foederal government depended for its adoption in this Commonwealth. But this injudicious act not only deserves the censure of the General Assembly, because it is not warranted by the constitution of the United States, but because it is repugnant to an express provision of that constitution; this provision is "That all debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution as under the confederation," which amounts to a constitutional ratification of the contracts respecting the state debts in the situation in which they existed under the confederation, and resorting to that standard there can be no doubt that in the present question the rights of states as contracting with the United States must be considered as sacred.

The General Assembly of the Commonwealth of Virginia confide so fully in the justice and wisdom of Congress upon the present occasion, as to hope that they will revise and amend the aforesaid act generally, and repeal in particular, so much of it as relates to the assumption of the state debts.

December the 23d., 1790. Agreed to by the Senate.

93. HAMILTON'S OPINION ON THE CONSTITUTIONALITY OF THE BANK

February 23, 1791

(*The Works of Alexander Hamilton*, ed. by J. C. Hamilton, Vol. IV, p. 104 ff.)

December 14, 1790, Hamilton presented to Congress his plan for the establishment of a national bank. A bill embodying most of the features of Hamilton's plan passed Congress February 8, 1791. Washington, doubtful of the constitutionality of the measure, requested Hamilton, Jefferson, and Randolph to submit written opinions on this question. For Jefferson's opinion, see Doc. No. 94. Randolph submitted two opinions, one adverse, one ambiguous. Hamilton's opinion is one of the ablest of his papers: it contained the substance of the argument subsequently adopted by Marshall in his decision in the case of *Mc Culloch* v. *Maryland*. Washington accepted Hamilton's argument, and signed the bill, February 25. On the First Bank, see, M. St. C. Clarke and D. A. Hall, *Legislative and Documentary History of the Bank of the United States;* W. G. Sumner, *History of Banking in the United States,* Vol. I.

. . . In entering upon the argument it ought to be premised that the objections of the Secretary of State and the 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. . . .

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*, were sovereign, there is a clause of the 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, . . . shall be the *supreme law of the land*. The power which can create a *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* intrusted 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. . . .

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 be rather 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. . . .

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 *mean* 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. . . .

Through 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*. . . .

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*. . . . 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. . . .

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*. . . .

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 &c., ought to be construed liberally in advancement of the public good. . . . 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 intrusted to a government on principles of liberal construction. . . .

But the doctrine which is contended for is not chargeable with the consequences 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 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 favor of its constitutionality, and slighter relations to any declared object of the Constitution may be permitted to turn the scale. . . .

It is presumed to have been satisfactorily shown in the course of the preceding observations:

1. That the power of the government, *as* to the objects intrusted to its management, is, in its nature, sovereign.
2. That the right of erecting corporations is one inherent in, and inseparable from, the idea of sovereign power.
3. That the position, that the government of the United States can exercise no power but such as is delegated to it by its Constitution, does not militate against this principle.
4. That the word *necessary*, in the general clause, can have no *restrictive* operation derogating from the force of this principle; indeed, that the degree in which a measure is or is not *necessary*, cannot be a *test* of *constitutional right*, but of *expediency only*.
5. That 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.
6. That the principle in question does not extend the power of the government beyond the prescribed limits, because it only affirms a power to *incorporate* for purposes *within the sphere* of the *specified powers*.

And lastly, that the right to exercise such a power in certain cases is unequivocally granted in the most *positive* and *comprehensive* terms. . . .

A hope is entertained that it has, by this time, been made to appear, to the satisfaction of the President, that a bank has a natural relation to the power of collecting taxes—to that of regulating trade—to that of providing for the common defence—and that, as the bill under consideration contemplates the government in the light of a joint proprietor of the stock of the bank, it brings the case within the provision of the clause of the Constitution which immediately respects the property of the United States.

Under a conviction that such a relation subsists, the Secretary of the Treasury, with all deference, conceives, that it will result as a necessary consequence from the position, that all the specified powers of government are sovereign, as to the proper objects; that the incorporation of a bank is a constitutional measure; and that the objections taken to the bill, in this respect, are ill-founded. . . .

94. JEFFERSON'S OPINION ON THE CONSTITUTIONALITY OF THE BANK
February 15, 1791

(*The Writings of Thomas Jefferson*, ed. by H. E. Bergh, Vol. III, p. 145 ff.)

The bill for establishing a national bank, in 1791, undertakes, among other things,—

1. To form the subscribers into a corporation.
2. To enable them, in their corporate capacities, to receive grants of lands; and, so far, is against the laws of *mortmain*.
3. To make *alien* subscribers capable of holding lands; and 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; and so far, changes the course of *descents*.
5. To put the lands out of the reach of forfeiture, or escheat; and so far, is against the laws of *forfeiture* and *escheat*.
6. To transmit personal chattels to successors, in a certain line; and so far, is against the laws of *distribution*.
7. To give them the sole and exclusive right of banking, under the national authority; and, so far, is against the laws of *monopoly*.
8. To communicate to them a power to make laws, paramount to the laws of the states; for so they must be construed, to protect the institution from the control of the state legislatures; and so probably they will be construed.

I consider the foundation of the Constitution as laid on this ground—that *all powers not delegated to the United States, by the Constitution, nor prohibited by it to the states, are reserved to the states, or to the people* (12th amend.). To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.

The incorporation of a bank, and the powers assumed by this bill, have not, in my opinion, been delegated to the United States 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 United States. But no debt is paid by this bill, nor any tax laid. Were it a bill to raise money, its organization in the Senate would condemn it by the Constitution.
2. To "borrow money". But this bill neither borrows money nor insures the borrowing of 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, and then borrow them back again, cannot change the nature of the latter act, which will still be a payment, and not a loan, call it by what name you please.
3. "To regulate commerce with foreign nations, and among the states, and with the Indian tribes." To erect a bank, and to regulate commerce, are very different acts. 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. To make a thing which may be bought and sold, is not to prescribe regulations for buying and selling. Besides, if this were an exercise of the power of regulating commerce, it would be void, as extending as much to the internal commerce of every state, as it is external. For the power given to Congress by the Constitution does not extend to the internal regulation of the commerce of a state . . . which remains exclusively with its own legislature; but to its external commerce only, that is to say, its commerce with another state, or with foreign nations, or with the Indian tribes. 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 United States;" 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. Congress 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 and independent power to do any act they please which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole instrument to a single phrase—that of instituting a Congress with power to do whatever would be for the good of the 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 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, and not that which will 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, and an amendatory one to empower them to incorporate. But the whole was rejected; and one of the reasons of objection urged in debate was, that they then would have a power to erect a bank, which would render great cities, where there were prejudices and jealousies on that subject, adverse to the reception of the Constitution.

2. The second general phrase is, "to make all laws *necessary* and proper for carrying into execution the enumerated powers." But they can all be carried into execution without a bank. A bank, therefore, is not *necessary,* and consequently not authorized by this phrase.

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

Perhaps 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. . . .

Can it be thought that the Constitution intended that, for a shade or two of *convenience,* more or less, Congress should be authorized to break down the most ancient and fundamental laws of the several states such as those against mortmain, the laws of alienage, the rules of descent, the acts of distribution, the laws of escheat and forfeiture, and the laws of monopoly.

Nothing but a necessity invincible by 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 and state legislatures.* The present is the case of a right remaining exclusively with the states, and is, consequently, one of those intended by the Constitution to be placed under his protection.

It must be added, however, that, unless the President's mind, on a view of everything which is urged for and against this bill, is tolerably clear that it is unauthorized by the Constitution, if the *pro* and the *con* hang so evenly as to balance his judgment, a just respect for the wisdom of the legislature would naturally decide the balance in favor 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.

95. CHISHOLM v. GEORGIA
2 Dallas, 419
1793

This is probably the most important of the early cases which came before the Supreme Court, and in the decision of the Court can be found a foreshadowing of the nationalism enunciated by Marshall a decade later. The case of *Chisholm* v. *Georgia* arose out of the effort of Chisholm and others, citizens of South Carolina and executors of the estate of an English creditor, to secure compensation from Georgia for property confiscated during the Revolution. The Constitution of the United States provided, Art. III. Sec. 2, that the judicial power of the United States should extend to controversies between States and between a State and the citizens of another State. Under this provision, could a citizen sue a State in the Federal Courts? That this clause authorized such suits against States was denied by Hamilton in the *Federalist,* and by Madison in the debates in the Virginia ratifying Convention. "It is not," said Madison, "in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court." (Elliot's *Debates,* 1861 ed. Vol. III, p. 533.) Yet in this case, the Supreme Court upheld the right of Chisholm to sue Georgia in the Supreme Court. Georgia refused to appear before the Court, denied the validity of the judgement, and threatened to punish by death any official who should attempt to execute the decree of the court. Other states also protested, and shortly after the decision an amendment was introduced which deprived the federal courts of jurisdiction in cases against one of the States by citizens of another State. This, the eleventh amendment, was ratified January 8, 1798. See C. Warren, *The Supreme Court in United States History,* 1928 ed. Vol. I, ch. ii; L. B. Boudin, *Government by Judiciary,* Vol. I, ch. vii; H. L. Carson, *The Supreme Court;* G. J. Mc Ree, *James Iredell,* Vol. II; U. B. Phillips, "Georgia and State Rights," American Hist. Assoc. *Reports,* 1901, Vol. II.

WILSON, J. This is a case of uncommon magnitude. One of the parties to it is a State, certainly respectable, claiming to be sovereign. The question to be determined is, whether this State, so respectable and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others, more important still; and may perhaps, be ultimately resolved into one, no less radical than this—"Do the People of the United States form a nation?". . .

To the Constitution of the United States the term sovereignty is totally unknown. There is but one place where it could have been used with propriety. But even in that place it would not, perhaps, have comported with the delicacy of those who ordained and established that Constitution. They might have announced themselves sovereign people of the United States; but serenely conscious of the fact, they avoided the ostentatious declaration. . . .

III. I am, thirdly, and chiefly, to examine the important question now before us, by the Constitution of the United States, and the legitimate result of that valuable instrument. Under this view, the question is naturally subdivided into two others. 1. Could the Constitution of the United States vest a jurisdiction over the State of Georgia? 2. Has the Constitution vested such jurisdiction in this Court? I have already remarked, that in the practice, and even in the science of politics, there has been frequently a strong current against the natural order of things; and an inconsiderate or an interested disposition to sacrifice the end to the means. This remark deserves a more particular illustration. Even in almost every nation, which has been denominated free, the state has assumed a supercilious preëminence above the people, who have formed it: Hence the haughty notions of state independence, state sovereignty, and state supremacy. . . .

In the United States and in the several States which compose the Union, we go not so far: but still we go one step farther than we ought to go in this unnatural and inverted order of things. The states rather than the People for whose sakes the states exist, are frequently the objects which attract and arrest our principal attention. This, I believe, has produced much of the confusion and perplexity, which have appeared in several proceedings and several publications on state-politics, and on the politics, too, of the United States. Sentiments and expressions of this inaccurate kind prevail in our common, even in our convivial, language. . . . A State, I cheerfully admit, is the noblest work of Man: But, Man, himself, free and honest, is, I speak as to this world, the noblest work of God. . . .

With the strictest propriety, therefore, classical and political, our national scene opens with the most magnificent object which the nation could present: "The People of the United States" are the first personages