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Scholarship in Review: A Response to David S. Schwartz's *The Spirit of the Constitution: John Marshall and the 200-Year Odyssey of McCulloch v. Maryland*

Law Review Editors

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**SCHOLARSHIP IN REVIEW: A RESPONSE TO
DAVID S. SCHWARTZ'S *THE SPIRIT OF THE
CONSTITUTION: JOHN MARSHALL AND THE
200-YEAR ODYSSEY OF MCCULLOCH V.
MARYLAND***

Arkansas Law Review Editorial Board

INTRODUCTION

We are elated to introduce, and the *Arkansas Law Review* is honored to publish, this series discussing and applauding David S. Schwartz's new book: *The Spirit of the Constitution: John Marshall and the 200-Year Odyssey of McCulloch v. Maryland*.¹ Schwartz sets forth meticulous research, coupled with unparalleled insight, into the opinion penned by Chief Justice John Marshall and details the winding path Marshall's words have traveled over the past 200 years. Schwartz argues that the shifting interpretations of *McCulloch*, often shaped to satisfy the needs of the time, echoes the true spirit of the Constitution.

Schwartz's book is incisive and insightful. It has rightly received significant attention among the nation's leading scholars. For instance, Jack N. Balkin, Knight Professor of Constitutional Law and the First Amendment at Yale Law School selected the book for discussion in an online symposium on his blog, Balkinization.² Professor Balkin generously agreed to allow the *Arkansas Law Review* to publish edited versions of the online symposium and six of the initial participants agreed to contribute: David S. Schwartz, Foley & Lardner-Bascom Professor of Law,

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

2. In the pages that follow, prominent constitutional scholars examine Schwartz's book, expounding, extrapolating, and posing further questions about the meaning and impact of *McCulloch*. These pieces are adapted from a symposium originally published on Balkinization (organized by Jack Balkin and John Mikhail). See *Symposium on David Schwartz, The Spirit of the Constitution*, BALKINIZATION (Nov. 11, 2019), available at <https://balkin.blogspot.com/2019/11/symposium-on-david-schwartz-spirit-of.html>.

University of Wisconsin Law School; Sanford Levinson, W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law, University of Texas Law School; Richard Primus, Theodore J. St. Antoine Collegiate Professor, University of Michigan Law School; Mark A. Graber, Regents Professor, University of Maryland Carey School of Law; Franita Tolson, Vice Dean and Professor of Law, University of Southern California Gould School of Law; and Kurt Lash, E. Claiborne Robins Distinguished Professor of Law, University of Richmond School of Law.

The *Arkansas Law Review* is thrilled to publish Professor Franita Tolson's commentary on Schwartz's book. In responding to Schwartz, Professor Tolson offers a novel and exciting perspective on the Reconstruction Amendments' enforcement clauses. Her essay serves a meaningful contribution to the literature.

In recognizing her wonderful essay, however, the *Arkansas Law Review* must also offer Professor Tolson a profound apology. An earlier version of this series errantly and inexcusably omitted her contribution. The mistake has weighed heavily on our journal's editors since its discovery. Despite our error, Professor Tolson extended us unwarranted grace and understanding as we worked to correct the issue, and we are immensely grateful to her for her generous response to our omission. This series would have been deficient without Professor Tolson's voice.

Professor Sanford Levinson engages in a fascinating discussion of both *McCulloch* and its author, Chief Justice John Marshall. The former, Levinson notes, holds a place of unique importance in constitutional law and history. The latter, Levinson equates to "a master of intellectual three-card monte," whose skills were on full display in *McCulloch* as Marshall engaged in both extreme judicial restraint and an assertion of significant judicial power.

Professor Richard Primus broadens the scope of Schwartz's book beyond *McCulloch* and Marshall, observing that the book is truly "about the long struggle over the scope of national power." It is in this context that Primus believes Schwartz's book will contribute to a reshaping of the constitutional worldview by giving readers the sense that constitutional authorities have been read narrowly in order to limit congressional power.

Professor Mark Graber praises Schwartz's treatment of the way aspects of *McCulloch* have been "used, abused, or ignored in light of the dominant constitutional ethos of the time." Graber traces these varying interpretations of *McCulloch* through our nation's history and concludes that *McCulloch* deserves canonical status not only for defining government powers but for illuminating the constitutional politics of fundamental rights.

Professor Kurt Lash dissents from many of the views articulated in Schwartz's book, arguing that Justice Marshall's opinion sets forth a mythical origin story of the Constitution. In his view, "Schwartz comes not to praise the mythological *McCulloch*, but to bury it." Schwartz, in his response, disagrees with much of Lash's article. After reading each critique, our reader will walk away having peered into the scholarly debate of one of our nation's most historic cases—and having enjoyed herself in the process.

On behalf of the *Arkansas Law Review*, we would like to express our sincerest gratitude to the incredible professors who so generously contributed these pieces of scholarship to the *Review*. Additionally, the *Arkansas Law Review* would like to thank Professor Mark R. Killenbeck, Wylie H. Davis Distinguished Professor of Law, for his efforts in bringing this series to our journal. Professor Killenbeck has made significant contributions to our understanding of the Constitution and to the *Arkansas Law Review*. In 2019, our journal published its first series debating *McCulloch*—a series made possible by Professor Killenbeck and appropriately dubbed a "scholarly birthday party for *McCulloch*" by Schwartz himself.³

We welcome you to enjoy this phenomenal series, one that unequivocally proves what David S. Schwartz averred in the last two lines of *The Spirit of the Constitution*: "The truth is that *McCulloch* did not make great constitutional law. Rather, constitutional law made *McCulloch* great."⁴

3. See generally 72 Ark. L. Rev 1, 1-163 (2019).

4. SCHWARTZ, *supra* note 1, at 255.