

# The Tenth Amendment

## U.S History

### John Marshall and the Bank Case

[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)

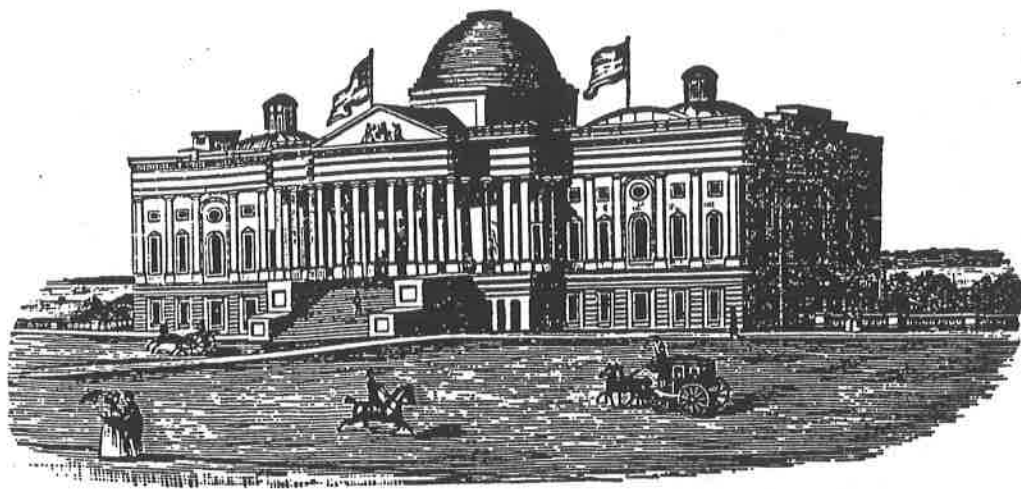
What sort of government should the United States have? This was the underlying question facing the writers of the Constitution in 1787. Many were convinced that to continue leaving most government power in the hands of the states would cripple the infant nation. Others repeatedly voiced their fears about a centralized government controlled by a few all-powerful men. The Constitution attempted to resolve these concerns.

When the Bill of Rights was debated in the First Congress, those suspicious of the Constitution demanded assurance that the states would not be obliterated by the new national government. The result was the Tenth Amendment: "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 ratification of the Bill of Rights 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*. The unanimous decision was written by Chief Justice John Marshall. 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."

#### Tax on the Bank

In 1791, Alexander Hamilton successfully argued for a privately-owned national bank, chartered by Congress, to facilitate



▲ The White House - 1825 (The Bettmann Archive.)

the financial transactions of the United States government. The charter of this first Bank of the United States extended only to 1811 and was not renewed. But after the War of 1812, the finances of the U.S. government were in shambles. This situation prompted efforts to restore the national bank.

After the second Bank of the United States was created by Congress in 1816, financial problems continued to plague the country. Unfortunately, the Bank seemed to add to these troubles. The Bank suffered from mismanagement which resulted in radical swings in its interest rates for credit. This, in turn, ruined many competing state banks. On top of this, Bank officers were found to be using depositors' money to buy and sell Bank stock. All of these things led many people, especially in the South and West, to believe that the Bank was the cause of the economic depression then ravaging the country.

A number of states attempted to retaliate against "the monster monopoly" by banning the Bank outright, or at least taxing it. In February, 1818, Maryland passed a law that required a stamp tax on all notes issued by banks that were not chartered by the state. In May of that same year, Maryland sued James W. McCulloch, an officer of the Baltimore branch of the Bank. Technically, McCulloch was sued for \$110, which was the penalty for circulating unstamped banknotes in violation of Maryland's tax law. However, everyone on both sides of the case knew that a great deal more was at stake.

#### *McCulloch v. Maryland*

Maryland won its case in the state courts, but the Bank then appealed to the U.S. Supreme Court. The Supreme Court at this time consisted of seven justices led by

Chief Justice 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, then 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 also had been a delegate to the Constitutional Convention in 1787.

The case centered around two deceptively simple 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 were quick to remind the Supreme Court justices that chartering banks was not one of the "delegated powers" of Congress listed in Article I, Section 8 of the Constitution. Where then, did Congress get its authority to set up the Bank of the United States? The Maryland attorneys argued that unless a power was specifically delegated (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." Therefore, only the states, or the people they rep-

esent, had the power to incorporate banks. asking for Congress and the Bank, 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 such as collecting taxes, borrowing money, and regulating commerce. "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 mails 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 arguments in *McCulloch v. Maryland*, Chief Justice John Marshall announced the Supreme Court's unanimous decision 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."

Marshall went on to declare that states can only tax their own people and property. The Bank was an "instrument" of the United States government which represents all of the people. Furthermore, if Maryland were to be allowed to tax the Bank, this would eventually lead to taxes on other U.S. government operations. Marshall then 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 from two directions. First, by activating the "necessary and proper" clause, the Court greatly 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.



▲ John Marshall: (1755-1835) The most notable of American jurists. (The Bettmann Archive.)

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 Tenth 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 Tenth 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 Mifflin, 1919. [4 vols.]
- Friendly, Fred W. and Elliott, Martha J. H. *The Constitution, That Delicate Balance*. New York: Random House, 1984.

## A C T I V I T Y

### "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 Tenth 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 chalkboard 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 chalkboard. Finally, take a class vote on which ones should become laws in the United States.