The MARSHALL COURT and CULTURAL CHANGE 1815-1835

G. Edward White

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Abridged Edition

G. Edward White

With the aid of Gerald Gunther

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The Marshall Court and Cultural Change 1815–35

For
John F. Davis

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Preface to the Abridged Edition

THIS WORK's initial appearance was as a volume in the *Oliver Wendell Holmes Devise History of the Supreme Court of the United States*, a series of encyclopedic reference works covering the history of the Supreme Court in predetermined phases, generally tracking the tenures of the Court's successive Chief Justices. In some instances, however, the tenure of a Chief Justice was considered sufficiently important to require more than one volume. I thus began my work on the Marshall Court under the assumption that my coverage would principally be restricted to the last twenty years of Chief Justice Marshall's tenure. Given those constraints of coverage, and methodological constraints imposed by the Holmes Devise project itself, I was faced with the prospect of writing a volume whose essential purpose would be that of a reference guide for specialists.

To an extent I rebelled against that prospect, and sought to produce a volume on the Marshall Court that was unabashedly interpretive, even revisionist, while retaining something of the format of other Holmes Devise volumes. In particular, I sought to place the Marshall Court's decisions firmly in a cultural context, taking culture to include not only features of the political, sociological, and economic landscape in which the Marshall Court functioned but also the sets of ideological belief systems that framed the Court's jurisprudential universe and informed the discourse of its decisions. My emphasis on the culture of the Marshall Court resulted in attention to some topics, such as the state of early nineteenth-century transportation facilities or the writings of James Fenimore Cooper, that might at first blush seem quite remote from cases decided by the Supreme Court of the United States.

Another way to characterize my orientation in the volume, and to distinguish that orientation from some of the other volumes in the Holmes Devise series, was that I self-consciously sought to communicate with generalist readers, those who shared my interest in late eighteenth- and early nineteenth-century American culture, as well as specialist readers who had a particular concern with the factual and doctrinal dimensions of the Marshall Court's cases. My aim, in short, was to treat the Supreme Court between 1815 and 1835 as a cultural artifact and to invite others to react to my interpretations of it in that capacity. My interpretations in this

volume are, of course, informed by the fact that the Court was a legal institution whose justices employed the discourse of legal professionals, but they are also informed by my view of other institutions and discourses in the culture at large.

Happily, a sufficient number of specialist readers and reviewers discerned the generalist orientation of my Holmes Devise volume and encouraged me to prepare an edition that would be more accessible to a generalist audience. This abridged edition is the result.

The principal abridgement I have made in this edition is to eliminate chapters discussing the Marshall Court's nonconstitutional cases. While those cases represented most of the Court's docket in the years between its 1815 and 1835 Terms, the bulk of them came to the Court simply because they involved disputes between citizens of different states in which the amount in dispute exceeded $2000. Such cases qualified for litigation in the federal district courts created by Article III of the Constitution and the Judiciary Act of 1789, and could be appealed from those courts directly to the Supreme Court of the United States. The Supreme Court had no discretionary power to decline to hear such cases, as it currently does. Moreover, there was no obligation in the Court or lower federal courts to follow decisions handed down by state courts or substantive points of law, as there now is after *Erie R.R. v. Tompkins*.[1]

Many of the nonconstitutional cases on the Marshall Court's docket thus involved relatively minor disputes. But the cases can nonetheless be seen as having potentially significant implications for contemporaries. A dispute over the wording of a contract or the title to a tract of land, for example, might appear to have little interest except to the litigants, even though the case had been decided by the Supreme Court of the United States. But more was at stake in such cases than might first appear, since the Supreme Court, being a federal court, was theoretically free to decide the case on the basis of a substantive rule of law different from that promulgated by a state court on the same subject. The possibility of different substantive rules of law coexisting in the federal courts and the state courts of any given state had obvious implications for the allocation of state and federal power in the American legal system, and those implications were noted by contemporary observers, who treated the allocation of sovereign powers between the newly created federal government and the states as the most central and potentially divisive political question of their time.

Despite the potential significance of the Court's nonconstitutional cases, my conclusions about the Marshall Court's treatment of them suggest that the cases have only a limited interest to nonspecialists. The nonconstitutional cases can be subdivided into three convenient groupings. The first grouping included cases with a market component, that is, cases

[1] 304 U.S. 64 (1938).

raising legal issues with discernible economic implications, such as real property cases, cases involving contracts and negotiable instruments, and cases affecting corporations. The second grouping included cases in which the Court exercised explicit and implicit supervisory powers granted to it by the Constitution and the Judiciary Act of 1789, such as the power to fashion the technical limits of its own jurisdiction, the power to create federal rules for choosing between conflicting laws of different jurisdictions, and the power to define the meaning of federal criminal statutes or to declare, in a very limited context, the federal common law of crimes. The third grouping included maritime cases not raising constitutional issues, such as international law cases, prize cases, and marine insurance cases.

In the first group of cases I concluded that the Court's decisions were comparatively insignificant when compared with activity in the state courts and also with the Court's activity in constitutional cases. On the whole, I found this group of cases "more interesting in the aggregate than in the individual; more interesting as trends over time than as jurisprudential breakthroughs; more significant, on occasion, for what the Court did not do than what it did." While I found that the Court's decisions in areas related to a market economy confirmed that "in a society such as early nineteenth-century America in which economic relationships are being transformed . . . legal doctrines will both facilitate and respond to that transformation," I did not regard that finding as remarkable, and indeed suggested that "the cases confirm a view of the relationship between law and the co-economy which has in past years become entrenched."[2]

With respect to the second group of cases, I found that while "the impression is of a Court whose power to fashion nonconstitutional rules of jurisdiction and procedure for itself and the lower federal courts was taken for granted," the Court was nonetheless disinclined to invoke its appellate review powers under Section 25 of the Judiciary Act of 1789 to usurp the prerogatives of state courts where a procedural rule had substantive implications, or to "use the expanded federal criminal jurisdiction of the District of Columbia circuit court as a device to get itself into the business of reviewing substantive criminal decisions." In short, I concluded, "this batch of nonconstitutional cases revealed the Court's posture as comparable to that which it adopted in the more publicized constitutional decisions."[3] The Justices took pains to avoid the appearance of being partisan, invading state prerogatives, or making substantive criminal law decisions, while at the same time vigorously preserving the jurisdiction and discretion of the federal courts. None of these stances can be said to be counterintuitive.

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[2] G. Edward White, *The Marshall Court and Cultural Change, 1815–1835* 834–835 (1988 ed.)

[3] Id. at 751, 883.

The maritime nonconstitutional cases, involving international law, prize disputes, and marine insurance, were arguably more significant. But their significance, I concluded, was not principally based on the results the Court reached in those cases but in the relationship between the Court's increased involvement with maritime cases and its efforts to expand its jurisdiction over domestic sovereignty disputes in the years after 1819. As I put it, "One of the decisive episodes in the history of the Supreme Court of the United States was the interval from 1812 to 1819 during which the Court, because of its established jurisdiction over a number of maritime cases, suddenly became, with the War of 1812 and the Latin American revolutions, a major forum for the adjudication of high sea disputes."[4] Out of that period came the Court's intervention in prize and piracy cases, its announcement of a positivistic interpretation of the "law of nations" in international law cases, and even its conceptualization of commercial law, to which it was first introduced in a maritime setting, as a general and uniform subject. The interventionist stance of the Court in its early maritime cases, I argued, prepared it "to emerge as a force in domestic sovereignty disputes."[5] The principal interest of the cases, then, was not in their results or even in the doctrines the Court promulgated, but in the Court's activist but cautious involvement with delicate issues of sovereignty and politics.

On the whole, then, in an edition directed toward the generalist reader, it seems appropriate to refer those who desire a detailed treatment of the nonconstitutional cases decided by the Marshall Court between 1815 and 1835 to the original edition of this work.

My decision to abridge the work to eliminate some of its specialized material should not be taken to represent a shift in the methodological focus of this edition of the volume. This book remains one whose primary emphasis is on what might be called cultural details: on an amassing of the multidimensional texture of the Marshall Court's cultural universe. I have tried to re-create that universe through the extraction of apparently discrete features in late eighteenth- and early nineteenth-century American culture and through efforts to draw connections between those discrete features. Ultimately the features and their connections are presented as a cultural matrix in which the Marshall Court's decisions are seen as not merely set but in a sense imprisoned, so that the Court and its Justices come to be characterized as distinctively time- and place-bound.

And while the volume, even in its abridged form, remains a detailed portrait of one institution, in a comparatively short time frame, it is nonetheless an interpretive portrait. It might be useful to those readers primarily interested in the work's interpretive structure to be exposed, in prefatory form, to the sorts of cultural details that have been given primary interpretive significance. I have singled out three clusters of details for

[4] Id. at 925.

[5] Id. at 925–926.

particular emphasis: details pertaining to tangible physical changes in the early nineteenth-century American environment; details pertaining to predominant belief systems in the discourse of early nineteenth-century American elite culture; and details pertaining to the internal practices, deliberations, and decisions of the Marshall Court, an institution whose decisions were rendered collegially.

I will reserve further discussion of those clusters of details, and their relationship, for the work as a whole. At this point it seems appropriate to note the original intuitions that led me to conclude that those clusters deserved particular emphasis. One intuition followed from my observation that not only were there objectively dramatic quantitative and qualitative changes in the American environment in the first forty years of the nineteenth century—changes in demographics, political and economic practices and institutions, the geographic boundaries of the American nation itself—but contemporaries overwhelmingly perceived their environment as one of rapid change, and increasingly began to contrast their "past" with their "present" and their projected "future." I thus intuited that the nature and meaning of cultural change would be particularly pressing issues for contemporaries of the Marshall Court.

Another intuition stemmed from my investigation of primary and secondary literature on the ideologies of republicanism and liberalism, ideologies that have been identified by historians of the early Republican period as pervasive and potentially contradictory belief systems structuring American elite thought in the late eighteenth and early nineteenth centuries. I noted that at least during the time period covered in my volume neither of those belief systems, to the extent they could be fruitfully distinguished from one another, had generated a coherent theory of cultural change which could be described as a progressive evolution in which the future represented an "advance" or an "improvement" on the past. On the contrary, to the extent either system had advanced a theory of cultural change, it was a "cyclical" rather than a "progressive" theory, one in which nations, like individuals, passed through inevitable stages of youth, maturity, and decay.

A third intuition was related to the perhaps prosaic observation that in almost no respects did the Marshall Court, in its internal practices and deliberative procedures, resemble modern Supreme Courts. While one might not have found it startling to observe that the Marshall Court's justices met in Washington for only six or seven weeks a year, or that they spent a good portion of their time riding from one federal circuit court to another on horseback or in horsedrawn vehicles, I concluded that most modern observers of the Court would be taken aback to discover some other features of its internal practices. These included the justices' exercising discretionary power to place cases or issues on the Court's docket that they as individuals wanted heard and decided, and on which they had previously announced views; justices drafting petitions for one set of liti-

gants in a case, even though they subsequently declined to decide that case on conflict of interest grounds; justices occupying the same boardinghouse in Washington as the lawyers that argued cases before them, and discussing and even voting on cases in that boardinghouse; opinions of the Court not revealing the votes of individual justices; some justices "silently acquiescing" in a given decision even though they had not supported it in internal deliberations; justices not circulating their draft opinions after they had delivered them orally in court, but simply sending them to the Court's Reporter for subsequent publication; the Reporter editing and in some instances substantially rewriting opinions, even ones in which he had been one of the lawyers arguing the case before the Court. I concluded that these practices were sufficiently alien to modern conceptions of judicial accountability that they were themselves products of a distinctive culture, one whose assumptions about the nature of judging were as premodern as its assumptions about cultural change.

The interpretive structure ultimately derived from those intuitions treats the significant constitutional cases of the later Marshall Court as having a multifaceted character. At a straightforward level, those cases were exercises in the interpretation of a Constitution that had received only the sparest prior interpretation. At other levels, they were reflections of changing economic arrangements and attitudes, manifestations of evolving definitions of political sovereignty, illustrations of the inherent ambiguity of such culturally resonant concepts as "Union," "property," or "commerce." And at the level most directly related to the intuitions out of which the volume's interpretative emphasis emerged, they were efforts on the part of a group of Supreme Court Justices to recast the meaning of a document from their recent past—the text of the Constitution, together with the ideological assumptions they ascribed to that text—so that it could speak to their rapidly changing present and offer some sort of permanent guidance to their uncertain future. Those efforts took place within a jurisprudential universe in which issues of judicial power and judicial accountability were subsumed in a particularistic conception of judicial "discretion," a conception that has no precise modern equivalent.

I want to express my appreciation to four colleagues whose familiarity with the original edition of this work encouraged me to think it might have some continued appeal to a wider spectrum of readers. Thanks to William W. Fisher III, Alfred S. Konefsky, Sanford Levinson, and H. Jefferson Powell. I, of course, remain responsible for any decision not to abridge portions of the original edition that arguably should not have seen their way into print in the first place.

G.E.W.

Charlottesville, VA
October 1990

Preface

THIS WORK has had a long and not always tranquil history. As its authorship has changed, so necessarily has its emphasis. Constant in the life of the volume has been the prodigious amount of archival research engaged in by Gerald Gunther in the years in which he was connected with the project, research that, while it has been supplemented, could not have been duplicated in the several years I have been working on the volume, and has thus been an indispensable help in allowing me to prepare a manuscript in a manageable time. Constant as well has been the difficulty of writing about the Supreme Court of the United States in what was surely one of its most famous but one of its least accessible periods.

I began work on the project in earnest in 1982; before that Professor Gunther had shipped me his research files, which contained duplicates of many of the letters, notebooks, and manuscripts from archival collections cited in the notes. On occasion I have had to reverify some sources, but for the most part I have been able to rely on the files. Despite the great saving in time and effort that has resulted, I share the conviction of another author in this series that "the vicarious enlightenment to be derived from another's research is spotty and faint."[1] Research material is only as useful as the interpretations in which it is framed, and those interpretations rarely survive the passage from one scholar to another. Consequently there was a great deal of data collected by Professor Gunther that I did not use, and perhaps even more that I used in a fashion different from that which he would have employed. Moreover, there was a sizable amount of data that I collected myself. It goes without saying, however, that my debt to Professor Gunther has been considerable.

I bear sole responsibility, however, for the manuscript of this volume. In keeping with its substantial gestation period, the life of the manuscript has not been short, and there have been some false starts and adjustments along the way. I came into the Holmes Devise series with

[1] Benno Schmidt in A. Bickel and B. Schmidt, *The Judiciary and Responsible Government, 1910–21* (1984), 723.

the firm intention of writing an "interpretive" history, with a de-emphasis on the massive detail that has been characteristic of other volumes in the series. I found that the subject and the approach did not mix well, and thus this work resembles its predecessors in the series in length and to some extent in detail, although it may differ radically from some volumes in not being a "lawyer's history" but in consistently seeking to locate the Marshall Court in the larger culture of which it was a part.

This was not a book I had anticipated writing. I had not previously concentrated on late-eighteenth- and early-nineteenth-century legal history; I had no intention of writing a volume in a series; and I had no particular interest in institutional history. Through an odd combination of circumstances Professor Stanley Katz and I began discussions about the Holmes Devise series, and in some mysterious fashion those discussions evolved into a commitment on my part to take on the work of this volume. Looking back, I can only attribute the outcome to Professor Katz's unique version of sleight-of-hand. Having reluctantly and almost unconsciously taken on the volume, I should confess I have enjoyed writing it. No one, especially the authors, would remotely describe the production of a Holmes Devise history as fun, but for me it has been a stimulating experience in acculturation: working with early-nineteenth-century sources requires exposure to a great many "foreign" phenomena, from eighteenth-century calligraphy and etymology to the belief structure of republicanism. I have emerged from the project with a much keener sense for what it may have been like to live in the early days of the American nation; that sense is the closest thing to "fun" I can associate with my labors.[2]

An author invariably accumulates debts in a scholarly enterprise, and in this case the length of the project and my relatively neophyte status as a historian of the early Republic have made the list longer than usual. The persons to whom I am indebted can be subdivided into categories: those who gave me advice and critical reactions rather early, on issues that may have seemed to them elementary and tedious; those who became aware of my involvement with the project at an early stage and were somehow unable to disentangle themselves as my work progressed; and those whose counsel was requested in the later stages on specialized issues. Included in the first category are Professors Gordon Wood, Charles Hobson, and Hendrik Hartog; in the second category Kent Newmyer, Charles McCurdy, and Alfred Konefsky; and in the third William McLoughlin, Eric Freyfogle, Craig Joyce, and William Fisher. I also want to acknowledge the uncategorizable contributions of Gerald Gunther,

[2] I have tried to capture some of the sense of living and working as a Marshall Court Justice in "Imagining the Marshall Court," Supreme Court Historical Society *Yearbook* 77 (1986).

Stanley Katz, and John F. Davis, each of whom read the entire manuscript, sometimes at more than one stage. Messrs. McCurdy and Konefsky should be singled out a second time because they convinced me to make some substantial changes in the manuscript when I hoped it was nearly done. The result is that this volume has appeared in print later than it otherwise would have: the discriminating reader will know where to lay blame for that delay.

A group of research assistants has worked on this study, some of them rarely having the sense that they were engaged in a project that would ever come to fruition. Some may, on becoming aware of the mention of their names in connection with this project, require some effort to remember what it was, but in the time zone of academic life years are foreshortened, and I remember vividly the contribution of each. Thanks to Wendy Wysong, Joanne Schehl, Suanne Rudley, Diane Borkowski, Ann Hammersmith, Montsi Cangialose, and Wendy Rogovin. Thanks as well to Diane Moss, Madeline Branch, and the typing staff at the University of Virginia School of Law for their help with several drafts of the manuscript.

In addition, several people have been helpful during the process of evolution from completed manuscript to book. Marsha Rogers, the Archivist of the University of Virginia School of Law, and James Hutson and his staff at the Manuscript Division of the Library of Congress assisted in the selection of illustrations. Kent Olson, Head of Reference of the University of Virginia Law Library, assisted in the checking of sources. Charles E. Smith, Elly Dickason, and Nancy Brooks of Macmillan Publishing Company facilitated the volume's production. Stanley N. Katz was available when the world demonstrated its habitual indifference to an author's interests.

Despite the delays occasioned by Professors McCurdy and Konefsky, the manuscript would have been completed sooner had not two Siamese cats, Madeleine and Annabelle, regularly trod on its contents and sometimes scattered them on the floor, and had two small dogs, Lady and Nessie, been better housetrained and more reliable about their wanderings. Whatever increase in domestic tension may have occurred from the actions of those animals was offset by the pleasure they gave a household already enhanced by the presence of Susan Davis White, Alexandra V. White, and Elisabeth McC. D. White. Alexandra began high school when this work was in its first stages, and will be a sophomore in college when it is published. Elisabeth will have progressed from first to sixth grade. Susan will not have gotten any older, only better.

In looking at other prefaces written by authors of volumes in this series, I have noticed that it is customary to pay some respects to Oliver Wendell Holmes, Jr., whose bequest to the United States made the series possible, and to Felix Frankfurter, who first conceived the use of

Holmes's legacy to commission a history of the Supreme Court of the United States. I have written about Holmes on several occasions and shall write more about him; he needs no encomiums from me, and I am quite confident that if he had noted the size and detail of this study, he would no more have read it than he read the industrial commission reports Justice Louis Brandeis shipped him one summer. As for Frankfurter, I am not among the generation of authors—Julius Goebel, Carl Swisher, Charles Fairman, George Haskins, Alexander Bickel, Paul Freund—who were solicited directly by Frankfurter and "made" to undertake volumes in the series. I am not even sure Frankfurter would have approved of my entry, and had he discovered that this volume raises some questions about John Marshall's professional ethics and suggests that Justice Henry Baldwin may well have been at least temporarily insane, he might have disapproved of the result. But had it not been for Frankfurter, Holmes's legacy to the United States might still be sitting in some nameless government account, not even earning interest, and there would be no Holmes Devise volumes. I leave it to the reader to decide whether Frankfurter should have left well enough alone.

G.E.W.

Charlottesville
September 1986