

McCulloch v. Maryland

Right Principle, Wrong Case

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Few cases in the history of American constitutional law can match the significance and long-range implications of *McCulloch v. Maryland*.¹ Often considered the greatest of Chief Justice John Marshall's decisions, it is familiar to later generations of students not only as the landmark case in the development of American federalism, but also as a classic example of solemn Marshallian rhetoric. Probably no other opinion has left so many widely remembered phrases—"The power to tax involves the power to destroy"; "Let the end be legitimate . . ."; "We must never forget, that it is a *constitution* we are expounding." To most lawyers and students of American government, *McCulloch v. Maryland* stands for the doctrine of implied powers and broad construction, and to those more deeply interested, as a cause of considerable vexation in the twentieth century over intergovernmental taxation.

Yet, despite the deserved fame of Marshall's great decision, there has been remarkably little detailed analysis of the nature and context of the case—far less than some of Marshall's other far-reaching decisions such as *Marbury v. Madison*² and *Gibbons v. Ogden*.³ It is the purpose of this Article to help bridge this gap. And the thesis emerging from this analysis is that Marshall chose the wrong case for the embodiment of what is unquestionably the proper principle from the standpoint of later constitutional growth. No attempt is made to analyze the "implied powers" doctrine on which Marshall's reasoning depended, both because it has been adequately dealt with elsewhere and because at this stage of American history it needs no defense. This Article deals with the propriety of the decision on the facts of the particular case rather than with the validity of the principle enunciated by Marshall.

Probably more legislation extending the scope of federal powers

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1. 4 Wheat. 316 (U.S. 1819).

2. 1 Cranch 137 (U.S. 1803).

3. 9 Wheat. 1 (U.S. 1824).

has been based on *McCulloch v. Maryland* than on any other case decided by the Supreme Court. The "implied powers" doctrine established by Chief Justice Marshall has withstood the buffeting of time, the attacks by states' righters and the anguished howls of strict constructionists. Yet the issues in the case, so widely and so vehemently argued and discussed prior to the turn of the century, have virtually vanished from the public mind. What remains is the decision—the decision which is vaguely identified by most political science students as having saved the federal government from being taxed to death by state governments. The case today is largely remembered for establishing two main points: (1) Congress can charter a bank, even though no specific power to do so is mentioned in the Constitution. Marshall's generous construction of the "necessary and proper" clause here set the precedent for implied powers. (2) State governments may not tax such an instrumentality (as a bank) chartered by Congress.

Indeed, a reading of Marshall's opinion *in vacuo* leaves the impression that there were no other issues of consequence. The Chief Justice's forceful style, brilliant phraseology and decisive logic cannot fail to convince most readers. When the entire case is seen in its political and economic context, however, the issues seem far less clear-cut and simple than the opinion would suggest.

To establish the background for our argument, it is necessary to view the case in its temporal setting. We must first examine the status of the Bank of the United States in the *milieu* of the early 1800's. If the economic controversy is understood more completely, it is easier to comprehend the case against the Bank made by Maryland and the reasons for the emotional state of public opinion surrounding the legal maneuvers.

I

The twenty-year history of the second Bank of the United States illustrates the extent to which it was treated as a political football. Partisan lines were drawn in no consistent pattern. When the charter of the first Bank expired in 1811, it was Jefferson's Secretary of the Treasury, Albert Gallatin, who (along with most Federalists) urged renewal of the charter against the determined and successful opposition of states' righters. Later, during the War of 1812, when there was an obvious need for a central bank to assist the Government in financing the war, many Federalists (including

Daniel Webster) strongly opposed the creation of a bank because they opposed the war itself. By 1816 the Bank of the United States again became a reality, signed into law by President Madison, a strict constructionist. Later the strict constructionists attacked it via *McCulloch v. Maryland*, but it was saved by the ardent Federalist, John Marshall. The Bank finally received its *coup de grace* in the early 1830's from a Democratic President, Andrew Jackson.

It should be borne in mind that the Bank which went into court to fight for its life in 1819 was a far different institution from that which was to wage a losing war with Jackson. The Bank in its later years and under different management would show what benefits could accrue to the nation from a strong central bank under imaginative and efficient administration. The Bank under Nicholas Biddle was certainly not universally popular, but it was strong and commanded respect. However, the Bank that went into court in 1819 under the presidency of William Jones had demonstrated little strength and certainly commanded less respect from the state banks and from the public in general. A constant criticism of the second Bank of the United States was that throughout its history it had operated for the benefit of the few rather than the many. This opinion has considerable basis in fact for the period extending from its conception in 1816 to the publication of a critical report by a congressional committee in 1819⁴ and the subsequent resignation of Jones from the presidency.

Both during and after the War of 1812, the Madison Administration, represented primarily by Secretary of the Treasury Alexander J. Dallas, strongly supported the formation of another central bank as important to the interests of the federal government. While the need seemed apparent to many, it required a long series of negotiations and compromises, both with financiers and with members of Congress, before details of the new system could be worked out satisfactorily. At the outset of the discussions, Secretary Dallas envisaged a stronger role for the federal government in the Bank's affairs than that which finally emerged. He first proposed that the Government purchase forty percent of the Bank's \$50,000,000 capital, and, in addition, appoint one-third of the directors, including the president. Later plans reduced the amount of government subscription to one-fifth of a total \$35,000,000, and the number of government-appointed directors to five out of

4. 3 ANNALS OF CONG. 551-74 (1819).

twenty-five, with the Bank's president being named by the President of the United States. Even this degree of government participation in the Bank's direction was disliked by many financiers. To meet the objections the final congressional bill was modified to allow the stockholders, rather than the Government, to designate the Bank's head.⁵

Four financiers of the time are generally credited with having expedited the formation of the Bank. They were John Jacob Astor, David Parish, Stephan Girard and Jacob Barker. One need not be depreciatory to note that these gentlemen were probably motivated as much by the hopes of personal gain as by the benefits the nation would enjoy from the re-establishment of a central bank. Astor, Parish and Girard all owned substantial amounts of government war indebtedness,⁶ the market value of which would be enhanced by establishment of the new Bank, since Secretary Dallas had announced that Bank stock might be purchased with such war issue.⁷ To illustrate the essentially private nature of the Bank's make-up, the government-appointed directors were not only allowed but required to hold their own stock in the Bank. Both Astor and Girard were named to the first directorate as government appointees, and both owned bank stock. In the case of these two gentlemen it seems clear that they sought honest administration of Bank affairs, opposed (unsuccessfully) the corrupt Jones faction and were not responsible for the sordid details brought to light in 1819.⁸ However, the fact remains that the very nature of the directorate established by the Bank's charter was hardly one that would encourage a greater concern for service to the Government than for private stock dividends and profits.

In 1819 a House committee, headed by John C. Spencer of New York, appointed to investigate the operations of the Bank of the United States, brought to light many instances of favoritism and speculation. Their report⁹ made it clear that officers in the Baltimore branch of the Bank were using official positions to carry out extensive speculation in the Bank's stock. McCulloch, treasurer of the Baltimore branch and the plaintiff in the classic Supreme Court

5. Walters, *The Origins of the Second Bank of the United States*, 53 J. POL. ECON. 115, 129 (1945).

6. *Id.* at 116.

7. CATTERALL, *THE SECOND BANK OF THE UNITED STATES* 11 (1902).

8. See Walters, *supra* note 5, at 131. Walters adds that Secretary Dallas did not buy stock, feeling that it would be improper for one in his position. *Id.* at 130.

9. 3 ANNALS OF CONG. 551, 555-56 (1819).

case, was forced out of office in May of 1819. The Bank then prosecuted him in the courts of Maryland for complicity in a conspiracy to defraud it. The court of appeals reversed the trial court's sustaining of McCulloch's demurrer to the indictment,¹⁰ but McCulloch was acquitted at the trial on remand.¹¹

Under fire due to the Spencer committee report, Jones himself tendered his resignation as president of the Bank five days after publication of the report. Jones' appointment as the first head of the second Bank seems to have been most unfortunate from beginning to end. The Bank needed a man of considerable prestige, strength and personal economic well-being to offset ordinary criticism. While held in high regard by Madison and Dallas, Jones was mediocre in the position. It is obvious that his administration of the Bank had allowed too much speculation in stock to occur. Thus in August of 1817 the board of directors authorized loans on Bank stock up to 125 percent of its par value. As a consequence of such lenient lending terms, large groups of stockholders, both in Philadelphia and Baltimore, paid for their stock by using balances gained by discounting their notes, using the same Bank stock as collateral. The result of such high inflation of credits was heavy losses to investors; Professor Cushman recounts a loss "to Maryland investors alone of a sum variously estimated from \$1,700,000 to \$3,000,000."¹²

It should be stressed that the concern over the speculation in the Bank's stock is not gained only through historical hindsight. Considerable publicity and adverse comment were given to such activities at the time they occurred.¹³ As a result of such manipulations, the Bank was to be castigated until the expiration of its charter in 1836 for showing favoritism to the few "insiders." While this charge was of dubious authenticity during the Bank's later years,¹⁴ evidence is ample to support it during Jones' administration.¹⁵

10. *State v. Buchanan*, 5 H. & J. 317 (Md. 1821).

11. CATTERALL, *op. cit. supra* note 7, at 79.

12. CUSHMAN, *LEADING CONSTITUTIONAL DECISIONS* 9 (10th ed. 1955).

13. See *Niles Register* from 1816 to 1819 for frequent comment and criticism.

14. See Hammond, *Jackson, Biddle, and the Bank of the United States*, 7 J. ECON. HIST. 1 (1947).

15. See STUDENSKI & KROOSS, *FINANCIAL HISTORY OF THE UNITED STATES* 84 (1952); SWISHER, ROGER B. TANEY 89 (1935).

"[Jones] dealt in over 2650 shares between October 1817 and August 1818. Early in 1819 he was still the owner of 1165 shares. These he had presumably not purchased out of his savings from his salary of \$6000 as president of the Bank or his accumulations since the days of his bankruptcy in 1815."

SMITH, *ECONOMIC ASPECTS OF THE SECOND BANK OF THE UNITED STATES* 111 (1953).

After its earlier encouragement of over-expanded credits, the Bank then reversed its field and drastically curtailed credit, ruining many state banks in the process. This aroused further intense hostility toward the Bank. Here two main factors must be considered: first, the Bank's efforts to bring about the resumption of specie payment by the state banks, and second, the depression starting in 1818—the most severe the nation had yet experienced. Public opinion of the time generally considered these as cause and effect.¹⁶

When the Bank bill had been before Congress, its proponents had contended that with the Bank in operation all bank notes would shortly resume specie payment. The promise was easier than its fulfillment. The state banks of the New England area were relatively strong and stable and thus the facilities of the Bank were little used. On the other hand, the South and West were clamoring for credit accommodation, which the lax state banks of those areas were only too happy to provide in nonconvertible paper. The branches of the Bank of the United States accepted this paper in payment of taxes and debts, giving the Government credit for deposits of specie. Yet, for the Bank to acquire specie the state banks would have had to redeem their notes presented by the Bank in specie. This the state banks were not prepared to do.¹⁷ Since the notes of any branch of the Bank could be presented at any other office of the Bank for specie, the flow of payments was from east to west. That is, the notes of the Western branches were presented for payment to the branches in the East, draining them of their specie reserves. Thus, instead of exerting pressure on the state banks to curtail expansion, the Bank's policy resulted in a diminution in their own holdings of specie.

To stop the drain on the Eastern branches, the Board on August 28, 1818, issued a most controversial order: each branch was authorized to receive and pay out only its own notes, with the exception that the notes of any branch would be accepted at any other branch if tendered in payment of a government obligation. This order obviously restricted the circulatory powers of the Bank's notes and many critics at the time held that it violated not only the concept of the Bank, but the Bank's charter as well.¹⁸ The action aroused considerable antagonism against the Bank, since no ad-

16. See STUDENSKI & KROOSS, *op. cit. supra* note 15, at 86; SWISHER, *op. cit. supra* note 15, at 88–89.

17. CATTERALL, *THE SECOND BANK OF THE UNITED STATES* 454 (1902).

18. *Niles Register*, Sept. 5, 1818, pp. 25–27.

vance notice was given and many people were caught with notes which now would trade only at a discount in their locality.

Throughout 1818 Jones tried, but ineffectually, to get the branch offices, particularly in Ohio, to put more pressure on the state banks to redeem their state bank notes in specie. Jones, in contrast to Cheves and Biddle who followed him in the presidency, felt that the Bank should be operated as a unit rather than as an association of semi-independent banks. However, his administrative control was so poor that "the branches exhibited an almost anarchistic degree of independence."¹⁹

On October 30 the Board of the Bank flatly ordered the branch at Cincinnati not to grant further credits to Ohio banks until balances already due were paid off.²⁰ On the same day the Board cracked down on all the branches in the South and West. They were ordered to remit \$700,000 in specie to the East and were forbidden to accept notes of any nonspecie paying state banks.²¹ The Bank was finally implementing a policy that had been decided on a year earlier. What caused the Bank finally to take measures against the loosely run branches was the fact that by mid-1818 the New York state banks were owed some \$850,000 by the Bank of the United States. Furthermore, in the offing was the redemption date of government issued Louisiana stock, of which \$3,500,000 of the total \$4,500,000 was owing to Europeans.

The time was too late, however, for such a deflationary policy. In the last quarter of 1818 commodity prices took a serious downturn and the decline was greater for our exports than for imports. Between mid-1818 and mid-1819, prices for both cotton and tobacco fell about fifty percent. Further, bumper crops in Europe after two previous low crop years diminished the demand for other American agricultural commodities. Another factor that contributed to falling demand was the price deflation and depression that were incident to plans for resumption of specie payments in Europe.²² Given the tremendous drop in export prices, the terms of trade veered strongly against the United States, and the Bank's deflationary pressure on credit served to intensify the resulting depression. Thus the Bank was open to criticism, not so much for the

19. SMITH, *op. cit. supra* note 15, at 38. It is an interesting commentary on Jones' ability as an administrator that Cheves, in following a system of branch autonomy, achieved much greater unification in the Bank's policy.

20. *Id.* at 112.

21. *Id.* at 108.

22. *Id.* at 109.

deflationary policy itself as for its timing. If the credit restriction had taken place earlier, it is doubtful whether a severe depression would have ensued.

In the light of the Bank's activities from 1816 to 1819 and of the resultant state of public opinion, especially in the South and West, it is hardly surprising that individual states took steps to protect their own citizens and state-chartered banks. The usual approach was to prohibit the existence of the Bank of the United States in the state, either directly or through heavy and discriminatory taxation. The extent of the movement has been well-summarized in the following words:

In November, 1817, Tennessee imposed a tax of \$50,000 on any other than a State bank doing business in the State; in December, 1817, Georgia laid a tax of 31¼ % on every \$100 of bank stock employed within the State (the Legislature declaring by resolve, the next year, that this tax was only intended to apply to branches of the Bank of the United States); North Carolina, in December, 1818, imposed an annual tax of \$5,000 on the branches of the Bank. In February, 1818, there was enacted in Maryland a statute laying a heavy stamp tax on all notes issued by banks chartered outside the State, which tax might be commuted by the annual payment of \$15,000; in January, 1819, Kentucky imposed a still heavier tax, compelling each branch in that State to pay \$60,000 annually; the next month, February, 1819, Ohio rivaled Kentucky with a tax of \$50,000 on each branch.²³

We now turn our attention to the Bank's role as a central bank and its claim for exemption from state taxation. There can be little dispute that to the extent that a central bank then existed, that bank was the Bank of the United States. It should be clear that it was the central bank not because of its title, but because the Government saw fit to use it as such. The Bank's charter specified that it was to perform certain services for the Government without charge: it was to receive and keep funds, transfer public funds from one part of the United States to another, make disbursements from government funds to holders of public debt and handle payments to almost all classes of government pensioners. As *quid pro quo* for these free services, the Bank's notes were to be legal tender, all public funds had to be deposited in its vaults in every state with a branch of the Bank and the Government agreed not to charter any other national bank during the lifetime of its charter. For its charter the Bank paid a bonus of \$1,500,000 to the Government.

23. 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 505-6 (rev. ed. 1947).

There is also no doubt that the Bank's function as the central bank profited both the Government and the Bank, as well as its stockholders. It is estimated that during the life of the Bank the Government earned directly \$6,100,000. This figure includes, in addition to the bonus just mentioned, dividends on stock in the Bank held by the Government. On the cost side were the five percent government securities issued to provide funds for the purchase of Bank stock, plus interest paid by the Government on these issues.²⁴

As for the Bank, its profits directly attributable to its association with the Government have been estimated as at least \$6,600,000.²⁵ And it must be stressed that this represents only the direct profit to the Bank; indirect benefits stemming from the strong competitive position of the large government-chartered bank cannot be measured, but were obviously considerable. Furthermore, its branch banking status, covering as it did the entire nation, enabled the Bank to diversify its investment and loan portfolios in a manner superior to any of the state banks. Thus the Bank's high earning capacity can be attributed to its activities as the central bank. And its tax-paying ability was therefore enhanced, not diminished, by its work for the Government.

That the Bank of the United States, throughout its lifetime, had as its prime objective the earning of profits for its stockholders is a matter of record. In 1819 Secretary of the Treasury William H. Crawford wrote the newly elected president of the Bank, Langdon Cheves, that "the first duty of the Board [of the Bank] is to the stockholders; the second is to the nation."²⁶ In a similar vein, Nicholas Biddle, upon succeeding later to the presidency of the Bank, wrote a friend, "It is time to concentrate on our business—to bank where there is some use and some profit in it"²⁷ That the Bank was profitable to its stockholders is evident from the demand for its stock. The dividend rate was about the same as that of the large East Coast metropolitan banks, with a seven percent dividend being paid throughout most of its life. The stock

24. CATTERALL, *THE SECOND BANK OF THE UNITED STATES* 474 (1902).

25. This is Catterall's figure. Roger B. Taney had estimated the profit at \$6,700,000. See *id.* at 475.

26. SMITH, *ECONOMIC ASPECTS OF THE SECOND BANK OF THE UNITED STATES* 58 (1953).

27. Letter by Nicholas Biddle to R. Lennox, Feb. 3, 1823, as quoted in CATTERALL, *op. cit.* *supra* note 24, at 95.

was generally regarded as a gilt-edged investment in both the United States and Europe.²⁸

In view of the economic context, the controversial atmosphere surrounding *McCulloch v. Maryland* can be better understood. In the minds of much of the public the Bank of the United States was a ruthless and irresponsible institution, controlled by a small group of private bankers for personal profit. The federal government held a minor share of stock and held no actual control over the Bank's policies. While much of the antagonism was emotional, and while the Bank perhaps received more blame for economic conditions than it deserved, a good deal of the disrepute was justified (as indicated above) by poor management and selfish profit-seeking. In 1819 this central financial institution was also a sharp political issue. As Professor Cushman has noted: "The bank was largely under the control of the Federalists, who were accused of using it as a political machine and of wielding its great influence for political purposes"²⁹

In light of all the above considerations, it would seem that John Marshall could scarcely have picked a less propitious case for the assertion of his cherished principles. Professor Charles Warren's voluminous history of the Supreme Court, markedly sympathetic to Marshall and his doctrines, clearly agrees with this estimate:

It was highly unfortunate that the decision of a point of constitutional law of so vital importance should have become necessary, in connection with a subject on which the American people were even more excitedly divided—namely the existence of the Bank of the United States. Had the legal question been presented in a case involving a topic less obnoxious than the Bank, unquestionably the doctrines which the Court enounced in *McCulloch v. Maryland* would have aroused far less antagonism.³⁰

Yet, the challenge seemed inevitable. When the Bank disregarded the Maryland law by issuing unstamped bank notes (having no intention of paying \$15,000 annually), an action of debt was brought in behalf of the state to recover penalties from James McCulloch, cashier of the Bank. This was in May of 1818. By the following month, after an appeal on an agreed statement of facts, the Maryland Court of Appeals upheld the constitutionality of the Maryland tax law. A writ of error was immediately taken from the

28. See SMITH, *op. cit. supra* note 26, at 40.

29. CUSHMAN, *LEADING CONSTITUTIONAL DECISIONS* 9 (10th ed. 1954).

30. 1 WARREN, *op. cit. supra* note 23, at 503.

United States Supreme Court. Marshall could hardly have side-stepped the issue without allowing the Maryland decision to stand.

II

McCulloch v. Maryland was heard when oral argument before the Supreme Court was in its glory. Indeed, it took nine days (in February and March of 1819) for the six counsel to present their cases. Recognizing the crucial importance of the decision to be rendered, both the Bank and Maryland had recruited for the task the finest legal talent available. Beveridge asserted that "the counsel for both sides in *M'Culloch vs. Maryland* were the most eminent and distinguished in the Republic."³¹ In addition to United States Attorney General William Wirt, the Bank retained Daniel Webster and William Pinkney, both past masters of the eloquent style of oratory then in vogue.

Later commentary³² has done full justice both to the arguments of Webster and Pinkney, and particularly to the decision of Marshall, which parallels so often the major points stressed by the Bank's counsel. However, relatively little attention has been paid to the briefs presented by Maryland, though Marshall's biographer has given this interesting description of the Bank's adversaries:

Maryland was represented by Luther Martin, still Attorney-General for that State, then seventy-five years old, but a strong lawyer despite his half-century, at least, of excessive drinking. By his side was Joseph Hopkinson of Philadelphia, now fifty years of age, one of the most learned men at the American bar. With Martin and Hopkinson was Walter Jones of Washington, who appears to have been a legal genius . . .³³

Counsel for Maryland quite naturally opposed the implied powers doctrine so heavily relied upon by the plaintiff. But the interesting feature from our standpoint is not the relatively modest attention given to the questions of state sovereignty or of federal powers. More compelling is the constant reminder by the state's attorneys of the nature of the institution at issue—the Bank of the United States. "The state's case," Professor Fairman has recognized, "was not rested on a bigoted view of state rights; in fact some of their points had greater merit than one would suppose from the Chief Justice's masterful opinion."³⁴ Frequently and care-

31. 4 BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 285 (1929).

32. See, e.g., 4 *id.* at 285-88; 1 WARREN, *op. cit. supra* note 23, at 507-8.

33. 4 BEVERIDGE, *op. cit. supra* note 31, at 284-85.

34. FAIRMAN, *AMERICAN CONSTITUTIONAL DECISIONS* 120 (rev. ed. 1950).

fully, Maryland's counsel stressed the private nature of the Bank, which they felt invalidated its claim to tax exemption regardless of what the status of actual federal property might be.

Even granting that Congress may constitutionally incorporate a Bank of the United States, attorney Hopkinson proceeded to question whether the Bank could, of its own authority, establish its branches wherever it chose in the several states.

It is undoubtedly true that these branches are established with a single view to trading, and the profit of stockholders, and not for the convenience or use of the government; and, therefore, they are located at the will of the directors, who represent and regard the interests of the stockholders, and are such themselves. If this is the case, can it be contended that the state rights of territory and taxation are to yield for the gains of a money-trading corporation; to be prostrated at the will of a set of men who have no concern, and no duty, but to increase their profits?³⁵

Conceding that under the charter the Government could require a branch at any place it may designate, the attorney for Maryland contended that such a power, if used only for the necessities of the Government, must be exercised by the Government only and may not be delegated to a private group.

In truth, the directors have exercised the power, and they hold it without any control from the government of the United States; and, as is now contended, without any control of the state governments. A most extravagant power to be vested in a body of men, chosen annually by a very small portion of our citizens, for the purpose of loaning and trading with their money to the best advantage!³⁶

The establishment of a branch bank within a state, Hopkinson went on to assert, was a higher exercise of authority than the creation of the parent bank when confined to the seat of the Government.

Throughout his argument counsel Hopkinson stressed the private, profit-taking nature of the Bank and denied that it could legitimately claim the prerogatives and exemptions of Government. The United States, he pointed out, did not own the Bank's property, did not control its direction and management, but merely held stock in it as it might in any other private undertaking. "It is not, then, a bank of the United States, if by that we mean an institution belonging to the government, directed by it, or in which it

35. *McCulloch v. Maryland*, 4 Wheat. 316, 334-35 (U.S. 1819).

36. *Id.* at 335.

has a permanent, indissoluble interest."³⁷ The convenience which the Bank afforded the Government in the collection and distribution of the revenue was termed collateral and secondary. Such an institution as the Bank, Hopkinson asserted, attempted to claim the immunities of sovereignty which, to his lights, even the national sovereign did not possess.

Can an institution, then, purely private, and which disclaims any public character, be clothed with the power and rights of the government, and, demand subordination from the State government, in virtue of the federal authority, which it undertakes to wield at its own will and pleasure? Shall it be private in its direction and interests; public in its rights and privileges; a trading money-lender in its business; and uncontrolled sovereign in its powers?³⁸

This point was further developed by attorney Jones, who argued that a proprietary interest by the federal government as a stockholder was hardly sufficient to justify a tax exemption. He contended that if the United States

will mix their funds with those of bankers, or engage as partners in any other branch of commerce, their sovereign character and dignity are lost in the mercantile character which they have assumed; and their property thus employed becomes subject to local taxation, like other capital employed in trade.³⁹

Counsel for Maryland also relied upon the *Federalist* papers in their interpretation of federal-state relations in regard to taxation. Hopkinson cited one of the *Federalist* papers to the effect that the right of taxation in the states is sacred and inviolable (excepting only duties on imports and exports) and that states

retain the authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its constitution.⁴⁰

On the same subject, Luther Martin reminded the Court that when the Constitution was offered to the states for ratification, its opponents expressed grave apprehension at the vast potential of national power clothed in general terms. These purported dangers were vigorously denied by supporters of the Constitution.

37. *Id.* at 340.

38. *Id.* at 341.

39. *Id.* at 372.

40. THE FEDERALIST No. 32, at 249 (J. C. Hamilton ed. 1892) (Hamilton).

We are now called upon to apply that theory of interpretation which was then rejected by the friends of the new constitution, and we are asked to engraft upon it powers of vast extent, which were disclaimed by them, and which, if they had been fairly avowed at the time, would have prevented its adoption.⁴¹

However strong the arguments set forth by the legal staff for Maryland, they seem to have fallen on deaf ears. Marshall's famed opinion did not even undertake to answer the most challenging points raised by the state. When one studies the arguments presented by the Bank's counsel, it is readily apparent that the line of thought they embodied was far more congenial to Marshall's cast of mind.

For example, like Marshall later, Daniel Webster over-simplified the issue by an ostensibly logical dual query: (1) Has Congress the power to charter a Bank? (2) Can the states tax federal property? The first question posed, that of congressional power to establish a bank, Webster was able to answer in the affirmative without difficulty. The first Congress had created and incorporated a Bank and nearly every succeeding Congress had acted and legislated on the assumed legal existence of such a federal power. Webster interpreted the "necessary and proper" clause as implying means that are "*suitable and fitted* to the object; such as are *best and most useful* in relation to the end proposed."⁴²

Making no reference to the nature of the institution chartered by Congress (and as to whether it could properly be considered in the same category as government property), Webster moved to the second query, whether a state could tax a creature of Congress. In language anticipatory of Marshall, he asserted that "an unlimited power to tax involves, necessarily, a power to destroy"⁴³ Webster recalled that even under the Articles of Confederation, national property was immune from state taxation. "Is it supposed that property of the United States is now subject to the power of the state governments, in a greater degree than under the confederation?"⁴⁴ Could states, asked Webster, tax proceedings in the federal courts and thus expel the judiciary from their borders?

The nearest that counsel for the Bank came to discussing the "governmental" character of the institution was in Pinkney's con-

41. *McCulloch v. Maryland*, 4 Wheat. 316, 373 (U.S. 1819).

42. *Id.* at 324-25. [Emphasis added.]

43. *Id.* at 327.

44. *Id.* at 328.

cluding argument, where he boldly asserted: "The bank of the United States is as much an instrument of the government for fiscal purposes as the courts are its instruments for judicial purposes. They both proceed from the supreme power, and equally claim its protection."⁴⁵ However, the case of the Bank rested very largely upon an eloquent appeal for nationalism and broad construction. Pinkney's argument alone consumed three full days, and Beveridge declared that "few arguments ever made in the Supreme Court affected so profoundly the members of that tribunal."⁴⁶ On the third and last day Justice Story wrote in a letter:

I never, in my whole life, heard a greater speech; it was worth a journey from Salem to hear it; his elocution was excessively vehement, but his eloquence was overwhelming. His language, his style, his figures, his arguments, were most brilliant and sparkling. He spoke like a great statesman and patriot, and a sound constitutional lawyer. All the cobwebs of sophistry and metaphysics about State rights and State sovereignty he brushed away with a might besom.⁴⁷

Apparently all six justices on the Court were impressed by the arguments for the defendant. Only three days after the close of oral argument, Marshall delivered the opinion he had written for a unanimous court. In view of both the time sequence and the tenor of the decision, one cannot help but wonder whether the Chief Justice had written his opinion prior to having heard the case. Fantastic as this possibility may sound, it seems highly probable.⁴⁸

On this same point Professor Fairman has observed that "Marshall's opinion is very tightly integrated with the arguments of counsel, which suggests that at the least he revised what he had written to pick up the points made at the bar."⁴⁹ This seems true enough as far as the arguments by Webster and Pinkney are concerned. However, Marshall's reasoning hardly does justice to the case made by counsel for Maryland. Indeed, the decision and its

45. *Id.* at 396.

46. 4 BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 287 (1929).

47. Letter by Justice Story to White, March 3, 1819, as quoted in 4 BEVERIDGE, *op. cit. supra* note 46, at 287.

48. Marshall's biographer Beveridge observed:

"Since it is one of the longest of Marshall's opinions and, by general agreement, is considered to be his ablest and most carefully prepared exposition of the Constitution, it seems not unlikely that much of it had been written before the argument. The court was very busy every day of the session and there was little, if any, time for Marshall to write this elaborate document. . . . It appears to be reasonably probable that at least the framework of the opinion in *M'Culloch vs. Maryland* was prepared by Marshall when in Richmond during the summer, autumn, and winter of 1818-19."

Id. at 290.

49. FAIRMAN, *AMERICAN CONSTITUTIONAL DECISIONS* 120 (rev. ed. 1950).

references to contentions by the state, give one an erroneous impression of what the argument of Hopkinson, Jones and Martin actually stressed.

Marshall's train of thought in *McCulloch v. Maryland* is so well known that a repetition here would serve little purpose. Like Webster earlier, the Chief Justice built his case around the two major points of congressional power to create a bank and the validity of state taxation of instrumentalities of the federal government. Throughout the opinion there is no mention of the essentially private character of the Bank. Marshall consistently regarded the corporation as the Government itself. There was no place in his logic for nuances or differences of degree. He spoke only in terms of absolutes. The identification of the Bank with the sovereign itself is well illustrated when Marshall employed the following *argumentum ad absurdum*:

If the States may tax one 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 the papers of the custom house; 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.⁵⁰

Not until five years later in the case of *Osborn v. The Bank of the United States*⁵¹ did the Chief Justice make note of the contention that the Bank, though chartered by the federal government, should not enjoy the same immunities as government agencies. In 1824 the Supreme Court upheld the Bank against the attempt by Ohio to collect its prohibitory tax enacted in 1818. Ohio had ignored the decision in *McCulloch v. Maryland* as a feigned case and, further, had seized \$100,000 from a branch of the Bank as payment of the tax. The Bank's suit against state officials was concerned primarily with the question of whether the proceedings amounted to a suit against a state and whether the federal judiciary held jurisdiction in view of the eleventh amendment. However, after disposing of these questions in favor of the Bank, Marshall noted that the constitutional issue decided in the *McCulloch* case was again urged upon the Court, and he agreed to review it. His words are little short of remarkable:

50. 4 Wheat. at 432.

51. 9 Wheat. 738 (U.S. 1824).

The foundation of the argument in favor of the right of a State to tax the banks, is laid in the supposed character of that institution. The argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object.

If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the State, as any individual would be; and the casual circumstance of its being employed by the government in the transaction of its fiscal affairs, would no more exempt its private business from the operation of that power, than it would exempt the private business of any individual employed in the same manner.⁵²

In view of the economic background we have already discussed, it would be difficult to find a more apt characterization of the Bank of the United States. Yet, such a conclusion was far from John Marshall's mind. Without examining the make-up, the guiding policies or the leadership of the Bank, the Chief Justice dismissed the notion in these words:

But the premises are not true. The bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that congress could create such a corporation.⁵³

The decision in the *Osborn* case conclusively settled the constitutional issues involved in the Bank controversy. Marshall's forthright assertion of implied powers had aroused a storm of protest in the South and West. Those hostile to the Bank won the final political victory with Andrew Jackson's successful maneuvers to block rechartering of the central financial institution. But John Marshall's blow for judicial nationalism persisted far beyond 1836.

III

In making an assessment of *McCulloch v. Maryland* we should first consider whether it would have been possible for the Court to

52. *Id.* at 859-60.

53. *Id.* at 860.

have reached a different conclusion—*i.e.*, one unfavorable to the Bank—without at the same time sacrificing the constitutional principles which have proven so viable ever since. Much of the later commentary⁵⁴ on the classic decision assumes not, and the measure of success that the United States has attained in meeting the needs of an interdependent twentieth century society is often traced directly to Marshall's opinion in the Bank case. Yet, this would seem to be a far too superficial conclusion.

Actually, while Marshall's opinion in the *McCulloch* case is deservedly the leading precedent for the doctrine of implied powers, that concept itself was not new in 1819. Fifteen years earlier in the case of *United States v. Fisher*,⁵⁵ Chief Justice Marshall referred to the necessary and proper clause in these words:

In construing this clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. . . . Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution.⁵⁶

The *Fisher* case involved nothing controversial in public affairs and passed virtually unnoticed. It cannot be denied that the restatement and elaboration of implied powers in so heatedly controversial a case as *McCulloch v. Maryland* established the doctrine far more conclusively than would otherwise have been the case. Yet, we must not conclude that without its assertion in 1819 implied powers would have been absent from future constitutional growth.

What, then, might have been the possible alternatives for the Court in the Bank case, assuming, as we have, that Maryland had a strong case? Actually, the Court could have upheld the general power of Congress to establish a central bank to control the currency, collect taxes and pay debts, etc. Likewise the power of a state to place a discriminatory tax on an arm of the federal govern-

54. See, *e.g.*, McBAIN, *THE LIVING CONSTITUTION* 244 (1927); BURNS & PELTASON, *GOVERNMENT BY THE PEOPLE* 92 (3d ed. 1957).

55. 2 Cranch 358 (U.S. 1804). This case involved both the validity and interpretation of an act of Congress passed in 1797, Act of March 3, 1797, c. 20, § 5, 1 STAT. 512, giving a preference to the United States over private creditors on the property of bankrupt individuals indebted to the Government. Marshall's use of the necessary and proper clause specifically referred to the power of the United States to pay the debt of the Union. "It has, consequently, a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe." *United States v. Fisher*, *supra* at 396.

56. *Id.* at 396.

ment could have been rejected. Thus the two central theoretical bases of *McCulloch v. Maryland* need not have been denied. However, the Court might still have upheld Maryland on the ground that the Bank, as constituted, could not be considered as a proper recipient of immunity in the same sense that federal agencies could.

The contention by Pinkney, and later Marshall, that state power to tax the Bank of the United States was no different from a like power to tax the federal judiciary, the mint or the mails, seems far-fetched indeed. Certainly there is a decided distinction between a regularly constituted branch of Government and a private profit-seeking corporation which incidentally serves the Government. The argument by Maryland's attorneys that a power used for the necessities of Government may not be delegated to a private group seems a compelling one. In the absence of some form of governmental control, it is difficult to see how a minority of public funds bestows the perquisites of sovereignty on the whole private undertaking. Rather, it would seem, in the words of attorney Walter Jones (for Maryland), that the "sovereign character and dignity" of the United States "are lost in the mercantile character" thus assumed.⁵⁷

In this light, it is interesting to note the vast differences between the Bank of the United States and the nation's present-day instrumentality for stabilizing the currency—the Federal Reserve System. The latter is composed of private member banks which own stock. But the control of the system is unmistakably in the hands of the national Board of Governors, all seven of whom are appointed by the President of the United States and confirmed by the Senate. Responsibility for major policies, either initially or ultimately, rests with the Board. While the Federal Reserve System earns sufficient income to cover operating expenses, pays dividends to member banks and contributes to a surplus fund and to the United States Treasury, the profit aspect is purely incidental to the System's major function. The public interest, as gauged in terms of orderly economic growth and a stable currency, is the guiding purpose of the national institution. In addition to the political check of appointment of the Board by the two elective branches of Government, the System is accountable to the nation also through

57. *McCulloch v. Maryland*, 4 Wheat. 316, 372 (U.S. 1819), quoted in text at note 39 *supra*.

frequent audits of member banks, weekly statements of assets and liabilities and an annual report by the Board to Congress.⁵⁸ What a far cry this inherently governmental institution is from the private, profit-oriented second Bank of the United States. Yet, John Marshall's forceful opinion in *McCulloch v. Maryland* gives one the distinct impression that he is describing an agency more like the present Federal Reserve System than the privately regulated Bank then existing.

While Marshall's doctrine of implied powers espoused in the Bank decision has been crucial to the formation of later national economic regulation, there is also another side to the coin. The sweeping generalizations so fondly employed by the Chief Justice were destined to create innumerable problems in the area of inter-governmental taxation. Until fairly recent years Marshall's dictum that the power to tax involves the power to destroy had been judicially extended in many directions,⁵⁹ including the exemption of salaries of federal employees from state taxation and vice versa.⁶⁰ In 1927 Justice Holmes was moved to protest the elaboration of Marshall's dictum in this pithy observation:

In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether. . . . The power to tax is not the power to destroy while this Court sits.⁶¹

Eventually the Court began to recognize what Justice Frankfurter has termed "the practical limitations of a rhetorical absolute."⁶² A

58. This paragraph is based upon information found in BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *THE FEDERAL RESERVE SYSTEM: PURPOSES AND FUNCTIONS* 1-4, 77-79 (3d ed. 1954).

59. E.g., *Indian Motorcycle Co. v. United States*, 283 U.S. 570 (1931) (invalidating a federal sales tax on motorcycles purchased by a city for its police force); *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218 (1928) (invalidating a state sales tax on gasoline purchased by the United States for use in Coast Guard vessels); *Gillespie v. Oklahoma*, 257 U.S. 501 (1922) (saving the lessee of restricted Indian lands from a state income tax). This expansion of tax immunities was eventually curtailed and the cases cited were overruled, either explicitly or implicitly, in *Alabama v. King & Boozer*, 314 U.S. 1 (1941), and *Helvering v. Mountain Producers' Corp.*, 303 U.S. 376 (1938).

60. The doctrine embodied in *Collector v. Day*, 11 Wall. 113 (U.S. 1871), declaring state judicial salaries exempt from federal income taxation, persisted as late as 1937. See *Brush v. Commissioner*, 300 U.S. 352 (1937) (declaring that the salary of a New York city official was not subject to the federal income tax); *New York ex rel. Rogers v. Graves*, 299 U.S. 401 (1937) (holding the compensation of one employed by a federal instrumentality exempt from New York State's income tax). All of these cases were overruled, either expressly or impliedly, by *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939), and *Helvering v. Gerhardt*, 304 U.S. 405 (1938).

61. *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (dissenting opinion).

62. *New York v. United States*, 326 U.S. 572, 576 (1946).

more extended discussion of the problems of inter-governmental taxation is beyond the scope of this Article. It is sufficient here to stress an observation of the late Chief Justice Stone which seems of particular significance to the issues we have discussed earlier. "The trend of our decisions," said Stone, "is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents."⁶³

In conclusion, we suggest that *McCulloch v. Maryland*, and particularly the doctrine of implied powers, deserves the classic importance it has assumed in our constitutional growth, but that the case itself is often viewed mistakenly and superficially. That Marshall could have reached an alternative decision without rejecting the doctrine of implied powers seems clear enough. Yet, it would be a mistake to view John Marshall as a justice who merely neglected to see all aspects of a case, however much divergence there might seem between his opinion and the entire context. Marshall's habit of avoiding alternatives that ran contrary to his objectives, while making it appear that no such alternatives existed, is almost legendary.⁶⁴ A man of strong political views, Marshall seldom questioned his assumptions—and his assumptions were often more important than his logic. The Bank case seems to be a particularly good example of how intertwined were Marshall's political and economic views. That he could not (or would not) distinguish between the private Bank of the United States and the public United States Government reveals clearly his assumptions about government and the economy. As is the case with so many of Marshall's opinions, *McCulloch v. Maryland* must be read as a statement not only of constitutional logic, but of economic theory as well.⁶⁵

63. *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261, 270 (1943).

64. See, e.g., HAINES, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789-1835*, at 354 (1944); SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT 178-79* (2d ed. 1954). For suggested alternatives available to Marshall in *Marbury v. Madison*, see CARR, *THE SUPREME COURT AND JUDICIAL REVIEW* 67-68 (1942).

65. RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT OF THE UNITED STATES FROM 1790 TO 1955*, at 76 (1955).