The Greatest Judge in American History?

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Richard Brookhiser. *John Marshall: The Man Who Made the Supreme Court*. Basic Books, 324pp., $30 cloth

One might infer from his subjects—George Washington, Alexander Hamilton, and Abraham Lincoln—that Richard Brookhiser, a longtime editor at *The National Review*, favors a particular form of government: large, centralized, powerful, nationalistic, and anti-Jeffersonian. His latest biography, *John Marshall: The Man Who Made the Supreme Court*, supports that impression, celebrating Marshall while glossing his many flaws. "John Marshall is the greatest judge in American history," Brookhiser declares in a grand opening line that sets the lionizing tone for the rest of the book. But by which and whose standards?

Those of the long-lost Federalist Party, apparently. Marshall favored the federal government over the states, defending the United States Constitution—the terms of which had been quietly orchestrated by a secret convention of elite men—from Antifederalist and, later, Republican attacks and saving the national bank from constitutional challenge. His policies were "those of Washington and his most trusted aide, Alexander Hamilton." Washington was Marshall's "idol" whose "example would inspire and guide him for the rest of his life." Marshall's reverence for Washington was "personal, powerful, and enduring," in both war and peace. Washington convinced Marshall to run for U.S. Congress, a position he held before becoming U.S. Secretary of State and the fourth Chief Justice of the U.S. Supreme Court; Marshall, in turn, became Washington's first biographer.

The Supreme Court was Marshall's vehicle for instituting the Federalist vision of government even after the Federalist Party had perished. Marshall strengthened the Supreme Court, which previously had the appearance of triviality. He discouraged seriatim opinions—the practice of each justice offering his own opinion—prompting his colleagues to speak as one voice and authoring numerous opinions himself. He increased the number of cases that the Supreme Court considered per term and established the principle of judicial review in *Marbury v. Madison* (1803), holding that the judiciary may strike down legislation that contravenes the Constitution. He masterminded consensus among the justices even though the Supreme Court was populated by presidential appointees from rivaling political parties. His decisions in *Fletcher v. Peck* (1810), *Trustees of Dartmouth College v. Woodward* (1819), and *Gibbons v. Ogden* (1824) gave muscle to the growing federal government, weakening the position of the states.

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"Washington died, Hamilton died, the Federalist Party died. But for thirty-four years," Brookhiser intones, "Marshall held his ground on the Supreme Court." Were it not for Marshall, the Supreme Court would not enjoy its outsized influence and prestige today. We may, however, be entering into an era in which the Supreme Court loses some of the esteem that Marshall carefully cultivated for it. Conservative politicians have for decades objected to the powers exercised by the Supreme Court. In the wake of the confirmation hearings of Justice Brett Kavanaugh, however, partisans of the left have begun to fear the possibility that the Supreme Court will move in a different direction, one that effectively undermines the work of administrative agencies, restrains the courts, and restores power to the states. With few admirers on the Left or the Right, can the Supreme Court maintain its legitimacy as the arbiter of high-profile disputes with long-term ramifications on the lives and institutions that touch upon the everyday experiences of millions of Americans?

Brookhiser is a master storyteller with novelistic flair, deftly rendering here the colorful personalities of such American giants as John Randolph of Roanoke, Aaron Burr, Luther Martin, Francis Scott Key, James Kent, George Wythe, John C. Calhoun, Patrick Henry, Samuel Chase, Aaron Burr, Roger B. Taney, and Andrew Jackson. Who would have thought the story of "the Simpleton Triumphant"—Brookhiser's moniker for Marshall, who "never lost his country tastes and habits"—could be so gripping? That each of these diverse characters figures prominently in Marshall's biography demonstrates the sheer longevity and importance of his storied career. Divided chronologically into four sections, each focusing on different periods of Marshall's life, *John Marshall* is also organized thematically, with formative cases determining the theme: The chapter titled "Bankrupts," for instance, is principally about two cases—*Sturges v. Crowninshield* (1819) and *Ogden v. Saunders* (1827)—while the chapter titled "Bankers and Embezzlers" examines *McCulloch v. Maryland* (1819).

Cringeworthy lines do, unfortunately, find their way into the book. "It is an almost universal human experience," Brookhiser states, "to seek surrogates to correct the errors or supply the lacks of one's parents." Is that so? He claims that a letter "describing a ball in Williamsburg . . . might have been written by one of Jane Austen's young women." "A good lawyer," he quips, "goes where the business is and makes the best case he can." Such sweeping and superfluous assertions detract from the otherwise delightful prose.

Brookhiser seizes on the confusion and fluidity of the legal system in early America, adding needed clarity and context regarding the state of the common law—if that term applies—at that time and place. Too often lawyers, judges, and law professors parrot the phrase "at common law" before pronouncing some rule or principle. The phrase "at common law," however, should ring alarm bells: "at common law *when*?" should always be the resounding reply. The common law, after all, contained different rules in different eras and remains in flux; it is a deliberative process, not a fixed body of immutable rules. To say that *the* rule "at common law" was this or that is to betray an ahistorical understanding of the Anglo-American legal tradition. Brookhiser proves he's an historian by avoiding that error.

His conception of originalism, on the other hand, is crude. He claims that Marshall's opinion in *Dartmouth* "went beyond originalism to the text," implying a rejection of originalism, which, in his view, involves the recovery of the intent of the framers. "The framers had their intentions," he says, "but the words in which they expressed them might give rise to new, different intentions. The originalism of the Constitution's history and the originalism of its words could diverge." But the "original intent" approach to originalism has long been discredited. Justice Antonin Scalia popularized an originalism that interpreted the original public meaning of the text itself, rejecting the fallacy that the framers or a legislature possessed a unified intent; the words as written in the Constitution or a statute are instead the result of political compromise and must be construed reasonably according to their ordinary meaning at the time of their adoption. This hermeneutic ensures that present legislators may pass laws without concern that the judiciary will later alter the meaning of those laws. Brookhiser is therefore wrong to treat "literalism" and "originalism" as mutually exclusive: "Marshall's opening flourish paid little heed to the intentions of the framers—it was literalism that he was expounding, not originalism." On the contrary, literalism is fundamental to originalism.

Brookhiser's most serious omission is Marshall's odious attachment to slavery. Paul Finkelman recently took Marshall to task in his book *Supreme Injustice*, decrying the jurist's "considerable commitment to owning other human beings." Finkelman targeted scholarship on Marshall that was, in Finkelman's words, "universally admiring." Brookhiser, however, is another admirer, making no effort to rehabilitate Marshall on issues of race or human bondage—perhaps because he can't. Marshall was plainly racist and owned hundreds of slaves, a fact on which Brookhiser does not dwell. Marshall "bought slaves to serve him in town and to work on the farms he would soon acquire," Brookhiser briefly acknowledges, adding elsewhere that Marshall "was a considerable slave owner, who owned about a dozen house slaves in Richmond, plus over 130 more slaves on plantations in Fauquier and Henrico Counties"—numbers far shy of Finkelman's estimate. An ardent nationalist who dedicated his career to erecting and preserving the supremacy of the federal government, Marshall nevertheless compromised his principles when it came to slavery, deferring to state laws if doing so meant that slaves remained the property of their masters. He didn't free his slaves in his will, as had his hero, Washington. His extensive biography of Washington, moreover, didn't mention that Washington had freed his slaves.

"The morality of slavery did not concern [Marshall] in any practical way," Brookhiser submits without elaboration. "Marshall let the institution live and thrive." That is the extent of Brookhiser's criticism, which improperly suggests that Marshall passively observed the institution of slavery rather than actively participating in it. Brookhiser gives Marshall a pass, in other words, withholding analysis of Marshall's personal investment in human bondage.

Marshall "hated" the author of the Declaration of Independence, who had inherited slaves whereas Marshall had purchased them. Finkelman notes that, as chief justice, Marshall "wrote almost every decision on slavery" for the Supreme Court, "shaping a jurisprudence that was hostile to free blacks and surprisingly lenient to people who violated the federal laws banning the African slave trade." Marshall's rulings regarding indigenous tribes were problematic as well. He had not only "ruled that Indians could not make their own contracts with private persons," but also opined, notoriously, that Indians were "domestic dependent nations," thereby delimiting the scope of tribal sovereignty in relation to the federal government and the several states. Jefferson's thinking about slaves and natives has undergone generations of scrutiny that Marshall has somehow escaped.

Marshall does not come across as a loving or affectionate family man. Four of his children died; only six grew to adulthood. His wife Mary Polly suffered depression. Meanwhile, Marshall was out and about attending parties, working long hours, drinking liberally, and spending lavishly. He traveled to France shortly after the death of two of his children—abandoning Mary Polly while she was pregnant with yet another child. He wrote Mary Polly from France, where, Brookhiser speculates, he may have developed romantic feelings for the Marquise de Villette, a recently widowed French noblewoman. His son John Jr. became a drunk who was "kicked out of Harvard for 'immoral and dissolute conduct.'" Brookhiser suggests that John Jr. "imitated his father's conviviality too literally." Justice Story lost a daughter to scarlet fever. He had no idea when he related this news to Marshall that Marshall, his friend and colleague, had lost four children. Marshall must not have spoken much about his family. When he sought to console Story, he couldn't remember in which order his children had died, nor the age of his daughter at the time of her death.

The line from Hamilton and Marshall to Story, Clay, and Lincoln that once enamored Progressives is embraced by the leading historian at conservatism's flagship magazine. Brookhiser takes up the mantle of Albert J. Beveridge, who glorified Marshall and Lincoln for their expansion of federal power (Beveridge authored multivolume biographies of Marshall and Lincoln). Perhaps there's a larger story to tell about this book if it represents the appropriation of a past figure for present purposes. In the age of President Donald Trump, Brookhiser feels the need to insist that "Marshall, Jefferson, and Lincoln were not only populists" insofar as they shared philosophical allegiances, namely the belief in "rights, grounded in nature." One wonders, given his call to "look for other men to address" our "perplexities" and "challenges," what Brookhiser has in mind. Marshall has no clear parallel in current politics. Whether that's good or bad depends upon perspective, but Marshall must undergo more rigorous critique before he is presented as a model for improvement. A