The Smithsonian

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Article I, § 8, as you know, grants Congress authority "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Congress exercised this authority from the beginning, providing copyrights for authors and patents for inventors, to encourage their writings and discoveries respectively.[1]

As members of the House pointed out when the First Congress refused to finance a scientific expedition to Baffin's Bay, however, the clause in question gave Congress power only to provide for patents and copyrights, not to promote knowledge generally.[2] Congress's most significant contribution to science and learning during the first half of the nineteenth century was based upon quite another grant of authority.

Ever since George Washington was President there had been proposals to establish in the District of Columbia, over which Congress had the power of "exclusive legislation," institutions that Congress might not have authority to set up elsewhere—such as a university, a vaccine agency, or a bank. So long as the institution was truly local, *bien entendu*, there was no constitutional difficulty. Every endeavor to employ authority over the seat of government as a pretext for evading limits on congressional powers within the states, however, had so far been rightly rejected.[3]

Then, in 1829, an Englishman named James Smithson died, bequeathing to the United States (on certain contingencies that need not concern us here) a substantial sum of money "to found at Wash-

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1 See Act of April 10, 1790, 1 Stat 109 (patents); Act of May 31, 1790, 1 Stat 124 (copyrights). See also David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801* 91–93 (Chicago 1997).

2 See Currie, *Federalist Period* at 93 (cited in note 1).

3 See David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801–1829* 255, 297–98, 300, 302 (Chicago 2001); Currie, *Federalist Period* at 71–72, 79 n 190, 222–23 (cited in note 1) (examining several failed spending proposals that would have extended congressional power). As late as 1841, President Tyler vetoed a bill to establish a "Fiscal Corporation of the United States" in the District partly on the ground that Congress could not "invest a local institution with general or national powers." See David P. Currie, *The Constitution in Congress: Descent into the Maelstrom, 1829–1861* ch 3 (forthcoming 2004).

ington, under the name of the Smithsonian Institution, an Establishment for the increase & diffusion of knowledge among men."[4] The requisite contingencies having occurred, President Jackson in late 1835 called Congress's attention to the legacy.[5] Congress promptly passed a statute authorizing the President to appoint an agent to pursue the claim before the British courts and appropriating up to $10,000 to cover the attendant expenses. Once collected, the legacy was to be applied, "as Congress may hereafter direct," to the object specified in Mr. Smithson's will.[6]

Two years later, President Van Buren reported that the money had been duly collected and deposited in the Treasury, where it awaited Congress's further orders.[7] Nearly a decade elapsed before Congress responded, and the passage was rocky. But in August 1846 President Polk finally signed the bill establishing the Smithsonian Institution according to the terms of the bequest.[8]

Part of the delay stemmed from differences of opinion over the nature of the projected institution. Rhode Island Senator Asher Robbins, reflecting the views of several prominent sages consulted at the President's request, proposed a university; former President John Quincy Adams plumped for an observatory, which he had once urged Congress to establish with its own money.[9] "In 1846, however, the country was prepared to expect it to be a general agency for the advancement of scientific interests of all kinds— . . . catholic, . . . unselfish, . . . [and] universal."[10]

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4 The will is printed in George Brown Goode, ed, *The Smithsonian Institution, 1846–1896: A History of its First Half Century* 19–20 (City of Washington 1897). See also id at 22:

> The motives which actuated Smithson in mentioning the United States as his residuary legatee, rather than any other government or institution, must remain in doubt, for he is not known to have had any correspondent in America, nor are there in his papers any reference [sic] to it or its distinguished men.

5 "The Executive having no authority to take any steps for accepting the trust and obtaining the funds, the papers are communicated with a view to such measures as Congress may deem necessary." Andrew Jackson, Special Message to the Senate and House of Representatives (Dec 17, 1835), in James D. Richardson, ed, 4 *A Compilation of the Messages and Papers of the Presidents* 1406 (Bureau of National Literature 1897).

6 Act of July 1, 1836, 5 Stat 64. Sections 1 and 3 of the statute repeated the terms of the bequest almost verbatim. The amount of money paid into the Treasury was reported to be $515,169. See Act of August 10, 1846, 9 Stat 102, § 2.

7 Martin Van Buren, Special Message to the Senate and House of Representatives (Dec 6, 1838), in Richardson, ed, 4 *Messages and Papers of the Presidents* at 1723 (cited in note 5).

8 See 9 Stat at 102.

9 See George Brown Goode, *The Founding of the Institution*, in Goode, ed, *The Smithsonian Institution* 25, 32–36 (cited in note 4) (discussing the various proposals for carrying out Smithson's bequest). For a discussion of Adams and the observatory, see Currie, *The Jeffersonians* at 310–12 (cited in note 3); for Adams's active role in promoting the Smithsonian, see Samuel Flagg Bemis, *John Quincy Adams and the Union* ch XXIII (Knopf 1956).

10 Goode, *Founding of the Institution* at 49 (cited in note 9).

And so it was. The statute directed the Board of Regents of the new Institution to construct a building in Washington containing "suitable rooms" for "objects of natural history, including a geological and mineralogical cabinet; also a chemical laboratory, a library, a gallery of art, and the necessary lecture rooms."[11]

All relevant objects belonging to the United States and located in Washington, as well as Smithson's own collection, were to be transferred to the Institution. The Regents were also authorized to acquire "new specimens" and instructed to compile "a library composed of valuable works pertaining to all departments of human knowledge." Interest from the bequest was appropriated to cover the Institution's expenses, together with an unspecified sum from general revenues to help cover the cost of construction. The principal was to remain untouched.[12]

Thus Mr. Smithson's money was to be used chiefly to establish a museum, a library, and other facilities not for the government's own use but rather, in the terms of the will itself, "for the increase & diffusion of knowledge." From the outset some had denied that that was any of the government's business.

When President Jackson first referred Smithson's bequest to Congress, both John C. Calhoun and his South Carolina colleague William C. Preston predictably objected that Congress could not accept it.[13] Adams predictably replied in the House that Congress had

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11 9 Stat at 104, § 5.

12 See id at 102–05, §§ 2, 5, 6, 8. Advances from the Treasury were to be repaid out of accumulating interest, but that did not make the project easier to sustain; even a loan must be justified as necessary and proper to some enumerated power. Interest not needed for purposes of the Institution itself was to be expended as the Regents thought best "for the promotion of the purpose of the testator." Id at 105–06, § 9. The following section, id at 106, § 10, required the holder of any future copyright to deliver copies of the copyrighted work to the Institution and to the Library of Congress, with no mention of compensation. The acquisition of books and other works is necessary and proper to the establishment of libraries, but why it did not offend the Takings Clause to make contributions to the Government a condition of copyright protection seems to call for explanation.

13 See 12 *Register of Debates in Congress* 1375 (Gales and Seaton 1836) (Sen William C. Preston) ("[The donation] was general in its terms, and not limited to the District of Columbia; it was for the benefit of the United States, and could not be received by Congress."); id at 1376 (Sen John C. Calhoun) ("He understood the Senators, on all hands, to agree that it was not in the power of Congress to establish a national university," and "[h]e thought that acting under this legacy would be . . . the establishment of a national university."). Calhoun repeated his objection in 1839. See Daily Natl Intelligencer 2 (Apr 8, 1839), reprinted in Clyde N. Wilson, ed, 14 *Papers of John C. Calhoun* 576, 576–78 (South Carolina 1981). Preston added the quaint argument that the United States could not receive legacies even for national purposes, see 12 *Register of Debates* at 1374, but that was singularly unpersuasive; acceptance of private funding as an alternative to taxation would seem necessary and proper to the exercise of each of the enumerated powers. On the other hand, the fact that in the end the Institution would soak up no tax revenues made it harder rather than easier to sustain, for it meant one could not defend it on the basis of President Monroe's broad reading of the spending power. See Currie, *The Jeffersonians* at 300 (cited in note 3).

full authority to put the money to use in the District of Columbia.[14] South Carolina Representative Alexander Sims returned to the attack in 1846: Only a local legislature in the District could administer such a legacy, as "the Government was not instituted for any such purposes as the administration of charities"; and "[i]t was not intended that this fund should be applied to the exclusive purpose of the use of the District of Columbia."[15]

Congress passed the bill anyway, and that strict constructionist James Knox Polk signed it into law. One can hardly avoid the conclusion that in so doing they played fast and loose with the power to legislate for the seat of government. For nobody pretended that the Institution was especially intended to serve the few residents of Washington; the debate was about creating a great national resource for the whole country. The same was true when Congress established a national art gallery in 1860.[16] These were at least arguable cases, for District people would benefit from these institutions in common with everyone else. The ruse had been laid bare, however, two months before the National Gallery bill was adopted, when Congress brazenly established the United States Agricultural Society in the District of Columbia—which even at that time was hardly renowned for either its produce or its pigs.[17]

One final aspect of the Smithsonian legislation deserves mention. Section 1 of the statute described the Institution as an "establishment" consisting of an assortment of ranking federal officials, from the President, Vice President, and Cabinet through the Chief Justice, the Commissioner of Patents, and the Mayor of Washington.[18] Their task was "the supervision of the affairs of [the] institution and the advice and instruction of [the] board of regents,"[19] to whom the conduct

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14 See 12 *Register of Debates in Congress* 79 (Gales and Seaton 1836) (Appendix). See also id at 1375 (Virginia Sen Benjamin Leigh) ("Congress was the *parens patriae* of the District of Columbia . . . and could therefore very properly receive this trust for a charitable purpose in the District of Columbia."); id at 1376–77 (New Jersey Sen Samuel Southard) ("[I]n his opinion, the most rigid construction of the constitution would not be adverse to the bill [establishing the Smithsonian Institution]."). James Buchanan of Pennsylvania said it was all right because the United States would be acting as trustee for Smithson's estate, id at 1377; he failed to explain how that fiction connected the proposal with any of Congress's powers.

15 Cong Globe, 29th Cong, 1st Sess 738 (Apr 28, 1846). F.P. Stanton of Tennessee repeated the simplistic answer: "[T]his institution, located within a territory over which Congress has exclusive jurisdiction, surely cannot involve the exercise of a power unauthorized by the Constitution." Cong Globe App, 29th Cong, 1st Sess 891 (Apr 22, 1846).

16 See Act of June 15, 1860, 12 Stat 35.

17 See Act of April 19, 1860, 12 Stat 12.

18 9 Stat at 102.

19 Id at 105, § 8. The early members of the Establishment established a precedent of taking their responsibilities lightly:

> The Establishment, though exercising constant supervision over the affairs of the Institution, being represented upon the Board of Regents by two of its members, . . . has never

of "the business of the . . . institution" was entrusted.[20] Three members of the Establishment (the Vice President, the Chief Justice, and the Mayor) were to sit on the Board of Regents, along with three members of each House (to be chosen by their respective chambers), and "six other persons" to be appointed "by joint resolution of the Senate and House of Representatives."[21] The Regents in turn were to elect a "secretary" who, among other things, was to "take charge of the building" and "discharge the duties of librarian and of keeper of the museum"; in effect, he was to be chief executive officer of the entire Institution.[22]

What was this Institution, anyway? If it were a government agency, the provisions for its governance posed a nightmare of separation of powers problems. "Officers of the United States" were supposed to be appointed by the President and the Senate (or sometimes by the President alone, the heads of departments, or the courts), not by Congress or one of its Houses.[23] No one was supposed to hold "any office under the United States" and a seat in Congress at the same time.[24] No member of the House or Senate was supposed to be appointed to "any civil office under the authority of the United States" created during his term.[25] Yet under the statute Congress named members of the Board of Regents, Congressmen served as Regents, and several were appointed during the term in which the Institution was established. If Regents were federal officers, all of this was flatly unconstitutional.[26]

> deemed it necessary to take any formal action at its meetings, save to adopt . . . a code of by-laws, and to listen from time to time to general statements by the Secretary in regard to the condition and affairs of the Institution.

George Brown Goode, *The Establishment and the Board of Regents*, in Goode, ed, *The Smithsonian Institution* 59, 60 (cited in note 4).

20 9 Stat at 103, § 3.

21 Id.

22 Id at 103, 105, §§ 3, 7. See Goode, *The Establishment and the Board of Regents* at 61 (cited in note 19) ("The executive officer of the Board of Regents is the Secretary of the Institution, who is elected by them. The duties and responsibilities of Secretary are such as in other institutions usually belong to the office of Director."). The provisions respecting the Establishment, the Board of Regents, and the Secretary remain substantially unchanged today. See 20 USC §§ 41–43, 46 (2000).

23 US Const Art II, § 2. See *Buckley v Valeo*, 424 US 1, 124–41 (1976) (holding that certain provisions of the Federal Election Campaign Act of 1971 violated the Appointments Clause, Art II, § 2, cl 2).

24 US Const Art I, § 6.

25 Id.

26 Moreover, arguments against the inclusion of the Chief Justice can be made on the basis of Article III, § 2, which limits federal courts to the decision of judicial "cases" and "controversies." From the beginning, however, judges for better or worse have accepted nonjudicial responsibilities to be exercised outside the court itself; there is no explicit bar to their holding two offices at once, so long as they do not serve in Congress. See *Mistretta v United States*, 488 US 361, 397–408 (1989) (holding that "the principle of separation of powers does not absolutely

The statute did not say whether the Institution was a government agency. Not every organization created by Congress is. The Bank of the United States was not; it was a largely private corporation. The Smithsonian, in contrast, was financed with money that had been given to the United States, and its "Establishment" was made up entirely of federal officers.[27] Both they and the Regents were unpaid for their services to the Institution,[28] but that seems immaterial; compensation is not central to the purposes of any of the relevant provisions.[29] More pertinent, perhaps, is the fact that the Institution's functions were proprietary rather than governmental; as an original matter one might argue that the separation-of-powers provisions with which we are concerned, like certain intergovernmental immunities, apply only to the business of governing, not to government-run business.[30] One

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prohibit Article III judges from serving on commissions"); Currie, *Federalist Period* at 209–10, 274 n 310 (cited in note 1) (discussing the diplomatic adventures of Chief Justices Jay and Ellsworth). If the Regents could be characterized as "heads of departments," there was no difficulty with the Secretary's selection, but the supervisory powers of the Establishment suggested that its members, rather than the Regents, might occupy that position. For objections to the appointment of members of Congress based on the Ineligibility and Incompatibility Clauses, see Cong Globe, 29th Cong, 2d Sess 191 (Jan 16, 1847) (Florida Sen James Westcott) ("The office of *regent* was a *civil office*—and the Constitution prohibited members of Congress from being appointed to any office created 'during the term for which they were elected.'"); Cong Globe, 30th Cong, 2d Sess 23 (Dec 11, 1848) (Tennessee Rep Andrew Johnson) (raising an incompatibility objection to "the same individuals holding at the same time the office of members of Congress . . . and the office of regents of [the Smithsonian Institution]"). The Appointments Clause argument was apparently not made.

27 Stressing "the substantial federal funding" of the Institution and "the important supervisory role played by governmental officials," the D.C. Circuit held in 1977 that the Smithsonian, as an "independent establishment of the United States," was a "federal agency" for purposes of the Federal Tort Claims Act, 28 USC § 2671 (2000). See *Expeditions Unlimited Aquatic Enterprises, Inc v Smithsonian Institution*, 566 F2d 289, 296 & n 6 (DC Cir 1977). Subsequently the same court held that the Smithsonian was neither an "establishment in the executive branch of the Government" (because not entrusted with the execution of laws or subject to Presidential direction) nor an "authority of the Government of the United States" (because not exercising "governmental authority") within the meaning of the Privacy Act, 5 USC § 552a et seq (2000). *Dong v Smithsonian Institution*, 125 F3d 877, 878–82 (DC Cir 1997). Compare *Cotton v Adams*, 798 F Supp 22 (D DC 1992) (holding that the Smithsonian Institution is a federal agency under the Freedom of Information Act, whose definitions the Privacy Act incorporates). The Smithsonian (as of November 2002) describes itself as a "trust instrumentality of the United States." online at http://www.si.edu/oeema/LETSDOBZ_web.html (visited Nov 13, 2002).

28 See 9 Stat at 103, § 3.

29 See Currie, *The Jeffersonians* at 72 (cited in note 3) (discussing this question in the context of the Incompatibility Clause of Article I, § 6).

30 Compare *Dong*, 125 F3d at 877–92 (immunity from Privacy Act). See also *United Transportation Union v Long Island Rail Road Co*, 455 US 678, 685 (1982) (erstwhile immunity from federal regulation); *South Carolina v United States*, 199 US 437, 452 (1905) (tax immunity); *Bank of the United States v Planters Bank*, 22 US 904, 907–08 (1824) (immunity from suit). The dangers of generalization in this field, however, are suggested by the wholly inappropriate application of the same distinction in the so-called "market participant" exception to the negative effect of the Commerce Clause on state authority. See *Reeves v Stake*, 447 US 429, 436–39 (1980); David P. Currie, *The Constitution in the Supreme Court: The Second Century* 583–84 (Chicago 1990) (explaining how proprietary discrimination could be used to circumvent the

might also take refuge once again in the argument that if the Smithsonian was an agency of government, it was one of the District of Columbia: Territorial precedents had evinced the conviction that constitutional concerns over separation of powers were more attenuated in local than in national matters, and the official line was that the Smithsonian was a creature of Congress's authority to legislate for the seat of government.[31]

Overall the whole transaction was pretty shady from a constitutional point of view. But we got a pretty good set of museums out of it, didn't we?[32]

Commerce Clause). Doubts as to the immunity of proprietary activities from separation-of-powers concerns under present law, moreover, are suggested by *Springer v Philippine Islands*, 277 US 189, 203 (1928), and *Metropolitan Washington Airports Authority v Citizens for the Abatement of Aircraft Noise, Inc*, 501 US 252, 267 (1991), both of which struck down on general separation-of-powers principles provisions that envisioned the presence of legislators on managerial boards of public entities engaged in proprietary activities.

A House committee in 1899, building on congressional precedents subsequent to the establishment of the Smithsonian, concluded that members of advisory commissions, regents of public institutions, and similar animals were not "officers of the United States" within the meaning of the incompatibility provision. Appointment of Members of Congress to Military and Other Offices, HR Rep No 2205 pt 3, 55th Cong, 3d Sess 2–3 (1899) ("Directors and trustees of charitable or scientific institutions . . . are practically and for common good sense only ministers of science or public charity."). See also *Buckley*, 424 US at 138–39 (stating that officers appointed by Congress could be authorized to act "in an area sufficiently removed from the administration and enforcement of the public law to permit their being performed by persons not 'Officers of the United States'"); Johnny H. Killian and Leland E. Beck, eds, *The Constitution of the United States of America: Analysis and Interpretation: Annotations of Cases Decided by the Supreme Court of the United States to July 2, 1982* 131–32 (GPO 1987).

31 For the territorial analogy, see Currie, *The Jeffersonians* at 109–13 (cited in note 3).

32 We also got that observatory that Mr. Adams had been pushing, but in an indirect (not to say underhanded) way. In authorizing the President to hire astronomers for continuation of the Coastal Survey in 1832, Congress had gone so far as to specify that nothing in the statute should "be construed to authorize the construction or maintenance of a permanent astronomical observatory." Act of July 10, 1832, 4 Stat 570–71, ch 191 § 2. On the same day, however, Congress appropriated $487.80 to reimburse Lieutenant Charles Wilkes for the expenses of building "astronomical instruments" for a naval exploring expedition. Act of July 10, 1832, 4 Stat 569, ch 187 § 2. Before embarking, Wilkes, who was superintendent of the Navy's Depot of Charts and Instruments in Washington, had constructed a small observatory at his own expense to aid in the rating and repairing of chronometers. His successor was directed by the Secretary of the Navy to make astronomical observations in aid of the expedition. When he reported that existing facilities were inadequate, Congress authorized the expenditure of $25,000 for construction in the District of Columbia of "a suitable house for a depot of charts and instruments of the navy," Act of August 31, 1842, 5 Stat 576, §§ 1, 3, on the basis of a committee report making clear that an observatory was a principal object of the bill. See Depot of Charts, &c, HR Rep 449, 27th Cong, 2d Sess 3 (1842). The Secretary took this as authorization to construct what came to be known as the Naval Observatory, and thus Adams was able to say in 1846 that he was "delighted that an astronomical observatory . . . had been smuggled into the number of the institutions of the country, under the mask of a small depot for charts." Cong Globe, 29th Cong, 1st Sess 738 (1846). See Charles O. Paullin, *Early Movements for a National Observatory, 1802–1842*, in John B. Larner, ed, 25 *Records of the Columbia Historical Society* 36, 49–56 (Columbia Historical Society 1923) (chronicling the beginnings of the United States Naval Observatory); G. Brown Goode, *The Origin of the National Scientific and Educational Institutions of the United States* 55–66 (G.P. Putnam's Sons 1890).