THE FIGHT GOES ON FOREVER: "LIMITED GOVERNMENT" AND THE FIRST BANK OF THE UNITED STATES

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I. INTRODUCTION

Hearing conservative politicians and jurists argue that the "Framers" or the "Founders" wanted limited government always makes me wonder who they are talking about.[1] One of the first acts of the first Congress was to create a national bank, a bank that soon became the largest commercial enterprise in the nation. This, to me, does not sound like men who believed in limited government.

The issue arose most recently with the debate over the Affordable Care Act ("ACA"),[2] often derided by its opponents as "Obamacare." The rhetorical and legal challenges to the ACA were based almost entirely on the idea that Congress lacked the authority to enact many of the provisions of the ACA under the commerce clause of the Constitution, and specifically the so-called "individual mandate" that required all individuals to obtain health insurance. The substance of the ACA was upheld by the Supreme Court under the taxing authority,[3] but in the dissent the four most conservative justices, Antonin Scalia, Samuel Alito, Clarence Thomas, and Anthony Kennedy, asserted that the ACA exceeded the enumerated powers of Congress. The dissenters noted that in recent years the Supreme Court found limits to the power of Congress, specifically with regards to the regulation of commerce:

> In *United States v. Lopez*, we held that Congress could not, as a means of fostering an educated interstate labor market through the protection of schools, ban the possession of a firearm within a school zone. And in *United States v. Morrison*, we held that Congress could not, in an effort to

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1. Framers are the men who drafted, or framed, the Constitution at the Philadelphia Convention in 1787. Founders are a broader group which not only includes the framers, but also prominent men involved in the creation, or founding, of the nation from the earliest colonial times through the ratification of the Constitution. Thomas Jefferson, for example, was a founder but not a framer.
2. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119–1025 (2010).
3. Nat'l Fed'n of Indep. Buss. v. Sebelius, 132 S. Ct. 2566, 2595 (2012).

> ensure the full participation of women in the interstate economy, subject private individuals and companies to suit for gender motivated violent torts.[4]

The dissent explained that:

> [the] lesson of these cases is that the Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not carte blanche for doing whatever will help achieve the ends Congress seeks by the regulation of commerce. And the last two of these cases show that the scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power.[5]

Throughout these cases, and specifically in the ACA case, conservatives on the Supreme Court often refer to Madison's views on the limits of governmental power. As Justices Scalia, Kennedy, Thomas, and Alito said in their dissent: "As for the constitutional power to tax and spend for the general welfare: The Court has long since expanded that beyond (what Madison thought it meant) taxing and spending for those aspects of the general welfare that were within the Federal Government's enumerated powers."[6]

Justice Thomas filed a short dissent in the ACA case agreeing that the "Individual Mandate is beyond the power granted to Congress under the Commerce Clause and the Necessary and Proper Clause."[7] He then said that the modern interpretation of the "Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases."[8] He referred to his more lengthy analysis of that topic in his concurrence in the case of *United States v. Lopez*, where he said:

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. 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." *The Federalist No. 45*, pp. 292-293 (*C. Rossiter ed*. 1961). This constitutionally mandated division of

4. *Nat'l Fed'n of Indep. Bus*s. 132 S. Ct. at 2646 (internal citations omitted, but citing United States v. Lopez, 514 U.S. 549, 559–63 (1995) and United States v. Morrison, 529 U.S. 598, 609–19 (2000)).
5. *Id*.
6. *Id*. at 2643 (citing United States v. Butler, 297 U.S. 1, 65–66 (1936)).
7. *Id*. at 2677.
8. *Lopez*, 514 U.S. at 560.

> authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.[9]

Thomas, and conservatives on and off the bench, assert that the framers' intent was to create a government with strictly limited and enumerated power. The creation of the First Bank of the United States, by the First Congress, seems to throw that idea for a loop. The First Bank was more than just a bank—a depository of money and a commercial lending institution—it was the largest single commercial enterprise in the nation.[10] So the First Congress, with many Framers as members, created a government owned business, which became the largest single commercial enterprise in the nation.

Conservatives frequently quote James Madison as though he is an oracle, and the sole source of wisdom regarding what the framers intended. But what if some "framers" didn't agree with Madison? What if more "framers" supported the Bank of the United States, and Alexander Hamilton's more expansive view of Congressional power than Madison's views of limited powers? What does it say about the framers' belief in "enumerated powers" and "limited government" when a majority of the "framers" in the First Congress rejected Madison's views? This Article will address these questions.

The issue involves the meaning of the Commerce Clause and the Necessary and Proper Clause, and the interplay between the two. These issues arose during the Constitutional Convention, and were discussed during the ratification process. These arguments are described in the first section. The second section details the debate in the First Congress over the Bank of the United States, and describes how Congressmen and "framers" interpreted these two clauses. The Bank Bill then went to President Washington for his signature, and Washington sought the advice of his senior advisers. Their analysis is outlined in the third section. The final section tallies which framers supported the Bank, and an expansive view of the powers of Congress, versus the framers who opposed the Bank, and therefore wanted to restrict the powers of Congress. Notably, twice as many framers in the first government supported the Bank as opposed it.

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9. *Id.* at 552 (citing Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

10. DAVID JACK COWEN, THE ORIGINS AND ECONOMIC IMPACT OF THE FIRST BANK OF THE UNITED STATES, 1791–1797, at xxiv (2000).

II. THE COMMERCE CLAUSE AND THE POWER OF CONGRESS

A. Introduction

The First Bank of the United States was part of Treasury Secretary Alexander Hamilton's attempt to turn the United States into a mercantile nation to rival Great Britain. Hamilton proposed the First Bank during the first Congress, but he had long hoped that the new nation would be a mercantile power on par with England.[11] Hamilton knew, however, that the new nation would not rival England's mercantile power due to the chaotic and unorganized state of the nation under the Articles of Confederation.[12] A number of other prominent men, including James Madison and George Washington, were also concerned about the chaotic state of the nascent nation.[13] States were in open conflict over borders and commercial issues including imports and tariffs.[14] In the fall of 1786, Hamilton and Madison met with a group of like-minded individuals at Annapolis, Maryland, to discuss the inability of the Government under the Articles of Confederation to deal with these issues.[15] The Report from the Annapolis Conference noted that the delegates met

> to take into consideration the trade and Commerce of the United States, to consider how far an uniform system in their commercial intercourse and regulations might be necessary to their common interest and permanent harmony, and to report to the several States such an Act, relative to this great object.[16]

The delegates were not able to reach an agreement at Annapolis, so they proposed a subsequent meeting, tentatively scheduled for the following summer in Philadelphia, to discuss amending the Articles of Incorporation "to render the constitution of the Federal government adequate to the exigencies of the Union."[17] It was common knowledge that "the exigencies

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11. RON CHERNOW, ALEXANDER HAMILTON 344–49 (2004).
12. *Id.*
13. CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787, at 5–8 (1966).
14. *Id.* at 6–7.
15. *Id.* at 8–10.
16. PROCEEDINGS OF COMMISSIONERS TO REMEDY DEFECTS OF THE FEDERAL GOVERNMENT (1786), *available at* http://avalon.law.yale.edu/18th_century/annapoli.asp#1.
17. *Id.*

of the Union" involved the various problems with trade and the commercial relations between the states.[18]

B. The Purpose of the Constitutional Convention

Although one of the main purposes of the Constitutional Convention was to address the ability of the government to regulate commerce,[19] there is relatively little discussion of commercial issues in the record we have of the Convention.[20] There are many possible reasons for this. Perhaps the framers understood that the purpose of the new government was to actively engage in the regulation of commercial matters between the states, and so the issue warranted little discussion. Another possible reason is that the Framers actively debated the issue outside of the Convention, but with the limited surviving record we cannot say.

The lack of a record was by design. At the beginning of the Convention the delegates were sworn to secrecy;[21] the purpose was to allow the delegates to speak freely, and to prevent details from leaking out and generating public discussion and potential opposition before the work was done. The purpose was not to prevent later generations from learning about the "intent" of the framers, but that was the effect, at least until Madison's notes were published in 1840.[22] Because of this rule there is a very limited record of the proceedings. There was an official record of topics and speakers, but no official transcript of discussions. A few other delegates took notes, including Hamilton, Rufus King, William Pierce, James McHenry, William Paterson, and Robert Yates, but these were cursory and incomplete. The most detailed notes were compiled by James Madison.[23]

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18. CHRISTOPHER COLLIER & JAMES LINCOLN COLLIER, DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787, at 42–43 (1986).
19. BOWEN, *supra* note 13, at 6–11.
20. The record is limited to the Official Journal, and notes of a number of Delegates, including James Madison, Alexander Hamilton, Rufus King, William Pierce, James McHenry, William Paterson, and Robert Yates. Madison's notes are the most extensive and generally considered the best record of the Convention. These notes are available on-line at numerous sources, perhaps the best is Yale University's Avalon Project: *Notes on the Debates in the Federal Convention*, http://avalon.law.yale.edu/ (last visited Mar. 31, 2015). The Journal and notes are collected in, MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1996).
21. COLLIER, *supra* note 18, at 113–14; *see also James Madison's Notes On the Constitutional Convention of 1787, Tuesday, May 29, 1787*, NAT'L HERITAGE CTR. FOR CONSTITUTIONAL STUDIES, http://www.nhccs.org/dfc-0529.txt (last visited Mar. 31, 2015).
22. JAMES MADISON, NOTES ON DEBATES ON THE FEDERAL CONVENTION OF 1787 (W.W. Norton, 1987) (1840). Note some of the other's notes were published soon thereafter.
23. The notes of the debates and the official record are collated in FARRAND, *supra* note 20.

B. Enumerated Powers and the Necessary and Proper Clause

The Virginia Plan, written by James Madison and Edmund Randolph, and presented at the Convention by Randolph on May 29, was the framework for much of the debate over the form of the new government.[24] The plan set out a list of fifteen "resolutions" regarding the form of a new nation.[25] The Sixth Resolution set out the powers of the proposed National Legislature, and said that it

> shall have the power to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof.[26]

Essentially Madison's proposal was that the national legislature would have all powers not held by the states, which is the broadest possible degree of power. This was initially approved, but as the balance of power shifted among the states, particularly regarding the make-up of the two chambers of the legislature, the issue was readdressed. When the Committee of Detail was appointed to create a draft constitution for discussion, they took it upon themselves to set out a list of specifically enumerated Congressional powers.[27] When the Convention discussed the draft and the specifically enumerated powers, they debated whether specific provisions should be set out or if particular matters fell under the general grant of authority to the government.[28] On August 18, Madison proposed a list of specifically enumerated powers, which included the power "to grant charters of incorporation where the public good may require them."[29] Charles Pinkney proposed his own list, which also included the power to "grant charters of

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24. BOWEN, *supra* note 13, at 38; *see also* ROBERT ALLEN RUTLAND, JAMES MADISON: THE FOUNDING FATHER 15 (1987).
25. The Virginia Plan is available on-line at the Yale Avalon History web site. *See Variant Texts of the Virginia Plan, Presented by Edmund Randolph to the Federal Convention, May 29, 1787. Text A*, LILLIAN GOLDMAN LAW LIBRARY, http://avalon.law.yale.edu/18th_century/vatexta.asp (last visited Mar. 18, 2015).
26. *Id.*
27. COLLIER, *supra* note 18, at 190.
28. *Id.* at 190–91.
29. *Madison Debates August 18*, LILLIAN GOLDMAN LAW LIBRARY, http://avalon.law.yale.edu/18th_century/debates_818.asp (last visited Mar. 18, 2015).

incorporation."[30] This specific provision, along with a number of others, was eventually removed.[31] The record of the debate does not indicate whether it was removed because the delegates did not want to grant that power to Congress (Madison's suggested view), or because they considered it a general power that the national government would inherently have, and therefore need not be set out in the Constitution.

The Committee of Detail also included a version of the Necessary and Proper Clause.[32] As details of a specific list of powers was debated, the verbiage of the Necessary and Proper Clause was tweaked, but the substance of this provision was not subject to any recorded debate. It was modified only slightly by the Committee on Style and ended up in the final document.[33]

The final version of the Constitution gives Congress the power to regulate commerce between the states, and internationally,[34] but it also contains the "necessary and proper clause," which seems to expand the specifically delineated powers of Congress.

While there was little specific debate over the Necessary and Proper Clause, there were a number of delegates who objected to the clause because they thought that it expanded the powers of Congress to regulate almost anything, so long as they could conceivably state that it was "necessary" or "proper." The chief opponent was George Mason of Virginia. Mason raised his objections in only a cursory manner at the end of the convention when he explained why he refused to sign the final document,[35] but he circulated a letter afterwards, which described his objections.[36] His primary complaint was the lack of a Bill of Rights, but he also noted the potential problems created by the Necessary and Proper Clause.[37] His letter became the basis for a number of attacks on the Constitution regarding what Mason derisively called "the sweeping clause" because it swept up all powers to the federal government.[38]

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30. *Id.*
31. COLLIER, *supra* note 18, at 190–91.
32. *Id.* at 190.
33. U.S. CONST. art. I, § 8, cl. 18 ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof.").
34. U.S. CONST. art. I, § 8, cl. 3 ("To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.").
35. COLLIER, *supra* note 15, at 255. Mason's primary opposition over the lack a bill of rights.
36. *See infra* text accompanying note 34.
37. GEORGE MASON, OBJECTIONS TO THE CONSTITUTION OF GOVERNMENT FORMED BY THE CONVENTION (1787), *reprinted in* MERRILL JENSEN, ET AL., THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION [hereinafter "DHRC"] 348–51 (1976).
38. *Id.*

D. Ratification and the Powers of Congress

After the document was signed on September 17, 1789, it was sent to the Congress of the Confederation, and to the thirteen state capitals for ratification.[39] The proposed Constitution was the subject of almost immediate discussion and the subject of numerous essays and articles in the newspapers across the country. Some of the first to write were the opponents, who eventually became known as the "Anti-Federalists."[40]

1. The "Anti-Federalists"

George Mason's letter was one of the first to critique the Constitution, and it became the basis for a number of subsequent objections. Among his other objections, Mason complained about the "necessary and proper" clause, which he derided as the "sweeping clause."[41] The danger of this provision, he said, was that:

> Under their own construction of the general clause, at the end of the enumerated powers, the Congress may . . . extend their powers as far as they shall think proper; so that the State legislatures have no security for the powers now presumed to remain to them, or the people for their rights.[42]

Barely a month after the close of the Constitutional Convention, another skeptic of the new document, who called himself "Brutus," voiced his objection to the Necessary and Proper Clause, which he termed the "elastic clause," in an essay published in a New York paper in October 1787.

> This government is to possess absolute and uncontrollable power, legislative, executive and judicial, with respect to every object to which it extends, [because one clause] declared **"**that the Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this

39. BOWEN, *supra* note 13, at 263–68. Note, there were numerous "congresses" in the early nation, and they often went by similar names. For clarity's sake I will refer to the Congress of the colonies during the Revolution and before the creation of the Articles of Confederation as the Continental Congress. I will refer to the Congress that met and governed under the Articles of Confederation as the Congress of the Confederation, and later during the debate over the Bank Bill I will refer to the newly elected Congress as the First Congress.

40. BOWEN, *supra* note 13, at 268.

41. *Id.*

42. GEORGE MASON, OBJECTIONS TO THE CONSTITUTION OF GOVERNMENT FORMED BY THE CONVENTION (1787), *reprinted in* DHRC, *supra* note 37, at 348–51, *available at* http://www.constitution.org/gmason/objections.html.

> constitution, in the government of the United States; or in any department or office thereof."
> . . . .
> A power to make all laws, which shall be *necessary and proper*, . . . is a power very comprehensive and definite, and may, for ought I know, be exercised in a such manner as entirely to abolish the state legislatures, . . . annihilate all the state governments, and reduce this country to one single government.[43]

Another complaint about this provision is that the clause leaves it to Congress to decide what was necessary and proper. This was the argument of the "Old Whig," writing in Philadelphia in October 1787:

> Under such a clause as this can any thing be said to be reserved and kept back from Congress? Can it be said that the Congress have no power but what is *expressed*. "To make all laws which shall be necessary and proper" is in other words to make all such laws which *the Congress shall think necessary and proper*, — for who shall judge for the legislature what is necessary and proper? — Who shall set themselves above the sovereign? — What inferior legislature shall set itself above the supreme legislature? To me it appears that no other power on earth can dictate to them or control them, unless by force.
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> Where then is the restraint? How are Congress bound down to the powers expressly given? What is reserved or can be reserved?[44]

2. The Federalists

Hamilton read these and other critical essays with concern. He published a few essays in support of the Constitution, but decided that a more organized response was needed.[45] He discussed the matter with a number of Framers, but eventually only John Jay and James Madison committed to producing a series of essays.[46] They produced a total of eighty-five essays, but only a handful specifically dealt with the powers of Congress and the Necessary and Proper Clause.[47]

The authors of the Federalists were in a tough spot. On one hand they had to convince some people that the new government would be more

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43. "Brutus," published in the New York Journal, Oct. 18, 1787, *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 271–75 (Ralph Ketcham ed., 1986); *see also* DHRC, *supra* note 37, at vol. VIII, 412–21, at 413–14. This was the first of three essays by Brutus.
44. The Old Whig 2, *reprinted in* DHRC, *supra* note 37, at 402-03*; see also* THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1971), *available at* http://teachingamericanhistory.org/library/index.asp?document=1937.
45. CHERNOW, *supra* note 11, at 243–46.
46. *Id.* at 246–47.
47. *Id.* at 246–49.

effective, and hence have more power, than the government under the Articles of Confederation. But at the same time they had to convince the skeptics, typified by the Anti-Federalists, that the new government was not overly powerful. The result was that at times the Federalists seem like they were trying to have it both ways.

Modern conservatives like to quote Madison from *Federalist No. 45*: "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."[48]

But there are a number of other essays that deal with the scope of Congressional power and the Necessary and Proper Clause. The first was *Federalist No. 23*, written by Alexander Hamilton, and published on December 21, 1787.

Hamilton first addressed the power of Congress to enact laws relating to the common defense. He said that these powers:

> [O]ught to exist without limitation, BECAUSE IT IS IMPOSSIBLE TO FORESEE OR DEFINE THE EXTENT AND VARIETY OF NATIONAL EXIGENCIES, OR THE CORRESPONDENT EXTENT AND VARIETY OF THE MEANS WHICH MAY BE NECESSARY TO SATISFY THEM. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed . . . .[49]

But this broad grant of authority is not just necessary for matters of national defense, it is necessary for all matters under Congressional authority, including commerce. "The same must be the case in respect to commerce, and to every other matter to which its [Congress] jurisdiction is permitted to extend."[50] This, according to Hamilton, is necessary for a competent government.[51]

> Not to confer in each case a degree of power commensurate to the end, would be to violate the most obvious rules of prudence and propriety, and improvidently to trust the great interests of the nation to hands which are disabled from managing them with vigor and success . . . . A government, the constitution of which renders it unfit to be trusted with all the powers which a free people OUGHT TO DELEGATE TO ANY GOVERNMENT,

48. THE FEDERALIST NO. 45, at 260 (James Madison) (Clinton Rossiter ed., 1999).
49. THE FEDERALIST NO. 23, at 121 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (emphasis in original).
50. *Id.* at 123.
51. *Id.* at 124 (emphasis in original).

> would be an unsafe and improper depositary of the NATIONAL INTERESTS.[52]

In *Federalist No. 33*, published on January 3, 1788, Hamilton discussed the powers of taxation, and attempted to explain that the Necessary and Proper Clause did not expand this to render the power to tax absolute.[53] He noted that there had been complaints about this provision by opponents of the Constitution.[54] He did not identify them, but it seems likely that he was referring to the "Brutus" and the "Old Whig," among others. He then said that the Necessary and Proper Clause was "only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers."[55]

Hamilton explained the purpose of the clause with a bit of conclusory logic:

> What is a power, but the ability or faculty of doing a thing? What is the ability to do a thing, but the power of employing the MEANS necessary to its execution? What is a LEGISLATIVE power, but a power of making LAWS? What are the MEANS to execute a LEGISLATIVE power but LAWS? What is the power of laying and collecting taxes, but a LEGISLATIVE POWER, or a power of MAKING LAWS, to lay and collect taxes? What are the proper means of executing such a power, but NECESSARY and PROPER laws?[56]

He then addressed the question, raised by "The Old Whig," of who decided what is necessary and proper?

> Who is to judge of the NECESSITY and PROPRIETY of the laws . . . [The] national government, like every other, must judge, in the first instance, of the proper exercise of its powers, and its constituents in the last. If the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify.[57]

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52. *Id.* at 124 (emphasis in original).
53. THE FEDERALIST NO. 33, at 169–73 (James Madison) (Clinton Rossiter ed., 1999).
54. *Id.*
55. *Id.* at 170 (emphasis in original).
56. *Id.*
57. *Id.* at 171.

So Congress can be its own judge of what is necessary and proper, but ultimately the members of Congress must stand for election, and if the public disagrees with what Congress has done, they can remove those representatives and elect new ones more in line with their thinking.

A few weeks later, Madison set out the most specific and detailed analysis of the Necessary and Proper Clause, as well as a broad overview of the scope of federal powers, in *Federalist No. 44*. *No. 44* is the continuation of a series starting with *No. 41*, which goes through, point by point, the powers of the Federal Government. The main thrust of these essays is how the Constitution actually limits the national power by clearly delineating the various things that the government can do. After setting out all of the powers under various provisions of the Constitution, including an extensive explanation of the powers granted to Congress in Article I, Section 8, Madison addressed the Necessary and Proper Clause.[58] He noted that "Few parts of the Constitution have been assailed with more intemperance than this,"[59] but he proclaimed that "[w]ithout the SUBSTANCE of this power, the whole Constitution would be a dead letter."[60] Since the substance is necessary, he then asked how the Constitution could have expressed this grant of authority.[61] Madison suggested that there are basically four "methods which the Constitution might have taken on this subject."[62] First, the framers "might have copied the second article of the existing Confederation, which would have prohibited the exercise of any power not EXPRESSLY delegated."[63]

> Had the convention [done this] it is evident that the new Congress would be continually exposed, as their predecessors have been, to the alternative of construing the term "EXPRESSLY" with so much rigor as to disarm the government of all real authority whatever, or with so much latitude as to destroy altogether the force of the restriction.[64]

In other words, the fight would have been over the meaning of the concept of "expressed" powers. This possibility was discussed and rejected at the Constitutional Convention. As noted, the Articles of Confederation were widely considered ineffectual in large measure because the central

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58. THE FEDERALIST NO. 44, at 251-56 (James Madison) (Clinton Rossiter ed., 1999).
59. *Id.* at 252. Note: The organization of the essay has been reformatted for clarity and simplicity.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*

government lacked sufficient powers to deal with national matters, and the framers wanted a more able government.

Second, the framers "might have attempted a positive enumeration of the powers comprehended under the general terms 'necessary and proper.'"[65]

> Had the convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect, the attempt would have involved a complete digest of laws on every subject to which the Constitution relates; accommodated too, not only to the existing state of things, but to all the possible changes which futurity may produce; for in every new application of a general power, the PARTICULAR POWERS, which are the means of attaining the OBJECT of the general power, must always necessarily vary with that object, and be often properly varied whilst the object remains the same.[66]

This too was discussed at the Convention. At one point both Madison and Charles Pinckney attempted to draw up lists of specifically delegated powers, but it became obvious that this was unworkable, and was rejected.[67]

Third, the framers "might have attempted a negative enumeration . . . by specifying the powers excepted from the general definition."[68]

> Had they attempted to enumerate the particular powers or means not necessary or proper for carrying the general powers into execution, the task would have been no less chimerical [that listing granted powers]; and would have been liable to this further objection, that every defect in the enumeration would have been equivalent to a positive grant of authority.[69]

In other words anything not prohibited would have been assumed allowed. This was not specifically discussed at the Convention, but Madison likely sets it out to show that it too would be unworkable.

Fourth, "they might have been altogether silent on the subject, leaving these necessary and proper powers to construction and inference."[70]

> Had the Constitution been silent on this head [as it was], there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government, by unavoidable

65. *Id.*
66. *Id.* at 252–53.
67. *See supra* text accompanying notes 24–27; *see also* James Madison, *Notes of Debates in the Federal Convention of 1787, Debates of August 18, 1787*, TEACHINGAMERICANHISTORY.ORG, http://teachingamericanhistory.org/convention/debates/0818.html (last visited Mar. 18, 2015).
68. THE FEDERALIST NO. 44, *supra* note 58, at 253.
69. *Id.*
70. *Id.* at 252.

> implication. No 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.[71]

Madison stole a march on potential critics by asking, hypothetically, what the consequence would be if Congress overreached and exerted powers not authorized:

> I answer, the same as if they should misconstrue or enlarge any other power vested in them; . . . In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; and in the last resort a remedy must be obtained from the people who can, by the election of more faithful representatives, annul the acts of the usurpers.[72]

In other words, the president and the judiciary would serve as a check on Congressional power, and ultimately, if the people objected they could elect new representatives.

In *Federalist No. 45*, Madison discussed the apportionment of power between the states and the federal government. He was apparently addressing the Anti-Federalist argument that the federal government overly encroached upon the state governments, and perhaps even supplanted them.[73] He began the essay by reviewing the history of some other confederations and noted that in most cases the general government failed not because it assumed too much power but because of encroachment of powers by the state.[74] Then he noted that under the system proposed by the Constitution the federal government is largely controlled by the states.[75] First the elected members of the federal government are largely beholden to the states.[76] The President, he noted, cannot be elected "without the intervention of the State legislatures," Senators are selected by the state legislatures, and Representatives, while elected by the people, "will be chosen very much under the influence of that class of men" who are in the state legislatures.[77] He then noted that the federal government will have relatively few employees when compared to the state governments.[78] He described tax collectors,

71. *Id.* at 253.
72. *Id.*
73. THE FEDERALIST NO. 45, at 259 (James Madison) (Clinton Rossiter ed., 1999).
74. *Id.* at 257–58.
75. *Id.* at 258.
76. *Id.* at 258–60.
77. *Id.* at 259.
78. *Id.*

justices of the peace, militia officers and the like.[79] It is when describing the various government employees that he noted that 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."[80] The main power of the federal government would be to deal with war and peace, while the states would be left to deal with "the ordinary course of affairs, concerning the lives, liberties, and properties of the people."[81]

Madison and Hamilton wrote another forty essays, and the *Federalists* were important in defining the scope of the Constitution for the delegates to the ratifying conventions and convincing enough of them to eventually ratify the Constitution. One of the complaints of the opponents was the lack of a Bill of Rights to protect individual rights, and a number of states ratified with the condition that a Bill of Rights be added to the Constitution.[82] A number of states included proposed amendments in their ratification documents.[83] New Hampshire was the ninth state to ratify the Constitution in June of 1788, which meant that it could take effect, and Virginia and New York subsequently ratified.[84] Elections were held in late 1788, and the first government under the Constitution was sworn-in in January 1789. Then the First Congress began the difficult task of putting the Constitution into effect and creating a working national government. There were a number of arguments over the scope of the powers of Congress and the Government during the First Congress, but the most detailed and illuminating involved Alexander Hamilton's plan for a National Bank.

III. THE FIRST BANK OF THE UNITED STATES AND THE POWERS OF CONGRESS

The Constitution created a rough outline for a new government, but it fell to the First Congress to create the institutions of a working government. The First Congress established the Judiciary, the Department of Foreign Affairs, Department of War, they selected the site for the new national capital (spoiler alert: they picked a location on the Potomac) and established provisions for the Federal assumption of the states' Revolutionary War

79. *Id.* at 260.
80. *Id.*
81. *Id.*
82. *See* BOWEN, *supra* note 13, at 282–305.
83. *Id.*
84. *Id.* at 293–306.

debts.[85] The First Congress also created a Treasury Department,[86] and President Washington appointed his friend and former aide-de-camp, Alexander Hamilton, as the first Secretary of the Treasury.[87] Hamilton wanted to transform the new nation into a mercantile power to rival England.[88] In early 1790, Hamilton submitted his "First Report on the Public Credit" to Congress, which was the first part of his plan, and described the nation's finances in general and government finances in particular, and suggested that the national government assume the state debts acquired to fight the Revolutionary War.[89] This issue was the subject of heated debate throughout the year, but Congress eventually agreed that the federal government would assume the war debt.[90] On December 23, 1790, Hamilton submitted his "Report on a National Bank" to Congress, which included a proposal for the establishment of a national bank.[91]

The Report again addressed the financial problems facing the new nation and government, and explained how a national bank would help deal with many of these problems.[92] The Report did not specifically address whether Congress had the authority to establish a bank, but did note that a bank would assist the nation in levying and collecting taxes, borrowing money, and raising and supplying an army and navy[93] The Report culminated in a draft bill for the establishment of a national bank.[94]

85. *See, e.g.*, CHARLES BANGS BICKFORD & KENNETH R. BOWLING, THE BIRTH OF THE NATION: THE FIRST FEDERAL CONGRESS 1789–1791 (1989); *See also Documenting the History of the First Federal Congress, 1789–1791*, FIRST FEDERAL CONGRESS PROJECT, http://www.gwu.edu/~ffcp/ (last visited Apr. 21, 2015).
86. An Act to Establish the Treasury Department, ch. 12, 1 Stat. 65 (1789).
87. CHERNOW, *supra* note 11, at 286–88.
88. *Id.* at 291, 297–98.
89. *Id.* at 297-305; *see also The First Report on Public Credit by Alexander Hamilton (1789)*, http://www.wwnorton.com/college/history/archive/resources/documents/ch08_02.htm (last visited Mar. 18, 2015).
90. BICKFORD & BOWLING, *supra* note 85, at 67–69.
91. ALEXANDER HAMILTON, REPORT OF THE SECRETARY OF TREASURY ON A NATIONAL BANK (1790), *reprinted in* 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, MARCH 4, 1789–MARCH 3, 1791, at 171 (Charlene Bangs Bickford & Helen E. Veit, eds., 2004) [hereinafter "DHFFC"].
92. *Id.* at 174–203.
93. *Id.*
94. *Id.*

A. The Senate Enacts a Bank Charter Bill

The Senate officially received Hamilton's report on December 23, 1790, and appointed a committee to evaluate it, and draft a Senate version of the Bill. The committee was made up of Caleb Strong of Massachusetts, Robert Morris of Pennsylvania, Philip Schuyler of New York, Pierce Butler of South Carolina, and Oliver Ellsworth of Connecticut. Strong, Morris, Butler, and Ellsworth were all at the Constitutional Convention (and were, therefore "framers"), and all except Butler ultimately supported the Bank Bill. On January 3, 1791, the Committee presented the Senate with their version of the Bill. The Senate Bill was nearly identical in substance to Hamilton's Bill, but with provisions numbered and reordered slightly.[95] The Committee, made up of four "framers," raised no concerns about the ability of Congress to create a national bank under the Constitution. While we do not know, because of the limited record, we can assume based on the debate in the House that followed, that they simply assumed that the new government had that power.[96]

The Bill was given two readings before substantive debate began on January 13, 1791.[97] The first substantive issue involved the duration of the Bank.[98] Hamilton's proposal, adopted by the committee, was for the Bank to exist as long as the national debt existed.[99] There was a motion to limit the term of incorporation to seven years.[100] This was debated without any record of a vote, and a second motion was made for the charter to terminate on March 4, 1815.[101] This motion passed, without record of the votes.[102] A subsequent motion was made to allow unlimited duration, but with a provision that the charter could be terminated at any time with a twelve month notice.[103] This was debated and rejected.[104] A motion was made to limit the charter to March 4, 1811.[105] While this was being debated a subsequent motion was made to limit the charter to March 4, 1801.[106] This

95. 1 DHFFC, *supra* note 91, at 522.
96. *See infra* text accompanying notes 73–164.
97. 1 DHFFC, *supra* note 91, at 522–31. Note the Senate record does not contain a transcript or record the substance of the debate.
98. *Id.* at 531.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 532.
104. *Id.*
105. *Id.* at 532–33. Under the Constitution of the time, the new administration was sworn in on March 4. Each of these proposals set dates corresponding to the beginning of a new Presidential administration.
106. *Id.* at 535.

vote was recorded, and the motion was defeated sixteen to six.[107] The six voting to strictly limit the duration of the Bank Charter were Pierce Butler and Ralph Izard of South Carolina, William Few and James Gunn of Georgia, Benjamin Hawkins of North Carolina, and James Monroe of Virginia.[108] Both Butler and Few were framers. It is notable that while no Senator questioned the constitutionality of the Bill, those who objected were all from the South. With this vote the charter was granted until March 4, 1811.[109]

The next matter, discussed only briefly, was the removal of a section that would prevent the chartering of any other bank, thereby granting a monopoly to the National Bank.[110] This was rejected by a vote of eighteen to five. The five opposed were Butler, Few, Hawkins, Izard, and Monroe, five of the six men who supported a strict time limit on the Bank. This was the last proposed amendment to the Bank Bill, and with this vote a resolution was enacted stating that the Bill passed, and should be sent to the House.[111] The objectors wanted to limit the power of the Bank, but did not raise concerns about the Bank's constitutionality. The objectors included two framers, Few and Butler. Their objections were noted by Senator William Maclay of Pennsylvania, who later published a diary of his service in the First Senate.[112] His diary included only a few brief lines regarding the discussion of the Bank Bill. He noted that Izard, Butler, and Monroe, along with one other member whose name was illegible in the diary but was probably either Few or Hawkins based on their recorded votes, opposed the Bank Bill.[113] In the diary entry of January 11, Maclay said: "The ostensible object held out by Butler & Izard were that the publick should have all the advantages of the Bank. But they showed no foundation for this."[114]

There was no recorded discussion in the Senate over whether Congress had the authority to charter a bank. We cannot get into the heads of the members, but based on the subsequent debate in the House, can assume that they simply believed that Congress had this power. This lack of debate over the constitutionality of the Bank was noted during the debate in the House.[115]

There were twenty-six Senators in the First Congress, and ten were framers. Not a single one questioned the constitutionality of the Bank. The

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107. *Id.*
108. *Id.*
109. *Id.* Note the debate took place over a couple of days, with other business intervening.
110. *Id.* at 535–36.
111. *Id.* at 536.
112. The Diary of Senator William Maclay of Pennsylvania, *in* 9 DHFFC, *supra* note 91, at 359.
113. *Id.*
114. *Id.*
115. Fisher Ames noted the lack of discussion generally, *see infra* text accompanying notes 163–81, and John Vining specifically mentions the lack of discussion in the Senate, *see infra* text accompanying note 275-76.

eight framers who supported the bank were Richard Bassett and George Read of Delaware, Oliver Ellsworth and William Samuel Johnson of Connecticut, Rufus King and Caleb Strong of Massachusetts, John Langdon of New Hampshire, and Robert Morris of Pennsylvania.[116] The two framers who opposed the Bank were Pierce Butler of South Carolina and William Few of Georgia.[117] They clearly disapproved of the Bank, but never questioned whether Congress had the authority to create a bank. Chart 1 in the appendix shows the Senators and their status as Framer and position on the Bank Bill.

B. The House Considers the Bank Bill

The House received the Bank Bill on January 21, 1791, but did not take it up in detail until the third reading on February 1, 1791.[118] After the third reading, William Smith of South Carolina rose to complain that there had been no opportunity to debate the Bill, and moved to send the Bill back to committee.[119] This was the first sign of opposition in the House, but the floodgates opened. James Jackson of Georgia agreed and said he opposed the Bill entirely.[120] Jackson was a planter, lawyer, and former state legislator, but had not participated in either the Constitutional Convention, or the Georgia ratifying convention.[121] He said that a bank would only benefit the mercantile interests on the northern states and would particularly harm farmers.[122] He said that there was already a "National" bank—the Bank of North America—which had been chartered by the Congress of the Confederation.[123] He also noted that Congress did not have the power to grant a monopoly to one bank, and cited the *Federalists No. 23* and *No. 44* to that end.[124] He did not, at this point, argue that Congress lacked the authority to charter a bank.

John Laurance of New York, a chief supporter of the Bank, rose to defend the Bill.[125] Laurance was a lawyer and former state legislator but had not been part of the Constitutional Convention or his state's ratifying

116. 1 DHFFC, *supra* note 91, at 531–32.
117. *Id.*
118. 14 DHFFC, *supra* note 91, at 359.
119. *Id.* at 362–63.
120. *Id.* at 363.
121. *Id.* at 845–52.
122. *Id.* at 363.
123. The Bank of North America was chartered by the Congress of the Confederation on December 31, 1781, to help finance the war.
124. 14 DHFFC, *supra* note 91, at 363–64. Note, the debates in the House are compiled in the DHFFC from current newspaper accounts. In this case it was from the Gazette of United States, published on February 19, 1791. For simplicity and clarity, I will not note the actual newspaper.
125. *Id.* at 364.

convention.[126] He said that the government had the power to borrow money, and that under the Articles of Confederation the Bank of North America had been chartered to facilitate this.[127] He said that the new federal government "is vested with powers equal to those of the late confederation,"[128] and therefore must have this power.

Debate over the Bank Bill occupied the House for the next week. On February 2, James Madison made his first detailed analysis of the Bank and the question of constitutionality.[129] He was opposed to the Bank, but began with a description of the advantages and disadvantages of a bank, and noted that there were many advantages.[130] Despite the advantages, however, he said that he did not believe Congress had the power to charter a bank.[131] He noted that there had been a proposal during the Constitutional Convention to give Congress the power to grant charters, but that proposal had been rejected.[132]

Madison was partially correct about the proposal during the Convention, though other framers would remember and describe the situation differently, as we shall see in a moment. The record of the debate does not indicate whether it was removed because the delegates did not want to grant that power to Congress (Madison's suggested view), or because they considered it a general power that the national government would inherently have, and therefore need not be set out in the Constitution (the position of the supporters of the Bank, see below.)[133]

Madison said that the powers of the federal government were limited.[134] The government was not created by a general grant of power, but a grant of particular powers only, leaving most powers in the hands of the states or "the people."[135] Because of this, Madison said he could find no power to incorporate a bank in (1) the power to lay and collect taxes to pay debts, (2) the power to borrow money, (3) the power to pass laws necessary and proper

126. *Id.* at 718–22.
127. *Id.* at 364.
128. *Id.* Note, the published news accounts do not contain quotations set out in quotation marks, so it is difficult to determine if the reporter is transcribing actual statements or simply paraphrasing. I will add quotations for clarity and readability but only where it appears from the context of the news report that the statement is likely a direct quote.
129. *Id.* at 367.
130. *Id.* at 367–68.
131. *Id.* at 369.
132. *Id.* at 368.
133. *See supra* text accompanying notes 23–28.
134. 14 DHFFC, *supra* note 91, at 369.
135. *Id.*

to carry into execution those powers, or (4) the power to promote the general welfare in the preamble.[136]

He said that if the national government could charter a bank it would interfere with the power of the states to incorporate banks, or more importantly to prohibit the incorporation of banks.[137] If Congress could incorporate a bank it could conceivably incorporate anything, including a state religion.[138] He distinguished this from the Bank of North America, which he called "a child of necessity," and asserted that it exceeded the powers granted under the Articles of Confederation, as shown by the fact that the Congress of the Confederation had requested that the states also incorporate the Bank.[139]

Next, Madison discussed whether the Bank could be allowed under the "necessary and proper" clause, either alone or in conjunction with enumerated powers.[140] He said the meaning of this clause must

> according to the natural and obvious force of the terms and the context, be limited to means necessary to the end, and incidental to the nature of the specific powers . . . . In this sense it had been explained by the friends of the constitution, and ratified by the state conventions.[141]

In other words, this provision only applied to specifically enumerated powers. Madison continued:

> The essential characteristic of the government, as composed of limited and enumerated powers, would be destroyed: if instead of direct and incidental means, any means could be used, which in the language of the preamble to the [Bank] bill, 'might be conceived to be conductive to the successful conducting of the finances; or might be conceived to tend to give facility to the obtaining of loans.'
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> . . . .
>
> [If Congress] by virtue of the power to borrow, can create the means of lending, and in pursuance of these means, can incorporate a Bank, they many do anything whatever creative of like means.[142]
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> . . . .
>
> The doctrine of implication is always a tender one . . . . Mark the reasoning on which the validity of the bill depends. To borrow money is made the end and the accumulation of capitals, implied as the means. The

136. *Id.*
137. *Id.* at 370.
138. *Id.*
139. *Id.*
140. *Id.* at 370–73.
141. *Id.* at 371.
142. *Id.*

> accumulation of capitals is then the end, and a bank implied as the means. The bank is then the end, and a charter of incorporation, a monopoly, capital punishments, etc., implies the means. If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.[143]

Madison said that the Constitution specifically sets out important powers, and leaves only the less important powers to implication.[144] For example, Congress has the power to regulate money, and it is expressly granted the power to punish counterfeiters.[145] It has the power to declare war, and then was expressly granted the power to raise an army.[146] Madison wrote, "It is not pretended that every insertion or omission in the constitution is the effect of systematic attention. This is the not the character of any human work . . . . Important powers are expressly asserted, not implied, and the creation of the bank is an important power."[147]

Madison distinguished between a power necessary and proper for the government, and a power necessary and proper for executing an enumerated power.[148] In the later, the incidental "necessary" powers were not expressed, but drawn from the nature of each enumerated power. In the former, the powers of the government were expressly enumerated.[149] "This constituted the peculiar nature of the government, no power therefore not enumerated, could be inferred from the general nature of government."[150]

Madison said that the discussion of the Necessary and Proper Clause in the state ratifying conventions had all turned on the same fundamental principle that the term "necessary and proper" gave no additional powers to those enumerated.[151] He then read sections of the ratifying debates from Pennsylvania, Virginia, and North Carolina to support his contention.[152]

Madison then read proposed limits on Federal power from the ratifying conventions, which eventually became the Ninth and Tenth Amendments,

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143. *Id.* at 371–72.
144. *Id.* at 372.
145. *Id.*
146. *Id.*
147. *Id.* at 372–73.
148. *Id.* at 374.
149. *Id.*
150. *Id.* at 373–74.
151. *Id.* at 374.
152. *Id.* Madison had long suggested that it was the intent of the ratifiers of the Constitution in the individual states that should define the meaning of the Constitution, not the intent of the Framers.

implying that these proposed limitations indicated a desire to limit the power of government.[153] Then he summarized his arguments:

> It appears on the whole that the power exercised by the bill was condemned by the silence of the constitution; was condemned by the rule of interpretation arising out of the constitution; was condemned by its tendency to destroy the main characteristic of the constitution; was condemned by the expositions of the friends of the constitution . . . , was condemned by the apparent intention of the parties which ratified the constitution; was condemned by the explanatory amendments proposed by Congress themselves to the Constitution" and he hoped would be condemned now by Congress.[154]

James Jackson agreed with Madison that nothing in the Constitution gave Congress the power to incorporate a bank, and the fact that the Congress of the Confederation chartered the Bank of North America was not applicable because that occurred during wartime.[155]

William Giles of Virginia said that while a bank might be used to help borrow money, a bank was not necessary to achieve that purpose.[156] Giles was a lawyer and had been a colonial legislator but had not participated in either the Constitutional Convention or his state ratifying convention.[157] He also noted that the Constitution was ratified based on the proposition that the new government was one of limited powers, and if it could charter a bank it could do almost anything, thus obviating the idea of limited powers.[158]

John Vining of Delaware said that he supported the Bank because of its obvious usefulness, and noted that the power to incorporate could be found in both express powers and those arising from necessary implication.[159] Vining was a merchant, a state legislator, and a state delegate to the Congress of the Confederation, but had not attended the Constitutional Convention or participated in his state's ratifying convention.[160] He said that the "Constitution was a dead letter if implied powers were not to be exercised." He also noted that the old government had chartered a bank, and that the new government had power "more extensive that the old one possessed."[161]

Debate continued the next day with a side discussion regarding the financing of the Bank. Some members wanted potential subscribers to be

153. *Id.*
154. *Id.* at 375.
155. *Id.* at 376
156. *Id.* at 376–77.
157. *Id.* at 895–99.
158. *Id.* at 377.
159. *Id.* at 378.
160. *Id.* at 535–39.
161. *Id.* at 377.

able to use state bank notes to purchase shares of the National Bank, but this proposal was rejected thirty-eight to twenty-one.[162] This debate over substantive provisions of the Bill, and the outcome of the vote, seemed to indicate a good deal of support for the Bank, even after Madison's argument.

Fisher Ames of Massachusetts was a leading sponsor of the Bank Bill. He was not a framer, but was a prominent lawyer in Massachusetts and a forceful advocate for ratification in the Massachusetts ratifying convention.[163] In many ways his arguments were a mirror image of Madison's. Ames noted that Madison had always been an opponent of banks, including the Bank of North America chartered by the Congress of the Confederation.[164] Ames expressed shock that he was only now hearing these constitutional objections to the Bank Bill. "Why did he [Madison] suffer the Bill to pass the committee in silence?"[165] He also expressed surprise that, in the weeks that the Bill had been before Congress, there had been no public complaint.

> It seems strange too that in our enlightened country, the public should have been involved in equal blindness. While the exercise of even the lawful powers of government is disputed, and a jealous eye is fixed on its proceedings, not a whisper has been heard against its authority to establish a bank.[166]

This, and the public's acceptance of the Bank of North America, was, for him, "sufficient proof of their opinion on the subject."[167] Ames admitted that the power to create a bank was not expressly granted by the Constitution, but said that Congress had added powers by implication, and virtually everything Congress has done since the beginning has been through some assumption of a broader power than that set out in the Constitution.[168]

> If Congress may not make laws conformably to the powers plainly implied, tho not expressed in the frame of the government, it is rather late in the day to adopt it as a principle of conduct: A great part of our two year's labor is lost . . . for we have scarcely made a law in which we have not exercised our discretion with regard to the true intent of the constitution.[169]

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162. *Id.* at 381–85.
163. *Id.* at 614–18.
164. *Id.* at 391.
165. *Id.*
166. *Id.* at 391-92.
167. *Id.* at 385.
168. *Id.* at 392.
169. *Id.*

He said that by the very nature of the government, the legislature had an implied power of using every means not positively prohibited by the Constitution, to execute the ends for which that government was constituted.[170] "Every constitutional right should be so liberally constructed as to effect the public good."[171]

There "was as much danger in doing too little as in doing too much," Ames said, and noted a number of recent matters where Congress addressed matters and used powers not expressly set out in the Constitution, including redeeming captives from Algeria and creating a land office to deal with land issues in the Northwest Territories. "The power here was derived by implication, and was deduced from the reason and necessity of the case."[172] Ames said that the "power of establishing banks . . . could be deduced from the same source: From their utility in the ordinary operations of government, and their indispensible necessity in cases of sudden emergencies."[173]

Ames's comment about the western land office was a reference to the establishment of a land office in the Northwest Territories (present day Ohio, Indiana, and Illinois) to manage the sale of government owned land.[174] A number of other Congressmen referred to this Bill. The implication was that if Congress lacked the power to charter a corporation, why had they done so for the land office in the Northwest Territories? And, if certain members now believed that Congress lacked this power, why had they not objected then? The objection, as Ames noted, is not to a corporate charter generally, but to a bank specifically.

Ames said that this power to charter a bank would fall under the power to lay and collect taxes, to borrow money, and regulate for the general welfare.[175] While these provisions do not specifically mention the creation of a bank, Ames said that "unless a reasonable latitude of construction of this part of the constitution was allowed he did not see upon what authority several acts of Congress would rest."[176]

Ames then said that while those opposed to the Bank complained about the assumption of powers by Congress,

> [D]o they mark out the limits of the power which they will leave to us, with more certainty than is done by advocates of the bank? Their rules of interpretation by contemporaneous testimony, the debates of conventions,

170. *Id.* at 393.
171. *Id.* at 386.
172. *Id.* at 388.
173. *Id.* at 387.
174. An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50 (1789).
175. 14 DHFFC, *supra* note 91, at 389.
176. *Id.*

> and the doctrine of substantive and auxiliary powers, will be found obscure, and of course as formidable, as that which they condemn. They only set up one construction against another.[177]

Ames then described his broad understanding of the powers of Congress.

> Congress may do what is necessary to the end for which the constitution was adopted, provided it is not repugnant to the natural rights of man, or to those which they have expressly reserved to themselves, or to the powers which are assigned to the states . . . That construction may be maintained to be a safe one which promotes the good of society, and the ends for which the government was adopted . . . .[178]

Ames said that he "had no desire to extend the powers granted by the constitution beyond the limits prescribed them," but in those cases where there was doubt as to its meaning and intention, he thought it was his duty to consult his "conscience and judgment to solve them."[179]

Ames concluded by observing that "we had felt the disadvantages of the confederation—we adopted the constitution expecting to place the national affairs under a federal head . . . ."[180] Presumably the purpose of this Constitution is to wield power a bit more broadly than the Confederation.[181]

Debate continued the next day, February 4, with Theodore Sedgwick of Massachusetts, a supporter of the Bank. Sedgwick had been a member of the Congress of the Confederation and the state legislature, and had taken an active role in ratification, but was not a framer.[182] Sedgwick said that until a few days ago he had not questioned the constitutionality of the Bank Bill because he had never heard any argument against it.[183] He also expressed surprise over Madison's objection to the idea of implied powers broadening specific grants of enumerated power, because Madison had used the doctrine of implied powers to grant the president the power to remove subordinates from office.[184]

Sedgwick was referring to a question that came up when Congress was debating the creation of the Department of Foreign Affairs[185] (which was

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177. *Id.* at 392 (emphasis added).
178. *Id.* at 393.
179. *Id.* at 390.
180. *Id.* at 397.
181. *Id.*
182. *Id.* at 635–42.
183. *Id.* at 398.
184. *Id.*
185. An Act for Establishing an Executive Department, to be Denominated the Department of Foreign Affairs, ch. 9, 1. Stat. 28 (1789).

renamed the Department of State later than year[186]). Madison had drafted the Bill creating the Department, and had included a provision stating that inferior officers could be removed by the President.[187] William Smith of South Carolina objected, noting that the Constitution included a provision for the removal of government officers: impeachment.[188] This was discussed but rejected as unduly cumbersome. Alexander White of Virginia said that the President could only appoint subordinate officers with the advice and consent of the Senate, and it stood to reason that the Senate should have the same authority regarding removal.[189] White and others were concerned that Madison's proposal would give the President far too much power, and a restriction on removal would prevent the President from usurping power. In defense of his removal provision, Madison said that it would be unduly cumbersome for the President to have to go to congress to remove subordinates. And besides, Madison said, where "the constitution was totally silent, Congress might use its discretion."[190] Sedgwick used Madison's previous argument against him.

Sedgwick said that without some degree of implied powers "the government would be so shackled, that it would be incapable of operating…. It is universally agreed that wherever a power is delegated, for express purposes, all the known and usual means for the attainment of the objects expressed, are conceded also."[191] This was a paraphrase of Madison's argument in *Federalist No. 44*. Sedgwick, like most supporters of the Bank, noted that Congress was authorized to lay and collect taxes, to borrow money, to raise and support armies and navies, to regulate trade foreign and domestic, and to make all laws necessary and proper to carry these out.[192] A bank would be very useful in carrying out those enumerated powers. He then asked rhetorically if banks were not "the most useful engines to facilitate the collection of taxes, [and] borrowing money"?[193]

Sedgwick said that in the Constitution the great ends of government were particularly enumerated, but all the means were not, nor could they all be pointed out, "without making the constitution a complete code of laws. Some discretionary power and reasonable latitude must be left to the judgment of the legislature."[194] Congress had the power to lay and collect

186. Ch. 14, 1 Stat. 68 (1789).
187. The Debate over removal and the Foreign Office is in 11 DHFFC, *supra* note 91, at 860–69, 921–27, 986–88, 1031–33.
188. *Id.* at 860–61.
189. *Id.* at 872.
190. *Id.* at 867–68.
191. 14 DHFFC, *supra* note 91, at 399.
192. *Id.*
193. *Id.*
194. *Id.* at 409–10.

taxes, and the means were left to the honest and sober discretion of the legislature, and in its discretion a bank was what was needed.[195] He reminded everyone that the Bank of North America had saved the nation from bankruptcy during the Revolution: "without its kind aid the wheels of government would have stopped and the dawn of freedom never have been followed by the sun-shine of liberty."[196]

John Laurance spoke again, and noted the lack of public comment or outcry against the Bank. "The silence of the people on the subject now before the House is strongly presumptive that the measure of a bank is not considered by them as unconstitutional."[197] He also reiterated that the government under the Articles of Confederation had very limited powers, yet they chartered a bank, and the states had passed laws re-chartering the bank, not eliminating it.[198] He said that he believed that the majority of the Congress of the Confederation did not believe that the Bank Act was unconstitutional, "but considered it warranted by a liberal construction of the powers with which they were entrusted."[199] He said that full power to "regulate the fiscal concerns of this union is a primary consideration in this government, and from hence it clearly follows, that it must possess the power to make every possible arrangement conducive to that great object."[200] He noted that one of the chief defects of the Confederation was its inability to deal with these sorts of situations.[201] The preamble to the Constitution says that the purpose of the new government is to create a more perfect union, as compared to the imperfect union governed under the Articles of Confederation, and "to suppose that this government does not possess the power for which the constitution was adopted, involves the grossest absurdity."[202]

Laurance, like many others, said that the question of the President's power to remove subordinate officers had not faced this question of constitutionality, and removal was at least as important as the Bank. He also noted that a number of states[203] had proposed constitutional amendments that would limit the ability of Congress to charter a commercial enterprise. This,

195. *Id.* at 410–11.
196. *Id.*
197. *Id.* at 403, 412. Note, the editor's footnote 19, on page 412 notes that there were two articles opposing the Bank, and after February 4, a few more articles opposed and raised constitutional questions.
198. *Id.* at 412–13.
199. *Id.* at 413.
200. *Id.* at 403.
201. *Id.*
202. *Id.*
203. At least four: New Hampshire, New York, North Carolina, and Massachusetts.

he asserted, must mean that the ratifiers in those states must have believed that Congress currently had that power.[204]

James Jackson said that he had initially raised the constitutional issue and wanted to defend his argument. He noted that there had been a few newspapers that had argued against the Bank (but the record does not indicate whether the criticism was based on constitutional concerns).[205] He agreed with others that if this assumption of power beyond the enumerated scope of the Constitution was allowed, the national government "shall soon be in possession of all possible powers."[206] He said that while states could still charter their own banks, a national bank would "eclipse" state banks.[207] He said that Congress did not have the power to create corporations, and cited the long history of hostility towards various types of corporations, including ecclesiastical corporations.[208]

Jackson also asserted that a bank was not necessary at the moment because commerce was flourishing.[209] If a bank was needed in the future, a future Congress could deal with the issue.[210] Finally, he distinguished the establishment of the western land office by noting that the territorial property belonged to the nation, and the creation of a corporation in those territories did not "interfere with the rights of any of the respective States."[211]

Debate continued on February 5, with William Smith of South Carolina, the only Southerner to vocally support the Bank, noting that the Senate had passed the Bank Bill without raising any constitutional objections.[212] He, like other Representatives, noted that Madison had a completely different constitutional argument regarding the question of the President's power of removal.[213] He also noted that fiscal matters "necessarily devolve on the general government, and . . . that every power resulting from the acknowledged right of Congress to control the finances . . . must be as necessarily implied, as in the case of the power of removability."[214] Because of this, the "power to establish a national bank must reside in Congress—for no individual State can exercise such power."[215]

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204. 14 DHFFC, *supra* note 91, at 404 (from the Gazette of United States, 9 March 91). Similarly published in the General Advertiser, 15 February 91. *Id.* at 415.
205. *Id.* at 405.
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 407.
210. *Id.* Jackson's point is illogical. If the Bank was unconstitutional now, how could it become constitutional in the future?
211. *Id.*
212. *Id.* at 421–22. *See supra* text accompanying notes 115–17.
213. *Id.* at 409.
214. *Id.* at 422.
215. *Id.* at 423.

Michael Stone of Maryland was opposed to the Bank. Stone was a lawyer, and though he was not a framer, as a state legislator had been involved in the ratification of the Constitution in Maryland.[216] He noted that the split seemed to be geographic, with the southerners generally opposing the Bank, and the northerners generally supporting it.[217] He said that the nation was united on the idea that "Congress ought not to exercise, by implication, powers not granted by the constitution," and felt that if Congress started expanding on those powers now it would never stop.[218] He said that if government could legislate for the "general welfare" under the Preamble, this "doctrine would make ours but a short constitution" consisting only of the Preamble.[219]

He reiterated a number of the previous arguments against the Bank, then noted that some members said that "if we tie up the constitution too tight it will break; if we hamper it we cannot stir; if we do not admit the doctrine [or implied powers] we cannot legislate at all."[220] But, he said, if Congress could do these things for expediency, convenience, or fear of war or the unknown, then "Congress may then do anything."[221]

Elias Boudinot of New Jersey was a supporter of the Bank. He was a lawyer and had been a member of the Congress of the Confederation, but had not been involved in either the Constitutional Convention or the ratification convention.[222] He reiterated many of the prior arguments in support of the Bill but added that one problem with private banks was that they had limited duration because they were partnerships which terminated at the death of any partner, but a chartered bank corporation would have a perpetual existence.[223] But, he continued, "the real issue is whether Congress has the power to charter a bank?"[224] He, like many bank supporters said that Congress had the power to lay taxes, pay debts, and borrow money,[225] and "as the constitution had not specified the manner of borrowing, or from whom the loan was to be obtained, the supreme legislature of the union were at liberty, it was their

216. *Id.* at 598–603.
217. *Id.* at 423. Note, Stone and a number of other Representatives refer to "eastern manufacturers" but he is referring to the portion of the nation we would now call New England, and would refer to the split as North versus South.
218. *Id.* at 424.
219. *Id.* at 424–25.
220. *Id.* at 429.
221. *Id.*
222. *Id.* at 683–87.
223. *Id.* at 433.
224. *Id.*
225. *Id.* at 434.

duty, to fix on the best mode of effecting the purposes of their appointment."[226]

He listed a number of previous cases where Congress acted beyond its expressly granted powers, including the western land office and the President's power of removal, but he also mentioned that the Congress of the Confederation often exceeded its expressly enumerated powers in a number of instances, including by dealing directly with the British during the war.[227] Finally, and perhaps in an attempt to embarrass Madison, he read portions of *Federalist No. 44*, including this section: "Had the convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect, the attempt would have involved a complete digest of laws on every subject to which the Constitution relates."[228] Clearly Congressmen were no longer deferring to Madison on matters of the meaning of the Constitution.

The House resumed debate on Monday, February 7, 1791. William Giles summarized and repeated a number of his and other opponents' arguments,[229] but added that the economy was currently "flourishing" without a bank, so he could see no need for one.[230]

Elbridge Gerry of Massachusetts was the only framer to speak in support of the Bank Bill. Gerry was an interesting case. He had attended the Constitutional Convention and had been a vocal participant but was known for being blunt, argumentative, and thin skinned.[231] He was generally supportive of a strong central government, but refused to sign the final version of the Constitution because it lacked a bill of rights, and in his view created a government that was not sufficiently representative of the people.[232] He was a leading opponent of ratification in the Massachusetts legislature because of his concerns about the lack of adequate representation, ambiguous legislative powers, and lack of clarity between legislative and executive powers.[233] After the Constitution was ratified, he ran for Congress noting that he supported the general outlines of the Constitution and felt that the defects he raised could be corrected by amendments.[234] Once elected, he

226. *Id.* at 435.
227. *Id.* at 437–38.
228. *Id.* at 437–44. Note, *The Federalist Papers* were first published in a single book in 1788 and was well known to the public.
229. *Id.* at 446.
230. *Id.* at 447–51.
231. COLLIER, *supra* note 18, at 236–38.
232. *Id.* at 355–56.
233. BOWEN, *supra* note 13, at 283–84.
234. 14 DHFCC, *supra* note 91, at 621.

supported most of Hamilton's economic programs and favored a strong central government.[235]

Gerry began by noting that Madison "has long decided against the authority of Congress to establish a bank, and is therefore prejudiced against the measure."[236] He suggested that Madison's "rules being made for the occasion, are the result of his interpretation, and not his interpretation of the rules."[237] Gerry disagreed with Madison's suggestion that the Constitution should be interpreted based on the intent of the framers, and suggested that the rules of interpretation by Blackstone might be a better guide, because they were familiar to everyone and were commonly used to interpret laws and statutes.[238] Blackstone, according to Gerry, said that the fairest and most rational method to determine the will of the legislature is "by signs the most natural and probable, and these signs are either the words, the context, the subject matter, the effect and consequences, or the spirit and reason of the law."[239] With respect to words, Blackstone observed that "they are generally understood in their usual and most ordinary signification."[240] Gerry said that the only word truly at issue was "necessary."[241] He said that the meaning of the word "varies according to the subject and circumstances."[242] For example, if there is not enough specie available in circulation it would be necessary for Congress to create paper money, but if there is enough specie then script is not necessary.[243]

If the meaning is still in doubt, Blackstone advised looking at the context, and noted that in England the preamble of a law was often used to construe an act of parliament.[244] Gerry read the Preamble and said that the "common defense and general welfare" are held up as "the primary objects of" the new Government.[245] He said that preparation for defense involves preparing for emergencies, which necessitates the ability of government to obtain "a sufficient sum of money, which is justly denominated the sinews of war."[246] How is this to be achieved? One solution was taxes, which are either "too slow in their operations" to deal with an emergency, or onerously

235. *Id.* at 622–24.
236. *Id.* at 452.
237. *Id.*
238. *Id.* at 453.
239. *Id.*
240. *Id.*
241. *Id.* at 453–54.
242. *Id.* at 454.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*

high to create a surplus for future needs.[247] The only other option was through the ability to obtain loans.[248] But what then? "Are we to apply to the banks already established in the states for loans?"[249] These may not be reliable, or the money not available. "Are we to apply to foreign banks or individuals?"[250] These are also not reliable, and could leave the nation beholden to hostile powers. It "must be evident that a previous arrangement to aid loans in cases of emergency is necessary and proper in the general and popular use of the term, . . . and what previous arrangement can we make so proper as that of a national bank?"[251]

Blackstone's last rule was that "the most universal and effectual way of discovering the true meaning of a law when the words are dubious, is by considering the reason and spirit of it, or the cause which moved the legislature to enact it."[252] Gerry asserted that the causes which produced the Constitution were "an imperfect union, want of public and private justice, internal commotions, a defenseless community, neglect of the public welfare and dangers to our liberties."[253] He said that these are set out in the Preamble, but are also known to the members of the House from "our own knowledge of the history of the times that preceded the establishment" of the Constitution.[254]

> If these weighty causes produced the constitution . . . shall we listen to assertions that these words [necessary and proper] have no meaning and that the new constitution has no more energy than the old? Shall we thus unnerve the government, [and] leave the union, as it was under the confederation, defenseless [against enemies] and thus relinquish protection of its citizens? Or shall we, by a candid and liberal construction of the powers expressed in the constitution, promote the great and important objects thereof? . . . I shall without hesitation choose the latter and leave the people and the states to determine whether or not I am pursing their true interests.[255]

Gerry noted that Madison "has urged the dangerous tendency of a liberal construction. But which is most dangerous a liberal or a destructive interpretation?"[256] Besides, he continued, "If it is enquired where we are to

247. *Id.* at 455.
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.* at 455–56.
252. *Id.* at 457.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* at 457–58.

drawn the line of a liberal construction, I would also enquire, where the line of restriction is to be drawn?"[257]

Gerry also noted that Madison referred to the pending amendment that provided that the powers not delegated to Congress or prohibited to the states shall rest in the states, or the people.[258] To this Gerry asked, what powers are delegated?[259] Gerry raised the issue of removal. "As the constitution is silent on this subject, the power mentioned, by the gentleman's own reasoning, is vested in the states or the people."[260] The record does not indicate if he pressed the point, but his implication is obvious: it makes no sense that the power of removal would belong to the states or the people, since it would be cumbersomely difficult, if not impossible, for them to execute it. Gerry does note that Madison "contended for an assumption of the power, and when assumed urged that it should be vested in the President," despite the objections of "a respectable minority in both Houses" who thought the power should belong to "the President and the Senate," like the power of appointment.[261] "His rule of interpretation then, was therefore more liberal than it is now."[262] And giving assumed powers to the President could produce far more dangerous results. "If we have this right in one instance, we may extend it to others and make him a despot."[263]

Next, Gerry addressed Madison's assertion that the meaning of the terms can be determined "by the sense of the federal convention."[264] How, he asked, "is this to be obtained?" Are "we to depend on the memory of the gentleman for a history of their debates and from thence to collect their sense?"[265] This would be improper, Gerry suggested, "because the memories of different gentlemen would probably vary, as they have already done, with respect to" that history.[266] And even if memories agreed, "the opinions of the individual members who debated are not to be considered as the opinions of the convention. Indeed if they were, no motion was made in that convention, and therefore none could be rejected, for establishing a national bank."[267] He noted that Madison had mentioned the power to grant charters

257. *Id.*
258. *Id.* at 458.
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.* at 459.
263. *Id.*
264. *Id.*
265. *Id.* at 459–60.
266. Gerry is referring to a number of previous cases in Congress where framers gave different accounts of the Convention, but he doesn't specify the specific situation, presumably because his listeners were aware of them.
267. 14 DHFFC, *supra* note 91, at 459.

and said that this "was a proposition . . . to enable Congress to erect commercial corporations which was and always ought to be negative."[268]

Gerry said that reference to the state ratifying conventions was even more suspect because the records were imperfect.[269] He specifically noted that reports from some states were from only one side of the debate.[270] There was a vigorous debate in all the states, and any one sided description clearly implies the wrong thing. In addition, "the speech of one member is not to be considered as expressing the sense of a convention."[271] Such speeches were meant to sway, and were not even-tempered or analytical discussion of the subject. The:

> union was at the 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, and to call in the aid of art, flattery, professions of friendship, promises of offices, and even good cheer, were recurred to . . . . Under such circumstances the opinions of great men ought not to be considered as authorities, and in many instances could not have been recognized by themselves."[272]

Gerry also noted that Madison read from *The Federalist* to support his view, but "this part of his performance I consider as political heresy. His doctrine indeed, was calculated to lull the consciences of those who differed in opinion with him at that time, and having accomplished his object, he is probably desirous that it may die with the opposition itself."[273]

Gerry closed by reiterating a number of arguments made by others: the Congress of the Confederation chartered a bank and the states and people had not objected; a number of states proposed amendments prohibiting Congress from establishing commercial corporations, which indicated that they thought Congress had that power; and the Bill does not create a monopoly since it does not prevent states from chartering a bank.[274]

John Vining again spoke in support of the Bill. He noted that Madison said that this Bill conflicted with the sense of the Federal Convention, but pointed out that the members of the Senate who had been in attendance at the convention had raised none of Madison's objections.[275] This, he indicated,

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268. *Id.*
269. *Id.*
270. At the time most newspapers were highly partisan, and not known for their reliability.
271. 14 DHFFC, *supra* note 91, at 460.
272. *Id.*
273. *Id.* at 456.
274. *Id.* at 461.
275. *Id.* at 471.

would mean that they did not have the same sense of the Federal Convention as Madison.[276]

Madison rose to give it one last try. He said that the power to grant a bank charter is significant, and such an important power should be specifically enumerated and not implied or allowed under the Necessary and Proper Clause.[277] He said that a bank would certainly be useful for collecting taxes and borrowing money, but that did not mean it was necessary.[278] He also denied that a national bank would play any role in regulating commerce.[279] He reiterated his belief that the use of the Necessary and Proper Clause in this instance could give Congress unlimited powers in the future, and attempted to distinguish the cases of the western land office, the president's power of removal, and the Confederation's chartering of the Bank of North America, but was essentially repeating his and others previous arguments.[280]

Gerry rose one more time to respond to Madison, but, according to the newspaper report, "the house discovering an impatience to have the main question put" he sat down.[281] The Bill to Charter the First Bank of the United States was put to a vote. The first question was whether the matter was ready to be voted on, and the House said yes thirty-eight to twenty.[282] The Bill itself was then voted on, and passed thirty-nine to twenty.[283] All who voted against it were from the South, except Jonathan Grout of Massachusetts.[284] Most of the votes for the Bank were from the North, except John Sevier and John Steele of North Carolina, William Smith of South Carolina, and Joshua Seney and William Smith of Maryland.[285]

There were eight Framers in the House when the Bank Bill was voted on: five supported the Bank and three opposed it.[286] Those framers who voted for the Bank Bill, and therefore voted in favor of a more expansive view of the powers of government, were George Clymer of Pennsylvania, Thomas Fitzsimmons of Pennsylvania, Elbridge Gerry of Massachusetts,

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276. *Id.*
277. *Id.* at 472–73.
278. *Id.* at 474–75.
279. This sounds strange to modern ears, where banks are the central institution in borrowing, taxes, and commerce.
280. 14 DHFFC, *supra* note 91, at 472–76.
281. *Id.* at 477. The tone of the news report makes it sound like the Hall was filled with groans and mutters of objection.
282. JOURNAL OF THE HOUSE, *in* 3 DHFFC, *supra* note 91, at 702.
283. *Id.* at 703.
284. *Id.*
285. *Id.* at 703.
286. *See* Chart 2 in Appendix.

Nicholas Gilman of New Hampshire, and Roger Sherman of Connecticut.[287] Those framers who voted against the Bank Bill, and therefore essentially supported Madison's views of strictly limited powers of government, were Daniel Carroll of Maryland, James Madison of Virginia, and Hugh Williamson of North Carolina.[288] Of the framers who supported the Bill, only Gerry spoke at length, and of the framers who opposed the Bill, only Madison spoke at length. And not only did they take different sides on the Bank Bill, but their recollections of the specific debates and general sense of the Constitutional Convention were quite different.

Tallying up all the members of Congress, both House and Senate, of the eighteen framers present, thirteen supported the Bank and five opposed it. From the debate in the House we see that the framers clearly had different opinions on the powers of Congress and the issue of enumerated versus implied powers. We also see that they were not swayed by the opinions of Madison as to Constitutional meaning, perhaps because it was clear that his views were not consistent or impartial, or perhaps because they had come away from the Constitutional Convention with a different understanding of its purpose and meaning.

IV. WASHINGTON REQUESTS ANALYSIS

The House passed the Bank Bill on February 8, 1791, and sent it to President George Washington for his signature. Washington was well aware of the debate in the House, and respected Madison and his views, so he felt he needed to fully address the question of constitutionality.[289] He asked for the opinions of three of his main advisers, Attorney General William Randolph, Secretary of State Thomas Jefferson, and Secretary of the Treasury Alexander Hamilton.[290]

A. Attorney General Edmund Randolph Opposes the Bank

Washington asked Attorney General Randolph for his views first. Opining on such matters was one of the duties proscribed to the Attorney General by the Judiciary Act of 1789.[291] Randolph was a major participant in the Constitutional Convention. He was one of the authors of, and the chief

287. JOURNAL OF THE HOUSE, *in* 3 DHFFC, *supra* note 91, at 703.
288. *Id.* at 703–04.
289. *Id.* at 703.
290. JAMES THOMAS FLEXNER, WASHINGTON: THE INDISPENSABLE MAN 240 (1969).
291. The United States Judiciary Act of 1789. ch. 20, 1 Stat. 73.

spokesman for, the Virginia Plan.[292] But Randolph had also been the author of the Bill to Create the Bank of North America in the Congress of the Confederation in 1781, and the author of a detailed committee report arguing the necessity of that bank.[293] Despite that, Randolph, like most Southerners, opposed the Bank.

Randolph delivered his opinion to the President on February 12, 1791. The opinion was in two parts, the first setting out Randolph's Constitutional analysis, and the second his critique of the major arguments raised during the debate in the House.[294] He began by noting 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."[295] The power to create a corporation is not expressly given to Congress. "If it can be exercised by them, it must be; 1st. because the nature of the federal government implies it; or 2d. because it is involved in some of the specified powers of legislation; or 3. because it is necessary and proper to carry into execution some of the specified powers."[296]

Randolph went through each point in order. "To be implied in the nature of the federal government would beget a doctrine so indefinite, as to grasp every power."[297] This mirrors the opponents' arguments in the House. He noted that it is not uncommon for government without a written constitution to operate in every area that the government sees fit.[298] Where, however, the government is created by a written constitution, the question becomes the degree to which the government is bound by the document. He noted the recent amendment reserving power to the states, to reflect the desire to limit the powers of Congress.[299] Despite this, he asked whether "upon any principle of fair construction, the specified powers of legislation involve the power of granting charters of incorporation?"[300] Since it is not expressed, can it be implied? He said no because "a constitution . . . is to be construed . . . with a closer adherence to the literal meaning." And here it cannot be found within the literal meaning of the Constitution.[301]

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292. Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinion*, 44 DUKE L.J. 110, 116 (1994).
293. *Id.* at 115.
294. EDMUND RANDOLPH, OPINION ON THE CONSTITUTIONALITY OF THE BANK BILL (1791), *reprinted in* Dellinger & Powell, *supra* note 292. Note, I was unable to find a copy of the full opinion in any other collection of early American documents.
295. Dellinger & Powell, *supra* note 292, at 122.
296. *Id.*
297. *Id.*
298. *Id.* at 122–23.
299. *Id.* at 123.
300. *Id.*
301. *Id.* at 123–24.

Next, he analyzed whether a bank charter can be allowed under other specifically enumerated powers, and looked at the four most commonly cited provisions, the power to tax, to borrow, to regulate commerce, and the general powers within the Preamble.[302]

Randolph noted that the advocates of the Bill said that the ability to create a bank lies in "the power to lay & collect taxes . . . because it facilitates the payment of them."[303] He admitted that a bank might make laying and collecting taxes convenient, but there are certainly other ways to do it, so it is not necessary.[304] The specific taxing powers, according to Randolph, include the power to (1) "ascertain the subject of taxation" (2) "declare the quantum of taxation" (3) "prescribe the mode of collection;" and (4) "ordain the manner of accounting for the taxes."[305] This does not include the power to create a bank, therefore Congress lacks that power.

Second, Congress has the power to "borrow money on the credit of the United States."[306] A bank, according to its advocates, facilitates the "borrowing money; because it creates an ability to lend."[307] This includes the ability to (1) "stipulate a sum to be lent," (2) determine whether "interest, or no interest to be paid," and (3) determine "the time and manner of repayment, unless the loan be placed on an irredeemable fund."[308] Randolph did not find the power to lend in his list of powers appended to the power to borrow, so he concluded that Congress lacks the power to create a bank based on the power to borrow.

Third, Congress has the "power to regulate commerce with foreign nations, among the several states, and with the Indian tribes."[309] In Randolph's view, this must include the power to

> prohibit [foreign nations] or their commodities from our ports . . . [and] to imposed duties on them, where none existed before, or to increase existing duties on them, . . . to subject them to any species of custom house regulations, or to grant them any exemptions or privileges which policy may suggest.[310]

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302. *Id.* Note, Randolph's argument has been reorganized for clarity.
303. *Id.* at 125.
304. *Id.* at 126.
305. *Id.* at 124.
306. *Id.*
307. *Id.* at 125.
308. *Id.* at 124.
309. *Id.*
310. *Id.*

He then noted the various powers relating to dealing with Indian tribes and the property and territories of the United States.[311] The advocates of a bank said that it is necessary to regulate commerce, "because it increases the medium of circulation, and thus encourages activity [and] industry."[312] Again this does not fall within Randolph's list of powers, so he rejected the reasoning. He noted that the

> Preamble to the Constitution has also been relied on as a source of power . . . To this, it will be here remarked, once for all, that the Preamble if it be operative is a full constitution of itself, and the body of the Constitution is useless; but that it is declarative only of the views of the convention, which they supposed would be best fulfilled by the powers delineated; and that such is the legitimate nature of preambles.[313]

This also mirrors comments made by Representative Stone and others in the Congressional debates. Randolph noted that while the Bank might not be allowed under each asserted power:

> [I]n truth, the serious alarm is in the concentered force of these sentiments. If the laying and collecting of taxes brings with it every thing which, in the opinion of Congress, may facilitate the payment of taxes; . . . if to regulate commerce is to range in the boundless mazes of projects for the apparently best scheme to invite from abroad, or to diffuse at home, the precious metals; if to dispose of or to regulate property of the United States, is to incorporate a bank, that stock may be subscribed to it by them, it may without exaggeration be affirmed that a similar construction on every specified federal power, will stretch the arm of Congress into the whole circle of state legislation.[314]

Finally, he looked at whether chartering a bank can fall under the Necessary and Proper Clause. "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."[315] Randolph concluded with his general determination that "[i]n every aspect therefore under which the attorney general can view the act, so far as it incorporates the Bank, he is bound to declare his opinion to be against its constitutionality."[316]

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311. *Id.*
312. *Id.* at 125–26.
313. *Id.* at 124.
314. *Id.* at 126.
315. *Id.* at 127.
316. *Id.*

In the second portion of the opinion Randolph addressed some of the other arguments raised in the House debate. He began by noting that some opponents of the Bill suggested "a rule of construction, adverse to the power of incorporation, springs out of the Constitution itself," because "after the grant of certain powers to Congress, the Constitution, . . . specially grants several other [subsidiary] powers . . . ."[317] For example, after granting Congress the power to regulate commerce, the Constitution also sets out the power to establish laws of bankruptcy, to set standards for weight and measure, and to establish post offices and post roads.[318] But Randolph stated that this does not necessarily follow from what happened at the Convention[319]

> Whosoever will attentively inspect the Constitution will readily perceive the force of what is expressed in the letter of the convention, "That the Constitution was the result of a spirit of amity and mutual deference & concession." *To argue, then, from its style or arrangement, as being logically exact, is perhaps a scheme of reasoning not absolutely precise*.[320]

Randolph explained,

> [t]hese similar powers, on which stress is laid, are either incidental or substantive . . . independent powers. If they be incidental powers, and the conclusion be that, because some incidental powers are expressed, no others are admissible, it would not only be contrary to the common forms of construction, but would reduce the present Congress to the feebleness of the old one, which could exercise no powers not expressly delegated.[321]

Randolph addressed Madison's suggestion that constitutional interpretation should be based on deducing the intent of the framers, and found the idea without merit because the historical record is lacking.[322] "What may not be the consequence if an almost unknown history should govern the construction?"[323] He then discussed whether the ratification debates could offer some insight, but found this equally implausible.[324] He said that "these have no authoritative influence," because it "ought . . . to be remembered that observations were uttered by the advocates of the

317. *Id.*
318. *Id.* at 128.
319. *Id.*
320. *Id.* (emphasis added).
321. *Id.*
322. *Id.* at 129.
323. *Id.*
324. *Id.*

Constitution" to ensure ratification, and implies that the ratification debates are therefore not necessarily unbiased or reliable.[325]

Finally, Randolph addressed the issues of the Western land office and the presidential power of removal. He noted the Constitution states that Congress has the power to regulate the territories and so could create the land office, but then concedes that on the question of removal, both sides have a point.[326] But it was his opinion that Congress must have the power of removal, though he did not explain why.[327]

B. Secretary of State Thomas Jefferson Opposes the Bank

Washington asked his Secretary of State for his opinion next. Thomas Jefferson was the main author of the Declaration of Independence, and an important founder but was not involved in the Constitutional Convention. He was the minister to France when the Constitution was drafted, and so had no direct involvement in its creation.

1. Jefferson Opposes the Bank

Jefferson delivered his opinion to President Washington on February 15, 1791.[328] Jefferson began with a broad statement of his views on the nature of the government under the Constitution:

> I consider the foundation of the Constitution as laid on this ground: That "all powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people."[329] 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.[330]

Jefferson then turned to the Bank Bill. "The incorporation of a bank, and the powers assumed by this Bill, have not, in my opinion, been delegated to the United States, by the Constitution."[331] First, "they are not among the

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325. *Id*.
326. *Id*.
327. *Id.* at 130.
328. *See* THOMAS JEFFERSON, OPINION ON THE CONSTITUTIONALITY OF THE BILL FOR ESTABLISHING A NATIONAL BANK (1791), *reprinted in* 19 THE PAPERS OF THOMAS JEFFERSON 275–81 (Julian P. Boyd ed., 1974).
329. *Id*. This was the verbiage of a pending constitutional amendment. It was proposed as the Twelfth Amendment but ratified by the states as the Tenth Amendment.
330. *Id*. at 276.
331. *Id.*

powers specially enumerated."[332] He then set out and analyzed the constitutional provisions which the supporters suggest gives Congress the authority to create a bank.[333] The first justification is the "power to lay taxes for the purpose of paying the debts of the United States," but Jefferson noted "no debt is paid by this bill, nor any tax laid."[334] He also noted that were this a "bill to raise money, its origination in the Senate would condemn it by the Constitution."[335] The second justification is the power to borrow money, but Jefferson noted "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."[336] The third justification is the Commerce Clause. Jefferson said,

> [t]o 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 . . . . Accordingly the bill does not propose the measure as a regulation of trade, but as "productive of considerable advantages to trade." Still less are these powers covered by any other of the special enumerations.[337]

Jefferson next addressed whether a bank can be created under the taxing authority. He analyzed what it meant to "lay taxes for the purpose of providing for the general welfare."[338] Jefferson said that the supporters' reading of this phrase

> 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 United States; and, as they would be the sole judges of the good or evil, it would be also a power to do whatever evil they please.[339]

Finally he addressed whether a bank could be created under the powers granted by the Necessary and Proper Clause. He said that the enumerated powers "can all be carried into execution without a bank. A bank therefore is not *necessary*, and consequently not authorized by this phrase."[340] Jefferson noted that the proponents of the Bank said "that a bank will give

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332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.*
337. *Id.* at 277.
338. *Id.*
339. *Id.* at 278.
340. *Id.*

great facility or convenience in the collection of taxes."[341] This may be true, but

> the Constitution allows only the means which are *'necessary*,' not those which are merely 'convenient' . . . . If such a latitude of construction be allowed to this phrase as to give any non-enumerated power, it will go to everyone, for there is not one which ingenuity may not torture into a *convenience* in some instance *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 power,

as set out under the Preamble.[342] He concluded by stating,

> [i]t 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. . . . 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.[343]

2. Jefferson and Constitutional Purity

Jefferson was considered the founder of the concept of "strict construction" and he based his campaign for the Presidency in 1800 on the idea that the Federalists had strayed from the original meaning of the Constitution.[344] Many historians have labeled the election of 1800 as the "Revolution of 1800," because it so dramatically shifted the government from the Hamiltonian views held by the Federalists, to the views of limited government held by Jefferson and his allies.[345] Despite this, it is important to remember that Jefferson's idea of "strict construction" was somewhat situational, because he was willing to ignore the clear words of the Constitution when it suited his purposes.[346] The most notable case involves the Louisiana Purchase.[347] Jefferson knew that the Constitution did not

341. *Id.*
342. *Id.*
343. *Id.* at 279.
344. *See* JAMES F. SIMON, WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES 118–38 (Simon & Schuster, 2002).
345. *Id.*
346. *See* Letter from Thomas Jefferson to John C. Breckinridge (Aug. 12, 1803), *available at* http://wps.prenhall.com/wps/media/objects/106/109018/ch9_a4_d1.pdf.
347. *See id.*

authorize him to take this action, yet he did it anyway.[348] He explained this in a letter to John C. Breckinridge on August 12, 1803:

> The constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union. The Executive in seizing the fugitive occurrence which so much advances the good of their country, have done an act beyond the Constitution. . . . It is the case of a guardian, investing the money of his ward in purchasing an important adjacent territory; & saying to him when of age, I did this for your good; I pretend to no right to bind you: you may disavow me, and I must get out of the scrape as I can: I thought it my duty to risk myself for you.[349]

So Jefferson's opinions on the meaning of, and fidelity to, the Constitution are, like Madison's, situational.

C. Hamilton's Response

After receiving the opinions from Randolph and Jefferson, Washington asked his Treasury Secretary, Alexander Hamilton, for his opinion. Hamilton, as noted above, had been a driving force behind the call for the Constitutional Convention and had been a major participant in the Convention. Washington gave Hamilton the reports from Randolph and Jefferson. Hamilton spent nearly a week working on the response, and as was his wont, he provided a voluminous analysis.

Hamilton began by noting that he had drafted the original Bill, so his opinion might be suspect.[350] He then jumped right in and addressed Randolph's assertion that Congress does not have the power to create a corporation.[351] Hamilton said,

> every power vested in a government is in its nature sovereign, and includes . . . 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.[352]

348. *Id.*
349. *Id.*
350. ALEXANDER HAMILTON, OPINION ON THE CONSTITUTIONALITY OF AN ACT TO ESTABLISH A BANK (1791), *reprinted in* 2 THE PAPERS OF ALEXANDER HAMILTON 98 (Harold C. Syrett, ed., 1961).
351. *Id.*
352. *Id.*

He asserted "it is unquestionably incident to sovereign power to erect corporations."[353] He does not specifically articulate why, but we may assume that he is referring to the historic powers of government, because he goes on to assert that "where the authority of the government is general, it can create corporations in all cases, [but] where it is confined to certain branches of legislation, it can create corporations only in those cases."[354]

> It is not denied that there are implied as well as express powers [in the Constitution], and that the former are as effectually delegated as the latter. . . . [The] power of erecting a corporation 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 . . . whether the mean to be employed . . . has a natural relation to any of the acknowledged objects or lawful ends of the government. Thus a corporation may . . . be erected in relation to the collection of taxes, or to the trade with foreign countries . . . because it is the province of the federal government to regulate those objects.[355]

He disagreed with Jefferson's definition of "necessary." Jefferson had stated "no means are to be considered as necessary but those without which the grant of the power would be nugatory."[356] Hamilton said that according to both the grammatical and popular sense,

> 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.[357]

He suggested that the words of the Necessary and Proper Clause make it clear "that it was the intent of the Convention . . . to give a liberal latitude to the exercise of the specified powers."[358] He suggested that it is as dangerous to read the Constitution literally (that is strictly) as it is to read the Constitution liberally (that is broadly).[359] "The moment the literal meaning

353. *Id*. at 99.
354. *Id*.
355. *Id*. at 100.
356. JEFFERSON, *supra* note 328, at 278.
357. HAMILTON, *supra* note 350, at 102.
358. *Id.*
359. *Id.* at 103.

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 government."[360]

He suggested that the way to resolve this is to look separately at the ends, and the means of achieving those ends.[361] "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."[362] This is a subtle restating of Madison's argument in *Federalist No. 44*, which stated, "wherever the end is required, the means are authorized."[363] Hamilton suggested an additional criterion: "Does the proposed measure abridge a pre-existing right of any State or of any individual?"[364] If not, then "there is a strong presumption in favor of its constitutionality."[365] And here, he noted, the Bill does not prevent the states from "erecting as many banks as they please."[366]

Hamilton concluded by stating that based on the forgoing analysis, "the power to erect corporations is not to be considered as an independent or substantive power, but as an incidental and auxiliary one, and was therefore more properly left to implication, than expressly granted."[367] Hamilton then explained that a bank is simply incidental to enumerated powers.[368] "A bank relates to the collection of taxes in two ways indirectly, [1] by increasing the quantity of circulating medium and quickening circulation, which facilitates the means of paying directly, [2] by creating a convenient species of medium in which they are to be paid."[369] A bank is directly related to borrowing money, "because it is an usual, and in sudden emergencies an essential, instrument in the obtaining of loans to government."[370] A bank is important for raising money during wartime because it may take far too long to raise taxes or obtain loans from other countries.[371]

> 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,

360. *Id.*
361. *Id.*
362. *Id.*
363. THE FEDERALIST NO. 44 (James Madison), *see supra* notes 58–66 and accompanying text.
364. HAMILTON, *supra* note 350, at 99.
365. *Id.*
366. *Id.*
367. *Id.* at 100.
368. *Id.* at 102.
369. *Id.* Reference numerals added for clarity.
370. *Id.*
371. *Id.*

> by preventing the frequent displacement of the metals in reciprocal remittances. `Money is the very hinge on which commerce turns.[372]

D. Washington Signs the Bank Bill

After reading and contemplating the three opinions, Washington signed the Bill that created the Bank of the United States on February 25, 1791.[373] Washington left no record of his reasoning, but we do know that he had been long concerned with the ability of the government to deal with commercial interests, including through his involvement with the Annapolis Convention.[374] Washington was also the presiding officer at the Constitutional Convention, and so was undoubtedly familiar with the arguments made during the debate over the Constitution. Based on that experience, and after reviewing the opinions supporting and opposing the constitutionality of the Bank of the United States, George Washington essentially endorsed Hamilton's expansive view on the powers of the national government.[375]

V. FRAMERS FOR AND FRAMERS AGAINST

There were fifty-five men who attended the Constitutional Convention, though only thirty-eight signed the final document.[376] Of those fifty-five men, twenty-one were in the first federal government, including President Washington, Treasury Secretary Hamilton, Attorney General Randolph, ten senators, and eight members of the House of Representatives.[377] Of those twenty-one men, sixteen supported the Bank, and five opposed it.[378]

The advocates of limited government like to quote Madison's comment from *Federalist No. 45*, with the implication that this was somehow the consensus view of the Framers. But the debate over the First Bank of the United States indicates that a majority of the framers did not support Madison's views on limited government.[379] Many actually seemed to favor

372. *Id.*
373. EDWARD KAPLAN, THE BANK OF THE UNITED STATES AND THE AMERICAN ECONOMY 25 (Praeger, 1999).
374. FLEXNER, *supra* note 290, at 199–223.
375. KAPLAN, *supra* note 373, at 25.
376. CALVIN C. JILLSON, AMERICAN GOVERNMENT: POLITICAL DEVELOPMENT AND INSTITUTIONAL CHANGE 31 (5th ed. 2009).
377. *Id.*
378. *Id. See* Chart 3 in the appendix, setting out the Framers, their subsequent service in the federal government, and their position on the Bank.
379. *See* HAMILTON, *supra* note 350, at 102.

a larger and more active government.[380] It should also be noted that many, as indicated above, did not share Madison's view of constitutional interpretation, or his recollection of the events at the Constitutional Convention.[381]

The Bank of the United States quickly became an important economic player in the new nation, and eventually was the largest single commercial enterprise in the country.[382] So a majority of the "framers" created a government owned enterprise that was the largest commercial enterprise in the nation. This is hardly an endorsement of limited government.

VI. THE SECOND BANK OF THE UNITED STATES

The charter for the First Bank of the United States ran until March 4, 1811. As it neared expiration, supporters began to discuss a new charter. James Madison was now President. Madison had seen the impact of the Bank on the new nation, and while he still harbored doubts about its constitutionality, he could not doubt its effectiveness.[383] But as the charter for the First Bank neared termination, Madison knew that he would be ridiculed if he endorsed its recharter, so he turned to his Treasury Secretary Albert Gallatin, to push the Bill.[384]

The first bill to arrive at his desk to recharter the Bank contained what Madison considered to be significant defects, so he vetoed the Bill.[385] But in his veto message to Congress he explained that he no longer challenged the constitutionality of the Bank:

> Waiving the question of the constitutional authority of the Legislature to establish an incorporated bank as being precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the

380. *See* RICHARD HOFSTADTER, GREAT ISSUES IN AMERICAN HISTORY: FROM THE REVOLUTION TO THE CIVIL WAR, 1765–1865, at 160–69 (Vintage Books, 1958).

381. *See id.*

382. DAVID JACK COWEN, THE ORIGINS AND ECONOMIC IMPACT OF THE FIRST BANK OF THE UNITED STATES, 1791-97, at xxiv (Routledge, 2000).

383. *Id.*

384. ROBERT ALLAN RUTLAND, JAMES MADISON: THE FOUNDING FATHER 235–36 (University of Missouri Press, 1987).

385. JAMES MADISON, VETO MESSAGE TO SENATE, JANUARY 30, 1815, *reprinted in* THE WRITINGS OF JAMES MADISON, COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED (Gaillard Hunt, ed., 1908).

> Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation, . . . [386]

Madison's statement does not sound like a person who believed in strict construction or rigid application of the words of the Constitution. Instead, Madison's statement sounds like a person who believed that the Constitution was amenable to the times, a living document.

Congress re-worked the Bank Bill and returned it to Madison's desk.[387] This time Madison signed it, on April 10, 1816, without comment.[388]

In the course of his public career, Madison embraced broad powers of the national government (under the Virginia plan), limited powers of government (in his opposition to the first Bank Bill), and in the end the concept of a living constitution (in his veto message on the Second Bank Bill).

The constitutionality of the Second Bank of the United States was challenged in the case of *McCulloch v. Maryland*.[389] The case involved an attempt by the state of Maryland to tax bank notes not created by banks chartered in Maryland.[390] The true purpose of the law was not to raise taxes, but rather to attack the Bank of the United States by burdening it with this tax.[391] McCulloch was the director of the Baltimore branch of the bank, and when he refused to pay the tax, the state sued.[392] The case wound its way through the courts and the Supreme Court eventually ruled in 1819. Chief Justice John Marshall's opinion essentially tracked Hamilton's argument that Congressional powers must be broad enough to get the job done. He noted that Congress did not have the express powers to charter a bank, but it had certain implied powers, and under the Necessary and Proper Clause it can use those implied powers to expand on enumerated powers.[393]

Two points are notable about Chief Justice Marshall. First, Marshall was a Federalist, and throughout his political and judicial career he supported a broad interpretation of the Constitution. Second, Marshall was also a ratifier, having taken a leading role in ratification of the Constitution in Virginia. So Marshall was familiar with the debates over the scope of the power of the federal government.[394] And in making his decision, Marshall

386. *Id.*
387. GAILLARD HUNT, THE LIFE OF JAMES MADISON 337 (Doubleday, Page & Co., 1902).
388. *Id.*
389. McCulloch v. Maryland, 17 U.S. 316 (1819).
390. *Id.* at 317.
391. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 441–42 (Holt Paperbacks, 1996).
392. *McCulloch*, 17 U.S. at 318–19.
393. *McCulloch*, 17 U.S. at 317.
394. *See, e.g.*, SIMON, *supra* note 344, at 173–87.

had this knowledge, as well as the weight of the framers in the First Congress, on his side.

VIII. CONCLUSION

Conservative justices, as well as politicians and political commentators, seem to suggest that there was a well-defined consensus on the Framers' understanding of the Constitution. But as we have seen, at least two framers, Elbridge Gerry and Edmund Randolph, stated that this was simply not the case. Conservative justices also like to quote Madison as if he were the oracle of Philadelphia, with intimate and encyclopedic knowledge of the framing of the Constitution. But as we have also seen, Madison's contemporaries did not hold him in quite that high regard. Conservative justices also seem to imply that the consensus of the framers was that the government was to be limited and constrained to strictly enumerated powers. The fight over the First Bank of the United States shows, in one neat package, that the historical record simply does not support any of these contentions.

APPENDIX

Chart 1. The Members of the First Senate in 1790

Name	Framer/Ratifier/Position	State
Bassett, Richard	Framer & Ratifier, **Supported**	Delaware
Butler, Pierce	Framer, not ratifier, **Opposed**	South Carolina
Carroll, Charles	Ratifier, supported	Maryland
Dalton, Tristram	Ratifier, supported	Massachusetts
Dickinson, Philemon	Neither, unknown	New Jersey
Ellsworth, Oliver	Framer & Ratifier, **Supported**	Connecticut
Elmer, Jonathan	Neither, unknown	New Jersey
Few, William	Framer & Ratifier, **Opposed**	Georgia
Foster, Theodore	Ratifier, supported	Rhode Island

Gunn, James	Ratifier	Georgia
Hawkins, Benjamin	Ratifier, Opposed	North Carolina
Henry, John	Neither, but supported	Maryland
Izard, Ralph	Neither, Opposed	South Carolina
Johnson, William Samuel	Framer & Ratifier, **Supported**	Connecticut
Johnston, Samuel	Ratifier, supported	North Carolina
King, Rufus	Framer & Ratifier, **Supported**	Massachusetts
Landon, John	Framer & Ratifier, **Supported**	New Hampshire
Lee, Richard Henry	Neither, believed to oppose	Virginia
Maclay, William	Neither, supported	Pennsylvania
Monroe, James	Ratifier, opposed	Virginia
Morris, Robert	Framer, not ratifier, **Supported**	Pennsylvania
Read, George	Framer, not ratifier, **Supported**	Delaware
Schuyler, Philip	Ratifier, supported	New York
Stanton, Joseph, Jr.	Ratifier, opposed	Rhode Island
Strong, Caleb	Framer & Ratifier, **Supported**	Massachusetts
Wingate, Paine	Neither, supported	New Hampshire

There were ten Framers were in the First Senate: Eight Supported the Bank, and Two Opposed.

Chart 2. The Members of the First Congress in 1791.

Name	Framer	Vote on Bank of US	State
Ames, Fisher		Yes	Massachusetts
Ashe, John Baptista		No	North Carolina
Baldwin, Abraham		No	Georgia
Benson, Egbert		Yes	New York
Bloodworth, Timothy		No	North Carolina
Boudinot, Elias		Yes	New Jersey
Bourn, Benjamin		Yes	Rhode Island
Brown, John		No	Virginia
Burke, Aedanus		No	South Carolina
Cadwalader, Lambert		Yes	New Jersey
Carroll, Daniel	Framer	**No**	Maryland
Clymer, George	Framer	**Yes**	Pennsylvania
Coles, Isaac		?	Virginia
Contee, Benjamin		No	Maryland
Fitzsimons, Thomas	Framer	**Yes**	Pennsylvania
Floyd, William		Yes	New York
Foster, Abiel		Yes	New Hampshire
Gale, George		No	Maryland

Gerry, Elbridge	Framer, did not sign.	**Yes**	Massachusetts
Giles, William		No	Virginia
Gilman, Nicholas	Framer,	**Yes**	New Hampshire
Goodhue, Benjamin		Yes	Massachusetts
Griffin, Samuel		?	Virginia
Grout, Jonathan		?	Massachusetts
Hartley, Thomas		Yes	Pennsylvania
Hathorn, John		Yes	New York
Heister, Daniel, Jr.		Yes	Pennsylvania
Huger, Daniel		?	South Carolina
Huntington, Benjamin		Yes	Connecticut
Jackson, James		No	Georgia
Laurence, John		Yes	New York
Lee, Richard Bland		No	Virginia
Leonard, George		Yes	Massachusetts
Livermore, Samuel		Yes	New Hampshire
Madison, James Jr.	Framer	**No**	Virginia
Mathews, George		No	Georgia
Moore, Andrew		No	Virginia
Muhlenberg, Frederick		?	Pennsylvania
Muhlenberg, Peter		Yes	Pennsylvania

Page, John		?	Virginia
Parker, Josiah		No	Virginia
Partridge, George		Yes	Massachusetts
Schureman, James		Yes	New Jersey
Scott, Thomas		Yes	Pennsylvania
Sedgwick, Theodore		Yes	Massachusetts
Seney, Joshua		Yes	Maryland
Sevier, John		Yes	North Carolina
Sherman, Roger	Framer	**Yes**	Connecticut
Silvester, Peter		Yes	New York
Sinnickson, Thomas		Yes	New Jersey
Smith, William		Yes	Maryland
Smith William L.		Yes	South Carolina
Steele, John		Yes	North Carolina
Stone, Michael Jenifer		No	Maryland
Sturges, Jonathan		Yes	Connecticut
Sumter, Thomas		?	South Carolina
Thatcher, George		Yes	Massachusetts
Trumbull, Jonathan		Yes	Connecticut
Tucker, Thomas Tudor		No	South Carolina
Van Rensselaer, Jeremiah		Yes	New York

Vining, John		Yes	Delaware
Wadsworth, Jeremiah		Yes	Connecticut
White, Alexander		No	Virginia
Williamson, Hugh	Framer	**No**	North Carolina
Wynkoop, Henry		Yes	Pennsylvania

There were Eight Framers in the First Congress: Five Supported the Bank and Three Opposed.

Chart 3. The Framers and Their Views on the Bank of the United States.

State	Later Service	View on Bank
Connecticut		
William Samuel Johnson	Senate	Support
Roger Sherman	House	Support
Oliver Ellsworth (Elsworth)*	Senate	Support
Delaware		
George Read	Senate	Support
Gunning Bedford, Jr.		
John Dickinson		
Richard Bassett	Senate	Support
Jacob Broom		
Georgia		
William Few	Senate	Opposed
Abraham Baldwin		
William Houstoun*		
William L. Pierce*		
Maryland		
James McHenry		
Daniel of St. Thomas Jenifer		

Daniel Carroll	House	Opposed
Luther Martin*		
John F. Mercer*		
Massachusetts		
Nathaniel Gorham		
Rufus King	Senate	Support
Elbridge Gerry*	House	Support
Caleb Strong*	Senate	Support
New Hampshire		
John Langdon	Senate	Support
Nicholas Gilman	House	Support
New Jersey		
William Livingston		
David Brearly (Brearley)		
William Paterson (Patterson)		
Jonathan Dayton		
William C. Houston*		
New York		
Alexander Hamilton	Treasury Secretary	Support
John Lansing, Jr.*		
Robert Yates*		

North Carolina		
William Blount		
Richard Dobbs Spaight		
Hugh Williamson	House	Opposed
William R. Davie*		
Alexander Martin*		
Pennsylvania		
Benjamin Franklin		
Thomas Mifflin		
Robert Morris	Senate	Support
George Clymer	House	Support
Thomas Fitzsimons	House	Support
Jared Ingersoll		
James Wilson		
Gouverneur Morris		
South Carolina		
John Rutledge		
Charles Cotesworth Pinckney		
Charles Pinckney		
Pierce Butler	Senate	Opposed

Rhode Island		
Rhode Island did not send delegates to the Constitutional Convention.		
Virginia		
John Blair		
James Madison Jr.	House	Opposed
George Washington	President	Supported
George Mason*		
James McClurg*		
Edmund J. Randolph*	Attorney General	Opposed
George Wythe*		

There were fifty-five "framers" or delegates that attended the Constitutional Convention, of which thirty-eight actually signed the document. Those marked with an asterisk did not sign the Constitution. Of the framers, twenty-one had a chance to directly weigh in on the question of the Bank of the United States, eighteen as members of the House or Senate, and three in the administration. Of those twenty-one, six clearly opposed the Bank, and by implication the more expansive idea of the powers of the national government, but fifteen supported the Bank, and by implication a broader view of the powers of the national government under the Constitution.