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# Does Importance Equal Greatness? Reflections on John Marshall and McCulloch v. Maryland

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# DOES IMPORTANCE EQUAL GREATNESS? REFLECTIONS ON JOHN MARSHALL AND *MCCULLOCH V. MARYLAND*[1]

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David S. Schwartz's *The Spirit of the Constitution: John Marshall and the 200-Year Odyssey of* McCulloch v. Maryland, is a truly excellent book, for which I was happy to contribute the following blurb appearing on the back jacket:

> "David Schwartz has written an indispensable study of the single most important Supreme Court case in the canon. As such, he delineates not only the meaning and importance of the case in 1819, but also the use made of it over the next two centuries as it became a central myth and symbol of the very meaning of American constitutionalism."

I meant every word of it. It *is* indispensable, which means that it not only deserves to be read, but really *must* be read, by anyone wishing to be truly literate in the subject of American constitutional law and its development over time. Jack Balkin and I published an essay in the *Harvard Law Review* some two decades ago[2] about the various "canons in constitutional law," where we distinguished among what we called the "pedagogical," "cultural literacy," and "contemporary constitutional theory" canons. That is, cases that legal academics choose to teach as part of introductory courses—or place in casebooks designed to initiate students into the study of constitutional law—may or may not register in the memories of professional lawyers, let alone even well-educated laity. They are irrelevant to the actual practice of law and

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1. This is a slightly revised version of my contribution to a symposium on David Schwartz's book initially posted on Balkinization. Sandy Levinson, *Does Importance Equal Greatness? Reflections on John Marshall and* McCulloch v. Maryland, BALKINIZATION (Nov. 15, 2019), [https://perma.cc/2JUY-2J5S].

2. J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998).

rarely, if ever, come up in general conversation so that it might prove embarrassing not to be aware of a case. And, separately, there are cases that are indeed well known that rarely, if ever, appear as the central focus of sophisticated treatments of constitutional theory, just as the cases that *do* appear in such articles may be, as a practical matter, both untaught in introductory courses and sufficiently esoteric that even a fully competent lawyer would be forgiven ignorance of the case in question.

Consider the chestnut case of *Marbury v. Madison*,[3] surely part of the cultural literacy canon but otherwise, I believe, justifiably ignored. I have achieved a certain notoriety by refusing to teach *Marbury*, which I consider basically a waste of students' valuable time in comparison with other cases—my stock example is *Prigg v. Pennsylvania*[4]—that I think are far more important for students to grapple with. No one cares about the actual legal issue raised in *Marbury*—whether Congress can add to the original jurisdiction of the Supreme Court; it is not relevant to any contemporary litigation, nor, as a matter of fact, does *Marbury* truly feature as the centerpiece of contemporary articles on constitutional theory, including, for that matter, the propriety of judicial review. No one who believes in modern judicial review is truly convinced by Marshall's arguments, and those persuaded by his rhetoric can find themselves quite critical of the contemporary Court. Given that *Marbury* is part of the cultural literacy canon, I usually did take literally five minutes to mention it to students before moving on to something I consider far more important for their education.

What is distinctive about *McCulloch v. Maryland* is that a full two centuries after its decision, it remains a part of all three canons. It is the only case, for example, that is printed unedited in the casebook that Jack and I co-edit, along with Akhil Amar and Reva Siegel,[5] and I have conducted courses at both Harvard and the University of Texas in which the case was read aloud—

3. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

4. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). My own take on *Prigg* can be found at *Is* Dred Scott *Really the Worst Opinion of All Time? Why* Prigg *is Worse than* Dred Scott *(But Is Likely to Stay Out of the "Anticanon")*, 125 HARV. L. REV. FORUM. 23 (2011).

5. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 39 (7th ed. 2018). Brest created the casebook singlehandedly in 1975; he no longer plays an active role in the editorial process.

and discussed—in its entirety over a twelve to fifteen-hour period of classes. Perhaps that may be thought excessive, but I certainly know of no teacher of an introductory course—or editor of a casebook—who ignores the case. Eight years ago, when visiting the Yale Law School and teaching an introductory constitutional law course, I spent my usual several weeks on *McCulloch* and explained to undoubtedly restive students that I fully expected it to be intensely discussed in the Supreme Court's much anticipated decision in the Obamacare case that came down in 2012. I was relieved, but not surprised, when my expectations were fully met.[6] The discussion of the meaning of the Necessary and Proper Clause was as angry and disputatious in 2012 as it was in 1819, when James Madison, who had, after all, signed the Bill establishing the Second Bank of the United States, wrote Spencer Roane of Virginia that the Constitution never would have been ratified in 1787-88 had delegates to the various conventions realized that the Clause would take on the meaning assigned to it by Chief Justice Marshall.[7] "Necessary," as we all know, turned out to mean "convenient" or "useful," with attendant liberation, as it were, of congressional lawmakers, a proposition that can still engender heated argument today.

To be sure, and this is an important theme of Schwartz's book, that is not the only message one can take from the opinion. As is true of most of the canonical opinions, one can find mixed messages and, therefore, develop conflicting doctrines that ostensibly follow from the valorized opinions. For reasons that I literally do not understand, Marshall chose to begin his opinion by referring to Maryland as a "sovereign state," which it most clearly is not, but there can be little doubt that by doing this he ended up giving aid and comfort to an anti-nationalist form of federalism that he was adamantly opposed to. Indeed, my immediately prior contribution to the *Arkansas Law Review* elaborated my perplexity about the very first sentence of Marshall's opinion.[8] Similarly, he writes fairly early on that "[t]his government is acknowledged by all to be one of enumerated powers," which provides for many

6. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2011).

7. *See* BREST ET AL., *supra* note 5, at 55.

8. Sanford Levinson, *The Confusing Language of* McCulloch v. Maryland*: Did Marshall Really Know What He Was Doing (or Meant)*?, 72 ARK. L. REV 7, 21 (2019).

the basis of the proposition that the national government possesses *only* these "enumerated powers" rather than "at least" what is written down. As it happens, Schwartz, University of Michigan Professor of Law Richard Primus, and Georgetown Professor of Law John Mikhail are currently writing full-scale scholarly attacks on this common belief, noting that Marshall never stated that the enumerated powers provided an exclusive and exhaustive account of what powers are available to the national government, even as gilded by his capacious interpretation of the "necessary and proper" clause. Mikhail, for example, places great reliance on the Preamble as providing a source of power.

In Paragraph 38 of the opinion—"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"—is often interpreted basically to license Congress to do whatever it wishes. Yet Paragraph 42, obviously only a few lines later, promises that the Court will monitor overreaching by a Congress that uses reference to assigned powers as only a "pretext" for what is not properly within that ambit. "[S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land." Not surprisingly, almost every lawyer educated since 1942 knows Paragraph 38 because it has been cited so often to justify what came to be called "the New Deal Settlement" and to stave off accusations that Supreme Court opinions upholding wide-reaching congressional legislation were "revolutionary" (at least in constitutional terms). It is worth noting that Bruce Ackerman's important rendering of the New Deal as a "constitutional moment" amending the Constitution outside Article V in effect requires ignoring, or at least diminishing the relevance, of *McCulloch.*

Yet, as Schwartz notes, every lawyer educated in the late nineteenth and early twentieth centuries would have been at least as familiar, if not more so, with Paragraph 42 inasmuch as it was repeatedly cited in what were often 5-4 decisions striking down federal legislation on the ground that Congress was in fact acting

*ultra vires* by asserting a national "police power" under the guise of regulating commerce. This was, of course, basically correct, though the dominant response, including that of the Court, and especially after the New Deal, is "so what," given the establishment of some "nexus" with interstate commerce, however tenuous.

As Marshall himself writes, a constitution is "designed to endure" and not to emulate, say, what Hamilton termed the "imbecilic" Articles of Confederation,[9] which proved inefficacious; this necessarily means that the United States Constitution *mus*t be "adapted to the various crises of human affairs" rather than read as trapping us inside a collective iron cage that prohibits even the possibility of mastering these crises. In any event, it should be clear beyond dispute that *McCulloch* is of almost unique importance on its 200th anniversary even if, as Schwartz demonstrates, it was in fact often ignored. Therefore, any book delving as deeply into its history and later impact as Schwartz's does will therefore be an important moment in legal scholarship.

All of this being said, I confess that I do find myself, partly as the result of the stimulation of reading Schwartz's book, more and more wondering whether *McCulloch*'s truly undeniable "importance" translates into it being as well a "great opinion" that establishes Marshall as a uniquely "great judge." Why, after all, is he often referred to as the "Great Chief Justice"? Oliver Wendell Holmes gave a famously snarky address on "John Marshall Day" in 1901, celebrating the 100th anniversary of his appointment as one of John Adams's "midnight judges" to the federal judiciary as a presumed guardian against the Jeffersonian menace about to take power. What Holmes was willing to say was that, like other ostensibly great men, Marshall "represented a great ganglion in the nerves of society"; he had the great advantage of being present at "a strategic point in the campaign of history, and part of his greatness consists in his being there." This is obviously very different from saying, for example, that his greatness consisted in his providing a role model for future judges or even that

9. *See* THE FEDERALIST NO. 15 (Alexander Hamilton); THE FEDERALIST NO. 20 (James Madison & Alexander Hamilton).

his opinions were necessarily persuasive, let alone convincing, on further reading.

Marshall *was* a rhetorical genius, but this is inevitably a mixed compliment once one sees through some of the rhetoric, including the presuppositions that are smuggled into the opinions and are, by the very nature of presuppositions, assumed rather than argued for. We know from one of the classic critiques of rhetoric, Plato's *Gorgias* dialogue, that the acid test for the skilled rhetor is to make "the lesser appear the greater," to persuade listeners that what is "in fact" the weaker argument is better than its challenger. To mention only undiscussed presuppositions, consider, for example, his declaration that the United States was destined to reach the Pacific Ocean and become a great empire in its own right, which necessitated (especially if one had a lax definition of "necessity") congressional power to charter a bank (and, of course, much else). If one did not share such imperial ambitions, one might be satisfied to tend one's garden, but that is never an offer, as it were.

Moreover, Marshall might have upheld the Bank on any one of multiple arguments: To name only three, in addition to the one he offered, he could have engaged in the equivalent of independent review and determined that there was indeed what we would today call a "compelling interest," demonstrating the "necessity" under a rigorous definition of chartering the Bank. Or, somewhat different would have been a review of the congressional debate regarding the Bank and the determination that, as with modern administrative agencies, Congress had indeed given a "hard look" at the arguments for and against a Bank and, using the correct standard of rigorous "necessity," reasonably determined that the General Welfare really would be enhanced by establishing a Second Bank after the lapse of the First Bank. Or, as Eric Lomazoff has argued in his own recent book, *Reconstructing the National Bank Controversy*, he could have adopted the argument actually proffered by Madison and his allies, which is the propriety of the Bank under the Coinage Clause of Article I, something Marshall simply ignored in his desire to offer a far broader, Hamiltonian, reading of the Constitution. One reason that *McCulloch* repays close reading is precisely that Marshall is such a clever rhetorician. Watching him perform is a bit like observing a master of

intellectual three-card monte. One might think one is following the moves and, therefore, can locate the ace, but one is almost always wrong unless one can slow down the action and observe the various feints and deceptions.

Is Schwartz's book "definitive"? The answer is no, and not simply for the same reason that one can no more write a truly "definitive" study of *McCulloch* than one can of *King Lear*, especially if one is interested not only in what Shakespeare might have been thinking, but also in the historical reception and productions of the play through the decades. After all, for almost a century, apparently, Cordelia lived, because it was just too sad to accept her cruel and unjustified death. Who knows what the future might bring with regard to directors "revisioning" the play? Cordelia might still die, but perhaps Regan and Goneril will be re-imagined as protofeminists in justified revolt against an almost stereotypically patriarchal tyrant. Richard Rorty once defined intellectual history as a process by which ostensible "interpreters" took culturally authoritative texts and "beat them" into forms that would be useful for new arguments in new settings. Whether or not that describes the history of philosophy, it is surely accurate regarding the use of legal arguments in the development of legal doctrines. Lawyers *are* rhetors, committed not to some Dworkinian notion of "the right answer" but, rather, to presenting whatever arguments are thought to enhance the interests of one's client. Judges may not have clients in a standard sense, but, as Balkin and I have also argued,[10] they *do* have distinct visions of what we call "high politics" as to what will best serve the interests of the United States—or perhaps the institutional interests of the Court itself, as in *Marbury*—and the arguments are crafted accordingly.

But there is one other major reason beyond the inability to foretell the future that Schwartz's book, however truly invaluable, nonetheless has its limits: like almost all modern treatments of *McCulloch*, it concentrates almost exclusively on what professionals have come to call *McCulloch* I, that is, the first 45 paragraphs of the opinion that uphold congressional power to charter the Bank. That is, to be sure, the part of the opinion that is of

10. *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001).

overwhelming importance, for good or for ill, in our world today. But *McCulloch* I is immediately followed by 30 paragraphs of *McCulloch* II, in which the lack of Maryland's alleged "sovereignty," however much it might be proclaimed in the very first sentence, is made clear inasmuch as the Court invalidates the state's attempt to tax the Bank on the basis of what Marshall identifies as the "texture" of the Constitution rather than anything in the text or even demonstrable history that might support the invalidation. For example, he rather ruthlessly dismisses the relevance of *Federalist* 32, in which Hamilton fully recognizes that the concurrent powers of both states and the national government to engage in taxation would almost inevitably create conflict; Hamilton appeared to suggest that such conflict would (and should) be resolved politically. There was not an iota of a suggestion that the conflict would be "legalized" and made the subject of cases to be settled by the federal judiciary. Instead, Marshall reached out to assert a significant new realm of judicial power. *McCulloch* I can be cited as an example of extreme "judicial restraint," whereas *McCulloch* II is just the opposite.

Moreover, Marshall justifies his conclusion that Maryland is without the power to tax the Bank of the United States by rhetorically presupposing that the Bank is unequivocally an instrument of the national government, akin, say, to an army base or the national Capitol. Not once, though, does he ever deign to inform the reader that the Bank is what we would today describe as a joint venture between the U.S., which owned twenty percent of the stock, and private investors who owned the other eighty percent. When vetoing the renewal of the Bank's charter in 1832, Andrew Jackson would make this a central point. But Monroe's Secretary of the Treasury years earlier had made it clear to the president of the Bank, in a private letter, that his first loyalties should be to the private shareholders. Suffice it to say that there is little in that part of the opinion that should commend it to someone today looking for a model of "great" judging even if we put to one side the brute fact that no judges today write in what Karl Llewellyn identified as the "Grand Style," substituting instead endless (and tedious) exercises in purported analysis of precedents (as against Marshall's willingness to ignore almost completely any existing precedents).

On more than one occasion, I asked my students, as part of final examinations, to specify what they considered the "best" opinion read during the semester and to offer reasons for their designation. Perhaps because they picked up what was then my deep esteem for *McCulloch*, quite a few students selected Marshall's opinion. I suspect I might have done so myself at some stage of my career. I did refer to it as a magnificent state paper, a "prose poem" setting out a vision of American political development as well as of a Constitution conducive to that development. For better or worse, I would not do so now. With all of its problems, I am now inclined to pick Robert Jackson's concurring opinion, signed only by himself, in the *Steel Seizure Case*, not least because it conveys on almost every page a deep sense of a gifted lawyer and citizen truly grappling with the deep issues presented instead of purporting to announce a judgment from on high, in which the judge pretends simply to be the vessel through which the impersonal majesty of the law speaks. But I hope I have also made it clear that this change in my own perception regarding the assessment of *McCulloch* in no way affects my judgment about its continuing unique importance for anyone studying American constitutional law and history or of the indispensability of David Schwartz's marvelous book.