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Kurt Lash  
*University of Richmond*

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## **MCCULLOCH V. MADISON: JOHN MARSHALL'S EFFORT TO BURY MADISONIAN FEDERALISM**

Kurt Lash\*

In his engaging and provocative new book, *The Spirit of the Constitution: John Marshall and the 200-Year Odyssey of McCulloch v. Maryland*, David S. Schwartz challenges *McCulloch*'s canonical status as a foundation stone in the building of American constitutional law. According to Schwartz, the fortunes of *McCulloch* ebbed and flowed depending on the politics of the day and the ideological commitments of Supreme Court justices. Judicial reliance on the case might disappear for a generation only to suddenly reappear in the next. If *McCulloch v. Maryland* enjoys pride of place in contemporary courses on constitutional law, Schwartz argues, then this is due more to personalities and institutions of the early twentieth century than it is to any deeply rooted historical consensus about the importance of Marshall's opinion. Nor, Schwartz insists, should we read Marshall's opinion on the Second Bank of the United States as embracing a theory of "aggressive nationalism" and the unlimited expansion of implied congressional power. That might be a correct reading of the Constitution (Schwartz is never completely clear on this particular point), but Marshall himself muddied the issue with ambiguous language—language that left the door open to later more restrictive interpretations of federal power. The fact that scholars and judges continue to treat *McCulloch* as a foundational statement of constitutional power reflects a triumph of twentieth century mythology—a triumph triply problematic in that it (1) is historically misleading, (2) does not embrace a fully robust understanding of implied federal power (which Schwartz presumably prefers), and (3) relies upon the same history-centric

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\* E. Claiborne Robins Distinguished Professor of Law, University of Richmond School of Law.

values as “conservative originalism” (which Schwartz presumably rejects).

In short, Schwartz comes not to praise the mythological *McCulloch*, but to bury it. Readers who complete this deep dive into two hundred years of cultural and judicial references to *McCulloch* will probably be persuaded by Schwartz’s general arguments: *McCulloch* does contain ambiguous and at times seemingly contradictory language, Marshall’s opinion *has* been viewed in different ways at different times, and it is only *recently* that the case has come to occupy its status as a canonical statement of congressional authority. As Bruce Ackerman pointed out years ago, the New Deal Court embraced John Marshall and *McCulloch* in order to add a patina of original understanding to its startling restructuring of federal power. The New Deal Supreme Court, in other words, made a myth of *McCulloch*.

But although Schwartz challenges the post-New Deal myth of *McCulloch*, his historical account remains substantially bound to that same myth. *McCulloch-as-myth* legitimates the modern Supreme Court’s expansive interpretation of implied federal power. The myth treats the case as important *because of* its paragraphs addressing the implied powers of Congress. Schwartz accepts the myth’s focus on this particular issue even as he challenges its veracity. The historical journey recounted in his book focuses on the issue of implied federal power: from disputes over internal improvements and slavery to the modern debates over the scope of the administrative state. The journey is fascinating, but this almost single-minded focus on implied power has the effect of further entrenching the myth’s insistence that *McCulloch* is important *because of* its discussion of the Necessary and Proper Clause. No doubt, this is the central importance of *McCulloch* today. But this was not the central importance of Marshall’s opinion in 1819. When John Marshall drafted *McCulloch*, he had more on his mind than justifying internal improvements, and much more than simply validating the existence of the Second Bank of the United States. *McCulloch v. Maryland* represents Marshall’s effort to redefine the nature of the Constitution itself. It is easy to miss Marshall’s ambitious effort. Indeed, Marshall likely *wanted* readers to initially miss the more radical implications of his opinion. He was so successful at masking his goal

that, to this very day, the most historically significant paragraphs of the opinion are rarely noticed, much less given the attention they deserve.

Marshall begins his constitutional analysis in *McCulloch* by addressing what he characterizes as an odd and rather unimportant point raised by Maryland's lawyers:

In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument, not as emanating from the people, but as the act of sovereign and independent states.<sup>1</sup>

Here, John Marshall feigns ignorance. In fact, Marshall and every other student of the American Constitution in 1819 knew *exactly* why Maryland's counsel "deemed it of some importance" to make this particular point about the origins of the Constitution. If, as Maryland argued, the Constitution "emanated" from the still sovereign people of the several states, then whatever power those people delegated away ought to be *strictly construed*. This was not just Maryland's opinion. This was the central interpretive principle announced in the most influential constitutional treatise of the day, St. George Tucker's "View of the Constitution."<sup>2</sup>

An influential Virginia judge and a professor of law at the College of William and Mary, St. George Tucker published "A View of the Constitution" in 1803. The very first constitutional treatise, Tucker's "View" was heavily influenced by the constitutional theories of James Madison and the Federalist Papers. Repeatedly citing Madison's work, Tucker described the Constitution as a "compact freely, voluntarily, and solemnly entered into by the several states, and ratified by the people thereof."<sup>3</sup> This was not the "compact theory" eventually espoused by John C. Calhoun. Tucker's theory of the constitutional compact echoed James Madison's dual federalism theories declared in the Virginia

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1. *McCulloch v. Maryland*, 17 U.S. 316, 402 (1819).

2. St. George Tucker, *View of the Constitution of the United States*, in 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, app. Note D *passim* (St. George Tucker ed., Lawbook Exch. 1996) (1803).

3. *Id.* at 155.

Resolution, Madison's Report of 1800, and originally introduced in the Federalist Papers. Quoting Madison's Federalist 39, for example, Tucker repeats Madison's assurance to the ratifiers that adopting the Constitution would not result in a "consolidated government":

[A]lthough the constitution would be founded on the assent and ratification of the people of America, yet that assent and ratification was to be given by the people, not as individuals composing one entire nation; but as composing the distinct and independent states, to which they respectively belong. It is to be the assent and ratification of the several states, derived from the supreme authority in each state, the authority of the people themselves. The act, therefore establishing the constitution, will not, said they, "be a national but a federal act. That it will be a federal and not a national act, as these terms are understood by the objectors, the act of the people, as forming so many independent states, not as forming one aggregate nation."<sup>4</sup>

The argument that the Constitution was a "federal" act of the people in the several states, and not the act of a single "aggregate" people, had significant implications for the proper interpretation of delegated powers. Citing the theories of treaty interpretation presented in Emmerich De Vattel's *Law of Nations* (1758), Tucker explained that when a sovereign delegates away power in a treaty or compact, they are presumed to have delegated away no more power than is absolutely necessary. All such delegations of sovereign authority, therefore, must be "strictly construed."<sup>5</sup>

In other words, according to Madison and Tucker, the nature and scope of constitutionally delegated federal power must be defined according to the nature of the Constitution, and the nature of the Constitution is determined by the manner by which it came into being. As a compact entered into by the sovereign peoples of the several states, the delegations of power in that compact must be narrowly construed on the presumption that the people in the states would not have delegated away their own independent existence. Any interpretation of delegated power which threatened to create a single "consolidated government" was

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4. *Id.* at 146.

5. *Id.* at 151.

presumptively incorrect given the interpretive mandate to preserve the remnant sovereign independence of the states.

Tucker's rule of strict construction is a distinctly *federalist* rule of construction. The rule comes into play whenever an expansive interpretation of federal power threatens the retained powers and rights of the people in the several states. As Tucker puts it, the Constitution "is to be construed strictly, *in all cases where the antecedent rights of a state may be drawn in question.*"<sup>6</sup> Such a rule might come into play, for example, if Congress tries to grant a corporate charter (a common state practice), but it might not come into play if the President tries to dismiss a member of his cabinet without Congress's approval. Similarly, the rule might apply if Congress tries to regulate state soil for "internal improvements," but it might not apply if the President wants to sign a treaty with France *gaining* soil for future states (the power to make treaties with foreign nations being expressly denied to the states). Finally, since the Constitution expressly prohibits the states from using anything but gold and silver coin as legal tender, determining whether *Congress* may issue paper money would not trigger Tucker's rule of strict construction.

Tucker's "View of the Constitution" was the most influential commentary on the Constitution published prior to Joseph Story's 1833 *COMMENTARIES ON THE CONSTITUTION*. One of the reasons for the influence of Tucker's treatise was its scholarly articulation of the theories of James Madison and the Democratic Republicans—the group who, in 1800, electorally vanquished the nationalist party that produced the Alien and Sedition Acts. It was the Federalist Party's sudden loss of political power that triggered President Adams's last-minute decision to elevate his Secretary of State, John Marshall, to Chief Justice of the Supreme Court—a kind of rearguard action to preserve his party's nationalist theories of the Federal Constitution.

John Marshall was well aware of the constitutional theories of his fellow Virginians James Madison and St. George Tucker. Indeed, Marshall accepted the basis of their interpretive theory; the proper rules of constitutional interpretation depended on the nature of the document, and one determined that nature by

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6. *Id.* (emphasis added).

considering the document's origins. This is why his opinion in *McCulloch* first addresses constitutional origins before articulating interpretive principles.

It would have been politically scandalous to directly criticize the work of James Madison and his influential "1800 Report on the Virginia Resolutions," and only slightly less scandalous to publicly criticize the only broadly accepted constitutional treatise in existence at that time, St. George Tucker's "View of the Constitution." Marshall therefore places the federalist compact theories of Madison and Tucker into the mouth of Maryland's counsel. This allowed Marshall to both avoid scandal and avoid having to address the fullest and best articulation of compact theory found in the works of the authors themselves.

Having feigned ignorance regarding Maryland's reasons for raising the issue of constitutional origins, Marshall then presents his own "origins story":

[The proposed Constitution] was submitted to the *people*. They acted upon it in the only manner in which they can act safely, effectively and wisely, on such a subject, by assembling in convention. It is true, *they* assembled in their several states—and where else should they have assembled? . . . [W]hen they act, *they* act in their states. But the measures *they* adopt do not, on that account, cease to be the measures *of the people themselves*, or become the measures of the state governments . . . . The government proceeds directly from the people; is "ordained and established," in the name of the people; . . . . The government of the Union then (whatever may be the influence of this fact on the case), is, emphatically and truly, *a government of the people*. In form, and in substance, it *emanates from them*. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.<sup>7</sup>

By characterizing the adoption of the Constitution as an act of the singular people of the United States (who just happen to assemble in individual states), Marshall sought to avoid the interpretive implications of compact theory. Since the Constitution did not emanate from the many sovereign peoples of the several states, it need not be interpreted in a manner preserving the

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7. *McCulloch v. Maryland*, 17 U.S. 316, 403-05 (1819) (emphasis added).

retained powers and rights of these independent sovereignties. Instead, the Constitution “emanates” from the *national* people and the powers of the government created by the document must be empowered to fully advance the needs and interests of the *national* people. After all, Marshall declares, the national government was a “government of all; its powers are delegated by all; it represents all, and acts for all.”<sup>8</sup>

Marshall’s opening gambit to reshape the story of our constitutional origins is the key to everything that follows in his opinion. Under compact theory, the federalist nature of the document required that all delegated powers (whether express or implied) be strictly construed. Under Marshall’s nationalist theory of the Constitution, the nationalist nature of the document required a rule of construction that effectuated its nationalist purpose. In what is probably the greatest act of interpretive chutzpa in American history, Marshall claimed that the language of the Tenth Amendment *supports* a nationalist interpretation of federal power:

[T]here is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word “expressly,” and declares only, that the powers “not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;” thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument.<sup>9</sup>

Putting aside the issue whether the people insisting upon and the ratifying the Tenth Amendment believed they were just “quieting” their own “excessive jealousies,” Marshall’s emphasis on what is omitted from the Tenth Amendment altogether ignores what is *in* the Tenth Amendment—an inescapable declaration that we have a federalist Constitution. In his “View of the

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8. *Id.* at 405.

9. *Id.* at 406.

Constitution,” Tucker pointed to both the language of the Ninth and Tenth Amendments as jointly calling for a rule of strict construction.<sup>10</sup> Marshall’s rule of nationalist construction dismisses the significance of the Tenth and ignores the Ninth altogether.

In his book, Schwartz tries to persuade the reader that *McCulloch* is not an “aggressively nationalist” opinion. When viewed in the historical context in which it was first handed down, however, it is clear that *McCulloch* was *radically* nationalist. Marshall sought to displace (indeed, up-end) what had been the dominant theory of the Constitution since the election of 1800, and which was articulated in the deeply influential writings of James Madison.

When *McCulloch* was handed down, Madison immediately recognized Marshall’s effort to rewrite history and transform the nature of the Federal Constitution. In his posthumously published “Detached Memoranda,” Madison wrote that the “reasoning of Supreme C[our]t [in *McCulloch v. Maryland* was] founded on erroneous views.”<sup>11</sup> It was not that Madison objected to the Court allowing Congress to charter a Bank—Madison himself had accepted that the “force of precedents” were in favor of the bank.<sup>12</sup> Instead, it was the *reasoning* employed by Marshall in *McCulloch* that Madison found “erroneous.” Madison singled out for particular criticism Marshall’s account of “the ratification of Const[itu]tion],” and his claim that “the people” was a term “meant . . . collectively [and] not by States.”<sup>13</sup>

Madison was not alone in objecting to the reasoning in *McCulloch*. As Schwartz points out, Marshall quickly found himself having to defend his opinion in Virginia newspapers. More than a decade later, Marshall’s protégé, Joseph Story, was still defending Marshall’s effort to bury the compact theory of the Constitution. Story’s *Commentaries on the Constitution* (1833) contains multiple passages expressly criticizing the dual sovereignty theories of St. George Tucker and James Madison, and

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10. Tucker, *supra* note 2, at 151.

11. James Madison, Detached Memoranda, 1819?, in JAMES MADISON WRITINGS 745, 756 (Jack N. Rakove ed., Library of Am. 1999).

12. *Id.*

13. *Id.*

emphasizing what Story viewed as Marshall's persuasive nationalist reasoning in *McCulloch v. Maryland*.

By the time of the Civil War, however, northern Republicans had come to embrace both John Marshall and James Madison. Schwartz notes that Marshall and *McCulloch* enjoyed something of a resurgence in the North during Reconstruction, with Republicans citing Marshall's opinions as authority for an indissoluble Union. What Schwartz does not mention, however, is that James Madison and the Federalist Papers were held in (at least) equally high regard by northern constitutionalists. Civil War and Reconstruction Republicans generally distinguished the constitutional federalism of James Madison from the secessionist theories of John C. Calhoun. Indeed, northern abolitionists embraced Madison's "Virginia Resolution" and his "Report of 1800" as justifying state-level resistance to slavery.<sup>14</sup> The man who drafted most of Section One of the Fourteenth Amendment, John Bingham, was especially committed to the ideals of Madisonian federalism and limited construction of congressional power. Bingham, for example, insisted that neither Section Two of the Thirteenth Amendment nor any other delegated power could be properly construed to authorize the 1866 Civil Rights Act.<sup>15</sup> According to Bingham, federal authority to pass civil rights legislation required the addition of a new amendment. Bingham prevailed, and the country got the Fourteenth Amendment.

Although John Marshall's reverse-Tenth Amendment reading of national power ultimately became the darling of the New Deal Court, Marshall's account of our constitutional origins has never been particularly convincing. When the Rehnquist Court restored the idea of limited construction of federal power, it also restored a more historically plausible account of the Constitution as emanating from the still sovereign people of the several states. True, the Constitution brought into being a national people

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14. See *In re Booth*, 3 Wis. 157, 175-76 (1854); S.J. Res. 4, 12th Leg., Reg. Sess. (Wis. 1859), reprinted in 1 THE RECONSTRUCTION AMENDMENTS: ESSENTIAL DOCUMENTS (Kurt T. Lash ed.) (forthcoming June 2020).

15. See CONG. GLOBE, 39th Cong., 1st Sess. 1291 (Mar. 9, 1866) (Speech of Honorable John Bingham, Of Ohio, on The Civil Rights Bill), reprinted in 2 THE RECONSTRUCTION AMENDMENTS: ESSENTIAL DOCUMENTS (Kurt T. Lash ed., Univ. of Chi. Press) (forthcoming June 2020).

(rendering secession unconstitutional), but in doing so it created a system of dual sovereignty, a system preserved by the people in 1868 despite radical Republican efforts to erase American federalism.

Schwartz is entirely correct that, despite its mythological status, the nationalist possibilities of Marshall's opinion in *McCulloch v. Maryland* have never been fully realized. Schwartz blames this failure, in part at least, on Marshall's sometimes ambiguous language. But equal blame must fall on Marshall's effort to spin a myth of his own—the myth of a fully nationalist Founding. One could, of course, argue that Madison and Tucker were spinning myths when they described the Constitution as a dual-federalist compact. Nevertheless, in the case *McCulloch v. Madison*, it is Madison's vision that informs the opinions of the modern Supreme Court.

Schwartz therefore is right to bury the myth of *McCulloch*. But in doing so, we should recognize *McCulloch* for what it was—a failed effort to bury the federalist interpretive theories of James Madison and reinvent the nature and origins of the American Constitution.