for the majority, relied on Alexander Hamilton's characterization of the Necessary and Proper Clause.<sup>9</sup>

In 1999, the Court in *Alden v. Maine*<sup>10</sup> invalidated a statutory provision of the Fair Labor Standards Act of 1938 that authorized employee actions against states in their own courts for violating the statute's wage and hour regulations.<sup>11</sup> In the majority opinion, Justice Kennedy, like Justice Scalia in *Printz*, followed the Hamilton characterization of the Necessary and Proper Clause in *The Federalist*.<sup>12</sup>

The Court's unquestioning reliance on the authority of *The Federalist* may seem correct. Hamilton and Madison, who authored almost all of the essays, were not only participants at the Constitutional Convention, they were political theorists of the highest caliber. Their statements, therefore, would seem to be authoritative. Yet other considerations point to a different conclusion. In practice, Hamilton systematically ignored *The Federalist* when he assessed the legislative powers of Congress and the powers of the presidency. In those papers, he and Madison had each contended that the legislative powers of Congress were limited to those enumerated in Article I, Section 8, Clauses 1 through 17; and, under the Necessary and Proper Clause in Clause 18, to the incidental execution of the powers enumerated in Clauses 1 through 17.

Specifically, Hamilton wrote that the Necessary and Proper Clause merely conferred "the power of employing the *means* necessary to [an enumerated power's] execution."<sup>13</sup> With Madison, he argued that the Constitution would mean the same if the Clause had not been included.<sup>14</sup> Madison wrote that "[n]o axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it, is included."<sup>15</sup>

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in any Department or Officer thereof.').

<sup>8</sup> See *Printz*, 528 U.S. at 923-24.

<sup>9</sup> See *id.* The Court quoted Hamilton's defense of the Necessary and Proper Clause against the charge that it would be utilized by Congress to pass laws not authorized by the Constitution. See *id.* Hamilton wrote that such measures "will be merely acts of usurpation and will deserve to be treated as such." THE FEDERALIST NO. 33, at 207 (Alexander Hamilton).

<sup>10</sup> 522 U.S. 706 (1999).

<sup>11</sup> See *id.* at 712.

<sup>12</sup> See *id.* at 732-33.

<sup>13</sup> THE FEDERALIST NO. 33, at 204 (Alexander Hamilton) (emphasis in original).

<sup>14</sup> See *id.* Hamilton stated that: "It may be affirmed with perfect confidence, that the constitutional operation of the intended government would be precisely the same [if the Necessary and Proper Clause was] entirely obliterated." *Id.*

<sup>15</sup> THE FEDERALIST NO. 44, at 304-05 (James Madison).

Hamilton, however, in a report to the House during the third session of the First Congress, advocating the establishment of a national bank, gave no consideration to the requirement that Congress may only pass a bill that comports with one of its enumerated powers.<sup>16</sup> Instead, Hamilton focussed on the benefits that the bank would bestow. Such an entity, he explained, would, through its circulating privately issued and governmentally sanctioned paper credit, create an adequate money supply suitable for the commercial and governmental needs of the country. Circulating bank notes serving as a paper currency would displace gold and silver as ordinary money. Thereby they would enable the government to hoard its gold and silver for the payment of its foreign debt, help merchants obtain credit and start new ventures, and promote commerce. Finally, Hamilton submitted that the bank itself would aid government borrowing in times of emergency, and facilitate the payment of the government's domestic debt.

But did Congress have the power to establish the bank? Such an institution, with local offices dispersed throughout the thirteen states, could have easily been employed in the execution of two of the enumerated powers: the collection of taxes and the payment of the government's domestic debt. In this way, the bank's charter could have been justified under the Necessary and Proper Clause. The scope of Hamilton's report, however, indicated that, in his view, such a service was a mere detail in a much grander plan: The creation of a national banking system that would underwrite and supervise a great national monetary and commercial enterprise. The bank's operations thus would be in the best interests of the country. Hamilton simply assumed the bill's constitutionality.

Madison, however, attacked the constitutionality of the bill during the House debate to establish a national bank. The bill's provisions, he contended, did not fall within any enumerated power, nor could the bank's establishment be justified under the Necessary and Proper Clause.<sup>17</sup> When Representative James Jackson of Georgia, who supported Madison, cited *The Federalist* as authority for a restrictive meaning for the Clause,<sup>18</sup> Hamilton's adherents argued for a much more accommodating

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<sup>16</sup> See 10 THE PAPERS OF ALEXANDER HAMILTON 305 (Harold C. Syrett & Jacob E. Cooke eds., 1961-87) [hereinafter HAMILTON PAPERS]. For a full discussion of Hamilton's views on the necessity for establishing the Bank as the instrument for the creation of a paper money supply adequate for the needs of the economy and the government, see Joseph M. Lynch, *McCulloch v. Maryland: A Matter of Money Supply*, 18 SETON HALL L. REV. 223 (1988).

<sup>17</sup> See 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 367, 369-71 (Linda Grant Depauw et al. eds., 1972) (statement of Rep. Madison) [hereinafter FIRST FEDERAL CONGRESS].

<sup>18</sup> See *id.* at 363-64. (referring to statement of Rep. Jackson); see also THE FEDERALIST No. 44, at 304 (James Madison).

interpretation. As Fisher Ames of Massachusetts stated: “[T]hat construction [of the Clause] may be maintained to be a safe one which promoted the good of society, and the ends for which the government was adopted, without impairing the rights of any man, or the powers of any State.”<sup>19</sup>

Following the bill’s adoption, President George Washington consulted his cabinet about the bill’s constitutionality. Hamilton, as a member of the cabinet, was not so bold as to repeat Ames’s contention and write of the need to legislate for the good of society and the ends for which the government was adopted. Instead, Hamilton adhered to a more limited construction of the Necessary and Proper Clause. Without referring to *The Federalist*, Hamilton stated: “[I]t will not be contended that the clause in question gives any *new* or *independent* power. But it gives an explicit sanction to the doctrine of *implied* powers.”<sup>20</sup> When applying this standard to the bill, however, Hamilton repeated what he had written in his report and what Ames and others had stated in the House: The bank would secure for the nation an adequate money supply through the medium of a privately issued, governmentally-approved paper currency. Hamilton proclaimed that such privately circulating currency would stimulate commerce and accomplish the many benefits he had set forth in his report.<sup>21</sup>

The Federalists in the First Congress, then, in the interest of what they conceived to be good government, ignored *The Federalist*’s more narrow interpretation of the Necessary and Proper Clause. In addition, they circumvented the restriction contained in Article I, Section 8, Clause 5, which on its face served to limit the creation of money to “coin,” that is, to gold and silver.<sup>22</sup>

The Federalists were not alone in departing from the construction of the Necessary and Proper Clause put forth in *The Federalist*. In opposing the bill, Madison, in the House, also adopted a construction different from that espoused in the publication. Perhaps mindful that the establishment of a national bank might be justified as incidental to the payment of the government’s domestic debt, Madison drew a distinction, nowhere

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<sup>19</sup> See 14 FIRST FEDERAL CONGRESS at 390, 393 (statement of Rep. Ames).

<sup>20</sup> 8 HAMILTON PAPERS 106 (emphasis in original).

<sup>21</sup> See *id.* at 121. While Hamilton argued that each aspect constituted an incidental means to the execution of one of the enumerated powers, such as borrowing or regulating commerce, only the collection of the government’s taxes and the payment of the government’s domestic debt were actually incidental. See *id.*

<sup>22</sup> See U.S. CONST. art. I, § 8, cl. 5 (“Congress shall have Power . . . To coin Money, regulate the Value hereof, and of foreign Coin, and fix the Standard of Weights and Measures.”). Hamilton considered the issuance of paper money by the federal government to be contrary to the spirit of the Constitution in view of its prohibition of the emission of paper money by the states. See 7 HAMILTON PAPERS 321-22 (discussing U.S. CONST. art. I, § 10, cl. 1).

mentioned in *The Federalist*, between unimportant incidental measures that he claimed were authorized under the Clause and important incidental measures that were not. The creation of a corporation, such as a national bank, Madison claimed, was an important incidental measure and, therefore, was not within the purview of the Clause.<sup>23</sup>

Secretary of State Thomas Jefferson in his opinion to Washington also drew a new distinction not discussed in *The Federalist*: between an indispensably incidental measure, which he claimed to be authorized by the word “necessary” in the Clause, and one not indispensably incidental, which was not.<sup>24</sup> Ultimately, President Washington ignored the contrary

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<sup>23</sup> See 14 FIRST FEDERAL CONGRESS 372-74 (statement of Rep. Madison). The Constitution, he declared, forbade “the exercise of any power, particularly a great and important power, which is not evidently and necessarily involved in an express power.” *Id.* Astonishingly, he added, such a power was on “necessary and proper for the exercise for the government or union.” *Id.*

<sup>24</sup> See 19 THE PAPERS OF THOMAS JEFFERSON 275, 278-79 (Julian P. Boyd et al. eds., 1950). Interestingly, neither Madison nor Jefferson advanced the argument that since a national bank in its operations would constitute such a radical transformation of the national monetary system, it constituted a means disproportionate to any enumerated end, such as paying the domestic debt. While the establishment of a bank could be considered as an appropriate means to the end of initiating a paper monetary system, Article I, Section 8 had not provided for it. Ironically, Hamilton himself in *The Federalist* may have suggested a proportionality test when commenting on the Necessary and Proper Clause. Hamilton wrote: “The propriety of a law in a constitutional light, must always be determined by the nature of the powers upon which it is founded.” THE FEDERALIST No. 33, at 206 (Alexander Hamilton).

The strength in Hamilton’s advocacy of the bank bill’s constitutionality, however, lay in its practicality. At that time only three states had chartered banks. 14 FIRST FEDERAL CONGRESS 394 (statement of Rep. Ames). The bill would remedy that deficiency. Envisioning the creation of a national banking system, the bill authorized the Bank’s directors to establish branches wherever in the United States it was considered suitable. 1 STAT. 191, § 15. Through these branches the Bank could, by the issuance of its paper, supply the credit necessary for the conduct of business within the respective districts.

After the Bank was established and the number of state banks increased, it maintained a restraining influence on their extension of credit. But in 1811 the Bank’s original charter, having terminated, was not renewed and the task of providing credit fell exclusively upon the state banks. Thereafter, their numbers increased markedly and in the absence of the Bank’s moderating influence, they issued paper without restraint. Within three years, the country fell into fiscal paralysis, with the result that the United States Treasury was compelled to announce its inability to service the interest on its debt. In short, the United States of America was in default. See *Lynch, supra* note 16, at 268-71.

In view of these developments, Congress chartered the second Bank of the United States. See Act of Apr. 10, 1816, ch. 44, 3 STAT. 266. It was the constitutionality of this statute which was at issue in *McCulloch v. Maryland*, wherein it was decided that the statute was an appropriate exercise of the Necessary and Proper Clause. See 17 U.S. (4 Wheat.) 316, 413-14.

In an attempt to distinguish *McCulloch*, it has been argued that since in that case the Bank’s opponents did not raise the issue of the propriety of the Bank’s establishment under the Necessary and Proper Clause, but merely its necessity, the former issue remains open. See Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A*

arguments of Madison, Jefferson, and Edmund Randolph, his attorney general,<sup>25</sup> and signed the bill into law.<sup>26</sup>

Both sides of the debate over the bank bill were therefore willing to disregard the authority of *The Federalist*. The Federalists disregarded *The Federalist* in order to broaden the Necessary and Proper Clause, and to enable them to legislate in the best interest of the nation; their opponents, the soon to be self-styled Republicans, so as to confine Congress to the most narrow interpretation of the clause.

During the Fifth Congress, the Federalists also ignored the limits of congressional legislative powers, as propounded in *The Federalist*, when enacting the Alien and Sedition Laws. Rejecting the Republican view that

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*Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 327 n. 244 (1993).

Yet, there can be no doubt that had the issue been raised, the Court in *McCulloch* would have upheld the propriety of the Bank's creation as well as its necessity under the Necessary and Proper Clause. A contrary ruling would eventually have brought about a return to the conditions which in 1814 had plunged the country into financial crisis and moved Congress to renew the charter of the Bank of the United States.

This was confirmed in *Osborn v. United States Bank*, 22 U.S. (9 Wheat.) 738, 740-41 (1824), in which the Court, striking down a taxed imposed on the Bank by the State of Ohio, reaffirmed its holding in *McCulloch*. As Justice Johnson noted in his dissenting opinion in *Osborn*, the termination of the first Bank of the United States had led to a rage for the multiplication of state banks, which "soon inundated the country with a new description of bills of credit, against which it was obvious that the provisions of the constitution opposed no adequate inhibition." *Id.* at 873. He proceeded to describe the essential role the second Bank of the United States played in the regulation of the nation's monetary system:

A specie-paying Bank, with an overwhelming capital, and the whole aid of the government deposits, presented the only resource to which the government could resort, to restore that power over the currency of the country, which the framers of the constitution evidently intended to give to Congress alone. But this necessarily involved a restraint upon individual cupidity, and the exercise of State power; and, in the nature of things, it was hardly possible for the mighty effort necessary to put down an evil spread so wide, and arrived to such maturity, to be made without embodying against it an immense moneyed combination, which would not fail of making its influence to be felt, wherever its claimances could reach or its industry and wealth be brought to operate.

*Id.*

The second Bank of the United States, then, was created to reestablish national control over the country's money supply. Just as the Court had disregarded the Madison and Jefferson gloss on the meaning of "necessary," it would have done the same with a Lawson and Granger gloss on the meaning of "proper." If the Bank was "necessary," its propriety had to follow.

Where no individual state is competent to act, the United States under the Necessary and Proper Clause must have the authority to act. That is what the Court in *McCulloch* and in *Osborn* decided. And that is what Madison also decided when in 1816, as President of the United States, he was presented with the bill to reestablish the second Bank of the United States. He signed the bill.

<sup>25</sup> See LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES, 86-89 (Matthew St. Clair Clarke & D. A. Hall eds., 1832).

<sup>26</sup> See Act of Feb. 25, 1791, ch. 10, 1 STAT. 191.

Congress lacked the authority to deport aliens or to protect the federal government from seditious speech or writing, because neither power had been enumerated in Article I, Section 8, Federalists again invoked the good of the country and relied, in part, on the Necessary and Proper Clause.<sup>27</sup>

Additionally, Hamilton and the Federalists ignored the limits on the power of Congress to spend for the general welfare of the country,<sup>28</sup> as expressed in *The Federalist*. There Madison asserted that Congress could spend only for the purposes subsequently enumerated in the section.<sup>29</sup> In a report to the Second Congress, however, Hamilton advocated a much broader scope for the general welfare provision when he supported a federal subsidy for manufacturing.<sup>30</sup> Responding to Hamilton, Madison, in the House, repeated the position he had taken in *The Federalist*.<sup>31</sup>

Hamilton was not the first person to urge on Congress a liberal interpretation of the general welfare provision. Addressing the second session of the First Congress, and going far beyond what Hamilton would recommend to the Second Congress, President Washington requested subsidies for agriculture, commerce, manufacturing, science, literature, and institutions of higher learning.<sup>32</sup> Later, in his final address to Congress during the second session of the Fourth Congress, President Washington called for an agricultural subsidy.<sup>33</sup> In sum, the Federalists, during the first twelve years of the new government, a period in which their influence in Congress and in the administration was predominant, consistently advocated a broad construction of the Article I powers of Congress, a position markedly in contrast with that expressed in *The Federalist*.

Similarly, during this period, the Federalists, despite *The Federalist*, supported the exercise of broad discretionary presidential powers under Article II of the Constitution, particularly in the formulation and execution of foreign policy. In *The Federalist*, Hamilton, defending the Constitution against the charge that because it provided for a nationally elected presidency it was creating a monarchy, had posited strict limits upon

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<sup>27</sup> See generally 9 DEBATES AND PROCEEDINGS OF THE CONGRESS OF THE UNITED STATES (Joseph Gales ed., 42 vols., 1834-56) [hereinafter DEBATES]. As further justification of the power to remove aliens, the Federalists relied, in part, on the guarantee to protect the states from invasion under Article IV, Section 4 of the Constitution. See *id.*

<sup>28</sup> See U.S. CONST. art. I, § 8, cl. 1 ("Congress shall have the power To . . . pay the debts and provide for the common Defence and general Welfare of the United States.").

<sup>29</sup> See THE FEDERALIST No. 41, at 277-78 (James Madison).

<sup>30</sup> See 10 HAMILTON PAPERS 302-04, 310.

<sup>31</sup> See 3 DEBATES 386-89 (statement of Rep. Madison).

<sup>32</sup> See 3 FIRST FEDERAL CONGRESS 252-53 (reporting President Washington's message to Congress).

<sup>33</sup> See 6 DEBATES 1592, 1594-95 (reporting President Washington's message to Congress).

executive conduct.<sup>34</sup> Accordingly, he wrote that the power of the President to receive foreign ambassadors and public ministers, as specified in Article II, Section 3, was “more a matter of dignity than of authority . . . without consequence in the administration of the government.”<sup>35</sup>

In 1793, however, during the crisis provoked by the outbreak of war between France and Great Britain, Hamilton ignored those remarks and instead argued for a broad presidential discretion, without the need to consult Congress, in the initiation and execution of foreign policy. Indeed, in his zeal to expand the scope of presidential prerogatives, he went so far as to cite the very power of the President to receive foreign ambassadors and public ministers as a specific constitutional expression of an overall executive preeminence in matters affecting foreign policy.<sup>36</sup> We may assume that President Washington, the “Federalist-in-Chief,” was not displeased with Hamilton’s advocacy of his implied powers.

Hamilton was not alone in ignoring what had earlier been written in *The Federalist* with respect to the constitutional powers of the President. The publication assured that the President’s power to remove officers whose appointment had, pursuant to the provisions of Article II, Section 2, Clause 2, required the advice and consent of the Senate, would also require senatorial consent.<sup>37</sup> In the first session of the First Congress, however, Madison, contradicting that assurance, asserted that the President had the inherent power under Article II to remove the Secretary of State, whose appointment required the consent of the Senate, without the necessity of such consent. When those opposing the proposal cited *The Federalist* to justify their position, Madison simply ignored it. Sound governmental practice, he asserted, required the recognition of his proposition.<sup>38</sup> His willingness to disregard a position that *The Federalist* had espoused the very year before the debate evidences his belief that the essays were not authoritative. On that point, at least, Hamilton, we can be sure, agreed with him.

If the essays in *The Federalist* are not authoritative, how should they be regarded? Spencer Roane, the Chief Judge of the Virginia Court of Appeals, answered this question in *Hunter v. Martin, Devisee of Fairfax*.<sup>39</sup> The issue before the court was whether Congress had the constitutional

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<sup>34</sup> See THE FEDERALIST NO. 69, at 462 (Alexander Hamilton).

<sup>35</sup> *Id.*

<sup>36</sup> See 15 HAMILTON PAPERS 37, 55-63.

<sup>37</sup> See THE FEDERALIST NO. 77, at 515-16 (Alexander Hamilton).

<sup>38</sup> See 11 FIRST FEDERAL CONGRESS 845-47 (statement of Rep. Madison).

<sup>39</sup> 18 Va. (4 Munf.) 1 (1815). The name of the parties may sound familiar. That is because this action formed the lower court record for the landmark decision of the United States Supreme Court in *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816).



authority to enact Section 25 of the Judiciary Act of 1789, which authorized an appeal to the Supreme Court from a final judgment of the highest state court deciding against a claim purportedly arising under a federal statute or treaty. Martin, claiming title to realty under a federal treaty, successfully appealed to the Supreme Court from a prior decision of the Virginia court that denied his claim.<sup>40</sup> On remand, however, the state court instead of obeying the Supreme Court's mandate, belatedly questioned the constitutionality of Section 25 and thus the Supreme Court's jurisdiction to entertain an appeal from its own prior decision.<sup>41</sup>

Martin, in defense of Section 25, relied on *The Federalist*.<sup>42</sup> But the Virginia court, brushing *The Federalist* aside, held the statute unconstitutional.<sup>43</sup> Chief Judge Roane dismissed the notion out of hand that *The Federalist* constituted controlling authority:

With respect to the work styled "the Federalist," while it's [*sic*] general ability is not denied, it is liable to the objection, of having been a mere newspaper publication, written in the heat and hurry of the battle, (If I may so express myself), before the constitution was adopted. Its principal reputed author was, an active partizan [*sic*] of the constitution, and a supposed favourer of a consolidated government.<sup>44</sup>

Judge Roane also added:

Whatever weight may be attached to the contemporaneous exposition, in other cases, little credit is certainly due to the construction of those, who were parties to the conflict, and which were given before the heat of the contest had subsided, or their passions had time to cool: and as to the advantages supposed to have been gained, from their having formed the constitution, which is expounded, that circumstance is in entire conflict with the principle, deemed vitally important to free government, by all enlightened writers, "The Federalist" not excepted, that the power of making and expounding a law, or constitution, should

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<sup>40</sup> See *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1812). Section 25 provides:

That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of . . . the United States, and the decision is against their validity; or . . . the decision is against the title, right, privilege, or exemption specially set up or claimed . . . under such . . . treaty [or] statute . . . may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error.

Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, § 25.

<sup>41</sup> See *Hunter*, 18 Va. (4. Munf.) at 3.

<sup>42</sup> See *id.* at 10.

<sup>43</sup> See *id.* at 7 (Cabell, J.); see *id.* at 25 (Brooke, J.); see *id.* at 54 (Roane, C.J.); see *id.* at 58 (Fleming, J.).

<sup>44</sup> *Id.* at 27-28. Judge Roane referred to Hamilton and his advocacy of a broad construction of the general welfare provision in the Spending Clause. See *id.* at 28.

not be blended in the same hands.<sup>45</sup>

The views expressed in *The Federalist*, therefore, were not authoritative, and indeed, in light of the fact that they were given in order to induce ratification, might be suspect. Judge Roane's animus on this point, however, may be attributed to the fact that, as a member of the Virginia convention, he had joined with Patrick Henry and voted against ratification.<sup>46</sup>

Judge Roane's sentiments were anticipated during the House discussions about the bank bill. Representative Elbridge Gerry of Massachusetts, speaking in favor of the bill, also dismissed arguments against its constitutionality based on statements made and assurances given during ratification. Such statements, Gerry claimed, were made only to obtain ratification, and should not therefore be regarded as the speakers' genuine sense of what the text meant. Representative Gerry stated that:

[T]he union was at that time divided into two great parties, one of which feared the loss of the union, if the constitution was not ratified unconditionally, and the other the loss of our liberties, if it was. The object on either side was so important, as perhaps to induce the parties to depart from candor. . . . Under such circumstances the opinions of great men ought not to be considered as authorities . . . .<sup>47</sup>

Gerry's brutal candor was more delicately expressed by Judge Roane, but the thrust of their remarks is the same: The opinions expressed in *The Federalist* were not authoritative. Moreover, their remarks were borne out by the statements that Hamilton, President Washington, and their Federalist supporters in Congress made when they disregarded words Hamilton had expressed before ratification. To a lesser extent, the Gerry and Roane remarks were also confirmed by the positions that Madison adopted during the debates on the bank bill and on his own bill to confer upon the President the power to remove the Secretary of State without the consent of the Senate. In those instances, Madison also disregarded what had been written in *The Federalist* with respect to the scope of the Necessary and Proper Clause and the powers of the Presidency. To use Gerry's test, the

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<sup>45</sup> *Id.* at 29. Despite Judge Roane's opposition, the United States Supreme Court did follow the line taken by Hamilton in *The Federalist*. That the need for the uniform construction of a federal statute or treaty required the appealability of state court judgments to the United States Supreme Court in cases involving such a construction. *See Martin*, 14 U.S. at 347; *see also* THE FEDERALIST NO. 82, at 555-56 (stating that "the Constitution in direct terms, gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of federal cognizance"). Nevertheless, Justice Story's opinion for the Court did not cite *The Federalist* as authority.

<sup>46</sup> *See* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1537-42 (Merrill Jensen et al. eds.).

<sup>47</sup> 14 FIRST FEDERAL CONGRESS 459-60 (statement of Rep. Gerry).

genuine, or at least the more genuine, sense of how Hamilton and Madison thought the Constitution ought to be construed is to be deduced from the words they spoke and the positions they assumed after the Constitution was ratified, and not before.

Applying Gerry's test, we should afford no weight to what Hamilton wrote in *The Federalist* regarding the extent of congressional power and, within the federal government, presidential power. Rather, we should consider his genuine conviction to reside in the words he wrote and the positions he took following his entry into the federal government.

Contrary to what Justice Scalia wrote in *Printz*, and what Justice Kennedy wrote in *Alden*, neither Hamilton nor the Federalists genuinely regarded the Necessary and Proper Clause as meaning "little or nothing."<sup>48</sup> The Federalists considered the clause as authority for Congress to legislate in the best interests of the nation: Only Congress could establish a national banking system and only Congress could protect national security through the deportation of aliens and the proscription of sedition.

Likewise, we can conclude that following ratification Madison advocated limits on the legislative powers of Congress stricter than those he had advocated in *The Federalist*, and that he ignored *The Federalist* when its position contravened his own concerning the constitutional extent of presidential power. Nevertheless, it is fair to say that Madison consistently contended for a strict construction of the Necessary and Proper Clause and of the general welfare provision in the Spending Clause. Chief Justice Rehnquist was, therefore, correct in *Lopez* when he quoted Madison's words in *The Federalist* that referred to the legislative powers of congress as "few and defined."<sup>49</sup> Chief Justice Rehnquist's assumption that Madison's views concerning the first principles of the Constitution coincided with those of his Federalist contemporaries, such as Hamilton, Washington and Ames, however, is simply not correct.

In fact, neither the country nor the Court itself has followed Madison's lead. As discussed above, the Court upheld the power of Congress to establish a national bank.<sup>50</sup> Later, the Court sustained congressional power to deport aliens,<sup>51</sup> and the power to protect the federal government against seditious speech and literature, provided that the legislation was consistent with the protection afforded under the First

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<sup>48</sup> See *supra* notes 5-12 and accompanying text (discussing *Printz v. United States*, 521 U.S. 898 (1997) and *Alden v. Maine*, 527 U.S. 706 (1999)).

<sup>49</sup> See *supra* note 3 (discussing *Lopez v. United States*, 514 U.S. 549 (1995)).

<sup>50</sup> See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

<sup>51</sup> See *Ping v. United States*, 130 U.S. 581, 606 (1889) (*The Chinese Exclusion Case*); see also *Ting v. United States*, 149 U.S. 698, 705-14 (1893).

Amendment.<sup>52</sup> Of course, the Court has also approved the power of Congress to spend for purposes not enumerated in Article I, Section 8.<sup>53</sup>

Anomakously, although Madison has not been followed in fact, his ideas prevail in theory. This is largely because the statements that Madison and Hamilton made in *The Federalist* have been taken at face value. It is time for constitutional interpreters to rediscover the forgotten history of the first twelve years of the country and to give no more deference to the constructions espoused in *The Federalist* than did the first Federalists or, on occasion, Madison and his fellow Republicans. In that event, the Supreme Court would abandon Hamilton's opinion in that publication regarding the Necessary and Proper Clause and federal legislative powers, as it has already abandoned Madison's opinion in *The Federalist* regarding the scope of the general welfare provision in the Spending Clause.

Instead, the Court should fashion a construction of federal power truly consistent with the Federalists' philosophy. To repeat the words of Fisher Ames during the debate over the bill to establish a national bank: "[T]hat construction [of the Necessary and Proper Clause] may be maintained to be a safe one which promotes the good of the society, and the ends for which the government was adopted, without impairing the rights of any man, or the powers of any State."<sup>54</sup> This construction is, in fact, reasonably close to the proposal drafted by Madison and offered at the start of the Constitutional Convention, whereby Congress would be authorized to pass laws "in all cases in which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."<sup>55</sup>

Why Virginia abandoned this proposal and why a similar one, approved by the Convention over Virginia's opposition and referred to committee, disappeared from view, and why the Necessary and Proper Clause was substituted in its stead, what all this entailed, and what it should now mean is discussed in great detail elsewhere.<sup>56</sup>

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<sup>52</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969); *Dennis v. United States*, 341 U.S. 494, 501 (1951); *Schenck v. United States*, 249 U.S. 47, 52 (1919).

<sup>53</sup> See *United States v. Butler*, 297 U.S. 1, 65-66 (1936); *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937).

<sup>54</sup> See *supra* note 19 and accompanying text (discussing statements of Fisher Ames).

<sup>55</sup> 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 21 (Max Farrand ed., rev. ed. 1996).

<sup>56</sup> See JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT* 4-26 (1999).