7 The Constitutional Principles of Alexander Hamilton

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‘‘MINE IS AN ODD DESTINY,’’ ALEXANDER HAMILTON wrote in 1802. ‘‘Perhaps no man in the U States has sacrificed or done more for the present Constitution than myself—and contrary to all my anticipations of its fate, . . . I am still laboring to prop the frail and worthless fabric.”

He spoke the truth, without exaggeration. Even as he had signed the document in 1787, he had expressed grave misgivings and had said that he was signing it only because the Constitution offered a “chance of good” and because the alternative was “anarchy and Convulsion.” He worked feverishly to bring about its ratification; and once it had been adopted, it was he, more than any other man including Washington, who breathed life into it, who made it into an enduring government. His doubts arose from concern that the Constitution did not provide a central authority strong enough and stable enough to bind together as one nation the intensely provincial American people. His hopes and his labors arose from a belief in the magnificence of the undertaking and from a self-confidence that bordered on the sublime.

The constitutional principles that guided Hamilton in his public career from 1787 onward were the product of interaction between experience and observation, on the
one hand, and reading and contemplation on the other. In the pages that follow, we shall attempt to describe that interaction and to show how he applied his principles in the practical business of establishing a viable national government.

Hamilton was a man of ardent and enthusiastic temperament, inclined in his thinking to move swiftly and too far in one direction, overreact when he learned the error of his ways, then gradually work back to a firm, balanced position. In his earliest commentary on a written constitution—the New York Constitution of 1777—he belittled the common observation that “instability is inherent in the nature of popular governments.” Rather, he insisted, instability arose from mixing the “popular principle” with monarchical and aristocratical principles. “A representative democracy,” he added with characteristic self-assurance, “where the right of election is well secured and regulated & the exercise of the legislative, executive and judiciary authorities, is vested in select persons, chosen really and not nominally by the people, will in my opinion be most likely to be happy, regular and durable.” Those thoughts were written in May of 1777; less than a year later, after the bitter winter at Valley Forge, he began to express utter contempt for the people and their representatives, and for a time he was outspokenly elitist. That attitude lasted until the mid 1780s, when close observation of the rivalry between merchants and bankers in New York and Philadelphia demonstrated to him the corrupt behavior that greed could inspire in well-born and generally virtuous men.

Paralleling this zigzag course was Hamilton’s changing attitude toward Congress. At first he thought that America “had a representation, that would do honor to any age or nation.” By 1778 he was writing that “there is not so much wisdom [in Congress] as there ought to be. . . .
Folly, caprice [and] a want of foresight, comprehension and dignity, characterise the general tenor of their actions. . . . Their conduct . . . is feeble indecisive and improvident.” It was at this time that he warmly embraced David Hume’s proposition that in framing a government, “every man must be supposed a knave.” For a while he also held to the counterpart proposition that men, or at least most men, could be persuaded to act in the public interest only if it were in their private interest to do so. By 1787, however, he had gradually come to a more temperate and judicious understanding, one that would be a polestar during the remainder of his career: public men could be persuaded to act in the public interest by appealing to their reason, prudence, and love of country, provided that so acting was not directly or fatally contrary to their personal interest.

On one subject no evolution of ideas was necessary: the greatest danger to America came from the centrifugal forces that threatened to tear it asunder. From the outset and even when his faith in Congress was at its lowest ebb, Hamilton was convinced that the vital shortcoming in the constitutional order was a lack of power in the central authority and an excess of power in the state governments. He thought that if those arrangements were not drastically altered, they would, soon or late, bring both independence and liberty to an end. At least three times, beginning in 1779, he urged the calling of a convention to increase the powers of Congress. At least twice, once before and once during his tenure as a member of the Confederation Congress, he urged that it simply exercise power without specific constitutional authority, justifying his position on the ground that the responsibilities and duties vested in Congress inherently implied the powers necessary to the fulfillment of those duties.

The intensity of Hamilton’s conviction on this matter amounted almost to an obsession, and it is the key to understanding his mature view of the most efficacious
constitutional order of the United States. The conviction derived partly from his psyche and his personal history, but it stemmed also from observation. Repeatedly, throughout the war, he saw that Americans were patriotic—that is, were willing to make sacrifices for the good of the nation—whenever British troops were near, but that absent the Redcoats, patriotism was likely to be absent as well. Having no trace of provincialism in his own make-up, he simply could not comprehend it in others. For a time he attributed it, without serious thought, to meanness, spite, envy, greed, and any number of other vices; but in time he came to realize that it had explicable roots and that if he and others were to forge an American nation out of the country's disparate parts, he must explore those roots.

The emergence of his ideas on the subject can be traced in various of his writings between 1783 and 1787, but they are most clearly and fully expressed in his great speech of June 18, 1787, at the Philadelphia Convention. There he posited the proposition that there were five general “principles of civil obedience” which made people loyal adherents to a particular regime, and he elaborated each at some length.

The first was interest, by which Hamilton meant the narrow, immediate “active & constant” rewards, whether monetary or psychic, to be derived from supporting a government. He offered as examples New York and other states that had devised “particular plans of finance” to purchase loyalties at the expense of the plans and requisitions of Congress. Similarly, the love of power impelled officeholders in the states “to regain the powers delegated” to Congress, rather than “to part with more, or give effect to what they had parted with.” He added that their “esprit de corps”—then a pejorative term—was strong and that “the ambition of their demagogues is known to hate the control of the Genl. Government.”

The second principle was opinion, in discussing which Hamilton followed closely the reasoning that David Hume...
had employed in one of his essays. Hamilton meant the general, usually unarticulated belief that government was necessary and, on the whole, beneficent; in that sense the weight of opinion was solidly on the side of state and local governments. If the Confederation Congress were entirely dissolved, he said, no one would especially miss it, for the particular governments could perform the ordinary functions of government tolerably well, and their capacity to do so would increase over the years. By contrast, most people were of the opinion that a dissolution of the state and local governments would be fatal.

Under the heading of habit, the third principle, Hamilton spoke of the “habitual attachment of the people” and their “habitual sense of obligation”; obviously, “the whole force of this tie,” historically and presently, was with state and local authority. The sovereignty of the state government, he said, “is immediately before the eyes of the people: its protection is immediately enjoyed by them. From its hand distributive justice, and all those acts which familiarize & endear Govt. to a people, are dispensed to them.” Conversely, because “distance has a physical effect upon mens minds” (another Humean conceit), when the unfamiliar and alien general government demanded money or services from the people, they regarded that demand as odious.

The fourth principle was force—that is, the coercion of law and the coercion of arms, both of which were necessary. As for the coercive power of law, Congress possessed virtually none, and that of the states was “nearly sufficient,” though not entirely so, because law is “inefficient unless the people have the habits of Obedience.” As for the force of arms, the states had generally been accustomed to getting along without it, but the experience of Shays’ Rebellion had taught that “a certain portion of military force is absolutely necessary in large communities.”

Finally, there was what Hamilton called influence. He denied that he meant corruption, but his elaboration was
scarcely distinguishable from corruption as the term was understood at the time—what would later come to be called patronage. He referred to those regular “honors & emoluments,” such plums as militia commissions and judgeships, which “produce an attachment” of the recipients.

In time, Hamilton hoped, it might become possible to turn some of these forces in support of the national government, but for the foreseeable future they would continue to favor loyalty to states, not to the nation. The only way to preserve the Union, therefore, was “to go as far in order to attain stability and permanency, as republican principles will admit.”

To understand Hamilton’s conception of a well-constituted system of government, it is necessary to turn briefly to his emerging perception of himself. As we have seen, it was a convention in eighteenth-century England and America that people in public life and polite society assume a “character,” a stylized role that one played or a persona that one wore at all times. Until 1783 Hamilton’s character was a military one, that of the officer and gentleman who is rigidly bound by the code of honor and motivated by a craving for glory. Afterward, he restlessly cast about for a larger character that would enable him to win, not mere military glory, but the undying Fame of the Lawgiver.

He found the ideal character, one he could play to perfection, in 1786, when he read Jacques Necker’s Treatise on the Administration of the Finances of France. In a long introduction to this memoir of his service as France’s wartime financial minister, Necker itemized the prerequisites for greatness in a minister of finance, and those qualities matched Hamilton’s self-image with mirrorlike precision. Then Necker drew a sketch of the grand things—far grander than any that Hamilton had previously imagined—that
an able minister could do. After warning his readers that the game was a perilous one, unfitted for peaceful souls who hoped for serenity in their lives, Necker concluded with a passage that might have been written expressly for Hamilton. “There are men,” he wrote, “whose zeal ought not to be cooled: such are those who being conscious that they are qualified for great things, have a noble thirst for glory; who being impelled by the force of their genius, feel themselves too confined within the narrow limits of common occupations; and those, more especially, who being early struck with the idea of the public good, meditate on it, and make it the most important business of their lives. Proceed you, who after silencing self-love find your resemblance in this picture.”

Given that conception of his character and given his understanding of the imbalance between centripetal and centrifugal forces in American politics, it became crucial to Hamilton that power—as much as possible, but at minimum the power to tax—be vested in the central government. It would be saying too much to assert that the arrangement and distribution of central power was a matter of indifference to him, but it was nearly so. Unlike Madison and most of the other Framers, Hamilton held no special brief for checks and balances, the separation of powers, or other devices for restraining the general government, for he thought that the states would always be an adequate, and probably more than adequate, source of restraint. He summed up his attitude in Federalist number 83: “The truth is that the general GENIUS of a government is all that can be substantially relied upon for permanent effects. Particular provisions, though not altogether useless, have far less virtue and efficacy than are commonly ascribed to them.” He summed it up even better in the New York ratifying convention. “Sir, when you have divided and nicely balanced the departments of government; When you have strongly connected the virtue of your rulers with their interest; when, in short, you have
rendered your system as perfect as human forms can be; you must place confidence; you must give power.” Hence he could labor heroically in the New York Assembly to persuade that body to approve the amendments to the Articles of Confederation, proposed in 1783, that would give Congress an independent source of revenue, and he could do so even as the call for the Philadelphia convention was pending. For he knew in his heart that if the central government had the taxing power and if he could get in a position to manage its finances, he could remake the nation by that means alone.

IT IS FROM THIS PERSPECTIVE THAT HAMILTON’S BEHAVIOR in the convention can be most meaningfully viewed. As is well known, he was not an especially active member. He arrived on May 18 and served on the three-man rules committee. During the first few weeks of the debates he spoke but little, voting with the advocates of the Randolph Plan but being outvoted in his own delegation by fellow New Yorkers John Lansing and Robert Yates. On June 18 he delivered his great speech, holding the floor all day. As William Samuel Johnson noted, Hamilton’s performance was praised by everybody, but his proposals were supported by none. Eleven days later, Hamilton left the convention to attend to private business at home. For various reasons he did not return, except for brief appearances in mid July and on August 13, until September 2. He was instrumental in working out the legal niceties of the provisions for ratification, but otherwise he was generally passive. He was there, as he made clear, only because he wanted to sign the finished document, for he intended to support any plan the convention proposed.

Hamilton would have preferred a constitution more like the one he had proposed in June or like the elaborate version he handed to Madison, the convention’s unofficial historian, in September. The democratic branch of his gov-
ernment, though elected for three-year terms, would have been more democratic than the actual House of Representatives, for all free adult males would have been qualified to vote for its members; all other branches would have been chosen by electors and would have served during good behavior. The Senate, not the whole Congress, would have been empowered to declare war, but otherwise Congress would have had power to pass all laws that it deemed "necessary to the common defense and safety and to the general welfare of the Union." The president, however, would have had an unconditional veto, not subject to being overridden. Moreover, the state governors, who would have been appointed by the national government and would have served during good behavior, would have had unconditional vetoes over state legislation.

Hamilton believed that nothing short of these arrangements could ensure that the national government would have sufficient stability and energy to protect itself against the states, which would continue to have most of the "principles of civil obedience" working in their favor. Nonetheless, as indicated, Hamilton resolved to support the Constitution as being better than nothing.

There was more to his decision to champion the Constitution, however, than is evident at first glance. He was aware that the struggle over ratification would in effect be a continuation of the Constitutional Convention because the debates would help shape the original understanding of what the Constitution meant. He was equally aware that the first few sessions of Congress would also be an ongoing convention, because the Constitution left a number of crucial matters to be worked out by the new government. Hamilton flung himself vigorously into both sets of quasi conventions, determined to shape the living Constitution into something more to his liking than the parchment version was.

Hamilton's best-known contribution to the debate over ratification was as coauthor of the Federalist. As the prin-
principal authors, Hamilton and Madison shared many viewpoints and objectives, and the essays form a well-rounded whole; but close analysis reveals profound differences between them. Madison’s desire to strengthen the Union was tempered by concern with guarding against governmental excess. The great difficulty in framing a government, he wrote, was that “you must first enable the government to control the governed; and in the next place oblige it to control itself.” To that end, power must be divided, and “ambition must be made to check ambition.” Hamilton, by contrast, preferred that power be concentrated as much as circumstances would permit. He argued that the new government would have powers that inhered in sovereignty and were limited only by the ends for which it was created; it would, as he put it, have “an unconfined authority, as to all those objects which are entrusted to its management.” Thus, for example, he insisted that to place limits upon the legislative power to provide for the common defense was “unheard of” and that the power to tax to promote the general welfare was “indefinite,” although his conception of what was encompassed by the term “general welfare” was itself limited, and quite narrowly at that.

Indeed, Hamilton’s often-quoted argument against a bill of rights, which he set forth in Federalist number 84, is based explicitly upon the recognition that the scope of federal authority was limited. A bill of rights would be “far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation,” than to the constitutions of the states, which retained “the regulation of every species of personal and private concerns.” Why, he asked in regard to the federal Constitution, “should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?”

Among Hamilton’s other important arguments in the Federalist is his justification, in number 78, of the doctrine
of judicial review: the power of the courts to declare that legislative acts or executive actions are void if contrary to the Constitution. To Hamilton this was a matter of logical necessity, not of power, for he believed that the judiciary, having "neither force nor will," was "beyond comparison the weakest of the three departments of power." In light of the activism that has characterized the Supreme Court in recent years, Hamilton might seem to have been a poor prophet. But his assertion that the judiciary "can never attack with success either of the other two" branches has proved true: judicial activism has been effective only when directed at states, through the instrumentality of the Fourteenth Amendment.

Yet another argument is less well known—that in number 77 concerning the removal power. Upon careful scrutiny of Article II of the Constitution, Hamilton found, or thought he had found, an oversight that could be a source of the kind of stability and durability that he believed the government would lack. The second section of the article provides that the president shall appoint all high-ranking officials, "with the Advice and Consent of the Senate"; but it makes no provision for removing such officials except through the impeachment process. On the assumption that the power to fire must lie in the hands of those who hire, Hamilton asserted that the consent of the Senate "would be necessary to displace as well as to appoint." He went on to describe how this would contribute to steadiness and permanency in the administration of government: "Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him, by the apprehension that a discountenance of the Senate might frustrate the attempt, and bring some degree of discredit upon himself." Had Hamilton's interpretation prevailed, a ministerial system, not unlike that evolved in Britain, might well have been the result. The First Congress, however, took the
position that the power to remove presidential appointees should reside solely in the president.

Hamilton's role in bringing about ratification of the Constitution in New York can be summarized briefly. Despite the sagacity of Publius, the state's electorate—at which the Federalist essays were aimed—voted overwhelmingly to reject the Constitution. In the ratifying convention, Hamilton, John Jay, and Robert R. Livingston advanced a succession of potent arguments in favor of ratification, but to little avail. Hamilton was especially brilliant in countering anti-Federalist objections based upon country-party ideology, such as the fear of standing armies and the need for jury trials in civil cases; but such argumentation won over few if any of the oppositionist delegates. Only after the convention had received the news that New Hampshire and Virginia, the ninth and tenth states, had ratified, meaning that the Constitution would go into effect whether New York approved or rejected it, did the opposition begin to waver; and only after Hamilton and Jay had circulated a rumor that if the state refused to ratify, New York City would secede from the state and would seek to join the Union on its own, did the anti-Federalists capitulate.

It was in his role as Secretary of the Treasury—or as he preferred to think of it, minister of finance—that Hamilton made his greatest contributions toward establishing constitutional government. Those contributions were many and varied, but they may be grouped under three broad headings. The first were administrative. The lifeblood of a government is its capacity to collect and disburse revenue, and almost every detail of the machinery for doing so was established by Congress in accordance with blueprints drawn by Hamilton; he set it in motion, and for more than five years he directed its operations. He had a voice in the affairs of the War Department as
well, being indirectly responsible for paying and supplying the nation’s tiny army (for a time, indeed, he doubled as acting secretary of war); and the peacetime concerns of the State Department, overseeing international commerce and establishing credit abroad, were also concerns of the Treasury Department. And on a day-to-day basis, Hamilton and his subordinates—more than five hundred civilian employees, as compared with a total of twenty-two in the other departments—were the government; the president, the Congress, and the courts were on duty only three or four months each year. Moreover, Hamilton’s operations had to be conducted in such a way as to keep the Treasury Department above reproach and to avoid offending the tender republican sensibilities of a citizenry that was accustomed to regard tax collectors as the veriest enemy of freedom.

The complexity of his tasks and the efficiency with which he performed them can be seen by considering just one of his functions, that of making quarterly interest payments on the public debt. About twenty-five thousand separate transactions were involved. Payments were made on the first day of January, April, July, and October at the Treasury and at thirteen state loan offices, scattered over a thousand-mile area and as much as two weeks’ travel time from the Treasury. There were only six banks in the country. The main source of revenue was sixty-seven customs offices, which collected widely varying, seasonally fluctuating, and often unpredictable sums. But on interest day, Hamilton had to know how much money was available, in what places, and in what forms—and had to move it in appropriate ways. Given the slowness of communication and transportation, that would seem to be impossible, and yet during Hamilton’s tenure as secretary, there was never once a complaint of error or delay in the making of interest payments.

Hamilton’s second contribution as secretary was to provide stability during the formative years by causing
the federal government to function as the British ministerial system did, rather than as the Framers had planned, though always within the framework of the Constitution. In the British system, as it had evolved under the leadership of Sir Robert Walpole, the king was the symbolic embodiment of the nation but was not its chief executive officer: that role was played by the chancellor of the exchequer, who was responsible to king and Parliament but who acted as the “prime” minister, the person charged both with the duty of running the government and with that of setting legislative policy. Hamilton was given the opportunity to operate the United States government in that way (though Washington was by no means a mere figurehead) because the House of Representatives, jealous of its constitutional authority over money bills and fearful of executive power, required the secretary of the treasury to report directly to the House as well as to the president. It expressly required Hamilton to prepare reports and propose legislation on fiscal policy. That made him, in effect, a nonvoting member of the House and enabled him to become the American Walpole.

Hamilton’s third, and most enduring, contribution as secretary was to couple the fate of constitutional government with the development of a free-market economy. That statement may elicit surprise, for Hamilton did propose, in his “Report on Manufactures,” the enactment of protective tariffs, which are both antithetical to free trade and also a highly questionable stretching of the Constitution’s requirement that taxes be levied only for the common defense and general welfare. But the tariffs would have been minimal and temporary, to last just until certain industries survived their infancy. Hamilton’s larger goal was as indicated.

The Constitution prohibited the erection of interstate trade barriers, but economic activity in America was far from unfettered, as we shall see in a subsequent essay. Only under the lex mercatoria—that is, the established rules
and customs that governed the international exchange of commodities and bills of exchange, notes, and other negotiable instruments—was economic activity free from governmental restraint.

Therein lay the reason for Hamilton’s belief that he could bring about fundamental change by the way in which he administered the nation’s finances. The *lex mercatoria* was consistent with Hamilton’s ideas about liberty, industry, justice, and honor, because it was based upon free but orderly and structured contractual relationships. It governed all international transactions in commercial paper, and by transforming the public debt into the basis for the nation’s currency and banking system, Hamilton saw to it that the spirit of the *lex mercatoria* governed that system as well. Because the public debt was huge, being many times the amount of hard money in circulation, to turn the debt into money was to infuse the whole of American society with that spirit.

The genius of Hamilton’s program lay in his idea of establishing rules and procedures that would make money the universal measure of the value of things. He constructed efficient fiscal machinery, made it beneficial to everyone, and interlocked its operations with the workings of the economy. It was so designed that the people came, imperceptibly, to find it a convenient, a useful, and finally a necessary part of their daily lives. That accomplished, everyone had to comport himself in accordance with the rules by which the machinery of government itself functioned, and it became almost impossible to dismantle the machinery short of dismantling the whole society. The permanence and stability of the constitutional order had become inescapably connected with a free economic order.

IN ADDITION TO HELPING ESTABLISH CONSTITUTIONAL government through his actions, Hamilton helped shape contemporary and future interpretations of the Constitu-
tion through opinions he wrote in various capacities. Some had influence and implications quite as profound as any decision that Chief Justice John Marshall would write. Indeed, at least two of Marshall’s major opinions were drawn directly from Hamilton’s earlier constitutional pronouncements.

Hamilton’s most famous opinion was that of February, 1791, in which he advised President Washington in regard to the constitutionality of the bill to incorporate the Bank of the United States. Secretary of State Thomas Jefferson and Attorney General Edmund Randolph had previously advised the president that the bill was unconstitutional on the ground that the Constitution did not empower Congress to establish corporations (a motion to give Congress that power had, as both Washington and Randolph knew, been explicitly rejected by the Philadelphia Convention). In response, Hamilton formulated the classical expression of the doctrine of implied powers, or the so-called loose construction of the Constitution. Jefferson and Randolph had argued as if the creation of a corporation was an end rather than a means to an end. The real issue, Hamilton insisted, was whether the corporation in question was being erected for a legitimate, constitutional purpose. “If the end be clearly comprehended within any of the specified powers,” he said, and “if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution—it may safely be deemed to come within the compass of the national authority.” He added several further criteria: the proposed mean must not “abridge a preexisting right of any State, or of any individual,” and it must not be “immoral” in itself, or “contrary to the essential ends of political power.” Marshall would paraphrase this argument in ruling on the constitutionality of the Second Bank of the United States in *M’Culloch v. Maryland*.

As for the contention based upon the refusal of the Philadelphia Convention to grant the power of incorpora-
tion, Hamilton offered a common-sense proposition: "Whatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual & established rules of construction. Nothing is more common than for laws to express and effect, more or less than was intended." Accordingly, if a power to erect a corporation could be fairly deduced from the words of the Constitution, "arguments drawn from extrinsic circumstances, regarding the intention of the convention, must be rejected."

Hamilton's opinions continued to be of influence after he had retired from the Treasury and resumed his law practice. He intended not to practice in the federal courts, for greater challenges and rewards were to be found in state courts. But just after he returned to private station, a group of Virginia Republicans challenged the constitutionality of a tax on carriages that had been levied on Hamilton's recommendation, claiming that it was a direct tax and thus fell within the Constitution's mandate that such taxes must be apportioned among the states in relation to their population. The attorney general of the United States, William Bradford, asked Hamilton to plead the case as special counsel for the government. Hamilton did so, arguing that the tax was actually an excise and need therefore merely be uniform throughout the country. The Supreme Court, in the first case in which it passed upon the constitutionality of an act of Congress, so ruled.

Another opinion was an advisory one. In 1795 the legislature of Georgia granted four companies of land speculators 35 million acres for a paltry $500,000, the inducement being bribes paid to the lawmakers. A year later a rival faction of politicians gained control of the legislature and passed an act rescinding the sale. A former political supporter of Hamilton's, Senator James Gunn of Georgia, headed one of the companies; and another ally, Congressman Robert Goodloe Harper of South Carolina, was attorney for the companies. They sought Hamilton's
legal counsel on the controversy, and he responded with a broad interpretation of the contract clause of the Constitution. In Article I, Section 10, states are prohibited from passing any laws “impairing the obligation of contracts.” It had previously been assumed that the clause referred only to contracts between individuals, but Hamilton—who may very well have authored the contract clause and with just this in mind—argued that it also applied to contracts between states and individuals, that grants were contracts, and therefore that Georgia’s rescinding act was unconstitutional. In 1810, his argument was brought to bear before the Supreme Court in the case of Fletcher v. Peck, and the Court ruled in accordance with his opinion. It extended that ruling to apply to corporate charters in the Dartmouth College case a few years later, with profound implications for America’s economic development.

In a semiofficial capacity, Hamilton dealt with a subject that was to be a hot political and constitutional issue during much of the nineteenth century—namely, that of “internal improvements” at the federal government’s expense. While serving as commanding general of the American army during the Quasi War with France, Hamilton wrote to Senator Jonathan Dayton (who had been a member of the Philadelphia Convention), offering a number of suggestions for strengthening the nation’s capacity for defense. Among his proposals was the improvement of internal transportation facilities. Congress should, he urged, build an extensive network of roads, which it had the constitutional authority to do under the power to “establish post offices and post roads.” He also thought that Congress should authorize the construction of a system of interstate canals to make the inland waterways navigable, but—significantly—he declared that this could be done only if the Constitution were amended.

Possibly Hamilton’s most vociferously expressed constitutional opinion was one concerning the federal judiciary. Early in 1801, after Jefferson had been elected presi-
dent but before he had taken office, the lame-duck Congress passed a revised Judiciary Act which, among other things, created a number of new federal courts. President John Adams filled most of these positions with what Jefferson called "midnight appointments," and the Jeffersonians were outraged. Early in 1802 the new Congress passed an act repealing the Judiciary Act of 1801, thus vacating the new positions. Hamilton argued, in a series of newspaper articles and in an address to the New York City bar association, that the repeal act was clearly unconstitutional, since the Constitution provides that federal judges hold office during good behavior, and the act removed the new judges by legislative fiat. His position was sound, but politics prevailed.

Two years later, Hamilton was counsel in a legal action that did not bear directly upon the Constitution but was pivotal to the whole concept of free and lawful government. Harry Croswell, the printer of a small upstate New York newspaper, ran a story charging that Jefferson had hired a notorious pamphleteer to calumniate Washington and John Adams, "grossly slandering the private characters of men, who, he well knew were virtuous." The charge against Jefferson was true, but Ambrose Spencer, the Jeffersonian attorney general of New York, brought seditious libel proceedings against Croswell and obtained a conviction. Croswell appealed and engaged Hamilton to argue the appeal before the New York Supreme Court.

At issue was the refusal of the trial court to admit as a defense testimony regarding the truth of what Croswell had written. Under the English common law as adopted by New York, truth was not admissible as a defense in cases of seditious libel. Hamilton was concerned with the suitability of that doctrine in a republic, and he set out to have it struck down. Libel, he said, was "a slanderous or ridiculous writing, picture or sign, with a malicious or mischievous design or intent, towards government, magistrates, or individuals." The criminal quality in it was mal-
ice, or intent to defame, and truth was relevant to determining intent. Truth was not an absolute defense; it should not be used wantonly, "for the purpose of disturbing the peace of families" or for matters that do not "appertain to official conduct." But he added: "That the truth cannot be material in any respect, is contrary to the nature of things. No tribunal, no codes, no systems can repeal or impair this law of God, for by his eternal laws it is inherent in the nature of things." Hamilton went on to declare: "If you cannot apply this mitigated doctrine for which I speak, to the cases of libels here, you must forever remain ignorant of what your rulers do. I never can think this ought to be; I never did think the truth was a crime; I am glad the day is come in which it is to be decided; for my soul has ever abhorred the thought, that a free man dare not speak the truth."

The court was divided, and the conviction was allowed to stand; but Hamilton's eloquence was not in vain. Most members of the state legislature came to hear his argument, and a bill was forthwith introduced to declare Hamilton's position the law of the state. It was formally passed the next year, and in time it was embraced throughout the American Republic, forming the legal foundation, firmer than any provided by the First Amendment, for the ideal of a free and responsible press.

Hamilton's last contribution to American constitutional discourse was in the form of an amendment that he proposed in 1802. The Constitution provided that presidential electors be chosen in any manner that the several state legislatures should direct and that electors vote for two candidates; whoever got the most votes (if a majority) would become president, and whoever got the second most would become vice-president. In 1800, most of the electors were chosen by the legislatures themselves, and the electoral votes were equally divided between Jefferson and Burr, with the result that the House of Representatives made the selection. There was widespread sentiment for
changing the Constitution to provide that electors vote separately for president and vice-president. Hamilton’s amendment would have done that, but it would also have required that electors be chosen by popular vote on a district basis, rather than by legislatures and at large. This democratization of presidential elections would, in Hamilton’s view, have provided greater stability by removing the choice from the machinations of politicians. Hamilton’s proposal was adopted as a resolution by the New York legislature and then introduced in Congress. It passed in the House but was rejected by the Senate. Subsequently, Congress passed, and the requisite number of states ratified, the Twelfth Amendment, which provided that electors vote separately for president and vice-president but left the method for choosing the electors up to the legislatures.

DISCOURAGED BY FAILURES AND DEPRESSED BY THE REPEAL of the Judiciary Act of 1801 and by other actions of the Jefferson administration, Hamilton feared that the end of constitutional government in America was imminent. In that mood he wrote to his old friend Gouverneur Morris that “the time may ere long arrive when the minds of men will be prepared to make an offer to recover the Constitution, but the many cannot now be brought to make a stand for its preservation.” It was in the same letter that he spoke of his “odd destiny” and his labors to “prop the frail and worthless fabric.” He ended by asking: “What can I do better than withdraw from the Scene? Every day proves to me more and more that this American world was not made for me.”

Two years later Hamilton was dead, slain at the age of forty-seven by Aaron Burr. Gouverneur Morris pronounced the eulogy. What Morris said provides a valuable guide for Americans to this good day. “I CHARGE YOU,” he declared, “TO PROTECT HIS FAME—It is all he has left—
all that these poor orphan children will inherit from their father. But, my countrymen, that Fame may be a rich treasure to you also. Let it be the test by which to examine those who solicit your favour. Disregarding professions, view their conduct and on a doubtful occasion, ask, *Would Hamilton have done this thing?*"