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# BURYING *MCCULLOCH*?

David S. Schwartz*

Kurt Lash is a superb constitutional historian trapped inside the body of an originalist. He is one of the few originalists bold enough to acknowledge that *McCulloch v. Maryland*[1] needs to be ejected from the (conservative) originalist canon of great constitutional cases. While he attributes to me an intention "not to praise the mythological *McCulloch*, but to bury it," it is Lash who seeks to bury *McCulloch*, which he views as a fraudulent "story of our constitutional origins."[2]

Characteristically, Lash's debatable conclusions and interpretations are accompanied by keen and erudite historical insight. The centerpiece of Lash's post is an implicit debate between John Marshall and St. George Tucker, the William and Mary law professor, judge, and author of the first major treatise on American constitutional law. For Lash, Marshall channels the nationalist view of broadly construed national powers, whereas Tucker advocates "Tucker's rule," requiring that the Constitution "'be construed strictly, in all cases where the antecedent rights of a state may be drawn in question.'"[3]

In *McCulloch*, of course, Marshall prefaces his analysis of implied powers with a brief rejection of "compact theory," the view that the Constitution was, like the Articles of Confederation, essentially a treaty among sovereign states.[4] Marshall instead embraces a "nationalist" vision of the Constitution's essence in which the people of the United States, rather than the states, ratified the Constitution, meeting in state conventions solely for

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1. 17 U.S. (4 Wheat.) 316 (1819).

2. Kurt Lash, McCulloch *v. Madison: John Marshall's Effort to Buy Madisonian Federalism*, 73 ARK. L. REV. 119, 125 (2020).

3. *Id.* at 123 (emphasis omitted). For a more extended elaboration of Tucker's notions of federalism, see generally Kurt Lash, *"Tucker's Rule": St. George Tucker and the Limited Construction of Federal Power*, 47 WM. & MARY L. REV. 1343 (2006).

4. McCulloch v. Maryland, 17 U.S. (4 Wheat) at 402-03.

convenience.[5] As Marshall asked rhetorically, "[W]here else should they have assembled?"[6]

Every Constitutional Law professor who teaches *McCulloch* explains this conflict between nationalist and compact theory, so that much is well known. But Lash adds a new layer. Marshall claims that he only mentions compact theory because Maryland's counsel "deemed it of some importance."[7] Lash argues that Marshall thereby "feigned ignorance" both of the true expositor of compact theory (Tucker), and of its true importance to the case. "Tucker's rule" would presumably have required a robust application of the Tenth Amendment by construing congressional powers narrowly in all cases where the states' reserved powers "may be drawn in question"—that is to say, all cases of implied powers.[8] "Tucker's rule" was not therefore "of some importance," to the *McCulloch* decision, but of central importance: Tucker's rule is the antithesis of "*McCulloch*'s rule" that implied powers should be broadly construed to promote the effective operation of the national government.

Lash convincingly argues that Marshall felt compelled to address and reject Tucker's rule in *McCulloch* and that Marshall used "Maryland's counsel"[9] as a stand-in for Tucker, who was an influential constitutional theorist. Moreover, as Lash points out, Madison came around to views similar to Tucker's by the time of the Virginia and Kentucky Resolutions of 1798. When Marshall penned the *McCulloch* opinion in 1819, Lash astutely observes, "It would have been politically scandalous to directly criticize the work of James Madison and his influential 1800 Report on the Virginia Resolutions."[10] Lash provides no direct evidence of Marshall's motivation to rebut Tucker beyond the fact that Marshall and Tucker were "fellow Virginians."[11] But Lash's inference has to be right. Marshall had studied law at William and

5. *Id.* at 403.
6. *Id.*
7. *Id.* at 402.
8. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").
9. Lash, *supra* note 2, at 124.
10. *Id.*
11. *Id.*

Mary with Tucker's predecessor, the renowned George Wythe, and it would be a simple matter to show personal and professional connections between Marshall and Tucker in the small circle of Virginia political and legal elites. As I show in my book, Marshall was deeply concerned, if not obsessive, about answering the views of his Virginia opponents—hence his pseudonymous editorials defending *McCulloch* in the spring of 1819.[12]

Lash thus enriches our understanding of *McCulloch* and its context in intellectual history. Lash shows that the Jeffersonian "strict necessity" test for implied powers had more substantial backing than that of Maryland's counsel Luther Martin, the cantankerous old anti-federalist. (The "strict necessity" test held that implied powers were limited to those without which the enumerated power would be "nugatory.") Lash's post can also shed new light on *Gibbons v. Ogden*,[13] where Marshall again seemed to tangle with an unnamed Tucker. There, Marshall oddly changed his tune about the Constitution's source, describing it, not as the product of the people themselves, but of the states—"these allied sovereigns [who] converted their league into a government."[14] While more compatible with Tucker, this version of an origin story did not entail that the powers of Congress "ought to be construed strictly."[15] Rather, Marshall argued, there was not "one sentence in the constitution which gives countenance to this rule."[16] Thanks to Lash, we can infer that "this rule" rejected by Marshall is Tucker's rule.

Lash is less convincing when he takes off his historian hat and puts on his originalist hat. Lash chides me for being "never completely clear" on what I think is "the correct reading of the Constitution."[17] But I take it as praise, rather than criticism, that I did not reduce the ongoing 230-year conflict over federalism to a single "correct reading of the Constitution." I certainly believe that there is a "better" reading. That the Constitution empowers

12. DAVID S. SCHWARTZ, THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF *MCCULLOCH V. MARYLAND* 62-67 (2019).

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

14. *Id.* at 187

15. *Id.*

16. *Id.*

17. Lash, *supra* note 2, at 119.

the national government to address all national problems is both historically *justifiable* and normatively superior to its alternative. That alternative, "enumerationism," is the Jefferson-Jackson-Taney-*Carter Coal-Morrison-NFIB* view that we must on occasion let national problems go unaddressed in order to demonstrate to ourselves that we are more committed to the ideology of limited enumerated national powers than we are to the preamble's purposes of promoting justice and the general welfare of the nation.[18]

Lash insists that Tucker's rule supplies the "correct" (originalist) reading of the Constitution, requiring that federal powers be narrowly construed whenever they touch on reserved state powers. By rejecting Tucker's rule and compact theory, Lash argues, Marshall tries to "reshape the story of our constitutional origins"[19] by turning it into a mythical, nationalist one. But at this point, Lash offers a competing myth of his own. He relies heavily on James Madison's mythical reputation as "father of the Constitution" to claim that Madison's belated, politically motivated adoption of compact theory in the late 1790s is the true "original meaning" of the Constitution. In doing so, Lash ignores Madison's earlier views in the Framing and ratification periods, that the national government's powers were not ceded by the states, but were instead derived directly from the people, who redistributed powers from the states to create a national government with supremacy over the states. (Recall Madison's cherished proposal at the Philadelphia Convention for a national legislative veto over all state laws.[20]) Lash's constitutional origin story also asks us to ignore the views of George Washington, James Wilson, Gouverneur Morris, and indeed the dominant majority of the 1787 Convention; the ratification debates over federal power, the Federalist party, Daniel Webster, Henry Clay and the national Republicans—in short, one entire side of the debate over national powers that began with the founding and has been, in Marshall's

18. *See* SCHWARTZ, *supra* note 12, chs. 2, 5, 11, 13; David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 587-90 (2017).

19. Lash, *supra* note 2, at 125.

20. *See, e.g.*, JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 14 (1996).

words, "perpetually arising." To read Tucker's rule as the sole "original" and therefore "correct" interpretation of the Constitution's grant of powers to the national government is to read half of constitutional history out of history.

Lash argues that my "almost single-minded focus on implied power" somehow feeds a particular "myth of *McCulloch*"—presumably the New Dealers' sometime insistence that broad federal power was the correct original meaning of the Constitution.[21] Of course, Tucker's rule is also primarily, if not single-mindedly, focused on the theory of implied powers, which is indeed the centerpiece of *McCulloch*. But, importantly, *McCulloch* didn't invent the theory of implied powers, which was the subject of heated debate during ratification and was relied on heavily in the First Congress and in the debates over the First Bank of the United States.[22] Marshall was not "reshaping" this aspect of the Constitution's origins, as Lash asserts, but merely recapitulating it.

Historian Lash knows this, and it's hard, even for Originalist Lash, to keep a good historian down. Tucker's rule, Lash admits, became "the dominant theory of the Constitution" only at "the election of 1800"—not at the founding.[23] And Lash concedes that "One could, of course, argue that Madison and Tucker were spinning myths when they described the Constitution as a dual-federalist compact."[24] Yes, one could. They were. And originalists are spinning myths when they claim that there is a simple "origin story" of the Constitution that can compel a single "correct" reading of the Constitution's most contested elements.

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21. Lash, *supra* note 2, at 120; s*ee, e.g.*, SCHWARTZ, *supra* note 12, at 204-11.

22. *See, e.g.*, John Mikhail, *Fixing the Constitution's Implied Powers*, BALKINIZATION (Oct. 25, 2018), [ https://perma.cc/9WS2-FD6V]; JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 217 (2018); SCHWARTZ, *supra* note 12, at 25-26, 38-41.

23. Lash, *supra* note 2, at 126.

24. *Id.* at 6.