

To George Washington from Thomas Jefferson, 15 February 1791

From Thomas Jefferson

Feb. 15. 1791.

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

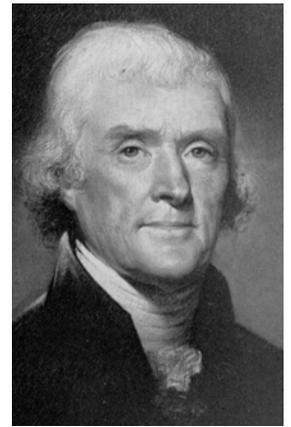
1. to form the subscribers into a Corporation.
2. to enable them, in their corporate capacities to receive grants of land; and so far is against the laws of *Mortmain*. though the constitution controuls the laws of *Mortmain* so far as to permit Congress itself to hold lands for certain purposes, yet not so far as to permit them to communicate a similar right to other corporate bodies.
3. to make *alien* subscribers capable of holding lands, & so far is against the laws of *Alienage*.
4. to transmit these lands, on the death of a proprietor, to a certain line of successors: & so far changes the course of *Descents*.
5. to put the lands out of the reach of forfeiture or escheat: & so far is against the laws of *Forfeiture & Escheat*.
6. to transmit personal chattels to successors in a certain line: & so far is against the laws of *Distribution*.
7. to give them the sole & exclusive right of banking under the national authority: & so far is against the laws of *Monopoly*.
8. to communicate to them a power to make laws paramount to the laws of the states: for so they must be construed, to protect the institution from the controul of the state legislatures; & so, probably they will be construed.

I consider the foundation of the Constitution as laid on this ground that “all powers not delegated to the U.S. by the Constitution, nor prohibited by it to the states, are reserved to the states or to the people” (XIIth Amendmt) to take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless feild of power, no longer susceptible of any definition.

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

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

1. a power to *lay taxes* for the purpose of paying the debts of the U.S. but no debt is paid by this bill, nor any tax laid. were it a bill to raise money, it's origination in the Senate would condemn it by the constitution.
2. “to borrow money.” but this bill neither borrows money, nor ensures the borrowing it. the proprietors of the bank will be just as free as any other money holders to lend or not to lend their money to the public. the operation, proposed in the bill, first to lend them two millions, & then borrow them back again, cannot change the nature of the latter act, which will still be a payment, & not a loan, call it by what name you please.
3. “to regulate commerce with foreign nations, & among the states, & with the Indian tribes.” to erect a bank, & to regulate commerce, are very different acts. he who erects a bank creates a subject of commerce in it's bills: so does he who makes a bushel of wheat, or digs a dollar out of the mines. yet neither of these persons regulates commerce thereby. to erect a thing which may be bought & sold, is not to prescribe regulations for buying & selling. besides; if this was an exercise of the power of regulating commerce, it would be void, as extending as much to the internal commerce of every state, as to it's external. for the power given to Congress by the Constitution, does not extend to the internal regulation of the commerce of a state (that is to say of the commerce between citizen & citizen) which remains exclusively with it's own legislature; but to it's external commerce only, that is to say, it's commerce with another state, or with foreign nations or with the Indian tribes.



accordingly the bill does not propose the measure as a “regulation of trade”, but as “productive of considerable advantage to trade”.

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

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

1. “to lay taxes to provide for the general welfare of the U.S.” that is to say “to lay taxes *for the purpose of* providing for the general welfare.” for the laying of taxes is the *power* and the general welfare the purpose for which the power is to be exercised. they are not to lay taxes ad libitum *for any purpose they please* but only to pay the debts *or provide for the welfare of the Union*. in like manner they are not *to do anything they please* to provide for the general welfare, but only *to lay taxes* for that purpose. to consider the latter phrase, not as describing the purpose of the first, but as giving a distinct & independent power to do any act they please, which might be for the good of the Union, would render all the preceding & subsequent enumerations of power completely useless. it would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the U.S. and as they would be the sole judges of the good or evil, it would be also a power to do whatever evil they pleased. it is an established rule of construction, where a phrase will bear either of two meanings, to give it that which will allow some meaning to the other parts of the instrument, & not that which would render all the others useless. certainly no such universal power was meant to be given them. it was intended to lace them up straitly within the enumerated powers, and those without which as means, these powers could not be carried into effect. it is known that the very power now proposed *as a means*, was rejected *as an end*, by the Convention which formed the constitution. a proposition was made to them to authorize Congress to open canals, & an amendatory one to empower them to incorporate. but the whole was rejected, & one of the reasons of rejection urged in debate was that then they would have a power to erect a bank, which would render the great cities, where there were prejudices & jealousies on that subject adverse to the reception of the constitution.

2. the second general phrase is “to make all laws *necessary* & proper for carrying into execution the enumerated powers.” but they can all be carried into execution without a bank. a bank therefore is not *necessary*, and consequently not authorised by this phrase.

It has been much urged that a bank will give great facility, or convenience in the collection of taxes. suppose this were true: yet the constitution allows only the means which are “necessary” not those which are merely “convenient” for effecting the enumerated powers. if such a latitude of construction be allowed to this phrase as to gain any non-enumerated power, it will go to every one, for there is no one which ingenuity may not torture into a *convenience, in some way or other, to some one* of so long a list of enumerated powers. it would swallow up all the delegated powers, and reduce the whole to one phrase as before observed. therefore it was that the constitution restrained them to the *necessary* means, that is to say, to those means without which the grant of the power would be nugatory.

But let us examine this *convenience* & see what it is. the report on this subject, page 3. states the only *general* convenience to be the preventing the transportation & re-transportation of money between the states & the treasury. (for I pass over the increase of circulating medium ascribed to it as a merit, and which, according to my ideas of paper money is clearly a demerit.) Every state will have to pay a sum of tax-money into the treasury: & the treasury will have to pay, in every state, a part of the interest on the public debt, & salaries to the officers of government resident in that state. in most of the states there will still be a surplus of tax-money to come up to the seat of government for the officers residing there. the payments of interest & salary in each state may be made by treasury-orders on the state collector. this will take up the greater part of the money he has collected in his state, & consequently prevent the great mass of it from being drawn out of the state. if there be a balance of commerce in favour of that state against the one in which the government resides, the surplus of taxes will be remitted by the bills of exchange drawn for that commercial balance. and so it must be if there was a bank. but if there be no balance of commerce, either direct or circuitous, all the banks in the world could not bring up the surplus of taxes but in the form of money. Treasury orders then & bills of exchange may prevent

the displacement of the main mass of the money collected, without the aid of any bank: & where these fail, it cannot be prevented even with that aid.

Perhaps indeed bank bills may be a more *convenient* vehicle than treasury orders, but a little *difference* in the degree of *convenience*, cannot constitute the necessity which the constitution makes the ground for assuming any non-enumerated power.

Besides; the existing banks will without a doubt, enter into arrangements for lending their agency: & the more favourable, as there will be a competition among them for it: whereas the bill delivers us up bound to the national bank, who are free to refuse all arrangement, but on their own terms, & the public not free, on such refusal, to employ any other bank. that of Philadelphia, I believe, now does this business, by their post-notes, which by an arrangement with the treasury, are paid by any state collector to whom they are presented. this expedient alone suffices to prevent the existence of that *necessity* which may justify the assumption of a non-enumerated power as a means for carrying into effect an enumerated one. the thing may be done, and has been done, & well done without this assumption; therefore it does not stand on that degree of *necessity* which can honestly justify it.

It may be said that a bank, whose bills would have a currency all over the states, would be more convenient than one whose currency is limited to a single state. so it would be still more convenient that there should be a bank whose bills should have a currency all over the world. but it does not follow from this superior conveniency that there exists any where a power to establish such a bank; or that the world may not go on very well without it.

Can it be thought that the Constitution intended that for a shade or two of *convenience*, more or less, Congress should be authorised to break down the most antient & fundamental laws of the several states, such as those against Mortmain, the laws of alienage, the rules of descent, the acts of distribution, the law of escheat & forfeiture, the laws of monopoly? nothing but a necessity invincible by any other means, can justify such a prostration of laws which constitute the pillars of our whole system of jurisprudence. will Congress be too strait-laced to carry the constitution into honest effect, unless they may pass over the foundation-laws of the state-governments for the slightest convenience to theirs?

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

It must be added however, that unless the President's mind on a view of every thing which is urged for & against this bill, is tolerably clear that it is unauthorised by the constitution. if the pro and the con hang so even as to balance his judgment, a just respect for the wisdom of the legislature would naturally decide the balance in favour of their opinion. it is chiefly for cases where they are clearly misled by error, ambition, or interest, that the constitution has placed a check in the negative of the President.

Th: Jefferson

Note:

GW solicited TJ's opinion on the constitutionality of the bank bill after receiving the opinion of Edmund Randolph. It seems likely that Jefferson enclosed a copy of one of Madison's speeches against the bill with his own opinion. Madison had spoken at length against the bill in the House of Representatives on 2 and 8 Feb. 1791, but only the former speech had been printed fully in newspapers by this date, in the *General Advertiser* [Philadelphia] on 7 Feb. 1791 and reprinted in the *Federal Gazette* [Philadelphia] on 12 Feb. 1791. GW referred the opinions of Randolph and Jefferson to Hamilton on 16 Feb. 1791.

The above info. is provided by The University of Virginia.