Arkansas Law Review

Volume 72 | Number 1 Article 1

July 2019

McCulloch at 200

David S. Schwartz
University of Wisconsin, Madison

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David S. Schwartz*

March 6, 2019 marked the 200th anniversary of the Supreme Court's issuance of its decision in *McCulloch v. Maryland*,[1] upholding the constitutionality of the Second Bank of the United States, the successor to Alexander Hamilton's national bank. *McCulloch v. Maryland* involved a constitutional challenge by the Second Bank of the United States to a Maryland tax on the banknotes issued by the Bank's Baltimore branch. The tax was probably designed to raise the Second Bank's cost of issuing loans and thereby disadvantage it relative to Maryland's own state-chartered banks. Marshall's opinion famously rejected the Jeffersonian strict-constructionist argument that implied powers are limited to those legislative means that are indispensably necessary to the viability of the enumerated power. Instead, Marshall concluded, Congress must have discretion to choose among any means convenient or well-adapted to implementing the government's granted powers. After concluding that Congress had the power to create the Second Bank, the *McCulloch* opinion turned to the question of whether Maryland could tax it. Reasoning that the essence of federal supremacy is to remove all obstacles to federal government action within its sphere, Marshall concluded that states cannot tax operations of the federal government.

For more than a century, constitutional scholars have agreed with James Bradley Thayer's 1901 appraisal of *McCulloch* as Chief Justice John Marshall's "greatest opinion" and "the chief illustration" of Marshall's "giving free scope to the power of the national government."[2] But the case has meant many things to

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* Foley & Lardner-Bascom Professor of Law, University of Wisconsin Law School.

1. 17 U.S. (4 Wheat.) 316 (1819).

2. James Bradley Thayer, *John Marshall* (1901), *reprinted in and quoted from* JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES AND FELIX FRANKFURTER ON JOHN MARSHALL 66 (1967). See, e.g., Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 219 (1955)("the conception of the nation which Marshall derived from the Constitution and set forth in *M'Culloch v. Maryland* is his greatest single judicial performance."); ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 42 (1960)(

many courts and commentators over the years. For example, in 2012, in *National Federation of Independent Business ("NFIB") v. Sebelius*,[3] the constitutional challenge to the Affordable Care Act, the parties' briefs and oral arguments debated the meaning of *McCulloch* and the justices divided over whether Marshall's decision meant the law was constitutional or not. As Michael Klarman has summed up, "Twentieth-century advocates of expansive national power have insisted that Marshall's capacious understandings of the Necessary and Proper Clause and the Commerce Clause were sufficient to accommodate the modern regulatory state."[4] In contrast, G. Edward White concludes that Marshall's nationalism in a case like *McCulloch* was "not nationalism in the modern sense of support for affirmative plenary federal regulatory power" but "can more accurately be described as a critique of reserved state sovereignty."[5] Perhaps because of this variation in understandings led Sanford Levinson to observe in 2014 that *McCulloch* is "the richest and most important single opinion of the United States Supreme Court in our entire history."[6]

Despite such room for divergent interpretation, Gerard Magliocca was undoubtedly right when he observed in 2006 that "the opinion's fame has not generated a commensurate level of academic commentary on the decision that the Court actually reached."[7] Twelve years later, that commensurate level of academic commentary is well underway. Mark Killenbeck's 2006 book, *M'Culloch v. Maryland: Securing A Nation* – the first

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McCulloch is, "by almost any reckoning, the greatest decision John Marshall ever handed down."); R. Kent Newmyer, *John Marshall and the Southern Constitutional Tradition*, in AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 105, 108 (Kermit L. Hall & James W. Ely, Jr. eds., 1989) (rating *McCulloch* as "possibly the most far-reaching decision ever handed down by the Supreme Court").

3. 567 U.S. 519 (2012).

4. Michael J. Klarman, *How Great Were the "Great" Marshal Court Decisions?*, 87 VA. L. REV. 1111, 1128, n. 82 (2001) (citing sources).

5. G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, vols 3-4 of THE OLIVER WENDELL HOLMES DEVISE, HISTORY OF THE SUPREME COURT 486 (1988).

6. Sanford Levinson, *Course Description: A Close Reading of McCulloch v. Maryland*, HARV. L. SCH. ONLINE CATALOGUE (Fall 2014), http://www.law.harvard.edu/academics/curriculum/catalog/index.html?o=67026 [https://perma.cc/YAJ3-YYLA].

7. Gerard N. Magliocca, *A New Approach to Congressional Power: Revisiting the Legal Tender Cases*, 95 GEO. L.J. 119, 125 (2006).

monograph-length study of *McCulloch*[8]— and Sanford Levinson's close-reading classes at Harvard and University of Texas Law Schools (which involved reading the entire *McCulloch* opinion aloud with frequent stops for discussion), have powerfully demonstrated that the case is worth careful study and attention rather than the talismanic treatment it has long been given. Legal scholars should not lightly assume that the shorthand conventional story tells us all we need to know about the case.

Exciting new work is starting to come out, exploring the ambiguities of *McCulloch*, its historical context and trajectory, and its present-day meaning for constitutional law. To help move this scholarly enterprise forward, the annual Wisconsin Discussion Group on Constitutionalism hosted by the University of Wisconsin Law School made its fall 2018 topic "*McCulloch v. Maryland* at 200: the Past and Future of American Constitutional Law." Thirteen constitutional law and legal history scholars gathered for an intensive discussion and presented papers on numerous facets and interpretations of Marshall's great opinion.[9]

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8. MARK R. KILLENBECK, *M'CULLOCH V. MARYLAND*: SECURING A NATION (2006); *see also* RICHARD E. ELLIS, AGGRESSIVE NATIONALISM: *MCCULLOCH V. MARYLAND* AND THE FOUNDATION OF FEDERAL AUTHORITY IN THE YOUNG REPUBLIC (2007).

9. In addition to the papers published in this symposium, the workshop papers included: Sam Erman, University of Southern California Law Center, *A Constitution of Empire without McCulloch v. Maryland;* Neil Komesar, University of Wisconsin Law School, *False Flags and Fragments– The Questionable Past and Uncertain Future of the Analysis of Judicial Review;* Alison LaCroix, University of Chicago Law School, *The Brig, the Steamboat, and the Immense Mass of State Laws;* Martin Lederman, Georgetown University Law Center, *Letter or Spirit? What Does it Mean to "Never forget that it is a constitution we are expounding"?;* Sophia Lee, University of Pennsylvania Law School, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*; Eric Lomazoff, Villanova University, Dept. of Political Science, *Did John Marshall Have a Death Wish for his McCulloch Opinion? The Dangerous Invitation in "A Friend to the Union" No. 2*; John Mikhail, Georgetown University Law Center, *McCulloch's Strategic Ambiguity;* Brad Snyder, Georgetown University Law Center, *McCulloch, Brown, and Section 5;* Matthew Steilen, University of Buffalo School of Law, *A Virginia Perspective on McCulloch.*

For other new work on *McCulloch*, see ERIC LOMAZOFF, RECONSTRUCTING THE NATIONAL BANK CONTROVERSY: POLITICS AND LAW IN THE EARLY AMERICAN REPUBLIC (2018); DAVID S. SCHWARTZ, THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF *MCCULLOCH V. MARYLAND* (forthcoming 2019); Mark R. Killenbeck, *"All Banks in Like Manner Taxed?" Maryland and the Second Bank of the United States,* 44 Journal of Supreme Court History (forthcoming 2019). *See also 2019 Salmon P. Chase Distinguished Lecture and Faculty Colloquium on "McCulloch at 200"* https://www.law.georgetown.edu/constitution-center/chase-lecture-and-colloquium/chase-lecture-colloquium/ [https://perma.cc/BLW8-G8ST]

The University of Arkansas Law Review generously offered publication to a selection of the papers presented at the workshop. These papers follow.

Sanford Levinson leads off with *The Confusing Language of McCulloch v. Maryland: Did Marshall Really Know What He Was Doing (or Meant)?* Levinson confronts a key idea that has seemed innocuous to generations of readers of the opinion, but that turns out to be quite momentous. In calling Maryland "a sovereign state" at the start of the opinion, Marshall was using a term freighted with historical and contested meaning. Levinson demonstrates that constitutional platitudes about divided sovereignty in our federal system beg crucial theoretical questions. Mark Killenbeck's contribution, *M'Culloch in Context*, argues that a better understanding of the opinion can be gained by reading it in conjunction with the other two great cases of the 1819 term, *Dartmouth College v. Woodward*[10] and *Sturges v. Crowninshield*.[11] The three cases together, Killenbeck argues, demonstrate a nationalist project that was betrayed by the Taney Court and its successors until the mid-twentieth century.

The next two pieces, Mark Graber's *Overruling McCulloch*?, and my own *Defying McCulloch? Jackson's Bank Veto Reconsidered*, are something of a matched pair examining the fate of *McCulloch* in the Jacksonian era. Graber offers fascinating portraits of the sixteen men who served on the Taney Court (1836-1864), demonstrating the dominance of their political commitments to Jacksonian ideas. Against this backdrop, he argues that it was unnecessary for the Court to formally overrule *McCulloch* to implement the Jacksonian pro-slavery, states'-rights constitutional vision because that was being done by Jacksonian presidents and congressional majorities. Graber introduces the idea of "partisan supremacy," in which the Court defers to the political branches in matters of constitutional interpretation when doing so is consistent with the justices' partisan commitments. In *Defying McCulloch?*, I argue that Jackson's famous veto of the recharter of the Second Bank contains important cross-currents at odds with the conventional picture of the veto as a landmark of presidential defiance of the

10. 17 U.S. (4 Wheat.) 518 (1819).
11. 17 U.S. (4 Wheat.) 122 (1819).

Supreme Court. When read closely as a legal text, the Bank Veto Message lays out a doctrinal roadmap for undermining *McCulloch* without overruling it—a roadmap assiduously followed by the Taney Court.

The symposium concludes with the contribution by Yxta Murray, entitled *What FEMA Should Do After Puerto Rico: Toward Critical Administrative Constitutionalism*. Murray brings *McCulloch* into the 21st century by applying it to constitutional issues raised by the federal government's inadequate response to the devastation caused by Hurricane Maria in Puerto Rico. Murray points to *McCulloch*'s requirement that "necessary and proper" laws must conform to "the letter and spirit of the Constitution." Rather than construing that qualification as a limitation authorizing courts to strike down acts of Congress, Murray argues that it should be understood as imposing an obligation on Congress to affirmatively promote constitutional norms, such as the guarantee of equal protection.

A word of thanks is due to Professor Mark Killenbeck, the Wylie H. Davis Distinguished Professor of Law at the University of Arkansas School of Law. Professor Killenbeck was well established as a leading scholar in Constitutional Law and American Legal History when he published the first book-length study of *McCulloch* in 2006. This outstanding work, which is an essential starting point for research into the case, has inspired much of the significant interest in *McCulloch* that has emerged in the last decade. Professor Killenbeck, far from claiming *McCulloch* as his own scholarly "turf," has been extremely supportive of other scholars attempting to contribute to this subject. In the highest traditions of collegiality, he has generously devoted time to reading drafts and offering insightful comments, sharing his comprehensive knowledge of U.S. constitutional history. The participation of the Arkansas Law Review in publishing this symposium is the direct result of Professor Killenbeck's good offices.

We welcome you the reader to join this scholarly birthday party for *McCulloch* at 200. What better way to celebrate the great case than to give it a close and new look.