

# *McCulloch v. Maryland*

John Marshall



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## **OVERVIEW**

*McCulloch v. Maryland* established the basis for the expansive authority of the U.S. Congress. The Supreme Court held that the necessary and proper clause of the U.S. Constitution (art. I, sec. 8, cl. 18) allows Congress to do more than the Constitution specifically authorizes Congress to do. The decision suggests that Congress has the authority to enact almost any law that will help achieve the ends established by the necessary and proper clause. The Court also held that a state does not have authority to tax a corporation established by the federal government. The decision therefore gave the federal government priority over certain state interests as well. A portion of the decision follows.

**GUIDED READING** As you read, consider the following questions:

- What are implied powers?
  - What is the objective of the "necessary and proper" clause?
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MARSHALL, Chief Justice, delivered the opinion of the Court.

In the case now to be determined, the defendant, a sovereign State, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that State. The Constitution of our country, in its most interesting and vital parts, is to be considered, the conflicting powers of the Government of the Union and of its members, as marked in that Constitution, are to be discussed, and an opinion given which may essentially influence the great operations of the Government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps, of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our country devolved this important duty.

The first question made in the cause is—has Congress power to incorporate a bank?

It has been truly said that this can scarcely be considered as an open question entirely unprejudiced by the former proceedings of the Nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognised by many successive legislatures, and

has been acted upon by the Judicial Department, in cases of peculiar delicacy, as a law of undoubted obligation.

It will not be denied that a bold and daring usurpation might be resisted after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted, if not put at rest by the practice of the Government, ought to receive a considerable impression from that practice. An exposition of the Constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first Congress elected under the present Constitution. The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire, but a short experience of the embarrassments to which the refusal to revive it exposed the Government convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation to which the Constitution gave no countenance. These observations belong to the cause; but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the Constitution.

In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the Constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the General Government, it has been said, are delegated by the States, who alone are truly sovereign, and must be exercised in subordination to the States, who alone possess supreme dominion.

It would be difficult to sustain this proposition. 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 pretensions 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 proceeding was adopted, and by the convention, by Congress, and by the State legislatures, the instrument was submitted to the 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. It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

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, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.

The assent of the States in their sovereign capacity is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it, and their act was final. It required not the affirmance, and could not be negated, by the State Governments. The Constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.

It has been said that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But surely the question whether they may resume and modify the powers granted to Government does not remain to be settled in this country. Much more might the legitimacy of the General Government be doubted had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty created by themselves. To the formation of a league such as was the Confederation, the State sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective Government, possessing great and sovereign powers and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. 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.

This Government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise so long as our system shall exist. In discussing these questions, the conflicting powers of the General and State Governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this—that the Government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the Government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it by saying, this Constitution, and the laws of the United States, which shall be made in pursuance thereof, "shall be the supreme law of the land," and by requiring that the members of the State legislatures and the officers of the executive and judicial departments of the States shall take the oath of fidelity to it. The Government of the United States, then, though limited in its powers, is supreme, and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers and which requires that everything granted shall be expressly and minutely described. Even the 10th Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people," thus leaving the question whether the particular power which may become the subject of contest has been delegated to the one Government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it to avoid those embarrassments. A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit,

and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations found in the 9th section of the 1st article introduced? It is also in some degree warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a Constitution we are expounding.

Although, among the enumerated powers of Government, we do not find the word "bank" or "incorporation," we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation are intrusted to its Government. It can never be pretended that these vast powers draw after them others of inferior importance merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended that a Government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the Nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the Nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the Nation may require that the treasure raised in the north should be transported to the south that raised in the east, conveyed to the west, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise, by withholding a choice of means? If, indeed, such be the mandate of the Constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential, to the beneficial exercise of those powers. It is, then, the subject of fair inquiry how far such means may be employed.

It is not denied that the powers given to the Government imply the ordinary means of execution. That, for example, of raising revenue and applying it to national purposes is admitted to imply the power of conveying money from place to place as the exigencies of the Nation may require, and of employing the usual means of conveyance. But it is denied that the Government has its choice of means, or that it may employ the most convenient means if, to employ them, it be necessary to erect a corporation. On what foundation does this argument rest? On this alone: the power of creating a corporation is one appertaining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever is a sovereign power, and if the Government of the Union is restrained from creating a corporation as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty, if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects. The Government which has a right to do an act and has imposed on it the duty of performing that act must, according to the dictates of reason, be allowed to select the means, and those who contend that it may not select any appropriate means that one particular mode of effecting the object is excepted take upon themselves the burden of establishing that exception...

We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to 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.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that Government from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose that a Constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in Government, ought to have specified this. Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the Government. But being considered merely as a

means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.

The propriety of this remark would seem to be generally acknowledged by the universal acquiescence in the construction which has been uniformly put on the 3d section of the 4th article of the Constitution. The power to "make all needful rules and regulations respecting the territory or other property belonging to the United States" is not more comprehensive than the power "to make all laws which shall be necessary and proper for carrying into execution" the powers of the Government. Yet all admit the constitutionality of a Territorial Government, which is a corporate body.

If a corporation may be employed, indiscriminately with other means, to carry into execution the powers of the Government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one must be within the discretion of Congress if it be an appropriate mode of executing the powers of Government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations is not now a subject of controversy. All those who have been concerned in the administration of our finances have concurred in representing its importance and necessity, and so strongly have they been felt that Statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the Confederation, Congress, justifying the measure by its necessity, transcended, perhaps, its powers to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away when it can be necessary to enter into any discussion in order to prove the importance of this instrument as a means to effect the legitimate objects of the Government...

After the most deliberate consideration, it is the unanimous and decided opinion of this Court that the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land.

The branches, proceeding from the same stock and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise to locate them in the charter, and it would be unnecessarily inconvenient to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches; and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be fixed, reserving always to the Government the right to require that a branch shall be located where it may be deemed necessary.

It being the opinion of the Court that the act incorporating the bank is constitutional, and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire:

2. Whether the State of Maryland may, without violating the Constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the Government of the Union; that it is to be concurrently exercised by the two Governments—are truths which have never been denied. But such is the paramount character of the Constitution that its capacity to withdraw any subject from the action of even this power is admitted. The States are expressly forbidden to lay any duties on imports or exports except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a State from the exercise of its taxing power on imports and exports—the same paramount character would seem to restrain, as it certainly may restrain, a State from such other exercise of this power as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law absolutely repugnant to another as entirely repeals that other as if express terms of repeal were used.

On this ground, the counsel for the bank place its claim to be exempted from the power of a State to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds.

This great principle is that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve; 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve; 3d. That, where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

These propositions, as abstract truths, would perhaps never be controverted. Their application to this case, however, has been denied, and both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument seldom if ever surpassed have been displayed.

The power of Congress to create and, of course, to continue the bank was the subject of the preceding part of this opinion, and is no longer to be considered as questionable.

That the power of taxing it by the States may be exercised so as to destroy it is too obvious to be denied. But taxation is said to be an absolute power which acknowledges no other limits than those expressly prescribed in the Constitution, and, like sovereign power of every other description, is intrusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by, the Constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle, not declared, can be admissible which would defeat the legitimate operations of a supreme Government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain...

The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared.

We are unanimously of opinion that the law passed by the Legislature of Maryland, imposing a tax on the Bank of the United States is unconstitutional and void.

This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the Government of the Union to carry its powers into execution. Such a tax must be unconstitutional...

**Source:** *McCulloch v. Maryland*, 17 U.S. 316 (1819)