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BOOK REVIEW

HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOLUME II, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815. GEORGE L. HASKINS AND HERBERT A. JOHNSON. New York: Macmillan, 1981. Pp. 687, Tables and Index. $35.

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Ten years after the publication of the first volume of this exhaustive history of the Supreme Court,[1] the second of a projected eleven volumes has been published. Volume II is the fourth of the series to be released: Volumes I and VI appeared in 1971, the former covering the opening decade of the Court, and the latter covering the record of the Court and the Constitution in the post-Civil War period;[2] Volume V, published in 1974, chronicles the Taney Chief Justiceship.[3] The total project, funded by the Oliver Wendell Holmes Devise of the Library of Congress, began more than a quarter of a century ago.[4]

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1. J. GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOLUME I, ANTECEDENTS AND BEGINNINGS TO 1801 (1971). This pioneer volume placed the little-known opening decade of the Court into the context of the whole eighteenth century and confirmed the existence of a vast amount of previously unused documentary material in the Federal Records Centers of the National Archives. A major editorial project subsequently was undertaken by the Supreme Court Historical Society, under the editorship of Maeva Marcus, to collect this and other primary source material supplemental to the Holmes Devise History. The first of a multivolume series entitled DOCUMENTARY HISTORY OF THE SUPREME COURT, 1789-1801, will be published by Columbia University Press early in 1983.

2. C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOLUME VI, RECONSTRUCTION AND REUNION, 1864-1888, PART ONE (1971).

3. C. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOLUME V, THE TANEY PERIOD, 1836-1864 (1974).

4. The Devise is administered by a permanent committee of which the Librarian of Congress is an *ex officio* member. *See* G. HASKINS and H. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOLUME II, THE FOUNDATIONS OF POWER: JOHN MARSHALL,

Three volumes will be devoted to the history of the Court under Chief Justice Marshall, confirming the fundamental importance of the thirty-five years during which the Marshall Court laid the foundation of American federalism. Each of the volumes represents one of the three main periods generally recognized as comprising the history of the Marshall Court: the *Foundations of Power*, an aptly chosen title for the present volume, covers the years 1801-1815; *The Struggle for Nationalism* covers the years 1815-1825; and *The Challenge of Jacksonian Democracy* covers from 1825 to Marshall's death.[5] The present work, Volume II, is the joint product of Professor Haskins of the University of Pennsylvania[6] and Professor Johnson of the University of South Carolina. Professor Johnson also was the first editor of the project on the Papers of John Marshall, sponsored by the College of William and Mary and its Institute of Early American History and Culture.[7] The two following volumes will be produced by Professor Gerald Gunther of Stanford University.[8]

The authors of Volume II divide the period 1801-1815 topically rather than chronologically. Haskins, the original appointee for the volume, traces the evolving constitutional definition of the Court from the renowned case of *Marbury v. Madison*[9] to the settlement, in *Martin v. Hunter's Lessee*,[10] of the great dispute over state's rights which brought Marshall and Joseph Story into confrontation with Spencer Roane and the massed Jeffersonians. Johnson, in his part of the volume, addresses developments less glamorous than this titanic constitutional struggle, but equally important to the foundations of American federal law—maritime[11] and international

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1801-1815, at xi (1981) [hereinafter cited as HASKINS & JOHNSON].

5. This division of the history of the Marshall period has long been recognized. *See* L. BAKER, JOHN MARSHALL: A LIFE IN LAW, Book Four (1974); W. SWINDLER, THE CONSTITUTION AND CHIEF JUSTICE MARSHALL, chs. 1-5 (1978); C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, VOLUME I *passim* (1922).

6. Professor Haskins is the author of a definitive study of colonial law, G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS (1960).

7. *See* H. JOHNSON, JOHN JAY, COLONIAL LAWYER (1966) (microfilm); H. JOHNSON, THE LAW MERCHANT IN COLONIAL NEW YORK (1963).

8. For Gunther's previous work on the subject, see G. GUNTHER, JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND (1969).

9. 5 U.S. (1 Cranch) 137 (1803).

10. 14 U.S. (1 Wheat.) 304 (1816).

11. HASKINS & JOHNSON, *supra* note 4, at 459-92 (ch. 3).

law,[12] public land policy,[13] and the federal common law of crimes.[14]

The fifteen years covered by this volume unquestionably are the most critical in all of American judicial history. As Professor Paul Freund of Harvard, general editor of the Holmes Devise project, writes in the opening foreword: "The Court [during this period] might languish in benign obscurity or it might go down under the lash of active contempt."[15] Haskins, in his own preface, adds: "A relatively feeble institution" at the time of Marshall's appointment, the Court "nevertheless acquired in only a few years' time, and largely under the guiding hand of John Marshall, more power than even the framers of the Constitution may have anticipated."[16] Marshall's contribution made the Court an instrument of statecraft, "a bulwark of an identifiable rule of law as distinct from the accommodations of politics."[17]

This characterization of Marshall's contribution to the Court is a restatement of an already frequently stated historical verdict.[18] Haskins, however, has confirmed this verdict with fresh documentation illuminated in a significantly new perspective. The first four of Haskins' ten chapters are devoted to the political background of Thomas Jefferson's fateful attack on the Federalist judiciary, which prepared the way for *Marbury* in 1803 and the treason trial of Aaron Burr in 1807, landmarks that established, respectively, the reviewability of acts of Congress and of the Executive.[19] The reviewability of state acts under the "supreme law of the land" provision[20] inexorably followed in *Fletcher v. Peck*[21] and the Fairfax lands case.[22]

The Burr treason trial was a criminal proceeding in which Chief

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12. *Id.* at 526-58 (ch. 5).
13. *Id.* at 588-611 (ch. 7).
14. *Id.* at 612-46 (ch. 8).
15. *Id.* at xiii.
16. *Id.* at 7.
17. *Id.*
18. *See supra* note 7.
19. *See* W. SWINDLER, THE CONSTITUTION AND CHIEF JUSTICE MARSHALL, ch. 2 (The Supreme Court and Congress) and ch. 3 (The Supreme Court and the President) (1978).
20. U.S. CONST. art. VI, cl. 2.
21. 10 U.S. (6 Cranch) 87 (1810).
22. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

Justice Marshall sat as a circuit judge.[23] This trial presented issues of executive answerability that did not become ruling constitutional law until the Watergate litigation in 1974.[24] Burr's trial offers a unique view of Marshall handling a case at the trial level, because the trial's sensationalism insured the preservation of a more complete record than most lower court cases of the time.[25] Haskins concludes that the record demonstrates "the care and meticulousness of [Marshall's] scholarship and . . . his ability to reach out and formulate — on the basis of existing doctrine and accepted substantive and procedural rules — new and revised concepts in American law."[26]

Any history of the Supreme Court, and particularly of the Marshall era, inevitably tends to become a history of the Constitution as well. The study of the institutional development of the Court itself, which presumably is the primary focus of the Holmes Devise History, continues in Johnson's part of this volume. In his opening chapter entitled "Introduction: The Business of the Court," Johnson observes that, despite the spectacular nature of the great constitutional cases, there was "a shift in the nature of cases heard," accompanied by a shift in "the procedural mode by which those matters were presented."[27] Despite the explosiveness of states' rights issues as exemplified by *Fletcher v. Peck*,[28] the majority of cases reviewed were federal cases; thus, the Court began to settle into its primary role of "policing the federal system."[29]

In this area of judicial business, as much as in the constitutional area, the Chief Justice was the dominant figure. Johnson points

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23. The case was tried in Richmond before Marshall as Circuit Judge and Cyrus Griffin as District Judge. The circuit court had jurisdiction over Virginia and the "western waters" of the Ohio where the indictable acts allegedly took place. *See* Act of April 29, 1802, ch. 31, § 4, 2 Stat. 156-57. The history of the Fourth Circuit, to which Virginia belonged both before and after the 1802 statute, is being prepared as part of the circuit history projects of the Judicial Conference of the United States.

24. United States v. Nixon, 418 U.S. 683 (1974).

25. The Burr trial has been exhaustively studied. Among the more important recent studies are: T. ABERNATHY, THE BURR CONSPIRACY (1954); L. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE (1963); W. MCCALEB, A NEW LIGHT ON AARON BURR (1963).

26. HASKINS & JOHNSON, *supra* note 4, at 246.

27. *Id.* at 378.

28. 10 U.S. (6 Cranch) 87 (1810).

29. For a discussion of the "policing" role of the Court, see W. SWINDLER, AMERICAN CONSTITUTIONAL PRINCIPLES, ch. 3, § 11 (to be published in 1983).

out that "[f]rom 1801 through 1815, [Marshall] delivered 209, or fifty-five percent, of the opinions of the Court."[30] Marshall's prolific opinion writing demonstrated his energetic approach to his own responsibilities and also tended to replace the *seriatim* opinion with the institutional opinion, giving added weight to the controlling force of the precedents — a condition which in any age makes the bar of the Court more comfortable.[31] Although "a limited trend toward the 'opinion of the Court'" developed under Chief Justice Oliver Ellsworth,[32] Marshall, in both constitutional and nonconstitutional cases, used *per curiam* opinions rather than definitive disquisitions to shape the law and the function of the judicial branch.

Johnson concludes chapter one with a summation: "In beating a strategic retreat before the armies of Jeffersonian legislators, the judges arrived at a delineation of judicial power such that even their detractors were forced to concede the validity of their pretensions, and Republican judges found incumbent Federalist judges to be of one mind with them. Upon this consensus was built the foundations of the Supreme Court of the United States as we know it today."[33]

An important area of federal law — public if not strictly constitutional — is discussed in the fourth chapter of this part of the volume, under the heading "The Articulation of American Nationality." As an aid to diplomacy, this jurisprudential area augmented the commercial law principles enunciated in the admiralty cases discussed in chapter three; but this area also committed the Court to the consistent notice of "the rules concerning citizenship in the United States and the various States of the federal Union."[34] Rejection of "the British doctrine of perpetual allegiance" completed the sovereign act of independence begun in 1776, a process which Jay's Treaty had attempted with indifferent results[35] and which

30. HASKINS & JOHNSON, *supra* note 4, at 358.

31. *See, e.g.*, address by Judge Edward D. Re entitled "Stare Decisis," *reprinted in* 79 F.R.D. 509, 512 (1978).

32. HASKINS & JOHNSON, *supra* note 4, at 383.

33. *Id.* at 406.

34. *Id.* at 493.

35. For a discussion of Jay's Treaty and its effect on the work of the Court, see J. GOEBEL, *supra* note 1, at 749-52.

the War of 1812 only exacerbated. The often overlooked side effect of the Fairfax litigation, which came to a climax in the immediate postwar years, was a judicial resolution of the citizenship question as significant as the judicial review principle established in *Marbury*. As in *Marbury*, Marshall turned the Jeffersonian argument against itself, and in a series of cases between 1809 and 1815, the Court shifted the effect of the "perpetual allegiance" doctrine.[36]

The discussion of the cases involving the development of American nationality leads to chapter five and coverage of international law, a subject already masterfully treated[37] but now addressed in the complete historical context of the Court. Although Johnson contends that the area of private international law, alternatively referred to in American jurisprudence as conflicts of law, was developed inadequately,[38] one might speculate that Justice Joseph Story's experience with the frustrations of the Court in this area prompted his definitive statement of conflicts doctrine a generation later.[39] In any event, the cases on foreign governmental and commercial relations served to broaden the Court's own definition of the commerce clause[40] and planted seeds that would bear fruit a decade later.[41]

On balance, the authors conclude, the fifteen years that opened the Marshall Court established the judiciary as an impartial arbiter of issues that would affect the nation's development and maturity through most of the nineteenth century. For the further history of the Court's functioning during this period, scholars must await anxiously the remaining volumes in the too-long-delayed Holmes Devise Series.

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36. HASKINS & JOHNSON, *supra* note 4, at 524-25.

37. *See* B. ZIEGLER, THE INTERNATIONAL LAW OF JOHN MARSHALL (1939).

38. HASKINS & JOHNSON, *supra* note 4, at 558.

39. *See* G. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 312 (1970); J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834).

40. U.S. CONST. art. I, § 8, cl. 3.

41. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).