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Franita Tolson
University of Southern California

WHAT IS "APPROPRIATE" LEGISLATION?: *MCCULLOCH V. MARYLAND* AND THE REDUNDANCY OF THE RECONSTRUCTION AMENDMENTS

Franita Tolson*

I am thankful for the opportunity to review Professor David Schwartz's really thoughtful and incisive critique of *McCulloch v. Maryland*.[1] The book is a creative and masterful reinterpretation of a decision that I thought I knew well, but I learned a lot of new and interesting facts about *McCulloch* and the (sometimes frosty) reception that the decision has received over the course of the last two centuries. Professor Schwartz persuasively argues that modern views of *McCulloch* as a straightforward nationalist decision that has always had a storied place in the American constitutional tradition are flat-out wrong. *The Spirit of the Constitution* shows that the meaning of *McCulloch* and its use as precedent by both the Supreme Court and Congress has been much more fraught and complex than the scholarly literature has appreciated.

For this symposium, I would like to focus my comments on Professor Schwartz's views regarding the relationship between the Necessary and Proper Clause and the enforcement provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments. According to Professor Schwartz, very few representatives in the Reconstruction Congress explicitly cited *McCulloch* to explain the meaning and scope of those provisions of the Reconstruction Amendments that give Congress the power to enforce their terms through "appropriate legislation." Subsequent to the adoption of the Amendments, however, many representatives argued that

* Vice Dean for Faculty and Academic Affairs and Professor of Law, University of Southern California Gould School of Law.

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

McCulloch's holding regarding the Necessary and Proper Clause was a proper interpretation of what constitutes "appropriate legislation" under the enforcement provisions. Although the link between *McCulloch* and the enforcement provisions was not extensively debated during the ratification and adoption of the Reconstruction Amendments, Professor Schwartz argues that the issue of *McCulloch*'s influence on what is appropriate under the Reconstruction Amendments is "academic" because "[t]he Necessary and Proper Clause empowers congress [to] make 'necessary and proper' laws to execute powers granted anywhere in the Constitution, not just the 'foregoing powers' in Article I, section 8. It therefore applies to the enforcement provisions of the Reconstruction Amendments."[2]

The notion that the *McCulloch* standard applies to the enforcement provisions of the Reconstruction Amendments is a view that the Supreme Court had endorsed at one time,[3] and that some scholars continue to endorse.[4] Rather than viewing *McCulloch* as a guide to understanding what legislation is appropriate, however, Professor Schwartz instead applies the Necessary and Proper Clause to the Reconstruction Amendments, rendering Congress's explicit power to enforce the Amendments through "appropriate legislation" redundant. According to Professor Schwartz:

> [a]nyone who views *McCulloch* as the correct interpretation of implied powers under the Necessary and Proper Clause should therefore conclude that 'the *McCulloch* standard' governs the enforcement clauses of the Reconstruction Amendments, whether or not the framers of those amendments had *McCulloch* in mind. The 'appropriate legislation' tag is likewise immaterial, since the Necessary and Proper Clause calls for appropriate implementing legislation for all grants of legislative power. As an authoritative precedent interpreting the Constitution, *McCulloch* was already constitutionalized.[5]

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2. *Id*. at 129.

3. South Carolina v. Katzenbach, 383 U.S. 301, 326-27 (1966).

4. Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 428-29 (2014).

5. SCHWARTZ, *supra* note 1, at 129.

Instead, Professor Schwartz attributes the need for enforcement provisions written into the Reconstruction Amendments as "demonstrat[ing] *McCulloch*'s lack of influence on the Supreme Court at that time" and the Reconstruction Congress's fear of "states'-rights backsliding by the Court in reviewing Reconstruction enforcement legislation."[6]

While I agree with Professor Schwartz that these considerations undoubtedly motivated the Reconstruction Congress's decision to include enforcement provisions in the Amendments, I nonetheless resist his characterization of the relationship between these provisions and the Necessary and Proper Clause. Even if Congress legitimately feared an unsympathetic Supreme Court, there are two problems with an argument about the relationship between the Necessary and Proper Clause and the enforcement provisions of the Reconstruction Amendments that would render the latter redundant as a practical matter.

First, the presence of an enforcement mechanism within a particular constitutional provision helps illuminate the provision's scope and meaning, which is not necessarily true when Congress turns to the Necessary and Proper Clause as a supplement. The Reconstruction Amendments not only contain open-ended terms like due process, equal protection, and right to vote, but Congress's power to enforce their terms is substantively different from other grants of legislative authority that the Necessary and Proper Clause explicitly supplements, such as the Commerce Clause.

Take, for example, Section 2 of the Fourteenth Amendment. One may view Section 2, which allows Congress to reduce a state's delegation in the House of Representatives for abridging the right to vote, as a clear rule. But the language of Section 5 of the Fourteenth Amendment, the terms of which give Congress the power to enforce *all* of the Amendment's substantive provisions through "appropriate legislation," suggests that the language of

6. *Id.* at 130.

Section 2 might be more of a standard than a rule.[7] Section 2's reference to the "right to vote" incorporates the laws of fifty different state constitutions setting out voter qualification standards, suggesting that "appropriate legislation" might require something other than enforcing the penalty. Section 2, already expansive because what constitutes an abridgment or denial is not limited by considerations of race or partisanship, also became substantially broader after the Supreme Court determined that the Equal Protection Clause required that the right to vote under state law comport with new federal constitutional requirements. Section 1's prohibition on poll taxes, for example, automatically means that the poll tax is a practice that abridges or denies the right to vote under Section 2.[8] Likewise, an unreasonable residency requirement, found to be a violation of Section 1, similarly abridges the right to vote under Section 2.[9] Finally, in thinking through the range of appropriate penalties to address these violations, Congress can abrogate state sovereign immunity under the Reconstruction Amendments even if it cannot do so under the Commerce Clause.[10]

Thus, one cannot consider the scope of Congress's authority to enforce the Fourteenth Amendment, particularly with respect to voting rights, without viewing that provision through the lens of Congress's authority to enforce all of its moving parts. The presence of Section 5 not only facilitates this analysis but encourages it. Rather than the phrase "appropriate legislation reflect[ing] a type of redundancy to underscore a quality presumed to be inherent in the modified noun," as Professor Schwartz contends, the addition of the "appropriate legislation" language is a more specific signal about what is "appropriate" for purposes of the Fourteenth Amendment.[11] In this context, "appropriate" legislation to enforce Section 2 might be penalties other than reduced representation to further the aims of both Sections 1 and 2. This conclusion might be less apparent if one

7. *See* Franita Tolson, *What is Abridgment? A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 457-58 (2015).

8. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966).

9. *See* Dunn v. Blumstein, 405 U.S. 330, 334-336 (1972).

10. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55-59 (1996).

11. SCHWARTZ, *supra* note 1, at 126.

had to rely on the Necessary and Proper Clause alone, which does not invite this sort of granular, intra-textual analysis. The presence of Section 5 helps illuminate the relationship between the provisions—and congressional power to enforce them—within the four corners of the Fourteenth Amendment.

Second, the other risk of viewing the enforcement provisions as redundant is that it obscures that the Necessary and Proper Clause is not only about enlarging the scope of a specific enumerated power, but the Clause also provides a link between enumerated powers. In *McCulloch,* Chief Justice Marshall found that Congress had broad authority to charter a bank when acting pursuant to its enumerated powers. But he comes to this conclusion without specifying the degree to which each power that he identified—Congress's ample authority "to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies"—was the basis for the constitutionality of the bank. Professor Schwartz emphasizes that *McCulloch* was vague about which enumerated power justified the chartering of a Bank, holding only that the Necessary and Proper Clause enlarges the means that Congress can adopt to enforce a specific enumerated power. In his view, "*McCulloch* is conventionally read to mean that an implied power must be derived from specified enumerated powers, but Marshall never clearly identified the enumerated powers from which he derived the implied power to incorporate a bank."[12]

But it is entirely possible that *all* of the powers that Chief Justice Marshall listed served as predicate authorities for the Bank. Just as the enforcement provisions can serve as mini-Necessary and Proper Clauses for each Reconstruction Amendment, shedding light on the relationship between provisions within a clause, the Necessary and Proper Clause of Article I can serve as the glue between constitutional provisions, justifying the aggregation of constitutional power arising from multiple sources of authority to enact much needed legislation. Thus, legislation that is an appropriate exercise of power under multiple provisions, as in the case of the Bank of the United States, is not necessarily appropriate when Congress seeks to

12. *Id.* at 49.

advance the same legislation pursuant to just one source of power. In other words, *McCulloch* is a Commerce Clause case as well as a Taxing and Spending case, a War Powers case, and so on, and the Bank is a necessary and proper means of advancing all of these powers, collectively.

This view of the Necessary and Proper Clause is consistent with Congress's practice of sometimes aggregating its authority, relying on not one, but multiple sources of power to enact legislation. The Court has, on occasion, been deferential to Congress in these circumstances, even if Congress was not always explicit about the constitutional authority pursuant to which it was acting. In *Katzenback v. Morgan*, for example, the Court upheld Section 4(e) of the Voting Rights Act, which prohibits literacy tests as a precondition for voting as applied to individuals from Puerto Rico who have completed at least the sixth grade, as an appropriate exercise of Congress's authority to enforce the Fourteenth Amendment.[13] The Court sustained Congress's ban on literacy tests, even though an earlier court decision found these tests to be constitutional as a general matter, and Congress made no evidentiary findings that literacy tests were being used in a racially discriminatory manner. The Court was willing to defer to Congress because of the myriad provisions that the Court identified as potential sources of authority for section 4(e)—ranging from the treaty power to the Territorial Clause of Article III—even though Congress did not explicitly rely on any of these provisions in enacting the legislation.

At the very least, *Katzenbach* illustrates that the presence of multiple sources of constitutional support has some relevance to the inquiry into the scope of congressional power, a position that received the Court's full-throated endorsement in *McCulloch v. Maryland* and later, the *Legal Tender Cases*.[14] Had the Supreme Court continued to endorse this view of congressional power, one of its most controversial decisions would have arguably come out differently. In *Shelby County v. Holder,* the Court, in invalidating Section 4(b) of the Voting Rights Act of 1965, focused on the question of whether the Act was an appropriate exercise of

13. Katzenback v. Morgan 384 U.S. 641, 643-647 (1966).
14. Legal Tender Cases, 79 U.S. 457, 532-534 (1870).

authority under the Fourteenth and Fifteenth Amendments. Together, Sections 4(b) and 5 required certain jurisdictions with terrible voting rights records to preclear all changes to their election laws with the federal government before those changes could go into effect. In assessing the legislative record, the Court concluded that Congress did not compile a legislative record of intentional discrimination sufficient to justify the coverage formula as appropriate legislation under these provisions.

The Court ignored that the coverage formula arguably could have been sustained under some combination of the Fourteenth and Fifteenth Amendments and the Elections Clause, which allows Congress to regulate federal elections in the absence of intentional discrimination.[15] Even if the power that Congress has to enforce each of these Amendments, standing alone, was insufficient to support the Act, the aggregate of these provisions, when combined with the Elections Clause, was more than sufficient to justify the scope of the coverage formula as a necessary and proper means of executing these powers. As I have argued in prior work, the Elections Clause, unlike the Fourteenth and Fifteenth Amendments, is not constrained by federalism concerns and allows Congress to make or alter state legislation at will.[16] The Court arguably could have conceived of the Necessary and Proper Clause as a link between the Elections Clause and the Reconstruction Amendments, an approach that would permit the Court to view congressional power over elections comprehensively and assess the legislative record in light of this broad authority.

In conclusion, reading the Necessary and Proper Clause as a means of both furthering a specific enumerated power and allowing Congress to aggregate its authority under multiple clauses would solve a core problem presented by Professor Schwartz's reading of the Reconstruction Amendments. This interpretation acknowledges the unique relationship between the

15. The Elections Clause, in its entirety, provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1.

16. Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317, 393 (2019).

Amendments' substantive and enforcement provisions that the Necessary and Proper Clause cannot adequately capture because the enforcement provisions themselves inform the meaning of the relevant substantive provisions.

In addition, this approach reflects that the Clause has a broader purpose than simply furthering the scope of an enumerated power, a fact that gets lost when the Clause is blindly applied to all grants of legislative authority. The Clause is also about the relationship across provisions, which is an extremely nationalistic interpretation that might also explain the Clause's desuetude in the years following *McCulloch*. The Chief Justice's failure in *McCulloch* to indicate which of the aforementioned powers, standing alone, supported the Bank could be attributed to the fact that all of these enumerated powers, in the aggregate, served as the basis for Congress's authority to charter the Bank. The Necessary and Proper Clause provides the link between these enumerated powers, broadening the universe of means that Congress can rely on to further these constitutionally endorsed ends.