

## JUDGE CLAYTON'S REVIEW

*Of the Report of the Committee of Ways and Means, to whom was referred so much of the Message of the President, as relates to the Bank of the United States, which report was, in the House of Representatives of the U. States, read and laid on the table, April 13, 1830.*

### NO. IV.

We are aware that the express rejection, by the convention, of the proposition to vest Congress with the power of "granting charters of incorporation," is evaded by the disingenuous suggestion that such a power was unnecessary, in as much as they had conferred the right to make all laws *necessary & proper* to carry the other powers into effect. This argument is as artful as it is unsound and highly reproachful to the intelligence if not the integrity of the convention. It is now confessed, by the report itself, that corporations may have a two-fold agency, that when the effect is "without reference to the objects entrusted to the jurisdiction of the government," then Congress has no power to create them, but when it has, they may. Can it be for one moment supposed that this distinction never occurred to such men as Madison, Hamilton, Adams, Franklin and the other profound sages of the Convention? Was it a keen stroke of discernment reserved for the more discriminating sagacity of after Statesmen? If the worthies of the Convention did not perceive it, they are not entitled to that boasted fame that has so wonderfully brightened and exalted their names. If they did, they were faithless to their trust, because every consideration of honor, justice and fidelity, admonished them to leave nothing in doubt. They were erecting a government of specified and limited powers, and all the feelings of the nation, warmed by an ardent and mercurial jealousy, continually cried aloud to take nothing more than was absolutely necessary, and to let that be expressed in a language so plain that a way-faring man, though a fool, might not err therein."

Would these men, under such an obligation to be vigilant, suffer such an instrument as a *corporation*, one that stood so intimately connected with some of the most momentous, not to say disastrous events of Europe, pass away from their explicit mention, to be used as an *incidental* power, possessing too a doubtful, because a double character, one innocent and the other not. The thing is impossible! But we have shewn, if records prove any thing, that they did not. That they did understand what they were about. What more could they do? The question is proposed to give to Congress the power of granting charters *generally*. It is thoroughly weighed, as every thing in that body was, and *positively* rejected. For this obvious reason, that such an unlimited power would have taken away from the States the jurisdiction of all the objects, and they are, as every one knows, very numerous, in which corporations are employed. Does not every one perceive this? And why do we know that this was the reason that actuated the Convention? Listen to the next proposition on the same subject, to wit. "to grant charters of incorporation, *in cases* where the PUBLIC GOOD may require them, and the authority of a single State may be incompe-

tent." Who does not see the reasoning on this last proposition as connected with the first? If, said the advocates of large powers, you are afraid that the grant of the power generally, will take from the States the right to incorporate cities, towns, seminaries of learning, navigation and turnpike companies, and many other objects peculiarly belonging to municipal regulation, you can have no possible objection to grant to Congress the power *specially* in such cases as the public good may require, and where a single State is unable to do it. No! was the reply, we will not grant it *even in this shape*. There is more in it than meets the eye. Corporations are dangerous things, at least, so says the warning voice of our mother country! And this peculiar, and we will add, wise caution manifested itself on all the subjects connected with corporations. Did they not thrice refuse to charter a University; to "establish seminaries for the promotion of literature and the arts and sciences;" to "grant letters of incorporation for canals, &c.?" They surely did not reject these propositions because they might be used as incidental powers, and in what do they differ from the other, but in the fact that they were much more useful to the public, because *exclusively* of a public nature? We are well apprised it is becoming very fashionable, to consider these as implied powers, and it requires no prophetic vision to shadow out the uses to which, in that character, they will, sooner or later, be applied. Under the head-long tendencies of the government, they and every thing else that Congress chooses, will be held & taken as incidental powers.

But much reliance is placed upon the opinion of men, great men! (by the by a bad sentiment for republics.) As we intimated before, if the evidence of men is good, records are better, and we have fully supplied them. But we have men, great men! also.

Who were more conspicuous in the Convention than Edmund Randolph and James Madison? The former proposed, among three others, the basis of the Constitution that was accepted, and yet he and Mr. Jefferson, who composed part of the Cabinet of President Washington, declared in their opinion, the charter of the Bank of '91 was unconstitutional. That was also Mr. Madison's opinion until unfortunately yielding to the force of great names, he seems, either in diffidence of himself, or respect for the better judgment of others, to have surrendered all his early opinions at discretion. And this proves, among very many other wholesome truths, how dangerous it is to take great names for argument. Besides the illustrious personages above cited, we have the no small weight of the names of Mr. Giles and the venerable Clinton, the last of whom immortalized himself by his vote on this very question, and as an act of moral heroism, has proudly elevated it far above all others in the political history of this country, where it must forever stand, an enduring trophy of firmness, to the admiration, if not to the envy of the world.

No one is entitled to more real confidence for the soundness of his judgment and the still higher purity of his motives than General Washington; but General Washington was a man and not exempt from his liability to err, as he himself most affectingly declared in his farewell address. And an additional fact, remarkable as it may appear, establishes this truth. In a few years after the adoption of the Constitution he recommended the establishment of a University! Now with the evidence submitted, does any one wonder at his opinion on the Bank question, especially as that is said by the committee to be "doubtful."

As to Mr. Clay's change of opinion, there are some curious facts connected with his political career that every body should know, because every body is concerned in it, if they have any concern for the duration of the Union. When the federal constitution was under discussion, there was an unusual, nay, fearful excitement throughout the Union.—The great and absorbing dread was that the States would be swallowed up by the confederacy, and after the instrument was adopted, some of the most devoted patriots, at the head of whom were Samuel Adams of the North, and Patrick Henry and Richard Henry Lee of the South, conscientiously believed that the powers conferred on the general government were subversive of the best interests of the States, and so they warned the people with all the powers of their great minds. Their warnings (how prophetic) created a spirit of unflinching watchfulness, over the new government, which went into operation under the most torturing apprehension, that it would reach out its vigorous and withering arm to blight the then growing but tender prospects of the States. All professed to be, and perhaps were, friends to the Union, some however were greater to the States, because those were governments with which they were well acquainted, the other was untried, and they well knew a man must do well at home, or he may fare ill abroad. It was well known that the Union could do no good if the States were laid in chains. These last were styled *Republicans*, and those who were, not so much for the Union, as they were for larger powers to the Union, were called *Federalists*. The first bank was wholly a creature of the latter, and so continued from that day down, with some honorable exceptions. This measure Messrs. Jefferson, Randolph, Madison, Giles, Clinton, and a number of others, who belonged to the centinels of State rights, believed to be the entering wedge of a construction of the constitution that would eventually let in such a host of powers, as must finally lay waste the trembling hopes of the States. If the doctrine of incidental powers would authorize such an institution, they conceive that this first would be the last, because mortal blow to the liberties of the country, for if this was a rightful exercise of power any could be, and the field of opposition from that day, might be considered as conquered and cleared by the weakest antagonist on the roll of constructive combatants. And such has been awfully the fact. Every day realizes some fresh instance of this growing encroachment. This very bank has been the opening of a sluice that is uprooting all the flourishing growth of State prosperity, and, leaving a putrescent deposit, sends forth a pestilence that blasts the remaining verdure spared from the ravages of the flood. Through this opening has entered the "American System," and in this system, with all its out-stretchings after high office, way be found the reason for the boasted change of Mr. Clay, and, it might be added, of Mr. Calhoun.

After having long postponed it, we come now to the examination of those remaining clauses of the constitution, from which it is affirmed the power to charter a bank is clearly drawn; and we hope our readers have

kept in remembrance the position of the committee, that Congress have the right to employ the agency of a corporation to carry into effect "powers expressly conferred."—And it will also be recollected that we left the question pent up within the narrow limits of the 1st, 2d, 3d and 5th clauses of the said 8th section. Now, what is the first? "Congress shall have power to lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defence and general welfare of the United States, but all duties, imposts and excises shall be uniform." &c.—The most obvious question that presents itself is this, if Congress were for the first time to legislate upon this "express power," what kind of a law would they pass? Would it be a bank law? And if it would, would they not mention somewhere in the law the manner in which the taxes, duties, imposts and excises were to be raised and collected, the debts to be paid, the kind of provision for the common defence and general welfare? Does any of this appear in the bank charter? Have they not made provision for all these expressed objects in other well known laws? Now, here is the "express power," and we will admit the charter is the incidental power to carry it into effect, how is it to be done? Recollect, all that is claimed for the implied power is to execute an express power. Suppose we grant all that is wanting in this argument, that a charter is an incidental power and may be legitimately used to carry into effect the above mentioned express power, will it then be contended that it can do more? Will it be pretended that the incidental power shall reach beyond the execution of the express power? Surely that would be strange doctrine. In view of such a principle, incidental powers can do more than express powers, and loosens the constitution from all its bands. Let it but include the express power, and then it is without limits as to its further range. Take an example, the power of taxation is a sovereign power, and belongs alike to the State and General Governments.—Neither can exist without it. The General Government cannot directly deprive the State Governments of this right. It has no express power to authorize such a procedure. But by the use of a charter, called an incidental power, they maintain that they can execute an express power and couple with it a privilege which shall exempt thirty-five millions of private property from taxation, by the States. To be better understood, if an individual were to come from Philadelphia, with thirty-five millions of dollars, either in cash or merchandise, to Georgia, for the purposes of trade, the State would have an undoubted right to tax that capital to any amount she pleases, and Congress could, by no act, directly prevent it. But the bank corporation, only a person in law, sends the same capital from Philadelphia to the same place, to trade on their own private account, behold, it has become a government instrument, and cannot be taxed. Though Congress could not by an express law do this act, it has by an indirect act accomplished the object. Is it not perceived by the use of corporations the whole of the power of taxation may be swept from the States. If it can be done to one extent, it may to another, and ingenuity will not be wanting to apply such instruments whenever it becomes desirable to destroy the right. Can it be necessary and proper to deprive States of sovereign rights merely to carry into effect such a clause as the one above mentioned, much less to execute an inferior power, barely derived from it? And is it believed that such a clause, adhering strictly to its objects may not be executed, without the aid of a privileged order of men, and without conferring upon private persons the most extraordinary rights? What right has Congress in using its own powers to take away the powers of others? We understand that the powers not conferred on the General Government, were "reserved to the States," but of what consequence is such reservation, if all their rights can be taken away by the use of incidental powers. We have shewn one case where a State may lose indeed, has lost an unquestionable sovereign right, under the pretext that it was necessary and proper for carrying into effect a power of the General Government! Now we put this serious question, and it ought to be well pondered, is it contended, under the right to employ incidental powers, that the General Government may divest the States of all their rightful powers if it be necessary and proper, in the opinion of Congress, to carry its own into effect? People of the United States, this is the doctrine of the Federal Government, as solemnly expressed by its Legislative and Judicial departments, in this very Bank question—And carried out and fully sustained in the odious doctrines of Internal Improvement and the protective system. The man who does not shudder over such an idea, is well prepared for any state of things which may happen to this country and the worst condition that may befall it, can never come too soon for such cold blooded indifference.

Congress dare not violate a private right in executing any of its powers and yet, strange to tell, it may violate the rights of that very being from whom it has derived its own being! It can violate the rights of the States.

If we were asked how we would carry the above clause into execution we would reply, precisely in the way Congress has already done, by other well known laws, always with the exception of its doctrines on the subject of the general welfare, and its still later usurpations on the Tariff, a cousin-german of this famous Bank. We would clearly designate the "express power" in the law, make all its provisions correspond with that law, stick close to the letter of the Constitution and follow its obvious dictates. Appoint officers, where officers were necessary, and give them stated and suitable salaries. We would not say here, Stock-holders, take this clause of the Constitution and carry it into effect, and you may speculate upon the community and make all the money you can. We would have no undefined something or nothing on the subject, no secret understandings, no written instrument declaring one thing and meaning another. But say the advocates of the Bank, true, the express power is not mentioned in the Charter, in so many words, but the Bills of the Bank, are "Coin" and you know we can regulate coin! are so handy to be collected and transferred from place to place, so little liable to depreciation, will regulate the currency of the whole country, these are incidental to the collection and disbursement of the public funds, nay, if you think this connection a little far fetched, they will help us to borrow money and that is another express power contained in our 2d clause, and if this won't do they will surely aid in the regulation of Commerce and

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that is another express power to be found in the 3d clause. In some one or all of these, and we mix them all together, not exactly choosing to rely on either alone, we think you will find enough to concede that the Charter is necessary and proper to carry the clause into effect. Now who does not understand in all this this that instead of the Charter's carrying into effect the "powers expressly conferred," to wit, the power "to levy a tax, &c." it is only executing the *inferred* power from this particular grant, viz. the power to transmit money and to regulate the currency, consequently making a corporation *itself*, nothing but an *incidental power*, carry into effect another incidental power. All that was claimed was to suffer an *inferred power* to execute an express power. But to transmit money from place to place, and to regulate the paper currency of the country is not an express power, therefore, an incidental power cannot be employed for that purpose. If this were Constitutional where would be the boundary to legislation in the infinite series of incidental powers. If one incidental power can be used to carry into effect another, it can be equally employed to execute one, inferred from this *second*, and so on *ad infinitum*. If so, away with the ridiculous idea of a limited government. As we hinted before, in the million of inferred powers, which such a doctrine would produce, corporations could and would be used to the utter subversion of all the powers of the States.

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