

## WHAT WOULD HAMILTON DO?

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On July 14, 1804, Gouverneur Morris stood by an open coffin at the front of Trinity Church in Manhattan and addressed a massive crowd that filled every nook of the sanctuary and spilled out into the street of lower Broadway.<sup>1</sup> Morris had been one of the most active and influential delegates to the Constitutional Convention. Now he was at Trinity Church to eulogize his friend, Alexander Hamilton, who had tragically been shot and killed at a dueling ground in Weehawken, New Jersey, by the Vice President of the United States, Aaron Burr. Hamilton himself had shot high and wide, but the Vice President shot straight and true, and his bullet found its mark.<sup>2</sup> Morris reminded the audience of his friend's valor during the Revolutionary War, his unflinching advocacy of the Constitution, and his exemplary public service as first Secretary of the Treasury and counselor at the bar.<sup>3</sup> At the end of his oration, Morris offered the assembled mourners some practical advice about how to decide difficult political questions in the future: Pay more attention to acts than "professions," he warned.<sup>4</sup> And most significant: "[O]n a doubtful occasion ask, Would Hamilton have done this thing?"<sup>5</sup>

What would Hamilton have done? Not a bad question to ask, even today. But I doubt anyone in the United States in 2011 is doing that. For all his brilliance and influence on the Founding, Hamilton stands as the odd man out in the current ideological

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1. For an account of Alexander Hamilton's funeral, see RON CHERNOW, *ALEXANDER HAMILTON* 710–13 (2004).

2. *See id.* at 700–05 (describing the fatal duel).

3. *See id.* at 712–13.

4. Gouverneur Morris, *Oration over Alexander Hamilton* (Jul. 14, 1804), in 9 *MODERN ELOQUENCE: OCCASIONAL ADDRESSES* 887, 890 (Thomas B. Reed ed., 1900).

5. *Id.*

divide. Conservatives today tend to favor limited government and strict constitutional construction—ideas Hamilton rejected in favor of energetic administration and broad construction. Even so, one might still expect some, like the Federalist Society, to champion Hamilton’s legacy. After all, Hamilton was the progenitor of the *Federalist* Papers and founder of the *Federalist* Party.<sup>6</sup> Yet it is the portrait of James Madison—a Jeffersonian Republican—that graces the Federalist Society logo, not Hamilton’s.

Modern liberals are no more inclined to take their cues from the Hamilton legacy. To be sure, modern progressives tend to advocate big government and loose constitutional construction—ideas Hamilton originated.<sup>7</sup> But every year Democrats sponsor Jefferson-Jackson Dinners, which are named for the biggest scourges of Hamiltonian policy. From the modern progressive point of view, Hamilton was too much a believer in private property, too much the advocate of sound conservative finance, too much the critic of the French Revolution, too inclined to use American military power abroad, and too much a believer that American prosperity would come from profit and markets.

Thus, neither the tea partiers nor the Obama Democrats are likely to honor Hamilton as an example. But perhaps this lack of modern adulation makes it all the more worthwhile for us to take a new look at Hamilton’s constitutional vision for America. In undertaking a study of what Hamilton stood for, it helps to recall first what Hamilton did. Whatever one’s opinions of his ideas, Hamilton’s life is an impressive, indeed amazing, exemplar of the American Dream. No prominent American statesman rose so quickly, from so little, to excel so splendidly in so many things.

Alexander Hamilton arrived in this country in about 1772,<sup>8</sup> on the eve of the Revolution, at about the age of seventeen—his exact birth date is unknown—penniless and family-less, an object of charity from back home.<sup>9</sup> John Adams called him “the bastard brat of a Scotch pedlar,” which was true.<sup>10</sup> But his early history was even less prepossessing than that. Hamilton was born on the West Indian island of Nevis, where slaves out-

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6. See CHERNOW, *supra* note 1, at 4–5.

7. See *id.* at 352–54.

8. See *id.* at 38.

9. See *id.* at 522.

10. *Id.* at 15–17.

numbered the free population by a ratio of four to one.<sup>11</sup> His maternal grandfather was a Huguenot who fled France after revocation of the Edict of Nantes, and his mother, Rachel Faucette, was rumored to be half or a quarter black.<sup>12</sup> She married a Dane, Johann Lavien (or possibly Levine), who may have been a Sephardic Jew.<sup>13</sup> Whatever his background, Lavien was a coarse, repulsive, and violent fellow. After giving birth to a son, Rachel left him. Lavien accused her of adultery and had her jailed for several months in a dank medieval fortress usually reserved for pirates and runaway slaves.<sup>14</sup> After her release, Rachel fled Nevis. She could not obtain a divorce, though Lavien, as the wronged party and the male, was free to divorce her and remarry.<sup>15</sup>

Rachel took up with James Hamilton, fourth of eleven children of a minor Scottish laird. Unsuccessful in business, he had migrated to the West Indies, where he repeated his pattern of failure. The two began a fifteen-year relationship, which ended when Alexander was about ten years old and James abandoned his family;<sup>16</sup> Alexander never saw him again. They maintained correspondence, however, and Alexander assisted James financially in James's old age.<sup>17</sup> Alexander Hamilton certainly regarded James Hamilton as his father, but evidence suggests this was not the case. Most likely, Hamilton's biological father was one Thomas Stevens, a gentler and more successful man whose son was the spitting image of Alexander.<sup>18</sup>

Between the ages of ten and fourteen, Alexander experienced a series of misfortunes that staggers the imagination. Soon after his father absconded, both Alexander and his mother caught a tropical disease, and she died in their shared bed.<sup>19</sup> At her death, all her property was seized by her first, and legitimate, son, Peter Lavien. Alexander and his brother went to live with a cousin; a month later, the cousin committed suicide and was

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11. *Id.* at 9.

12. *Id.* at 8–9.

13. About a quarter of the free population of Charlestown, where Hamilton probably lived as a boy, were Sephardim. *Id.* at 17.

14. *See id.* at 10–11.

15. *Id.* at 11–12, 16.

16. *See id.* at 12–16 (describing Alexander Hamilton's youth with James Hamilton).

17. *Id.* at 147–48.

18. *Id.* at 27–28.

19. *Id.* at 24.

discovered dead in his bed in a pool of blood. Another relative took them in and promptly died.<sup>20</sup> Young Alexander's troubles did not end there; he survived one of the fiercest hurricanes ever to strike the West Indies, with fifteen-foot waves crashing through the town and destroying everything in their wake.<sup>21</sup>

Hamilton thus endured illegitimacy, poverty, disease, the death of three sequential guardians, abandonment, and natural disaster. And yet, by the age of fourteen, young Alexander Hamilton had won a trusted position as clerk in an export company on St. Croix.<sup>22</sup> By sixteen, he was so knowledgeable and so capable that the owners left him in charge when they were out of the country.<sup>23</sup> As a teenage boy, Hamilton issued orders to ship captains, handled money in multiple currencies, kept the books, and managed the business. So impressed were the merchants of St. Croix with this "bastard brat" that they raised a subscription to send him to New York to obtain a proper education.<sup>24</sup>

Hamilton undertook his studies at King's College, now Columbia, a pillar of the Anglican and Tory establishment.<sup>25</sup> He distinguished himself there with precocious essays and speeches denouncing British misrule and supporting the nascent cause of Independence—and incidentally orchestrated the rescue of the Tory rector when a patriot mob attacked his residence.<sup>26</sup> At twenty-one, at the outbreak of war, he was selected to serve as a captain of the artillery. General George Washington noticed the young officer and made him his aide de camp—essentially his right hand man and the manager of the Continental Army.<sup>27</sup> Of Washington's written orders during the war, most are in Hamilton's handwriting.<sup>28</sup> But Hamilton was not content with this vital and central role; he wanted combat. In the final stages of the war, Washington gave him command of three battalions of light infantry, and he led the bayonet attack on the British fortifications at Yorktown, making him one

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20. *Id.* at 25–26.

21. *See id.* at 29–40.

22. *See id.* at 29–31.

23. *See id.* at 31.

24. *Id.* at 37–38.

25. *Id.* at 48–50.

26. *See* FORREST McDONALD, ALEXANDER HAMILTON: A LIFE 12–14 (1979).

27. *Id.* at 14–15.

28. CHERNOW, *supra* note 1, at 89.

of the military heroes of the war.<sup>29</sup> Later, during John Adams's presidency, the President promoted Hamilton to the rank of major general and put him in charge of the forces preparing for war against France.<sup>30</sup> Had that war broken out—as he imprudently wished—Hamilton might be remembered even more as a military leader than as a leader in finance and law.

More interesting and ultimately more significant than his Revolutionary War military exploits were his ventures into economic and constitutional theory. Despite the demands of his job and the privations of military service, Hamilton spent the depths of the war gaining insights into human nature from Cicero, Bacon, Montaigne, and Hobbes.<sup>31</sup> He took notes in the blank pages of a pay book, filling 112 pages during the war. From the moderns, particularly the Scots, he learned the “new sciences” of economics and politics. Among his favorite sources was Malachy Postlewayt's *Universal Dictionary of Trade and Commerce*, a cross between an almanac and an economics textbook.<sup>32</sup>

Hamilton did not just read. He formulated ideas that would later be central to the new Republic's foundations. In the winter of 1780–81, he composed and sent two significant letters. The first letter, addressed to his friend James Duane, a member of Congress from New York, criticized the then-new Articles of Confederation. It suggested a plan for a new and much stronger constitution—the first detailed proposal for a new constitution by anyone in the nation.<sup>33</sup> In its basic outline—particularly the powers that would eventually be allocated in Article I, Section 8—this plan closely resembled what would later come out of the Philadelphia Convention.<sup>34</sup> Hamilton's second letter, to the newly appointed Secretary of Finance Robert Morris, outlined an economic plan for restoring the public credit and economic health of the nation.<sup>35</sup> This lengthy letter, which Hamilton wrote at the age of twenty-five while serving full-time as a military officer during the war, lays out almost the entirety of the plan Hamilton would put into effect a decade later as the first Secre-

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29. *See id.* at 161–66 (describing the battle at Yorktown).

30. *See id.* at 592–602.

31. *Id.* at 110–11.

32. *Id.*

33. *Id.* at 138–39.

34. *See id.* at 110–11.

35. *See id.* at 156.

tary of the Treasury.<sup>36</sup> Reading the two letters in tandem is the best possible way to see the connection between constitutional reform and economic reform at the Founding.

After the war, Hamilton numbered among the prime supporters of the campaign to summon a constitutional convention. As a delegate to the Annapolis Convention, he had time to swap ideas with James Madison and begin their remarkable, if short-lived, period of collaboration.<sup>37</sup> He also served as a delegate from the State of New York to the Constitutional Convention, though he was hamstrung by service with two other delegates who were implacably opposed to the new Constitution and consistently outvoted him.<sup>38</sup> Immediately after the Convention, alarmed by the tenor of opposition in the press, Hamilton organized the writing of its most important defense, known today as *The Federalist*, recruiting Madison and John Jay to assist in the effort.<sup>39</sup> At the crucial New York ratifying convention, which was dominated by Anti-Federalists, Hamilton was by far the most active and eloquent advocate for the Constitution.<sup>40</sup> So close was the identification of Hamilton with the Constitution in New York that when the ratifiers eventually approved the document, the City of New York put on a celebratory parade, which featured a float in the form of a miniature frigate, pulled by ten horses, dubbed the *Federal Ship Hamilton*.<sup>41</sup> This celebration marked the all-time peak of Hamilton's public popularity.

Meanwhile, Hamilton had become the most successful lawyer in the city of New York. In 1784, he argued the most important pre-constitutional case involving judicial review.<sup>42</sup> In 1796, he argued, and won, the first case in American history in which the Supreme Court was asked to judge the constitutionality of an act of Congress.<sup>43</sup> It is this case, *Hylton v. United States*, which de-

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36. *Id.* at 156–58; see also *id.* at 370–462.

37. *Id.* at 222–24.

38. *Id.* at 235–36. Even when his fellow delegates were not present, Hamilton still could not prevail because each state needed a minimum of two delegates present to vote. *Id.* at 236.

39. *Id.* at 247.

40. See *id.* at 262–69.

41. *Id.* at 269.

42. William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 480–87 (2005). The case, *Rutgers v. Waddington*, is not found in any case reporter. *Id.* at 480 n.107.

43. See *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796).

serves the title of the first instance of constitutional judicial review, not *Marbury v. Madison*, decided seven years later.<sup>44</sup> Later, during the Jefferson presidency, Hamilton argued *People v. Crosswell*, the case that established the important principle of freedom of the press that truth is a defense to an action for libel.<sup>45</sup>

Hamilton's signature achievement is found in his tenure as President Washington's first Secretary of the Treasury. As Washington's most trusted advisor and cabinet member, he drafted legislation for America's first tax system, creation of the currency, establishment of a national bank, reform of the public credit, and support of manufacture.<sup>46</sup> It is no exaggeration to say that Hamilton's economic policy set the course for the new republic's two-century run of prosperity. But much of this was controversial. Jefferson and his supporters bitterly opposed Hamilton's economic program, claiming that it would benefit the aristocrats and speculators.<sup>47</sup> Hamilton believed, however—and argued in *Federalist* 35—that a free economy produces a powerful conjunction of interest between the owners of economic enterprises and those who work in them.<sup>48</sup> His economic program assumed—correctly, as it turns out—that policies that fostered the growth and prosperity of industry, agriculture, and commerce would enrich the whole of society, and not just the wealthy. Along with differences arising from foreign policy, Hamilton's economic program inspired the nation's division into two ideologically antagonistic political parties, with Hamilton himself the guiding light of the Federalists. To a great extent, this division over economics still animates American politics to this day.

At the age of forty-nine, Hamilton became the only American statesman ever to be killed by a sitting Vice President of the United States.<sup>49</sup>

His remarkable life sets the stage for consideration of the groundbreaking ideas he used to shape America's political, social, and financial landscape. It is these ideas that I ask you to

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44. 5 U.S. (1 Cranch) 137 (1803).

45. See 3 Johns. Cas. 337 (N.Y. Sup. Ct. 1804).

46. See CHERNOW, *supra* note 1, at 370–462.

47. See *id.* at 424–28.

48. THE FEDERALIST NO. 35, at 211 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

49. See CHERNOW, *supra* note 1, at 700–05.

think about as our nation faces financial and geopolitical difficulties not much less severe than those that Hamilton himself confronted. Let us begin with his constitutional interpretive approach, move to his understanding of federalism, his opposition to slavery, his view that the Bill of Rights was unnecessary, his exposition of the executive power, and his reform of public finance, concluding with his ideas about constitutional structure.

### I. CONSTITUTIONAL INTERPRETATION

Hamilton's approach to constitutional interpretation, which can only be described as loose and nontextual, clashes with modern conservative jurisprudence. Modern conservatives worry that the courts will impose their own, undemocratic notions of social change in the name of the Constitution, and that they will fail in their responsibility to limit the exercise of federal power to its enumerated objects.<sup>50</sup> Hamilton's fullest statement of the nature of constitutional judicial review, presented in his *Federalist* essays 78 through 82, is less than reassuring from that point of view. Hamilton calls the judiciary the "least dangerous" branch,<sup>51</sup> but he rests this assessment principally on the fact that the executive might refuse to enforce judicial decrees,<sup>52</sup> that the Congress can impeach judges whose "deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it,"<sup>53</sup> and that judges will be "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . ."<sup>54</sup>

Today we would regard executive defiance of a judicial decree as flagrantly inconsistent with the rule of law, and impeachment on account of the substance of a judge's decisions a core violation of judicial independence. Precedent, we now know, can serve as easily as a jumping-off point for further ju-

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50. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997).

51. THE FEDERALIST NO. 78, *supra* note 48, at 465 (Alexander Hamilton).

52. See *id.*

53. THE FEDERALIST NO. 81, *supra* note 48, at 485 (Alexander Hamilton).

54. THE FEDERALIST NO. 78, *supra* note 48, at 471 (Alexander Hamilton).



dicial adventurism as it can for restraint.<sup>55</sup> Those supposed checks are therefore not credible.

We are left in the end with Hamilton's assurance that judges will exercise not "will" but "merely judgment."<sup>56</sup> This would be reassuring if true. It assumes, however, that constitutional interpretation is a sufficiently objective enterprise that we can tell the difference between will and judgment, and that judges will not be tempted to read their own predilections into the uncertainties of legal sources. Experience shows that these assumptions, however normatively attractive, are less than reliable in practice.

How did Hamilton put these constitutional interpretive principles to work? The telling example here is his opinion on the constitutionality of the Bank of the United States, which he wrote for President Washington to refute opinions by James Madison, Thomas Jefferson, and Edmund Randolph that the Bank exceeded the powers of Congress.<sup>57</sup> These men were serious adversaries. Madison, often called the "Father of the Constitution,"<sup>58</sup> also was Hamilton's co-author of *The Federalist*. Randolph, presented the Virginia Plan at the Convention and was Washington's first Attorney General.<sup>59</sup> Jefferson was Jefferson, the only person among the Founders whose brilliance rivaled Hamilton's own. Madison, Jefferson, and Randolph all employed a mode of interpretation easily recognizable today. They began with the constitutional text, and asked whether the measure in question was authorized by any of the specific enumerated powers. The answer was "no," and they further reasoned that any process of reasoning that stretched the text far enough to countenance the Bank would render the new federal government one of unlimited powers.<sup>60</sup>

Hamilton might well have prevailed in the argument over the Bank even on his adversaries' terms. A strong argument could be mounted that a national bank would be the best pos-

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55. See William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1317 n.88 (1998) ("Every first-year law student can distinguish any precedent.").

56. THE FEDERALIST NO. 78, *supra* note 48, at 465 (Alexander Hamilton).

57. See CHERNOW, *supra* note 1, at 352–55.

58. See, e.g., BRENT P. KELLY & ARTHUR M. SCHLESINGER, JAMES MADISON: FATHER OF THE CONSTITUTION (2000).

59. See generally JOHN J. REARDON, EDMUND RANDOLPH: A BIOGRAPHY (1975).

60. The various opinions can be found in edited form in MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 67–74 (2010).

sible agency for carrying out the congressional powers to coin money, to borrow, to collect taxes in far-flung parts of the republic, and to spend where necessary.<sup>61</sup> Certainly, the Bank of England had proven invaluable in these respects.<sup>62</sup> But that was not the focal point of Hamilton's argument. Hamilton began instead by explaining that the power of incorporation is "inherent in the very *definition of government*" and that "every power vested in a government is in its nature *sovereign* and includes by *force* of the *term* a right to employ all the *means* requisite . . . ."<sup>63</sup> He thus argued from general propositions about the nature of a federal union, rather than from specific powers enumerated in Section 8 of Article I. With such a starting premise, his conclusion in favor of the Bank was inevitable.

We might compare these approaches to the two sides in the current healthcare litigation. The plaintiffs in those cases demand a specific link between the legislation and particular powers enumerated in Section 8. They argue that individuals who choose not to purchase insurance are not engaging in commerce, let alone commerce "among the several States," and thus that Congress's attempt to force them to purchase insurance from private companies exceeds congressional power.<sup>64</sup> That argument is reminiscent of Jefferson's, Randolph's, and Madison's. Those statesmen pointed out that a private bank engages in many activities unrelated to the discharge of congressional powers, and that those activities were properly within the regulatory authority of the States.<sup>65</sup> Just as opponents of the healthcare law argue that imposing legal mandates on individual citizens is an extraordinary power, which should not be implied, the opponents of the Bank argued much the same about the power of incorporation. They stressed that a delegate to the Convention—it happened to be Madison—had proposed vesting Congress with the power of incorporation

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61. See U.S. CONST. art. I, § 8.

62. See CHERNOW, *supra* note 1, at 295–96.

63. Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791), in 8 PAPERS OF ALEXANDER HAMILTON 97 (Harold C. Syrett ed., 1965), quoted in CHERNOW, *supra* note 1, at 354.

64. See, e.g., *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 542–44 (6th Cir. 2011).

65. Thomas Jefferson, *Opinion against the constitutionality of a National Bank*, in 3 THE WRITINGS OF THOMAS JEFFERSON 558 (H. A. Washington ed., New York, Riker, Thorne & Co. 1854) (1791).

and that the proposal was voted down. Even more to the point, challengers to the healthcare legislation stress the importance of finding a limiting principle, lest the Necessary and Proper Clause (sometimes called the “Sweeping Clause”) be transformed into a general police power, which seems contrary to the very purpose of the enumeration of powers.<sup>66</sup> Jefferson made essentially the same argument: “Congress are authorised to defend the nation: ships are necessary for defence: copper is necessary for ships: mines necessary for copper: a company necessary to work the mines: and who can distrust this reasoning who has ever played at ‘this is the house that Jack built?’ under such a process of filiation of necessities the sweeping clause makes clean work.”<sup>67</sup>

Hamilton’s mode of analysis more resembles the arguments in support of the legislation. Healthcare, supporters say, is a national industry of great economic importance.<sup>68</sup> Congress may exercise “all the means requisite” (Hamilton’s words) to regulate it.<sup>69</sup> Far from being constitutionally suspect, they say, the power to require individuals to take certain actions is “inherent in the very definition of Government” (Hamilton’s words, again).<sup>70</sup> Some supporters of the constitutionality of the law take the ultra-Hamiltonian step of arguing that it is not necessary to tie the legislation to specific enumerated powers at all, because this form of regulation is outside the competence of the individual states and therefore inherently national in character.<sup>71</sup>

Of course, we do not know how Hamilton, summoned from the grave, would analyze the constitutionality of the individual mandate. But I strongly suspect that he would be more concerned with the long-term fiscal imprudence of the program than its constitutional basis under Article I, Section 8. He advocated the Bank because it would help the new nation manage and reduce the na-

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66. See *Thomas More Law Ctr.*, 651 F.3d at 549–50 (Sutton, J., concurring in part).

67. Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), in 31 *The Papers of Thomas Jefferson* 547 (Barbara B. Oberg ed., 2004).

68. See *Thomas More Law Center*, 651 F.3d at 550 (Sutton, J., concurring in part).

69. CHERNOW, *supra* note 1, at 354.

70. *Id.*

71. See, e.g., Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 6–15 (2010); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 117, 123 (2011); Andrew Koppelman, *Bad News For Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 12–13 (2011).

tional debt, making the Bank “necessary and proper” for the discharge of the entirety of Congress’s functions.<sup>72</sup> It is doubtful he would be so sanguine about the necessity or propriety of multiplying the nation’s future fiscal obligations.

## II. FEDERALISM

Hamilton’s broad interpretation of national powers does not, however, suggest that he believed the national government should take on all the tasks of domestic government. He did not think a unified national administration would be workable or wise. To be sure, at the Constitutional Convention, Hamilton advocated a plan that would have reduced the States to mere administrative units of a unitary state<sup>73</sup>—a proposal that attracted almost no support from other delegates.<sup>74</sup> His point, though, was not that the national government should be omnipotent, but that state governments should not be given a checking function with respect to national powers, which advocates of the confederal model sought to achieve. In that, he largely succeeded, apart from the mode of the election of Senators. Once the Constitution was in place, his interpretation of its federalism was more nuanced. In *Federalist* 17 he maintained that commerce, finance, negotiation, and war were the only concerns that would be pursued by the national government. Hamilton declared that domestic policy—he gave the examples of private justice and the supervision of agriculture—should and will be left to the States.<sup>75</sup> His reasons were not grounded in a theory of the reserved powers, or “states’ rights.” He argued, instead, that the federal government should focus on the important matters that call it forth. For the national government to dabble in the mundane matters of internal domestic policy would be distracting and beneath it. Hamilton’s philosophy seems to be that the national government should deal with a small number of important matters and do them well. That might be good advice.

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72. See CHERNOW, *supra* note 1, at 347.

73. See 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 304–11 (Max Farrand ed., 1937).

74. See CHERNOW, *supra* note 1, at 233.

75. THE FEDERALIST NO. 17, *supra* note 48, at 118–22 (Alexander Hamilton).

## III. SLAVERY

Less well-known is Hamilton's advocacy against slavery and the slave trade. Hamilton arguably devoted more time and attention to fighting slavery than did any other major founder. His biographer, Ron Chernow, speculates that Hamilton's abhorrence of slavery stemmed from his early life on Nevis and St. Croix, where slavery was at its cruelest and most ubiquitous.<sup>76</sup> Hamilton was an active member of the New York Manumission Society almost from its beginning. He left the Constitutional Convention in August to attend a convention of the Society—the only delegate to do so.<sup>77</sup> Later, Hamilton defended several slaves in court against abuse, and after he stepped down as Treasury Secretary he returned to the antislavery cause in New York.<sup>78</sup> Yet almost no one today is aware of any of this.

History has mostly been written by latter-day admirers of Jefferson, who for understandable reasons underplay the connection between slavery and the Federalist-Republican divide. But Hamilton's vision of an industrial and financial society based on market capitalism, as opposed to Jefferson's vision of an agrarian republic, reflected the division between freedom and slavery. The Federalists we now call "conservatives" dominated the ranks of the antislavery movement, while Jeffersonian Republicans, even in the North, were mostly on the other side. Chernow comments that an antislavery petition in 1786 reads like a who's-who of leaders of the Federalist Party.<sup>79</sup> It is one of the great mysteries of American historiography that Master Thomas Jefferson of Monticello, owner of 130 slaves, who never freed any of them who was not a close family relation, is treated as the great democrat and apostle of liberty, while Hamilton, born in poverty and a consistent foe to slavery, is branded the aristocrat.

## IV. THE BILL OF RIGHTS

One feature of Hamilton's thought that appears wrong to most of us today, but might have a grain of important truth, is his argument that the Constitution had no need for a bill of rights. The

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76. See CHERNOW, *supra* note 1, at 19, 23.

77. *Id.* at 239.

78. *Id.* at 580–81.

79. *Id.* at 216.

procedural, democratic, and substantive limits on national power, he thought, made a bill of rights unnecessary—and possibly dangerous, because a bill of rights would imply that the government had been given power in the first place to invade them.<sup>80</sup> In light of the fact that the federal government was limited to such matters as international and interstate commerce, finance, war, and foreign affairs, which do not touch the ordinary lives of the citizens, there was not much danger that it would violate freedom of religion, freedom of the press, or the like.<sup>81</sup>

We now recognize this argument was not as powerful as Hamilton thought. Almost every power Article I, Section 8 vests in Congress could, if abused, infringe such freedoms as religion, speech, or press. The power to tax and spend could be used to establish and support a church. The power to raise and support armies raises the question of conscientious objection. Regulation of commerce could affect the circulation of newspapers. Copyright arguably can impinge on freedom of speech, as can the power over delivery of the mail.

But in a broader, more theoretical sense, Hamilton may have been on to something. The existence of a bill of rights has tended to focus legal and constitutional attention on enumerated rights, to the point that few people worry much about the scope and breadth of government. Indeed, many of the people who regard themselves most fervently as civil libertarians also tend to advocate for bigger, more-expansive government, as if there were no tension between the two.

Take two examples: subsidies for the arts, and healthcare. Self-styled supporters of the arts tend to advocate for government subsidies of favored artists and of highbrow radio, but they also can be quick to complain if the representatives of the people, who are funding the programs, seek to exercise any control over content. But funding for the arts—like funding for religion—inherently invites government favoritism and attendant government control. When the question of restrictions on artistic freedom through funding went to the Supreme Court, the Court tied itself up in incoherent knots, pleasing neither democrats nor libertarians.<sup>82</sup> Similarly, when the government takes it upon itself to decide what kinds of healthcare services people ought to pur-

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80. THE FEDERALIST, NO. 84, *supra* note 48, at 513–14 (Alexander Hamilton).

81. *See id.*

82. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

chase in the form of insurance, instead of leaving these decisions to private choice (presumably with public subsidies for the poor), we collectivize decisions about deeply controversial matters of life, death, and quality of life. These contentious issues then must be fought out in Congress, rather than being resolved by each individual according to conscience. Witness the debates in Congress over abortion coverage, which almost frustrated passage of the new healthcare program, or the recent regulatory imposition of a requirement that every health insurance plan cover birth control pills with abortifacient properties.<sup>83</sup> Conscientious objectors have taken these questions to court, saying they should not be forced to pay for services they regard as deeply immoral. The courts, however, have never granted effectual relief.<sup>84</sup> Limitations on the reach of government, as Hamilton understood, ward off interferences with private choice and conscience far more effectively than after-the-fact interventions in the name of civil liberties.

## V. EXECUTIVE POWER

Hamilton's belief in a strong executive is notorious. At a time when most of the Founders, Madison especially, expected Congress to be the centerpiece and fulcrum of American politics, Hamilton, almost alone, believed that administration would be the most important determinant of good government and thought that the powerful new executive created by Article II would be central to the republic's success.<sup>85</sup> Hamilton saw that only the executive had the requisite energy, and could operate with the necessary dispatch to govern fast-moving financial and foreign policy matters. More inventively, he argued that a single-headed executive is more accountable to the public for good or bad administration, because the public would know whom to praise or blame.<sup>86</sup>

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83. See, e.g., *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004).

84. See, e.g., *Calvey v. Obama*, CIV-10-353-R, 2011 U.S. Dist. LEXIS 64189, (W.D. Okla. Apr. 26, 2011); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006); *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 67.

85. See THE FEDERALIST NOS. 68, 70, *supra* note 48 (Alexander Hamilton).

86. This argument would eventually become conservative orthodoxy. See, e.g., *Printz v. United States*, 521 U.S. 898, 922 (1997) (Scalia, J.) ("The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known.").

This aspect of Hamiltonian thinking always has noisy critics. It is easy for friends of the party out of power to raise alarms about the “imperial presidency” and to wax indignant about the current administration’s shockingly expansive theories of executive power. But when political winds shift and their own party comes into power again, those criticisms somehow never lead to fundamental correction. Instead the new inhabitants of the executive branch adopt only slightly different theories of expansive executive authority. Never was a modern President more excoriated for expansive use of executive power than George W. Bush, but his successor, who joined in those critiques as a Senator and a candidate, has continued most of those policies, with unauthorized war and vast discretion in financial affairs added to the mix.<sup>87</sup> We might not like it—at least when the President is not of our persuasion—but Hamilton seems to have understood, more clearly than any of his contemporaries, the dynamic character of the presidential executive.

## VI. PUBLIC FINANCE

Hamilton’s most valuable insights, not surprisingly, concerned the sphere of finance, and the connection between finance and sound constitutionalism.

Most people have forgotten that the main reason the Constitutional Convention met in 1787 was to resolve a financial crisis—one more serious even than ours of today. In the wake of the successful Revolution, the United States government was broke: It owed \$11.7 million to European creditors, mostly the French government and Dutch bankers; \$40.1 million to creditors in the United States; and an additional \$25 million in state debts incurred during the war.<sup>88</sup> Annual interest charges came to just over \$4.5 million.<sup>89</sup> To put that into perspective, this was about seven-and-a-half times the annual operating budget of

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87. See, e.g., Tung Yin, “Anything But Bush?": The Obama Administration and Guantanamo Bay, 34 HARV. J.L. & PUB. POL’Y 453 (2011).

88. Alexander Hamilton, *Report of the Secretary of the Treasury with his Plan for Supporting the Public Credit* (Jan. 14, 1790), in 2 ANNALS OF CONGRESS 2005 (Joseph Gales ed., Washington, Gales & Seaton 1834) (1791).

89. *Id.*



the United States government.<sup>90</sup> That is the stuff of national disaster. Recall that it was King Louis's inability to pay the national debt that brought on the French Revolution.<sup>91</sup>

The United States Constitution was designed to provide long-term institutional solutions to the young nation's fiscal woes. The central problem in 1787 was that the United States government, under the Articles of Confederation, had power to borrow but no power to tax.<sup>92</sup> That is a nasty combination. Under the Articles, Congress would, in theory, divide its budget up among the States in proportion to their population and property, and the States, in theory, would send in their allocated share. But there was no mechanism for enforcement.<sup>93</sup> At the beginning, most states attempted to meet their quotas, though some, like Connecticut, were simply unable to do so. And by 1785, some states, like New Jersey, were refusing outright.<sup>94</sup> Once some states stopped paying, the others refused to support the free-loaders. Revenues slowed to a trickle. The United States was out of money. The government was no longer paying interest on bonds held by Americans. It had defaulted on payments to Europeans. Interest alone on the debt exceeded all reasonable prospects for revenue. The value of the currency collapsed.<sup>95</sup> Hamilton lamented, "We may indeed with propriety be said to have reached almost the last stage of national humiliation. . . . We have neither troops, nor treasury, nor government."<sup>96</sup>

Hamilton recognized that solving the fiscal crisis was central to winning the war for independence. In his 1781 letter to Robert Morris, Hamilton wrote, "Tis by introducing order into our finances—by restoring public credit—not by gaining battles that we are finally to gain our object."<sup>97</sup> In this, Hamilton was ahead of his time. Today, economic and military historians look back

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90. *Act Making Appropriations for the Support of Government, for the Year One Thousand Seven Hundred and Ninety* (Mar. 26, 1790), 1 ANNALS OF CONGRESS 2264 (Joseph Gales ed., Washington, Gales & Seaton 1834) (1790).

91. See Thomas J. Sargent & François R. Velde, *Macroeconomic Features of the French Revolution*, 103 J. POL. ECON. 474, 477 (1995).

92. ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 5.

93. See CHERNOW, *supra* note 1, at 171.

94. See MCDONALD, *supra* note 26, at 89.

95. See Richard Sylla, *The transition to a monetary union in the United States, 1787–1795*, 13 FIN. HIST. REV. 73, 80–82, 85 (2006).

96. THE FEDERALIST NO. 15, *supra* note 48, at 106 (Alexander Hamilton).

97. CHERNOW, *supra* note 1, at 156.

on the long series of wars between England and France—France having three times the population, two and a half times the GDP, a better climate, more fertile land, and significant advantages in science and culture—and conclude that England’s military advantage was, purely and simply, its superior financial system and thus its ability to finance war.<sup>98</sup>

Hamilton also realized that if the new nation could put its public credit on proper footing, this would not only avert fiscal meltdown in the short run but also bring huge commercial, military, and political benefit to the new nation. As Hamilton said in his 1790 *Report on Public Credit*, “the proper funding of the present debt will render it a national blessing.”<sup>99</sup> This statement must be read with care; some have taken it to mean Hamilton was an advocate of deficit finance. Not so. By “proper funding,” he meant that there must be a reliable and realistic long-term plan to extinguish the debt. Moreover, he explained that Congress should use its borrowing power only when necessary for “exigencies” or “emergencies”<sup>100</sup>—most especially war, but also such peacetime expenditures as Jefferson’s Louisiana Purchase, which he supported in the face of widespread Federalist disapproval.<sup>101</sup> Hamilton did not advocate borrowing for the ordinary and predictable costs of government. He thus appears at odds with both of the major political factions of our time. He would not favor a balanced budget constitutional amendment, but he would almost certainly be appalled at our current “structural” deficit, in which we finance current operations with ever-mounting issuance of debt.

Putting the national finances on a responsible footing required three things: an efficient tax system, a tight budget, and provision for restructuring and then paying the existing debts. At the invitation of Congress, and with Washington’s backing, Hamilton proposed plans for all three, which Congress

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98. See, e.g., NIALL FERGUSON, *THE CASH NEXUS: MONEY AND POWER IN THE MODERN WORLD, 1700–2000*, at 267–72 (2001); PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000*, at 79–82 (1989).

99. Alexander Hamilton, *Report on Public Credit* (Jan. 1790), in 1 *ANNALS OF CONGRESS* 27 (Washington, Blair & Reves 1837).

100. Alexander Hamilton, *Report of the Secretary of the Treasury with his Plan for Supporting the Public Credit* (Jan. 14, 1790), in 1 *ANNALS OF CONGRESS* 1991 (Joseph Gales ed., Washington, Gales, & Seaton 1834).

101. CHERNOW, *supra* note 1, at 671.

adopted and Hamilton then executed.<sup>102</sup> The political opposition, led by Jefferson, accused Hamilton of taxing too much, spending too much, and being too concerned with paying off creditors, whom they regarded as speculators. In fact, Hamilton did his best to keep taxes low enough to avoid stifling economic growth, to spend as little as necessary to perform the essential responsibilities of government, and to restructure the debt to reduce interest costs.

Although the massive public debt from the Revolution appeared daunting, Hamilton realized that if the nation provided proper funding for paying the interest, creditors would be more than happy to roll over their investments into new government securities, even at a lower interest rate—thus saving on interest and virtually eliminating the need for repayment of principal, except on the government's own terms.<sup>103</sup> He cleverly used the western lands, as well as a dedicated fund for repayment, to give investors confidence in new securities. As investors switched to more reliable securities at lower interest, the public debt became manageable.<sup>104</sup> Moreover—and this was Hamilton's visionary insight—if the interest were paid regularly, and everyone knew it would be paid, then the underlying securities would gain stable value and would become a kind of liquid capital—a blessing in a world where gold and silver specie was costly to transport and use for transactions. Hamilton wished to bring these innovations, which economic historians call “the Financial Revolution,” to America.<sup>105</sup> To do that, the Articles of Confederation had to be scrapped, and a new Constitution adopted, one that would enable the federal government to raise revenue and service its debts.

Examine the list of powers given to Congress, which appears in Article I, Section 8. The very first in the list, Clause 1, reads, “[Congress shall have the power] To lay and collect taxes . . . to pay the debts of the United States.”<sup>106</sup> Its prime position in the list of enumerated powers suggests just how crucial debt financing was to the constitutional project. Indeed, the Constitution

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102. *See id.* at 480–81.

103. *See id.* at 297–301.

104. *See id.*

105. *E.g.*, DOUGLAS A. IRWIN & RICHARD SYLLA, *FOUNDING CHOICES: AMERICAN ECONOMIC POLICY IN THE 1790S* 61 (2011).

106. U.S. CONST. art. I, § 8, cl. 1.

assigns to the federal government the exclusive right to the most lucrative source of public revenue in early America: taxes on imports, and a supervening claim on the second most lucrative: excise taxes<sup>107</sup>—not to mention giving the federal government the nation's most valuable physical asset: the western lands.<sup>108</sup>

The first sentence of Article VI, which most famously contains the Supremacy Clause, also declares: "All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States, under this Constitution, as under the Confederation."<sup>109</sup> The clause prevents the new nation from taking advantage of regime change to repudiate its old obligations. Although modern lawyers usually skip right over this requirement, creditors in 1788 were paying attention.

Upon publication of the new Constitution, even before ratification, speculators in New York and abroad began buying up United States securities. In March of 1788, a leading Dutch banker bought \$200,000 in American securities at 37 ½ cents on the dollar.<sup>110</sup> In August, he increased his order to \$1 million in securities, and by early 1789 Dutch investors had purchased about \$4 million—and the price of continental securities was soaring toward par.<sup>111</sup>

As Treasury Secretary, Hamilton put into place the very plan he had outlined in his 1781 letter to Morris. His public finance program had three elements and two important effects. First, he created a national bank modeled on the Bank of England. Hamilton insisted that private investors control the Bank; the United States government was merely a minority shareholder.<sup>112</sup> He explained that investors would not trust the Bank if it were controlled by politicians. The government is a perpetual debtor and as such has an interest in debauching the currency, so that debts can be repaid in cheaper money. Private bankers would have the opposite incentive.

Hamilton also realized that it was essential to properly align the incentives for private bankers. He did not imagine that

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107. *Id.*

108. U.S. CONST. art. IV, § 3, cl. 2.

109. U.S. CONST. art. VI.

110. See MCDONALD, *supra* note 26, at 155.

111. *Id.*

112. See CHERNOW, *supra* note 1, at 348–49.

bankers are inherently public spirited; that is silly. Hamilton understood that bankers try to make money and that it is the responsibility of financial statesman to craft a system in which they make money by engaging in sound banking practices. Thus, Hamilton required the Bank to redeem its notes and deposits in silver or gold, on demand.<sup>113</sup> As a result, the Bank's owners would lose money if they allowed the Bank's credit to slip. Moreover, he gave the Treasury power to inspect the books and to receive weekly reports on the Bank's activities.<sup>114</sup> The government became a guarantor of the transparency and integrity of the Bank's books, but left its investment decisions to private hands, under conditions where investors will lose money if the Bank fails to maintain sound practices.

Arguably, recent policy has been exactly the opposite: to allow private financial entities to profit when excessive risk-taking pays off but to bail them out, at the expense of the taxpayer, if they fail catastrophically enough—all under cover of complicated transactions that render their activities opaque.

Second, Hamilton set tax rates at a manageable level, which would not inhibit trade and production.<sup>115</sup> He realized that excessive tax rates would both hurt the economy and bring in less revenue. He was attentive to which kinds of taxes would depress economic growth. He thought taxation of the consumption of alcohol would be both inelastic and harmless. That is how he inadvertently set off the Whisky Rebellion.<sup>116</sup> And for all his reputation as a big spender, Hamilton kept government expenditures not to a minimum, but at least to modest levels: less than a million dollars in his first few budgets, and less than Jefferson, for all his talk of economy in government, would later expend.

Third, Hamilton dedicated certain revenue sources to repayment of the debt, with priority over other spending.<sup>117</sup> This removed debt service from the politics of annual appropriations.

Hamilton's financial plan had two effects. First, with the prospect of reliable payments on the new securities, holders of the old public debt were willing to trade it in for Hamilton's

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113. *Id.* at 348.

114. *Id.* at 349.

115. *Id.* at 341–42.

116. *Id.* at 468.

117. *See id.* at 480.

new public notes, at a significantly lower interest rate.<sup>118</sup> By cutting the risk premium, the Treasury saved millions in interest payments. Second, by honoring securities at face value for all holders—even those who had purchased them from the original lenders at a discount—and keeping values stable by regular, predictable payments, Hamilton made government securities freely transferable, thus creating a market in government securities, transmuting government notes from an albatross into the economic equivalent of money, and greatly expanding liquidity for the new economy.<sup>119</sup> This was the most controversial piece of the program. Jefferson, Madison, and others were indignant at the fact that this would enrich speculators and stock-jobbers—and they insinuated that this had been Hamilton's real purpose all along.<sup>120</sup> But if downstream purchasers were not treated equally, securities could not sell, securities markets would not emerge, investors would not be willing to roll over their holdings, and government notes could not serve the function of creating a liquid money supply.

Hamilton's program worked amazingly quickly. By 1792, the interest rates on federal debt had crawled down to 6%, then to 5 ¼%, then 4 ¼%.<sup>121</sup> For a brief period in 1797, American securities even carried a lower risk premium than their British counterparts.<sup>122</sup>

The properly funded public debt indeed turned out to be a national blessing, as Hamilton predicted. Despite controversy at the beginning, generations of Congresses and Treasury secretaries from both parties maintained the basic outlines of the Hamiltonian system, enabling the United States to borrow money at the lowest interest rates in the world, and making the dollar the reserve currency of the world.

Recent events may be calling this accomplishment into question. According to Congressional Budget Office budget projections, unless something dramatic is done, this national blessing will soon turn into a curse. As the debt level rises above sixty

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118. *See id.* at 404.

119. Hamilton, *Report*, *supra* note 100, at 1994.

120. CHERNOW, *supra* note 1, at 302, 305.

121. *Id.* at 404.

122. *See* Richard S. Chew, *Certain Victims of an International Contagion: The Panic of 1797 and the Hard Times of the Late 1790s in Baltimore*, 25 J. EARLY REPUBLIC 565, 578 (2005).

percent of annual GDP toward ninety percent, which some economists think is the tipping point, we may not be able to withstand the shock.<sup>123</sup> Standard & Poor's downgraded the credit rating of Treasury securities, potentially endangering their status as essentially risk-free investments.<sup>124</sup> Hamilton believed that the public debt must be "properly funded." For the first time in modern history, there is some question about that.

## VII. DEMOCRATIC STRUCTURE

This leads to a final observation about Hamilton's constitutional thought, and an irony. Hamilton was skeptical of the ability of politicians facing frequent elections to make the long-term sacrifices necessary for the common good. In the constitutional struggles of the founding, Hamilton advocated what he called "high-toned" government, in contrast to the more democratic and accountable forms favored by the Jeffersonians and Anti-Federalists.<sup>125</sup> At the Constitutional Convention, Hamilton went so far as to suggest that the President and the Senate serve life terms, insulating them from popular demands for short-sighted policies, like spending today and promising to pay tomorrow.<sup>126</sup> He also thought other executive officials needed security of tenure. In Hamilton's mind, long terms led to a focus on the long term.

This aspect of Hamiltonian constitutionalism has enjoyed a resurgence in modern times. Our government relies increasingly on long-termed regulatory bodies, insulated from direct democratic control, like the FCC, FTC, and NLRB, to govern our economic life. Increasingly, all Congress does to address problems is delegate more power to these less-democratically accountable bodies. The Federal Reserve is the finest example of neo-Hamiltonian high-toned government. No agency has ever wielded so much power, with so much independence and so little accountability to the people.<sup>127</sup> Meanwhile, modern po-

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123. See, e.g., Carmen M. Reinhart & Kenneth S. Rogoff, *Growth in a Time of Debt*, 100 AM. ECON. REV. 573, 573 (2010).

124. Zachary A. Goldfarb, *U.S. rating downgraded for first time*, WASH. POST, Aug. 6, 2011, at A1.

125. CHERNOW, *supra* note 1, at 96.

126. *Id.* at 231-39.

127. See generally DONALD R. WELLS, *THE FEDERAL RESERVE SYSTEM: A HISTORY* (2004).

litical campaign conditions have produced incumbency advantages so large that members of Congress are almost impervious to electoral challenge in the absence of scandal. It is not uncommon for Senators and Representatives to serve in Congress for decades, an effective life term.<sup>128</sup>

But here is the irony. All this high-toned government, the unelected and long-termed Governors of the Federal Reserve, supported by Senators and Representatives serving for decades—these establishment figures are the ones who have created the current mess. They did nothing to curb budget deficits or to reform entitlements when it might have been done less painfully. They wallowed in earmarks and budget gimmickry, set unrealistically low interest rates, borrowed ever-increasing sums of money to satisfy current expenses, and made promises that are unsustainable but somehow never get contained. And it is the placard-waving, Jeffersonian common horde flocking to town halls and filling town squares, who have become the champions of Hamiltonian concern for the long run: “Spend less, tax less and borrow less,” they say. Bring back the Hamiltonian dream, where penniless bastards from nowhere can rise by the sheer force of intellect, hard work, and audacity to succeed in an America that prefers opportunity to entitlement, that lets losing businesses fail, and winning businesses make serious money.

How ironic it will be if Hamilton’s dream of a national blessing were restored by the very low-toned, democratic, unruly politics that he thought incapable of it.

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128. See, e.g., LISA TUCKER McELROY, *TED KENNEDY: A REMARKABLE LIFE IN THE SENATE* (2009).