

# The Mythical *McCulloch*

By Nelson Lund

## Federalism & Separation of Powers Practice Group

### A Review of:

The Spirit of the Constitution: John Marshall and the 200-Year Odyssey of *McCulloch v. Maryland*, by David S. Schwartz  
<https://www.amazon.com/Spirit-Constitution-Marshall-200-Year-McCulloch/dp/0190699485>

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### Note from the Editor:

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Generations of lawyers have been taught that *McCulloch v. Maryland*<sup>1</sup> is the foundational precedent that “established an expansive view of national power under the U.S. Constitution.”<sup>2</sup> In *The Spirit of the Constitution*, David S. Schwartz maintains that this is a myth created by twentieth-century progressives in order to make the expansive view they favored seem more venerable than it really is.<sup>3</sup> I am satisfied that he has proved his case, though I am less sure that his revisionist history throws any new light on the spirit of the Constitution. Schwartz’s detailed commentary does sharpen the issues raised by recent efforts to cabin the expansive view of national power that *McCulloch* supposedly established, and that may be the chief value of his book.

As every law student learns, *McCulloch* held that Congress had an implied power to establish the Second Bank of the United States and that Maryland’s tax on the operations of the Bank was unconstitutional.<sup>4</sup> Schwartz observes that Marshall’s opinion is ambiguous about the extent of the federal legislature’s implied powers and about the Supreme Court’s role in enforcing whatever limits the Constitution places on those powers.<sup>5</sup> This is not a revelation. Anyone who reads the case with care and an open mind can see that the opinion is by turns vague, ambiguous, and equivocal. Marshall sometimes suggests that the Constitution imposes virtually no limits on the reach of congressional power, or at least that it is up to Congress itself to decide what those limits are. At other points, he emphasizes that judicially enforceable limits on implied powers can be found in the Constitution’s text as well as in its “spirit” and in the principle that lawful powers may not be exercised as a pretext for accomplishing unauthorized ends.

Notwithstanding the fog created by the opinion’s conflicting signals, modern lawyers have tended to assume that *McCulloch* established that Congress has a very expansive range of implied

1 17 U.S. 316 (1819).

2 J.M. Balkin and Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 973 (1998).

3 DAVID S. SCHWARTZ, *THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF MCCULLOCH V. MARYLAND* 4, 178-86, 213 (2019) (hereinafter Schwartz).

4 Schwartz has little to say about the tax ruling, and some of his comments are unfounded. He assumes without evidence that Maryland was trying to drive the Bank’s Baltimore branch out of business. *Id.* at 9. The Court did not say this, and it is probably wrong. See Nelson Lund, *The Destructive Legacy of McCulloch v. Maryland*, in *MCCULLOCH V. MARYLAND AT 200* (Gary J. Schmitt ed., forthcoming), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3436876](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3436876). Schwartz then asserts that the Court’s ambiguous and incomplete discussion of the tax is a preemption analysis that Marshall “thoroughly” explained. Schwartz at 15. In fact, the *McCulloch* opinion did not clearly indicate whether the tax was preempted by the Constitution itself or by the federal statute that established the Bank. Nor did the opinion point to anything in either the Constitution or the statute that conflicted with Maryland’s tax law. See Lund, *supra*.

5 Schwartz at 54-58.

powers, especially under the Commerce Clause. Schwartz shows that the case was largely ignored by the Court for several decades, and then at different times invoked for broad and narrow understandings of implied powers. As he summarizes this point at the very end of his book, “The interpretation given to *McCulloch* through successive generations tells us much about each generation’s spirit of the Constitution. The truth is that *McCulloch* did not make great constitutional law. Rather, constitutional law made *McCulloch* great.”<sup>6</sup>

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Many readers will be surprised to learn that the putatively foundational *McCulloch* opinion on implied powers was essentially ignored by Marshall himself, and by the Taney Court, and then for many years after the Civil War. Although Schwartz understandably wants to emphasize the novelty of his description of *McCulloch*’s “200-year Odyssey,” much of the story is familiar.

Until the late nineteenth century, Congress did not enact much legislation that tested the limits of its delegated powers.<sup>7</sup> When Congress began to adopt more aggressive laws dealing with commercial activities, the Court sought to establish doctrines that would permit the effective regulation of interstate commerce without unleashing a tool for displacing the states’ authority over their internal affairs. The New Deal Court abandoned that effort and appeared to remove virtually all restraints on Congress, save what the Justices might find from time to time in the Bill of Rights. More recently, majorities in the Rehnquist and Roberts Courts have resumed the search for limits on implied powers.

As Schwartz recognizes, *McCulloch* generated considerable controversy the moment it was decided, largely because it could be construed as a green light for congressional interference with the internal affairs of the states. But the Marshall and Taney Courts declined either to confirm or to repudiate that construction. The most obvious explanation is that Congress did not try to exploit any such green light, but Schwartz offers a different interpretation. Noting that legislation under the Commerce Clause would be the natural way for Congress to displace a great deal of state authority (as it eventually did), he maintains that *Gibbons v. Ogden*<sup>8</sup> quickly put a damper on *McCulloch*’s nationalist potential.<sup>9</sup>

Like *McCulloch*, *Gibbons* is now regarded as a canonical case that established a broad view of federal power. But it, too, offers a confusing assemblage of mixed signals. The case held that navigation is a part of commerce and that Congress therefore had the authority to preempt a state-created monopoly that restricted commercial navigation between New York and other

states. *Gibbons* did not cite *McCulloch*, and Schwartz contends that Marshall characterized navigation as a part of commerce in order to avoid applying the kind of implied-power analysis toward which *McCulloch* pointed. This was important, he believes, because it “made the potential scope of the Commerce Clause more concrete and *smaller* in order to reduce the potential displacement of state laws were the Court ever to adopt an exclusive commerce theory.”<sup>10</sup>

I find this argument unconvincing. Schwartz maintains, on the basis of very little evidence, that the definition of the word “commerce” was generally thought to cover only trade, not the transportation without which trade can seldom take place.<sup>11</sup> Even if one accepts that questionable claim,<sup>12</sup> cross-border commercial transportation (including navigation) is so closely and necessarily bound up with interstate and foreign trade that a “*McCulloch* analysis” need not have recognized any broader power than the definitional approach taken in *Gibbons*. And whether or not the Court were to adopt the theory that Congress has exclusive authority over interstate and foreign commerce, which it never has, *Gibbons* would not preclude the use of implied-powers analysis. Nor has the Court ever suggested that *Gibbons* constitutes an obstacle to the implied-powers analysis that is routinely employed in Commerce Clause cases.

What’s more, *Gibbons* contains language that can easily, if improperly, be interpreted to give Congress authority to regulate intrastate commerce that affects other states, no matter how remote or small the effects may be.<sup>13</sup> This would amount to *McCulloch* on steroids. Even if one assumes that Marshall only meant to approve the regulation of intrastate activities that have *substantial* effects in other states, the scope of congressional power would be very wide, as we know from the modern cases. It is quite implausible that *Gibbons* was as an effort by Marshall to reduce the potential scope of implied congressional powers.

For Schwartz, *Gibbons* was just the first example of the Supreme Court’s repeated refusals to draw the most appropriate inferences from *McCulloch*. This affected both the Commerce

6 Schwartz at 255.

7 Some important exceptions occurred during the Civil War, including the Legal Tender Act of 1862, which required creditors to accept paper money issued by the government as payment even when the debtor had promised to pay with gold. The Court purported to rely on *McCulloch* when it declared the statute unconstitutional. *Hepburn v. Griswold*, 75 U.S. 603, 614-16 (1870). The next year, the Court overruled *Hepburn*, purporting to rely once again on *McCulloch*, this time for exactly the opposite conclusion. *Legal Tender Cases*, 79 U.S. 457, 538-53 (1871).

8 22 U.S. 1 (1824).

9 Schwartz at 71-80.

10 *Id.* at 80. The exclusive commerce theory, which Justice Johnson adopted in his *Gibbons* concurrence, holds that Congress alone has the authority to regulate interstate and foreign commerce, thus forbidding the states to do so even when Congress has not enacted any preemptive legislation.

11 *Id.* at 73-74.

12 Based on a much more thorough review of the evidence, a serious student of the relevant source materials concluded that navigation is probably (though not indubitably) included within the meaning of the term “commerce.” See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 125-28 (2001).

13 “It is not intended to say that these words [commerce ‘among the several states’] comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States.” 22 U.S. at 194. The impropriety of interpreting this as a license to regulate anything that affects other states is confirmed by the opinion’s reference to the “immense mass of legislation” left to the states, which embraces such measures as “[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c.” *Id.* at 203.

Clause and the enforcement provisions of the Reconstruction Amendments. As I understand his argument, it goes like this.

*McCulloch* might have established the expansive view of national power that the modern myth attributes to it because the potential was there in Marshall's opinion.<sup>14</sup> But for way too long, the Supreme Court was unable or unwilling to drop the pernicious assumption that state governments must have significant reserved powers.

Possibly in the Marshall Court and certainly in the Taney Court, Schwartz maintains, this reflected pro-slavery sentiments.<sup>15</sup> After the Civil War, the Court was determined to sustain social inequality between the races by narrowly construing the enforcement provisions of the Reconstruction Amendments.<sup>16</sup> The Court's misbegotten solicitude for state prerogatives continued with such decisions as *Hammer v. Dagenhart*<sup>17</sup> and *Carter v. Carter Coal Co.*,<sup>18</sup> in what Schwartz tendentiously calls the "Lochner era."<sup>19</sup> As he must know, *Lochner's* substantive due process restriction on the states' police power was doctrinally disconnected from questions about the scope of Congress's implied powers. But *Lochner* is now reviled by a wide range of judges and commentators,<sup>20</sup> so the use of this term serves mainly

to smear the Court's reserved-powers decisions through guilt by association.

In *United States v. Darby*,<sup>21</sup> the Court finally woke up and adopted the view Schwartz favors, namely that the regulatory powers reserved to the states constitute a null set.<sup>22</sup> Although he thinks that *Wickard v. Filburn*<sup>23</sup> returned to the *Gibbons* "definitional" approach he dislikes, Schwartz admits that the two approaches will usually lead to the same result.<sup>24</sup> In any event, neither the Tenth Amendment nor a fetish about enumerated powers would henceforth inhibit congressional efforts to foster the welfare of the nation. For more than half a century, this understanding of the Constitution appeared to be settled.

Regrettably, in Schwartz's view, the Court has more recently been attempting to resuscitate the "Tenth Amendment" view of the powers available to Congress. Ironically, perhaps, Schwartz credits Justice Scalia with being the only member of the Court who ever explained the distinction Schwartz draws between the approaches taken in *McCulloch/Darby* and in *Gibbons/Wickard*.<sup>25</sup> In his concurrence in *Gonzalez v. Raich*, Scalia stressed that Congress has the power to enact regulations that would otherwise be ultra vires, so long as they are needed to make an authorized regulation effective.<sup>26</sup> And it is true that Scalia distinguished this principle from the doctrine that Congress may regulate intrastate activities that have substantial effects on interstate commerce.<sup>27</sup> But he also noted that the Court has acknowledged at least since 1838 that authority over activities that are not part of interstate commerce derives from the Necessary and Proper Clause.<sup>28</sup>

14 Schwartz at 22-23.

15 *Id.* at 65-67, 109-10. I have no doubt that the Court became extremely solicitous of the interests of slaveowners in the years leading up to the Civil War, perhaps because of pro-slavery sentiments or perhaps from a fear of triggering the dissolution of the Union. There is no other plausible way to explain such legally preposterous decisions as *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) (forbidding free states to protect innocent black citizens from being kidnapped and sent into slavery), and *Scott v. Sandford*, 60 U.S. 393 (1857) (invalidating a statute that outlawed slavery in federal territories). These decisions relied on restrictions putatively derived directly from the Fugitive Slave and Due Process of Law Clauses, respectively, so they imply little or nothing about the scope of powers that may be inferred from Article I. But any signals suggesting that Congress could use the Commerce Clause to regulate matters internal to the states would presumably have been very alarming to slave interests, and the Justices likely would have thought it prudent not to send such signals.

16 Schwartz at 135-38. Schwartz focuses on the *Civil Rights Cases*, 109 U.S. 3 (1883), which held that the Fourteenth Amendment prohibits racial discrimination by the states, not by private businesses that serve the public. Schwartz agrees with the first Justice Harlan's dissent, which cited *McCulloch* for the proposition that Congress has broad discretion to choose the means best adapted for achieving a lawful end. *Id.* at 50-51. Although Schwartz laments the fact that this precedent has not been overruled, the Warren Court effectively adopted Harlan's position. *See, e.g., Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

17 247 U.S. 251 (1918). The case held that a federal statute restricting the interstate shipment of goods produced by child labor was an ultra vires effort to regulate the production of those goods.

18 298 U.S. 238 (1935). The case held that local labor disputes did not have a sufficiently direct relation with interstate commerce to justify federal regulation of employment contracts, even if such disputes had economic effects in other states. The Court cited *McCulloch* for the proposition that "to a constitutional end many ways are open; but to an end not within the terms of the Constitution, all ways are closed." *Id.* at 291.

19 Schwartz at 186-92, 203-04.

20 The few dissenters from this consensus include my colleague David Bernstein. *See* DAVID BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING*

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INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

21 312 U.S. 100 (1941). The case upheld the Fair Labor Standards Act of 1938, declared that the Tenth Amendment "states but a truism that all is retained which has not been surrendered," and expressly overruled *Hammer v. Dagenhart*.

22 Schwartz at 218-23.

23 317 U.S. 111 (1942). The case held that Congress may limit how much wheat a farmer may grow for use on his own property because such home consumption by many farmers would substantially affect the price of wheat in other states.

24 Schwartz at 223-28. I think Schwartz is mistaken about the nature of *Wickard's* "substantial effects" test. *Gibbons* does not say or imply that intrastate commerce that affects other states comes within the definition of "commerce among the several states." Nor do I think that *Wickard* suggests that the definition of "commerce," let alone the term "commerce among the several states," includes the consumption of wheat that one grew on one's own land. *Wickard* is therefore best understood as an implied-powers decision.

25 Schwartz at 242-43.

26 545 U.S. 1, 36-37 (Scalia, J., concurring in the judgment) (relying especially on *Darby* and *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942)). *Raich* held that Congress has the authority to forbid the possession of marijuana that was grown within the state and approved for medical uses by the state government.

27 Scalia noted that *Wickard* was a case in which the two principles led to the same conclusion. 545 U.S. at 37 n.2.

28 *Id.* at 34. *United States v. Coombs*, 37 U.S. 72 (1838), involved a statute that punished theft from shipwrecks even when the goods were taken from above the high water line. Schwartz never mentions this implied-powers decision, perhaps because the opinion did not cite *McCulloch*.

Schwartz then claims that Scalia contradicted himself by concluding, in his dissent in *National Federation of Independent Business v. Sebelius*,<sup>29</sup> that the Commerce Clause does not empower Congress to “regulate inactivity” by forcing individuals to purchase certain kinds of health insurance. According to Schwartz, Scalia’s *Raich* concurrence “irrefutably supported” the constitutionality of this individual mandate because the regulation was reasonably adapted to the effectiveness of the statute’s regulation of the health care market.<sup>30</sup>

Schwartz is irrefutably wrong. The two cases are easy to distinguish, and in just the way implicitly suggested by the *Sebelius* opinion that Scalia co-authored:

What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power—upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States. Whatever may be the conceptual limits upon the Commerce Clause . . . , they cannot be such as will enable the Federal Government to regulate all private conduct . . . .

That clear principle carries the day here. The striking case of *Wickard v. Filburn*, 317 U.S. 111 (1942), which held that the economic activity of growing wheat, even for one’s own consumption, affected commerce sufficiently that it could be regulated, always has been regarded as the *ne plus ultra* of expansive Commerce Clause jurisprudence. To go beyond that, and to say the *failure* to grow wheat (which is *not* an economic activity, or any activity at all) nonetheless affects commerce and therefore can be federally regulated, is to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity.<sup>31</sup>

In *McCulloch* terms, a principle that would allow Congress to exert control over virtually all private conduct cannot be “appropriate” because it is inconsistent with “the spirit of the Constitution.”<sup>32</sup> For that reason, even though the individual mandate might have been conducive to regulating an interstate health care market, Scalia rejected it on the ground that it violates what he called “structural limits upon federal power.” Whether or not Scalia was right to vote with the majority in *Raich*, his concurrence did not imply approval of a federal power to regulate everything in human life.

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Schwartz is confident that a proper understanding of *McCulloch*’s logic “allows Congress to legislate about most things that ‘we the people’ need it to.”<sup>33</sup> But he worries that debunking

29 567 U.S. 519 (2012).

30 Schwartz at 245.

31 *Sebelius*, 567 U.S. at 647–48 (dissenting opinion of Scalia, Kennedy, Thomas, and Alito, JJ.)

32 See *McCulloch*, 17 U.S. at 421.

33 Schwartz at 252.

the *McCulloch* myth, according to which the Great Chief Justice established this principle two hundred years ago, might undercut arguments for “liberal constitutional values I agree with.”<sup>34</sup>

This concern is almost certainly misplaced. Schwartz fervently believes that the Supreme Court was “fairly liberal” for thirty-two years before President Nixon came along, and that the current “long conservative Court” has made profound and baleful doctrinal changes affecting such matters as abortion, gun violence, protections for criminal defendants, affirmative action, sovereign immunity, and campaign financing.<sup>35</sup> None of these issues has anything to do with implied congressional powers under Article I. Notwithstanding his assertion that the Court’s conservatives have turned *McCulloch* into a “splendid bauble,”<sup>36</sup> he offers no actual evidence that meaningful limits have been imposed on implied congressional powers. On the contrary, his most effective jab at the modern federalism revival targets the Court’s failure to articulate any principle or theory that would identify such limits.

When the revival began with *United States v. Lopez* in 1995, Chief Justice Rehnquist insisted that the Constitution’s enumeration of powers implies that Congress does not possess a general police power, and he criticized Justice Breyer’s dissent for its failure to identify any activity that only the states may regulate.<sup>37</sup> Schwartz ridicules this argument, calling it “the mustbesomething rule.”<sup>38</sup> I think Rehnquist’s point was perfectly valid, but Schwartz is right that it leaves the important questions unanswered. Neither *Lopez* nor subsequent cases have told us how to identify the reserved powers of the states.

So far at least, the Court has identified only a few trivial ways in which Congress may not supplant the regulatory authority of the states. Nor do the Court’s opinions suggest that it will ever go beyond such symbolic concessions to the “mustbesomething rule.” Consider just two examples. *Lopez* struck down a statute that criminalized the possession of a gun in or near a school. Congress simply amended the statute to require that the gun have moved in interstate commerce.<sup>39</sup> *NFIB v. Sebelius* held that a statute requiring the purchase of specified insurance policies was not authorized by the Commerce Clause, but then upheld the mandate as an exercise of the taxing power.<sup>40</sup>

As this second case should remind us, almost anything that the Court might decide is beyond congressional power under the Commerce Clause can be accomplished through the spending power that the Court has purported to find in the Taxation Clause.

34 *Id.* at 253.

35 *Id.* at 237–38. I can’t help wondering what Schwartz would regard as a “really liberal” Court. I also wonder about the suggestion that the Court became “conservative” in 1969 and stayed that way until now.

36 *Id.* at 237. *McCulloch* warned against an interpretation of the Constitution under which it would merely be a “splendid bauble.” 17 U.S. at 420–21.

37 514 U.S. 549, 564–65 (1995).

38 Schwartz at 242.

39 See *United States v. Dorsey*, 418 F.3d 1038 (9th Cir. 2005); *United States v. Danks*, 221 F.3d 1037 (8th Cir. 1999), *cert. denied*, 528 U.S. 1091 (2000).

40 See 567 U.S. at 562–74.

