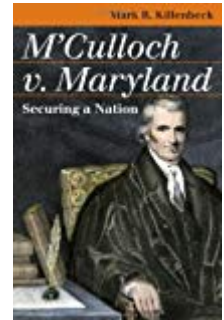


**Mark R. Killenbeck.** *McCulloch v. Maryland: Securing a Nation*. Lawrence: University Press of Kansas, 2006. xii + 227 pp. \$16.95, paper, ISBN 978-0-7006-1473-8.



**Reviewed by** H. Robert Baker

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Along with John F. A. Sanford (of *Dred Scott* fame), James W. McCulloh must stand as the most famous man to lend his misspelled name to the Supreme Court canon. His case, *McCulloch v. Maryland*, put the Supreme Court's stamp of approval upon Congress's power to incorporate banks and on a Hamiltonian interpretation of the Constitution. The import of the decision was far greater than this, and it is doubtless one of Chief Justice John Marshall's gems. In his new survey of the case, Mark R. Killenbeck examines the particulars of the opinion of the court and the storied newspaper exchange between Marshall and Spencer Roane (pseudonymous, of course) over merits of the decision. He also reveals the human side of the story in the shady dealings of James McCulloh as cashier of the Baltimore branch of the Bank of the United States and his quest for personal redemption.

As a survey designed to introduce readers to the case, this book has significant strengths. Killenbeck grounds his study in the familiar story of the constitutional controversy over the creation of the national bank in 1791. Hamilton and Jeffer-

son's arguments are carefully reproduced, as are the debates in Congress. The narrative then follows the bank's life and eventual death in 1811, and the creation of the second Bank of the United States in 1816.

This is, of course, the standard narrative leading up to the Supreme Court's handling of *McCulloch v. Maryland*. More impressively, Killenbeck takes seriously the range of constitutional arguments presented outside the Court. He gives ample time to the 1794 Senate debate of a constitutional amendment limiting the power of Congress to incorporate banks. He links this, albeit indirectly, with the controversial Alien and Sedition Acts, the Virginia and Kentucky resolutions, and the constitutional crisis they engendered before the election of 1800. This is a welcome contextualization of the bank controversy as one battle among many in a long constitutional war, and Killenbeck does a great service in recreating the political climate of the early republic.

He also demystifies the Supreme Court's role in the process. The bank controversy was not a three-decade dispute seeking judicial resolution,

but an ongoing constitutional disagreement that involved every branch of the government. Implicit in Killenbeck's narrative is the understanding that the Supreme Court was in no position to weigh in authoritatively on the subject during the 1790s. Things were different by 1819, but only because of the conscious workings of the Court's chief justice since 1801, John Marshall. In a valuable chapter, Killenbeck describes Marshall's efforts to transform the Supreme Court into a co-equal branch of government that might speak with some authority on serious constitutional controversies. Coverage is given to Marshall's strong opinions in *Marbury v. Madison* (1803), *Fletcher v. Peck* (1810), as well as the trio of decisions of which *McCulloch* (1819) was a part (along with *Dartmouth College* and *Sturges v. Crowninshield*, both decided in 1819). But this is not just intellectual history. Readers will encounter the boardinghouse in which all justices lived, the galleries of the Supreme Court packed to hear oral arguments by Daniel Webster, and snippets of the Washington social scene. These elements are not added just to color to the narrative. As Killenbeck makes clear, such matters impinged directly on Marshall's ability to mold the Court to his liking and upon the country's reception of the Court's decisions.

Two chapters dispose of the actual case, from McCulloch's get-rich-quick schemes to the case's arrival in the Supreme Court and Marshall's decision. The attention to context is, once again, exemplary. This is no abstract rendering of *McCulloch* as a disembodied dialogue with the Jefferson of 1791, or of the enunciation of timeless constitutional principles, but rather an examination of the real-life factors that went into the decision. The analysis is clear and thorough if somewhat unsurprising.

Two more chapters discuss the public debate over *McCulloch*. The first addresses the Virginian storm over the decision first expressed in the *Amphictyon* essays authored by William Brocken-

brough, and the storied exchange between John Marshall and Spencer Roane. The second, somewhat misleadingly titled "The Nation Reacts," covers more newspaper responses to the decision and John Taylor's lengthy rebuttal, *Construction Construed, and Constitutions Vindicated* (1820). Killenbeck is to be applauded here for bringing the sharp public debate on the case into focus. But whether sampling partisan newspapers scattered across the country might really take the temperature of the nation is a problem left unresolved. He probably gets closer to the matter in the chapter immediately following, where he recounts the second Bank of the United States's history after *McCulloch*. It weathered stern resistance in Georgia and in Ohio, where state officers seized bank deposits and placed them in the state treasury. John Marshall once again came to the Bank's defense, this time ruling in *Osborn v. Bank of the United States* (1824) that the Supreme Court had jurisdiction in cases regarding the national bank and further curtailing the states' claims of sovereign immunity derived from the Eleventh Amendment. The legislatures of Ohio and Georgia relented, and the issue ended. But even this victory proved short lived. Andrew Jackson began his campaign against the Bank and, as president, finally had his way when he vetoed the Bank's renewal bill on constitutional grounds.

Even if the Bank did not survive, *McCulloch* did. Despite the ascendancy of Jacksonian constitutionalism and the appointment of Roger B. Taney as chief justice of the Supreme Court, efforts to reverse *McCulloch* came to naught. In the final chapter, Killenbeck celebrates the triumph of *McCulloch* by pointing to its structural remnants in the *Legal Tender* cases and then to several decisions of the Rhenquist Court. *McCulloch*, claims Killenbeck, provided the analytical framework for judicial deference to congressional legislation and to the proper role of the three branches in determining constitutionality of certain issues in several important cases. Justice Scalia cited it in his concurring opinion in the medical marijuana case

*Gonzales v. Raich* (2005). What appeared on the surface a "hard case," argues Killenbeck, was "actually from a constitutional perspective quite an easy decision. For the manner in which the Court should resolve the question was obvious, assuming that the doctrines articulated by *McCulloch* and the cases that followed those rules remained in force" (p. 182).

This conclusion reaches a bit. No matter how hard one tries, a straight line cannot be drawn from *McCulloch* to the Legal Tender cases to *Gonzales v. Raich*. At the very least, the author would have to detour through the *Lochner* era, explain the 1937 court-packing crisis, and the constitutional settlement expressed in *United States v. Carolene Products* (1938). Nor can the Rhenquist Court's take on federalism be considered without adequate reference to the jurisprudential innovations of the Warren Court.

Treated properly, however, problems such as this become fruitful points of departure for discussion. For that reason, I do not hesitate to recommend this book for use in the classroom. It's breadth of coverage extends from the ratification of the Constitution through Jackson's presidency. The bibliographic essay is a resource in itself—an excellent prompt for students looking to begin their own legal history research. And not least of all, its attention to context will stimulate students to think about the role of law in politics and society and the extralegal factors that shape court decisions.

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