


August 2020

## Marshalling McCulloch

Richard Primus  
*University of Michigan*

Follow this and additional works at: <https://scholarworks.uark.edu/alr>

 Part of the [Constitutional Law Commons](#), [Jurisprudence Commons](#), [Legal History Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Richard Primus, *Marshalling McCulloch*, 73 Ark. L. Rev. 89 (2020).  
Available at: <https://scholarworks.uark.edu/alr/vol73/iss1/6>

This Article is brought to you for free and open access by ScholarWorks@UARK. It has been accepted for inclusion in Arkansas Law Review by an authorized editor of ScholarWorks@UARK. For more information, please contact [ccmiddle@uark.edu](mailto:ccmiddle@uark.edu).

## MARSHALLING *MCCULLOCH*

Richard Primus\*

David Schwartz's terrific new book is subtitled *John Marshall and the 200-Year Odyssey of McCulloch v. Maryland*. But the book is about much more than Marshall and *McCulloch*. It's about the long struggle over the scope of national power. Marshall and *McCulloch* are characters in the story, but the story isn't centrally about them. Indeed, an important part of Schwartz's narrative is that *McCulloch* has mattered relatively little in that struggle, except as a protean symbol.

Schwartz sees the Constitution, properly understood, as warranting a robust vision of national power. The book's studied ambivalence about the canonical status of *McCulloch* is partly a function of *McCulloch*'s capacity to retard as well as to advance national power, and thus to vindicate or repress the spirit of the Constitution, depending on who is using it. In Schwartz's view, *McCulloch* should be pressed into better service for its capacity to vindicate the best view of national power. But better yet would be for that view to be vindicated in a way that did not rely on the backward-looking, court-centered, Marshall-celebrating framework that is inextricably part of marching under the banner of *McCulloch*.<sup>1</sup>

The appearance of the book is an important moment in the development of a new wave of literature arguing for expansive conceptions of national power and, in particular, for skepticism toward the orthodox account of Congress as a legislature limited by enumerated powers. Schwartz's fellow travelers in that

---

\* Theodore J. St. Antoine Collegiate Professor, The University of Michigan Law School.

1. *See, e.g.*, DAVID S. SCHWARTZ, THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF *MCCULLOCH V. MARYLAND* 254 (2019).

literature include John Mikhail,<sup>2</sup> Robert Reinstein,<sup>3</sup> and, well, me.<sup>4</sup> This literature is not skeptical about federalism, and it doesn't think that the national government should be able to act without limits.<sup>5</sup> But it doubts that the Constitution's enumeration of congressional powers can or should do the limiting work that orthodox constitutional-law discourse assigns to it.<sup>6</sup> One of the targets of Schwartz's book is accordingly the familiar idea that even without respect to affirmative limits like those articulated in the First Amendment, there are things that Congress lacks the authority to do, because its enumerated powers are collectively less than a grant of general jurisdiction. In a delightful coinage, Schwartz calls this idea "the mustbesomething rule,"<sup>7</sup> because it holds that there must be something that Congress cannot do, even before we start talking about affirmative prohibitions. (I have previously called this idea the "internal limits canon,"<sup>8</sup> a term with a decent rationale but none of the pizzazz of Schwartz's label, so I may be switching.)

Schwartz thinks the mustbesomething rule is ill-conceived, and he thinks *McCulloch* provides a framework for understanding why. But he is not arguing that Marshall deliberately wrote an opinion that would authorize plenary federal power, nor anything close to it. Instead, the book presents Marshall in *McCulloch* as having practiced "defensive nationalism,"<sup>9</sup> aimed more at resisting radical states'-rights views than at establishing a strong view of national power. Seen in historical context, Schwartz writes, Marshall's opinion is cautious on all of the truly explosive national-power issues of the day, notably slavery and internal

---

2. See, e.g., John Mikhail, *Is the Constitution a Power of Attorney or a Corporate Charter? A Commentary on "A Great Power of Attorney": Understanding the Fiduciary Constitution by Gary Lawson and Guy Seidman*, 17 GEO. J.L. & PUB. POL'Y 407 (2019); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045 (2014).

3. See Robert J. Reinstein, *The Aggregate and Implied Powers of the United States*, 69 AM. U. L. REV. 3 (2019).

4. See Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576 (2014).

5. See, e.g., *id.* at 595-96.

6. See, e.g., *id.* at 596-98.

7. SCHWARTZ, *supra* note 1, at 242.

8. See, e.g., Primus, *supra* note 4, at 578 (emphasis added).

9. SCHWARTZ, *supra* note 1, at 5. Schwartz credits Charles Hobson with the term. *Id.* at 17.

improvements.<sup>10</sup> Much of the real action in nineteenth-century doctrines about federal power, in Schwartz's view, was animated (and distorted) by judicial attempts to prevent Congress from being able to jeopardize chattel slavery in the states where it was practiced. Not until after Emancipation (in particular, in the *Legal Tender Cases*<sup>11</sup>) was *McCulloch* presented as authority for a significantly more robust nationalist vision,<sup>12</sup> and Schwartz describes Justice Strong's use of *McCulloch* in the *Legal Tender Cases* as an exercise in entrepreneurial misreading, one that made more of *McCulloch* than *McCulloch* made of itself.<sup>13</sup> But the post-Civil War Court did not want to embrace *McCulloch*'s nationalism fully, because that would have opened the door to expansive exercises of congressional power under the Reconstruction Amendments, which the Court was determined to avoid.<sup>14</sup> (Again, the specter haunting the construction of congressional power is the need to insulate racial hierarchy against potential reform; Schwartz's thoroughly critical diagnosis of the Court here reads like cold water dumped on Larry Lessig's recent rehabilitative account in *Fidelity and Constraint*.<sup>15</sup>) Only in the 1940s did Chief Justice Stone resuscitate the nationalist use of *McCulloch*, with assists from historians Thomas Reed Powell and Charles Beard.<sup>16</sup> And this time, the Court was about to embrace congressional efforts to combat racial discrimination, so the powerful force that blocked that possibility earlier in history was finally turned in the other direction, and the nationalist reading of *McCulloch* could have staying power.

---

10. *See, id.* at 52-53, 58.

11. 79 U.S. (12 Wall.) 457 (1870).

12. SCHWARTZ, *supra* note 1, at 143-44.

13. *Id.* at 148-49.

14. *Id.* at 155.

15. LAWRENCE LESSIG, *FIDELITY AND CONSTRAINT: HOW THE SUPREME COURT HAS READ THE CONSTITUTION* 284-334 (2019) (presenting an account of Supreme Court jurisprudence during and after Reconstruction on which the Court was not animated by an impulse to preserve racial hierarchy). Lessig's account is partly indebted to the work of Pamela Brandwein. *See* PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* (2011); Lessig, *supra*, at 284 (crediting Brandwein).

16. SCHWARTZ, *supra* note 1, at 201-02.

Schwartz is not the first to see the modern, nationalist view of *McCulloch* as a creature of the mid-twentieth century.<sup>17</sup> But what follows in Schwartz's telling is an argument that even after the New Deal, judicial doctrine has subordinated the robust national-power view that *McCulloch* might represent to a more restrictive view associated with a different Marshall decision: *Gibbons v. Ogden*.<sup>18</sup> The key difference between the two frameworks, Schwartz explains, is the difference between associating Congress's broad, post-New Deal legislative jurisdiction with the Necessary and Proper Clause (per *McCulloch*) and associating it with the commerce power as such (per *Gibbons*).<sup>19</sup> Schwartz reads the modern Court from *Wickard v. Filburn*<sup>20</sup> to *Gonzales v. Raich*<sup>21</sup> as favoring the *Gibbons* paradigm.<sup>22</sup> And that choice had bite, Schwartz says, in the greatest twenty-first century mustbesomething case: *NFIB v. Sebelius*.<sup>23</sup> Chief Justice Roberts's argument that a law creating (rather than regulating) commerce cannot be justified as necessary and proper for the execution of an exercise of the commerce power makes sense, Schwartz argues, only if the scope of congressional power under the Necessary and Proper Clause is limited by the terms of whatever other power it is invoked to support—here, the commerce power.<sup>24</sup> And that sort of transferred limitation would make sense on a *Gibbons* view, where the question is ultimately whether *the commerce power* gives Congress the authority at issue. But on a robust *McCulloch* view, Congress is entitled to do things that are in no way regulations of commerce, so long as they are practically helpful for other things that are regulations of commerce. Naturally enough, Schwartz prefers the necessary-and-proper framework, understood as the more expansive of the two because it overtly authorizes Congress to regulate things that are *not* commerce.

---

17. For one earlier account, see Gerard N. Magliocca, *A New Approach to Congressional Power: Revisiting the Legal Tender Cases*, 95 GEO. L.J. 119 (2006).

18. 22 U.S. (9 Wheat.) 1 (1824).

19. SCHWARTZ, *supra* note 1, at 154-55 (drawing the distinction).

20. *Wickard v. Filburn*, 317 U.S. 111 (1942).

21. 545 U.S. 1 (2005).

22. See SCHWARTZ, *supra* note 1, at 226-34, 242-43.

23. 567 U.S. 519 (2012).

24. See SCHWARTZ, *supra* note 1, at 245.

Schwartz's careful teasing apart of the *McCulloch* and *Gibbons* strands of doctrine over time is one of the book's excellent contributions to the literature. The book makes a compelling case that *McCulloch*'s doctrine has been the more expansive framework through most of history. But to the extent that the project here is not just understanding the past but also setting up the future, it is worth wondering whether the relationship between the two ways of thinking might shift, or might already have shifted. In recent times, the Supreme Court opinion that most thoroughly nails the analytic difference Schwartz is excavating here is Justice Scalia's concurrence in *Raich*, as Schwartz recognizes.<sup>25</sup> Unlike the Court majority, which regarded congressional authority to prohibit the growing of medical marijuana as within the commerce power,<sup>26</sup> Scalia located the relevant provision of law firmly under the Necessary and Proper Clause.<sup>27</sup> And at least as much as any Justice, it was Scalia who understood the limiting potential of deeming exercises of power to occur under the Necessary and Proper Clause rather than under clauses with their own substantive content, because a non-deferential Court will make up its own mind about whether a given action is "improper." (Shutting down medical marijuana was proper, but directing sheriffs to do background checks was not.<sup>28</sup>) So as long as the judiciary remains willing in Commerce Clause cases to respect formal jurisdictional hooks like the one in the reenacted Gun Free School Zones Act,<sup>29</sup> federal legislation might find safer haven in substantively obtuse formalisms deployed within the *Gibbons* paradigm than in the world of normative judgment that awaits under the Necessary and Proper Clause. And in the highest-stakes cases, one might be skeptical that the choice of doctrinal framework will matter. Perhaps the decision will depend, as someone once said, "on a

---

25. *See id.* at 243.

26. *See Raich*, 545 U.S. at 5 (identifying the question presented as one about the scope of the commerce power).

27. *Id.* at 34-35 (Scalia, J., concurring).

28. *See Printz v. United States*, 521 U.S. 898, 923-24, 933 (1997); cf. Richard A. Primus & Roderick M. Hills, Jr., *Suspect Spheres, Not Enumerated Powers: A Guide for Leaving the Lamppost* 15-17 (unpublished manuscript), [<https://perma.cc/CR6G-AP5E>] (explaining the use of the Necessary and Proper Clause as a vehicle for substantive, extra-textual judgments limiting congressional power).

29. 18 U.S.C. § 922(q) (2015).

judgment or intuition more subtle than any articulate major premise.”<sup>30</sup>

The largest potential impact of this book, then, does not flow from its perspicacious reconstruction of this or that doctrinal framework, whether in the modern jostling between *Gibbons* and *McCulloch* or in its treatment of nineteenth-century struggles over the scope of implied powers—though those would be enough to make the book worth reading. It is rather a matter of the book’s gestalt capacity to contribute to the potential reshaping (Schwartz might say correcting) of the big-picture constitutional worldview that law students absorb. If readers come away with the sense that constitutional authorities (judicial and otherwise) have been read in cramped ways in order to avoid letting Congress exercise the full sweep of power that the Constitution warrants, they will be moved incrementally toward Schwartz’s view of the spirit of the Constitution.

---

30. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).