Legal Privilege and the Bank of North America

Twice in the mid-1780's the Bank of North America became involved in conflicts of varying length and intensity over the rights it derived from its charter.* Following seventeenth-century English precedent, the Continental Congress had incorporated it in 1781 as a means of conferring legal privileges on individual citizens in return for their performing state functions. Initially no one had publicly questioned the propriety of the parceling out of governmental authority to private persons. In the years immediately after the peace of 1783, however, rival political and financial groups attacked the Bank as illegitimate in its conception. The episodes of the charter fight were in some ways disjointed, but these attempts by competing groups to manipulate state authority

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to their own advantage gain coherence from one of the most hotly disputed constitutional questions of the years after Independence—the nature of legal privilege in a republic. Although the controversy in which the Bank of North America was immersed produced no lasting solution to the problem of privilege, it does serve to reveal some conflicting currents in the political thought of the young Republic and to exemplify the development of certain features of the early business corporation.

When Robert Morris drew on, in his words, "the Experience and Example of other Ages and Nations" to urge the Continental Congress to incorporate a national bank in 1781, he did so quite consciously as a way of inducing private individuals to undertake necessary activities for the state. Elected Superintendent of Finance in February, 1781, he quickly proposed the founding of a national bank as part of his program to restore the public credit of the Confederation. Principally, he wanted to speed the creation of a bank as a much-needed means of multiplying the credit resources available to him as Superintendent of Finance. In his efforts to secure a charter Morris did little to indicate his specific source for the legal joining of public purpose and private capital in a bank, but probably he relied most heavily on the charter of the Bank of England. He departed from his model in various ways, however, in particular by requesting that his institution enjoy perpetual life and have the right to determine its own procedures for the election of officers. The grant of privileges from the Crown to the Bank of England had not been as generous in these matters. The weakness of the national government and the necessity of its seeking favors from private

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citizens served as the justification for the liberality of the charter provisions. By offering individuals the opportunity to aid the government by investment in bank stock on such attractive terms, Morris hoped "to appeal to the interest of mankind," which, he explained, "in most cases will do more than their patriotism."\(^5\)

For all his assurance of the profitability of a bank, Morris never once hinted at the answer to the fundamental question, why the conferring of the legal attributes of incorporation would make the bank so particularly attractive, so preferable an investment medium to a private and unincorporated bank.\(^6\) He simply repeated, and no one contradicted him, that a charter provided the sole, effective means of persuading private, monied individuals to lend their capital to the Confederation. Though giving greatest stress to the financial and commercial utility of an incorporated bank, Morris also underlined its potential political importance. He argued that it would serve the needed function of promoting national stability. Its success would "unite the several States more closely together in one general money connexion" and create an order of propertied men devoted to "the cause of our country by the strong principle of self-love and the immediate sense of private interest."\(^7\)

The force of Morris' arguments and his skills as a lobbyist, together with the hard-pressed financial situation of the Confederation, moved the Congress to incorporate the Bank of North America on


\(^6\) In fact the Bank did not at first seem particularly attractive to many potential investors, and individuals subscribed at most $70,000 to the initial stock offering of $400,000. To insure the success of the Bank, Morris had to make up the difference from the proceeds of a loan to the United States from France. Private demand for the stock did not increase until the Bank demonstrated its profitability, a point which indicates that one attraction of the corporate form was the opportunity it offered for fairly safe investments without the necessity of direct involvement in the management of one's money. Two of the largest stockholders, John Church and Jeremiah Wadsworth, first purchased Bank stock solely because it seemed a good investment. See John D. R. Platt, "Jeremiah Wadsworth: Federalist Entrepreneur" (doctoral dissertation, Columbia University, 1955), 134. For the sources of the Bank's capital, see Ferguson, *Power of the Purse*, 136-137; William M. Gouge, *A Short History of Paper-Money and Banking in the United States* (2nd edn., New York, 1835), 12-13, and *The Journal of Banking, From July 1842 to July 1842* (Philadelphia, 1842), 69; Ver Steeg, 84-85. For the problem of the advantages of incorporation, see Oscar and Mary Handlin, "Origins of the American Business Corporation," *Journal of Economic History*, V (1945), 1-2, and Hurst, 19-30.

\(^7\) Wharton, IV, 563.
December 31, 1781, with the powers he had requested. Many in the Congress did doubt its capacity to pass an act binding on all the states, but no one publicly questioned the propriety of issuing a charter to private individuals.\(^8\)

To meet the reservations about the power of the Congress to incorporate, Morris sought confirmatory grants from the individual states. Since the institution was located in Philadelphia, the charter passed by the Pennsylvania Assembly on April 1, 1782, became the effective legal basis for its operations. The politics of Pennsylvania were in some ways the most viciously and radically equalitarian of those of any state in the Revolutionary period, yet the act raised only slightly more controversy in its passage through the Pennsylvania Assembly than through the Congress, in spite of Morris and his followers being leaders of the Republican or anti-Consstitutionalist party in the state. As far as the available records indicate, none of Morris’ enemies in the Assembly seized the opportunity to question the right of the state to bestow the legal privilege of incorporation on private individuals, though they did make an effort to pare the powers given by the Congress. They wanted to limit the grant to a term of seven years and to eliminate land as one of the kinds of property that the Bank might legally include in the $10,000,000 in capital assets its charter authorized it to acquire. Their proposals met with little acceptance, however, and the Assembly proceeded to re-enact the Congress charter.\(^9\)

The Bank did not become involved in a prolonged dispute over the nature of its corporate status until after the end of the Revolution, when it no longer performed important services for the national government nor enjoyed the protection from criticism that such services had formerly conferred on it. Its financial success made it an increasingly potent, though unregulated, force in the Pennsylvania economy and government, one which Morris and his most intimate associates among the stockholders were willing to


exploit to their advantage. The high profits of the Bank and its policy of active discrimination in the making of loans induced rival groups in the Philadelphia financial community to seek a charter from the state in January, 1784, for their own institution, the Bank of Pennsylvania. After a bitter two-day debate in the Assembly in March between lawyers for the two banks, the attempt to charter a second bank ended in compromise in April, 1784, with subscribers to the new institution being taken into the Bank of North America on equal terms with the old stockholders.¹⁰

Though this agreement ended the first threat to the position of the Bank, Pennsylvania politics shortly produced a second, much more dangerous one. After winning control of the state government in the annual elections in the fall of 1784, the Constitutionalists or radicals enacted a debt-funding scheme that provided for an issue of paper money. Since Morris and his associates—whose interests were directly attacked by this financial plan—lacked the power in the Assembly to oppose it effectively, they turned to the Bank of North America as an instrument to destroy the new bills of credit. Under their direction the Bank refused at first to accept the new issue and, according to one critic of 1786, in private did "everything to depreciate it."¹¹ The Constitutionalists had even less interest in compromise than Morris and his group. "With all the violence of party rage," they took advantage of their power in the Assembly to pass an act repealing the charter of the Bank in September, 1785.¹² To recover their corporate privileges, Morris and his associates had to engage in a two-year struggle in Pennsylvania politics, one which


ended successfully in 1787 when the Bank received a new, though more limited, charter.\textsuperscript{13}

The disputes that swirled around the Bank in the mid-1780’s in the Assembly and in the accompanying newspaper and pamphlet literature probed some of the most unsettling and unexpected consequences of the Revolution. These argumentative appeals to the legislature and the electorate were a response to the conditions of Pennsylvania politics—the wide franchise, the almost evenly balanced political divisions of the state, and the yearly elections to the one-house legislature. The purpose of the exchange was undeniably polemical, to put forward the best possible case for one side or another, even by concealing or distorting some of the real motives in the Bank dispute. Yet the debates also reveal Americans attempting to come to terms with the consequences of the Revolution, with the way its events and ideas were flying off in new and, to many people, sometimes alarming directions.\textsuperscript{14}

In Pennsylvania during the Revolution men previously without political influence had made the Constitutionalist party a vehicle to push themselves into positions of power.\textsuperscript{15} The one-time carpenter, John Smilie, typified the lowly social origins of these new political leaders. One correspondent in the \textit{Independent Gazetteer} drew attention to Smilie’s sudden social elevation by observing that “but having lately learned to \textit{read}, and perhaps \textit{write} his own motions occasionally, we now hear of nothing but the great display of his legislative talents; and his vast abilities are \textit{held} out to us on every occasion.”\textsuperscript{16} Yet Smilie and the other upstart Constitutionals were willing to draw disturbingly radical implications from the Revolution and the ideas that had propelled Americans into it. In blunt terms the former weaver, William Findley, stated in 1785, “no man has a greater claim of special privilege for his £100,000 than I have

\textsuperscript{13} For the Assembly argument over repeal, see the \textit{Pennsylvania Evening Herald}, Sept. 7 and 8, 1785, and James Wilson, Case of Bank Before Assembly, September, 1785, Wilson Papers. Brunhouse, 151, 170-171, 172-175; Ireland, 183-188; McDonald, 48-56.


\textsuperscript{15} Ireland, 7.

\textsuperscript{16} Sept. 10, 1785.
Pennsylvanians had entered the Revolution with the expectation that their new government would guarantee the equality of all its citizens, but what did republican equality mean after the entry of new men into politics? Did it imply that all citizens, no matter what their place in the traditional social hierarchy, had as good a right to enjoy state privilege as Robert Morris and his associates, men of property and social position? This question converted the Bank debates into a commentary on the nature of corporations and of republican government.

In the exchanges of the mid-1780's the defenders of the Bank of North America used the European experience with banks as a backdrop for discussing the legitimate means of organizing and distributing power in the Pennsylvania republic. They maintained that the state in America had to imitate the example of Europe by taking an active and in some sense directing part in the economy. With equal certainty they insisted on the usefulness of this activity and direction being carried on by one of the means traditionally employed by European governments, by the state incorporation of banks. To the Philadelphia merchant, George Clymer, the proved value of European public banks amply justified the chartering of the Bank of North America. In the Pennsylvania Assembly in 1785 he stated that “banks are in general encouraged in all the commercial nations of Europe. And the more republican a country is—or at least the greater degree of liberty it possesses—the greater is the success of its banks.” As did all involved in the Bank dispute, Clymer knew and accepted the commonplace of traditional political theory that republican governments were established to further the good of the people. The example of the European state banks proved that the Pennsylvania Assembly had no more legitimate means of reaching this goal available to it than incorporating the Bank of North America. As “An Old Banker” wrote, “any disposition of the

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17 Mathew Carey, ed., Debates and Proceedings of the General Assembly of Pennsylvania, on the Memorials Praying a Repeal or Suspension of the Law Annulling the Charter of the Bank (Philadelphia, 1786), 130. As with many new men, lack of education handicapped Smilie and Findley. Charles Biddle wrote of them in his Autobiography (Philadelphia, 1883), 203: “They are both men of talents, and if they had received a good education would have made a figure in any legislative body.”

18 Carey, 28.
wealth of a country, which shall soonest bring it into operation, demands the attention and encouragement of the Legislature."

Those hostile to the Bank readily allowed many of the claims of its supporters. They admitted the necessity of state participation in the economy and for the most part conceded the utility of incorporating banks in Europe. Yet they steadily denied the need for state activity to take such form in America. The foreign public banks they knew about—those of England, Amsterdam, Hamburg, Venice, and Genoa—had mostly existed as agencies of the state, endowed with their corporate attributes in order to perform some public function. The Bank of Genoa proved the only significant, though hardly encouraging exception, for it had lacked close ties to the state and accordingly had run wild. "Before its dissolution" it had "appointed generals, made war, &c. in its own name." The enemies of the Bank realized that European governments had gained important commercial benefits from the chartering of banks. Yet they persisted in asking why the pursuit of such benefits should be a matter of public policy in Pennsylvania. They knew that as a republic it had, of course, to promote the good of the people. But, they argued, this formula had an entirely different meaning, in the context of Pennsylvania society, from its meaning in Europe.

For the antagonists of the Bank the term, "the people," no longer possessed its traditional meaning in eighteenth-century political theory. Like many Americans during the Revolution they rejected the assumption of classical political writers that the people were an undifferentiated mass, one part of the traditional division into monarchy, aristocracy, and democracy. Though they occasionally reverted to the language of the older theory, they effectively aban-

19 Pennsylvania Gazette, Mar. 30, 1785.
20 Pennsylvania Mercury, Dec. 10, 1784. For the most extensive discussion of foreign public banks by the opponents of the Bank, see William Findley, "Observations upon the Address of H. H. Brackenridge, Esq.; to the Inhabitants of the Western Country," Pittsburgh Gazette. Aug. 25, 1787, and the anonymous Cool Thoughts on the Subject of the Bank (Philadelphia, 1786), 4–9. Findley's article, though written after the end of the Bank controversy, was directly related to it and reflected the knowledge of foreign banks gained during the struggle.
21 Findley, "Observations upon the Address."
doned its substance by conceiving of the people, or the democracy, in more realistic terms, principally as merchants, farmers, and mechanics. By such a formulation they achieved a theoretical position whereby they could call into question the legitimacy of using state authority to benefit any limited body in Pennsylvania society. Breaking away from the hold of the unitary conception of the people led to the radical and, from the perspective of 1776, unexpected discovery that no single, narrowly defined interest group could possibly claim to represent the sum total of the public good in a republic. In their state constitution Pennsylvanians had required that the Assembly actually represent the people. The opponents of the Bank of North America argued that the government in its economic activities must represent the public good in the same actual terms. Such actual representation could occur only by furthering the best interests of the majority of the people. Thus, rather than bestow the exclusive privilege of conducting a public bank on a minority group of merchants, the government of such an essentially agrarian state as Pennsylvania ought to benefit the major interest groups among the people. The Assembly ought to create a public loan office to “enable the farmer to anticipate the products of his lands and natural increase of his property; and . . . put it in the power of the mechanic to carry on his occupation to his own advantage and the public benefit.”

The example of the European public banks proved additionally unattractive to the enemies of the Bank because in Europe, so their argument ran, banks were found only in aristocratic countries. That circumstance did not result from accident, but rather from defects in corporations that made them extremely unsuited for republican society. This conclusion derived from the belief that republican governments should seek the common good in accordance with the principles of the original social compact. In advance of most of the American states, the people of Pennsylvania had transformed the fundamental law on which they based their republic into a bill of rights. That basic charter became a potent weapon in the attack on the Bank, for it “expressly declared . . . that government is not

23 Freeman’s Journal, Jan. 19, 1785; Pennsylvania Packet, Mar. 31 and Apr. 1, 1785; Freeman’s Journal, Dec. 12, 1786; Carey, 62.
24 Pennsylvania Evening Herald, Sept. 8, 1785; Freeman’s Journal, June 28, 1786.
I48 M. L. BRADBURY April

nor ought to be instituted for the advantage of any single man, family, or set of men." 25 More succinctly, republics ought to safeguard the equality of the people.

For many Americans before the Revolution this injunction had meant nothing more than preserving equality of liberty. Now, however, the opponents of the Bank extended the concept of republican equality far beyond this earlier definition. "Equal liberty and equal privileges are the happy effect of a free government," wrote "Colbert" in the Pennsylvania Packet. "They are, in fact, convertible terms: neither can subsist without the other." The grant of legal privileges appeared as an act creating an aristocracy. Any such grant in a republic would always tend toward an aristocracy, for "the unequal or partial distribution of public benefits within a state, creates distinctions of interest, influence and power, which lead to the establishment of an aristocracy, the very worst species of government." 26

The opponents of the Bank did not intend that Pennsylvania in its efforts to abolish aristocracy should destroy all economic distinctions among its citizens. They knew from traditional political theory that the Pennsylvania republic ought to promote industry and frugality. These two republican virtues would inevitably produce some inequality of wealth. William Findley confessed to the members of the Assembly that he "loved wealth, and pursued it." 27 But wealth remained for him, as for the rest of the Constitutionalists, an essentially Lockean concept, a form of property that gave man independence and thus political power. A citizen could legitimately seek wealth for its Lockean political benefits, as it offered "a means of enjoying happiness and independence," but he could not amass wealth simply for its own sake, in the manner of the stockholders of the Bank. 28 Their unrestrained pursuit of wealth directly conflicted with the interests of the state and the people. "Plain Sense" defined the issue in the Bank controversy as "whether the State of Pennsylvania may be allowed to emit Paper Money for public use; or whether this shall belong only to the owners of

26 Mar. 31, 1785.
27 Carey, 128.
28 Ibid.
the Bank to do, for their own benefit, so as to put the profits of this Paper Money, and the interest arising from it, into their own pockets, to the exclusion of the State at large.”

This fear of inevitable conflict between Bank and state obtained greater force from the anti-authoritarian ideas that Americans borrowed so heavily from English radical and Opposition thought in the course of the eighteenth century. From such sources as Harrington, Milton, and Sidney, this English ideology had taken shape as a means of denouncing the centralizing tendencies of, in J. G. A. Pocock’s phrase, “mercantilistic government”—among other things, its efforts to extend its powers by the development of government credit and finance. In the intellectual world of the predominantly radical Whig writers on whom Americans drew, the court continually tried to corrupt the country as it sought by the use of influence to upset the balance of the English Constitution and destroy the independence of Parliament. “Atticus” applied the central Opposition themes to the Pennsylvania Bank controversy in the Freeman’s Journal in 1786. “The possession of power, as it has been well observed by Harrington . . . invariably followed the possession of property; the bulwarks of security, therefore, which the laws have erected, though not subverted by force, have been sapped by influence.” By analogy the significance of the Bank of North America became easily grasped. It proved to be identical with the instruments of influence that the mercantilistic state had used to extend its powers, with the “wealthy incorporated companies of merchants” and the “royal prerogative supported by an enormous civil list and numberless dependents” that had undermined English liberty.

The incorporation of the Bank subverted the meaning of the Revolution by reintroducing the court politics that Pennsylvanians had tried to eliminate in their Constitution. In a classical sense the Pennsylvania Constitution was unbalanced, for in their Revolu-

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29 Freeman’s Journal, Mar. 29, 1786.
31 June 14, 1786.
32 Carey, 123.
tionary effort to rid themselves of corruption and influence Pennsylvanians had done away with the monarchical and aristocratic elements that traditionally balanced the democracy. William Findley spoke for all the opponents of the Bank when he asked whether its continued existence could safely be permitted in the economically unbalanced society that resulted from the abolition of monarchy and aristocracy. "In a country where we have no counterpoise to correct its influence or control its enormities by their own—shall we grant such an institution? Shall we give such an artificial spring to congregated wealth? By no means."33

In spite of the violence of the assault on the Bank, at least a few of its adversaries hinted at the possibility of compromise. For most of 1785 and 1786, of course, this group was a decided minority. Mathew Carey defined the prevailing attitude on both sides in 1785 as one of "aut Caesar, aut nullus."34 Yet in the course of the debate some opponents did imply that the grant of a charter to the Bank might have been acceptable if the privileges had been less generous, that privilege and republicanism might yet be made compatible. "Philadelphienis" wrote in the Freeman's Journal that "had the capital of the bank been limited to a moderate amount, and its charter to a reasonable duration, though renewable by government;—and had its constitution rendered a director incapable of serving, as such, more than two (or at most three) years out of five, and required the election of four new directors annually, a great source of the jealousy and apprehensions, caused by this institution, would have been prevented."35 The charter proved additionally dangerous because it did not prevent foreigners from acquiring Bank stock. Many had made just such investments and by their act had exposed Pennsylvania to the possibility of outside intervention in its affairs. Soon perhaps the Bank "may become subject to foreign influence, this country may be agitated with the politics of European courts, and the good people of America reduced once more into a state of subordination and dependence upon some one or other of the European powers."36 Though no one said so openly, some limitation on the right of foreigners to own stock might

33 Ibid.
34 Pennsylvania Evening Herald, Oct. 19, 1785.
35 Mar. 2, 1785.
36 Pennsylvania Gazette, Mar. 30, 1785.
quiet one objection to the Bank. Possibly, too, the charter was a defective contract between the stockholders and the state, which could be made acceptable if its defects were removed. Robert Lollar explained in the Assembly that in civil law "in all contracts, unless there was an equivalent received for what was given, the bargain or agreement was void in itself, and incomplete." He added that "the only consideration received from the Bank, was, that it facilitated commerce." If the state received some more substantial assistance from the Bank, perhaps it might regain its charter. The Assembly, wrote "Plain Truth" in an argument that anticipated what shortly became the standard practice of legislatures in incorporating banks in the early years of the Republic, should extract a financial quid pro quo from the Bank. It should demand from the Bank "a loan of two, three, or four hundred thousand pounds, at 3 per cent, per annum, for a number of years, as a consideration for continuing their charter, for a limited time." These proposals were not particularly radical; they mostly imitated restrictions the Parliament had placed on the powers of the Bank of England.

Whether willing to compromise or not, the enemies of the Bank agreed that the legislature had never deeded away the right to annul or amend what it had once granted. Even if the charter of the Bank was a contract with the state, the Assembly had the authority to change it. Denial of such power would overturn the controlling principle of the Pennsylvania Constitution, its guaranteeing liberty by the removal of all traditional restraints on the legislative expression of the popular will. For in Pennsylvania the Revolution had made the people sovereign, and the legislature their actual representatives. William Findley reminded the Assembly that "the popular opinion ... is not only formally but in fact the voice of the government—the government being solely founded on the popular authority; and the legislature being authorised and instructed to speak the popular voice, they are necessarily supposed to speak the voice of the people."
In an argument that showed the radical implications that could be drawn from Whig political theory the opponents of the Bank claimed that the sovereignty conferred on the Assembly by its representative character gave to it alone of the branches of the state government the power and duty to protect the natural rights of man. And the Bank might easily violate such natural rights. In the way described by the Whig writers it might through the use of its influence “without breaking any law that may be devised . . . become not only a nuisance but dangerous.”

The people had the indisputable right to decide by their annual choice of Assemblymen whether the Bank constituted such a danger. The Constitutionalists in the Council of Censors concluded in 1784 that “we cannot concede, that a charter obtained perhaps by fraud or imposition, or granted through the facility of our representatives, cannot be altered or repealed by any succeeding General Assembly.”

Lack of power to repeal such an act destroyed the substance of the Pennsylvania experiment in government. As John Smilie asked, “if one house . . . beholding this monster in the face of the constitution, has not power to give redress, to what purpose are annual elections?”

The sovereign organ of government must have the right to repeal illegal acts of past meetings of the Assembly, or its sovereignty would no longer have meaning. The people of Pennsylvania would have left only the alternative of revolution. “If the house cannot afford a remedy” when encroachments eat up the spirit of the Constitution, “the people must have recourse to the means God and nature have given them for redress.”

The opponents of the Bank concluded with the pragmatic reflection that taking away its charter deprived it of no powers it legitimately needed to engage in banking. They understood quite clearly the advantages of incorporation. In an effort to show that banks could be conducted without them, William Findley discussed them in an Assembly speech in December, 1786. Incorporation made an institution more stable, for its stockholders could not withdraw their capital at will as in a partnership. They could only

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41 Pennsylvania Gazette, Aug. 17, 1784.
42 Ibid.
43 Carey, 23.
44 Ibid.
sell their stock. Moreover, a charter offered certain conveniences to investors. It permitted them to sue and be sued in their corporate capacity, and it gave greater security to their personal estates. Findley did not specify what he meant by greater security. Undoubtedly, however, he had in mind the principle of limited liability, for in an Assembly speech ten months earlier he had insisted that the personal estates of the stockholders of the Bank were not liable for the debts of the corporation. Findley ended his enumeration by admitting the convenience of incorporation, while at the same time concluding it was in no sense essential to the business of banking. To this analysis Robert Whitehill added the observation that most European banks were private and unincorporated institutions. Whitehill then proceeded to ask the question that such knowledge obviously posed. Why could the Bank of North America not "go on as a private bank? How many banks in Europe are carried on in that manner?"

Whitehill's question received little direct answer from the friends of the Bank. Rather they asserted that the Bank performed a needed state function in the tradition of European public banks. Though it did not at the moment make loans to the state—the assistance that foreign banks had customarily rendered to their governments—it still possessed great potential to give such aid in time of need. "A Pennsylvanian" remarked that "emergencies often require a state to anticipate its revenues. Should Pennsylvania have any such occasion, which must often occur in affairs of such magnitude, the bank will be found extremely useful." Also, the Bank indirectly performed valuable services for the state. Though society was composed of farmers, merchants, and mechanics, the Bank helped all equally, for it "draws and confines the money of the United States to the city of Philadelphia, from whence it is diffused, as from a reservoir, to every part of the state."

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46 Pennsylvania Packet, Dec. 25, 1786.
47 Carey, 62.
48 Pennsylvania Packet, Mar. 29, 1785.
49 Independent Gazetteer, Sept. 3, 1785.
The defenders of the Bank paid detailed attention to only one of the customary advantages of incorporation—the monopoly right that a charter conferred. The discussion of the monopoly aspect of incorporation resulted from their insistence that they favored quite as active state participation in the economy as their opponents. Appearing for the Bank before the Assembly in September, 1785, James Wilson urged that the government of Pennsylvania turn its “entire attention to the promotion of every generous liberal plan, whose object is the public welfare.”  

Such urging had a polemical use, for it freed Wilson to deny the politically damaging charge that the Bank enjoyed a right to a monopoly. Both sides in the Bank dispute knew that incorporated banking in Europe was traditionally carried on in the form of a state monopoly. Though the Bank had a similar monopoly in the United States until 1784 and in Pennsylvania until the 1790’s, it never claimed that its charter implicitly contained an exclusive grant of such privileges. In fending off the Bank of Pennsylvania in 1784, attorneys for the Bank of North America argued that having two incorporated banks in a state was unprecedented and economically unsound; still they admitted that “the legislature has always a Charter in its Power. It may institute another Bank.”  

By such an admission the supporters of the Bank moved pragmatically, if reluctantly, toward the position assumed in the general incorporation acts of the nineteenth century: that in a republic the possession of corporate privileges could be justified only by multiplying them rather than by confining them to exclusive groups. Tacitly, this abandonment of one of the most highly valued of corporate attributes admitted a charter to be more a convenience than a legal necessity.

Even though their charter was more an aid to banking than an indispensable requirement, the friends of the Bank still fought stubbornly to regain it. The correspondence of Alexander Hamilton with the Connecticut merchant, Jeremiah Wadsworth, reveals its importance to some of the leading stockholders. Soon after learning of the loss of the charter, Hamilton—as the attorney for John Church, a

50 Pennsylvania Evening Herald, Sept. 7, 1785.
51 Wilson, Notes Before a Committee of the Assembly.
large shareholder—had written to express his uneasiness to Wadsworth, Church's one-time partner and the most substantial investor in the Bank. Hamilton claimed, and Wadsworth agreed, that "to leave so considerable a sum in a Company of this kind not incorporated is too dangerous." Hamilton did not make clear the reasons why incorporation made the Bank so much safer; possibly he meant that a charter conferred limited liability on the stockholders and that Wadsworth and Church could not afford the unlimited risks of an unincorporated company. However, the largest investors in the Bank on the whole lacked great influence in its affairs. Their beliefs about the value of incorporation do not figure as prominently in the Bank controversy as those of Robert Morris and his close financial associates.

Morris and his small circle of Philadelphia speculators largely ran the Bank to suit themselves and undertook the fight to win back the charter in 1785 and 1786 on their own initiative without troubling to consult the wishes of the rest of the stockholders. From the opening of the Bank in 1782 they had taken advantage of the failure of the original charter to set the terms for the election of officers and had so manipulated the bylaws of the institution that they could easily dominate its affairs. Then, released from all effective supervision, they had unscrupulously used the capital of the rest of the stockholders in the ensuing years to promote their own financial speculations. After the Bank lost its charter in 1785, any disgruntled shareholder had the right in law to withdraw his capital, and several in 1785 and 1786 thought the time opportune, in the words of Jeremiah Wadsworth, to "rescue my property from their grasp." As the attorney for the Bank, James Wilson had exercised his legal ingenuity to circumvent these demands temporarily, but even his considerable skills could not effect a permanent evasion. To keep the capital of the present stockholders and retain the

52 Syrett and Cooke, III, 625.
53 Platt, 152, states that Wadsworth feared that the loss of the charter meant the end of limited liability for the stockholders.
54 Syrett and Cooke, III, 645–646; Thomas Willing to James Wilson, June 10, 24, and 25, Oct. 29, and Nov. 15, 1784; Feb. 18, 1786, Minutes and Letter Book of the Bank of North America; McDonald, 53–55.
55 Syrett and Cooke, III, 633.
powerful financial position that control of the Bank gave them, Morris and his associates had to get their charter back.\textsuperscript{56}

In the struggle to recover their charter Morris and his followers obscured the pursuit of their economic self-interest—and justified their right to incorporation—by re-examining the premises of Pennsylvania republicanism. The political activities of the Constitutionalists in the Revolutionary years had furnished the Morris group with an accumulation of grievances. Whenever in control of the legislature the parvenu radicals had taken advantage of the unbalanced nature of the Pennsylvania government to strike at customary sources of authority. They had forced through test acts that disfranchised many in the groups that traditionally dominated Pennsylvania politics. They had eliminated the power of the former controlling element in education by repealing the charter of the College of Philadelphia. They had attacked established wealth by a host of devices—by confiscating property, by emitting paper money and passing legal tender acts, and by preventing the recovery of debts through normal legal processes. The Pennsylvania government simply was not working in the way that Whig political theory predicted.\textsuperscript{57} By firmly linking the assault on the Bank to the malfunctioning of the Pennsylvania Constitution, Morris and his associates contributed to the rethinking of the nature of politics that produced a new and distinctively American political thought by the end of the 1780’s. In effect, in the Bank controversy they probed the limitations of Whig political theory and by their exploratory effort tried to convince the voters of Pennsylvania of the need to recharter the Bank.

In a theoretical sense, or so Morris and his supporters indicated, the attack on the Bank proved so troubling because from the perspective of pre-Revolutionary thought it was so unexpected. Americans had anticipated from their knowledge of political theory that democracy might easily degenerate into its traditional excesses of

\textsuperscript{56} One sometimes ignored advantage of the early corporate charter was the opportunity it offered a group of inside investors to use the capital of the rest of the stockholders in the pursuit of their own self-interest. Hurst, 47–49, points out that early American corporate law paid little attention to the internal functioning of corporations and by its silence gave management fairly great independence.

\textsuperscript{57} Wood, 232–235, 438–446. For the political history of Revolutionary Pennsylvania, see Brunhouse.
anarchy and licentiousness. However, the Bank war, as so many other contemporary political battles, did not result from anarchy and licentiousness, but from what before the Revolution was dismissed as a theoretical impossibility: that an excess of power in the popular branch of government should destroy by law "the existence and rights acquired by law." Tom Paine thought the "proceedings respecting the bank" resulted from "governing too much" by the Assembly. Failure to provide a balance in the Constitution for the power of the people had allowed the legislature to concentrate all power in its hands. The Constitutionalists were now using that un-restrained power to stretch the meaning of equality far beyond its legitimate bounds of equality of liberty. As Robert Morris concluded, "holding more or less shares in the bank" could not destroy republican equality unless the enemies of the Bank "meant equality in the possession of property. If that was their view, they should first have reported a law, fixing limits to industry—and an agrarian law for making an equal division of property."

In essence the friends of the Bank sought to attack its detractors by showing that the assault on it was clear evidence of political illness, proof of the inadequacy of Whig political theory to explain the problems of politics and to provide a remedy for them. In his role as chief publicist for the Bank Tom Paine undertook to document this claim by re-examining the concept of representation that infallibly linked the Assembly to the will of the people. He agreed with the opponents of the Bank that the people were not an undifferentiated mass, but from this agreement he deduced quite different and—from the point of view of pre-Revolutionary political thought—quite startling conclusions. If the people could no longer be conceived as an entity in the terms of classical political theory, then annual elections by themselves guaranteed very little in the way that the Whig science of politics had asserted. Since the democracy was composed of competing interest groups, one or the other of them was likely to triumph in elections. Once elected, no matter how frequently, a legislature was beyond popular control

89 Pennsylvania Packet, Dec. 17, 1785.
60 Carey, 57.
until the time of the next election. Thus, the representatives of the people did not exercise their power in the uniformly benevolent way proclaimed by the Constitutionalists. Nor did the form of the Pennsylvania Constitution really eliminate court politics. On the contrary, "when party operates to produce party laws, a single House is a single person, and subject to the haste, rashness and passion of individual sovereignty. At least, it is an aristocracy."61

According to the allies of the Bank, to give Pennsylvania a government of law, and not one of the arbitrary acts of men, required principally a restoration of constitutional balance—not in the classical sense of balancing the orders of society, but in the more modern sense of a functional division of powers among the various branches of government.62 Possibly, however, they argued as part of their effort to justify the Bank, if it won back its charter on terms that made it independent of the Assembly, it might help to cure the political ills of Pennsylvania.

To explain the role the Bank might play in Pennsylvania required its defenders to convince the Pennsylvania electorate of the error of certain of the concepts inherited from English disputes over the activities of the mercantilistic state. As "Artemon" expressed the need in the Pennsylvania Gazette, both sides in the Bank struggle had to leave "the dark lanthorn" of Sir James Steuart "for the clear and bright light of Smith."63 They had to abandon the intellectual world inhabited by such defenders of mercantilistic government as Sir James Steuart and enter the modern laissez-faire commercial world of Adam Smith.64 Such a movement taught that the Bank did not fit analogies drawn from Opposition thought. The

63 Pennsylvania Gazette, Mar. 16, 1785.
64 The references are to Steuart's An Inquiry into the Principles of Political Economy (1767) and Smith's The Wealth of Nations (1776). Steuart was a Jacobite, and the Inquiry represents a mildly mercantilist or "court" point of view prolonged into the eighteenth century. For the influence of Steuart in America, see Fritz Redlich, Essays in American Economic History (New York, 1944), 107-130, and The Molding of American Banking: Men and Ideas (New York, 1947), Part I, 5-7. See, however, the rebuttal by Anna Jacobson Schwartz, "An Attempt at Synthesis in American Banking History," Journal of Economic History, VII (1947), 208-217.
allies of the Bank had to phrase their rearrangement of the images of politics in compelling terms, for, as the participants in the controversy knew, the original charter of the Bank had been far more generous than those of European public banks. The grant had been for life and had given the Bank the right to issue notes, whereas European banks had received charters for only limited periods and had been mostly banks of deposit, not of issue. To counter this knowledge—damning evidence if understood in the categories of the radical Whigs—the friends of the Bank contended that to portray it in the characteristic terms of the Opposition ideology as a device to undermine the liberty of the people misled more than it informed. Such description ignored that the stock of the Bank circulated freely and that its membership constantly changed. Anyone, of whatever social position or political persuasion, could become a member by buying its stock. From these commercial facts the supporters of the Bank deduced a character for it fundamentally different from that learned by reference to Opposition thought.

In the light of a modern commercial understanding, the supporters of the Bank insisted, a public institution presented fewer problems to the state than a private one. If the Bank of North America did not receive a new charter, then most assuredly its investors would carry on their activities as private bankers. But, George Clymer cautioned, the danger to the government thereby would be much greater, for incorporation had the advantage of permitting numerous small stockholders to combine their capital to use it in the best interests of the state, whereas private banks—which were controlled by very small groups of wealthy persons—wielded their economic power in the ways charged by the Constitutionalists. "An individual at the head of a private bank" might "employ his influence to embarrass the affairs of government," but, Clymer explained, incorporated banks would not. "In a public bank the directors are supported or turned out as the stockholders approve or disapprove their

measures." Gouverneur Morris reinforced Clymer's analysis with the argument that it was "utterly inconceivable" that chartered banks would act in the ways predicted by the Opposition ideology, "that four or five hundred stockholders, (of all ranks, parties and denominations) should join in chusing directors who would attempt to overturn the government."

The defenders of the Bank based this claim of its safety to the state on the new insight they offered into the nature of power. They still accepted the formula of their opponents that the possession of property inevitably conferred power, but they added the important qualification that power could be benign as well as malignant. Influence could not be uniformly equated with corruption, for the "sort of influence" the investors in the Bank possessed "has ever been found safe to the state." The stockholders' pursuit of private interests became the justification for their possession of public power in the form of a charter. So numerous were the interest groups among the people and so actually representative of this diversity were the stockholders of the Bank that a charter provided a mechanism for preventing attempts to use their economic power improperly.

Though the dominance in the Bank of Morris and his group made factual nonsense of their argument, the friends of the Bank in contending for this point effectively employed one of the most potent concepts in the contemporary rethinking of politics—the significance of the multiplication of interest groups in a republic. They insisted that the range of interest groups among the stockholders was so wide that they differed on practically all issues and united only on one—the defense of property. To a mind familiar with the workings of a commercial economy, the propertied interests of society agreed only on the need to demand stability from the government. On most of the pressing public issues of the day the granting of a charter to the Bank would immobilize the economic power of the stockholders. They would combine sufficiently to exercise their strength only in

67 Morris, Address to the Assembly, 23.
69 Wood, 499–518.
times of great emergency and then they would use it in precisely the way it needed to be employed—to preserve the government. Creating a public bank and leaving its control in private hands would help to give the Pennsylvania republic the balance it so urgently needed. A privately-owned public bank would be "the surest antidote or preservative against tyranny in the government, that can be named; its owners are the rich men of the state, who will never be concerned in needless popular clamours or sedition against the government, but at the same time have both influence and inducement eno' to be a check and restraint on government, when it becomes oppressive, and really verges towards tyranny." 70

In no sense did giving men of property such powers violate the equality guaranteed by the Pennsylvania Constitution. For the defenders of the Bank, property was not exclusively a Lockean concept—the attribute that gave man political independence—but also a separate element in society that deserved representation in government in its own right. 71 Men of property achieved greater wealth than the rest of the citizens by their more successful pursuit of the republican virtues of industry and frugality. If the state accepted such inequality among individuals—which the opponents of the Bank conceded it had to do—then it could not object to the inequality of wealth produced by corporations. For abandoning the analogies of the Opposition ideology had shown that it was "of little consequence to the state, whether its wealth is in the hands of individuals, or of an incorporated body." 72

The supporters of the Bank conducted their argument on implicitly aristocratic lines, but they argued that certain kinds of social and economic inequalities were perfectly compatible with republicanism. Their emphasis reflected the increasing concern of many Americans in the 1780's to assert and justify the role of a propertied element in politics in order to curtail the raging equalitarianism that seemed epidemic in American society. For argumentative purposes, however, the friends of the Bank carefully distinguished a republican

70 Webster, 16, 20–21. Pennsylvania Evening Herald, Sept. 7, 1785; Carey, 32; Morris, Address to the Assembly, 21.
71 Hugh Henry Brackenridge, "To the Inhabitants of the Western Country," Pittsburgh Gazette, May 26, 1787; Carey, 58; Wood, 218–222.
72 Pennsylvania Gazette, Apr. 6, 1785.
elite from the aristocracies of Europe. They conceded a legitimate task of social and economic levelling to Pennsylvania republicanism. In the Revolution Pennsylvanians had sought to destroy the kind of wealth represented by the entailed estates of the English aristocracy, wealth of the sort that gave its holders the influence to encroach on the liberty of the people. But the Bank did not fall under this prohibition, for it was not an entailed estate. Its property, in the form of its shares, constantly circulated. Though the stockholders of the Bank did constitute an elite, access to their economic and social status was available to all who were sufficiently industrious and frugal to accumulate enough capital to invest in its shares. Because no institutional arrangements barred entry into the Bank, because its wealth was not concentrated in the manner of the English aristocracy in a single family line, it offered little danger to the state. Its stockholders had the power only to balance popular excesses, not to destroy popular freedom.

Once freed from the charge of violating republican equality, the special privileges the Bank charter gave the stockholders yielded a powerful theoretical means of resisting the right of the state to take them away. In his *Dissertations on Government, the Affairs of the Bank, and Paper-Money* Tom Paine examined the principles of the social contract and announced that the people of Pennsylvania had "renounced, as despotic . . . the assuming a right of breaking and violating their engagements, contracts and compact with . . . each other." He continued that because the people had given up their right to break their agreements with each other, "their representatives can not make an Act to do it for them." These premises were innocuous, but Paine extended the mercantile analogy on which much of social compact theory was based to an innovative conclusion that expanded the distinctions Americans already recognized between kinds of laws. In the course of the Revolution Americans had accepted the separation of the constitutional law made by the people from the statute law made by their representatives. Paine, however, proposed a more subtle formulation. What his opponents called simply statute law, he wanted to divide into statutes and

73 Carey, 18; Webster, 21.
74 Paine, 8.
contracts. He asserted that the Assembly performed in two capacities—it passed statutes and entered into "Acts of agency or negotiation, that is . . . Acts of contract and agreement, on the part of the State, with certain persons therein mentioned, and for certain purposes therein recited." Because statutes affected all the people equally, their representatives could change them at will. But contracts—which involved an engagement between the state and limited numbers of the people—could not be so changed. Once granted, a charter had value; it became in fact a species of property. And the Pennsylvania Constitution protected the rights of property, as even the enemies of the Bank admitted. Robert Morris contended in the Assembly, "if the rights of property are not of the nature of those we receive from our creator, yet the security of them is amongst the great objects of civil society: and if in a government formed for the protection of property, after the bank has been endowed with certain rights, privileges and immunities, these are not to be sacredly secured, the very end of government is violated." Contracts had to be interpreted "by the laws of the land, in a court of justice and trial by jury." This conclusion, made possible by Paine's extension of the principles of the social compact, became the basis of the defense of the nineteenth-century corporation against interference by the state.

In possibly their most effective polemical stratagem the friends of the Bank joined the security of its charter to the safety of all constitutionally-protected rights. By attacking the Bank its enemies had made the Pennsylvania Constitution "a nose of wax, which they twisted at pleasure." If the principles of the radicals prevailed, no other group could protect its rights from legislative tyranny; "the change and fluctuations of party might be dangerous to the rights and property of every man." The conflict of interest groups in a republic meant that an unbalanced government offered no protection to the rights of the people. In the past the opponents of the Bank had obtained the privilege of incorporation for the churches of their

75 Ibid., 10.
76 Carey, 39.
77 Paine, 14.
78 Carey, 114.
constituents. Robert Morris speculated that if the government of Pennsylvania continued to be unbalanced, then these might well be revoked "a few years hence, on some pretence or other." In case the enemies of the Bank missed the significance of these remarks, Gouverneur Morris made their implication more obvious. "Should the next election give power to those who may now be oppressed, what bounds shall be set to unbridled resentment?"

The efforts of the supporters of the Bank eventually secured a favorable response from the Pennsylvania electorate. The Independent Gazetteer reported of the fall elections in 1786, "the late returns of Assemblymen . . . fully evinces that the Bank of North America has recovered its popularity, and that paper money has lost its credit throughout the state. On these two points the late general election turned in every county." The struggles of the past two years had also stirred up the outside stockholders of the Bank sufficiently to make them force Morris and his associates to seek a compromise with their political enemies. The first meetings of the Assembly in the fall made clear that if the Bank would in essence accept some of the alterations that its opponents had previously suggested, it could recover its corporate status. If the Bank of North America would accept changes that limited its charter to a duration of fourteen years, reduced the capital it could acquire to $2,000,000, and severely restricted its right to own land and to trade in goods, then it could regain its charter. A compromise was eventually reached on this basis, and on March 17, 1787, the Pennsylvania Assembly once more incorporated the Bank.

In no permanent sense did the struggle over the Bank of North America resolve the problem of privilege. It continued to disturb the course of American politics long after 1787. The debates did anticipate two nineteenth-century conclusions—that in a republic the possession of privilege could be justified only by its multiplication, and that a charter was a contract which the state could not unilaterally alter. The changes made in the charter of the Bank—a

80 Carey, 86.
81 Morris, Address to the Assembly, 5.
82 Nov. 27, 1786.
83 Syrett and Cooke, III, 699-700; Brunhouse, 195-197.
short duration, a strictly limited capitalization, and a prohibition on owning land and trading in goods—came to characterize most early banking charters. Though not written into the compromise legislation of 1787, the demands of some of the opponents of the Bank that foreigners be prevented from owning its stock and that it be forced to make a loan to the state appeared as issues in later disputes. In the early decades of the nineteenth century state governments regularly required loans or some sort of financial compensation as the price for bank incorporation, and charters occasionally prohibited foreigners from owning bank stock, though an injunction against their serving as directors was more common. And states generally adopted another unused suggestion in the Bank dispute—that the banking charter set the terms for the election of directors. Finally, in ending in compromise the struggle over the Bank typified the entire controversy over privilege and the corporation in the early years of the Republic. In all these contests no one group found it possible to control the government sufficiently to monopolize privilege or, equally, to destroy it. All had to compromise with their opponents. A lengthy series of such compromises made possible the development of the American business corporation in the nineteenth century.

In spite of their inconclusiveness, the exchanges of the mid-1780’s have value of a different kind. They formed part of the important constitutional debates of the 1770’s and 1780’s. Certainly the rethinking of the nature of politics by the supporters of the Bank was


85 The Handlins, Dimensions of Liberty, 95-97.
extremely significant. Largely on the basis of their own independent experience in the Revolutionary era many Americans agreed that equality had been stretched beyond all legitimate meaning and that the state legislatures had become as tyrannical as any king. Precisely, these widespread beliefs served as a major stimulus in setting in motion the reconstitution of the national government that shortly followed the end of the Bank war.86

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86 Wood, 463-467.