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Book Review -- Federal Courts in the Early Republic

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BOOK REVIEW

FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816. By Mary K. Bonsteel Tachau. Princeton, New Jersey: Princeton University Press, 1978. Pp. ix, 234. $16.50.

*Reviewed by Randall Bridwell**

Without a doubt, historical writing about the American federal courts has been "top heavy." Historians have been interested mainly in the Supreme Court. What little book-length writing there has been on the lower federal courts has had a distinctly biographical tone and mainly has been concerned with a single judge or the period of a single judge's tenure,[1] or it has treated the lower federal courts only in relation to the Supreme Court.[2] Indeed, the Supreme Court not only has dominated our institutional history,[3] but also seems to have preoccupied our judicial biographers for quite some time.[4] To be sure, this must be in part a natural result of the Court's preeminent position within the American federal judiciary, and in part a result of the inaccessibility of data relevant to the lower courts. But it is at least in part a product of professional emphasis, if not bias, and it is very refreshing to see some counterbalance to our usual preoccupation with the high court.

The well-done monograph by Mary K. B. Tachau is an impor-

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1. *See* M. SCHICK, LEARNED HAND'S COURT (1970); M. TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816, at 4 n.7 (1978) (for authorities cited therein). Professor Tachau mentions only three recent books treating the lower federal courts, but does cite numerous other relevant books and articles in her bibliography. M. TACHAU, *supra*, at 219-25.

2. *See, e.g.*, J. GOEBEL, ANTECEDENTS AND BEGINNINGS TO 1800 (1971).

3. Aside from C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (2 vols.) (rev. ed. 1937), there has been little effort directed toward a complete institutional history of the Supreme Court. THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT (P. Freund ed. 1971) so far has produced three volumes, which collectively cover the Court from 1789-1801, 1835-1864, and 1864-1888. The notable gap in the early period represented by the Marshall Court, 1801-1835, shortly will be filled by a volume written by Herbert W. Johnson and George H. Haskins, covering the 1801-1815 period. This volume will contain a rather detailed analysis of federal circuit court activity for this period. Another volume will cover the period from 1815-1835. Literature *about* the Supreme Court that attempts to articulate or analyze the Supreme Court's function in our federal system rather than to chronicle its rise (or fall) is immense and beyond the scope of this review. For a particularly notable and controversial example of this latter type of book, see R. BERGER, GOVERNMENT BY JUDICIARY (1977).

4. *See, e.g.*, L. FRIEDMAN & F. ISRAEL, THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969 (4 vols.) (1969); K. UMBREIT, OUR ELEVEN CHIEF JUSTICES (1938).

tant addition to the history of the federal courts and should become a significant building block in the literature. Far removed from the highly abstract political metaphysics that have become commonplace in "scholarly" analysis of the Supreme Court,[5] the stated purpose of Professor Tachau's book is both straight-forward and intelligible. She proposes "a systematic examination of the lower federal courts of one state during the first generation after the adoption of the Constitution. It is not an investigation to test any particular hypothesis, but an inquiry, as in the original etymological meaning of the word *history*."[6] After carefully cataloging the basic materials and records used in her study and describing her methodology,[7] Professor Tachau analyzes the federal courts in Kentucky during the tenure of Judge Harry Innes as district judge from 1789 to 1816.[8] Although Professor Tachau is careful to outline

5. *See, e.g.*, Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191 (1978). Perry informs the reader that in this country "the judicial process is ultimately a creature of the political process" and that judges "are inevitably political beings." *Id.* at 1233. The judiciary has a responsibility, a mission to "incorporate society's ideals, its moral vision" into the law. *Id.* at 1235. Judges fulfill the mission by engaging in "governmental policymaking," but do so in a manner sensitive "to sociopolitical context." *Id.* One is at a loss to distinguish the role of a religious disciple (or apostle) from that of the judge. For the more strict Calvinists, however, the apostle is responsible only for his witnessing, and not for the results it produces. Some contend, on the other hand, that the judge must bear some responsibility for the results of his decisions and thus must be judged by factors other than the genuineness or intensity of his motivation. For the latter type of person, transcendent generalities about the judge's sacred role are often unsatisfying. The point is that a strikingly large proportion of the literature about the Supreme Court, or about judicial action generally, is dominated by a strident, doctrinaire, polemical approach in which the author strives to push judicial decisionmaking in the direction he deems "socially desirable." *See generally* Bridwell, *Theme v. Reality in the Writing of American Legal History: A Commentary on Horwitz, The Transformation of American Law, 1780-1860 and on the Common Law in America*, 53 IND. L.J. 449 (1978).

6. M. TACHAU, *supra* note 1, at 4.

7. *Id.* at 5-6. The tables and appendices of her book also lucidly illustrate the interrelationship of the records employed; consequently, the book is a very valuable example of research methods applicable to this type of judicial record. Additionally, Professor Tachau provides a useful glossary of terms that should be especially helpful to the researcher with little or no formal legal training. *See id.* at 210. *See also id.* at 11-13 (for a general statistical profile of the cases analyzed).

8. The original district court for the District of Kentucky was metamorphosed into the short-lived Sixth Circuit Court by the Federal Judiciary Act of 1801. For a brief time, Judge Innes sat with William McClung and John McNairy, who unfortunately had no significant knowledge of Kentucky law. McClung had no significant judicial experience. *Id.* at 54. For a brief account of the 1801 Act, see Surrency, *The Judiciary Act of 1801*, 2 AM. J. LEGAL HIST. 53 (1958). The 1801 Act was repealed in 1802 during Jefferson's first term, and Harry Innes again sat alone until the Judiciary Act of 1807, which incorporated Innes into the Seventh Circuit Court. There he sat with Kentucky's first Supreme Court Justice, Thomas Todd. The Circuit Court was composed of the district court judge and the supreme court justice assigned to that circuit.

the institutional structure and procedures of the Kentucky federal courts,[9] she justly emphasizes the persons involved in their operation[10] and provides the reader with a thorough biographical sketch of the politically controversial Harry Innes,[11] as well as the other personnel of the courts, from the other judges on down to the marshall.[12] Thus, both biography and institutional history are well-blended and used skillfully to chart the dynamics of one early federal court. The result is insight into the operation of the court during the politically sensitive times when Kentucky seemed to harbor very little natural, political, or economic affinity with her eastern neighbors, especially the distant federal government in Washington.

What enabled the federal courts not only to survive and work in Kentucky, but also to work efficiently and well?[13] This is an especially interesting question since Professor Tachau demonstrates that about one-third of the 2290 cases recorded for the period were actions by the United States government, mainly to enforce unpopular federal revenue laws. Moreover, the attempt to impose criminal sanctions on those who violated the most controversial of these laws—the hated whiskey tax—were notably unsuccessful.[14] Part of the answer to this riddle is revealed by the overall role that Professor

9. Chapter 1 of Tachau's book is entitled "The Style, Structure, and Jurisdiction of the Courts," and chapter 4 is entitled "The Procedures of the Courts."

10. "But the records of the early federal courts in Kentucky indicate that there, at least, men decided which laws would be enforced, how they would be interpreted, and to whom they would be applied." M. TACHAU, *supra* note 1, at 31. Professor Tachau also states:

> And so declaring the law in the new federal judiciary was a complicated and subjective process. The Kentucky court records illustrate that the concept of a clear and simple "rule of law" upon which all could agree was a myth believed only by laymen. Conflicting traditions, decisions, and statutes had to be weighed. Discovering "the law" for a particular case was often a delicate matter requiring a high degree of selectivity and interpretation.

Id. at 17.

11. *Id.* at 31-53. Innes' rivalry with the impulsive Humphrey Marshall, cousin of the Chief Justice, is explored at length, along with Innes' strange entanglement with the Spanish over the Louisiana question.

12. *Id.* at 54-76.

13. This is especially interesting in light of conventional wisdom to the effect that Kentucky was "at war" with the federal government, particularly the federal courts. *See id.* at 24 n.27 (discussion of this thesis made popular largely by Charles Warren).

14. For example, Professor Tachau relates that between 1789 and 1816 there was only one petit jury conviction on a grand jury indictment involving a prosecution for violation of the whiskey tax laws. *Id.* at 118. Under the astute guidance of the first competent federal attorney for this district, however, civil actions to recover back taxes from delinquents were by comparison notably successful. *Id.* at 119-26. Significantly, Professor Tachau points out that Judge Innes' scrupulous and evenhanded enforcement of these civil penalties, particularly after 1799, correlated with the rise in the court's private caseload. She remarks that "because the court successfully met the challenge of enforcing unpopular statutes, it became an institution that was both trusted and respected." *Id.* at 126.

Tachau ascribes to the federal courts during this critical period. She observes:

> In Kentucky, as throughout the nation, the judiciary was involved in a legal experiment that paralleled (as it proceeded from) the contemporaneous experiment in federalism.
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> . . . It was the particular obligation of federal judges to discover traditional principles that would provide sufficient continuity with the past to give the new legal system the predictability and prestige needed for its survival.[15]

Thus, Innes' court was able to uphold "the traditions of centuries of English experience"[16] and to gain the popular respect for his court by a consistent "insistence upon tradition, form, and authority."[17] Consequently, even though the substantive law was quite unpopular, it was enforced with a decidedly due process tone that on balance kept Innes' court in high regard.[18]

Professor Tauchau's argument that generally there was high regard for the federal court in Kentucky is quite contrary to the conventional wisdom about the reception of the federal judiciary in this region. Notably, Charles Warren in his famous work on the Supreme Court focused on particular events in the legal history of

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15. *Id.* at 16-17.

16. *Id.* at 15.

17. *Id.* at 87. Relevant to the question of the "reception" of English law or its impact on post-revolutionary American law, Professor Tachau constantly emphasizes the degree to which the success of this district court depended upon the air of impartiality and regularity created by a highly traditional application of English procedural and doctrinal precedent. Thus, the destructive impression of mere expediency in the minds of skeptical Kentuckians was avoided.

> The court was indeed affected by the environment: the substance of its caseload reflected the newness of the nation and the unsettled conditions of the frontier. But the procedures, practices, and principles of the court were nonetheless as consistent with the English judicial tradition as that first generation of Americans knew how to make them.

Id. at 94. Professor Tachau's finding thus would seem implicitly contrary to the "transformation" thesis that attributes some startling, new revolutionary quality to the judicial decision techniques of the post-revolutionary period. For an example of the "transformation" thesis, see M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).

18. Note, however, that the alleged due process bias that Professor Tachau emphasizes generally militated in favor of violators of unpopular federal laws such as the whiskey tax, and thus perhaps offered a respectable way of reducing the impact of the law to a minimum. In addition, some of the exceptions to this rule, such as the successful civil actions under the federal revenue laws, involved penalties on the federal officials themselves. For example, Professor Tachau notes the tremendous success of civil actions to recover deficiencies from revenue agents. M. TACHAU, *supra* note 1, at 121-24. She remarks upon how it was generally popular in Kentucky to turn "Federalist statutes against Federalists," *id.* at 128, and thus some of the due process orientation may not be quite as apolitical or neutral as it appeared. Similarly, Judge Innes' failure to insist on the prosecution of three white men accused of murdering several Indians seems somewhat inconsistent with any extreme claim of neutrality. *Id.* at 129-33. Professor Tachau is careful to place this incident in its proper political perspective, emphasizing the dominant problems in the local Indian relations at the time.

the area to support the thesis that Kentuckians generally were hostile to the federal courts and the policies they enforced. In his chapter entitled "Kentucky Against the Court," Warren emphasized the alleged usurpation of admiralty jurisdiction over Kentucky's navigable waters, the protectionist policies displayed toward the National Bank after the opinion of the Supreme Court in *McCulloch v. Maryland,*[19] and the disregard of Kentucky's statutes protecting judgment debtors. The Court's decision in *Green v. Biddle,*[20] overturning Kentucky's principal land claimant laws, also was seen by Warren as the culmination of a very general hostility toward the federal courts, which by this time had become almost as much of a Kentucky tradition as whiskey. Professor Tachau disposes of the Warren thesis in a footnote,[21] although her assessment is supported by the rich documentation and authority throughout her book. She argues convincingly that the dissatisfaction displayed toward *individuals* on the court was directed mainly towards the two "strangers" sent to Kentucky by the Adams administration under the abortive "reform" plan of 1801, which replaced Innes' district court with a two-judge Sixth Circuit Court. Furthermore, Professor Tachau correctly notes that the *Green* decision in fact overturned the previous decisions of Harry Innes supporting the occupying claimants statutes. She thoroughly examines the very popular approach used by the federal district court in land cases generally,[22] most particularly their strict observance of state law in this area under the compulsion of section 34 of the Judiciary Act of 1789 (the Rules of Decision Act).[23] Although the revision of Warren's important thesis is only a minor facet of her work, this particular point aptly illustrates the pitfalls of an approach to federal judicial history that minimizes the importance of the lower federal courts.

It is, however, in her treatment of the overall dynamics of federal decisional law during this period that Professor Tachau's work seems to have some pronounced weakness. For example, in her discussion of the real property cases before the Innes court, Professor Tachau comments upon the judge's "scrupulous adherence to ear-

19. 17 U.S. (4 Wheat.) 316 (1819).

20. 21 U.S. (8 Wheat.) 1 (1823).

21. M. TACHAU, *supra* note 1, at 24 n.27.

22. *Id.* at 167-90. Land cases in the Kentucky federal courts for the period comprised about one-third of the total caseload.

23. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92 (current version at 28 U.S.C. § 1652 (1976)). The statute provides in part that "the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

lier decisions of the Virginia and Kentucky courts,"[24] and contrasts it with "the broad construction later given to Justice Joseph Story's 1842 interpretation of section 34 in *Swift v. Tyson.*"[25] Commenting on what she regards as Judge Innes' election to follow a narrow or strict interpretation of section 34, Professor Tachau observes: "Had he developed a separate federal common law in the land cases, the situation in Kentucky would have been even more chaotic—and the litigation even more voluminous—than it already was."[26]

Perhaps Professor Tachau's repeated observations about the highly traditional approach that Innes took toward his judicial functions should have alerted her to the possibility that more was involved in the contrast between the land cases, with their ritualistic imitation of state law, and the *Swift* opinion, than simply a discretionary, policy-oriented choice between a "broad" or "narrow" construction of section 34. In fact, the difference between purely local or "intraterritorial" matters and the "extraterritorial" matters that transcended state boundaries[27] accounted for the different treatment of local precedent. Moreover, this distinction was a well-developed part of the common law system and very quickly worked itself into American jurisprudence after the Revolution. Viewed in this light, Innes' "election" seems rather commonplace. This perhaps illustrates that the clouded perspective that comes from viewing our legal history from the Supreme Court level has its counterpart in a perspective that inadequately integrates lower level details with each other or with some defensible interpretive theme that makes some overall sense out of the isolated minutiae of the lower court records. This comment, however, should not be construed as a serious criticism of Professor Tachau,[28] but rather as a caution to the reader who wishes to use her valuable addition to the overall ensemble that constitutes our legal history.

Any impression that Professor Tachau's study is too narrow or parochial certainly is dispelled by the admirable relation of the legal

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24. M. TACHAU, *supra* note 1, at 182.

25. *Id.* at 183. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), involved the relevance of the decisional law of New York on the question of the effects of negotiation of a bill of exchange to a bona fide purchaser who was not a New York resident. For a different and perhaps slightly contrary interpretation of this type of case and its relation to real property cases, see R. BRIDWELL & R. WHITTEN, THE CONSTITUTION AND THE COMMON LAW 68-70, 112 (1977).

26. M. TACHAU, *supra* note 1, at 183.

27. For example, see the language used by Justice Story to distinguish these types of cases in Van Reimsdyk v. Kane, 28 F. Cas. 1062, 1065 (C.C.D.R.I. 1812), *rev'd on other grounds sub nom.* Clarke v. Van Reimsdyk, 13 U.S. (9 Cranch) 153 (1815).

28. It is admittedly beyond the scope of Professor Tachau's work to make any collective assessment of the jurisprudence of the lower federal courts generally; consequently, this limitation should not detract from the worth of the book.

detail to the persons and political events of the period. Indeed, her conclusion essays to provide a "chronicle of the political factors that profoundly influenced the work of the courts and perhaps also the jurisprudence practiced there."[29] With much common sense, the author reemphasizes the theme that the highly traditional and professionally competent conduct of this court allowed it to gain acceptance "by protecting the people from the consequences of ignoring unpopular federal statutes"[30] such as the federal whiskey tax. With a touch of irony, Professor Tachau chronicles the spectacle of a relatively ardent Jeffersonian, Judge Innes, who early on had little use for the federal courts or federal government, but who made a tremendous contribution to the sucess of the "experiment in federalism" in what was then little more than a wilderness. Judged by its stated purpose, which the author accomplishes admirably, or by its contribution to our knowledge of this facet of our legal past, Professor Tachau's book is a success and should be read by all who desire a complete knowledge of this important area.

29. M. TACHAU, *supra* note 1, at 191.
30. *Id.*