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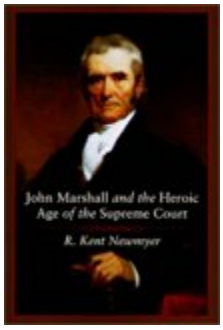
R. Kent Newmyer. *John Marshall and the Heroic Age of the Supreme Court.* Baton Rouge: Louisiana State University Press, 2001. xviii + 511 pp. $39.95 (cloth), ISBN 978-0-8071-2701-8.



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Legal History and the Problems of Jurisprudence

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In the preface to his magisterial biography of John Marshall, R. Kent Newmyer writes that his ambition was to produce an "interpretive biography" that combines "narrative biography" with a "study of Marshall's jurisprudence" (p. xiv). Textual analysis of Marshall's judicial writings consumes large chunks of the book. There is accordingly a great deal of constitutional argument in Newmyer's volume, and my assignment was to judge the book from the standpoint of constitutional theory.

Here is the good news: much of Newmyer's constitutional analysis is praiseworthy. When he sticks close to the text of Marshall's opinions or when he is setting Marshall's work in historical context, Newmyer handles his subject deftly. The book is sprinkled with astute characterizations of Marshall's constitutional thought. The biography reflects prodigious scholarly effort, and it will be valuable to anybody who seeks a detailed treatment of the great Chief Justice's life and work.

To Newmyer's credit, he is not content to offer discrete insights into particular cases. He aims to expose and describe the core principles of Marshall's jurisprudence. According to Newmyer, "Of all the strands that make up the rich tapestry of Chief Justice Marshall's constitutional jurisprudence, none was more important than the distinction he drew between law and politics" (p. 102). Unfortunately, Newmyer's treatment of this ambitious and interesting claim suffers from conceptual difficulties that cause mischief throughout the book.

One problem is that Newmyer never makes entirely clear what he wants to say about Marshall and the law/politics distinction. Sometimes he seems to suggest that Marshall succeeded in separating law from politics. When analyzing *Fletcher v. Peck*,[1] Newmyer declares that "[i]n *Marbury*, Marshall asserted that law and politics *were* separable; now in *Fletcher* he had to demonstrate the truth of his assertion. This he did by turning a public-policy issue into a question for the common law" (p. 226; see also e.g., p. 193). Yet, in other passages, Newmyer suggests that Marshall could not possibly have separated law from politics. Thus, when commenting on *Marbury v. Madison*,[2] Newmyer says that the Constitution "was supreme law and supremely political as well" and that Marshall's "opinion, like the Constitution itself, was both political *and* legal" (p. 168).

Some of this confusion may arise because Newmyer never specifies what he means by "politics." People sometimes use "politics" quite generally, so that it encompasses nearly all public contestation and discretionary choices about controversial policies. On other occasions, people conceive of the concept more narrowly, so that it refers specifically to partisan struggles for offices and power. It is possible that Newmyer means to admit that Marshall made the Court political in the first, general sense of the term, but to deny that he engaged in politics in the narrower sense of electoral partisanship.

Much of what Newmyer says is consistent with this interpretation. He writes, for example, that Marshall's chief concern was that "constitutional interpretation"

should not be "a matter of party orthodoxy" (p. 103). He says that *Stuart v. Laird*[3] taught Marshall not only that "[p]olitical calculation and judging, in the American constitutional system, could never be entirely separate," but also that "the Court could survive its political vulnerabilities most effectively by projecting itself as a legal institution." (P. 157). And, in his most explicit comment on the hypothesis we are now considering, Newmyer claims in his conclusion that "[e]ven in its most 'political moments'–*Marbury* comes to mind, as does *McCulloch*, and the Georgia Cherokee cases–the Court's 'politics' differed fundamentally from those of Congress and the executive branch" (p. 480).[4]

Perhaps, then, we can construe Newmyer's point this way: even though Marshall could not make the Court *apolitical*, he sought to make it political in a distinctively legal or judicial way. On this view, the Marshall Court practiced a kind of "high politics" buffered against the pressures of partisan competition for political office. Newmyer has made a compelling argument of this kind at least once before, in his marvelous 1987 article about the Harvard Law School and the origins of American jurisprudence.[4] Moreover, the "high politics" thesis fits Marshall's career fairly well. There are exceptions, to be sure. Newmyer admits, for example, that Marshall probably "hurried the litigation" in *Worcester v. Georgia*[5] "so as to make Jackson's Indian policy an issue in the presidential election of 1832" (p. 456). Still, exceptions aside, Newmyer does a good job rebutting those who want to portray Marshall as a "politically motivated" judge (p. 474) who pursued ideological objectives without much concern either for legal norms or the judicial role.

Yet, whether or not the "high politics" thesis fits Marshall's career, it does not fit Newmyer's book. Newmyer struggles throughout the book not only to defend Marshall against charges of crass partisanship, but also to deny that Marshall resolved legal issues on ideological grounds. Nowhere is this mission more explicit than in Newmyer's summation on *Fletcher*, where he declares that "[Justice William] Johnson's concurrence ... raises the question of whether Marshall really believed that he and the majority had risen above politics. Or, had they found the law, not made it? " In response to his question, Newmyer admits that it is "tempting to say no," but he then labors to show that while Marshall may have "stretched the constitutional language" and taken "considerable interpretive liberties," he nevertheless had followed "the general, if not the explicit, intent of the Framers"–and so, apparently, was not guilty of "making" the law (p. 235).

>From the standpoint of legal theory, the choice between "finding" and "making" the law is unpardonably clunky, and I will have more to say about that formulation later. For the moment, though, the crucial point is that Newmyer tries to demonstrate that Marshall respected a strong version of the law/politics distinction, pursuant to which judicial decisions ought to be legal rather than political, even if we mean political in the sense of "high politics" about contested ideas, values, and policies. This task is obviously difficult, since Marshall not only produced a series of controversial rulings in politically charged cases, but did so in a way consistent with Federalist party ideology. How could anybody conclude that Marshall had not behaved politically?

Newmyer relies heavily on two strategies. The first is to claim that Marshall behaved legally rather than politically because he remained faithful to common law principles and methods. Newmyer introduces this idea early (see, e.g., pp. 76-77) and the theme of Marshall-as-common-law-judge recurs frequently in his discussion of particular cases. Some of this analysis is harmless. Marshall was indeed a skilled practitioner of the common law, and his legal education and his career as a practitioner undoubtedly shaped his legal sensibility. Yet if deployed in order to show that Marshall was not "political," the idea of Marshall as common law judge becomes misleading. The common law itself was in important respects political, and manifestly so in the hands of a skilled and aggressive judge like John Marshall. Newmyer recognizes as much in his sensitive readings of individual cases. So, for example, with regard to *New Jersey v. Wilson*,[7] Newmyer doubts Marshall's claim that precedent controlled the case: "What did seem to be controlling, or at least constant, instead, was a general disposition on [Marshall's] part to bend common-law methodology to create uniform, property-protecting rules for the land market" (p. 238; see also p. 244). Moreover, if Marshall was a great common law lawyer, he also understood that constitutional law was not simply common law (p. 379; see also p. 346).

More troubling is Newmyer's second strategy for explaining how Marshall managed to separate law from politics: he contends that Marshall struggled to respect the intent of the framers. Newmyer's treatment of framers' intent is peculiar. The idea makes cameo appearances throughout the book, but "framers' intent" does not emerge as a major theme until near the end. Newmyer eventually declares that all of Marshall's "major constitutional decisions operated on the premise that the Court was bound by the law of the Constitution to

do what it was doing; that it was guided by legal, not political, reasoning by [sic] the intent of the Framers" (p. 378). In his conclusion, Newmyer announces that Marshall believed that "the role of the Court was to preserve the Constitution of 1787 against all comers by adhering to the intent of the Framers as expressed in the text of the document" (p. 473). He adds, "Marshall referred to intent in his opinions; he believed what he said" (pp. 480-481).

Marshall did refer to "intent"–but he almost always did so in a highly abstract way, referring not to any specific judgments made by actual framers but rather to aspirations that the American people must have had when they adopted the Constitution, given the general nature of the constitutional project. For example: "It must have been the intention of those who gave [Congress its] powers, to insure, so far as human prudence could insure, their beneficial execution."[8] The idea of "intent" is not doing any work in this sentence, nor is Marshall engaged in any historical effort to discern the opinions of the men who actually attended the Philadelphia convention.

Marshall's interpretive practice stands in marked contrast to methods employed by James Madison, who did sometimes reject constitutional interpretations on the ground that they were inconsistent with judgments made by the framers. For example, Madison invoked debates from the Philadelphia convention to justify his opposition to the first Bank Bill.[9] Marshall rejected both Madison's methods and his conclusions; indeed, Newmyer opines that "it seems obvious that the doctrine of broad construction set forth in *McCulloch* was ... a response to Madison's strict construction views" (pp. 305-306).

If the textual evidence for making Marshall an originalist is so thin, why does Newmyer–a competent historian and a careful reader of texts–end up talking so much about framers' intent? In my view, he is driven there by a jurisprudential error. Newmyer wants to show that Marshall thought the Constitution had objective meaning, tried to remain faithful to it, and in important respects succeeded. That project is a laudable corrective to the realist excesses of some scholarship. Unfortunately, however, Newmyer seems to think that he can show Marshall was faithful to the law only if he denies that Marshall exercised creative, independent political judgment. Not so: modern legal theory offers several ways to break down the blunt dichotomy between "finding" and "making" the law. Especially useful to Newmyer might have been Ronald Dworkin's theory, which attempts to explain how constitutional interpretations can be at once objective, bounded, distinctively legal, and dependent upon controversial political arguments.[10] Newmyer never avails himself of such conceptual tools. As a result, he fails to distinguish consistently between "high" and "low" politics, struggles to show that Marshall "found" the law in framers' intent and common law sources, and effaces the differences between Marshall's enterprise and Madison's.

There is now a considerable literature in which historians criticize constitutional theorists for second-rate historiography.[11] Perhaps it is time to turn the tables. When historians tackle theoretical topics, such as the law/politics distinction, they had better avail themselves of the best that theory has to offer. Of course, historians must understand Marshall on his own terms; their task is to render him accurately, not to make him look good from the standpoint of twenty-first century legal and constitutional theory. That point does not, however, excuse reliance upon an impoverished legal theory. Even if Newmyer's only objective were to reproduce Marshall's own assessment of the law/politics distinction, he would need a conceptual vocabulary adequate to the complexity of his subject's thought. Ordinary lawyers in Marshall's day may have thought that judges should "find" the law not "make" it, and they may not have recognized any possibilities intermediate between those two. Marshall, however, was no ordinary lawyer, and it would be an error to assume, absent proof, that he was captive to ordinary views.

I do not mean to suggest that Marshall somehow anticipated Ronald Dworkin's theoretical work almost two centuries before it was written, or that Marshall produced important advances in legal philosophy. In terms of disposition, Marshall was neither a philosopher nor a scholar. In terms of capacity and insight, though, he soared with eagles. Marshall had real jurisprudential genius. He possessed an intuitive and unsystematized but not atheoretical understanding of the newly minted, distinctively American enterprise of constitutional interpretation. From the standpoint of modern constitutional theory, what is remarkable about Marshall's opinions is not that they seem dated, but that, on the contrary, they speak in terms consistent with modern insights. Perhaps that is mere coincidence, a superficial impression that depends upon separating Marshall's words from conceptual premises essential to his thought. But that conclusion is not something an historian can assume as *a priori* truth; it is something that must be demonstrated.

In any event, Newmyer's treatment of the law/politics distinction is part of the conceptual frame-

work he invokes to describe and analyze Marshall's behavior, not an ideological construct that he attributes to Marshall but holds at arm's length from himself. Newmyer appears to believe not only that Marshall *thought* he had separated law from politics, but that he actually *did* so. Indeed, Newmyer tries to distinguish Marshall's Court from the modern Court on the ground that today's Court is "highly politicized" and practices an "open-ended approach to constitutional interpretation" that Marshall "surely would have opposed" (pp. 481, 478-479).

Had Newmyer employed better jurisprudential theory, he might have dispensed with the effort to show Marshall's reasons as legal *rather than* political and instead offered an account of *how* Marshall made the Court's politics distinctively legal. Scattered through his biography are tantalizing suggestions from which one might construct an answer to that question. I am especially sympathetic to an observation that Newmyer makes before the midway point of the book, when he comments that Marshall tried "to convince the American people that the Court, for all of its elitist characteristics, somehow spoke for them; that it was uniquely qualified to stand guard over the Constitution" (p. 206). If so, Marshall was emulating the framers rather than following them; he endeavored to speak on behalf of an American people whose single authentic expression was the constitutional text itself.[12] Newmyer later notes in passing the implications of this position: Marshall's conception of the judicial role "appeared to make the Court into a sitting constitutional convention, and *McCulloch* was the classic case in point" (p. 355).

Newmyer's book is rich with insights that might be used to construct other, quite different descriptions of the Marshall Court. Had the author drawn these observations together into a compelling portrait of Marshall's distinctively legal *and* thoroughly political Court, this biography could have been a great book. Instead, Newmyer settles for declamations about Marshall's loyalty to the Founding Fathers. The narrative that remains is very good, but less than what it might have been.

Notes

[1]. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

[2]. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

[3]. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803).

[4]. *McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 316 (1819); *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Peters) 515 (1832).

[5]. R. Kent Newmyer, "Harvard Law School, New England Legal Culture, and the Antebellum Origins of American Jurisprudence," *Journal of American History* 74 (1987): 814-835.

[6]. *Worcester v. Georgia*, 31 U.S. (6 Peters) 515 (1832).

[7]. *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812).

[8]. *McCulloch*, 17 U.S. (4 Wheaton) at 415.

[9]. Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Knopf, 1996), 351.

[10]. Ronald M. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986). Also useful might have been the "new institutionalist" literature in political science; see, e.g., Cornell W. Clayton and Howard Gillman, eds., *Supreme Court Decision-Making: New Institutionalist Approaches*(Chicago: University of Chicago Press, 1999).

[11]. See, e.g., Martin S. Flaherty, "History 'Lite' in Modern American Constitutionalism," *Columbia Law Review* 95 (1995): 523.

[12]. Christopher L. Eisgruber, "John Marshall's Judicial Rhetoric," *Supreme Court Review* 1996 (1996): 439-481.