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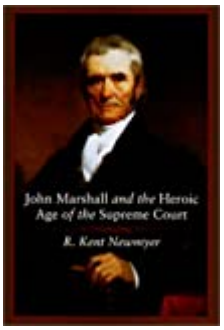

R. Kent Newmyer. *John Marshall and the Heroic Age of the Supreme Court.* Baton Rouge: Louisiana State University Press, 2001. xviii + 511 pp. $39.95 (cloth), ISBN 978-0-8071-2701-8.

Reviewed by Michael A. Bellesiles (The Newberry Library)

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Making a Nation That Would Last

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John Marshall is back. Appointed to the Supreme Court two hundred years ago as a final act of a defeated President, Marshall is arguably the most significant judge in American history–yet only now is he getting the scholarly recognition he so richly deserves. For instance, Herbert A. Johnson, the founding editor of the invaluable *Papers of John Marshall*, Charles F. Hobson, his successor, and Jean Edward Smith have written excellent biographies of Marshall. These works tend toward the massive, as does G. Edward White's important study of the last twenty years of the Marshall Court.[1] One could list many specific examinations of aspects of Marshall's years on the bench, all highlighting the renewed interest in the Chief Justice. R. Kent Newmyer's new biography reminds us why John Marshall still matters.

Newmyer fixes John Marshall firmly in his historical context. Marshall saw himself as a product of the American Revolution, and, as Newmyer says, "Perhaps no other event in American history educated those it touched more profoundly than did the American Revolution" (p. 2). Marshall and many of his generation learned the danger or relying on the good will of the states or their citizens to keep the nation alive. Like his fellow Federalists, Marshall wanted a nation, not a collection of states. As Marshall expressed it, "the general tendency of state politics convinced me that no safe and permanent remedy could be found but in a more efficient and better organized general government" (p. 28). He supported the Constitution, as he said at the Virginia ratifying convention, because it created "a well regulated Democracy" (p. 55). As Chief Justice, John Marshall would work for nothing less that "a nation armed with the sovereign power to govern" (p. 320).

But what role would the law play in this "well regulated Democracy"? The law should definitely be above politics, yet could never hope to escape it entirely. Newmyer labels Marshall "A Passionate Moderate" (p. 119), which seems a fair summation. Marshall's moderate style "masked a passionate commitment to social order" (p. 143). When confronted in 1800 with what he thought to be the triumph of Jefferson's dangerous metaphysics, Marshall sought to keep his head and battle for time. Newmyer puts it well in seeing Marshall's model in

his hero George Washington, "who realized that victory lay in keeping his army in the field." Marshall and John Adams reasoned that, "with time, thinking constitutionally could turn into a national habit, providing the states' rights theorists didn't interpret it into oblivion" (p. 131). For Marshall, the Court was "the last best hope for the Republic as it rushed precipitously toward democracy" (p. 457).

As Newmyer makes evident, the fundamental political questions facing the United States during Marshall's lifetime were constitutional in nature. What activated the political battles of the 1790s and the 1850s was the same central and unchanging constitutional question of the balance between the federal and state governments. Excessive state power, Marshall held, posed a threat to the very survival of the nation. That position did not translate, as Marshall's bitterest enemies charged, into a desire to destroy the states. He saw himself holding true to the Framers' vision of federalism. But there was no escaping the simple issue of the verb. Does one say "the United States is" or the "the United States are"? Grammatically the latter makes better sense; but politically as well as constitutionally, there was no doubt in Marshall's mind that the Framers of the Constitution had created a nation, and that nation needed to speak with a single voice if it was to survive.

Though Newmyer maintains that Marshall did not reach his decisions for explicitly political reasons, there can be no mistaking their vital political consequences. His opinion in *Marbury v. Madison*, 5 U.S. [1 Cranch] 137 (1803), brilliant in denying Jefferson the ability to respond in any meaningful fashion, was widely perceived as a defeat for the President, and in politics perceptions matter deeply. Likewise, the acquittal of Aaron Burr on charges of treason was both constitutionally significant in confirming a narrow definition of treason and another bitter political blow to Jefferson. The President certainly took them that way, transforming the Chief Justice into the symbol of a counter-revolutionary class that, like the kulaks in the 1930s U.S.S.R., must be exterminated: "Nothing should be spared to eradicate this spirit of Marshallism," Jefferson wrote (p. 146). Marshall in his turn had to admit that Jefferson, that "great Lama of the mountains" (p. 336), was not an "absolute terrorist" (p. 148).

Newmyer fashions a dialectic in the great debate between Jefferson and Marshall – labeling it "A Grand Creative Hatred" (p. 148). Jefferson's political dominance kept the states dynamic and maintained the states' rights ideology, while Marshall's prestige limited the power of the states and upheld the ideal of central authority. At the same time, Jefferson's failed effort to impeach Justice Samuel Chase sent a clear and lasting message to the Supreme Court to not step further into the political realm.[2] Between them they fashioned a working federalism,[3] and each gave a little in the direction of the other. As Newmyer notes, Marshall's "nationalism had considerable states' rights play in the joints" (p. 435). It is ironic that Jefferson most bent the Constitution toward Presidential power with the Louisiana Purchase and the Embargo Acts, but it has been some time since anyone has praised Jefferson for his consistency. It is additionally ironic that Marshall should develop his judicial reasoning largely in opposition to Jefferson. It was as though each man needed the other to fire his genius.

The Chief Justice thought the President's combination of states' rights rhetoric and abuse of Presidential power offered two paths to national destruction. Jefferson threatened "to subvert the rule of law, which was the polestar of republican constitutional culture" (p. 173). Marshall used the Supreme Court as an educational forum, "a sitting constitutional convention" (p. 355), to clarify Constitutional order, and to remind the American people that, as he wrote in *Marbury*, "It is, emphatically, the province and duty of the judicial department, to say what the law is" (p. 170).

Judicial review had deep roots in English common law, but Marshall wanted to make it authentically American, an explicit part of the Constitution. "A written constitution," Newmyer writes, "had altered America's constitutional universe – without clearly mapping its coordinates" (p. 198). This break from common law precedent was as much a political as a legal revolution, and the battle between Jefferson and Marshall was to determine who held the power of interpretation, who set the coordinates. Marshall understood that it was all a shadow play in which Jefferson held most of the cards. After all, when they wanted to, the states simply ignored the federal courts, as Pennsylvania did in *United States v. Peters*, 9 U.S. [5 Cranch] 115 (1809), South Carolina did in *Elkison v. Deliesseline*, 8. Fed. Cas. 493 (No. 4366) (Cir. Ct. Dist. S.C. 1823) (Justice Johnson), and Georgia did in *Worcester v. Georgia*, 31 US (6 Peters) 515 (1832). But Marshall played for the long-term, aiming to establish legal perceptions that would have political consequences for later generations.

For Newmyer, this determination to act for the future led Marshall to save the Constitution from states' rights.

Try to imagine what the United States would have looked like had Jefferson won his historic battle with Marshall. As Peter S. Onuf has recently argued, Jefferson expected and would have been content with a series of republican confederations spreading across North America. If Jefferson had not been so effectively challenged by Marshall, the United States may have been a smaller, less powerful nation.[4] Such considerations aside, there is a great deal of merit to Newmyer's appreciation for the constitutional impact of the political contest between President and Chief Justice.

Almost every major decision of the Marshall Court had economic repercussions that aided the functioning of national markets, creating what Newmyer calls "The Marshall Plan for America" (p. 315). Between them, Marshall and Justice Joseph Story made the Contract Clause into "an all-purpose instrument for protecting private property from state regulation, even when no contract was involved" (p. 240). They found a natural constituency in the "emerging commercial class" (p. 315). Marshall's Court prevented the states from interfering with commercial enterprise, as well as the larger nation-building goals of the Federalists and Whigs. For many contemporaries and later scholars, such an attitude put the federal judiciary at the service of the business elite.[5] But Newmyer insists that Marshall consistently acted on the same intellectual basis, "Marshall said what he truly believed, and what history shows to have been true: The Union was in danger from the states and from a persistent cultural localism, not the other way around" (p. 299). The Supreme Court undermined that localism and fostered a national identity, including in areas of commercial law. Borrowing from the imagery of John Murrin,[6] Newmyer argues that Marshall hoped that "If the American people could forge an 'economic e pluribus unum,' they might just put a solid foundation and walls under the constitutional roof the Framers left suspended in the thin air of patriotism and historic memory" (p. 302).

The Supreme Court's efforts to secure political and economic nationalism had unintended consequences. As Newmyer observes, "Marshall's opinion in *McCulloch v. Maryland*"–17 U.S. [4 Wheaton] 316 (1819)–"set in motion the forces of states' rights that chartered the direction of antebellum history" (p. 375). Marshall inadvertently gave the states' rights adherents the link between federal authority and economics that they used to gain national political power under Andrew Jackson. With *McCulloch*, the first case that aroused the sustained interest of the press, the Supreme Court became perceived as a central political institution beyond the people's control and thus anti-democratic. Yet Marshall's effort to avoid the aura of partisanship drove his desire to make all decisions unanimous, and fed his willingness to compromise with his fellow judges in pursuit of that unanimity. With Andrew Jackson's election to the Presidency in 1828, those efforts collapsed.[7]

Law and politics were intimately connected for Marshall because the danger was obvious. In *Cohens v. Virginia*, 19 U.S. [6 Wheaton] 264 (1821), Marshall warned that if the states' rights doctrine promoted by his home state of Virginia spread, that the result could be the destruction of the Constitution. "The people made the constitution, and the people can unmake it." A desire to terminate the union "will not be restrained by parchment stipulations; the fate of the constitution will not then depend on judicial decisions" (p. 375). Marshall realized the Court's limitations; they could persuade but not determine. Politics, not law, would ultimately decide the fate of the nation. By selecting John Marshall as Chief Justice, John Adams had put his political mark on the Supreme Court for thirty-five years. It was Andrew Jackson who determined the Court's conduct over the next twenty-five. Marshall "held his own against the Court's external foes, but with the appointment process, the doctrine of states' rights democracy invaded the Court via the Constitution" (p. 435). Jackson appointed six justices, including Chief Justice Roger Taney.

The lesson of Marshall's Court is that law and politics cannot be meaningfully separated. As Newmyer intelligently observes, "the Framers' Constitution" is itself a political document. "It was the supreme law of the land, as Article 6 proclaims, and a bundle of political compromises" (p. 483). Making sense of it is thus also a political act. And Marshall was a clever politician. He dominated the Supreme Court through a mix of legal brilliance and personal modesty. He was amiable company in the small town of Washington, and possessed an admirable mind that it was difficult not to admire. And, perhaps most notably, he was always willing to listen to those with whom he disagreed.

As "a principled but practical-minded conservative with an innate distrust of ideological purity" (p. 393), Marshall feared social chaos most. He never questioned any institutional arrangement in his society other than its link to England, and then only in the purely political sense. He had no trouble with slavery either. Marshall's sanguine attitude toward slavery clearly disturbs Newmyer, for Marshall devoted almost no mental energy to and found no moral fault with slavery (pp. 414-434).

As Newmyer succinctly puts the case, Marshall "showed little interest in the subject" (p. 416).[8] This disinterest had consequences; for at no point did Marshall's Court show the slightest concern for the constitutional nature of slavery. When *Mima Queen v. Hepburn*, 11 U.S. [7 Cranch] 290 (1813), gave the Court a chance to place human rights before property rights, only Justice Gabriel Duvall argued, "It will be universally admitted, that the right to freedom is more important than the right of property" (p. 428). Unfortunately the rest of the Court, including Chief Justice Marshall, did not hold to this universal value; for Marshall, property rights always came first. As Newmyer concludes of *The Antelope*, 23 U.S. [10 Wheaton] 66 (1825), "property trumped freedom again" (p. 433).[9]

Yet Marshall was no virulent racist like Taney, his successor as Chief Justice. For example, Marshall deserves great credit for fighting to preserve the rights of Native Americans. His opinion in *Worcester v. Georgia*, for all its paternalism, speaks to the humanity of the Cherokee people. As Newmyer tellingly observes, "In an age when racism, land greed, and arrogance mingled to destroy an innocent people unnecessarily, he worked to put the Court on the side of justice" (p. 457).

By 1830, Marshall's constitutional vision no longer seemed to matter. Newmyer frames Marshall's decisions following Jackson's inauguration in 1827 as a graceful retreat. Perceiving the enormous power of President Jackson, who would be appointing more justices to the Court, Marshall did his best, in Newmyer's telling, to uphold the dignity and independence of the Court.[10] Marshall hoped for vindication from the electorate, setting another precedent in staying on the bench longer than he initially intended in hopes that Jackson would be defeated and a Whig would appoint Justice Story his successor. Marshall even hoped to give the Whigs a winning issue with his *Worcester* decision, but for the Jacksonians it was just another example of the Court trampling on the rights of the states and white settlers. Marshall's last years were marked by the conviction that he had lost his battle against states' rights.

What is Marshall's lasting political message? Most vital is Marshall's understanding that the Constitution can be read in different ways, but that the real world requires that it be read to grant sufficient powers to the federal government to secure the nation's survival. The American people thus spoke through Congress rather than their state legislatures. The Supreme Court fit into that equation "as the special guardian of the Constitution and of the federal Union" (p. 370). Americans, Marshall insisted, are one people, as he wrote in *Cohens v. Virginia*: "That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people.... [A]nd the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character, they have no other" (quoted at p. 372).

Newmyer's is an extremely fair and judicious treatment of John Marshall, beautifully written. Some readers may find the text just a bit adoring at times. Still, it is pleasant to find a biographer who respects his subject rather than another effort to tear down a reputation. As Newmyer frames Marshall's legacy: "Who except the radical states' rightists could deny that the Constitution was a document meant to 'energize' the national government, to give it the powers governments of a sovereign nation ordinarily have" (p. 483)? There are still such theoretically minded people dedicated to minimizing the sovereignty of the people's government. Those who would place the verb "are" after the United States will find little support in the works of John Marshall; those who insist on "is" will always have a champion in the great Chief Justice. The United States was fortunate to have had John Marshall. We are fortunate to have a biography befitting the man.

Notes

[1]. Herbert A. Johnson, *The Chief Justiceship of John Marshall, 1801-1835* (Columbia: University of South Carolina Press, 1997); Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University Press of Kansas, 1996); Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt, 1996); and G. Edward White (with the assistance of Gerald Gunther), *The Marshall Court and Cultural Change, 1815-1835* (New York: Macmillan, 1988) (volumes III and IV in the Oliver Wendell Holmes Devise History of the Supreme Court of the United States).

[2]. Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York: Oxford University Press, 1971) offers a differing and compelling examination of the Chase impeachment, suggesting that Jefferson's real goal was to send precisely such a political message to the Court.

[3]. See Leonard D. White, *The Federalists: A Study in*

Administrative History (New York: Macmillan, 1948) and *The Jeffersonians: A Study in Administrative History* (New York: Macmillan, 1951).

[4]. Peter S. Onuf, *Jefferson's Empire: The Language of American Nationhood* (Charlottesville: University Press of Virginia, 2000).

[5]. The perception of Marshall as the representative of specific class interests goes back to his own lifetime. Many scholars have followed that understanding in seeing Marshall as a servant of the economic elite. Gustavus Myers, *History of the Supreme Court of the United States* (Chicago: C. H. Kerr & Company, 1912, reprinted 1925); Charles Grove Haines, *The Role of the Supreme Court in American Government and Politics, 1789-1835* (Berkeley: University of California Press, 1944 [vol. 2, written with Foster H. Sherwood and published in 1957, covers the period of Taney's Chief Justiceship, 1835-1864); Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977).

[6]. John Murrin, "A Roof Without Walls," in Richard R. Beeman, Stephen Botein, and Edward C. Carter II, eds., *Beyond Confederation: Dimensions of the Constitution and American National Identity* (Chapel Hill: University of North Carolina Press for the Institute of Early American History and Culture, 1987).

[7]. Marshall saw no change from the Anti-Federalists of 1788 to the Jacksonians of the 1830s. Their ideal government remained the Articles of Confederation. Marshall derided those opposed to the *McCulloch* decision for setting forth principles that "would essentially change the Constitution, render the government of the Union incompetent to the objects for which it was instituted, and place all its powers under the control of the state legislatures. It would, in a great measure, reinstate the old confederation" (p. 339).

[8]. I think Newmyer may try a bit too hard in noting that Marshall's Richmond was "known for its liberal treatment of slaves" (p. 416) and Marshall was "a humane slave master" (p. 429)–as though such a thing is possible.

[9]. See Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: University of North Carolina Press, 1981), and Thomas D. Morris, *Southern Slavery and the Law, 1619-1860* (Chapel Hill: University of North Carolina Press, 1996).

[10]. William Winslow Crosskey, *Politics and the Constitution in the History of the United States* (3 vols.; Chicago: University of Chicago Press, 1953-1980; vol. III completed and edited by Murray Dry), famously cast Marshall's actions during Jackson's Presidency in a more craven light. Newmyer responds to Crosskey on pp. 410-413.

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