TURNER:: Hello, and welcome back to Wisconsin Law in Action, a podcast where we discuss new and forthcoming scholarship with University of Wisconsin Law School professors. I'm your host, Kris Turner, and today my guest is the Foley & Lardner-Bascom Professor of Law, David S. Schwartz. Thanks for joining me, Professor Schwartz.

PROF. SCHWARTZ:: Thanks for having me, Kris.

TURNER:: Professor Schwartz has joined the podcast to discuss his new book, The Spirit of the Constitution: John Marshall and the 200-Year Odyssey of McCulloch V. Maryland, which was released last month and is now available from Oxford University Press. With that, let's just go ahead and get right into it. To begin, can you give our listeners some background on your research interest and what led you to focusing on McCulloch?

PROF. SCHWARTZ:: Well, Kris, the deepest and oldest debate over the spirit of the Constitution has to do with the scope of the federal government's powers. That question has always been fascinating to me. It's extremely important. It was the primary concern of the framers and the ratifiers and it's generated a lot of constitutional litigation in the Supreme Court pretty much in every generation up to the present day. For example, it was the primary issue in the Affordable Care Act case in 2012 and I think it's going to come up again in the foreseeable future because the Supreme Court is likely to be considering the constitutionality of things like environmental litigation, laws against hate crimes, and laws that are trying to rein in that rampant economic inequality that is currently, I think, shaking the foundations of our democracy. So I think we're going to be seeing laws that maybe push the envelope on federal powers.

PROF. SCHWARTZ:: McCulloch versus Maryland was decided exactly 200 years ago and it was the first major Supreme Court decision on the scope of national powers. Every constitutional law course teaches McCulloch to introduce the subject of the federal government's powers. But in my research, I found that it wasn't always viewed as the authoritative word on the scope of national powers. It turns out that every generation has interpreted McCulloch differently. They've interpreted it in ways that really tell us a lot about how that generation viewed constitutional law. So I realized that McCulloch was a great vehicle for exploring this history of American constitutional ideas about the scope of federal power.

TURNER:: So you just mentioned McCulloch multiple times. Can you tell us what the McCulloch case was about?

PROF. SCHWARTZ:: Yeah. McCulloch versus Maryland was a constitutional challenge to one of the first federal governmental agencies, the Bank of the United States. This was modeled on a proposal that originated with Alexander Hamilton in 1791 when he was our first treasury secretary, and the proposal was to create a public private corporation to act as a central bank that would be financier to the federal government. By 1819, when the case was decided, some of the state

governments had come to resent the presence of national bank branches in their states because the national bank was competing with state banks for business.

PROF. SCHWARTZ:: So Maryland proposed or imposed a tax on the Baltimore branch of the Bank of the United States in the hope that they would drive it out of the state, but the bank refused to pay and they claimed that Maryland had no power to tax what was basically an instrumentality of the federal government. So Maryland responded that Congress lacked the power to create the bank in the first place because the Constitution's list of federal powers, that is the enumerated powers, did not mention any express power to create corporations in general or to create a bank in particular.

TURNER:: What did the US Supreme Court decide?

PROF. SCHWARTZ:: The court unanimously upheld Congress's constitutional power to charter the bank, and specifically, the court held that Congress had implied powers in addition to its enumerated powers, so it didn't matter that there wasn't an express power to create a bank. And these implied powers included basically anything that Congress reasonably believes is useful as a means to execute as granted powers. That's the reasoning that McCulloch adopted. And in this particular case, the bank was useful for administering the finances of the government. So as a principle, McCulloch recognized that Congress has broad discretion to figure out how can it best implement the powers that are granted to it by the Constitution.

TURNER:: Towards the beginning of the book, you discuss how John Marshall, the author of this opinion, the chief justice at the time, is viewed very differently by constitutional lawyers and legal historians. Can you briefly explain how these diverging views came about?

PROF. SCHWARTZ:: Yeah, I think legal historians tend to be interested in understanding the past on its own terms, but constitutional lawyers approach history differently. I think they're interested in explaining the present. And so they ask, "What is our constitutional doctrine today and how is it justified?" And so I think both by training and also by disposition, constitutional lawyers read the past through the lens of present day ideas and present day doctrine. And I think as a result, they tend to create myths and symbols which are useful to convey those ideas about the present.

PROF. SCHWARTZ:: So for example, today we understand that the federal government has broad constitutional powers, and because Chief Justice Marshall was the first great expounder of the Constitution, he's become something of a hero for constitutional lawyers who tend to view him as a nationalist who shares 21st century ideas about the scope of federal power. That's really ahistorical and historians paint a more modest picture of Marshall. They see no point in asking, "What would John Marshall think of our constitutional interpretations today?"

They want to understand him in his historical context. And so those two different approaches I think produce diverging views of who John Marshall was.

TURNER:: And based on that, the book really revolves around these different views of who John Marshall was and how his opinion, especially in McCulloch, is interpreted throughout American history. So your book proceeds chronologically examining how this interpretation and the importance of McCulloch has evolved over the years. Briefly, what are some of the factors that have affected these changing views?

PROF. SCHWARTZ:: Well, we have to start with the logic of McCulloch's theory of implied powers, which produces a very broad view of federal power. If we apply McCulloch's logic of implied powers to the enumerated powers in the Constitution, particularly the commerce clause, which is probably the broadest grant of an enumerated power in the Constitution, then we see that Congress has the power to regulate essentially all national problems, which is a sensible interpretation of the Constitution given what it was intended to do.

PROF. SCHWARTZ:: But in the 19th century, strict constructionists of the Constitution worried about two things. First, they thought that broad implied powers would basically authorize the federal government to regulate and perhaps even abolish slavery, and southerners in Thomas Jefferson's Republican Party and later the Jacksonian Democratic Party wanted to protect slavery. They were also concerned that broad federal powers would simply destroy the state's ability to govern. In modern times, we know that's not true because we can have broad federal powers like we do now and also have vibrant state governments at the same time. But in the 19th century, they didn't seem to know that. Constitutional theorists didn't really understand how those two things could coexist.

PROF. SCHWARTZ:: After Marshall died, the pro-slavery court under the new chief justice, Roger Taney, and this is the court that gave us the Dred Scott Case, they simply ignored McCulloch. After the Civil War, the court wanted to allow the states to regulate post-slavery race relations, which ended up producing Jim Crow laws, and at the same time, they wanted to promote a free market ideology of no or very limited government regulation. So the court exploited ambiguities in the McCulloch decision to strike down federal regulations of the economy and federal anti-discrimination laws. And it wasn't really until well into the New Deal in the late 1930s that the court abruptly changed its views and started to interpret McCulloch broadly the way we do now to allow federal regulation of the economy.

TURNER:: One thing, as I consider myself an armchair historian, and it was really fun to go through here and see how these enormous historical events in American history have impacted how this particular case is interpreted and applied to the law that helped shine a light on how this case has evolved through the years for me.

So I really appreciated that tact in developing this, so thank you, author, for doing it that way.

PROF. SCHWARTZ:: Thanks.

TURNER:: As you were doing the research, what kind of challenges or surprises did you encounter?

PROF. SCHWARTZ:: Well, the book covers a 200 year span of US constitutional history, from 1819 to 2019, and I had huge gaps in my knowledge, particularly about what was happening in the Supreme Court in the 100 years between Marshall's death in 1835 and the New Deal. It was a challenge for me to read these mid and late 19th century cases, which are written in kind of verbose, archaic language, and to fill in the gaps in my knowledge. And what was really surprising was to learn how interesting those eras are even though we don't teach them in the standard common-law course.

PROF. SCHWARTZ:: I was also surprised to learn how consciously and intentionally the legal establishment worked to try to build up a myth around John Marshall as the great chief justice. I learned that there were two nationwide John Marshall celebrations. One happened in 1901, which is the centennial year of his appointment as chief justice, and the other was in 1955, which was the bicentennial year of his birth. The interesting thing is that both of these celebrations were aimed at fortifying the reputation of the Supreme Court in challenging times for the court. In 1901, a conservative court was under progressive attack. In 1955, it was the southern reaction against Brown versus Board of Education that had put the court on the defensive. And in both of those instances, they thought it was useful to appeal back to the great reputation of John Marshall.

TURNER:: Right, you lean on the reputation of someone who is respected by all parties, no matter what their party or cliques, so to speak, is. This is John Marshall. This is why the court should be and was still respected at the time. I had learned that as well from the book, the 1901 and 1955 celebrations. That was fascinating, and to think that today there could be a celebration of another chief justice, I'm not sure if I see that nowadays. So it was really interesting historical context.

PROF. SCHWARTZ:: They're not the rock stars that John Marshall was in those eras.

TURNER:: No, I'd be surprised if they reached the status of Marshall going forward from here. So there's quite a lot of scholarship available on John Marshall and on McCulloch as well. What distinguishes your book from these other works?

PROF. SCHWARTZ:: Well, you're right. You're absolutely right. There's a lot on John Marshall and there's some on McCulloch in particular, but very little scholarship about John Marshall and really none about McCulloch versus Maryland had previously looked at what happened after Marshall's death. The McCulloch books, and

there are only a couple of them, are really excellent accounts of what led up to the McCulloch decision and what the decision said, but they pretty much stopped there. And the scholarship on John Marshall has focused either on Marshall's life and times or on what Marshall means to us today, but kind of skipping over the period in between. We don't have a lot on how Marshall's reputation fluctuated before 2019. So my book, I would say, is the first one to study what McCulloch meant in the years between 1819 and 2019 and to look at Marshall's changing reputation in some of these periods.

TURNER:: With the John Marshall at the time, it's kind of a snapshot of how John Marshall's interpreted through the current lens of political and legal thinking. Your book takes that and adds it into one long story about how that has changed over time, which I think is very useful and appropriate for us to study because it's not just McCulloch V. Maryland goes through this transition, but every case will have some different interpretation as we go through and that makes it much more obvious to the reader.

PROF. SCHWARTZ:: Certainly the most important cases that we continue to read are going to go through something like that. Yeah, I think you're right.

TURNER:: So what kind of reaction to your book do you hope to receive?

PROF. SCHWARTZ:: Well, I hope the book will cause constitutional law scholars and teachers to reconsider how they teach constitutional law and how they think about constitutional law, which is maybe biting off a lot. But constitutional law, as I see it, is a historical process. It's produced by constitutional politics, by which I mean debates about public policy efforts to solve social problems, and these debates occur over time within the bounds of constitutional government and constitutional values. I don't think constitutional law is the product of just a few great cases coupled with today's prevailing doctrine, which is kind of how we teach constitutional law.

PROF. SCHWARTZ:: So I think the best understanding of our Constitution today and of constitutional law is gained by understanding our history and understanding the history of the Constitution. And so I hope my book contributes to that understanding. And I also hope it can be read and possibly even enjoyed, if that's not too much to ask, by readers who are interested not just in law, but in US history, and that it reaches people beyond constitutional law specialists.

TURNER:: So the whole point of this podcast is to promote faculty scholarship. I like to add in that I sincerely enjoyed this book. I'm so glad we had a chance to discuss it and that the book has found an audience in both legal scholarship and historian communities. We just scratched the surface of what Professor Schwartz covers in this book, so check it out. There are links to either find the book in your local library or to purchase it directly from the publisher on our website.

TURNER:: So thank you very much for joining us, Professor Schwartz. We've been talking about your new book, The Spirit of the Constitution: John Marshall and the 200-Year Odyssey of McCulloch V. Maryland. And thank you all out there for listening to Wisconsin Law in Action. Professor Schwartz's scholarship can be found on his SSRN page and in the University of Wisconsin Law School repository. Links to Professor Schwartz's scholarship, along with more information about where you can find his book will be posted along with this podcast at wilawinaction.law.wisc.edu.

TURNER:: You can subscribe to the Wisconsin Law in Action podcast in the Apple iTunes store, Stitcher, or Google Play, or find our full archive at wilawinaction.law.wisc.edu. Thank you again very much for listening and join us next time as Professor Keith Findley joins the podcast to discuss the controversy surrounding legal and medical conclusions of shaken baby syndrome and abusive head trauma post-conviction, and other challenges within the criminal justice system. Until then, happy researching.