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Hist 445

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*McCullough v. Maryland* Brief

The case before the Court today poses two questions regarding the Bank of the United States: 1.) does Congress have the power to create the bank, and 2.) does the state of Maryland’s tax on it unconstitutionally interfere with congressional power? This brief will argue that the answer to both of these questions is “no.” It will answer the first by arguing for a narrow reading of the Necessary and Proper Clause and the second by successively reminding the Court of the high degree of sovereignty states retain under the Constitution, the co-equality of both the state and national governments to collect revenue, and arguing against the precedent not allowing the state to tax the bank would set. In so doing, this brief will demonstrate not only that Congress lacks the authority to create the bank, but that even if it does have the authority, the state still has the authority to tax the bank.

To answer the first question in further detail, we turn first to Article 1, Section 8, where we find clauses permitting Congress “To lay and collect Taxes,” “to pay the Debts…of the United States,”[[1]](#footnote-1) “To borrow money on the credit of the United States,”[[2]](#footnote-2) “To regulate Commerce…among the several States,”[[3]](#footnote-3) and “To coin Money, [and] regulate the Value thereof.”[[4]](#footnote-4) In other words, we find several phrases permitting congress to perform a variety of functions at least tangentially related to banking and the functions a bank performs, but nowhere do we find a clause specifically permitting the Congress to charter a bank. Even if we concede that Congress, under the Necessary and Proper clause[[5]](#footnote-5), has implied powers beyond those explicitly listed in Section 8 of Article 1, does this include the power to charter a bank? The answer to this question turns we on the meanings of those two words, “Necessary” and “Proper.” “Necessary” is generally understood to mean something that cannot be done without, while “Proper” in this context generally refers to what is suitable or appropriate. In contrast, the best that can be said of the Bank of the United States is that it is merely convenient or useful. But as we have already seen, Section 8 of Article 1 permits Congress to perform many of the same functions as a bank, thus decisively putting to rest any notion of the Bank’s purported necessity. Additionally, the number of state banks that could easily fulfill the same purpose as the Bank only casts further doubt on its constitutionality.

But let us concede for the sake of argument that Congress does indeed have the power to charter a bank. Does this preclude the state of Maryland from imposing a tax on the revenues the bank generates? While there are a variety of sources and lines of logic one could employ to arrive at an answer to this question of “No,” two will be examined here: 1.) the powers and sovereignty reserved to the states (including the power to tax) and the co-equal authority of the state and federal governments in raising revenue, and 2.) the conceivable consequences likely to prevail should the federal government have its way.

To elaborating on the first of these lines of reason, requires us to turn first to the 10th Amendment as well as Section 10 of Article 1. The 10th Amendment makes it clear in no uncertain terms that “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.”[[6]](#footnote-6) In Section 10 of Article 1, we find a number of actions prohibited to the states, such as the coining of money and using anything apart from either gold or silver coin to pay debts[[7]](#footnote-7), but nowhere do we find a clause prohibiting states from taxing corporations created by congress, to say nothing of a clause prohibiting the states from taxing a bank created by Congress. What do these clauses tell us? Well, Federalist 32 tells us that the Constitution will strip the states of none of their pre-existing sovereignty, with three exceptions: 1.) where the Constitution gives exclusive authority to the federal government (such as writing bankruptcy laws); 2.) where the Constitution gives authority to the federal government and prohibits the states from exercising like authority (such as in the instance of coining money); and 3.) where an action taken by the federal government, if the same were taken by the states, would produce a result “CONTRADICTORY and REPUGNANT” to the Constitution[[8]](#footnote-8). As we have already seen, the first prohibition is not applicable here since, even if we grant Congress’ authority to charter to charter the bank, this is also an authority held by the states. The second prohibition is similarly inapplicable on account of the lack of a clause or course of logic that could be construed to prohibit states from chartering banks. This leaves only the third prohibition, the exemption to which in this case requires us to examine the tax itself and the powers reserved to the states.

The tax itself empowers the state of Maryland to collect a tax amounting to either $15,000 or between one and two percent of the value of each bill (the exact percentage varies by bill) held by any banking corporation not incorporated in the state of Maryland[[9]](#footnote-9). Given the amount of money handled by the Bank of the United States, it should not be a controversial statement to point out that the amount of the tax itself actually quite minimal, showing significant restraint on the part of the state legislature not to impede the function of the bank. The charge that the state could hypothetically make the tax ruinously expensive is negated by the fact that this is not the tax here before us. If the state later decides to increase the tax to an unduly burdensome level, that is a different case for a different day. The more important principle here is that the power to tax is among the most fundamental powers the states have. Furthermore, the tax is being collected to help the state repay the substantial debt it incurred during the War of 1812, and removing the state’s power to tax the bank, the federal government is all but condemning Maryland to be in debt for all eternity.

Beyond this, if the court does not preserve the inherent power of the states to regulate and tax, what is to stop other similarly fundamental powers of the states from being striped from them? The answer is that there is nothing stopping this from occurring, and the powers the states have will be at the whim of the national government.

In short, the power to tax may well be the power to destroy, but removing the power to tax is to destroy the state.

1215 words

1. [Article] U.S. Const. art. 1. sec. 8. cl. 1. [↑](#footnote-ref-1)
2. [Article] U.S. Const. art. 1. sec. 8. cl. 2. [↑](#footnote-ref-2)
3. [Article] U.S. Const. art. 1. sec. 8. cl. 3. [↑](#footnote-ref-3)
4. [Article] U.S. Const. art. 1. sec. 8. cl. 5. [↑](#footnote-ref-4)
5. [Article] U.S. Const. art. 1. sec. 8. cl. 18. [↑](#footnote-ref-5)
6. [Amendment] U.S. Const. amend. X. [↑](#footnote-ref-6)
7. [Article] U.S. Const. art. 1. sec. 10. cl. 1. [↑](#footnote-ref-7)
8. Hamilton, Alexander, Federalist No. 32 [↑](#footnote-ref-8)
9. *McCullough v Maryland* 17 U.S. 316 (1819), quoting the Maryland Statue at issue [↑](#footnote-ref-9)