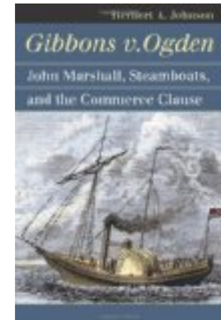
H-Net Reviews
in the Humanities & Social Sciences



Herbert A. Johnson. *Gibbons v. Ogden: John Marshall, Steamboats, and the Commerce Clause.* Landmark Law Cases and American Society Series. Lawrence: University Press of Kansas, 2010. 198 pp. $17.95, paper, ISBN 978-0-7006-1734-0.

Reviewed by Jill O. Acree

Published on H-Law (June, 2012)

Commissioned by Ethan Zadoff (CUNY Graduate Center)

Herbert A. Johnson continues his portrayal of John Marshall as the compromiser of the U.S. Supreme Court in this short introduction for the general reader on the first Supreme Court interpretation of the interstate commerce clause. His book complements Thomas H. Cox's ***Gibbons v. Ogden, Law, and Society in the Early Republic*** (2009) by shortening the convoluted factual background of the case while elaborating on Supreme Court and circuit cases preceding ***Gibbons*** (1824). It is easy to distinguish the law professor from the historian as Johnson focuses on law cases rather than Cox's market revolution and historiography.

As he has argued before, Johnson sees ***Gibbons v. Ogden*** as the epitome of Marshall's willingness and ability to compromise for the sake of achieving unanimity. The preponderance of Jeffersonians on the Court caused Marshall to rely on persuasion, compromise, narrow holdings, and ambiguity to achieve a best possible result. Therefore, Marshall's practicality was of a different order than that presented by Cox and other scholars, such as G. Edward White (***The Marshall Court and Cultural Change, 1815-1835*** [1991]) and R. Kent Newmyer (***John Marshall and the Heroic Age of the Supreme Court*** [2001]) who see Marshall as more powerful within the Court. Scholars seem to agree that Marshall advanced slowly to bring others with him. As Cox explains, Marshall advanced softly in order to "convince a majority of Americans ... that each had a vested interest in the future technological and commercial development of the young United States."[1] The question is whether the other justices, then, also needed to be brought along.

In four chapters leading up to the subject case, Johnson provides a brief background to ***Gibbons*** and a short history of the commerce clause and relevant prior cases, including interpretations by Supreme Court justices riding circuit. He sees two cases as pivotal in determining Marshall's and the Court's response to Thomas Gibbons's lawsuit challenging Aaron Ogden's monopoly steamship rights in New York waters: ***Elkison v. Deslesseline*** (1823) and ***Cohens v. Virginia*** (1821). Associate Justice William Johnson's strong-

ly nationalist opinion in the circuit case of Elkison had frightened the "slaveocracy": he not only declared South Carolina's law mandating imprisonment of black seamen while their ships were in port unconstitutional, but also asserted that the federal commerce clause had exclusive jurisdiction in international commerce, even where the federal government had not yet acted (a dormant power). As Herbert Johnson rightly stresses, for the "slaveocracy," states' rights were ultimately about protecting property in human beings and they specifically feared that the federal commerce power could be used to end the interstate slave trade.

Meanwhile, Marshall used the ***Cohens*** case, in which District of Columbia lottery tickets were sold in Virginia in violation of state law, to assert the need for uniform commercial laws as interpreted by federal courts across the expanding nation. Marshall contended that Americans were "one people," not only "in war" and "in making peace," but also in "all commercial regulations."[2] Herbert Johnson classifies Virginia's and New York's positions in ***Cohens*** and ***Gibbons*** as state "threats," indicating "that vigorous regulation of interstate commerce would destroy the union" (p. 64). ***Cohens*** provided the Marshall Court with practice at dealing with such "political blackmail." Johnson also suggests that Marshall's task of editing and abridging his biography of George Washington during the early 1820s may have influenced Marshall as it reminded him of the connection of commercial union to political union, whether for the British Empire or for the new American Republic.

In chapter 5, Johnson summarizes oral argument in the case before the Supreme Court, delving into the arguments for concurrent versus exclusive federal power and the notion of dormant power. Johnson challenges the regnant orthodoxy by asserting that Ogden's attorneys, Thomas Emmet and Thomas Oakley, "outgunned" Gibbons's more famous but overconfident advocates, Daniel Webster and William Wirt, and agrees with White that Emmet and Oakley had more of an impact on commerce clause jurisdiction until the 1930s, "quite an accomplishment for a pair of attorneys who 'lost' their case!" (p. 103). Ogden's attorneys gave Marshall the way out: kill the unpopular monopoly by straining to find congressional exercise of the commerce power in a federal licensing act, but avoid a conclusion on either exclusivity or dormancy. Interestingly, Johnson also brings up the problems that having two counties within the District of Columbia with different commercial rules presented. The justices themselves had already seen the problems that lack of uniformity caused within the nation's capital.

Chapter 6 presents Marshall's opinion for the Court and Justice Johnson's concurring opinion. This is where Herbert Johnson elaborates on his portrayal of Marshall as Court mediator. He notes that the Court's "uniformity of opinion had been shattered by 1819, thrusting John Marshall into a new role as conciliator and mediator" (p. 107). Johnson points to the 1819 case of ***Sturges v. Crowinshield*** as a third influence on Gibbons. In that case, Marshall suggested concurrency in bankruptcy law, room for both federal and state involvement. Johnson notes that the ***Sturges*** opinion "cloaked a serious division within the Supreme Court" and speculated that Marshall took advantage of the opportunity of finding a New York statute unconstitutional without having to explain exclusive and concurrent powers precisely (p. 109). The ***Sturges*** opinion emboldened Ogden's attorneys, "placing a heavy burden on Marshall to undo in the Steamboat Case the markedly concurrent construction of the Constitution he had grudgingly accepted in ***Sturges***" (p. 110). Like most observers of the chief justice, Johnson points to Marshall's practicality, a desire to decide cases based on narrow grounds, unlike Justice Johnson. Justice Johnson's clearly nationalistic concurrent opinion setting forth exclusive commerce clause jurisdiction suggests to the author that the associate justice had presented these

arguments in deliberations to the rest of the Court but had been overruled. Herbert Johnson speculates that the concurrence actually may represent Marshall's own opinion of the case, but that Marshall instead chose compromise in order to present a unanimous opinion. In support of this statement, Johnson cites both the unusual month-long delay in rendering the opinion and the opinion's omission of foreign commercial implications, something of which a former secretary of state would have been very aware.

The final two chapters give us subsequent commerce clause rulings. Johnson hails the tendency since 1995 for the Supreme Court to look more critically at federal legislation and return to Marshall's concern that some economic activity was "internal to the individual states" (p. 169). Johnson concludes by giving us a too brief international perspective, comparing U.S. federalism with that of Canada, Australia, and the European Union. He attributes the greater centralization of Canada and Australia to the nations' more congenial relations with the British Parliament while he extols the European Union's unified market and justice system as forming better "mousetraps" than those of the United States (p. 174).

Johnson's *Gibbons v. Ogden* is a welcome addition to the Landmark Law Cases and American Society series.

Notes

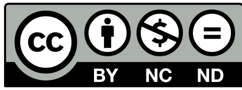
[1]. Thomas H. Cox, *Gibbons v. Odgen, Law and Society in the Earl Republic* (Athens: Ohio University Press, 2009), 193.

[2]. *Cohens v. Commonwealth of Virginia* 19 U.S. (1 Wheat.) (1821).

If there is additional discussion of this review, you may access it through the network, at
https://networks.h-net.org/h-law

Citation: Jill O. Acree. Review of Johnson, Herbert A. *Gibbons v. Ogden: John Marshall, Steamboats, and the Commerce Clause.* H-Law, H-Net Reviews. June, 2012.

URL: https://www.h-net.org/reviews/showrev.php?id=34043

 This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.