

Chapter 2

McCulloch v. Maryland

When Thomas Jefferson voiced opposition to the Bank of the United States in 1791, the heart of his argument was that establishing banks was an unconstitutional extension of the federal government's powers. Secretary of the Treasury, Alexander Hamilton, quickly countered Jefferson's arguments by demonstrating both the need for and the constitutionality of the Bank. After careful study of both opinions, George Washington signed the bill that created the first Bank of the United States.

Hamilton's creation thrived for twenty years. It realized its founders' objectives by serving the United States government as an instrument for collecting taxes and a depository for government funds. Simultaneously, it provided the young nation with a sufficient and uniform currency. By requiring payment in hard money, the Bank helped restrain state banks that tended to issue too much paper currency.

Despite its proved usefulness, the Bank failed to be re-chartered in 1811 by two votes, one in the House and one in the Senate. Its misfortune may be attributed to the opposition of die-hard Jeffersonians who controlled the legislative branch of government. Many never completely overcame their distrust for National Banks. Thus, on the eve of the War of 1812, the United States was without a central bank to direct and stabilize its system of money and credit. The war quickly revealed the glaring need for some kind of central banking. Money printed by state banks seldom circulated outside of the states that issued it. These bank notes were seldom accepted at full face value. With no restraining hand, state banks circulated more money than they could redeem with gold or silver coin. Consequently, by 1814, all but the New England banks had stopped converting their bank notes to hard currency. Meanwhile, the National government, deprived of a reliable source for loans, was unable to pay the interest on its debts.

The Second Bank of the United States

Believing that the nation needed a national bank, Congress chartered the Second Bank of the United States (B.U.S.) in 1816. Like its predecessor, the Second Bank was a corporation subscribed to by both individuals and the government. Eighty percent of its stock was bought by private American citizens and twenty percent was owned by the federal government. The B.U.S. like its predecessor, was controlled by a Board of Directors elected by the stockholders. It too could establish branches throughout the country. It was empowered to issue money and could thus expand or contract the nation's money supply. It could lend money to the U.S. government, serve as a depository for government funds, and demand that state banks repay paper money with gold. The main difference between the first and the second bank was that the latter issued \$35,000,000 in stock as compared to the \$10,000,000 issued by the former.

Unfortunately, the second B.U.S. did not enjoy as productive and successful a career as the first. When its door first opened in 1817, America was in the midst of an orgy of speculation. Rather than restrain the state banks in their reckless lending of money to irresponsible businessmen engaged in questionable projects, the Second Bank also made unwise and speculative loans. Furthermore, the B.U.S.'s Baltimore branch, the busiest in the nation, was controlled by unprincipled men who lent the Bank's money to themselves. One cashier alone borrowed \$500,000 dollars. When the Bank's directors finally

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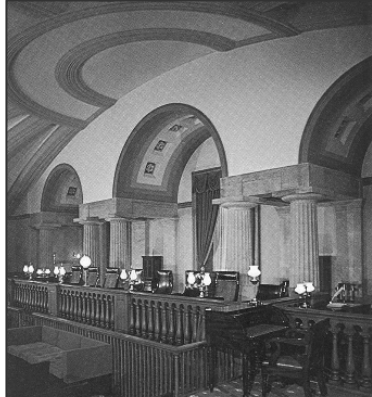
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began to control this situation by recalling many of the least justifiable loans, the resulting reduction of credit caused a number of men to go bankrupt. The contraction that followed both caused and fueled a general financial panic leading to business and bank failures throughout the land. The Panic of 1819 was the most severe depression young America had experienced. Westerners were especially hard hit by the panic, and one, General Andrew Jackson of Tennessee, would not soon forget the losses he suffered at the hands of the 'Monster Bank.*

While the Bank was on the verge of a collapse, caused in part by its own recklessness, it came under attack from another source. Bankers in many states deeply resented the awesome powers granted the B.U.S. They found allies among old time Jeffersonians who could not accept the idea of the Federal government establishing any kind of a bank. These groups were supported by state legislators who had witnessed the monumental monetary mismanagement by the B.U.S. and now sought to find a way of destroying it. Their method was to place a tax on the money issued by the branches of the bank located in several states. Maryland passed a tax of \$15,000 on the Baltimore branch; North Carolina, Tennessee, Kentucky and Ohio passed similar bills. These laws threatened to destroy the B.U.S. by crippling its ability to issue money. The Bank would now have to fight for its existence in the courts.

McCulloch V. Maryland

The Maryland case was the first to reach the Supreme Court. When James McCulloch, cashier of the B.U.S. Baltimore branch, refused to pay Maryland's bank tax, he was brought to court. The municipal and the state's appeals courts upheld the law and their decision was quickly appealed to the Supreme Court of the United States.



Inside the Supreme Court

Arguments were held before the Supreme Court in February and March, 1819. The Bank's principle attorney was none other than Daniel Webster, destined to become for over 30 years the most ardent and eloquent defender of the powers of the Federal government and the rights of businessmen. Among the distinguished lawyers arguing Maryland's case was Luther Martin, an opponent of Federal power since the Constitutional Convention. Chief Justice John Marshall presided over this crucial case which was to resolve the question of the Federal government's power to establish corporations.

Although a native of Thomas Jefferson's Virginia, Marshall had become and remained an ardent Federalist. After distinguishing himself in Virginia's constitutional convention and in the XYZ Affair, Marshall was elevated to the Supreme Court by President Adams in 1801. Because of the force of his personality, the qualities of his astute legal mind, and the peculiar nature of Washington, D.C.'s society (which led justices to live in a single rooming house during their six week annual stay in Washington) Marshall exercised a dominant influence over the Supreme Court. For 34 years he successfully imposed a Federalist interpretation on the Constitution in a series of precedent-making decisions that, to this day, have not been overturned. In *McCulloch v. Maryland*, Marshall wrote what was considered to be his most important decision.

The Issues of the Case

Among the crucial Constitutional questions raised in this case were the following:

1. Had the states, and not the people, written the Constitution, and, if so, did they remain the sole judges of what powers the states delegated to the Federal Government?
2. Did the powers granted Congress by the Constitution include the power to establish a National Bank?
3. Did the states have the right to tax the Bank or any other Federal creation?

The answers to these questions are presented here in the able words of the lawyers on both sides:

1. Did the States or the People Write the Constitution?

It springs from the people, precisely as the State Constitutions

The Constitution acts directly on the people, by means of powers communicated directly from the people. No State, in its corporate capacity, ratified it; but it was proposed for adoption to popular conventions. It springs from the people, precisely as the State Constitutions spring from the people, and acts on them in a similar manner. It was adopted by them in the geographic sections into which the country is divided. The federal powers are just as sovereign as those of the States.¹

The Constitution was formed by the people of the respective States.

The Constitution was formed and adopted, not by the people of the United States at large, but by the people of the respective States. To suppose that the mere proposition of this fundamental law threw the American people into one aggregated mass, would be to assume what the instrument [Constitution] itself does not profess to establish. It is, therefore, a compact between the States, and all the powers that are not expressly relinquished by it, are reserved to the States.²

¹ *McCulloch v. Maryland* (1819), 4 Wheaton, 377.

² *ibid.*, p. 363.

2. Was Congress Given Power to Establish the Bank?

Many means may be proper which are not necessary

A bank is a proper and suitable instrument

Congress is authorized to pass all laws necessary and proper to carry into execution the powers conferred on it. These words, necessary and proper, in such an instrument, are probably to be considered synonymous. Necessary powers must here intend such powers as are suitable and fitted to the object; such as are best and most useful in relation to the end proposed. If this be the not so, and if Congress could use no means but such as were absolutely indispensable to the existence of the granted power, the government could hardly exist; at least it would be wholly inadequate to the purposes of its formation. A bank is a proper and suitable instrument to assist the operations of the government in the collection and disbursement of the revenue; and in the regulation of the actual currency, as being a part of the trade and

exchange between States. It is not for the Court to decide whether a bank or such a bank as this be the best possible means to aid the government. Such topics must be left to the two houses of Congress. Here, the only question is whether a bank, in its known and ordinary operations, is capable of being so connected with the finances and revenues of the government, as to be fairly within the discretion of Congress when selecting means and instruments to execute its powers and perform its duties.³

It is contended that the powers expressly granted to the national government in the Constitution are enlarged to an indefinite extent, by the sweeping clause, authorizing Congress to make all laws which shall be necessary and proper for carrying into execution the powers expressly delegated to the national government, or any of its departments or officers. Now, we insist, that this clause shows that the intention of the Convention was, to define the powers of the government with the utmost precision and accuracy. The creation of a sovereign legislature implies an authority to pass laws to execute its given powers. This clause is nothing more than a declaration of the authority of Congress to make laws, to execute the powers expressly granted to it, and

the other departments of government. But the laws which they are authorized to make are to be such as are necessary and proper for this purpose. No terms could be found in the language more absolutely excluding a general unlimited discretion than these. It is *not necessary or proper but necessary and proper*. The means used must have both these qualities. It must be, not merely convenient fit-adapted-proper, to the accomplishment of the end in view; it must likewise be necessary for the accomplishment of that end. Many means may be proper which are not necessary, because the end may be attained without them.⁴

³ *ibid.*, p. 323-25.

⁴ *ibid.*, p.365-7

3. Could the States Tax the Bank?

If the States may tax, they have no limit but their discretion

An unlimited power to tax involves, necessarily, a power to destroy because there is a limit beyond which no institution and no property can bear taxation. A question of Constitutional power can hardly be made to depend on a question of more or less. If the States may tax, they have no limit but their discretion; and the bank, therefore, must depend on the discretion of the State governments for its existence.⁵

[The] right of taxing property [is the] right to exist

The right now assailed by the bank is the right of taxing property within the territory of the State. This is the highest attribute of sovereignty, the right to raise revenue; in fact, the right to exist; without which no other right can be held or enjoyed. The general power to tax is not denied by the States, but the bank claims to be exempted from the operation of this power. ... Such a right must not be defeated by doubtful pretensions of power, or arguments of convenience. or policy to the government; much less to a private corporation.⁶

Suggested Student Exercises:

1. As your teacher directs, divide into groups of three, with one person in each group arguing the side of the bank, one taking the role of the state of Maryland, and the third acting as a judge. After hearing arguments on both sides, the judge should determine who was right, and the group then proceeds to the next issue.

Epilogue

Arguments before the Supreme Court began on February 22, 1819, and lasted until March 3rd. It is commonly acknowledged that they reached a pitch of eloquence and intensity seldom matched before in the Supreme Court. Nevertheless, the arguments may have had little bearing on the outcome of the case. John Marshall delivered the unanimous decision of the Court but three days after arguments ended. His was considered to be one of the most tightly reasoned and influential verdicts in the entire history of the Court. Most of it was probably written during the previous summer or fall.

The excerpts below present the conclusions reached by the Court:

1. Did the States write the Constitution?

The Convention which framed the Constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretension to it. It was reported to the then existing Congress of the United States with a request that it might be submitted to a Convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification. This mode of procedure was adopted; and by the Convention, by Congress, and by the State Legislature, the instrument was submitted to the

⁵ *ibid*, p. 327

⁶ *ibid.*, 338-9

people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention

From these Conventions the Constitution derives its whole authority. The government proceeds directly from the people; is ordained and established in the name of the people; and is declared to be ordained, in order to form a more perfect union, establish justice, ensure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.⁷

The government of the Union, then, (whatever may be the influence of this fact on the case), is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

2. Was Congress given power to establish the Bank?

We think the sound construction of the Constitution must allow the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional.⁸

3. Could the state governments tax the Bank?

If the states may tax an instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States.⁹

Suggested Student Exercises:

1. Compare your decisions with Marshall's.

⁷ loc. cit.

⁸ *ibid.*, p. 421.

⁹ *ibid.*, p.432