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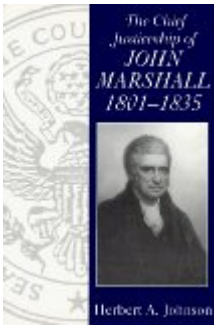
**Herbert A. Johnson**. *The Chief Justiceship of John Marshall: 1801-1835.* Columbia: University of South Carolina Press, 1997. xii + 317 pp. $39.95 (cloth), ISBN 978-1-57003-121-2.

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**Beyond the Chestnuts: The Marshall Court as Institution**

Herbert A. Johnson, who with the late George L. Haskins co-authored the Holmes Devise volume *Foundations of Power: John Marshall, 1801-1815* (1981), here turns his attention to Marshall's overall tenure of office. Indeed, the book under review is part of a series, of which Johnson is the general editor, on "Chief Justiceships of the United States Supreme Court," of which four books have appeared so far. (The others are William B. Casto on Marshall's predecessors Jay and Ellsworth; James W. Ely, Jr. on Melville W. Fuller; and Melvin I. Urofksy on Harlan Fiske Stone and Fred M. Vinson.) One could easily question the value of periodizing the Supreme Court history through its chief justices; but it probably makes more sense to do so in regard to the formidable Marshall than for any of his successors.

Significantly, though, one of the themes throughout Johnson's volume is that even in regard to Marshall, one cannot understand his "chief justiceship" without paying close attention to the contexts within which Marshall acted. The most immediate context, obviously, was formed by his fellow justices; the more far-reaching is perhaps the general political atmosphere that helped to explain the particular appointments to the Court that made the achievement of Marshall's political and jurisprudential goals easier or harder.

This is a book written for a scholarly audience, and I dare say that most of its readers will already have their own views about such classic Marshall chestnuts as *Marbury v. Madison*, *McCulloch v. Maryland*, *Gibbons v. Ogden*, and the like. Although Johnson discusses these cases, as he must, he does not spend an inordinate amount of space on them, and the great value of this book lies in his emphasis on facets of the Court, including cases, of which many scholars (or at least I myself) may not be so aware.

Chapters One and Two introduce the members of the Supreme Court and the general political context within which they operated. There is relatively little here that will be new to most scholars of the era, though Johnson writes felicitously and provides a good overview. The scholarly contribution of the book really begins in chapters three, "Marshall at the Matrix of Court Leadership," where close analysis of the patterns of decision-making leads Johnson to detect "four phases of the Marshall Court" (p. 86): The first, 1801-1812, shows "Marshall exercis(ing) considerable control over the Court and its decision-making process," followed by a six-year period (1813-1819) in which "internal conflicts over the law of war erupted, generating dissents and concurring opinions." Then arrive the surprisingly brief (1819-1822) "golden years," featuring "monumental constitutional decisions emphasizing federal powers, during which the Chief Justice seems to have regained substantial control over opinion delivery."

Finally, there is a long period of decline (1823-35) "marked by the compromise of some golden years decisions and by Marshall's only dissent in a constitutional law case." If there is a cavil, it would be Johnson's decision to close his "golden-year" period in 1822, inasmuch as *Gibbons v. Ogden* (1824), even though it included a

concurring opinion by Justice William Johnson that kept Marshall from speaking in a unified voice for a unanimous Court, seems surely to count as a "monumental decision emphasizing federal powers."

Chapter Four, "The Circuit Courts and the Projection of Federal Power," is even more likely to provide scholars with new and interesting insights. Johnson lays groundwork for this inquiry by pointing out that an important duty of Supreme Court justices was to engage in circuit riding, and he offers a copious, illuminating analysis of the Justices' work as circuit judges. Indeed, Johnson begins this chapter with the provocative statement, "Had there been no circuit-riding duties for members of the Supreme Court, John Marshall might never have been offered the chief justiceship of the United States," for former Chief Justice John Jay, the first choice of President Adams, rejected re-appointment to the Court "because of his reluctance to resume the grueling burden of riding the circuits" (p. 112). Thanks to Johnson's painstaking labors, we learn how different the legal universe might look from the perspective of what the Constitution calls "inferior courts." Among Johnson's findings is that relatively few of these circuit-court cases involved constitutional law. "(W)hile constitutional law cases, and public law generally, have attracted the most attention of contemporaries and historians alike, the bulk of Marshall era circuit court caseload was in nonconstitutional litigation. More specifically, the judges on circuit were developing a commercial law for the United States and secondarily administering admiralty and prize jurisdiction" (p. 120). Moreover, Johnson notes that circuit riding served not only as a way by which federal justice was brought, almost literally, to the nation at large, but also, and just as important, as a way to provide the Justices with "a well delineated understanding of the public's attitude toward the central government and federal justice. Such a chastening experience," he says, "had an impact upon their approach to constitutional issues before the Supreme Court" (p. 133). I have often wondered if the 1891 act that ended Supreme Court Justices' circuit-riding has in fact served the nation all that well. Given the propensity of the current Supreme Court to reduce its workload, one wonders if the country might benefit more from the Justices returning to some circuit-riding duties (or even, dare one say it, conducting a criminal trial and actually having to work with the egregious sentencing guidelines) rather than going off to various European seminars and summer schools or being treated as visiting royalty at one or another law school.

Johnson devotes the remainder of his book to analyzing various groupings of cases. As already suggested, if the chapters focusing on the great constitutional and public law cases will be far less likely to stimulate new ruminations, that is most certainly not the case with the chapters dealing with such topics as admiralty and prize law. I found almost enthralling Johnson's pages on these subjects (pp. 236-242); he also has some fine pages on "slavery and the slave trade" (pp. 242-248). The Marshall Court emerges with a definitely mixed record in regard to the latter. In two cases, the Court upheld the forfeiture of two ships being constructed in Charleston "because their equipment indicated an intent to engage in the slave trade"; even more strikingly, "(s)o intent was the Court upon suppressing the slave trade that it denied the wage claims of an American sailor who knowingly shipped on a forfeited slave ship" (p. 244). On the other hand, in *The Antelope* (1825), Marshall ostentatiously distinguished between the role of the "jurist" and that of the "moralist" in an opinion accepting the legality of slavery in international law and, more important, the duty of the United States to grant comity to countries that tolerated the international slave trade even though it had been made illegal vis-a-vis the United States. Moreover, in *Mima Queen v. Hepburn*, 7 Cranch 290 (1813), the Court, through Marshall, refused to expand the rule against hearsay evidence in regard to determining whether a person was slave or free. Only the legendarily obscure Justice Gabriel Duvall, "a Maryland planter with a sizeable plantation and large slave work force, spoke out to ease the impact of the hearsay rule in freedom proceedings" (p. 246). For the Court generally, though, Johnson notes, "it must be conceded that the property rights of the master were preferred to the liberty claims of the slave" (ibid.).

There are a few typographical errors that should have been caught (for example, Akhil Amar's name is misspelled on page 62, and the date of *The Antelope* is wrongly given at page 47). There is also some repetition in discussion of some of the cases, particularly those involving the Cherokee Nation, that could well have been eliminated. Overall, though, this is a book that well serves the aims of the series of which it is a part. It makes no claim to be so comprehensive as the Holmes Devise behemoths, nor is it fair to compare it with the biographies that have recently come out on Marshall himself. This is, indeed, an overview of a particular chief justiceship, in its institutional setting, and one can profit from reading it.