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MCCULLOCH AND THE AMERICAN REGIME

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Professor David S. Schwartz's magnificent *The Spirit of the Constitution: John Marshall and the 200-Year Odyssey of* McCulloch v. Maryland[1] explicitly challenges how we teach government powers in first weeks or semester of constitutional law and implicitly challenges how we teach civil rights and liberties in later weeks or second semester of constitutional law.[2] Contrary to the impression given in many classes on the constitutional law of national powers,[3] no straight line exists from the Marshall opinion in *McCulloch v. Maryland* to the New Deal and beyond. Schwartz meticulously details how, for two-hundred years, different aspects of *McCulloch* have been used, abused, or ignored in light of the dominant constitutional ethos of the time. Both Chief Justice John Roberts and Justice Ruth Bader Ginsburg in *National Federation of Independent Businesses*[4] claimed to be Marshallian, even as they offered constitutional visions that sharply diverged from each other and almost as sharply diverged from that of the *McCulloch* opinion.[5] Professor Schwartz's history of *McCulloch* subverts the common decision to discuss government powers in the first part or semester of constitutional law

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

2. Some law schools require a two-semester constitutional law sequence. Others require one, typically four-hour, constitutional law class. The vast majority of these constitutional law classes use casebooks whose initial chapters discuss the constitutional law of structures/powers and later chapters discuss the constitutional law of rights/liberties. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (6th ed. 2020); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (5th ed. 2005); NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW (20th ed. 2019).

3. *See* CHEMERINSKY, *supra* note 2 (moving immediately from *McCulloch* to *National Federation of Independent Business v. Sebelius*).

4. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

5. *See infra* notes 21-22 and accompanying text.

and fundamental rights in the second part or semester of constitutional law. *The Spirit of the Constitution* highlights how *McCulloch* is central to questions of slavery and race that often form the bulk of the second part or semester of constitutional law.[6] For most of the nineteenth century, government power was the crucial instrument for ensuring that Americans enjoyed certain fundamental rights. Interpretations of *McCulloch* determined the scope of that national power. Progressives turned to *McCulloch* in the 1960s for the government powers necessary to combat Jim Crow. If strengthening national legislatures ought to be central to progressive efforts to turn back right-wing populist movements throughout the universe of constitutional democracy,[7] then *McCulloch* ought to be as canonical a decision for the constitutional politics of fundamental rights as that decision is for the constitutional politics of government powers.

A. The Constitutional Law of Structures/Powers Story

The Spirit of the Constitution is primarily devoted to the checkered history of *McCulloch* as a precedent for broad government powers. Schwartz points out that *McCulloch* when initially decided was an expression of "defensive" constitutional nationalism[8] that largely failed.[9] John Marshall and the Federalist/National Republican majority on the Court sought to provide constitutional foundations for National Republican legislative projects that were under attack from the Old Republicans who later became core members of the Jacksonian Democratic coalition.[10] *McCulloch* may have won the battle in 1819, but the antebellum opponents of broad interpretation of federal powers won the war. By the 1840s, Henry Clay's American System was in shambles. Numerous efforts in Congress to incorporate a national bank, sponsor internal improvements, and promote domestic industry

6. *See infra* notes 23-26 and accompanying text.

7. *See* Mark A. Graber, *What's in Crisis? The Postwar Constitutional Paradigm, Transformative Constitutionalism, and the Fate of Constitutional Democracy*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS? 665, 668 (Mark A. Graber et al., eds., 2018).

8. SCHWARTZ, *supra* note 1, at 5.

9. *Id.* at 87-110.

10. *See generally* Michael J. Klarman, *How Great were the "Great" Marshall Court Decisions*, 87 VA. L. REV. 1111 (2001); Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 STUD. AM. POL. DEV. 229 (1998).

through protective tariffs either failed to pass the national legislature or were vetoed by Jacksonian presidents.[11] Abraham Lincoln during the debates with Stephen Douglas proclaimed that these precedents constitutionally settled that the federal government had no power to incorporate a national bank.[12]

McCulloch became a permanent presence in the American constitutional law of national powers only during the late New Deal when liberal justices committed to the administrative state repeatedly invoked that decision and *Gibbons v. Ogden*[13] in opinions sustaining federal legislation. The common claim that "*McCulloch* 'laid the foundations for the modern welfare state' . . . may not reflect the intentions of the Marshall Court," Schwartz notes, "but there is little doubt that *McCulloch* came to be interpreted this way."[14] *McCulloch* played a crucial role in the two most important cases that signaled the arrival of the New Deal commerce clause. *United States v. Darby*[15] cited *McCulloch* for two crucial propositions when obliterating the line between federal and state power that had structured the constitutional law of

11. *See* Andrew Jackson, *Veto Messages*, *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 483-93 (James D. Richardson, ed., 1897) (no power to finance local improvements) [hereinafter MESSAGES AND PAPERS]; *id.* at 576-91 (no power to establish a national bank); John Tyler, *Veto Message*, *in* 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 63-71 (James D. Richardson, ed., 1897) (no power to incorporate a bank); *id.* 330-33 (no power to improve navigation of rivers); James K. Polk, *Veto Messages*, *in* 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 460-66 (James D. Richardson, ed., 1897) (no power to construct local improvements); *id. at* 610-26 (no power to construct local improvements); Franklin Pierce, *Veto Messages*, *in* 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 247-56 (James D. Richardson, ed., 1897) (no power to construct hospitals for the insane); *id.* at 256-71 (no power to make local improvements); *id.* at 386-88 (no power to make internal improvements); James Buchanan, *Veto Messages*, *in* 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 543-50 (James D. Richardson, ed., 1897) (no power over education); *id.* at 599-607 (no power to make local improvements); *id.* at 608-614 (no power to give public lands away to settlers). *See also* Mark A. Graber, *Resolving Political Questions into Judicial Questions: Toqueville's Thesis Revisited*, 21 CONST. COMMENT. 485, 534-35 (2004). Jacksonian members of Congress also rejected national power to incorporate a bank. *See* CONG. GLOBE, 25th Cong. 1st Sess. app. 96 (1837).

12. Sixth Debate with Stephen A. Douglas at Quincy, Illinois (Oct. 13, 1958*)*, *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245, 278 (Roy P. Basler eds., 1953) (arguing that Jackson and the Democrats reversed McCulloch "as completely as any decision ever was reversed—so far as its practical operation is concerned").

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

14. SCHWARTZ, *supra* note 1, at 213.

15. 312 U.S. 100 (1941).

federal powers for over a century. The first citation was for the proposition, "[t]he power of Congress over interstate commerce . . . extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end."[16] The second citation was for the proposition, "[f]rom the beginning and for many years the [tenth] amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end."[17] Justice Robert Jackson's opinion in *Wickard v. Fillburn* cited *McCulloch* for the proposition, central to New Deal liberalism, that the "conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process."[18]

McCulloch in the twenty-first century became a celebrity citation on questions of national power.[19] One feature of celebrity citations is that the reference is famous, like Paris Hilton at the turn of the twenty-first century, simply for being famous. Schwartz points to the elements of a celebrity citation when he observes,

> *McCulloch* rarely does any real doctrinal work in modern Supreme Court decisions, despite the fact that it has been cited in over 130 opinions since 1969. Most of the time, the justices used *McCulloch* as a symbol for a very abstract point or to signal the importance of the constitutional issue it was deciding.[20]

A second feature of celebrity citations is that all parties on all sides of constitutional controversies cite that text as supporting their position. *McCulloch* as such a celebrity citation was front and center when the Supreme Court considered the

16. *Id.* at 118-19.

17. *Id.* at 124; *See* SCHWARTZ, *supra* note 1, at 219-23.

18. 317 U.S. 111, 129 (1942).

19. For discussions of celebrity citations, see Mark A. Graber, *The Declaration of Independence and Contemporary Constitutional Pedagogy*, 89 S. CAL. L. REV. 509, 518-20 (2016); Mark A. Graber, *The Prince of Fame:* Brown *as Celebrity*, 69 OHIO ST. L.J. 939, 943-44, 1004-13 (2008).

20. SCHWARTZ, *supra* note 1, at 238.

constitutionality of the Affordable Care Act. Chief Justice Roberts was certain John Marshall was on his side. His opinion striking down the individual mandate cited *McCulloch* for the proposition that "the Federal Government 'can exercise only the powers granted to it.'"[21] Justice Ginsburg was as certain that John Marshall would have been as supportive of Obamacare as he was of the Bank of the United States. She cited *McCulloch* for the proposition that "the Constitution was of necessity a 'great outline,' not a detailed blueprint."[22] As good constitutional lawyers, neither Roberts nor Ginsburg was at all perturbed by their invoking a turn of the nineteenth century jurist to resolve a twenty-first century problem that jurist could never have imaged, using a twenty-first century conceptual apparatus that jurist could not have comprehended.

B. The Constitutional Law of Rights/Liberties Story

McCulloch is always present, sometimes present by absence, Schwartz details, when slavery and race are on the table. The first debates over national power were as animated by concerns over federal power to regulate slavery as by concerns over the national bank or internal improvements.[23] Southerners objected to the apparently broad definitions of federal power in *McCulloch* and *Gibbon v. Ogden* because they feared precedents that might license the federal government to restrict the slave trade and, perhaps, human bondage. John Randolph famously declared that a Marshallian understanding of national power would give Congress the power to "emancipate every slave in the United States."[24] James Madison objected to *McCulloch* in part because latitudinous constructions of federal authority might license federal bans on slavery in the territories.[25] Such southern Federalists

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21. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 534-35 (2012) (internal citations omitted). *See id.* at 654 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (citing *McCulloch* for the proposition that the individual mandate was "not 'consistent[ent] with the letter and spirit of the constitution'").

22. *Id*. at 601 (Ginsburg, J., concurring in part) (internal citations omitted).

23. SCHWARTZ, *supra* note 1, at 35-38, 98-99.

24. 41 ANNALS OF CONG. 1308 (1856); *see also* JOHN TAYLOR, CONSTRUCTION CONSTRUED, AND CONSTITUTIONS VINDICATED 313-14 (Richmond, Shepherd & Pollard 1820).

25. *See infra* note 35.

as James Wayne performed daring feats of legal gymnastics when explaining why broad federal powers over commerce did not entail any federal power over slavery.[26]

Concerns over national power in the early republic often trenched on matters commonly taught in Constitutional Law II or in the rights and liberties portion of the single constitutional law course. National Republicans and Whigs saw federal power as a means for advancing Protestant moral virtues and for promoting national commercial prosperity.[27] They sought to build a national university and ensure school systems with particular curricula.[28] Many derived national programs promoting such social services as hospitals from constitutional commitments to ensuring the welfare of the citizenry that constitutionalists in later periods would claim to be positive rights. After calling for internal improvements, a national university, an "astronomical observatory," John Quincy Adams concluded his First Annual Message by claiming,

> if these powers and others enumerated in the Constitution may be effectually brought into action by laws promoting the improvement of agriculture, commerce, and manufactures, the cultivation and encouragement of the mechanic and elegant arts, the advancement of literature, and the progress of the sciences, ornamental and profound, to refrain from exercising them for the benefit of the people themselves would be to hide in the earth the talent committed to our charge—would be treachery to the most sacred of trusts.[29]

For John Quincy Adams and other Whigs, national power was a means for promoting a particular kind of regime rather than simply a means for growing the economy. Adams and his supports did not cite *McCulloch* when championing their vision of

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26. Smith v. Turner, 48 U.S. (7 How.) 283, 428-29 (1849) (Wayne, J., concurring).

27. *See* DANIEL WALKER HOWE, THE POLITICAL CULTURE OF THE AMERICAN WHIGS 8-9 (Univ. of Chi. Press ed., 1979) (discussing the Whig political culture as focusing on increasing total national wealth and as ensuring the entire society converted to Protestantism and its values).

28. *See* Elizabeth Beaumont, *Education and the Constitution: Defining the Contours of Governance, Rights, and Citizenship*, *in* THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 967, 970-71 (Mark Tushnet, Mark A. Graber, & Sanford Levinson eds., 2015); *see also* GEORGE THOMAS, THE FOUNDERS AND THE IDEA OF A NATIONAL UNIVERSITY 47-48 (2015).

29. John Quincy Adams, *First Annual Message*, *in* 2 MESSAGES AND PAPERS, *supra* note 11, at 313-16.

the national powers necessary to create their Protestant regime, but Marshallian premises underlay the construction of that polity.[30]

McCulloch moved out of the background when Americans debated the status of slavery in the territories. Schwartz appreciates that crucial issues in *Dred Scott v. Sandford*[31] revolved around *McCulloch*'s understanding of "'needful.'"[32] One issue in *Dred Scott* was whether Article IV, Section 3, paragraph 2, which declares, "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," authorized the national legislature to forbid human bondage north of the Missouri Compromise line. Justice John McLean cited *McCulloch* for the proposition that "needful rules and regulations" gave Congress the power to ban slavery in all American territories. "[T]he extent of those 'needful regulations,'" he derived from Marshall's opinion, "depends upon the direction of Congress, where the means are appropriate to the end, and do not conflict with any of the prohibitions of the Constitution."[33] Justice Peter Daniel, advancing a southern understanding of "necessary," insisted that banning slavery in the territories was unconstitutional because doing so was not sufficiently necessary.[34] Madison took this view forty years earlier. In language that echoed his previous criticism of *McCulloch*,[35] the former president informed a correspondent that the

30. *But see* CONG. GLOBE, 41st Cong., 3rd Sess. 1376 (1871) (statement of Rep. Townsend) (citing *McCulloch* as supporting a "national system of education").

31. 60 U.S. (19 How.) 393 (1856).

32. SCHWARTZ, *supra* note 1, at 105-07.

33. *Dred Scott*, 60 U.S. (19 How.) at 542 (McLean, J., dissenting); s*ee also Id.* at 614-15 (Curtis, J., dissenting) ("[T]he question whether a particular rule or regulation be needful, must be finally determined by Congress itself. Whether a law be needful, is a legislative or political, not a judicial, question. Whatever Congress deems needful is so, under the grant of power."); CONG. GLOBE, 35th Cong., 1st Sess. 1162 (1858) (statement of Sen. Trumbull) (citing *McCulloch* to justify federal bans on slavery in the territories).

34. *Dred Scott*, 60 U.S. (19 How.) at 491-92 (Daniel, J., concurring).

35. James Madison sets forth his criticism of *McCulloch* in his September 2, 1819 letter to Virginia Supreme Court of Appeals Judge Spencer Roane. *See* Letter from James Madison to Judge Spencer Roane (Sept. 2, 1819), *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 359, 359-62 (Marvin Meyers ed., 1973).

territorial clause merely gave Congress "a power to make the provisions really needful or necessary for the government of settlers."[36]

McCulloch in the debate over slavery in the territories involved regime principles far broader than a commitment to national commercial prosperity. Eric Foner notably details how Republican opponents of slavery had a constitutional commitment to a free labor society.[37] Congressional power created the conditions under which contract would be the fundamental relationship between persons. The ban on slavery in the territories was only one aspect of a Republican congressional program that would facilitate a west settled by farmers and others committed to a free labor regime. The Republican Platform of 1860 called for a "complete and satisfactory homestead measure," "river and harbor improvements of a national character," and "a railroad to the Pacific Ocean."[38] During the Civil War, some Republicans began explicitly citing *McCulloch* as the foundation of this free labor regime. As important, Republicans called for congressional legislation rather than judicial decree as the vehicle for establishing that free labor regime. Nowhere in the Republican Party Platforms of 1856, 1860, and 1864 was any suggestion made that the courts were the institution primarily responsible for protecting rights in the promised anti-slavery polity.

The post-Civil War amendments incorporated *McCulloch*'s understanding of national power as fundamental to the creation of a new American rights regime. Schwartz details how Republicans repeatedly insisted that the enforcement clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments vested Congress with the same powers to implement the constitutional ban on slavery and guarantee of fundamental rights as John Marshall maintained Congress had to implement the provisions of Article I, Section 8. [39] *McCulloc*h was the appropriate precedent because

36. Letter from James Madison to Robert Walsh (Nov. 27, 1819), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON FOURTH PRESIDENT OF THE UNITED STATES 149, 152 (1865). Taney insisted the territorial clause was inapplicable to territories on the west side of the Mississippi. *Dred Scott*, 60 U.S. at 432.

37. *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN 11-39 (1970).

38. *Republican Party Platform of 1860*, THE AM. PRESIDENCY PROJECT (May 17, 1860), [https://perma.cc/8UYG-WEQT].

39. SCHWARTZ, *supra* note 1, at 126-30.

McCulloch was about the use of national power to achieve the fundamental regime goals. Senator Charles Sumner of Massachusetts, when championing the Civil Rights Act of 1875, cited *McCulloch* for the proposition that "the Supreme Court will not undertake to sit in judgment on the means employed by Congress in carrying out a power which exists in the Constitution."[40] Representative James Wilson made the same argument when defending congressional power to pass the Civil Rights Act of 1866.[41] Senator William Stewart of Nevada during the debates over the Supplemental Reconstruction Act cited *McCulloch* for the proposition that: "If those who sustained the Union were right in their theory that the Constitution authorized the suppression of the rebellion then the language of the Constitution itself plainly authorized Congress to pass all necessary laws to carry into execution that power."[42] Representative George Hoar of Massachusetts pointed to *McCulloch* as providing congressional authority to pass the Civil Rights Act of 1871.[43] Representative Robert S. Hale during the debates over the Civil Rights Act of 1875 pointed to *McCulloch* as demonstrating why Congress had extensive power to ban race discrimination under Section 5 of the Fourteenth Amendment.[44]

Republican accounts of the Thirteenth and Fourteenth Amendments during the late 1860s and early 1870s suggest that had the framers followed practices in some constitutional democracies and engrafted the post-Civil War Amendments onto the original Constitution,[45] Article I, Section 8, which outlines the powers of the national legislature, rather than Article I, Section 10, which constrains the power of state governments, would have been the most appropriate location. Antislavery advocates insisted that the Thirteenth Amendment obligated the national

40. CONG. GLOBE, 42d Cong., 2d Sess. 728 (1872).

41. CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866).

42. CONG. GLOBE, 40th Cong., 2d Sess. 929 (1868).

43. CONG. GLOBE, 42d Cong., 1st Sess. 332 (1871). *See* CONG. GLOBE, 42d Cong., 1st Sess. app. 202 (1871) (speech of Rep. Snyder).

44. 3 CONG. REC. 979 (1875).

45. Different methods of engrafting constitutional amendments on to the constitution are illustrated in Richard Albert's book. *See* RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 229-40 (2019).

legislature to adopt legislation ensuring that former slaves would become full citizens. Wilson stated:

> [W]e must see to it that the man made free by the Constitution of the United States, sanctioned by the voice of the American people, is a freeman indeed; that he can go where he pleases, work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; that the rights and guarantees of the good old common law are his, and that he walks the earth, proud and erect in the conscious dignity of a free man, who knows that his cabin, however humble, is protected by the just and equal laws of his country.[46]

Republicans often referred to the Fourteenth Amendment as guarantees enforceable by national power rather than as limits or constraints on government officials. Representative Robert Elliott of South Carolina described Section One as a "constitutional guarantee against inequality and discrimination by appropriate legislation."[47] Republicans no doubt thought courts had some independent role to play in implementing the Thirteenth and Fourteenth Amendments, perhaps akin to the dormant commerce clause, but few antislavery advocates discussed the judicial role during the ratification debates and debates over legislation implementing the Thirteenth and Fourteenth Amendments.[48]

Justice William Strong's opinion in *Ex parte Virginia* spoke for the original conception of the post-Civil War Amendments when he pointed out,

> It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the

46. CONG. GLOBE, 39th Cong., 1st Sess. 111 (1865). *See* Mark A. Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 TEX. L. REV. 1361, 1372-90 (2016).

47. 2 CONG. REC. 410 (1874). *See* 3 CONG. REC. app. 304 (1874) (statement of Sen. Alcorn); 3 CONG. REC. 943 (1875) (statement of Rep. Lynch).

48. *See* Graber, *supra* note 46, at 1371-72.

> amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.[49]

States could not exclude persons of color from juries because Congress in the Civil Rights Act of 1875 had prohibited race-based jury selection in the jury process.[50] No Republican supporter of the Civil Rights Act of 1875 or federal court decision handed down before 1875 presumed that federal courts could forbid states from excluding persons of color from juries in the absence of federal legislation implementing the Fourteenth Amendment.[51]

Free labor constitutionalism changed dramatically during the late nineteenth century. Republicans in Congress and on the federal bench converted the Thirteenth and Fourteenth Amendments from national powers analogous to the commerce clause into individual rights provisions analogous to the contracts clause. By the turn of the century, the Supreme Court had become the institution primarily responsible for implementing the post-Civil War Amendments. Neither the majority nor dissenting opinion in *Plessy v. Ferguson*[52] examined or even mentioned federal statutory law or congressional debates when determining the constitutional legality of segregation in railway cars. The only contributions the elected branches made to the jurisprudence of the freedom of contract instantiated by *Lochner v. New York*[53] were to pass vague laws that enable judicial policymaking[54] and secure the appointment of federal justices opposed to progressive

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49. *Ex parte* Virginia, 100 U.S. 339, 345-46 (1879) (emphasis original).

50. *See id.* at 345; Strauder v. West Virginia, 100 U.S. 303, 310 (1879).

51. *See* Mark A. Graber, The Constitution of the Civil Rights Act of 1875 (2020) (unpublished manuscript) (on file with author).

52. 163 U.S. 537 (1896).

53. 198 U.S. 45 (1905).

54. *See generally* GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY (2003).

legislation.[55] The few persons who bothered asking Congress for civil rights legislation were rebuffed. The constitutional protections persons of color enjoyed before the Great Society came almost entirely from judicial decisions based directly on the Constitution of the United States.[56]

Americans partially reinvigorated the relationship between rights and powers during the 1960s. Congress passed such path-breaking legislation as the Civil Rights Act of 1964,[57] the Voting Rights Act of 1965,[58] and the Fair Housing Act of 1968.[59] The Supreme Court sustained these measures as appropriate exercises of federal legislative power under the Civil War Amendments.[60] The judicial supporters of these measures made ample reference to *McCulloch*. Chief Justice Warren, when upholding the Civil Rights Act of 1964, cited *McCulloch* for the proposition that the commerce power "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end."[61] Warren in *South Carolina v. Katzenbach*, when upholding the Voting Rights Act of 1965, stated that Chief Justice Marshall "laid down the classic formulation" for determining the exercise of national powers when

55. *See generally* Walter F. Murphy, *In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments*, 1961 SUP. CT. REV. 159 (1961).

56. *See* Terry v. Adams, 345 U.S. 461, 469-70 (1953) (holding persons of color may not be excluded from pre-primary voting by private organizations closely affiliated with political parties); Smith v. Allwright, 321 U.S. 649, 662 (1944) (holding political parties cannot prohibit persons of color from voting in primary elections); Bolling v. Sharpe, 347 U.S. 497, 500 (1954); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954); Nixon v. Herndon, 273 U.S. 536, 541 (1927); Guinn v. United States, 238 U.S. 347 (1915). For exceptions, see Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941).

57. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.).

58. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 42 U.S.C.).

59. Pub. L. No. 90-284, §§ 801-819, 82 Stat. 73, 81-89 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619).

60. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249-50 (1964); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966). The Supreme Court sustained a direct ancestor of the Fair Housing Act in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 420-22 (1969).

61. *Heart of Atlanta Motel, Inc.*, 379 U.S. at 258 (internal quotations omitted).

sustaining the constitutionality of the national bank.[62] In seven opinions sustaining government power to promote civil rights and civil liberties published between 1966 and 1970, the Supreme Court quoted "the celebrated words of Chief Justice Marshall in *McCulloch v. Maryland*," '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.'"[63]

A subtle difference nevertheless exists between the constitutional politics of Reconstruction and the constitutional politics of the Great Society. Republicans during Reconstruction, the more Radical Republicans in particular, conceptualized the post-Civil War Amendments, the Thirteenth Amendment specifically, as declaring fundamental regime commitments to be implemented largely, if not exclusively, by Congress.[64] Great Society liberals more often conceptualized the post-Civil War Amendments as declaring particular fundamental rights whose implementation was shared in ways not fully developed in the 1960s by the Supreme Court and Congress. With rare exception, members of Congress and the justices focused on the constitutional power to protect individual rights, not the *McCulloch* power to secure the conditions of a particular fundamental rights regime. Congress was empowered to pass legislation remedying, identifying, and preventing violations of the individual rights enumerated in the Thirteenth, Fourteen, and Fifteenth Amendments.[65] The Voting Rights Act of 1965 forbade "the use of voter qualification laws where necessary to meet the risk of continued or renewed violations of

62. *South Carolina v. Katzenbach*, 383 U.S. at 326. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) ("the *McCulloch v. Maryland* standard is the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment").

63. *Jones*, 392 U.S. at 443 (internal citations omitted). *See* Oregon v. Mitchell, 400 U.S. 112, 143 (Douglas, J., concurring and dissenting); *Katzenbach v. Morgan*, 384 U.S. at 650; United States v. Guest, 383 U.S. 745, 783-84 (1966) (Brennan, J., concurring in part); *South Carolina v. Katzenbach*, 383 U.S. at 326; *Heart of Atlanta Motel, Inc.*, 379 U.S. at 276 (Black, J., concurring); *Heart of Atlanta Motel, Inc.*, 379 U.S. at 281 (Douglas, J., concurring). *But see South Carolina v. Katzenbach*, 383 U.S. at 358 (Black, J. concurring in part) (claiming the above quotation in *McCulloch* supports limiting power to protect voting rights).

64. *See supra* notes 38-45 and accompanying text.

65. *See* City of Boerne v. Flores, 521 U.S. 507, 517 (1997).

constitutional rights."[66] Congress refrained from adopting measures promoting voting in the absence of constitutional rights violations.[67]

C. The Constitutional Law of Structures/Powers/ Rights/Liberties Story

The Spirit of the Constitution suggests that constitutional pedagogy and development might benefit from further breaking down the barriers between constitutional powers and constitutional rights. Americans have historically acknowledged the relationships between government structures and constitutional rights. Alexander Hamilton in *Federalist* 1 asserted that "the vigor of government is essential to the security of liberty."[68] In *Federalist* 31, he declared, "all observations founded upon the danger of usurpation ought to be referred to the composition and structure of the government, not to the nature or extent of its powers."[69] The persons responsible for the Civil War Constitution understood how a liberty regime collapsed the distinction between rights and powers. Conservatives on the Roberts Court echo this conjunction of powers and rights when they repeatedly declare that federalism is a vital protection for liberty,[70] although how in their opinions state rights promote freedom seems obscure to many progressives.[71] Progressives are often less sensitive to potential relationships between Article I, Section 8 and the Fourteenth Amendment. Jesse Choper suggests the Supreme Court should focus exclusively on individual rights, treating questions

66. S. REP. NO. 89-162, pt. 3, at 19 (1965).

67. One might compare H.R.1—For the People Act of 2019, 116th Congress, which after declaring "It is the policy of the United States that . . . all eligible citizens of the United States should access and exercise their constitutional right to vote in a free, fair, and timely manner" outlines such policies as same day registration that promote voting, even though not designed to remedy, identify, or prevent constitutional violations. For the People Act of 2019, H.R. 1, 116th Cong. (2019), [https://perma.cc/6F2W-PF9U].

68. THE FEDERALIST NO. 1, at 35 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

69. THE FEDERALIST NO. 31, at 196 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

70. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012) (quoting New York v. United States, 505 U.S. 144, 181 (1992)) ("federalism secures to citizens the liberties that derive from the diffusion of sovereign power") (internal quotations omitted); Bond v. United States, 564 U.S. 211, 222 (2011) ("the individual liberty secured by federalism").

71. *See Sebelius*, 567 U.S. at 595 (Ginsburg, J., concurring in part).

of government powers as non-justiciable.[72] A constitutional law class that begins by exploring *McCulloch* in the context of *Federalist* 1, *Federalist* 31, and the post-Civil War Amendments might provide foundations for a better constitutional law and politics that harnesses national power for human freedom as well as for material prosperity.

Professor Schwartz provides constitutional Civil War buffs who identify with radical Republicans some cause for optimism. The meaning and significance of *McCulloch*, he points out, has changed as American constitutional commitments have changed.[73] Our *McCulloch* is not the *McCulloch* of 1819, 1869, 1919, or 1969. Perhaps inspired by creative reinterpretations of *McCulloch* throughout history, progressive pedagogues will find ways to teach their students how theories of national power lay at the foundations of all fundamental rights regimes and progressives activists will construct a congressionally led constitutional politics that recognizes a strong national government to be the prerequisite of a strong progressive fundamental rights regime.

72. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980)

73. SCHWARTZ, *supra* note 1, at 248-52.