

John Marshall: The Man Who Made the Supreme Court

By Richard Brookhiser

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336 pages, \$30

Reviewed by Micah Bluming

Who was John Marshall? In theory, a biography should answer this question or, if existing sources are too thin, should take what we do know and offer theories to fill in the gaps. A biography, like any character study, ought to lead us along a path of development, the growth and change essential to every human story. Maybe author Richard Brookhiser had such a story in mind, but *John Marshall: The Man Who Made the Supreme Court* does not tell it.

From the title alone, the book promises a portrait with two dimensions: Marshall the man, and Marshall the judicial architect. Brookhiser starts off fine, immediately turning to the first. He spends the opening chapter on Marshall's 18th century origins in rural Virginia, at the time a royal colony with not a glimmer of revolution in sight. His story, at first glance, suggests a self-made man: a simple farm boy who, we know, will

one day leave an indelible mark on American history. But we quickly learn Marshall comes from a line of Randolphs, on his mother's side, one of the fledgling nation's most prominent families. Though raised in a humble milieu, Marshall is hardly a nobody.

Brookhiser then paints young adult Marshall as a kind of Forrest Gump of his time, right there in the thick of the country's most pivotal early moments. Revolution breaks out when he is 21 and he quickly finds himself on the front lines of major battles led by Gen. George Washington. When America triumphs, Marshall returns home to serve in Virginia's state house, where he and fellow delegates debate and ratify the newly drafted U.S. Constitution. He then takes up a law practice, going toe to toe with prominent lawyers such as Patrick Henry, and representing, among other clients, Washington, James Madison, and George Mason. President John Adams taps Marshall as a diplomat to France, then as secretary of state.

Through Marshall's early career, Brookhiser does a decent job of hitting the highlights of Marshall's young life and making clear that his subject, unlike Forrest Gump, was more than just an extra on history's stage. The gregarious and convivial Marshall delights in the company of others and climbs the social ladder not by accident, but through a mix of charm, intellect, and political skill. While living in Richmond, he joins the Quoits Club, a selective society of men who gathered to play quoits (a game similar to horseshoes), drink, and live the best life 18th century America had to offer. He marries a woman who, after losing a child in infancy and another in a miscarriage, succumbs to a sadness that will plague her for life, even as she and Marshall raise several healthy boys. Professionally, Marshall's rise culminates in 1801, when avowed Federalist and lame-duck President Adams scrambles to fill a Supreme Court seat before his successor, Republican (and Marshall's own cousin) Thomas Jefferson, can take office. Adams appoints Marshall, only in his mid-40s, to become the country's fourth chief justice. Self-made or not, Marshall doesn't merely observe history—he actively shapes it.

But it is here, just a quarter of the way in, that the book changes course. Presumably aiming at the title's second dimension, Marshall as maker of the Court, Brookhiser makes a disorienting shift from telling his subject's life story to a full-on exposition of Supreme Court business. For starters, though he largely avoids doctrinal excess, Brookhiser bumbles a handful of technical fine points that lawyers especially will find distracting. In describing the case *Fletcher v. Peck*, for example, Brookhiser tells us that Marshall's decision refined the rules for "striking down a federal law." Yet his own exposition makes clear that the case dealt with whether state law or the U.S. Constitution allowed Georgia to rescind land sales it had made to private parties. Striking down a federal law had nothing to do with it.

But the problem far exceeds a few flubs of legal esoterica. Seemingly a well-intentioned vehicle for depicting Marshall's life on the Court, Brookhiser swings the whole perspective to the inner workings of the Court itself and—far more distractingly—to the purely tangential backstories of the cases to come before it. The book, for instance, devotes a solid five pages to the factual background of *Gibbons v. Ogden*, a dispute over the right to operate shipping vessels on the Hudson River. Rather than receiving insight into Marshall, the reader gets tedious details about boat licensing and the business disputes between litigants otherwise wholly unconnected to the chief justice.

One could perhaps overlook these diversions were they necessary, if poorly paced, components of Marshall's story. But Brookhiser's skylarking produces no real payoff, no climactic insight into who his subject was. True, Marshall did author the (mostly unanimous) opinions for the vast majority of the cases over which he presided. Inevitably, we do learn something about his jurisprudence in seeing how he decided them. But that hardly justifies the deep dives into the background facts of each, facts that often bear little even on the key doctrinal takeaways from his decisions. A reader who wants to study Marshall's jurisprudence can read his opinions. A biography, though, should

indulge us in his inner monologues. What did Marshall learn from standing at the fledgling Court's helm, from deciding landmark cases like *Marbury v. Madison* and *McCulloch v. Maryland*, through which he sought to anchor the Constitution and, with it, the Court itself? Sitting as chief justice for more than three decades necessarily shaped the Court. But how did the experience shape him? The life of Marshall and the life of the Supreme Court don't have to—and shouldn't—exist in separate narrative spheres.

Brookhiser's *Marshall*, to put it bluntly, simply lacks the richness of someone most readers would want to spend time getting to know. For a statesman so devoted to the Supreme Court's efficacy, one has a hard time believing Marshall didn't spend more time grappling—privately and not just in his Court opinions—with how to make the institution durable. As Federalism dissolved under the weight of Jeffersonian Republicans (and, later, Jacksonian Democrats), Brookhiser points out that Marshall remained the lone Federalist holdout still in power, left by himself to carry on the legacies of Washington, Hamilton, and Adams. Surely he felt this burden and struggled with it. Yet instead of probing Marshall's mind for these insights, Brookhiser takes us on a four-page digression into a forgettable bankruptcy case, *Sturges v. Crowninshield*, only to tell us exactly nothing about how the case sheds light on Marshall's life.

Brookhiser nevertheless teases us with periodic glimpses of things any curious reader might want to know. For one thing, Marshall and his wife lose several children to early deaths. We see how deeply it affects her, but we get no insight into Marshall himself, how it made him feel, or whether and to what extent it changed him. Also, during one stint in France, Marshall writes to his wife that he is being hosted by “a very accomplished, a very sensible, and I believe a very amiable lady” (Voltaire's widow). This passage perhaps, as Brookhiser notes in passing, suggests a hint at something untoward. What else do we know about their relationship in Paris? What feelings toward his wife might have led Marshall to hide infidelity in plain sight?

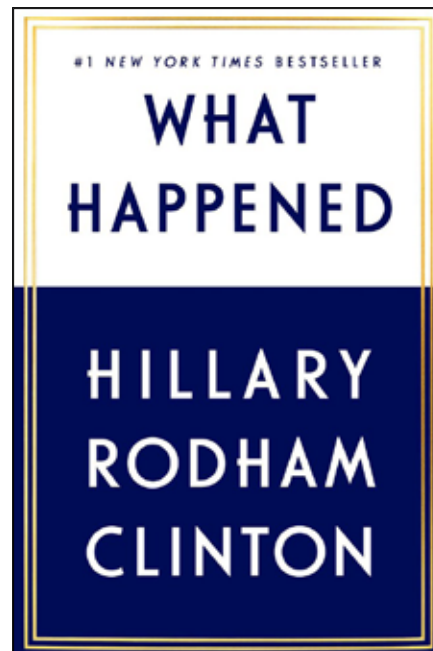
Bits and pieces show us that Marshall evolved to some extent, even amid his tenure on the Court. Toward the end of the book, Brookhiser observes almost offhandedly that Marshall, once the gregarious, can-do politician, spends his last years watching in

anguish as creeping populism overtakes the government he helped build. When Andrew Jackson wins the presidency in 1832, Marshall writes to his colleague, Justice Joseph Story, “I yield slowly and reluctantly to the conviction that our Constitution cannot last.” Defining and defending the U.S. Constitution was *the* project of his life. How did he react when Jackson infamously spurned the Court's authority in *Worcester v. Georgia*? The impact on Marshall begs for at least some musings. Yet Brookhiser offers none.

And then there is slavery. Whatever one's reverence for Marshall's ideas, one cannot ignore that he owned nearly 150 slaves. He never freed them *a la* George Washington, and he never even acknowledged, like James Madison, the grievous moral wrong he was too weak-willed to undo. Yet not until 200 pages into the book does Brookhiser even acknowledge Marshall's professional conflict—saying nothing of the moral conflict—in owning slaves while deciding cases about slavery. And only in one meek paragraph 50 pages from the end, does Brookhiser finally acknowledge that “the morality of slavery did not concern [Marshall] in any practical way,” observing that Marshall “let the institution live and thrive.” That's it. For the life story of someone devoted to intellectual consistency and the rule of law, that revelation calls for a whole chapter of its own. Instead, this fascinating topic gets less space than the life story of the bankruptcy debtor in *Sturges*.

The book, in the end, is not a total loss. The basics of Marshall's life emerge well enough, and those interested in learning how the early Supreme Court functioned will be pleasantly surprised at how much time the subject gets. For that, though, the reader pays a high price: a biographical subject who ceases to grow and develop, right at the most interesting junction of his life. Brookhiser attempted to write a book with two dimensions. Unfortunately, he wrote a curiously one-dimensional book instead. ☹

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What Happened

By Hillary Rodham Clinton

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Reviewed by Christopher C. Faille

On Election Day 2016, the Democratic Party's nominee, Hillary Clinton, a former first lady, former New York senator, and former secretary of state, lost key battleground states crucial to the unforgiving arithmetic of the Electoral College. Significantly, the politically seasoned Clinton lost the election to a political novice, Donald Trump, who is now President Trump.

Trump's electoral victory resulted in another round of scrutiny for the institution of the Electoral College, both of its arithmetic and of the office of the elector. In fact, Ron Faucheux wrote a perceptive article for *The Hill* in August 2016, with the headline, “Trump's Electoral College path is difficult, but not impossible.”

The Electoral College

Clinton briefly mentions this important issue in the book and suggests that she does not want to put forward the answer of “freakish arithmetic,” in response to her book's titular question: What happened (a question mark is not displayed in the title, but it seems implicit).

The populations of large states equate to less electoral power in the Electoral College than perhaps they “should” in a pure popular-vote system. But, of course Clinton knew that going in to the campaign. This was not Clinton's first experience with national

politics as she almost won the Democratic nomination in 2008, and she either planned her campaign with that thought in mind or she was woefully negligent about planning for the Electoral College's voting system.

The closest Clinton comes to considering such a question in her book is a comment near the end. She writes, "In a cruel twist of Fate, the Founders had also created [the Electoral College] as a bulwark against foreign interference in our democracy ... and now it was handing victory to Vladimir Putin's preferred candidate."

It is worth mentioning that there was some discussion, after election day, about the *office* of the electors. What if the Electoral College wasn't just an arithmetical trick, but a real deliberative body? Could it play a positive role, if the electors felt entitled to be "faithless" to their original commission?

Sen. Sanders

While the Electoral College is the subject of a sidelong shot, the role of Bernie Sanders is a major theme of this book. A better short approximation of Clinton's answer to the title's posited question is "Bernie Sanders happened." Clinton plainly believes that the Sanders primary campaign against her weakened her with what ought to have been her base. This is the essence of Sanders section of her book, which she titles "Idealism and Realism." Clinton clearly views herself as the realist in the primary campaign and the candidate concerned (as she puts it) with "sweating the details." Whereas, in her view, an unfortunate chunk of her party was attracted to that idealism-without-sweat guy, Sen. Sanders.

Clinton does not mention Henry Kissinger, in the context of her primary election struggle against Sanders. Obviously, it is Clinton's prerogative to stress whatever issues she thinks are important in her book; however, Kissinger played a memorable part in her efforts to defeat Sanders. In her role as secretary of state, Clinton had been publicly chummy with Kissinger, and that fact enraged Sanders. In one of the Clinton-Sanders debates, Sanders asserted that, "I am proud to say that Henry Kissinger is not my friend. I will not take advice from Henry Kissinger." When Clinton asked Sanders to name foreign policy experts, from whom he would take advice, Sanders stayed on course: "Well it ain't Henry Kissinger, that's for sure."

I expected some detail regarding that debate exchange in this book; however,

Kissinger only receives one mention, and in a very different context. Kissinger goes unmentioned, until a chapter titled "Those Damn Emails." In this passage, Clinton laments the fact that documents can be retroactively classified, and discusses how arbitrary such classification methods can be.

Greece, Cyprus, Turkey

Clinton argues that "something similar happened to Henry Kissinger around the same time [in 2016]. The State Department released the transcript of a 1974 conversation about Cyprus between then Secretary of State Kissinger and the director of the CIA, but much of the text was blacked out because it was now considered classified. This puzzled historians because State [Department] had published the full, unredacted transcript eight years before in an official history book—and on the department's website!"

Clinton clearly does not wish to author a foray into the history of Cyprus, but I am less focused than she, so I propose to do exactly that. The Republic of Cyprus came into being in 1960 through an uneasy truce between the Greek and Turkish communities on that island. Turkey and Greece signed a "Treaty of Guarantee" recognizing the independence and territorial integrity of the new republic. In effect, each of the larger countries gave up its own claims to Cyprus.

In 1967 (with at least tacit approval from Lyndon Johnson's administration), a military junta took over in Greece, and this junta had no commitment to the Treaty of Guarantee. It aimed at annexation of Cyprus from the start of its existence. Flash forward seven years, and in July 1974, Greece installed a figurehead as the new president of Cyprus. President Nikos Sampson had one job, in the view of his puppet masters in Athens: to approve of the union of that island with Greece.

It was amid the chaos after Turkey's invasion—as the junta in Athens was collapsing and as the Sampson government disintegrated—that Kissinger spoke to CIA Director James Schlesinger. Sampson held power for only eight days—just long enough to provoke Turkey's invasion of the island, which in turn provoked Sampson's resignation. He would eventually serve time in a prison cell.

These events occurred during the finale of the lengthy Watergate scandal in the Nixon administration. Nixon was near the term of his presidency, and most of his hangers-on understood this. Kissinger and

Schlesinger actually could do very little to fix the situation in Cyprus, which played its way toward an eventual bifurcation of the island. Further, Kissinger and Schlesinger both appeared to have been chiefly concerned about the security of U.S. military bases in the affected countries. Kissinger in particular, took a pro-Turkey view of the crisis, not due to any attachment to the rule of law as embodied in the Treaty of Guarantee, but because Turkey was the frontline state, vis-à-vis the Soviet Union.

The Uses of Sweat

Clinton appears oddly abstracted from such matters, even though as a former secretary of state, the times during which she played that role were as tumultuous in their own way (and tumultuous in the eastern Mediterranean in particular) as were the times when Kissinger did so, and the fact that she served as such in the Obama administration was, in the eyes of many of her supporters in the fall, one of her chief qualifications for the presidency.

If Clinton had honestly said what she thinks it is about Kissinger and his long involvement with U.S. foreign policy that makes him a worthy adviser to Democratic administrations, it might have helped us better understand her campaign. Further, the content of a conversation about Cyprus might have inspired such reflections. All we receive from Clinton is a picture of Kissinger and Clinton as fellow sufferers from the oddities of retroactive classification. Her mention of Cyprus, like her brief allusions to the Electoral College, are a lost opportunity for deeper reflection. Clinton sweats the details but she doesn't sweat the depth. She doesn't sweat the history.

This book is, on some points, less edifying than it could be. However, it is surely worth a read for Clinton's admirers, who still seem to be quite numerous. They will want her perspective of the campaign, at a gut level, and this book delivers on that. ☺

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