

## John Marshall and the Bank Case: *McCulloch v. Maryland*

*The Constitution is] intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.*

— Chief Justice John Marshall in *McCulloch v. Maryland* (1819)



A \$1,000 promissory note issued by the Second Bank of the United States. (Wikimedia Commons)

What sort of government should the United States have? This question faced the writers of the Constitution in 1787. The Articles of Confederation, the first national government, had left almost all powers to the states. Most viewed the Confederation a failure. Many believed that to continue leaving government power in the hands of the states would cripple the infant nation. Others repeatedly voiced their fears about a centralized government controlled by a few all-powerful men. Those who wrote the Constitution attempted to resolve these concerns.

The Constitution was ratified only after promises were made that a bill of rights would be added to it. When the First Congress met, it drafted the Bill of Rights. One amendment in particular addressed the concerns of those who worried the new national would obliterate the powers of the states. The 10th Amendment stated, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

Even after the Bill of Rights was ratified in 1791, doubts remained about just what powers the United States government could exercise. Sooner or later, the U.S. Congress was bound to pass a law that the states would claim went beyond the constitutional powers of the national government. When Congress chartered the second Bank of the United States in 1816, the stage was set for a monumental clash between Congress and the states. The controversy was played out before the U.S. Supreme Court in the case of *McCulloch v. Maryland*. Chief Justice John Marshall wrote the unanimous court decision. In the words of Marshall's biographer, this decision "so decisively influenced the growth of the nation that, by many, it is considered as only second in importance to the Constitution itself."

### **A Tax on the Bank**

In 1791, Alexander Hamilton successfully argued for a privately owned national bank, chartered by Congress, to facilitate the financial transactions of the U.S. government. The charter of this first Bank of the United States extended only to 1811 and was not renewed. After the War of 1812, however, the finances of the U.S. government were in shambles. This situation prompted efforts to restore the national bank.

Congress created a second Bank of the United States in 1816, but financial problems continued to plague the country. The bank seemed to add to these troubles. It was mismanaged, and radical swings in its interest rates hurt many competing state banks. On top of this, bank officers were found to be using depositors' money to buy and sell bank stock. Many Americans, especially in the South and West, concluded that the bank was causing the economic depression ravaging the country.

Some states attempted to retaliate against "the monster monopoly." They either banned the bank outright or taxed it. In February 1818, Maryland passed a law requiring a stamp tax on all notes issued by banks not chartered by the state. In May of the same year, Maryland sued James W. McCulloch, an officer of the Baltimore branch of the Bank of the United States. Technically, McCulloch was sued for \$110, the penalty for circulating unstamped banknotes in violation of Maryland's tax law. Everyone on both sides of the case, however, knew that a great deal more was at stake.

### ***McCulloch v. Maryland***

Maryland won its case in the state courts, but the bank appealed to the U.S. Supreme Court. The Supreme Court consisted then of seven justices. The chief justice was John Marshall, a Virginia Federalist. Most of the other justices were Jeffersonian Republicans, who normally would be expected to decide cases in favor of states' rights.

Arguments on the case began February 22, 1819. Three lawyers represented each side. Among those speaking on behalf of the bank was Daniel Webster, who was just beginning to build his reputation as a great orator and statesman. The other side

included Luther Martin, who was the attorney general for Maryland. He had been a delegate to the Constitutional Convention in 1787.

The case centered around two constitutional questions. First, did Congress have the constitutional power to create a nationally chartered bank? Second, did Maryland (and other states) have the constitutional power to tax a national bank chartered by Congress?

The oral arguments before the Supreme Court went back and forth for nine days. On the first question, the attorneys representing Maryland pointed out that chartering banks was not one of the “delegated powers” of Congress. Those powers are listed in Article I, Section 8, of the Constitution. Among the listed powers are collecting taxes, borrowing money, and regulating commerce. But setting up a bank is not listed. Where then, the attorneys asked, did Congress get its authority to set up the Bank of the United States? The Maryland attorneys argued that unless a power was specifically granted to Congress in the Constitution, it remained with the states.

Luther Martin drove home this point: “We insist, that the only safe rule is the plain letter of the Constitution, the rule . . . in the Tenth Amendment . . . that the powers not delegated to the United States nor prohibited to the states, are reserved to the states respectively, or to the people.” Martin concluded that therefore only the states, or the people they represent, had the power to incorporate banks.

Speaking for Congress and the bank, Daniel Webster referred the justices to another part of the Constitution. In the last paragraph of Article I, Section 8, Congress is given the power “to make all Laws which shall be necessary and proper” to carry out its delegated powers. “A bank is a proper and suitable instrument to assist the operations of the government,” Webster concluded.

Concerning the second question of the case, the attorneys representing Maryland noted that the Constitution placed no limit on the power of a state to tax any person or property within its borders. Daniel Webster responded by asking, “If the states may tax the bank, to what extent shall they tax it, and where shall they stop?” Webster wondered if states would go on to tax the mail or perhaps even the U.S. courts. He warned, “An unlimited power to tax involves, necessarily, a power to destroy . . . .”

### **Marshall’s Opinion**

On March 6, 1819, barely three days after the last oral argument in *McCulloch v. Maryland*, Chief Justice John Marshall announced the Supreme Court’s unanimous decision. The court ruled in favor of the bank and against the right of the states to tax it. The opinion of the court, written by Marshall, was nothing less than a justification for congressional or national power at the expense of the states.

In any conflict between national and state power, wrote Marshall, a law passed by Congress “is supreme within its sphere of action.” Did Congress have the constitutional

power to establish a national bank in the first place? Yes, said Marshall, Congress has the power to pass all laws “necessary and proper” to carry out its delegated powers in Article I, Section 8 of the Constitution. The bank provided the means to carry out these powers. Therefore, the act of Congress chartering the bank “is a law made in pursuance of the Constitution, and is part of the supreme law of the land.”

On the second question about whether Maryland had the power to tax the bank, Marshall ruled it did not. He declared that states can only tax their own people and property. The bank was an “instrument” of the U.S. government, which represents all the people. If Maryland were allowed to tax the bank, he argued, this might lead to taxes on other U.S. government operations. Marshall repeated Webster’s warning that “the power to tax involves the power to destroy.” The result would be a crippled national government bowing “at the foot of the states.” Marshall concluded by saying that “the states have no power, by taxation or otherwise, to retard, burden, or in any manner control the operations of the constitutional laws enacted by Congress.”

In effect, Marshall and the other justices of the Supreme Court reduced the power of the states in two ways. First, by activating the “necessary and proper” clause, the court expanded the potential for congressional lawmaking. Second, by invalidating Maryland’s stamp tax on the bank, the justices eliminated state taxation as a means of undermining acts of Congress.

The decision of the Supreme Court and Marshall’s written opinion were bitterly attacked, particularly in the South and West. Thomas Jefferson called the Supreme Court justices “a subtle corps of sappers and miners constantly working underground to undermine the foundations of our constitutional fabric.” The criticism was so intense that John Marshall, writing as “A Friend of the Constitution” defended the decision in a series of letters to a Philadelphia newspaper. Ohio continued the controversy for another five years in a lawsuit over that state’s confiscation of bank funds.

In the end, however, Marshall and the Supreme Court prevailed. Marshall’s broad view of national power gradually overshadowed the 10th Amendment and the idea that Congress could act only on those powers specifically mentioned in the Constitution. Albert Beveridge, the biographer of John Marshall, has written that the chief justice made the Constitution “a living thing, capable of growth, capable of keeping pace with the advancement of the American people and ministering to their changing necessities.”

### **For Discussion and Writing**

1. Why was the 10th Amendment included in the Bill of Rights?
2. Explain how Marshall used the “necessary and proper” clause to establish the constitutionality of the Bank of the United States.
3. What did Daniel Webster and John Marshall mean when they said that “the power to tax involves the power to destroy?”

## **For Further Reading**

Beveridge, Albert J. *The Life of John Marshall*. Boston: Houghton, 1919. [4 vols.]

Friendly, Fred W. and Elliott; Martha J. H. *The Constitution: That Delicate Balance*. New York: Random House, 1984.

# ACTIVITY

## 'Necessary and Proper'

In *McCulloch v. Maryland*, the U.S. Supreme Court ruled that Congress had the authority to charter a national bank based on the “necessary and proper” clause of the Constitution. In later years, this “implied power” enabled Congress to pass laws in many different areas. Today, which of the things listed below do you think Congress has the authority to establish or regulate? Form small groups to discuss this question after first reading Article I, Section 8, of the Constitution as well as the 10th Amendment of the Bill of Rights.

1. a national sales tax
2. a national property tax
3. a ban on the sale of cigarettes
4. a schedule of fares for all airlines
5. a system of rationing gasoline
6. a national lottery
7. a nationally funded health care insurance program
8. a national curriculum for all public schools
9. a ban on the sale of handguns
10. a military draft for men and women

The groups should next make a list on the board of those things they believe Congress has the authority to enact into law. What reasons can the students give for leaving out the other items? Informally debate the pros and cons of the items on the board. Finally, take a class vote on which ones Congress has the power to enact into law in the United States.