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### John Marshall's Long Game. Review of John Marshall: The Man Who Made the Supreme Court by Richard Brookhiser

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# The New Criterion

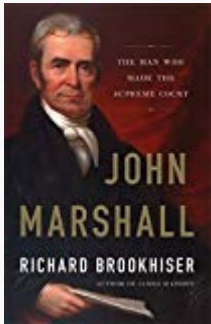
Books December 2018

## John Marshall's long game

by Marc M. Arkin

A review of *John Marshall: The Man Who Made the Supreme Court* by Richard Brookhiser

### BOOKS IN THIS ARTICLE



*Richard Brookhiser*

*John Marshall: The Man Who Made the Supreme Court*

Basic Books, 336 pages, \$30.00

“It is emphatically the duty of the judicial department to say what the law is. . . . A law repugnant to the Constitution is void.” With this ringing statement, recently appointed Chief Justice John Marshall (1801–35), laid down his marker. It was not so much the principle of judicial review that was novel—federal courts had considered the constitutionality of federal and state laws before—but the force with which it was expressed and the institutional agenda it portended.

The case itself, *Marbury v. Madison* (1803), concerned the unpromising topic of judicial commissions. In its waning hours, the Adams administration had sought to pack the bench with Federalist supporters through a mass signing of judicial commissions. (Indeed, Marshall himself had been the beneficiary of similar Federalist largesse; he was appointed by President Adams and confirmed by the Senate shortly after the Republican electoral victory in 1800.) Some of the commissions went undelivered in the confusion during the night before Jefferson’s inauguration. The new administration refused to deliver them. One would-be recipient, William Marbury, sued. He demanded his commission as a justice of the peace and sought a writ of mandamus (a court order) from the Supreme Court directing Secretary of State James Madison to produce the document.

Obviously, the case was one of “peculiar delicacy,” as Marshall put it, a showdown between two branches of the young government heightened by the fact that Marshall and Jefferson were cousins and famously loathed one another.

In his resolution, Marshall set forth the template for many of his future decisions. His ruling for a unanimous Court held that even though William Marbury was entitled to his appointment, and even though the law might afford him a remedy after the incoming administration failed to make good on that appointment, nonetheless the Supreme Court was not the place to start the legal ball rolling. As a court primarily of appellate jurisdiction, the Constitution tied its hands—just as it constrained the activities of the other two branches. While staking out the principle—the Supreme Court defines its own constitutional powers—Marshall deftly avoided direct confrontation with the hostile Jefferson administration.

It is a commonplace of legal history that an air of triviality hung over the Supreme Court in the early years of the Republic. Its first three chief justices departed in short order; the third was actually a recess appointment never confirmed by the Senate. The six justices comprising the Court were absent from Washington for long periods, whether on diplomatic missions or, until 1801, riding appellate circuits that covered hundreds of miles of bad roads and worse inns. In Washington, the Court met in dismal quarters: a cramped committee room of the Capitol Building, underneath the House chamber, a space described by its architect as “meanly furnished, very inconvenient.”

Marshall’s own appointment illustrated the Court’s orphan status. President Adams originally offered the job to John Jay, the Governor of New York, who had served as the first chief justice. Jay declined a second stab at the job, explaining pointedly that the federal judiciary was “lacking in energy, weight, and dignity.” In the process of delivering Jay’s letter of refusal, then-Secretary of State Marshall suddenly found himself with the nomination.

It fell to Marshall to mold the Supreme Court into the institution we recognize.

It fell to Marshall to mold the Supreme Court into the institution we recognize. In doing so, he was blessed by a long tenure (with thirty-four years in the post, he is still the longest-serving chief justice); a stable Court whose personnel did not change at all from 1812 to 1823; an institutional vision that led to such innovations as the Court issuing a single authoritative opinion rather than continuing the English practice of each judge offering his opinion seriatim; and, of course, his own superb legal mind. It did not hurt that Marshall was also blessed with a convivial nature, unflagging courtesy, and a fondness for providing his fellow justices—for many years they all boarded together when the Court was in session—with the best red wine that the merchants of Washington had to offer. As the story goes, the Court drank only on rainy days, and so, before dinner, Marshall would delegate the junior-most justice, Joseph Story, to look out the window; if he reported clear weather, Marshall would pronounce that it must be raining somewhere in the world and commence pouring.

**R**ichard Brookhiser, a political journalist and superb popular biographer with expertise in the founding era, focuses his new biography, *John Marshall: The Man Who Made the Supreme Court*, on the Chief Justice's public career and its effects. He tells the story primarily through a chronological account of the Marshall Court's most significant decisions, cases that mark the curriculum of a first-year law school course in American constitutional law to this day. The reader watches the Court grapple with its own role in defining the constitutional order, the relationship between the three branches of the federal government and the limits of their respective powers, and the relationship between the states and between the state and federal governments. Family, friends, associates, even Marshall's early life and his previous career in government, figure in the story primarily as background to his career on the Court.

For each lawsuit, Brookhiser provides a thumbnail sketch of the underlying dispute and the parties, as well as the Court's resolution, and, for many of the cases, a brief account of what happened to the parties after their day in court was over. Brookhiser's eye for the telling anecdote is particularly valuable as he sets the scene and explains the issues at stake. What emerges is a vivid picture of the early nineteenth century's freewheeling economy, ethically challenged local governments, and a legal profession that thought nothing of someone serving as attorney general while representing private clients.

Consider, for example, an effort by the New Hampshire state legislature to take over Dartmouth College—and thereby change its institutional orientation from Federalist to Republican. The effort was rebuffed in a decision based on the Constitution's clause that forbade states from "impair[ing] the Obligation of Contracts," a term that the Court construed to include colonial-era college charters. Famously, the case also featured a star turn by Daniel Webster in defense of his alma mater, "a small college." The New York State legislature's grant of a monopoly on Hudson River steamboats to Robert Fulton and Robert Livingston (a cousin of sitting Justice Livingston) was rejected with an affirmation of Congress's power to regulate interstate commerce without state interference; this, even

as the decision formally hinged on the challenger's federal coasting license, which empowered its ships to navigate all American ports and preempted inconsistent state law under the Constitution's Supremacy Clause. State efforts to tax the Bank of the United States fell in a decision that first upheld the constitutionality of the bank as within the federal government's necessary and proper "sphere of action" and then denied state power to tax the Bank given the "supremacy" of the federal government, noting, in a line still known to every law student, "The power to tax is the power to destroy."

Given the book's many pleasures, it seems only fair to point out some of its limitations. Rather surprisingly, given Marshall's towering prestige in the legal community, Brookhiser offers a less than enthusiastic appraisal of Marshall, both as a man and as a jurist, a stance seemingly driven by Brookhiser's own skepticism about the Court's place in contemporary America, a point he mentions but fails to develop fully. Although conceding that Marshall gave the Court a dignity it had previously lacked, Brookhiser depicts him as an essentially backward-looking figure whose pivotal moment of inspiration came during his Revolutionary War service under George Washington and whose Federalist principles were set in stone by his participation in the struggle to ratify the Constitution—playing what Brookhiser uncharitably terms "a small but worthy role" in both events. As Brookhiser concludes, Marshall came to fear that the Federalist legacy of the framing generation was under attack, and so, in Brookhiser's words, "this simple, lax, deeply serious man did his best to defend it."

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Brookhiser's depiction of Marshall as a dinosaur stranded in the age of mammals seems overdrawn.

Brookhiser seems to have some difficulty pinning down the legal methodology Marshall used to mount his rearguard defense of Federalism, and in his efforts to do so he imports twenty-first-century categories of constitutional interpretation into the nineteenth century. For example, in *Ogden v. Saunders* (1827), a case that held that the Constitution's grant to Congress of the power to pass bankruptcy laws did not preempt state bankruptcy laws, Marshall opined in dissent that "The intention of . . . the [Constitution] must prevail . . . this intention must be collected from its words . . . its words are to be understood in that sense in which they are generally used." This leads Brookhiser to characterize Marshall's approach as "literalism." In other contexts he calls it "textualism," the position associated with the late Justice Antonin Scalia. At other times, when Marshall relies on the historical context in which constitutional provisions were adopted to illuminate their meaning—something he knew firsthand from the Virginia Ratifying Convention, to which he was a delegate—Brookhiser describes him as embracing "originalism." Perhaps it would be more apt to treat Marshall as a (result-driven) eclecticist, who used whatever legal tool came to hand. The debates that shape today's canons of constitutional interpretation were not the debates of Marshall's generation, and our carefully constructed interpretive categories were not theirs.

Indeed, Brookhiser's depiction of Marshall as a dinosaur stranded in the age of mammals seems overdrawn. Like many historians, Brookhiser seems to conflate the visionary Federalists of the framing with the quarrelsome political party that collapsed in the wake of the French Revolution and the War of 1812. To this reader at least, it is not clear that Marshall's vision was all that backward-looking. His belief that the Constitution empowered a vigorous national government with a strong unified economy at the expense of the states—essentially a Hamiltonian perspective—hardly seems retrograde when compared with the neo-agrarian policies of the Jeffersonians or the reactionary populism of the Jacksonians. Marshall's view that the "people" came together in the state ratifying conventions to create the federal government—a position that Brookhiser calls "populism"—is arguably more forward-looking than the belief that the federal government resulted from a "compact" between states, a position that ultimately justified secession and undergirded the Confederacy. As to racial policies—and there is much in the book about Marshall's failure to come to proper terms with the peculiar institution, even to the point of being a substantial slaveholder himself—at least Marshall's Court ruled against the Cherokee removal policies of the Jackson administration (on the basis of the treaties signed by the Cherokees with the federal government) and avoided the ignominy of the *Dred Scott* decision of the succeeding Taney Court.

Finally, lawyers may bridle at Brookhiser's characterization of Marshall as "simple," given that he raised the Court to equal status with the other branches of government and that his vision of the relationship between the federal and state governments, as well as of the relationship among the federal executive, legislature, and judiciary still largely holds sway in our country. Although Brookhiser drily admits that he has "even less legal training than Marshall" (who, on a furlough from the Revolutionary Army, had attended a single course under the great George Wythe before hanging

out his shingle after the war), he suggests that as a non-specialist he may be able to see “legalisms afresh.” Yet there are limitations to this approach. Among the “blots on Marshall’s record,” Brookhiser cites Marshall’s characteristic technique of advancing a sweeping principle, then drawing back to rest the decision on a lesser point—as he did in *Marbury*. Disappointing as this might be to a layperson, most lawyers would see this as part of Marshall’s legal craftsmanship. Advancing a strong position in dictum (a legal assertion not essential to the judgment) inflects the legal landscape and leaves the point available for adoption on a future day while the court achieves its result on more currently conventional grounds. Perhaps this is a “blot,” but it is also a fundamental technique of judicial decision-making. It is also evidence of what may be called “playing a long game,” which, in the course of his long and productive life, is exactly what John Marshall did.

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