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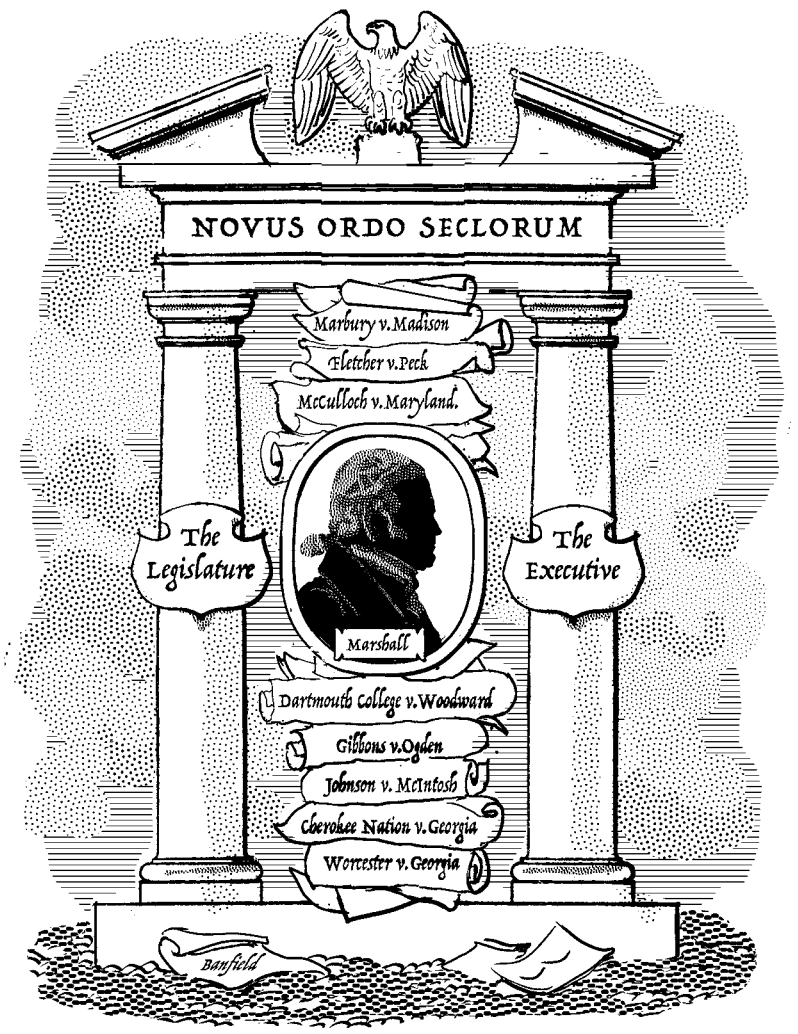
Book Review by Michael M. Uhlmann

The Last of the Founders

John Marshall: The Man Who Made the Supreme Court, by Richard Brookhiser.
Basic Books, 336 pages, $30



Among those designated as "founding Fathers," perhaps the least appreciated (at least compared to his importance) is John Marshall, the nation's fourth and most famous Chief Justice. Perhaps the reason is that discussion of his fame lies mainly within the province of legal specialists and, although what they say is for the most part praiseworthy, they often tend to concentrate on recondite legal issues at the expense of grander themes of the sort articulated by, say, *The Federalist*. Or perhaps the reason is that Marshall's accomplishments are largely derivative in nature, because they rest upon a constitutional foundation erected by others—indeed they postdate its establishment by years, even decades. Whatever the explanation, the great man's statesmanship seems to be overshadowed by the deeds of others. It shouldn't be.

Justice Joseph Story's brief, affectionate *A Discourse of the Honorable John Marshall*, written shortly after his senior colleague's death in 1835, sought to capture his enduring greatness. More than eight decades would pass, however, before another prominent authority seconded Story's assessment, in the form of Senator Albert J. Beveridge's massive four-volume biography, published between 1916 and 1919. An additional half-century (and more) would pass before other biographers ventured to imitate the spirit that animated Beveridge's writing. Among them, Jean Edward Smith's *John Marshall: Definer of a Nation* (1996) comes closest to capturing the reasons behind Justice Story's admiration.

A number of interesting historical monographs have appeared in recent years that pay special attention to Marshall's legal craft. This flowering interest in his thought has helped to redress the relative neglect of earlier decades. Like the vast legal literature on *Marbury v. Madison* (1803) and judicial review, however, it tends to sidestep analysis of Marshall's statecraft. Two notable exceptions deserve special praise in that regard: R. Kent Newmyer's *John Marshall and the Heroic Age of the Supreme Court* (2001) and Charles F. Hobson's *The Great Chief Justice* (1996). The former (from a scholar who is also a close student of Justice Story's thought) succeeds in capturing traits that mark Marshall's transcendent greatness. The latter, by the editor of the Marshall Papers, packs more insight into 200 pages than can be found in much lengthier works. Moving seamlessly among the various facets of his subject's thought, Hobson, like Newmyer, has an eye for philosophical issues that often escape the attention of historians. But even after 50 years the best study of Marshall remains Robert K.

Faulkner's magisterial *The Jurisprudence of John Marshall* (1968).

Mention should be made, too, of less favorable opinions about Marshall during the late 19th and early 20th centuries—the defining paradigm here is predominantly historicist and decidedly mixed in its assessment. Oliver Wendell Holmes, Jr., while Chief Justice of the Supreme Judicial Court of Massachusetts, delivered an address commemorating the centenary of Marshall's appointment as Chief Justice in 1801. After acknowledging his superior intellect, character, and leadership, Holmes then damns Marshall with faint praise, arguing that his fame largely rests on his "being there" during events of great historical moment. Many Progressive thinkers, ever reluctant to believe that anyone's thought (save perhaps their own) could transcend the circumstances of one's age, likewise tended to make Marshall a creature of his times. In that context, the Chief Justice's views were often said to reflect his ideological interest as a member of the Federalist Party.

Regarding the substance of the Court's rulings, Progressives exhibited somewhat schizophrenic views on judicial power: although suspicious of Marshall's political and partisan motives, they admired the nationalist thrust of his opinions, which they recast to suit contemporary concerns; and they certainly had second thoughts about judicial review when federal judges overturned Progressive reform legislation. Their misgivings about judicial power, animated by what has come to be called "Lochnerism"—after the landmark labor law case *Lochner v. New York* (1905)—reached a peak in the mid-1930s. Earlier reservations abated after Franklin Roosevelt stacked the Court with New Dealers, who beginning in 1938 decided to give a pass to Congress on economic and social reform legislation. Thereafter, Progressives gradually became champions of judicial power, and doubled down when the Warren Court and its successors found previously undiscovered penumbras of constitutional text that lent support to their ideological preferences. By then, of course, anything remotely resembling the jurisprudence of John Marshall had disappeared from sight.

The Chief Justice, who worked hard to insulate the Court and the rule of law against the winds of political fashion, would not be happy with this Janus-faced disposition on constitutional questions. The Constitution, he believed, should be a text for all seasons, and he sought to make it so. Richard Brookhiser would agree, as he makes clear in *John Marshall: The Man Who Made the Supreme Court*, the latest addition to his series on leading American statesmen that began in 1996 with *Founding Father*, his highly praised study of George Washington. Since then, the *National Review* senior editor has added monographs on Alexander Hamilton (1999), the Adamses (2002), Gouverneur Morris (2003), James Madison (2011), and Abraham Lincoln (2014). All of these, most weighing in at about a readable 300 pages, are written for the general reader, but only a snob would deny their appeal to those possessing academic credentials. Collectively, they constitute a mini-library on the lives of great Americans and why their lives should matter to us, an admirable reversion to an older style of literature that has, alas, largely disappeared. The new Marshall book is one of Brookhiser's best: it is wonderfully written and at times eloquent, admiring of its subject without being hagiographical. As in his earlier books, Brookhiser has a gimlet eye for details that reveal the human person behind the reputation.

The opening section describes Marshall's early life, education, and public career before donning the robe. There then follow 13 concise chapters on the major cases and controversies that riveted the Chief Justice's attention and eventually solidified his fame. Summarizing the likes of *Marbury*, the Burr treason trial (1807), *Dartmouth College v. Woodward* (1819), *McCulloch v. Maryland* (1819), *Cohens v. Virginia* (1821), and *Gibbons v. Ogden* (1824), to name the topics of only six chapters, is no easy task. A writer must sail between the Scylla and Charybdis of over- and under-inclusion; Brookhiser, a skilled literary helmsman, manages to avoid both dangers. Only a pedant would fault his neatly abridged summaries of the cases under review, which manage to be generally accurate without sacrificing anything of critical importance. He never lets the reader forget how much Marshall's self-discipline, creative imagination, and political prudence resolved controversies that might have flummoxed or defeated a lesser man. All in all, Brookhiser has given us an engaging assessment of what made a great man great, and why his virtues should be applauded. It makes one look forward to the author's next venture.

Well, what about Marshall's status as a first-tier founder? It is true that he was not a delegate to the Constitutional Convention, but among other important public duties during the nation's first decade, he did take a leading part as a delegate to Virginia's ratification convention. As he would have been the first to acknowledge, Marshall lacked the intellectual depth and sophistication of men like John Adams, James Madison, Alexander Hamilton, and Thomas Jefferson. But few men had a surer grasp of what happened at Philadelphia or in the state ratifying conventions, and why it mattered. Moreover, his judgment in practical matters was at least the equal of, and arguably superior to, that of these intellectual titans. (It is worth noting that in at least four important political confrontations with Jefferson—the Marbury matter, the Burr trial, the constitutionality of the national bank, and Jefferson's perpetual flirtation with Anti-Federalism—Marshall beat the Sage of Monticello every time.)

Even on a conceptual level, no one (except perhaps Hamilton or Oliver Ellsworth) thought more deeply about the judiciary's role in sustaining republican principles or, more importantly, how to effectuate it. On these and related matters, Marshall's understanding was in its way as bold and creative as Publius's conception of the extended republic, or the presidency as conceived by Hamilton, James Wilson, and Gouverneur Morris. Indeed, one wonders whether the federal judiciary would have become a fully independent and co-equal branch at all without Marshall's statesmanship. Article III of the Constitution is, compared to Article I especially, quite spare; indeed it is the least elaborated part of the structural Constitution. It establishes "one supreme Court," and provides a barebones description of its jurisdiction, but not much else. Most of the important missing details were left to the discretion of Congress, which filled in some of the blanks in the Judiciary Act of 1789. The legislation temporarily fixed the size of the Supreme Court at six, created a limited number of lower federal courts, and addressed the Court's appellate jurisdiction.

By providing the nation with a provisional sketch of the federal judiciary's operational map, the Act performed a singular service. But it left many questions unanswered, the most nettlesome of which concerned the delicate issue of competing jurisdictional claims between federal and state courts. These were but one subset of a larger universe of federal-state disputes that lay at the heart of opposition to the Constitution but had been only partly and ambiguously resolved during the battle over ratification—they would not be fully resolved until the Civil War. It was one thing to declare, as Madison famously did in *The Federalist*, that ours was a "compound" republic, neither wholly national nor wholly federal. It was quite another to delineate what precisely that formula meant when conflicts arose. Much of that task fell to the Supreme Court under Marshall, who over the course of three decades articulated the constitutional metes and bounds of federal-state relations better than almost anyone, including Madison himself. For that accomplishment alone, Marshall deserves a position of high honor in the founders' gallery.

Delineating the constitutional topography of federalism was only one of his signal accomplishments. The achievement of that goal necessarily entailed careful explication of (among other important provisions) the Commerce

Clause, the Contract Clause, the Supremacy Clause, and the constitutional bargain that created the Bill of Rights. With rare exceptions, Marshall was able to bring his colleagues together unanimously on all of these significant issues. Clearly he was a man of clever wit and extraordinary charm, who put both to good use on the Court. Oliver Wolcott, who had worked with Marshall, captured a remarkable trait when he wrote to a friend that the Chief Justice had a way of "putting his own ideas into the minds of others, unconsciously to them."

And what a workhorse! the court decided approximately 1,200 cases during Marshall's 34-year tenure. The Chief Justice, who wrote quickly and well, authored the Court's opinion in almost half of these. With but one exception, he performed a similar labor in virtually all of the great constitutional cases for which his Court is chiefly remembered. Again, he did so with relatively few dissents from his colleagues, most of which came late in his tenure when changing politics had altered the composition of the Court. And such was his influence with his colleagues, he found it necessary to dissent only once, in *Ogden v. Saunders* (1827), involving the enforcement of contracts.

Other noteworthy achievements lay claim to thoughtful attention:

(1) He took over a judiciary that after twelve years had yet to secure a well-defined place within the national constitutional structure. The Supreme Court, for its part, had decided only a relative handful of cases, which were argued in a basement room of the Capitol. The justices, most of whose time was devoted to adjudicating cases while riding circuit, held their conferences in the parlor of a rooming house. And many public-spirited lawyers sought honors elsewhere to satisfy their ambition. All that had changed by the time Marshall died in 1835: no one (whether friend or foe) could doubt by then that the Supreme Court had become a respected, co-equal branch of the federal government. At almost every turn, from the beginning of his tenure to his last years, this goal was accomplished without benefit of historical precedent and despite strong partisan opposition.

(2) Before Marshall became Chief Justice, a form of what would later be called judicial review (he never used the phrase, which was not coined until 1910) was recognized in principle, although sparingly and gingerly deployed by state judiciaries. Marshall was nothing if not prudent, and after *Marbury v. Madison* his Court would never again find an Act of Congress unconstitutional. (The next occasion would be *Dred Scott v. Sandford* in 1857, under his successor, Chief Justice Roger Taney.) Although the Chief Justice did not generally search for dragons to slay, he was not at all shy when policing state actions that challenged the national government's constitutional powers. Even then, however, states (not the federal government) were almost always the aggressors. States were not happy to see their laws second-guessed by the federal judiciary, but their constitutional claims (resting on the state-compact theory of the Constitution) never acquired intellectual traction in the court of public opinion, nor sometimes even in their own jurisdictions. Over time, the power of Marshall's counter-arguments proved persuasive to all but the most dyed-in-the wool advocates of states' rights. His great opinions, especially as set forth in *McCulloch*, *Cohens*, and *Gibbons* are compelling mini-treatises on the meaning of the compound republic. In the same vein are the pseudonymous essays he wrote following *McCulloch* in which he elaborated the Court's reasoning on the Necessary and Proper Clause, implied powers, and the Supremacy Clause.

(3) One rarely noted feature of Marshall's jurisprudence is the way in which he read the Commerce Clause and the Contract Clause as integral parts of a conceptual whole. The whole was the development of a truly national market secured by a rigorous defense of property rights and the elimination of barriers to freely flowing interstate commerce. Marshall's understanding of political economy not only contributed significantly to economic growth; it helped to minimize the political mischief of faction within state legislatures, which, as Madison rightly believed, were endlessly flowing fonts of what we now call crony capitalism. In this, as in most things, the Chief Justice was sensitive to the spirit that lay behind the Constitution's relatively spare text. He used these two clauses as best he could to minimize state interference with a national commercial market and to prevent states from favoring powerful local interests at the expense of what Madison called "the permanent and aggregate interests of the community."

(4) Time and again, Marshall sought to make clear that when the Court spoke, it was really the Constitution speaking, not just the opinion writer or a group of Justices. That is why he changed the previous custom by which the Justices, following English practice, would often issue seriatim opinions when announcing the ruling in a case. Henceforth, there would be simply the ruling of "the Court."

(5) Not least, Marshall constantly emphasized the idea, not fully understood at the time, that the Constitution was fundamental law, i.e., a social compact expressing the definitive voice of the people in their highest deliberative capacity. The Chief Justice deployed this understanding to good effect, especially when beating back misguided arguments about the meaning of what happened at Philadelphia or the state ratifying conventions. The Constitution considered as fundamental law informed his reflections on the Supremacy Clause and the logic of implied powers, and greatly strengthened his effort to make clear that when the Court spoke, it spoke not just as one branch of government, but as a representative of the people in their sovereign capacity.

Finally, (6), no assessment of marshall's accomplishments would be complete without mentioning his extraordinary efforts in composing *The Life of George Washington*, his multi-volume paean to the virtues of the nation's most indispensable man. Dissatisfied with the first printings (which appeared between 1803 and 1807) Marshall frequently revised and improved the text until almost the day he died. Clearly, he wanted to get Washington right for the sake of posterity. The work is only partly a biography of Washington. It is chiefly a biography of the importance of statesmanship to the nation's founding, and a commentary on the need for virtue in our public officers. Consider this excerpt from the concluding paragraphs:

> Respecting as the first magistrate in a free government must ever do, the real and deliberate sentiments of the people, their gusts of passion passed over without ruffling the smooth surface of his mind. Trusting to the reflecting good sense of the nation, he had the magnanimity to pursue its real interests in opposition to its temporary prejudices; and in more instances than one, we find him committing his whole popularity to hazard, and pursuing steadily the course dictated by a sense of duty, in opposition to a torrent which would have overwhelmed a man of ordinary firmness.

Those words might have been written about Marshall himself.

These are extraordinary achievements that left an enduring mark on the development of American constitutional thought and institutions. That not everything worked out in quite the way Marshall wished was hardly his fault. As previously noted, his accomplishments were all the more remarkable because they were frequently undertaken in the teeth of entrenched and powerful opposition. The Great Chief Justice was not present to sign the Declaration of Independence or the Constitution, but among those who were, few can lay better claim to achieving their noble purposes. We are indebted to Richard Brookhiser for reminding us.

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