

***McCulloch v. Maryland* / Excerpts from the Unanimous Opinion—Answer Key**

The following are excerpts from Chief Justice John Marshall's unanimous opinion:

The first question made in the case is: Has congress power to incorporate a bank?

This government is acknowledged by all to be one of enumerated powers.

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 . . . 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;” . . . 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, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked.

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. . . . But it may with great reason be contended, that a government, entrusted with such ample powers . . . must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution.

But the constitution of the United States has not left the right of congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added, that of making “all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof.”

This provision is made in a constitution, intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been . . . an unwise attempt to provide . . . for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.

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.

[I]t is the unanimous and decided opinion of this Court, that the act to incorporate the Bank of the United States 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 -- Whether the State of Maryland may, without violating the constitution, tax that branch?

There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution. . . . 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 . . . other propositions are deduced as corollaries.

That the power to tax involves the power to destroy. . . . 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. This was not intended by the American people. They did not design to make their government dependent on the states.

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.

Questions to Consider

1. How did Chief Justice John Marshall justify the power of the federal government to establish a bank? What phrases in the Constitution does he use to support his argument?
Chief Justice John Marshall says that the Constitution is merely an outline of the powers of the government; the framers could not possibly have enumerated all of the powers of the government so they included the necessary and proper, or implied powers clause, which says, "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof." Marshall believes that this clause provides justification for the national government to establish a national bank. He concedes that the power to establish a national bank is not among the enumerated powers, but he says that among them are the 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 . . ." To carry these out, the government needs to have additional authority, such as the power to establish a bank.
2. The Articles of Confederation did not allow the national government to exercise implied powers. Why?

Under the Articles of Confederation, the states were supreme, and the federal government had only those powers specifically delegated to it by them. This was to prevent an abuse of power by the national government. Including implied powers would have risked allowing the federal government to exceed its authority.

3. How does one determine that a power is “implied” when it is not specifically stated in the Constitution?

To determine if a power that is not in the Constitution is an "implied power," one must make sure that the goal is legitimate, and that the method used to reach that goal is appropriate. In addition, one must make sure that it is not a denied power, that it is within the scope of the constitution and that it "consist with the letter and spirit of the constitution."

4. In the Court’s opinion, Chief Justice Marshall says, “the power to tax involves the power to destroy.” What did he mean by that?

When he says, "the power to tax involves the power to destroy," Justice Marshall means that if the Court grants Maryland the authority to tax the national bank, the state will be able to impede the functioning of the federal government. It may even tax the bank—and other federal institutions—out of existence. He says that this is clearly not what the framers intended.

5. In making this decision, the Supreme Court of the United States helped to determine the relationship of the federal and state governments to one another. Which is supreme?

In making this decision, the Court established the supremacy of the federal government. This meant that in the future, when conflicts arose between the state and federal governments, the federal government would prevail.

6. What impact did this decision have on the future of the United States? If the decision had been different—that the states had power to regulate or tax the national government—how might our lives be different now?

The Court broadened the permissible scope of federal law to include, that which was helpful to carry out Congress's enumerated goals.

Student answers will vary. If the decision had gone the other way, we might be living in a system that functioned more like a confederate system. As a result, our national government as we know it would be very weak or almost non-existent. There may be little consistency in laws and in the currency we use. Foreign governments may take advantage of us. On the other hand, seeing the value of a strong, unified nation we might have amended the Constitution, as was done after the Civil War.