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## Book Review

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## BOOK REVIEW

**John Marshall: A Life in Law.** By Leonard Baker. New York: Macmillan, 1974. Pp. x, 846.

John Marshall, according to Justice Holmes, became the pre-eminent American judge less for original contributions to jurisprudence than for being at the right place at the right time. Revolutionary soldier, Richmond lawyer, diplomat, member of Congress, Secretary of State, and Chief Justice of the United States from 1801-1835, Marshall occupied so many positions of influence in the early Republic—and had such a profound impact on the Supreme Court as an institution—that judges and biographers alike face difficulty in appraising the mortal man and his works. This massive biography, the first full treatment of Marshall's career in over fifty years, only partly succeeds in balancing the biographical values of character and career. The personal portrait of Marshall is rendered with greater skill and in richer detail than ever before. The evaluation of Marshall at the helm of the Supreme Court, however, deifies Marshall into a remote and heroic jurist, larger than life.

Because Baker examines Marshall's life on a grand scale, comparison with Albert J. Beveridge's magisterial biography of 1916-1919 is inevitable.<sup>1</sup> The author, a journalist who has written respected works on the Warren Court, divides the study into four parts roughly corresponding to Beveridge's organization; half is devoted to Marshall and the Supreme Court. Baker has conducted extensive research in the unpublished papers of Marshall at William and Mary<sup>2</sup> as well as in many collateral collections unavailable to Beveridge. Absorbing historical scholarship since World War I, Baker is also more charitable than Beveridge to Marshall's opponents, such as Patrick Henry and Thomas Jefferson. The result is a more full-bodied, even-handed work whose conclusions are better documented and supported than Beveridge's.

With the journalist's eye for dramatic detail, Baker is particularly effective in depicting Marshall's early life, his struggle to establish him-

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1. A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* (1916).

2. Marshall's papers are currently being published by a joint undertaking of the University of North Carolina Press and the Institute of Early American History and Culture in Williamsburg, Virginia. The first of a projected series of ten volumes was published in November 1974. 1 *THE PAPERS OF JOHN MARSHALL* (H. Johnson ed. 1974).

self as a lawyer, his qualities of judgment as a diplomat in the XYZ affair, and in setting forth the issues and arguments of great cases in contracts and commerce. He brings fresh perspective to Marshall's views of slavery and treatment of Indians. Above all, Baker is superior to Beveridge in humanizing Marshall in his various roles as father, lover, neighbor, and statesman. The portrait of Marshall in old age is quite moving. At long last one begins to understand how Marshall, unpretentious but ardent Federalist, managed to dwell harmoniously in Richmond, a citadel of southern elitism and state's rights philosophy. Politics aside, the man's personal magnetism must have been awesome.

Despite these strengths, Baker's study shares the defects that make Beveridge's biography a flawed masterpiece. Overpuffed and underedited, the book overwhelms the reader with unnecessary detail about episodes in which Marshall figured peripherally. While the scandal of Marshall's client, Nancy Randolph, may be interesting, for example, the lengthy accounts of military battles or the recitation of state precedents for judicial review which Marshall did *not* cite in *Marbury v. Madison*,<sup>3</sup> tax the reader's patience. Even more tiresome is constant preachment on behalf of principles of free government and the rule of law. Baker lacks Beveridge's majesty as a preacher. His rhetoric, like unrestrained pornography, dulls the senses.

Baker is also too one-sided in evaluating Marshall. For all the teaching of revisionist historians and legal realists, he views Marshall politically through Federalist eyes and legally through a Blackstonian model of law and the judicial function. Consequently, the study does not advance our understanding of the linkages among Marshall's political and legal principles nor the transformation of the Court's role in the American polity, which is his lasting contribution. Interpretatively, the work is inferior to the analyses of Corwin,<sup>4</sup> Frankfurter,<sup>5</sup> and Faulkner,<sup>6</sup> from which it draws.

Apart from hero worship, these interpretative flaws stem largely from four specific defects. First is limited historical sight, which leads Baker to underestimate the caliber of other justices such as James Wilson, James Iredell, or Roger B. Taney. Only Joseph Story, in Baker's view, is in Marshall's class among the justices of the first half of the nineteenth century.

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3. 5 U.S. (1 Cranch) 187 (1803).

4. E. CORWIN, *JOHN MARSHALL & THE CONSTITUTION: A CHRONICLE OF THE SUPREME COURT* (1919).

5. F. FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* (1937).

6. R. FAULKNER, *THE JURISPRUDENCE OF JOHN MARSHALL* (1968).

Second is oversimplification of doctrinal developments which strengthen as well as weaken the case for Marshall as a great legal craftsman. For instance, while rightly showing that Marshall was sensitive to the need of state regulatory power in the silence of Congress, Baker neglects *Willson v. Blackbird Creek Marsh Co.*<sup>7</sup> and Marshall's conception of state police power. Great cases under the contract clause, such as *Fletcher v. Peck*<sup>8</sup> and *Dartmouth College v. Woodward*,<sup>9</sup> are presented as dramatic episodes rather than as incremental decisions in which Marshall skillfully shifted the anchorage of vested rights from natural justice to the safer ground of the contract clause. By like token, Baker soft-pedals standard criticisms of Marshall's legal techniques, such as his resort to dicta and either-or distinctions, to avoid tough questions of degree. A case in point is *McCulloch v. Maryland*.<sup>10</sup> The author appears unaware of Holmes' devastating critique of Marshall's dictum that the power to tax is the power to destroy—"not . . . while this Court sits." Ignored altogether is Marshall's additional dictum that, while states cannot tax federal instrumentalities, the federal government can tax the states, which salted sectionalist wounds. Too often, Baker takes Marshall at face value and presents his decisions as if no other conclusion were possible.

A third defect is inadequate attention to the social and political environment within which Chief Justice Marshall operated. Considered as discrete episodes, to be sure, the political backgrounds and implications of great cases, such as the Burr treason trial or *Marbury v. Madison*, are well drawn. Baker happily avoids Beveridge's habit of condemning the motives of Marshall's adversaries, especially Jefferson. Still, insensitive to the political thought of anti-Federalists, Baker underplays the class bias of Marshall's decisions and the political nature of the Supreme Court as an institution, for which Marshall above all was responsible. As in the work of Beveridge, Marshall's nationalism becomes the source of a heroic portrait. That the prime beneficiaries of Marshall's principles were the interests of property is too little noted.

Fourth, and closely related, is a Blackstonian conception of the legal order. For Baker, as for Marshall, law is an abstraction divorced from social conflicts or political and economic values; the judicial function is an exercise of professional judgment, not will. The central

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7. 27 U.S. (2 Pet.) 152 (1829).

8. 10 U.S. (6 Cranch) 48 (1810).

9. 17 U.S. (4 Wheat.) 250 (1819).

10. 17 U.S. (4 Wheat.) 159 (1819).

theme of the work is that Marshall was the champion of the rule of law. Yet not even Baker denies that Marshall's opponents, too, were fired by the ideals of a free government of laws in a continental empire of liberty. The real questions were whose law? What values and interests did it serve? Marshall himself had no illusions about this. On the eve of Jefferson's inauguration as president the new Chief Justice wrote Charles Pinckney: "'Of the importance of the judiciary at all times but more especially the present I am very fully impressed and I shall endeavor in the new office to which I am called not to disappoint my friends. . . .'"<sup>11</sup> The union of political principle with a legally enforceable constitution was precisely Marshall's great contribution as Chief Justice. By treating law as a closed system of values, Baker overrates Marshall's legal prowess and underrates his impressive political achievements as a jurist.

A curious contradiction, indeed, pervades the work because Baker seldom reconciles legal and political interpretations of Marshall's conduct. Like his protagonist, Baker usually treats law and politics as polar opposites. Marshall embodies the former, his opponents the latter. On several occasions, however, Baker also acknowledges political facts of Marshall's judicial life which contradict the law-politics dichotomy and his own conclusions. To the reader is left the task of discovering the mixture of law and politics in the Supreme Court during John Marshall's tenure as Chief Justice. That mixture, at least since *Marbury v. Madison*, is the heart of the matter. Equating judicial review with civilization, and Marshall with public law as opposed to public will, Baker serves up rhetoric in lieu of understanding.

A new study of the great Chief Justice, particularly one so richly researched, is intrinsically interesting to all students of American government. As a narrative and personal history, this book deepens our understanding of John Marshall as a human being. As a study of judicial statesmanship, however, it fails to come to grips with the politics of Marshall's jurisprudence. Lost, accordingly, is fresh insight into the role of the federal judiciary as perceived from the life of the man who more than any other politicized the American Supreme Court.

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11. L. BAKER, JOHN MARSHALL: A LIFE IN LAW 359 (1974).