H-Net Reviews
in the Humanities & Social Sciences

R. Kent Newmyer. *The Supreme Court under Marshall and Taney.* American History Series. Wheeling: Harlan Davidson, 2006. xii + 191 pp. $15.95 (paper), ISBN 978-0-88295-241-3.

Reviewed by Herbert Johnson (University of South Carolina School of Law)
Published on H-Law (July, 2007)

Marshall-Taney Redivivus

Back in those archaic times when constitutional history was taught to undergraduates, one of the staple supplementary readings was R. Kent Newmyer's *The Supreme Court under Marshall and Taney*, published in the Crowell American History Series in 1968.[1] An even-handed and eminently readable synthesis of the then extant scholarship, this was a little paperback we all learned to appreciate. My copy has remained on my library shelves for the better part of forty years, margin-marked, shelf-worn, and gradually becoming somewhat obsolete in its coverage. Having so long treasured the first edition and having drawn pedagogic benefits from its use, I am delighted to see a new and up-dated edition appear even as the author enters an increasingly active retirement.

Unfortunately, this is not a revised edition, which would give us a valuable opportunity to compare Newmyer's altered interpretations after nearly four decades of teaching and highly productive and influential scholarship. A comparison of the two texts indicates that, in a substantial part of its contents, the second edition simply repeats verbatim what appeared in the first edition. There apparently was a concerted effort to limit the length of the monograph to that of the first edition. Those two goals, one suspects, were achieved at the cost of limiting what the author could do in terms of re-shaping and revising for the second edition. Fortunately, the new version emerges as an extremely good survey; at the same time, the consequences of allowing publishing economies to restrict scholarly preferences are apparent.

Having made the all-too-common reviewer's suggestion that an author should have written another book, what is new about this second edition? Concerning the Marshall Court, Newmyer seems to have moved further in the direction of agreeing with Donald Morgan that the Chief Justice was not the only determinative force in the Court's decision-making.[2] Rather, he suggests that John Marshall's leadership was as much a product of circumstance, personality, and persuasion, as it was a result of intellectual, institutional, or psychological power. Viewed in this light, the landmark decision in *Marbury v. Madison* becomes, for Newmyer, simply a holding action by which the Court braced itself against the onslaught of Jeffersonian impeachment and legislative power (pp. 27-33).[3] *Gibbons v. Ogden* is an example of "dazzling" legal footwork, in which the Chief Justice achieves a delicate balance between decisiveness in reasoning and calculated vagueness in establishing doctrine (pp. 51-57).[4] In short, the second edition seems to give increased emphasis to the political aspects of Marshall Court decisions, and perhaps unfairly characterizes the evidence in a way that gives substance to a concluding comment that the Marshall Court, along with its successor under Roger B. Taney, represented a victory of constitutional process over the elaboration of constitutional doctrine (p. 151).

Like the first edition, the second avoids the pitfalls inherent in sharply contrasting the jurisprudence of the Marshall and Taney Courts on economic and political grounds. However, Newmyer does point out that in the Taney era the Supreme Court viewed the states as better qualified than the federal government to determine what was in the public interest, and to regulate business and corporate enterprise accordingly (pp. 115-116). The Taney Court saw the need to diminish the power of "static capitalism" and to encourage opportunities available to "dynamic capitalist groups" (pp. 97-98). Among those "dynamic" entrepreneurs were the land speculators, whose audacious and aggressive business methods as frequently won U.S. Supreme Court approval under Taney as they did under Marshall (pp. 109).

Following but expanding upon the earlier edition, this volume devotes a substantial number of pages to the Taney Court's famous–some would say infamous–opinions in *Dred Scott v. Sandford* (pp. 118-145).[5] Not surprisingly this climactic decision cannot be summarized without resort to the substantial number of relevant scholarly works that have been published over the

past forty years. This is undoubtedly the most useful section of the volume. As revised, it gives a more expansive discussion of the political dynamics and economic consequences of slavery, and provides a balanced retrospective look at the slavery decisions of the Marshall Court (pp. 119-120, 122-123). Substituting a discussion of *Strader v. Graham* for an earlier section that discussed *Ableman v. Booth*, Newmyer demonstrates the precedential importance of *Strader* to the *Dred Scott* case (p. 127).[6] And his discussion of *Dred Scott* is both recast and elaborated to provide readers with a more perceptive understanding of the case than was available in the first edition (pp. 136 *et seq.*).

Dred Scott was a critically important antecedent to the passage and ratification of the fourteenth amendment. Indeed, the very phraseology of that vital constitutional provision cannot be understood without familiarity with *Dred Scott v. Sandford.* The modern U.S. constitutional system, in its new definition of citizenship, its elaboration of a concept of federal rights, and its emphasis upon personal liberties and equality before the law, rests upon a largely successful judicial, legislative, and constitutional effort to repudiate *Dred Scott.* Ironically, the doctrine of substantive due process, used variously through the years both to protect economic interests and to preserve individual liberties, rests squarely on *Dred Scott*, an ill-advised attempt by the Taney Court to resolve judicially a mortal (and moral) threat to the antebellum federal union. Our students will profit from Newmyer's careful discussion of a case much maligned in an age of "political correctness."

The second edition of Newmyer's book, although not presented as a revised edition, has clearly been reworked in light of the major contributions to U.S. constitutional history since 1968. Listing titles and authors would, to steal a phrase from Chief Justice Marshall, make this review "unduly prolix."[7] On the other hand, it is appropriate to recognize Newmyer's bibliographic diligence. By this reviewer's count, he mentions no fewer than fourteen book length monographs published subsequent to 1968 which have informed his revisions. The authors include Stanley Kutler, Bruce Mann, William Wiecek, Paul Finkelman, Donald Fehrenbacher, Robert Cover, Christopher Wolfe, Carl Swisher, and Timothy Huebner. Also cited are the now completed publications of *The Documentary History of the U.S. Supreme Court* and *The Papers of John Marshall.*[8] Given this impressive list of new materials, it is perhaps churlish to suggest that Newmyer demonstrates some disciplinary myopia in the process. On the evolution and metamorphosis of the doctrine of judicial review, he cites Christopher Wolfe's monograph and its revision, but fails to mention the work of political scientists Robert L. Clinton and Sylvia Snowiss.[9] Also lacking in the discussion of judicial review is law professor Paul Kahn's perceptive re-evaluation of the public and professional impact of John Marshall's implementation of a unifying and unitary "opinion of the Court."[10] These oversights remind us that U.S. constitutional history is, like other fields of legal history, becoming increasingly more interdisciplinary in its dialogues and scholarly bibliography. How greatly we historians would be blessed if bibliographic coverage of the field was more diversified into the legal and the social science disciplines!

Although Newmyer acknowledges the formative influence that J. Willard Hurst exerted in establishing the law and society school of inquiry, he misses an opportunity to enlarge his discussion of economics and the Constitution through a consideration of the ground-breaking monographs of Morton Horwitz.[11] Admittedly these deal with private law topics, but increasingly the public law field draws more heavily on private "black letter" parallels than ever before. Even the Supreme Court of the United States must simultaneously resolve private law cases and issues along with the "big" constitutional law controversies of the day.

Keeping these caveats in mind, readers will find the new bibliography an invaluable guide through the growing body of literature on the Marshall and Taney Courts. This short and tightly written volume will be an outstanding title for optional reading; and it will also serve as a source of enlightenment and thoughtful preparation for instructors wishing a quick refresher course before taking to the podium.

Notes

[1]. R. Kent Newmyer, *The Supreme Court under Marshall and Taney* (New York: Thomas Y. Crowell Company, 1968).

[2]. Donald G. Morgan, *Justice William Johnson, the First Dissenter: The Career and Constitutional Philosophy of a Jeffersonian Judge* (Columbia: University of South Carolina Press, 1954), pp. v., 53-54, 88-89, 174-189.

[3]. 5 U.S. (1 Cranch) 137 (1803).

[4]. 22 U.S. (9 Wheaton) 1 (1824).

[5]. 60 U.S. (19 Howard) 393 (1857).

[6]. On *Strader v. Graham* see 59 U.S. (15 Howard) 602 (1856); on *Ableman v. Booth* see 62 U.S. (21 Howard) 506 (1858).

[7]. See Marshall's comment in *M'Culloch v. Maryland*, 17 U.S. (4 Wheaton) 316, at 407 (1819).

[8]. *The Documentary History of the Supreme Court of the United States, 1789-1800*, ed. Maeva Marcus, et al., 8 vols. (New York: Columbia University Press, 1985-2006); and *The Papers of John Marshall*, ed. Charles F. Hobson, et al.,12 vols. (Chapel Hill: University of North Carolina Press, 1974-2006).

[9]. Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* (New York: Basic Books, Inc., 1986); Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law*, revised edition (New York: Littlefield Adams, 1994); Robert L. Clinton, *Marbury v. Madison and Judicial Review* (Lawrence: University Press of Kansas, 1989); and Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven: Yale University Press, 1990). Also see David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*(Chicago: University of Chicago Press, 1985), a revisionist work by a law professor not mentioned in Newmyer's text, but included in the bibliography.

[10]. Paul W. Kahn, *The Reign of Law: Marbury v. Madison and the Constitution of America* (New Haven: Yale University Press, 1997). .

[11]. James Willard Hurst, *Law and Social Order in the United States* (Ithaca: Cornell University Press, 1977); James Willard Hurst, *Law and Markets in United States History: Different Modes of Bargaining among Interest Groups* (Madison: University of Wisconsin Press, 1982); Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977); and, Morton J. Horwitz, *The Transformation of American Law, 1860-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992). Also see Herbert Hovenkamp, *Enterprise and American Law, 1837-1937* (Cambridge: Harvard University Press, 1991), an intellectual history of the relationship between law and economic theory.

If there is additional discussion of this review, you may access it through the list discussion logs at:
http://h-net.msu.edu/cgi-bin/logbrowse.pl.

Citation: Herbert Johnson. Review of Newmyer, R. Kent, *The Supreme Court under Marshall and Taney.* H-Law, H-Net Reviews. July, 2007.
URL: http://www.h-net.org/reviews/showrev.php?id=13415

Copyright © 2007 by H-Net, all rights reserved. H-Net permits the redistribution and reprinting of this work for nonprofit, educational purposes, with full and accurate attribution to the author, web location, date of publication, originating list, and H-Net: Humanities & Social Sciences Online. For any other proposed use, contact the Reviews editorial staff at hbooks@mail.h-net.msu.edu.