States, which had a branch office in Baltimore, led to *McCulloch* v. *Maryland,* a case for which the Marshall Court was waiting. Not only was the constitutionality of state taxation of a national bank at issue; the case also had clear ramifications for federal internal improvements programs, whose constitutionality was in doubt at the time. *McCulloch* was speedily dispatched to the Marshall Court. A Maryland state official sued James William McCulloch, the cashier of the Baltimore office of the Bank of the United States, to enforce the tax. The Maryland Court of Appeals, in an unreported per curiam decision, upheld the state's power to collect the tax, and attorneys for the Bank immediately filed a writ of error to the Marshall Court, accompanied by a stipulated set of facts.[158] The *National Intelligencer* identified *McCulloch* as a "great case" even before arguments began.[159]

The Court, recognizing the significance of *McCulloch,* waived its customary rule "permitting only two counsel to argue for each party,"[160] and six lawyers took part in the argument. Daniel Webster, for James McCulloch, opened the arguments on February 22, followed by Hopkinson for Maryland, William Wirt for McCulloch, and Walter Jones for Maryland. On Thursday afternoon, February 5, Martin began his argument, with William Pinkney to follow in rebuttal for McCulloch. Martin spoke through Saturday afternoon, February 27. Wheaton's Reports give a bare summary of the argument, which, contemporary accounts reveal, was characteristically long, rambling, and exhaustive,[161] and was also highly personalized. Martin devoted the bulk of his argument to "the contemporary exposition of the constitution by its authors,"[162] of which he was one, to show that the doctrine of implied powers, on which supporters of the Bank's constitutionality relied, had been "rejected by the friends of the new constitution [and], . . . if [it] had been fairly avowed at the time, would have prevented its adoption." The "only safe rule," Martin contended, "is the plain letter of the constitution." And since "the power of establishing corporations" was "not delegated [by the Framers] to the United States, nor prohibited to the individual states, [i]t is therefore reserved to the States . . . or to the people."[163] But even if one concluded "that Congress has a right to incorporate a banking company," Martin continued, the States could still tax banks "within their

[158] 4 Wheat. at 317.

[159] Washington *National Intelligencer,* [Saturday], Feb. 20, 1819. Arguments began on the following Monday.

[160] See 4 Wheat. at 322.

[161] William Pinkney began his rebuttal to Martin and his co-counsel by saying: "We have had the affecting retrospections of Mr. Martin upon scenes . . . [the Convention debates] which . . . , luckily for the time of the court, had their commencement at an epoch considerably subsequent to the flood." Quoted in Wheaton, *Some Account,* 163–64.

[162] 4 Wheat. at 372.

[163] Ibid., 373–74.

territory." Again he used original constitutional language and debates to buttress a point. "[T]he [Philadelphia] Convention," he argued, "found . . . the subject of taxation . . . impossible to solve in a manner entirely satisfactory." But "the debates in the state conventions show that the power of State taxation was understood to be absolutely unlimited, except as to imports and tonnage duties." The states, Martin claimed, "would not have adopted the constitution upon any other understanding."[164]

By concentrating on the history of the Constitution Martin reminded the Court of his direct participation as a Framer and of his venerable status. He also reminded the Justices of their own close connections with the Framers' generation.[165] Near the close of his argument, in the course of reading from state ratifying convention debates on the taxing power, Martin announced to the Justices that "he had one last authority which he thought the Court would admit to be conclusive," and then read passages from the dictates of the Virginia ratifying convention of 1788. The speaker whose words Martin called to the Court's attention was John Marshall, who reportedly drew a deep breath as Martin began his recitation.[166] Marshall had said, in 1788, that "the powers not denied to the states are not vested in them by implication, because, being possessed of them antecedent to the adoption of the government, and not being divested of them, by any grant or restruction in the Constitution, the states must be as fully possessed of them as ever they had been."[167] Marshall reportedly told Story, "I was afraid I had said some foolish things in that debate; but it was not so bad as I expected";[168] and Martin's side lost the *McCulloch* case: Marshall's unanimous opinion held that Congress could create a bank and that the states could not tax its "operations."[169] But Martin's argument has been remembered as one of his best performances. Albert Beveridge characterized it as "the last worthy of re-

[164] Ibid., 375–76.

[165] Martin interjected in his references to the Philadelphia convention a parenthetical paraphrase of the Aeneid, "quorum pars [minima] fuit," thereby reminding his audience that he had "played a very [small] part" in the deliberations that resulted in the Constitution. Pinkney in rebuttal then responded,

> "quorum pars *magna* (or minima) fuit" (for I will not object to [Martin's amendment of the original Latin], lest I should distress the modesty that suggested it. . . .

Quoted in Wheaton, *Some Account,* 163–64.

[166] The quotation from Martin's argument, and Marshall's response, are taken from an anecdote told by Story in late 1844 or early 1845 to Alexander H. Stephens, then a congressman from Georgia, quoted in R. Johnson and W. Browne, *Life of Alexander H. Stephens* (1870), 183. For the context of the anecdote, see ibid., 176–83.

[167] Quoted in D. Robertson, *Debates and Other Proceedings of the Convention of Virginia* (2d ed., 1805), 298.

[168] Quoted in Johnson and Browne, *Alexander H. Stephens,* 183.

[169] Ibid., 437. See discussion in Chapter VIII.