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MCCULLOCH'S "PERPETUALLY ARISING" QUESTIONS

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I'm truly honored to have my book be the subject of a symposium on Balkinization, and I'm deeply grateful to Jack Balkin and John Mikhail for organizing and hosting it. Among its many gratifications for me personally, the symposium guaranteed that at least eight people would read the book. That these readers have engaged with it so closely and insightfully is icing on the cake.

My first article on *McCulloch* four years ago, which became the basis for a couple of the early chapters in the book, insisted that *McCulloch* was properly interpreted as far less nationalistic than we were taught to think.[1] But Sandy Levinson persuaded me that I was mistaken in asserting that there was one true interpretation of the case. The more I thought about it, the more my interpretation of *McCulloch,* like the arc of federalism history, would bend toward nationalism. The case is highly—probably studiedly—ambiguous, and the logic of its theory of implied powers is so decidedly nationalistic that the "aggressive nationalism" interpretation I take issue with is not exactly wrong. By the time I completed the book, I had come around to the view that Marshall tried to mask, and later actually retreated from, the nationalistic logic of his own *McCulloch* opinion, and that the Supreme Court has never consistently embraced that logic.

But if a book winds up as a mental map of the author's evolving thinking, it will be confusing and will invite conflicting interpretation. I was therefore delighted that the symposium posts read the book the way I ultimately hoped it to be understood. The posts by Richard Primus and Victoria Nourse are the sort of book reviews an author daydreams about: expressing what I tried to

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1. David S. Schwartz, *Misreading* McCulloch v. Maryland, 18 U. PA. J. CONST. L. 1, 23 (2015).

convey in language better than I was able to write, while extending the book's implications into ideas of their own. Primus is too modest to say that he is one of the two leading figures (John Mikhail is the other) in the "new wave of literature arguing for . . . skepticism toward the orthodox account of Congress as a legislature limited by enumerated powers."[2] If my book contributes to that literature, then my work here is done. Nourse sees my book as supporting her view of federalism as "a story of judicial hubris." As she crisply puts it, "No federalism standard created by courts can destroy the states."[3] But the Court has frequently assumed otherwise, and it is this view, I argue, that has led it to ignore *McCulloch*'s full implications for most of the past 200 years.

Franita Tolson and Mark Graber use my brief treatment of *McCulloch* and the Reconstruction Amendments as a springboard for a stimulating discussion of the enforcement clauses. Graber argues that the rights/structure distinction in constitutional law teaching and doctrine denigrates the legislative role in creating and enforcing rights. That's an extremely important insight that delegitimates cases like *City of Boerne v. Flores*[4] and *Shelby County v. Holder*,[5] as well as the Court's failure to overrule *The Civil Rights Cases*[6] when upholding the 1964 Civil Rights Act. Tolson argues here, as in her excellent scholarship,[7] for a broad construction of Congress's enforcement powers under these amendments. According to Tolson, the phrase "appropriate legislation" in the enforcement clauses of all three Reconstruction Amendments signals a design to read these clauses synergistically with the other enumerated powers of Congress. I couldn't agree more that Congress's enforcement powers under these

2. Richard Primus, *Marshaling* McCulloch, BALKINIZATION (Nov. 11, 2019) [https://perma.cc/PK9R-WBNA]. *See, e.g.*, John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L. J. 1045 (2014); Richard Primus, *"The Essential Characteristic": Enumerated Powers and the Bank of the United States*, 117 MICH. L. REV. 415 (2018).

3. Victoria Nourse, McCulloch v. Maryland: *Not Only Right, But Inevitable*, BALKINIZATION (Nov. 18, 2019)

4. 521 U.S. 507, 527-29 (1997).

5. 570 U.S. 529, 555 (2013).

6. 109 U.S. 3, 14-15, 25 (1883).

7. *See e.g.*, Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 384-86 (2014).

amendments should be read broadly, and Tolson and I undoubtedly agree that the Court undermined the spirit of these power grants in *The Civil Rights Cases* and *Shelby County*.

John Mikhail and Kurt Lash, in very different ways, enrich our understanding of *McCulloch*'s context. I will reply to Lash in a separate post. Mikhail shows that *McCulloch*, rather than representing the alpha and omega of congressional powers, is but a piece in the larger puzzle of the Constitution's enumeration of powers.[8] That puzzle is whether the Constitution limited the national government to its enumerated powers. Mikhail, as I noted above, is the leading figure along with Richard Primus in an emerging body of scholarship suggesting that the Constitution's grant of powers was not so limited. Mikhail's current post, along with his recent Balkinization symposium contribution on Jonathan Gienapp's splendid *The Second Creation*,[9] are essential reading on this vital question. As Mikhail demonstrates, this question cannot be answered by cherry-picking quotations from *The Federalist* or the ratification debates, but requires disentangling the positions taken in the series of debates from the Philadelphia Convention through the First Congress, with careful attention to the constitutional position of slavery. Mikhail's dueling "slavery syllogisms," by which he explains the pro-slavery motivation behind a limited-enumerated-power interpretation of the Constitution, are a brilliant addition to scholarship on federal powers.

Anything written about *McCulloch* since 2006 owes a huge debt to Mark Killenbeck's and Sandy Levinson's scholarship on the case.[10] Along with that of Gerard Magliocca and Jack Balkin,[11] their work asks whether we really understand *McCulloch* as

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8. John Mikhail, McCulloch, *Slavery, and the Sweeping Clause*, BALKINIZATION (Nov. 25, 2019)

9. John Mikhail, *Fixing the Constitution's Implied Powers*, BALKINIZATION (Oct. 25, 2018), [https://perma.cc/9WS2-FD6V]; JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 68 (2018).

10. *See, e.g.*, MARK R. KILLENBECK, *M'CULLOCH V. MARYLAND*: SECURING A NATION 90 (2006); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1008 (1998); Sanford Levinson, *The Confusing Language of* McCulloch v. Maryland*: Did Marshall Really Know What He Was Doing (or Meant)?*, 72 ARK. L. REV. 7, 9 (2019).

11. Gerard N. Magliocca, *A New Approach to Congressional Power: Revisiting the* Legal Tender Cases, 95 GEO. L.J. 119, 125 (2006); Balkin & Levinson, *supra* note 10; Jack M. Balkin, *The Use That the Future Makes of the Past: John Marshall's Greatness and Its*

well as we think we do, and why and how it holds a place within the "canon" of constitutional law. In his post, Killenbeck argues that *McCulloch* presents "a far more Marshallian conception of federal power" than is recognized in revisionist accounts, particularly when we consider Marshall's felt need to navigate the hostile Jeffersonian-Republican political environment in which he wrote. I agree with Killenbeck that Marshall obscured *McCulloch* in a (perhaps vain) effort to preempt attacks on the Court by strict constructionists while offering a theory of implied powers that was indeed "robust." But Marshall himself backed away from the robust implications of implied powers almost immediately after the opinion was issued—starting with his April and June 1819 editorials defending *McCulloch*[12] and more consequentially in *Gibbons v. Ogden* (1824).[13] Thus, to my mind, Marshall's failure to cite *McCulloch* in later cases, which Killenbeck attributes to Marshall's judicial writing style, was more substantive in its implications. For reasons I explain in Chapter 4, Marshall refrained from applying the broad implied powers concept to the Commerce Clause, where it might have done significant work in advancing nationalist jurisprudence. In part for that reason, and in contrast to the conventional view, I argue that the appellation "nation builder" applies far more accurately to Marshall's National Republican contemporaries Henry Clay and John Quincy Adams than it does to Marshall. Clay and Adams, unlike Marshall, actually argued that the Constitution blessed the building of national infrastructure.[14]

Sandy Levinson has read and parsed the *McCulloch* opinion more than anyone: even in conversation, he can quote passages, chapter and verse, and can cite them by paragraph number. In his symposium contribution, Levinson continues to raise probing questions about Marshall's argumentative technique and conceptual difficulties in *McCulloch*. For example, what did Marshall

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Lessons for Today's Supreme Court Justices, 43 WM. & MARY L. REV. 1321, 1336-37 (2002).

12. *See* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 78, 155 (Gerald Gunther, ed. 1969).

13. 22 U.S. (9 Wheat.) 1, 33 (1824).

14. DAVID S. SCHWARTZ, THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF *MCCULLOCH V. MARYLAND* 46-47, 59-80 (2019).

mean when calling Maryland a "sovereign" state in the opinion's first line? Levinson also shows us that there is much more to be learned from the frequently underemphasized second section of the opinion, dealing with the taxation question, which Levinson dubs "*McCulloch* II." Levinson's longstanding love affair with *McCulloch* was a source of inspiration to my research, but his post, and more recent writing—including his Salmon P. Chase Lecture—look like a series of "Dear John [Marshall]" break-up letters.[15] He continues to call Marshall's opinion the work of "a rhetorical genius," but questions the quality of Marshall's reasoning, particularly on such key concepts as "sovereignty" and the concurrent power of taxation. Levinson goes so far as to suggest that Holmes's "famously snarky address" on John Marshall Day in 1901[16] may offer more truth than the conventionally idolatrous portraits of Marshall.

Levinson's post demonstrates that *McCulloch* is a deep, if not bottomless, well of ambiguity such that new interpretations of it, to borrow Marshall's phrase, "will probably continue to arise, as long as our system shall exist." Levinson is therefore quite right that my book cannot be a "definitive" account of *McCulloch*; I can only hope that it is a useful contribution to an ongoing dialogue.

15. Levinson, *supra* note 10, at 28-30; Sanford Levinson, Salmon P. Chase Distinguished Lecture at the Georgetown Center for the Constitution, 2019 Salmon P. Chase Lecture and Colloquium: The 200th Anniversary of *McCulloch v. Maryland* (Dec. 5, 2019).

16. OLIVER WENDELL HOLMES, *John Marshall*, *in* COLLECTED LEGAL PAPERS 266 (1920).