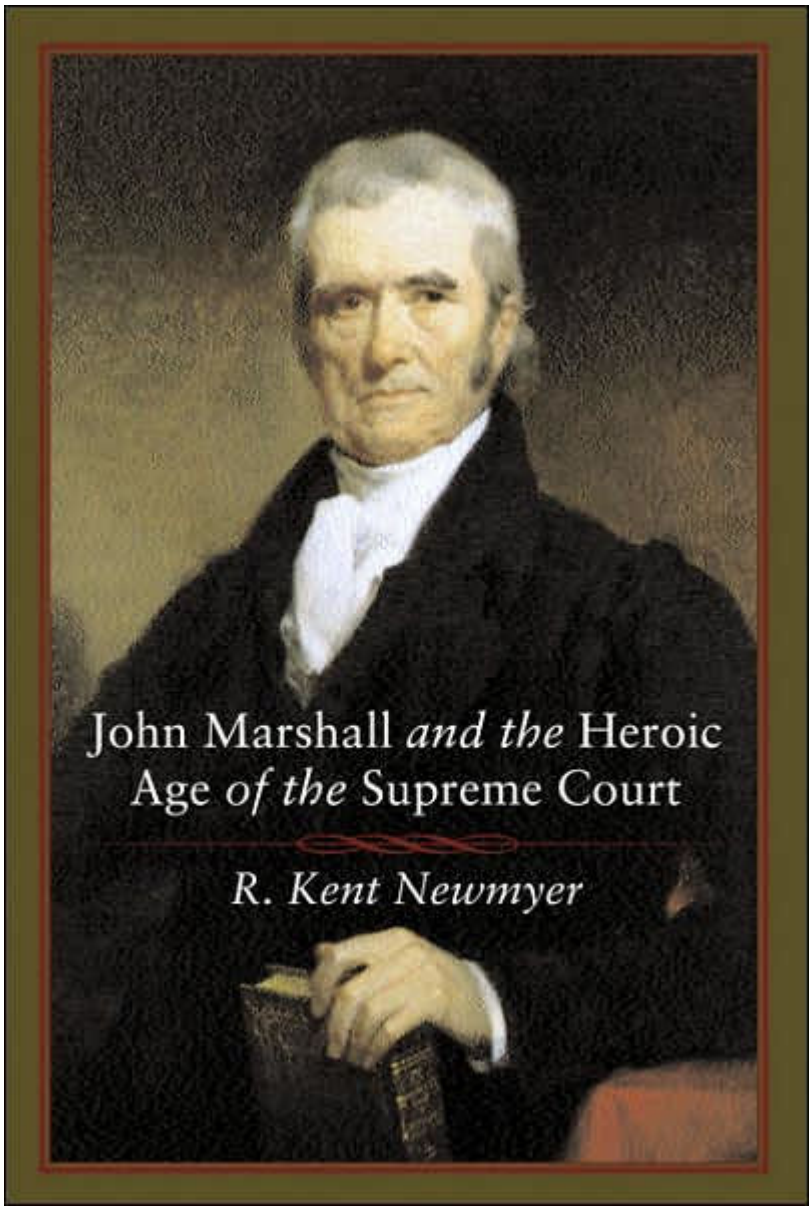
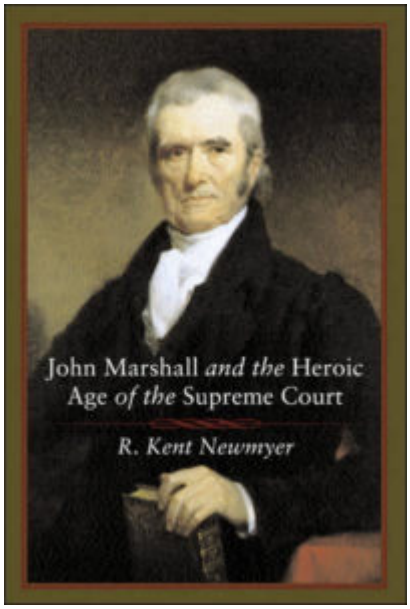
“The Constitution Must Be Looked into by the Judges”





R. Kent Newmyer, John Marshall and the Heroic Age of the Supreme Court. Baton Rouge: Louisiana State University Press, 2001. 568 pp., $39.95 cloth.

Next year will be the two-hundredth anniversary of *Marbury v. Madison*, one of the most famous cases ever decided by the U.S. Supreme Court. In *Marbury* the Court for the first time struck down a portion of a federal law as unconstitutional. It was, to say the least, an unusual event. The Court did not again explicitly exercise its power of judicial review over federal legislation for over half a century, when it struck down the Missouri Compromise in the infamous *Dred Scott* decision in 1856. At the dawn of the twenty-first century, such actions now seem almost routine. In the 1990s alone the Supreme Court struck down two dozen acts of Congress as violating the Constitution. At the time of *Marbury*, American courts were alone in the world in claiming such a power to set aside legislation. In the twentieth century, the power of constitutional review spread across the globe and is now almost universally regarded as an essential feature of a democratic and constitutional political system. Few decisions by any court can rival the symbolism and influence of the *Marbury* decision. Few judges can rival the stature of *Marbury*‘s author: Chief Justice John Marshall.

The Marshall years were, as R. Kent Newmyer aptly labels them in his new study of the great chief justice, the heroic age of the Supreme Court, and Marshall was without a doubt the hero who defined that age. No justice before or since so dominated the Court as John Marshall did. It is common to name periods of Supreme Court history after the chief justice, but the Marshall Court is the only one that can be labeled that way without inviting immediate qualification. It was John Marshall’s Court. And in some ways, it still is.

There were few signs of what was to come when Marshall first took his seat on the bench. Marshall was one of outgoing President John Adams’s notorious last-minute appointments to the federal judiciary, which had itself been dramatically expanded by the lame-duck Federalist Congress. Even as he assumed his new office, Marshall finished out his duties as secretary of state, duties

that included the preparation and delivery of judicial commissions. The incoming Jeffersonians, who had swept the federal elections of 1800 from the Federalists, held the federal judiciary in contempt and regarded it as filled with partisan hacks, especially after the legal persecution of Thomas Jefferson's supporters in the years leading up to the 1800 election. The Jeffersonians in Congress in fact embarked on a sustained attack on the courts, which included the impeachment and near removal of the intemperate Justice Samuel Chase. The Federalists had held the Supreme Court in only slightly better regard. The Supreme Court heard few cases, and the justices were obliged to spend much of their time individually riding circuit to hear cases out in the states. In overseeing the plans for the construction of federal buildings in the new capital in Washington, then Secretary of State Marshall neglected even to provide space for the Supreme Court. Sessions were not infrequently cancelled when too few justices showed up. In the Court's short history three prior chief justices had resigned from the bench, the first to pursue the more attractive office of the governorship of New York, and others had declined appointments to the Court. Marshall was not even the president's first choice to fill the vacancy on the Court.

In these inauspicious circumstances, Marshall remade the Court. He ended the traditional practice of each justice issuing an individual opinion in every case. Instead, the Court began to speak as a single body, issuing one authoritative opinion that was often written by Marshall himself. The chief justice helped stabilize the Court, remaining in office thirty-four years until his death in 1835. He helped the Court weather the initial Jeffersonian storm, and then found allies in government and the country who supported his nationalistic vision. Indeed, the great constitutional struggles of the early nineteenth century created the opportunities for Marshall to weigh in and promote his goals. All the while he managed to maintain his informal leadership of the Court even as his political opponents chose the new justices who replaced his original Federalist colleagues. A moderate Federalist from Virginia, Marshall remained at home in the new political world after 1800 even as the Federalist Party collapsed into irrelevance. An astute political operator, Marshall helped make the Court into a respected and influential institution and helped lay the foundations for the type of power that it would exercise in the twentieth century.

Newmyer's is one of several valuable new studies of Marshall that have appeared in the past few years. Part of the Southern Biography Series at LSU Press, this book focuses on Marshall's constitutional thought and its development over time, primarily as expressed in his many judicial opinions. Newmyer, who earlier produced a similar and well-regarded study of Justice Joseph Story (whom one legal historian has called "a thinking man's John Marshall"), handles the task expertly. This readable "interpretive biography" examines Marshall's "life in the law," explaining his work and contribution to the nation's political development in relation to his personality and early career.

As Newmyer notes, Marshall was not the most learned lawyer of the early

republic, and his greatness primarily rests on surprisingly few judicial opinions. Justice Oliver Wendell Holmes once asserted, with some truth, that Marshall occupied "a strategic point in the campaign of history, and part of his greatness consists of his being *there*." But Marshall knew how to take maximum advantage of his opportunities, and how to avoid overplaying his hand. Although by the time of his death the chief justice was quite pessimistic about the future of his constitutional values, and of the Constitution itself, Newmyer nicely traces the ways in which Marshall was quickly made into a mythic figure and a central reference point for those who came after him. Marshall not only had the advantage of "being *there*," but also of holding views that would eventually win the day and giving reason for later judges to find in his thinking a reflection of their own beliefs and ambitions. His colleague and friend, Joseph Story, published in 1833 the extremely influential *Commentaries on the Constitution*, which effectively identified the Constitution with Marshall's particular understanding of it. At the time of his death, he was revered in the commercial North. Throughout the nineteenth century, Marshall was the hero of nationalists. In the battles of industrialization, he was the defender of property rights. To the New Dealers, he was the advocate of government power. And ever since the Supreme Court invoked the language of *Marbury* to denounce southern resistance to school desegregation, he has been above all a prophet of judicial power.

Marbury was an impressive performance by Marshall and indicative of his achievements on the Court, but not for the reasons that it is usually celebrated now. William Marbury was another of the last-minute judicial appointments made by President John Adams, in this case to the post of justice of the peace in the District of Columbia. Marshall, as secretary of state, was unable to deliver all of the commissions, however, and when Thomas Jefferson assumed the presidency he ordered that the undelivered commissions remain that way. Marbury asked the Supreme Court to issue a writ of mandamus to force Jefferson's secretary of state, James Madison, to deliver the commission and allow him to take office. The administration denied the authority of the Court to intervene in what Jefferson regarded as an internal matter within the executive branch, refusing to send a lawyer to argue the case before the Court or even to admit the existence of the commission. The capital was full of speculation that the president would refuse to obey the Court if Marshall ruled against him. Putting Jefferson to the test risked a humiliating blow to the Court's prestige and perhaps enduring consignment to political irrelevance, but neither did Marshall want to accept Jefferson's contention that the Court could not supervise presidential conduct. Marshall escaped the dilemma by declaring that Congress exceeded its constitutional authority by giving the Court the power to hear such a case and thus dismissed Marbury's case for lack of jurisdiction. (Marshall's interpretation of the statute and the Constitution in *Marbury* remains controversial, feeding the suspicion that he was merely looking for an excuse to avoid having to rule either for or against the administration.) Marshall only reached this conclusion, however, at the end of a lengthy opinion chastising the administration and making clear that the Court would have ruled in Marbury's favor on the merits. The power of judicial review

was first used by the Court to renounce some of the power that Congress had tried to give it. Marshall was simultaneously able to make his legal and political points against the administration, to claim the power of judicial review, and to avoid a direct confrontation with Jefferson that the Court probably would have lost.

Although *Marbury* is now celebrated for its bold assertion of the power of judicial review, that assertion attracted little attention at the time. The Jeffersonians instead filled the papers with harsh denunciations of Marshall for addressing the substance of a case that the Court admitted it never should have heard. In fact, Marshall's explanation of the power of judicial review was wholly uncontroversial. After all, the Court did not offend any political constituency or significantly limit congressional power by striking down a section of the Judiciary Act. By 1803, few doubted the existence of some form of judicial review under the Constitution, and the Supreme Court had noted the existence of such a power in earlier cases. Marshall's argument in favor of the power was itself unoriginal. Marshall did not boldly invent a new power for the Court. He merely gave eloquent expression to a widely understood constitutional principle. *Marbury* is exemplary of what political scientist Mark Graber has called the "passive-aggressive" character of the Marshall Court. Marshall was adept at seizing opportunities to give voice to his constitutional vision and enhance judicial authority while avoiding actions that would expose the Court to reprisals or embarrassment. In doing so, he successfully navigated dangerous political waters and kept the Court afloat.

Newmyer concludes by observing that first Jefferson and later Andrew Jackson taught Marshall the bitter lesson "that the Court does not have the final word on the Constitution . . . What he did not fully appreciate was that the Court as an institution did not have to be final to remain the center of American constitutional government" (484). To his chagrin, Marshall was rarely able to settle constitutional and political debates with his opinions, and his arrogant belief that the Court could and should do so eventually contributed to his beloved institution's great "self-inflicted wound" of *Dred Scott*. But Marshall did demonstrate that the Court could have an important voice in constitutional debates, and Marshall's reputation rests in no small part on the fact that his constitutional values were shared by others and eventually became politically dominant. Marshall could not have anticipated, and can hardly be credited for, the kind of power that the Court wields today. Even so, the lessons of the Marshall Court remain valuable ones. The Court's power and authority depends on its political circumstances and the extent to which its constitutional opinions find favor with others.

This article originally appeared in issue 2.4 (July, 2002).

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