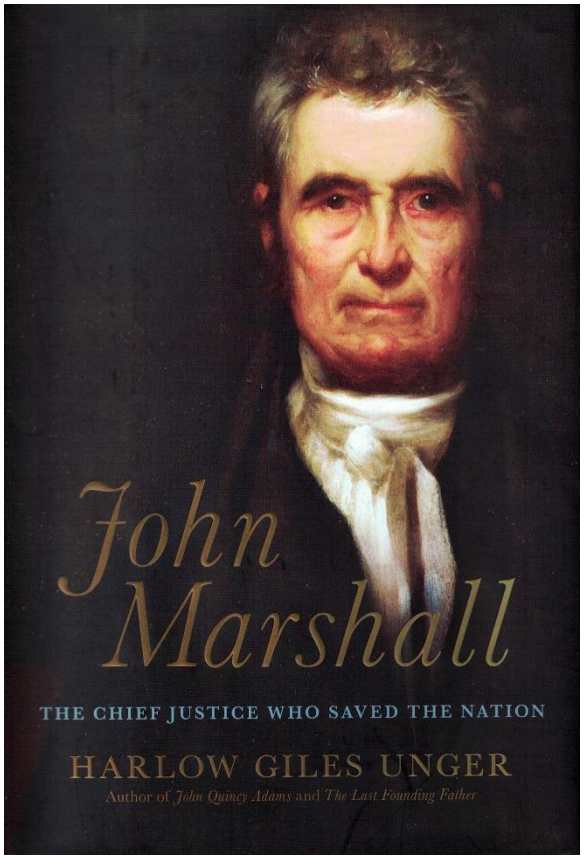
Ian Mitchell's Law-related
BOOK RECOMMENDATIONS

52 – John Marshall
(5 April 2020)



JOHN MARSHALL – the Chief Justice who Saved the Nation

Author: Harlow Giles Unger

Publisher: Da Capo Press, 2014
(*available on Amazon, click on cover image for link*)

Descriptor: Biography of the most influential Chief Justice of the United States, who "invented" judicial review of both executive action and legislative innovation in terms of the foundational Constitution

RusRoL relevance: *Massive: the idea of CONTRACT in practical government was pioneered by the US Constitution, but the struggle of its STATUS-orientated opponents to bring back semi-"monarchical" government reveals the vulnerability of any system which does not rely on violence to achieve dominance*

> **" 'Why do we love trial by jury?' asked Patrick Henry [the "iconic patriot who had called America to arms" in 1775]. He looked at the gallery filled with Kentuckians in tasselled deerskin shirts and coonskin hats. 'Because it prevents the hand of oppression from cutting yours off! They may call anything rebellion and deprive you of a fair trial…'**
>
> **" 'Is the relinquishment of trial by jury and liberty of the press *necessary* for your liberty?' he cried out.**
>
> **" '*NO!* the buckskins in the gallery answered."** (p. 65)

Reason to read: Many, but by far the most important is the fact that John Marshall was the inventor of the rule of law as a practical approach to constitutional government. His only peer in that respect was Sir Edward Coke, whose famous altercation with the hyper-monarchical King James I over *The Case of Prohibitions* (1607), laid down the principle that even the king was, in practice (he had been in theory since Magna Carta, but that had been largely forgotten) subject to the law of the land. But that was a false dawn as Charles I overturned the principle, and Oliver Cromwell ignored it while ruling by force

through the army and a one-party regime in the House of Commons. The 1688 Revolution brought the rule of law closer, as did the Act of Settlement in 1701 by establishing judicial independence. But it was not until 1803, when Marshall issued the opinion of the Court in *Marbury v Madison* (1803), that power was forced to treat law *as an equal* (in other words STATUS had to co-exist with CONTRACT).

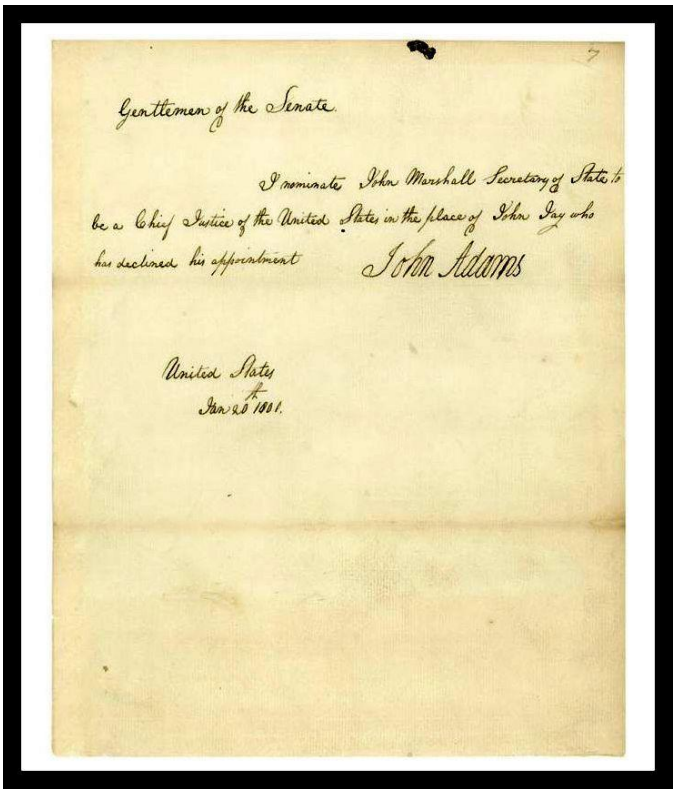
The new American republic had substituted the Constitution for the monarch in 1789, but it was not until John Marshall joined the Court, in 1801, that the stage was set for the conflict which was to result in both the President and Congress becoming subject to the law as expressed in the Constitution. After *Marbury* law reigned supreme for the first time in human history as a matter of practical constitutional fact. For all the subsequent lapses and dramas surrounding the US Supreme Court, that achievement has not been undone because it has been accepted that the Constitution is a *law* (a justiciable instrument, rather than a statement of aspirations and "values" of the windy, non-justiciable sort that was proposed by the SNP for Scotland before the referendum in 2014). That form of the rule of law is the *sine qua non* of modern constitutional orthodoxy, at least in the Anglo-American legal universe. It was almost entirely attributable to John Marshall and his followers, which makes him, in my view, one of the most important legal figures of all time.

This book tells the story of his life and, centrally, how he managed to make constitutional rights genuinely enforceable against the legislative and executive branches of government by the judiciary.

Main talking points:

1. This seems to me to be **the most important law-related conversation in modern Western history:**

"Just before [**President] Adams's** term ended [in 1801], Oliver Ellsworth resigned as Chief Justice, and the President asked his old friend, New York's Federalist Governor John Jay, to return to the court. Jay had planned to retire, however, and declined. With his term near its end, Adams was left with but one choice for Chief Justice.


Gentlemen of the Senate.

I nominate John Marshall Secretary of State to be a Chief Justice of the United States in the place of John Jay who has declined his appointment

John Adams

United States
Jan 20 1801.

"'When I waited on the President with Mr Jay's letter declining the appointment,' **Marshall** [then Secretary of State] recalled, 'the President asked thoughtfully, 'Whom should I nominate now?'

"'I replied that I could not tell,' [Marshall later recalled].

"'After a moment's hesitation he said, 'I believe I must nominate you.'

"'I had never before heard myself named for the office and had not even thought of it. I was pleased as well as surprised and bowed in silence. Next day I was nominated.'" (p. 180)

Such was the simplicity of government when the fundamental relationships between the great offices of state were being defined! I reproduce (above) the letter which Adams wrote as a result of that conversation. It, too, displays a manly simplicity which is, sadly, a lost art today.

2. STATUS *versus* CONTRACT: Four years earlier, Marshall had been sent to revolutionary France by President Adams (whom he had only just met in 1797) in order to try to secure a treaty permitting American ships to sail the high seas unmolested by French men-of-war which were then fighting the British for control of the world's trading routes. **Talleyrand** (a club-footed aristocrat, who was hated America after having lived there for two years) was France's foreign minister when he and Napoleon were trying to rescue France from bankruptcy by conquering territory from which they could levy tribute. The Caribbean was crucial to this project. Santo Domino (now Haiti) was France's most lucrative colony; other Caribbean islands provided much of the wealth that Britain relied on. The United States was trying to maintain a neutral stance in the trans-Atlantic conflict by trading on equal terms with both. But France wanted to stop the US trading with Britain.

   Marshall's task (with two others) was to try to arrive at a *modus vivendi* with the French government which would allow America to trade. This was a straight-forward appeal to the law of nations as it then stood and was based on the idea of CONTRACT in diplomacy. Talleyrand, however, had other ideas, mostly based on claims for French STATUS. One aspect of that is hierarchy. STATUS is achieved by *power* and requires that all others acknowledge it by paying tribute, Mongol-style, to the strongest tribe, nation or empire. In this case, the question of *douceurs* or "sweeteners" arose, mentioned first by a Jean Conrad Hottinguer, a Swiss financier who visited the Marshall party on Talleyrand's behalf.

   Hottinguer did not come straight to the point, but first said that President Adams had "insulted" France, which was another STATUS-based idea. In purely CONTRACT-based relationships, insults are irrelevant; the issue is the price you pay. Personal feelings do not count. France wanted both an apology and some *douceurs*. Marshall asked if payment of money would mean French attacks would cease, and captured American seamen and their cargoes be released. The answer was "no", as the Great Khan, so to speak, is never bound either by his own word or by any principle of equitable dealing. No-one talks to *him* as an equal.

   Two nights later, Hottinguer (who always came to see Marshall after dark) arrived and said that the French negotiators "demanded 'a spontaneous gesture of friendship or gift' to placate them enough to receive the American envoys. The *doucerus*, he explained, were similar to 'the fealty and remuneration demanded by the ancient kings of France.'" (p. 135) A gift of about $250,000 would suffice, plus a loan of $12.8 million "as a show of good faith". Without payment they would not be received by Talleyrand. "Marshall rejected the demand outright, warning that if France preferred war, 'we regret the unavoidable necessity of defending ourselves'."

   "Hottinguer returned a week later, warning the Americans, 'Think of the *power and violence* of France. Give them gifts and loans and buy some time. I fear the Directory will declare war on America.' Pinkney [Marshall's fellow negotiator] exploded. 'We are unable to defend our commerce on the seas, but we will defend our shores!' 'It is not a question of war, but money,' Hottingeur insisted. 'The Directors are waiting for money.'" (p. 135, emphasis added. Note that "power and violence" are the real currency of STATUS)

I have quoted this at length—though Unger gives even more detail—because it is such a clear illustration of the arrogance of STATUS in the face of *unarmed* CONTRACT. The sequel is that later that year Talleyrand came truckling to the Americans after the slaves rose in revolt in Santo Domingo and counter-revolution broke out in France itself. Nonetheless, Marshall had learned a lesson in how a democracy should *not* conduct itself in the diplomatic arena. It has implications for his later jurisprudence.

Incidental interest: I had no idea that there were quite so **many attempts to secede** from the United States in its early days. New England threatened to join Canada as early as 1787 (p. 52), and Kentucky wanted "union with Spain" in 1805. (p. 239) When the Supreme Court handed down judgement in *United States v Peters* (1809), the first case in which it subordinated states' laws to judicial review (*Marbury* had concerned the federal government only), "many states issued veiled threats of succession". (p. 264)

Most ominously of all, as it involved the race issue which was to precipitate actual secession in 1860, was the brutal treatment of the **Cherokee Indians**, which Marshall tried to mitigate in *Cherokee Nation v Georgia* (1831). After gold was found on Cherokee land, the state of Georgia confiscated territory which the US had previously agreed by treaty was owned by Cherokee Nation. The state Governor demonstrated his contempt for the federal Court by refusing to appear to defend his actions. This was Talleyrand again, proud of the "power and violence" of his regime. But Marshall and the justices ignored this and proceeded to hear the case anyway.

"In a decision which stunned the nation and sent it to the brink of civil war, Marshall ruled that the Cherokee Acts of the Georgia legislature were 'repugnant to the constitution, laws and treaties of the United States'." (p. 311) As a result, "Marshall ordered Georgia's Cherokee Acts 'reversed and annulled'. All but ordering rebellion against the federal government, Georgia Governor Wilson Lumpkin called Marshall's decision 'usurpation' and said the state would respond with 'the spirit of determined resistance'. With no means of enforcing their decision, Marshall and the justices were helpless to prevent the collapse of the federal legal system they had built so carefully." (pp. 311-2)

President **Andrew Jackson** at first refused to help the Court, issuing his famous statement: "John Marshall has made his decision. Now let him enforce it." (p. 313) That was equally contemptuous, though Jackson soon thought better of it and realised that a court unarmed is as helpless in the face of malfeasance as the US had been when revolutionary France was in its pomp. For a community to live under law it is necessary that such a community be armed against those, both within and without, who wish to substitute their own will for that of the community. Jackson made it his business to resolve the impasse. Both South Carolina and Georgia were by then threatening to secede from the Union and it was only Jackson's timely change of mind that prevented it from dissolving. To get the "power and violence" of the federal government behind the judicial reasoning of the Supreme Court was another of Marshall's game-changing achievements as Chief Justice.

Left Field: The sub-title of the book "The Chief Justice who saved the nation" does not say enough. If the rule of law is the only approach to government in general which has the potential to save the world from state gangsterism at home and war abroad, including nuclear war, then Marshall, as the man who

brought it into practical politics in the West for the first time ought better to be thought of as the man who *saved the world*.

Thought(s) provoked: After having written about the farcical and very damaging Judicial Appointments Board in Scotland in my review of Lord Hope's Diaries, it is a pleasure to be able to point out that John Marshall was appointed to his critical post *with no judicial experience whatsoever*. What would "the lady from the Post Office" or a freelance public sector equality duties coach make of that? Imagine what would have happened if he had had to write a paper recommending himself for appointment on the basis of his "vision" of the future of the Court and the "values" he would bring to the job? Quite clearly, he would never have been appointed. Bureaucracy hates inspiration (and genius even more) because creative thinking tends to take life forward in *unplanned* directions which can be hard to manage and control. The Soviet Union collapsed in large part because of that refusal to permit real talent to emerge. The JAB will produce a similar result within the Scottish judiciary.

Negative issue(s): Nothing major, though for my money there could have been more about law and judging in their political context and a bit less about the electoral battles of the early United States—though all of that is interesting too.

Surprising points: While speaking of the hand-outs Marshall gave when campaigning for election to the House of Representatives from Virginia in 1799, Unger compares it with George Washington's campaign, when he was a younger man, for the Virginian House of Burgesses. Washington "drenched voters and their families with forty gallons of rum, twenty-six gallons of rum punch, thirty-four gallons of wine, and forty-three gallons of beer… Washington's final cost for victory was about one-half gallon [more than 2 litres] of spirits per vote." (p. 153)

Style: Mr Unger writes clearly, fluently and with pace. He is not ostentatiously academic, which is appropriate as he is telling a story rather than analysing a problem.

Publishing quality: Excellent, especially the pictures which give depth to many of the pen-portraits of the leading characters. Proper index, too. There seem to be few mistakes, though on the same page as the letter from President Adams to the Senate recommending Marshall for appointment as "Chief Justice of the United States" (see above), Unger misdescribes him as "Chief Justice of the US Supreme Court." (p. 181) There is a much more important error: "Jefferson's victory [in the presidential election of 1800] astonished the British and European as much as it did Americans. For the first time in modern history an incumbent political party had ceded control of government to an opposition party *without violence*." (p. 191, emphasis added) That is astonishing: the Whigs and the Tories had been swapping sides in the House of Commons ever since the 1688 Revolution and the introduction of parliamentary semi-democracy. The only violence associated with attempts to change the government came from Jacobite STATUS fanatics who wanted to reimpose the Divine Right of Kings.

Smile(s): This is not that kind of book, really. However, there is one smile of relief, if I may put it like that, as Unger summarises very clearly and shortly the nine main cases that changed the face of law in

the Untied States while Marshall was Chief Justice. There is a list on p. 294 and an appendix starting on p. 321 which gives excellent summaries of "the case" and "what it did" for each of the nine.

Author: Harlow Giles Unger is not an academic, but historian who has written mainly for the educated layperson and is described as a "Former Distinguished Visiting Fellow at George Washington's Mount Vernon". He has written more than twenty books about the Founding Fathers and the early years of the Republic.

Link(s): Here is Mr Unger discussing this book on C-Span: https://www.c-span.org/video/?323167-4/john-marshall-chief-justice-saved-nation. It is perhaps worth emphasising part of what Unger says in this interview.

The new President, **Thomas Jefferson**, was so enraged by the judicial appointments which President Adams had made in the days before the end of his presidency in 1801—it was these which were to lead to *Marbury v Madison*—that temporarily dissolved the Supreme Court by sending all the justices out to ride circuit in their own districts, often many hundreds of miles, even thousands, from Washington. It did not meet again until 1803. But when it was able to consider *Marbury,* Unger says, "Marshall writes a decision and says that both Jefferson and Madison have violated the Constitution. Under the Constitution, a federal judge can only be removed for cause [i.e. for bad behaviour, as provided for in the UK Act of Settlement, 1701, but that Act did *not* apply to the north American colonies as they either had charter government or were Crown colonies]. He cannot be removed at the whim of the President and the President is not above the law. That shocked Jefferson. Jefferson thought that President was like the King: he can do no wrong. Marshall said he can do wrong and he no rights other than those of a citizen of the United States." Marshall's key point was to say in his opinion: "It is emphatically the province and duty of the Judicial Department to say what the law is."

Unger is also eloquent on the legal problem of Jefferson as a President. "Everything he said, he would do the opposite. He wrote 'All men are created equal' [in the Declaration of Independence], and rode home to his plantation which he ran with 200 slaves. At the bottom of the Declaration of Independence, 'We pledge our lives, our fortunes, our sacred honour…' He never fired a shot. Other people who signed that document went out and fought. He went home to Charlottesville and never fired a shot. Stayed out of the war completely." Marshall, by contrast, fought right throughout the war, and was with Washington at Valley Forge, perhaps the most desperate and hopeless moment of it.

Overall recommendation level: HIGH

About the reviewer: Ian Mitchell is the author of four books, including *Isles of the West* and *The Justice Factory*. He is writing a comparative study of Russian and Western constitutional history to be called *Russia and the Rule of Law*—hence the "RusRoL Relevance" section at the top. He can be contacted at: ian@ianmitchellonline.co.uk.

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