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Hamiltonian Constitutional Interpretation: In Defense of Energetic and Limited Government

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Abstract

In the struggle to maintain limited government against the continual expansion of federal powers, some conservatives are inclined to dismiss Alexander Hamilton. Hamilton, after all, is said to have favored an excessively broad interpretation of the national government's powers. But the constitutional debates between Jefferson and Hamilton reveal that Hamilton's thinking combines both energetic and limited government. Jeffersonian constitutionalism, by contrast, advocates for narrow national powers that are incompatible with the energetic government the Constitution was designed to realize. Hamilton's contemporary usefulness is found in his ability to harmonize our commitment to limited government with a proper respect for the powers of the national government.

An essential part of contemporary American conservatism's mission is the preservation of the Constitution as a charter of limited government. The Constitution, conservatives emphasize, limits the scope of the national government's powers even as it grants it those powers. That is, conservatives insist that the Constitution's enumeration of powers granted to the national government also indicates an outer limit to those very powers.

This insistence differentiates contemporary conservatism from its main ideological rival, contemporary liberalism or progressivism. Progressives, of course, admit that the Constitution establishes a government of limited powers. They emphasize,

however, the specific limits imposed by constitutional protections for individuals such as are found in the Bill of Rights. They do not tend to emphasize—and they often react with skepticism or hostility to conservative efforts to emphasize—the idea that the enumeration of powers itself confines the national government to a relatively narrow (although important) set of responsibilities.

Progressives tend to view the Constitution as giving the national government well-nigh comprehensive authority to pursue the national common good, limited only by certain specified exceptions. Conservatives tend to view the Constitution as empowering the national government to act in a few well-defined areas while leaving most of the rest of governing to the state governments.¹

Conservatives encounter a difficulty, however, in seeking a principle of limitation in the Constitution's enumeration of powers: These powers are not self-explanatory, and their limits are therefore not self-evident. Conservatives rightly turn to the

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Constitution for limits on the power of the national government, but those limits cannot always be gleaned directly from the constitutional text. To invoke a famous example from the early republic, does the Constitution permit the federal government to charter a bank? The Constitution neither expressly authorizes nor expressly forbids such an institution. As in many other cases, for the enumeration of powers to function as a limit on the powers of the national government, we must resort to constitutional interpretation.

Here we are faced with a question of approach: How, or with what kind of assumptions in mind, should we interpret the Constitution's enumeration of national powers? Conservatism has a ready answer to this question: The Constitution should be interpreted according to the original understanding of its ratifiers. Conservatives rightly reject contemporary liberalism's advocacy of a "living Constitution"—a Constitution that changes its meaning according to the prevailing values of each generation—as incompatible with the rule of law and the maintenance of any stable limits on the government's power. For conservatives, then, the enumeration of powers and the limits it implies should be understood as they were understood by the founding generation.

At this point, we run into another problem: The Founders themselves did not simply agree on how to interpret the scope of the enumerated powers. On this very question, they split conspicuously into two political parties led by two of the most eminent statesmen of the day. Alexander Hamilton led the forces that favored a broad or liberal interpretation of the powers of the national government, while Thomas Jefferson was the champion of those who called for a strict or narrow interpretation of those powers.

In turning to the constitutional enumeration of powers to limit the scope of the national government, conservatives, it seems, must choose between a Hamiltonian constitutionalism and a Jeffersonian constitutionalism.

Jeffersonian constitutionalism would seem to be the more immediately attractive of these options. For today's conservatives, the struggle is the struggle to maintain limited government in the face of a powerful adversary—progressivism—that seeks the continual expansion of the national power. In such a struggle, it would appear that Alexander Hamilton can be of little use. In his own day, he was known much more as an advocate of energetic government than of limited government. As a result, some contemporary conservatives are inclined to dismiss Hamilton as "a big government guy,"² unlike Jefferson, who was nothing if not an ardent enemy of big government.

The Founders split into two political parties led by two of the most eminent statesmen of the day. Alexander Hamilton led the forces that favored a broad interpretation of the powers of the national government, while Thomas Jefferson was the champion of those who called for a strict or narrow interpretation.

First appearances are sometimes deceptive, however, and this is the case in the matter at hand. In the end, despite their initial reservations, contemporary conservatives *can* be guided by Hamiltonian constitutionalism in their understanding of the powers of the national government. By contrast, Jeffersonian constitutionalism, despite its initial attractiveness, is problematic both because it advocates an interpretation of the national power that, while properly limited, is in fact excessively narrow and because it rests on assumptions that undermine the legitimate sovereignty of the national government. Hamilton's approach avoids these pitfalls while still providing

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1. The debate over the Affordable Care Act provides a good illustration of these different tendencies. Liberal proponents of the law tended to assume that the national government must have authority to pursue a national goal like universal health insurance coverage, while conservatives tended to question whether a government program designed to achieve such an end could really be justified under the Commerce Clause of the Constitution.
 2. Quoted in Mike O'Connor, *A Commercial Republic* (Lawrence, KS: University Press of Kansas, 2014), p. 10. For a defense of Hamilton against the charge that he was a proponent of big government, see also Carson Holloway, "Alexander Hamilton and American Progressivism," Heritage Foundation *First Principles Series Report* No. 52, April 20, 2015, <http://www.heritage.org/research/reports/2015/04/alexander-hamilton-and-american-progressivism>.

the materials by which to establish reasonable constitutional limits on the scope of the federal government's authority.

The Meanings of Strict Construction

The hallmark of Jeffersonian constitutionalism is its commitment to “strict construction.” This commitment makes Jefferson at first glance attractive to contemporary conservatives. In fact, however, Jeffersonian strict construction is deeply problematic.

Before turning to that argument, however, it is necessary to clarify exactly what we mean by strict construction. This expression has a variety of meanings, some of which are perfectly unexceptionable. We need to understand these innocent meanings of strict construction in order to understand the true target of the following argument.

In the first place, people sometimes use the term “strict construction” to refer to something like respect for the Constitution and the laws as having an authoritative meaning independent of the personal opinions of judges. This is a somewhat loose sense of the term, one that would probably not be used by most students of constitutional law but that is often used by ordinary citizens and political leaders when they are trying to articulate their opposition to a willful judicial activism that reads into the Constitution the political and moral opinions of judges.

A good example of this sense of strict construction was provided by President George W. Bush when he was running for re-election in 2004:

I wouldn't pick a judge who said that the Pledge of Allegiance couldn't be said in a school because it had the words “under God” in it. I think that's an example of a judge allowing personal opinion to enter into the decision-making process as opposed to a strict interpretation of the Constitution [...] I would pick people that would be strict constructionists.³

The idea here conveyed by the term “strict construction” is certainly not objectionable. It is in fact essential to maintaining our nation's commitment

to majority rule under the Constitution. This kind of strict construction would have been accepted by both Hamilton and Jefferson—indeed, by the whole founding generation—and should be accepted by a contemporary conservatism that is serious about preserving the Constitution as a rule of law.

The term “strict construction” can also be used in a second and more precise sense. Where the first sense refers broadly to the proper approach to the Constitution, this second sense refers more narrowly to our approach to the constitutional powers of the national government.

When we interpret the powers of the national government, we should be mindful that those powers are intended by the Constitution to be limited, that we should not read them in an unreasonably expansive way that justifies activities on the part of the national government that go beyond the responsibilities that have really been entrusted to it.

In this case, the term may simply mean that when we interpret the powers of the national government, we should be mindful that those powers are intended by the Constitution to be limited, that we should not read them in an unreasonably expansive way that justifies activities on the part of the national government that go beyond the responsibilities that have really been entrusted to it. This kind of strict construction is also perfectly acceptable and even essential to the preservation of constitutional government.

In his opinion for the Supreme Court of the United States in *Gibbons v. Ogden* (1824), Chief Justice John Marshall—probably the greatest Hamiltonian constitutionalist after Hamilton himself—helpfully distinguished this second useful meaning of strict construction from another more problematic meaning:

3. “George W. Bush on Choosing Strict Constructionists for the Supreme Court in the 2004 Second Presidential Debate,” Georgetown University, Berkeley Center for Religion, Peace & World Affairs, Resources on Faith, Ethics & Public Life, <http://berkeleycenter.georgetown.edu/quotes/george-w-bush-on-choosing-strict-constructionists-for-the-supreme-court-in-the-2004-second-presidential-debate> (punctuation as in original).

[The Constitution] contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly.... What do gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the object for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded.⁴

Thomas Jefferson's constitutionalism moved beyond the acceptable strict construction that Marshall noted and into the realm of the unacceptable strict construction that Marshall (and the Court) rejected. We need not repudiate strict construction in its unproblematic and even essential meanings. We must certainly not repudiate conservatism's insistence on reading the constitutional enumeration of powers in such a way as to respect the limits that it imposes. We must, however, confront the problems presented by a specifically *Jeffersonian* strict construction—an approach to the powers of the national government that is, as Marshall suggested, unduly narrow and informed by a theory hostile to the effective functioning of the national government.

Jeffersonian Strict Construction and Respect for the Constitution

Embracing a Jeffersonian constitutionalism would involve conservatives in several serious

problems. The first of these problems arises from the place of Jeffersonian strict construction in the historical development of American constitutionalism.

Jefferson's approach to the national power was rejected repeatedly by the Supreme Court in its early years. One example of that rejection is found in the aforementioned passage from John Marshall's opinion in *Gibbons v. Ogden*. Moreover, this passage in which Marshall condemned an unduly narrow reading of the government's powers did not represent his view alone. His opinion represented the views of a supermajority of the Court (five out of the seven justices) and was joined by both Federalist appointees (like Bushrod Washington) and Jeffersonian-Republican appointees (like Thomas Todd, Gabriel Duvall, and Joseph Story).

Five years earlier, in *McCulloch v. Maryland* (1819), the Court had issued an even clearer and more decisive repudiation of Jefferson's principles of construing the national government's constitutional powers. In that case, the state of Maryland had challenged the legitimacy of the Second Bank of the United States (1816–1836) on the grounds that Congress had no constitutional power to create such an institution. The argument turned on the correct interpretation of the Necessary and Proper Clause, which comes at the end of the Constitution's list of 17 enumerated powers in Article I, Section 8 and authorizes Congress 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 or Officer thereof.”⁵

The bank's defenders contended that it was “necessary and proper” in relation to the government's enumerated powers to raise taxes and borrow money (Article I, Section 8, clauses 1 and 2)—in other words, that it was “needful,” “requisite,” or “conducive to” the execution of those powers.⁶ Maryland argued for a much narrower construction of the Necessary and Proper Clause. The clause, it held, authorized only those measures that were necessary in the strict sense of being “indispensable, and without which the power would be nugatory.”⁷ On this strict test, the bank would have to be held unconstitutional, for

4. John Marshall, *Writings*, ed. Charles Hobson (New York: Library of America, 2010), pp. 608–609.

5. Constitution of the United States, Article I, Section 8.

6. Marshall, *Writings*, p. 424.

7. *Ibid.*, p. 420.

while such an institution was certainly useful with a view to managing the nation's revenues, it could not be said to be indispensably necessary.

These arguments replayed, in almost exactly the same terms, the debate over the constitutionality of the First Bank of the United States (1791–1811) that had taken place between Thomas Jefferson and Alexander Hamilton during the Administration of President George Washington. Faced with questions about the constitutionality of the law incorporating the bank, Washington wondered whether he should veto it. He sought advice on the question from his principal Cabinet officers, including Hamilton, the Secretary of the Treasury, and Jefferson, the Secretary of State. Here—as later in *McCulloch*—the key to the argument was the proper interpretation of the Necessary and Proper Clause.

Jefferson contended that the bank was not authorized under the clause because “necessary” should be understood in a narrow sense. It did not authorize Congress to do whatever was “convenient” with a view to executing its enumerated powers, but only what was strictly necessary. In other words, it authorized only “those means without which the grant of power would be nugatory.”⁸ Hamilton argued that the bank was constitutional because the Necessary and Proper Clause should be interpreted more broadly. It was intended to authorize, he contended, whatever was “needful, requisite, incidental, useful, or conducive to” the execution of the enumerated powers.⁹

In this contest, Hamilton's view prevailed: Washington signed the law, and the First Bank of the United States was chartered by the government.

We can see in view of this history how, paradoxically, embracing Jeffersonian constitutionalism would actually undermine the prospects for maintaining limited government, contrary to the aims of its proponents. The preservation of limited government requires popular respect for the Constitution. Insisting on the correctness of Jeffersonian strict construction, however, would indirectly undermine popular respect for the Constitution.

If we are to claim that Jefferson's strict approach to the powers of the national government is correct—to hold that his, and not Hamilton's, is the right reading of the Necessary and Proper Clause—then we are in effect admitting that America has no tradition of

fidelity to the constitutional limits imposed by the enumeration of powers. The country, on this view, jettisoned its commitment to observing those limits as early as 1791, when the Second Congress and the first President of the United States acted on Hamilton's interpretation.

Faced with this version of our history, ordinary citizens would tend to conclude that respect for the constitutional limits on the national power have played no role in our history—that America became a great, powerful, and prosperous nation by disregarding the Constitution. This is not a lesson that conservatives should want to teach.

According to Hamilton's view, the question of a measure's constitutionality depended on a comparatively easy inquiry into whether or not it was genuinely related to the enumerated power in relation to which it was invoked.

Defenders of Jeffersonian strict construction might respond that this problem is not inherent in the theory itself and does not prove that it is mistaken. It is possible, after all, that even men as great as Hamilton, Washington, and Marshall erred in rejecting Jefferson's approach to the national power and that the country made a constitutional wrong turn in following them. If this is the case, constitutional fidelity would require that we try to return to Jefferson's approach, however challenging such an enterprise might be at this late date.

We need, then, to consider the merits of the theory itself, apart from the problems that might arise from trying to resurrect it so long after its early defeats.

If we consider the merits of Jeffersonian strict construction, we will find that it does indeed suffer from serious intrinsic flaws. The first of these is that it tends—indirectly and unintentionally, but nevertheless inevitably—to undermine popular respect for the Constitution as a rule of law.

This effect is doubtless contrary to Jefferson's intention. He was certainly sincere in his desire to

8. Thomas Jefferson, *Writings*, ed. Merrill D. Peterson (New York: Library of America, 1984), p. 419.

9. Alexander Hamilton, *Writings*, ed. Joanne B. Freeman (New York: Library of America, 2001), pp. 618–619.

maintain a strict respect for the limits imposed on the national government by the Constitution. Hence his admonition in his *Opinion on the Constitutionality of a National Bank* that we must not “take a single step beyond the boundaries” drawn by the Constitution around the powers of Congress, lest we open up a “boundless field of power, no longer susceptible of any definition.”¹⁰ In the long run, however, despite Jefferson’s sincerity, the way he thought about those limits and the way he taught his fellow citizens to think about them could not help but undermine popular respect for the Constitution by fostering a popular perception that it is routinely disobeyed.

Jefferson’s *Opinion*, again, contended for the narrowest possible reading of the Necessary and Proper Clause. He held that it authorized only those implied powers without which the enumerated powers would turn out to be “nugatory” or would come to nothing. In other words, as Hamilton observed in his own opinion in defense of the bank’s constitutionality, Jefferson read the term “necessary” as if “the word *absolutely* or *indispensably* had been prefixed to it.”¹¹ Hamilton interpreted “necessary” more loosely, as indicating any means that are reasonably related to the enumerated powers. According to Hamilton’s view, then, the question of a measure’s constitutionality depended on a comparatively easy inquiry into whether or not it was genuinely related to the enumerated power in relation to which it was invoked. “The relation between the measure and the end, between the nature of the mean employed toward the execution of a power and the object of that power, must be the criterion of constitutionality.”¹²

Jefferson’s understanding of “necessary,” however, required a more perplexing inquiry. For him, to determine the constitutionality of a law, we have to ask *just how necessary* it is in relation to the enumerated power it is supposed to serve. Is it merely convenient, in which case it is unconstitutional? Or is it truly indispensable, in which case it is constitutional? In other words, Jeffersonian strict construction makes a measure’s constitutionality depend on a question of the “degree in which” it “is necessary.” For Hamilton, this question of degree—the “more or

less of necessity or utility”—could not be a proper test of constitutionality. Such questions were inescapably a “matter of opinion” and could “only be a test” of a measure’s “expediency.”¹³

To put it another way, Jefferson’s approach holds that the Necessary and Proper Clause authorizes only those laws for which there is no alternative or for which the only alternative is the failure of the government to execute its enumerated powers. This is not, however, an interpretation commanded by the language of the clause, and it again forces us into the kind of inquiry that cannot end in any clear legal answers or answers that can claim to be anything more than one person’s or party’s prudential opinion. This is a problem especially because those measures that are indispensably necessary or for which there is no alternative but failure to execute the government’s powers may vary according to the prevailing circumstances, with the result that what is constitutional varies from year to year and perhaps even from month to month.

Without debate over constitutional limits, we would accustom ourselves to thinking as if constitutional limits were irrelevant, and our determination to live by them would gradually be undermined.

Hamilton’s approach to the Necessary and Proper Clause, while it could not assign the kind of strict limits on national power that Jefferson desired, at least had the advantage of making the question of constitutionality a relatively clear and straightforward one. It is easier to tell whether a law has a genuine relationship to a given power than it is to determine whether it is so indispensably necessary that the power could not be executed in its absence. Jefferson, in his effort to make the powers of the national government capable of a clear “definition,” ended up making the question of constitutionality almost

10. Jefferson, *Writings*, p. 416.

11. Hamilton, *Writings*, p. 618 (emphasis in original).

12. *Ibid.*, p. 619.

13. *Ibid.*

practically undefinable by making the constitutional issue depend on a perception of degree that was inevitably a mere matter of opinion. Put another way, Jefferson's approach to the Necessary and Proper Clause made the constitutionality of laws depend on the kind of question that is endlessly debatable and therefore invited endless controversy over the constitutional legitimacy of practically any measure the government might adopt.

This is not a harmless effect of Jefferson's strict construction. To be sure, debate over the constitutionality as well as the expediency of government policy is essential to living out and perpetuating the nation's commitment to limited, constitutional government. Without debate over constitutional limits, we would accustom ourselves to thinking as if constitutional limits were irrelevant, and our determination to live by them would gradually be undermined. Nevertheless, there is a point at which such controversy becomes counterproductive and actually erodes our commitment to constitutional government by creating the impression that the government routinely surpasses the limits imposed by the Constitution.

Jeffersonian constitutionalism fosters this danger by insisting on a test of constitutionality on the basis of which almost any government policy could plausibly be condemned as illegitimate. Government policy will routinely stir up controversy, and sometimes bitter controversy, given the inescapable diversity of opinion about what kind of policy is most expedient for the country. As a result, there commonly will be a substantial body of opinion that is dissatisfied with almost any given law, at least at the time it is passed. Because of our human desire to seize upon the most forceful, most damning argument against anything with which we disagree, citizens of a constitutional government will be constantly tempted to find constitutional fault with anything the government does that they do not like.

Again, this tendency can be helpful to the extent that it imposes the discipline of constitutional argument on our policy deliberations. Jeffersonian strict construction, however, gives dangerous scope to this temptation. It provides a tool by which impassioned partisans can plausibly condemn as unconstitutional almost much of what the government does. If this goes on

long enough, it must inevitably foster in ordinary citizens the belief that the Constitution is routinely violated, from which they are likely to conclude that it is a mere museum piece and unsuitable to the actual operations of government.

At the very least, such endless controversy would lead citizens to think that questions of constitutionality are so perplexing that they can never be resolved satisfactorily. In the long run, either effect would undermine the citizenry's commitment to respecting constitutional limits.

Jeffersonian Strict Construction as a Threat to Properly Energetic Government

The second—and more directly and immediately dangerous—intrinsic flaw in Jeffersonian strict construction is that it is too strict for the successful operation of the federal government. This problem is vividly illustrated by the issue that first prompted Jefferson to propound his theory: the national bank. Jefferson, as we have noted, opposed the bank as unconstitutional on the grounds that it was not truly necessary in the sense of being indispensable to the execution of the national government's enumerated powers.

While this might have been true according to the abstract standard of necessity that Jefferson had in mind, Hamilton contended that as a practical matter, the bank was necessary to the effective execution of the government's powers. The "most incorrigible theorist among" the bank's "opponents," Hamilton declared, "would in one month's experience as head of the Department of the Treasury be compelled to acknowledge that it is an absolutely indispensable engine in the management of finances and would quickly become a convert to its perfect constitutionality."¹⁴ Two considerations tend to strengthen Hamilton's claim.

First, if we are tempted to dismiss it as the self-interested rationalization of the man who designed the bank and whose political reputation was therefore bound up with its defense, we should consider that Albert Gallatin—Jefferson's own Secretary of the Treasury while he was President—defended the Bank of the United States when he was charged with the "management" of the nation's "finances."¹⁵

14. *The Papers of Alexander Hamilton*, 27 vols., ed. Harold C. Syrett (New York: Columbia University Press, 1961–1987), Vol. 12, p. 251.

15. Gordon Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815* (New York: Oxford University Press, 2009), p. 293.

Second, national political events bore out Hamilton's claims, first made in his *Report on a National Bank*, that a public bank was essential for the effective administration of the nation's money and especially critical to the government's ability to raise money to wage war. During the War of 1812, President James Madison—Jefferson's ally in opposition to Hamilton's bank—vetoed a bill chartering a second national bank after the first bank's charter had expired. Subsequent experience during the war taught Madison that the government could not execute its functions effectively without such an institution, and he accordingly signed a later bill establishing a second bank.¹⁶

Jefferson's approach to the national power was actually debilitating and was based not on a reasonable reading of the Constitution, but on Jefferson's pre-existing desire to confine the national government as much as possible.

Other examples serve to show that Jefferson's approach to the national power was actually debilitating and that it was based not on a reasonable reading of the Constitution, but on Jefferson's pre-existing desire to confine the national government as much as possible. The Constitution, for example, explicitly empowers Congress to "establish Post Offices and post Roads."¹⁷ Jefferson, straining to read this passage as imposing limits that the words did not convey, held that Congress had no authority to build post roads, but only authority to choose which existing roads could be used for the post. He also famously doubted the constitutionality of the Louisiana Purchase because the Constitution confers no explicit power on the national government to acquire new territory, even though such a power would seem to be reasonably implied by the government's constitutional authority to make treaties.

For many, one of Jefferson's high points as a defender of the Constitution was his opposition to the Alien and Sedition Acts, which empowered the President to imprison or deport aliens he deemed a threat to the nation's peace and safety and prohibited speech that libeled the government. Jefferson may well have been correct that the Sedition Act, for example, violated the First Amendment's prohibition on laws abridging the freedom of speech. Even here, however, he injected into the controversy an interpretation of the Constitution that would be crippling to the government's rightful power. In his 1798 draft of the Kentucky Resolutions, Jefferson denounced the Alien and Sedition Acts as unconstitutional because the Constitution conferred on Congress no power to punish any crimes other than those—such as treason and counterfeiting—actually named in the text.¹⁸ As John Marshall suggested in a different context, such an interpretation would leave the government powerless to punish the theft of the mail that the Post Office carried or to punish perjury committed in federal court.¹⁹

A final example, drawn from the government's most crucial responsibility, may serve to reveal the full extent of the difficulties that can arise from Jefferson's approach to the constitutional powers of the national government. In 1793, the Cabinet considered putting forward a proposal to establish a military academy for the United States. Jefferson "objected that none of the specified powers given by the Const[itution] to Congress would authorize this."²⁰ The Constitution expressly authorizes Congress to "declare war," to "raise and support armies," to "provide and maintain a navy," and to "make rules for the government and regulation of the land and naval forces." It also further authorizes Congress to "make all laws which shall be necessary and proper for carrying into execution" these expressly listed powers.²¹ It is hard to view as reasonable an interpretation that refuses to admit that a military academy—which is so obviously and directly related to the exercise of several specifically enumerated

16. Ron Chernow, *Alexander Hamilton* (New York: The Penguin Press, 2004), p. 647.

17. Constitution of the United States, Article I, Section 8.

18. Jefferson, *Writings*, p. 449.

19. Marshall, *Writings*, p. 423.

20. *The Papers of Thomas Jefferson*, Vol. 27, ed. John Catanzariti (Princeton: Princeton University Press, 1997), p. 428.

21. Constitution of the United States, Article I, Section 8.

powers—is “necessary and proper” within the meaning of the Constitution.

Of course, Jefferson’s defenders might reply that a military academy is *not* in fact “necessary” to the execution of these powers on Jefferson’s understanding of the Necessary and Proper Clause. A military academy, while useful and convenient in relation to the government’s war and military powers, is not absolutely indispensable to them. One cannot say that those powers would be “nugatory” or could not be executed in the absence of a military academy.

There is no principled basis on which to say that some national powers are to be interpreted narrowly and others broadly. Essential national interests also depend on the successful—not just minimal—execution of the national government’s other powers.

This observation, however, only serves to highlight the problems with Jefferson’s interpretation of the Necessary and Proper Clause. The country’s dearest interests depend on the government’s effective exercise of its powers to wage war and maintain a military force. The safety and even the very life of the nation may be at stake in their execution. With such things hanging in the balance, no one would truly want these powers to be executed only by the most minimal necessary means, as Jefferson’s interpretation requires. We would not wish the war power to be exercised only by those means without which it would be nugatory, but rather that they be exercised by those means by which it can be exercised successfully.

This is not to say, going to an extreme opposite from the position occupied by Jefferson, that we would wish the government authorized to do every *conceivable* thing related to the successful prosecution of war. We would rather wish it to be authorized to do everything *reasonably* related to the successful conduct of war. We would wish, in other words, to see the Necessary and Proper Clause applied to the war power on Hamiltonian and not Jeffersonian principles.

This extreme case, however, also undermines Jeffersonian strict construction as an approach to the

interpretation of *any* of the national government’s powers. There is no principled basis on which to say that some national powers are to be interpreted narrowly and others broadly. Nothing in the language of the Constitution indicates such a distinction, and essential national interests also depend on the successful—not just minimal—execution of the national government’s other powers.

The Founders did not entrust everything to the national government. Much was reserved to the states, as the Tenth Amendment reminds us. Nevertheless, the things the Founders did choose to entrust to the national government relate to important national interests. Externally, these include not only the waging of war and protection of the nation’s security, but also generally the management of America’s relations with foreign countries. Internally, they include the creation of a vibrant capitalist economy through the coining of a national currency and the uniform regulation of commerce among the states.

It is not reasonable to suppose—it is in fact contrary to the obvious meaning of the Constitution—that they intended to vest unlimited power in the national government in relation to those interests. It is, however, equally unreasonable to suppose, with Jefferson, that they wished those important interests to be served only by the most restrictive or most limited means possible.

The Dangers of Jefferson’s Excessive Defense of the States’ Power

Finally, Jeffersonian strict construction is problematic because of the motive that informs it. When Jefferson approached the powers of the national government, the most reasonable reading of the constitutional text establishing them was not foremost in his mind. Nor was the need of the national government to have a broad choice of means with a view to the most effective execution of its responsibilities. Rather, his chief concern was protecting the sphere within which the state powers operate.

There is, of course, nothing wrong with such a concern in proper measure. Jefferson, however, took it too far. Constitutional fidelity requires that we acknowledge the legitimate powers of the states and so recognize that the powers of the national government are limited, but Jefferson did not merely read the national powers with their limits in mind; he read them with a desire to narrow them as much as

possible so as to reserve as much power as possible to the states.

Such an approach tends to suggest that the states are somehow primary and the national government merely secondary in our system of government, or that state sovereignty is somehow more important or more fundamental than the sovereignty of the national government. These assumptions carry dangerous consequences. They tend not just to limit the national power, but actually to undermine the Union itself by obscuring the fact that in America, sovereignty ultimately resides in the people and the Constitution they have established, which bestows an independent power on the national government that is not derived from the power of the states.

This problem presents itself at the very outset of Jefferson's first clash with Hamilton over the scope of the national government's powers. Jefferson began his *Opinion on the Constitutionality of a National Bank* by noting a number of ways the proposed bank would violate existing state laws. By authorizing the bank to hold land and by regulating the terms of its ownership and how it would be transferred from one owner to another, Jefferson complained, the bank bill went "against" state laws of mortmain, alienage, descents, forfeiture, escheat, and distribution. Moreover, by giving the bank the sole right to operate under the national authority, the bill was "against" state "laws of monopoly." Finally, Jefferson objected that the bill implicitly empowered the bank to make bylaws for itself that would be "paramount to the laws of the state: for so they must be construed, to protect the institution from the control of the state legislatures."²²

In his own *Opinion*, Hamilton replied that Jefferson simply had his facts wrong. The bank was not so much a violation of the laws Jefferson had cited as it was an institution—a corporation—to which they did not properly apply. The bill, moreover, created no monopoly because while it chartered only one national bank, it left the states free to charter as many state banks as they wanted. And the bank bill, properly interpreted, actually required the bank's bylaws to be consistent with state law.

Of far greater importance for the present argument, however, is the unspoken assumption underlying all of Jefferson's objections: that the national government may not exercise its powers in such a

way as to violate the laws of the states. Such a position would permit the states to exercise *their* powers with a view to defeating the exercise of national powers. After all, if it is improper for the national government to make laws that go "against" state law, then states can effectively hem in the national power by enacting laws for just such a purpose. Jefferson may have aimed only to protect the position of the states, but the tendency of his argument was in fact to subordinate the national government to the states.

The assumptions underlying Jeffersonian strict construction obscure the fact that in America, sovereignty ultimately resides in the people and the Constitution they have established, which bestows an independent power on the national government that is not derived from the power of the states.

Needless to say, this is not what the Constitution intends. The Supremacy Clause provides that the "laws of the United States" made in "pursuance" of the Constitution "shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding." It is difficult to conceive a clearer statement of the principle that when a federal law has a right to exist, it also has a right to go against state law. Jefferson, however, began his *Opinion on the Constitutionality of a National Bank* by arguing as if the Supremacy Clause did not exist.

Moreover, these consequences of Jefferson's thinking were not confined to the realm of mere theory. Even while he served as a high-ranking officer of the government of the United States, Jefferson urged others to exercise the powers of the state governments with a view to defeating an exercise of the national power. In October 1792, when Jefferson was still Washington's Secretary of State, he wrote to James Madison to express his disapproval of Virginia Governor Henry Lee's "plan" to "oppos[e] the

22. Jefferson, *Writings*, p. 416.

federal bank by setting up a state one.” Jefferson objected to such a scheme not as an improper meddling with the execution of a policy of the national government, but instead as too weak a response, a “milk and water measure.” The Virginia legislature “should reason thus,” Jefferson wrote:

The power of erecting banks and corporations was not given to the general government. It remains then with the state itself. For any person to recognize a foreign legislature in a case belonging to the state itself is an act of *treason* against the state, and whoever shall do any act under color of the authority of a foreign legislature whether by signing notes, issuing or passing them, acting as director, cashier or in any other office relating to it *shall be adjudged guilty of high treason and suffer death accordingly, by the judgment of the state courts.* This is the only opposition worthy of our state, and the only kind which can be effectual. If N. Carolina could be brought to a like measure, it would bring the General government to respect the counter-rights of the states. The example would probably be followed by some other states. I really wish that this or nothing should be done. A bank of opposition, while it is a recognition of the one opposed, will absolutely fail in Virginia.²³

Jefferson was here advising the state legislature to make it unlawful—to make it in fact an act of treason punishable by death—for any Virginian to work for or cooperate with the Bank of the United States. This is a radical proposal, only one step removed from using the state’s military force against the operations of the national government. It is all the more striking that Jefferson was moved to make such a suggestion not by a flagrant violation of a constitutional prohibition, but instead by an arguable question like the scope of the national government’s implied powers.

Jefferson’s tendency to subordinate the national government to the states is perhaps illustrated most famously by his 1798 draft of the Kentucky

Resolutions, written, again, in response to the Alien and Sedition Acts. Here Jefferson advanced a “compact theory” according to which the Constitution is to be understood as an agreement among the states—a view that, at least in Jefferson’s hands, tended to foster the idea that the sovereignty of the states is somehow more fundamental than the sovereignty of the national government.

According to Hamilton’s thinking neither level of government in our federal system depends on the other for its existence or its powers. Rather, each holds an independent existence and authority delegated to it by the people and recognized in the Constitution.

According to Hamilton’s thinking—and the thinking that has generally prevailed—both the national government and the states are sovereign in some respects but not in others. They can share or divide sovereignty between themselves in this way because the ultimate sovereign, the original font of power standing behind them, is the people of the United States. On this view, neither level of government in our federal system depends on the other for its existence or its powers. Rather, each holds an independent existence and authority delegated to it by the people and recognized in the Constitution.

In contrast, Jefferson’s draft of the Kentucky Resolutions held that the national government had been created by the states. The Constitution, Jefferson contended, was a “compact” by which the “several states” had “constituted a general government for special purposes” and had “delegated to” it “certain definite powers.” Elsewhere in the Resolutions, Jefferson even went so far as to say that the states had created the general government for their own “use” and that Congress was no more than a “creature” of the compact to which the states were the parties.²⁴

23. *Papers of Thomas Jefferson*, Vol. 24, ed. John Catanzariti (Princeton: Princeton University Press, 1990), pp. 432–433 (emphasis added).

24. Jefferson, *Writings*, pp. 449 and 453. By making this claim, Jefferson overlooked the importance of the difference between the Articles of Confederation, which presents itself as proceeding from “we the undersigned delegates of the states,” and the Constitution, the preamble to which indicates that it is an act of “We the people of the United States.” In other words, one can plausibly claim that the Union under the Articles of Confederation was a compact among the states such as Jefferson describes, because the Articles was the act of a congress of delegates representing the state governments. Such a claim, however, cannot plausibly be made about the Union under the Constitution, which presents itself as an act of “the people.”

On the basis of this theory, Jefferson contended that each state possessed authority to judge for itself the constitutionality of acts of the national government. Each state party to the compact, he wrote, “has an equal right to judge for itself” both the “infractions” of the Constitution by the national government and “the mode and measure of redress.”²⁵ Where the national government exercised a power it had not been granted, “a nullification of the act is the rightful remedy.” This doctrine would empower each state in the Union to declare void and forbid the enforcement of any federal law that it believed to be unconstitutional. Every state, Jefferson declared, “has a natural right in cases not within the compact... to nullify of their own authority all assumptions of power within their limits.”²⁶

The position Jefferson took in his draft of the Kentucky Resolutions was not entirely wrong, but he pushed it too far. There was nothing exceptionable, for example, in his claim that a state legislature has a kind of right to judge the constitutionality of acts of the national government. A resolution criticizing a federal law—on constitutional grounds or even simply on policy grounds—is merely an expression of the state legislature’s opinion and therefore clearly within its power.

State legislators, moreover, are not just citizens, but state government officials, in which capacity they have taken an oath to “support” the “Constitution.” To that extent, they have not only a right, but a duty to express opposition to federal laws that they believe violate the Constitution. Such state legislative action can be useful with a view to mobilizing public opinion and citizen action against unconstitutional acts of the national government—the path of constitutional, lawful opposition to which James Madison pointed in his Virginia Resolutions in response to the Alien and Sedition Acts.

Jefferson erred, however, and erred dangerously, in suggesting that the Constitution was a compact

among sovereign states and that, accordingly, each state had a right to judge *authoritatively* both violations of the Constitution by the national government and the proper mode of redress that the state might pursue. By drawing from these premises a state power of “nullification” of acts of the national government, he not only called for organized protest with a view to the repeal of unconstitutional laws, but in fact claimed that each state had a right to prevent the execution of such laws.

Jefferson had used the language of state sovereignty and nullification that was taken up by a later generation of Southern political leaders who extended it to include a right of secession, which led to disunion and civil war.

This was, in the immediate term, a recipe for anarchy and perhaps even armed conflict between the national government and some state governments. It fostered anarchy because it would result in a situation in which federal law would operate in some states but not in others. It opened the door to the possibility of armed conflict because the national government would surely find such a condition of selective obedience intolerable.

Moreover, Jefferson’s account set the stage for a more radical theory of states’ rights. He had used the language of state sovereignty and nullification that was taken up by a later generation of Southern political leaders who extended it to include a right of secession, which led to disunion and civil war.²⁷ The later, more radical proponents of states’ rights tried to justify their theories by appealing to both Jefferson’s and Madison’s arguments in response to the Alien and

25. Jefferson, *Writings*, p. 449.

26. *Ibid.*, p. 453.

27. Jefferson was joined by his longtime political ally James Madison in opposing the Alien and Sedition Acts, with Madison authoring the Virginia Resolutions that denounced those national measures. Madison, however, was characteristically more sober than Jefferson. In the Virginia Resolutions, Madison did not press the compact theory to the same dangerous extent as Jefferson had. Madison, most notably, did not assert a state power of “nullification” and in fact rejected the idea. For a discussion of Madison’s understanding of “interposition” as consistent with proper respect for the national authority and how it differs from nullification, see Christian G. Fritz, “Interposition and the Heresy of Nullification: James Madison and the Exercise of Sovereign Constitutional Powers,” *Heritage Foundation First Principles Series Report* No. 41, February 21, 2012, <http://www.heritage.org/research/reports/2012/02/interposition-and-heresy-of-nullification-james-madison-exercise-of-sovereign-constitutional-powers>.

Sedition Acts. Madison, who was still living, objected that his own arguments of the 1790s provided no support for such claims. Jefferson was no longer living and so could not try to distinguish his own position from that of the new generation of Southern radicals, but given how far he had pressed his claims, he would have had difficulty in doing so with the same degree of success that Madison achieved.

This is not to say that Jefferson was an enemy of the Union. On the contrary, he understood that disunion would be a disaster for America, and he made this clear by his deeds and words both early and late in his life.

When he served as Secretary of State, Jefferson opposed Hamilton's plan for assumption of the state Revolutionary War debts, but he accepted it because he feared that failure to include assumption would make it impossible for any bill providing for the national government's debt to pass, which in turn would destroy the government's credit, render it effectively dead, and thus cause the various states to go their own ways to try to protect their own interests.²⁸ Much later, as slavery began to threaten the peace of the Union, Jefferson hoped that passions would cool so that his countrymen would realize that their aspirations were "more likely to be effected by union than by scission," characterizing the latter outcome as "an act of suicide against themselves and of treason against the hopes of the world."²⁹

This is to say, however, that Jefferson allowed his constitutionalism to be influenced by an excessive partisanship on behalf of the states. This led him to put forward a dangerously mistaken theory of the relationship between the states and the national government, one that was later taken up and put to bad use by less responsible leaders.

No doubt Jefferson would not have intended his principles to be pressed this far, and conservatives need not blame him as if he had. Nevertheless, in choosing a founding guide to the interpretation of the national power, we must decide not so much on the basis of Jefferson's intentions as on the basis of the actual tendencies of his thought. Given the problems noted above, conservatives should eschew a Jeffersonian approach to the powers of the national government.

Hamiltonian Constitutionalism

Fortunately for contemporary conservatives, Jeffersonian constitutionalism is not the only approach to the national government's powers that the founding offers us. As an alternative, conservatives should look to the constitutionalism of Jefferson's great Cabinet and party rival, Alexander Hamilton.

Hamilton advocated a broad interpretation of the national government's powers, an interpretation that he thought was essential to that government's ability to meet the immediate needs of the young nation as well as the unforeseen crises that it would encounter in the future. But Hamilton's constitutionalism also acknowledged that there are limits on the national power, and to that extent, his approach is consistent both with the founding insistence on constitutionally limited government and with the needs of contemporary conservatism.

Hamilton advocated a broad interpretation of the national government's powers but also acknowledged that there are limits on the national power, and to that extent, his approach is consistent both with the founding insistence on constitutionally limited government and with the needs of contemporary conservatism.

Hamilton derived those limits, however, from the nature of the duties entrusted to the national government, not from a Jeffersonian desire to reserve as much power as possible to the states. Hamilton held that the national government was sovereign in the areas entrusted to it by the Constitution—such as foreign policy, the regulation of foreign and national commerce, and the waging of war—and that it consequently possessed wide-ranging powers to execute its responsibilities in these areas. At the same time, his principles acknowledged that the authority of the national government was limited,

28. *Papers of Thomas Jefferson*, Vol. 16, ed. Julian P. Boyd (Princeton: Princeton University Press, 1961), p. 537.

29. Thomas Jefferson to John Holmes, April 22, 1820, National Archives, Founders Online, <http://founders.archives.gov/?q=Project%3A%22Jefferson%20Papers%22%20%22treason%20against%20the%20hopes%22&s=1511311111&r=2>.

both because some things—such as education, local commerce, and generalized poverty relief—were not assigned by the Constitution to the national government and because, even in relation to its enumerated powers, the national government was authorized to do only those things that were reasonably related to the exercise of those powers.

Because Hamiltonian constitutionalism does not involve the manifold difficulties discussed above, it is preferable to the Jeffersonian alternative. In the first place, Hamilton's approach does not inadvertently foster disrespect for the Constitution as Jefferson's does. Hamilton's relatively broad interpretation of the Necessary and Proper Clause prevailed early on, both in the Cabinet deliberations on the bank in 1791 and in *McCulloch v. Maryland* in 1819. As a result, embracing it now does not involve us in the embarrassing dilemma that would be involved in trying to resurrect Jefferson's rationale for strict construction, with its underlying implication that the government has been routinely operating outside the Constitution almost since its inception.

Similarly, Hamilton's account of the Necessary and Proper Clause makes the question of a measure's constitutionality depend on the fairly straightforward question of whether it is reasonably related to the exercise of an enumerated power. It therefore avoids the perplexing and endlessly contentious inquiry that Jefferson's approach requires: whether the measure in question is *indispensably* necessary, a question so dependent on differing perceptions that it provides material by which almost every government policy can be publicly condemned as unconstitutional.

In the second place, and more obviously, Hamilton's broad reading of the Necessary and Proper Clause, unlike Jefferson's narrowly restrictive reading, does not threaten to impede the national government's pursuit of the important objects entrusted to it by forbidding the most effective means and permitting only the most minimally essential means. Hamilton, for example, did not oppose the establishment of a military academy on the grounds that it was not indispensably necessary to executing the national powers to make war and raise a military force. On the contrary, he generally favored a broad reading precisely because it would give the national

government the latitude it needed to execute its enumerated powers in the most effective way, or the way that best served the public. As he suggested to George Washington in defense of his approach, it favored "an enlarged and liberal construction of the Constitution for the public good and for the maintenance of the due energy of the national authority."³⁰

Hamilton's broad reading of the Necessary and Proper Clause does not threaten to impede the national government's pursuit of the important objects entrusted to it by forbidding the most effective means and permitting only the most minimally essential means.

Finally, Hamilton did not bring a preferential attachment to the state governments to his interpretation of the national powers, nor did he foster an overdone sense of state sovereignty that threatened to undermine the Union. When Jefferson opened his *Opinion on the Constitutionality of a National Bank* with a complaint about the various ways in which the bank bill went "against" existing state laws, Hamilton replied that his Cabinet colleague was straying into the realm of the irrelevant. Even if the bank were a "direct alteration" of some state laws, Hamilton argued, this fact "would do nothing toward proving that the measure was unconstitutional."

Jefferson's implied principle was inadmissible, Hamilton contended, because it would bring the essential operations of the national government to a halt. If the "government of the United States can do no act, which amounts to an alteration of a state law," then "all its powers are nugatory." After all, Hamilton reasoned, "almost every new law" will effect some "alteration" in the existing statute or common law of the states.³¹

Moreover, Hamilton warned from the beginning about the dangers of a Jeffersonian presumption that state governments could authoritatively judge the constitutionality of federal laws. Hamilton was unaware of Jefferson's hand in the preparation

30. *Papers of Alexander Hamilton*, Vol. 12, pp. 229–258.

31. Hamilton, *Writings*, p. 623.

of the Kentucky Resolutions of 1798–1799, but he knew about them and expressed a negative judgment about them: They had a “tendency,” he wrote, “to destroy the Constitution of the U[nited] States.”³²

Here, unfortunately, Hamilton was quite prescient. The spirit that these resolutions manifested was eventually killed, but only while it was in the process of trying to kill the government of the United States. That spirit, in other words, contributed to the American Civil War and was suppressed in the end only at great cost to the country in blood and treasure.

Hamiltonian Constitutionalism and Limited Government

Despite these considerations, however, contemporary conservatives might well worry that Hamilton’s constitutionalism goes to the other extreme from Jefferson’s and presents an equal but opposite danger. In other words, if Jefferson’s constitutionalism unduly limits the national power, does Hamilton’s open the door to an unlimited national power? Is it therefore unsuitable to a contemporary conservatism that is tasked with trying to limit the scope of the national government?

In their spirited contests of opinion, Jefferson certainly charged that Hamilton’s principles tended to destroy the Constitution’s limits on the national power. Hamilton denied this strenuously, which at least shows that he did not wish to establish a national government of unlimited powers. Hamilton, moreover, did not just deny the charge but mounted arguments to refute it. Jefferson’s critique, then, pressed Hamilton to identify and defend limits on the constitutional authority of the government. Accordingly, the full statement of Hamilton’s approach to the Constitution defended a broad interpretation of the national government’s powers but also explained the limits on those powers.

In the debate over the constitutionality of the national bank, Jefferson contended that Hamilton’s broad reading of the Necessary and Proper Clause tended to render the powers of the national government unlimited. Hamilton had defended the bank on the grounds that it would “give great facility or convenience in the collection of taxes.” Such a defense depended, as noted, on Hamilton’s

comparatively expansive interpretation of the Necessary and Proper Clause, according to which “necessary” meant “convenient” or “useful” *in relation to the exercise of the enumerated powers*, not in relation to just any power.

Hamilton noted that disputes over the exact scope of the national government’s powers were inseparable from America’s form of government, arising “inevitably from a division of the legislative power” between the federal and state legislatures. This formulation itself acknowledged that the scope of the national legislative power was limited.

Jefferson argued that such an interpretation would lead to unlimited government. There is, he suggested, no power “which ingenuity may not torture into a convenience in some instance or other, to some one of so long a list of enumerated powers” as the Constitution contained. The end result of such a broad reading would be to “swallow up all the delegated powers, and reduce the whole” authority of the national government “to one power”: a power to do whatever Congress might happen to think best for the country.³³

In his own *Opinion*, Hamilton denied that his principles could reasonably be pressed so far. Hamilton noted that disputes over the exact scope of the national government’s powers were inseparable from America’s form of government. They were “inherent,” he contended, “in the nature of a federal Constitution,” arising “inevitably from a division of the legislative power” between the federal and state legislatures.

This formulation itself, however, acknowledged that the scope of the national legislative power was limited: The national government was entrusted with some things, while others were entrusted to the states. The Constitution entrusted the national government with the power, among other things,

32. *Papers of Alexander Hamilton*, Vol. 22, pp. 452–454.

33. Jefferson, *Writings*, p. 419.

to wage war, manage American foreign policy, and regulate commerce among the states and with foreign nations; but this limited enumeration left a vast realm to the states that included most of the responsibility for day-to-day government, including the protection of life and property, education, and the regulation of the domestic commerce of each state.

The fact that the constitutionality of many specific measures of the national government would commonly generate disagreement did not detract from the fact that there was indeed an outer limit to the federal power. We should expect, Hamilton contended, that “there will be cases clearly within the power of the national government, others clearly without its power, 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.”³⁴

Hamilton contended, moreover, that his approach provided a reasonable principle by which statesmen could weigh the constitutionality of proposed policies. Hamilton’s defense of the national power did “not affirm that the national government is sovereign in all respects” but instead held that it was sovereign only to a “certain” extent—namely, “to the extent of the objects of its specified powers.”

Contrary to Jefferson’s fears, Hamilton’s approach to the Constitution did provide “a criterion of what is constitutional and what is not so”—specifically, “the end to which the measure” in question “relates as a mean.” “If the end be clearly comprehended within any of the specified powers” enumerated in Article I, Section 8 of the Constitution, “and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the Constitution,” then we may “safely” conclude that it falls “within the compass of the national authority.”³⁵ On this view, for example, the national government had no legitimate power to create a corporation to administer the government of the city of Philadelphia, because the national government was not authorized to regulate that city’s government. The government could, however, create a corporation—such as a national bank—“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 these objects are contained in the constitutional enumeration of powers.³⁶

Similarly, if we turn to contemporary questions, we would conclude that Hamilton’s principles admit the constitutionality—although he might have contested the prudence—of many national regulations of interstate commerce, such as those of airlines and railroads. Hamilton’s constitutionalism, however, lends no support to the desires of some contemporary liberals to seek national control of education or to protect endangered species by regulating local farming practices.

Hamilton’s mode of interpretation admittedly did not provide the kind of distinct and strict limits that Jefferson desired, but neither could it reasonably be charged with opening up a limitless horizon of national power by offering no intelligible principle of limitation.

To be sure, Hamilton’s mode of interpretation admittedly did not provide the kind of distinct and strict limits that Jefferson desired. At the same time, however, neither could it reasonably be charged with opening up a limitless horizon of national power by offering no intelligible principle of limitation.

As much as Jefferson feared Hamilton’s approach to the Necessary and Proper Clause, he was even more shocked by Hamilton’s interpretation of the General Welfare Clause. In his *Report on Manufactures*, Hamilton advocated a system of bounties—or payments—to American manufacturers. He believed such government support was necessary to build up an American manufacturing base adequate to sustaining the military power needed to preserve America’s independence. Aware that some might deny the constitutionality of such a program, Hamilton contended that these bounties could be justified under the General Welfare Clause of the Constitution, which authorizes Congress to lay taxes “to pay the debts and provide for the common defense and general welfare of the United States.” This language,

34. Hamilton, *Writings*, p. 621.

35. *Ibid.*

36. *Ibid.*, p. 616.

Hamilton contended, gave Congress a broad authority both to “raise” and to “appropriate” money with a view to the general welfare of the country.³⁷

In the spring of 1792, Jefferson argued to President Washington that Hamilton’s account of the General Welfare Clause was even more dangerous than his understanding of the Necessary and Proper Clause. Hamilton had defended the national bank as “an incident to an enumerated power.” Jefferson, as we have seen, had rejected that defense as involving a too expansive interpretation of the national power, but it at least kept the government linked in some way to the enumeration of powers in Article I, Section 8 of the Constitution.

Hamilton’s understanding of the General Welfare Clause, Jefferson believed, went a giant leap further by effectively eliminating the constitutional enumeration as a limit on the national power. As a consequence of Hamilton’s arguments in the *Report on Manufactures*, the “subsequent enumeration” of congressional “powers was not the description to which resort must be had, and did not at all constitute the limits on” the government’s “authority.” As Jefferson said in even stronger terms in a later letter, Hamilton’s *Report* “expressly assumed that the general government has a right to exercise all powers which may be for the general welfare.”³⁸

Despite Jefferson’s concerns, however, Hamilton did in fact make an effort to identify the principles that limited the scope of the power on which he was relying.

First, Hamilton argued that the General Welfare Clause contained the following “qualification” of its scope: Its language indicated that “the object to which an appropriation of money is to be made” must be “general and not local.” In other words, the Clause did not authorize Congress to spend the public’s money to advance merely provincial or partial interests, but only to promote the good of the whole nation.³⁹

Second, contrary to Jefferson’s claims, Hamilton did not understand his interpretation of the General Welfare Clause as implying a power in the national government to do just anything it wanted for the sake of the general welfare. The appropriation of

money, Hamilton’s argument implied, was one way to exercise the government’s power, but only one way. His argument that this mode could be exercised with such latitude did not require that the other modes could be exercised with a similar latitude. That Congress could spend money for any purpose that it believed advanced the general welfare did not mean that it could regulate or forbid or punish for any purpose that it thought advanced the general welfare. “A power to appropriate money” with such “latitude” did not “carry a power to do any other thing not authorized in the Constitution, either expressly or by fair implication,” Hamilton contended. Therefore, no one could object to his “construction” on the grounds that it “would imply a power to do whatever else should appear to Congress conducive to the general welfare.”⁴⁰

Hamilton’s further argument in his *Report on Manufactures* shows that he did not regard the limits on the national power as merely theoretical.

Moreover, Hamilton’s further argument in his *Report on Manufactures* shows that he did not regard the limits on the national power as merely theoretical. On the contrary, he noted some policies that he thought would be useful with a view to promoting American manufacturing but that he also thought had to be tabled because they seemed to lack a sufficient constitutional justification.

For example, Hamilton observed that American manufacturing could be promoted by encouraging the importation of technologies that had been developed abroad. He noted that a very effective way to encourage this importation was by giving an exclusive privilege to use the technology to whoever introduced it in America. He admitted, however, that the Constitution did not authorize this: The Copyright and Patent Clause empowers Congress to grant such exclusive privileges only to “authors and inventors” of new things, not to those who introduce

37. *Ibid.*, pp. 702–703.

38. *Papers of Thomas Jefferson*, Vol. 23, ed. Charles T. Cullen (Princeton: Princeton University Press, 1990), pp. 186–187, and Vol. 24, p. 351.

39. Hamilton, *Writings*, p. 703 (emphasis in original).

40. *Ibid.*

into America new things that had already been invented elsewhere. He accordingly suggested that the government would have to use other means to encourage the introduction of foreign technologies in America.⁴¹ Similarly, he later noted that American manufacturing could be aided by a comprehensive plan to improve the nation's roads and waterways; but he also admitted the "doubt" that Congress was constitutionally authorized to do it.⁴²

Hamilton not only took pains to acknowledge the constitutional limits on the powers of the national government, but also made a point of highlighting important non-constitutional limits as well.

It is worth noting that Hamilton not only took pains to acknowledge the constitutional limits on the powers of the national government, but also made a point of highlighting important non-constitutional limits as well. He was not, in other words, a legal positivist who believed that the man-made law of the Constitution provided the only principles by which one could judge the actions of the government. For him, as for the other Founders, these extraconstitutional limits on government were rooted in something even more fundamental than the Constitution: the natural rights doctrine that informed the Founders' understanding of the scope and purposes not just of the government of the United States, but of any legitimate government.

In his *Opinion on the Constitutionality of a National Bank*, Hamilton contended that the powers of the national government must be understood to be sovereign. Sovereignty, however, did not mean unlimited power. Sovereignty included a right in the government to use all means "fairly applicable" to the powers entrusted to it except those that are "precluded by restrictions and exceptions specified in the constitution," as well as those that are "immoral" or "contrary to the essential ends of political society."⁴³

The limiting principles indicated by the "essential ends of political society," moreover, amounted to more than a vague sense that there must be some things that the government may not do. Rather, they were part of a well-understood public philosophy: the Lockean conception of government in the service of natural rights, expressed so memorably by Hamilton's great rival, Thomas Jefferson, in the Declaration of Independence.

Once again, Hamilton acknowledged the importance of these moral limits on the power of government not only in theory, but also in the conduct of his statesmanship. Hamilton's first major act as Secretary of the Treasury was to propose a plan to service the nation's huge debts from the Revolutionary War. In crafting and explaining his proposals, Hamilton did not even consider the possibility that the government would refuse to pay any portion of its debts. In addition, he explicitly rejected calls for a policy of "discrimination" between the current and past holders of debt, a policy that would have required the government to violate the terms of the contracts by which the debt had been issued. Hamilton eschewed such expedients because by violating the rights of contract, they violated the right to property—a right that, with the rest of the founding generation, he held to be fundamental and the protection of which he held to be one of the first duties of government.

Finally, while Hamilton favored a broad reading of the national power in order to facilitate the government's efforts to secure the ends entrusted to it, his conception of those ends was not such as to justify the kind of unlimited government that we face today. The major tasks of the government of the United States, he suggested in *Federalist* No. 17, were to manage "commerce, finance, negotiation, and war" on behalf of the nation.⁴⁴ Today, the expansion of government power is driven not so much by an effort to discharge these duties effectively as by a desire to use the government as a tool of social and economic amelioration—to use it, in other words, in an endless quest to redress inequalities that progressives cannot tolerate. There is no hint in Hamilton's thought of any interest in dedicating government to such a pursuit.

41. *Ibid.*, pp. 705-706.

42. *Ibid.*, p. 707.

43. *Ibid.*, p. 613.

44. *Federalist* No. 17, in *The Federalist Papers*, ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961), p. 105.

In sum, conservatives should not fear that by embracing a Hamiltonian constitutionalism, they would also be embracing the cause of unlimited government.

Conclusion

None of this is intended to discredit Jefferson or the Jeffersonian impulse in American politics. Jefferson was undeniably a great man, and his contributions to the founding must be gratefully acknowledged. The point is not even to discredit Jefferson's concerns about the scope of the federal power and its tendency to expand itself, concerns that are obviously relevant to the mission of contemporary American conservatism. The point is to remind contemporary conservatives both that in their legitimate quest to limit the power of the government, they must choose their arguments with care and that serious problems would accompany any conservative attempt to resurrect Jefferson's strict construction of the Constitution and of the powers of the national government.

On the other side, we also need not insist that Hamilton's approach to the Constitution is perfect or the only defensible alternative, but only that it represents a permissible position for contemporary

conservatives. Some conservatives may seek an alternative approach in one of the other Founders, such as James Madison. Also, those conservatives who are generally attracted to Hamiltonianism need not accept all of Hamilton's conclusions. They might embrace his broad reading of the Necessary and Proper Clause, for example, but reject his interpretation of the General Welfare Clause.

Nevertheless, Hamiltonian constitutionalism offers conservatives a founding approach to the national power that avoids the problems associated with Jeffersonian constitutionalism while still sustaining the cause of limited government. A Hamiltonian constitutional conservatism is not an oxymoron but a viable path to harmonizing our commitment to limited government with a proper respect for the powers of the national government and the security of the Union.

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