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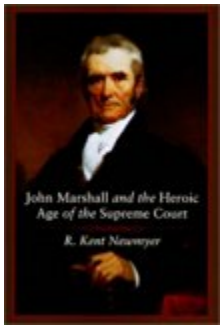

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R. Kent Newmyer and the Heroic Age of Judicial Biography?

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If he had not already done so, with the publication of this brilliant study of the life and work of John Marshall, R. Kent Newmyer has surely established himself as the foremost judicial biographer of our day. Previously known for his definitive work on Justice Joseph Story, Newmyer takes on an even more difficult subject in the "great chief justice." Skeptical readers may wonder–as Newmyer probably did when he began this project–what more could possibly be said about the man whom John Adams appointed as the fourth chief justice of the United States. Marshall and the Court over which he presided have, after all, been the subject of scores of scholarly books, articles, and dissertations, as well as a number of poplar biographies and essays. This book will pleasantly surprise such skeptics. From the first page to the last, Newmyer offers a compelling examination of Marshall that includes just the right blend of narrative, synthesis, and analysis. Newmyer builds on the work of other historians at the same time that he offers fresh insights. He mixes attention to the broad historical context with a close discussion of constitutional disputes. And he paints a sympathetic portrait of his subject while maintaining a balanced, scholarly tone. In short, Newmyer succeeds in crafting an original and insightful study of Marshall's life and work. In the process, the author may have even revived the art of judicial biography.

Newmyer begins by placing Marshall squarely within the context of the American Revolutionary era. Although most studies of Marshall have given scant attention to his early career, Newmyer utilizes Eric McKitrick's and Stanley Elkins's classic formulation to portray Marshall as a "young man of the Revolution."[1] Born in 1755, Marshall took up arms for the American cause at age twenty, in part because of the dictates of honor and the important role of his father, Colonel Thomas Marshall, in mobilizing the men of Virginia. Still, Newmyer argues, the young Marshall's decision to fight–and to keep fighting–was more the product of principle than of communal or familial obligation. Newmyer goes so far as to claim that the determination to fight the British constituted Marshall's "first great constitutional decision" (p. 5). The young Marshall held a deep concern for the liberties of Americans and a strong commitment to the creation of an American nation. This constitutionalist, nationalist perspective, Newmyer asserts, arose from Marshall's thoroughly English cultural background combined with a heavy dose of American frontier experience. Marshall's lifelong love of English literature and his early encounter with Blackstone's *Commentaries on the Law of England* instilled in the young man an appreciation for the written word, a respect for English constitutional principles, and a devotion to the rule of law. The American Revolution nourished these values by placing constitutional arguments about the nature of rights and the meaning of sovereignty at the center of Virginia political life for more than a decade, beginning with the Stamp Act controversy of 1765. Under the wartime tutelage of George Washington, Marshall perceived the dangers that local factions and state interests posed to creating an American republic. According to Newmyer, the War provided

a "constitutional education" for the future chief justice, and Marshall learned his lessons well (p. 21). After independence, he consistently championed a strong national government, which he perceived as the only means by which the fledgling nation could survive in a world dominated by imperial powers. He began to view the judiciary, moreover, as an independent arbiter of constitutional disputes and the young nation's only hope of preserving the republican distinction between law and politics. These ideals took shape while Marshall made his name as a leading lawyer, prominent Federalist, emissary to France, and member of Congress. In fact, Newmyer devotes nearly a third of his book to Marshall's life before his appointment to the Court. In doing so, Newmyer builds on David Robarge's recent work on Marshall's pre-Court career and demonstrates how the Revolution profoundly shaped Marshall's ideas about law, politics, and the judiciary.[2]

Newmyer covers the familiar territory of Marshall's major Supreme Court decisions with equal aplomb. He views *Marbury v. Madison* (1803) as the first victory in the chief justice's campaign to place the rule of law over partisan politics, an ongoing struggle that pitted Marshall against President Thomas Jefferson and included the 1805 impeachment trial of Justice Samuel Chase as well as the 1807 treason trial of Aaron Burr. Marshall emerged from these early battles as the respected leader of an increasingly powerful Supreme Court, whereas Jefferson "came off as impetuous, vindictive, and self-righteous" (p. 209). (Newmyer takes a dim view of the sage of Monticello throughout the book.)

Newmyer discusses Marshall's other great opinions within the general context of the ideological development of early nineteenth-century America. While many historians have portrayed classical republicanism and Lockean liberalism in tension with each other, Newmyer paints Marshall's jurisprudential record as displaying a commitment to both ideals. "Contract was the connecting link," he explains (p. 264). In protecting contractual relationships in cases such as *Fletcher v. Peck* (1810) and *Dartmouth College v. Woodward* (1819), Marshall attempted to "liberate individual economic energy," Newmyer writes, echoing James Willard Hurst, so as to promote "the collective prosperity and well-being of society" (p. 265).[3] Marshall's nationalistic rulings, including *McCulloch v. Maryland* (1819), thus aimed not to regulate the economy but to facilitate economic individualism, not to create "a nation-state but a national market, an arena in which goods and credit moved without hindrance across state lines" (p. 271). By so doing, Marshall hoped to bind the American people together through a shared sense of self-interest. Hovering over all the great nationalist decisions of the Marshall Court, Newmyer continually reiterates, were the memories of the Revolutionary era–the efforts of General Washington, the Continental Army, and the framers of the Constitution to create a nation where none had existed. To Marshall, then, the promotion of economic liberty within a framework of constitutional nationalism fulfilled the promise of the American Revolution.

Newmyer treats the second half of Marshall's judicial career–the decade and a half from the end of the 1819 term until his death–in a particularly compelling fashion. These were in many ways difficult years for the chief justice and his Court. Marshall's vigorous assertion of national power in *McCulloch* unified and mobilized the states' rights forces in Virginia, including Jefferson and Judge Spencer Roane, who spent the early 1820s challenging the Court's authority. Newmyer details the rise of this "anti-Court movement" and Marshall's efforts to combat it. But after the election in 1828 of President Andrew Jackson, it became evident that Marshall had lost the war. Jackson's rise not only reflected a new commitment to states' rights constitutionalism–it also demonstrated the new realities of mass, participant politics. "By fashioning the Court as a legal institution, by viewing judges as republican statesmen above the fray, Marshall set himself against this new way of doing constitutional business," Newmyer writes (p. 379). Marshall had to live with the consequences of these changes. He saw the Court come to reflect the rise of southern and western–and increasingly Democratic–political power, as new justices filled the seats vacated by his early colleagues. (Beforehand, from 1811 to 1823, the Court had experienced not a single change in its personnel, a remarkable record of stability that coincided with most of Marshall's greatest decisions.) Marshall watched as Jackson dismantled the National Bank that the *McCulloch* decision had legitimated and as the president ignored the chief justice's efforts to preserve the rights of the Cherokee nation in Georgia. Still, Marshall's shrewd leadership enabled him to preserve much of what he had already fashioned. Newmyer credits the chief justice for adjusting to these new realities and for taking a more pragmatic approach to constitutional decision making during his later years on the Court. In decisions such as *Willson v. Black-bird Creek* (1829), for example, in which the Court allowed the construction of a dam that obstructed a tidal river, Marshall took a less doctrinaire position on the Commerce Clause than he had in the landmark case *Gib-*

bons v. Ogden (1824). "It was flexibility, along with tactical savvy," Newmyer argues, "that permitted Marshall to salvage so much of his constitutional nationalism in an age hostile to it" (p. 413). Thus, Marshall's great contributions to American constitutional law–though somewhat modified–survived the Jacksonian revolution.

These few summary paragraphs, of course, fail to do justice to Newmyer's rich, multi-layered analysis of Marshall. Indeed, this book contains much that sets it apart from existing scholarship on Marshall and his Court. Newmyer discusses some of the chief justice's lesser-known decisions–such as *Huidekoper's Lessee v. Douglass* (1805), a case involving a Pennsylvania statute dealing with public land–that, he convincingly shows, played an important part in the chief justice's larger nationalizing project. The author takes seriously the contributions of some of Marshall's Supreme Court colleagues–especially William Johnson–who are often overlooked by constitutional historians of the era. Newmyer also devotes considerable attention to the chief justice's thoughts about and decisions regarding slavery, a topic that, though rarely examined, sheds significant light on Marshall as a southerner. Finally, Newmyer concludes his work with an insightful discussion of Marshall as "a judge for all seasons," which takes account of the mythology that has grown up around the chief justice over the past century. In the final analysis, Newmyer notes the irony of modern day partisans' enlisting Marshall in support of a wide variety of constitutional causes. At bottom, Newmyer concludes, Marshall was a conservative, who valued property and individualism and believed in the original intent of the framers. Although Marshall declared in *McCulloch* that the Constitution needed "to be adapted to the various crises of human affairs," Newmyer dismisses the notion of portraying the chief justice as the father of "modern constitutional relativism." "It is the historical reality of intent, more even than his unique concept of nationalism or his concept of balanced federalism," Newmyer argues, "that locates Marshall in his own age and distinguishes his jurisprudence from ours" (p. 480).[4]

This conclusion about Marshall's political utility in our own day may rankle some, but it is precisely Newmyer's ability to place Marshall "in his own age" that makes this such an outstanding example of judicial biography. Newmyer has mastered an important but difficult genre. As well as any community study of the social history of law, judicial biography allows scholars to examine questions of motive and ideological development at the individual, "micro" level. Antiquarians, lawyers, political scientists, and historians have all made their contributions to the body of scholarship that chronicles the lives and work of the nation's–mostly the U.S. Supreme Court's–judges. But Newmyer has set the standard. His studies of Story and Marshall demonstrate what judicial biography can and should contribute to legal and historical scholarship. Newmyer's ability to analyze judicial opinions with the clarity and depth of a legal scholar, combined with his gift for placing those opinions and personal motivations within the larger context of cultural development, make his work exceptional. Perhaps most impressive–and most daunting to prospective biographers–is Newmyer's facility with language. His smooth and straightforward prose, spiced with an appropriate degree of wit, gives his works a literary quality that makes them a joy to read. This indeed may be the key. Judicial biography is the most likely vehicle for introducing legal history to the non-specialist, and if historians and other scholars are at all serious about engaging an audience outside the academy, they should follow Newmyer's lead. His work is rigorous, relevant, and at the same time, readable. Other important nineteenth century Supreme Court justices–William Johnson, John McLean, even Roger B. Taney, for example–await new biographers, while scores of federal and states judges cry out for examination.[5] Newmyer has provided scholars with a model study. Let the "heroic age" of judicial biography begin!

Notes

[1]. Stanley Elkins and Eric McKitrick, "The Founding Fathers: Young Men of the Revolution," *Political Science Quarterly* 76 (June, 1961): 181-216.

[2]. David Robarge, *A Chief Justice's Progress: John Marshall from Revolutionary Virginia to the Supreme Court* (Westport, Conn.: Greenwood Press, 2000).

[3]. James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (Madison: University of Wisconsin Press, 1956).

[4]. In this assessment, Newmyer agrees with Charles Hobson's recent interpretation. See Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University Press of Kansas, 1996). Newmyer relies heavily upon Marshall's published papers, which Hobson has been editing for the past several years.

[5]. Donald Morgan's study of Johnson, *Justice William Johnson, The First Dissenter: The Career and Constitutional Philosophy of a Jeffersonian Judge* (Columbia: University of South Carolina Press, 1954) is nearly fifty

years old. F. P. Weisenburger, *The Life of John McLean: A Politician on the United States Supreme Court* (Columbus: Ohio State University Press, 1937) and the best book on Taney, Carl Swisher's *Roger B. Taney* (New York: Macmillan, 1936), are even older. *See also* the notable "Symposium: National Conference on Judicial Biography," *New York University Law Review* 70 (June 1995): 485-809.