

Alexander Hamilton, Opinion on the Constitutionality of the Bank (1791)

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

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

In entering upon the argument it ought to be premised, that the objections of the Secretary of State and Attorney General are founded on a general denial of the authority of the United States to erect corporations. The latter indeed expressly admits, that if there be anything in the bill which is not warranted by the constitution, it is the clause of incorporation.

Now it appears to the Secretary of the Treasury, that this general principle is inherent in the very definition of Government and essential to every step of the progress to be made by that of the United States, namely--that every power vested in a Government is in its nature sovereign, and includes by force of the term, a right to employ all the means requisite, and fairly applicable to the attainment of the ends of such power; and which are not precluded by restrictions and exceptions specified in the constitution, or not immoral, or not contrary to the essential ends of political society.

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

The circumstances that the powers of sovereignty are in this country divided between the National and State Governments, does not afford the distinction required. It does not follow from this, that each of the portions of powers delegated to the one or to the other is not sovereign with regard to its proper objects. It will only follow from it, that each has sovereign power as to certain things, and not as to other things. To deny that the Government of the United States has sovereign power as to its declared purposes and trusts, because its power does not extend to all cases, would be equally to deny, that the State Governments have sovereign power in any case; because their power does not extend to every case. The tenth

section of the first article of the constitution exhibits a long list of very important things which they may not do. And thus the United States would furnish the singular spectacle of a political society without sovereignty, or of a people governed without government.

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

This general and indisputable principle puts at once an end to the abstract question. Whether the United States have power to erect a corporation? That is to say, to give a legal or artificial capacity to one or more persons, distinct from the natural. For it is unquestionably incident to sovereign power to erect corporations, and consequently to that of the United States, in relation to the objects entrusted to the management of the government. The difference is this-- where the authority of the government is general, it can create corporations in all cases; where it is confined to certain branches of legislation, it can create corporations only in those cases.

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

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

The first of these arguments is, that the foundation of the constitution is laid on this ground "that all powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States or to the people," whence it is meant to be inferred, that congress can in no case exercise any power not included in those enumerated in the constitution. And it is affirmed that the power of erecting a corporation is not included in any of the enumerated powers.

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

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

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

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

Then it follows, that as a power of erecting a corporation may as well be implied as any other thing; it may as well be employed as an instrument or means of carrying into execution any of the specified powers, as any other instrument or mean whatever. The only question must be, in this as in every other case, whether the mean to be employed, or in this instance the corporation to be erected, has a natural relation to any of the acknowledged objects or lawful ends of the government. Thus a corporation may not be erected by congress, for superintending the police of the city of Philadelphia because they are not authorized to regulate the police of that city; but one may be erected in relation to the collection of taxes, or to the trade with foreign countries, or to the trade between the States, or with the Indian Tribes, because it is the province of the federal government to regulate those objects and because it is incident to a general sovereign or legislative power to regulate a thing, to employ all the means which relate to its regulation to the best and greatest advantage.

A strange fallacy seems to have crept into the manner of thinking and reasoning upon this subject. Imagination appears to have been unusually busy concerning it. An incorporation seems to have been regarded as some great, independent, substantive thing--as a political end of peculiar magnitude and moment; whereas it is truly to be considered as a quality, capacity, or means to an end. Thus a mercantile company is formed with a certain capital for the purpose of carrying on a particular branch of business. Here the business to be prosecuted is the end; the association in order to form the requisite capital is the primary mean. Suppose than an incorporation were added to this; it would only be to add a new quality to that association; to give it an artificial capacity by which it would be enabled to prosecute the business with more safety and convenience.

That the importance of the power of incorporation has been exaggerated, leading to erroneous conclusions, will further appear from tracing it to its origin. The roman law is the source of it, according to which a voluntary association of individuals at any time or for any purpose was

capable of producing it. In England, whence our notions of it are immediately borrowed, it forms a part of the executive authority, and the exercise of it has been often delegated by that authority. Whence therefore the ground of the supposition, that it lies beyond the reach of all those very important portions of sovereign power, legislative as well as executive, which belong to the government of the United States?

To this mode of reasoning respecting the right of employing all the means requisite to the execution of the specified powers of the Government, it is objected that none but necessary and proper means are to be employed, and the Secretary of State maintains, that no means are to be considered as necessary, but those without which the grant of the power would be nugatory. Nay so far does he go in his restrictive interpretation of the word, as even to make the case of necessity which shall warrant the constitutional exercise of the power to depend on casual and temporary circumstances; an idea which alone refutes the construction. The expediency of exercising a particular power, at a particular time, must indeed depend on circumstances; but the constitutional right of exercising it must be uniform and invariable--the same today as to morrow.

All the arguments therefore against the constitutionality of the bill derived from the accidental existence of certain State banks--institutions which happen to exist today, and, for ought that concerns the government of the United States, may disappear tomorrow, must not only be rejected as fallacious, but must be viewed as demonstrative, that there is a radical source of error in the reasoning.

It is essential to the being of the National government, that so erroneous a conception of the meaning of the word necessary, should be exploded.

It is certain, that neither the grammatical nor popular sense of the term requires that construction. According to both, necessary often means no more than needful, requisite, incidental, useful, or conducive to. It is a common mode of expression to say, that it is necessary for a government or a person to do this or that thing, when nothing more is intended or understood, than that the interests of the government or person require, or will be promoted, by the doing of this or that thing. The imagination can be at no loss for exemplifications of the use of the word in this sense.

And it is the true one in which it is to be understood as used in the constitution. The whole turn of the clause containing it indicates, that it was the intent of the convention, by that clause to give a liberal latitude to the exercise of the specified powers. The expressions have peculiar comprehensiveness. They are, "to make all laws, necessary and proper for carrying into execution the foregoing powers and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof." To understand the word as the Secretary of State does, would be to depart from its obvious and popular sense, and to give it a restrictive operation; an idea never before entertained. It would be to give it the same force as if the word absolutely or indispensably had been prefixed to it.

Such a construction would beget endless uncertainty and embarrassment. The cases must be palpable and extreme in which it could be pronounced with certainty that a measure was absolutely necessary, or one without which the exercise of a given power would be nugatory. There are few measures of any government, which would stand so severe a test. To insist upon it, would be to make the criterion of the exercise of any implied power a case of extreme necessity; which is rather a rule to justify the overleaping of the bounds of constitutional authority, than to govern the ordinary exercise of it.

It may be truly said of every government, as well as of that of the United States, that it has only a right, to pass such laws as are necessary and proper to accomplish the objects entrusted to it. For no government has a right to do merely what it pleases. Hence by a process of reasoning similar to that of the Secretary of State, it might be proved, that neither of the State governments has the right to incorporate a bank. It might be shown, that all the public business of the State, could be performed without a bank, and inferring thence that it was unnecessary it might be argued that it could not be done, because it is against the rule which has been just mentioned. A like mode of reasoning would prove, that there was no power to incorporate the Inhabitants of a town, with a view to a more perfect police. For it is certain, that an incorporation may be dispensed with, though it is better to have one. It is to be remembered that there is no express power in any State constitution to erect corporations.

The degree in which a measure is necessary, can never be a test of the legal right to adopt it. That must be a matter of opinion; and can only be a test of expediency. The relation between the measure and the end, between the nature of the mean employed towards the execution of a power and the object of that power, must be the criterion of constitutionality not the more or less of necessity or utility.

The practice of the government is against the rule of construction advocated by the Secretary of State. Of this the act concerning light houses, beacons, buoys and public piers, is a decisive example. This doubtless must be referred to the power of regulating trade, and is fairly relative to it. But it cannot be affirmed, that the exercise of that power, in this instance, was strictly necessary, or that the power itself would be nugatory without that of regulating establishments of this nature.

This restrictive interpretation of the word necessary is also contrary to this sound maxim of construction; namely, that the powers contained in a constitution of government, especially those which concern the general administration of the affairs of a country, its finances, trade, defence etc. ought to be construed liberally, in advancement of the public good. This rule does not depend on the particular form of a government or on the particular demarcation of the boundaries of its powers, but on the nature and objects of government itself. The means by which national exigencies are to be provided for, national inconveniences obviated, national prosperity promoted, are of such infinite variety, extent and complexity that there must, of necessity be great latitude of discretion in the selection and application of those means. Hence consequently, the necessity and propriety of exercising the authorities entrusted to a government on principles of liberal construction.

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

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

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

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

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

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

But the doctrine which is contended for is not chargeable with the consequence imputed to it. It does not affirm that the National government is sovereign in all respects, but that it is sovereign to a certain extent: that is, to the extent of the objects of its specified powers.

It leaves therefore a criterion of what is constitutional, and of what is not so. This criterion is the end, to which the measure relates as a mean. If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution--it may safely be deemed to come within the compass of the national authority. There is also this further criterion which may materially assist the decision: Does the proposed measure abridge a pre-existing right of any State, or of any individual? If it does not, there is a strong presumption in favour of its constitutionality; and slighter relations to any declared object of the constitution may be permitted to turn the scale.