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## The Marshall Court and the Writing of Law and History (review of G. Edward White, *The Marshall Court and Cultural Change, 1815-35, Vols. 3 and 4. The Oliver Wendell Holmes Devise History of the Supreme Court of the United States*)

Alfred S. Konefsky  
konefsky@buffalo.edu

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THE MARSHALL COURT AND THE WRITING  
OF LAW AND HISTORY

By ALFRED S. KONEFSKY

*The Marshall Court and Cultural Change, 1815–35, Vols. 3 and 4.* By G. Edward White. Macmillan. \$95.00. (Part of the 11-volume series, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States*, edited by Paul A. Freund and Stanley N. Katz.)

**M**ore than 30 years ago the Congress of the United States created the Permanent Committee for the Oliver Wendell Holmes Devise. The Committee's function, "with the aid of the [residual] estate left by" Justice Holmes to the United States, was to oversee the preparation of a multi-volume *History of the Supreme Court of the United States*. Now into its fourth decade, the project has had a somewhat fitful progress. Not all of the volumes have been completed, though those that have been published have been lavishly produced. Lettered, sealed, and brocaded in gold as befits their importance, the volumes are also long, weighty, and expensive. Though Justice Holmes intended to leave his estate to his country, his legacy has been confined

primarily to library shelves and academic debates. At almost one hundred dollars a volume, it is unlikely that the “people” of the United States will have much opportunity to own the books prepared in his honor. In addition, the books are hard to find in bookstores as a result of the publisher’s erratic distribution policy.

From the start, the Devise series has been plagued with a number of intellectual problems. First, the authors seemed to operate under a special burden, a kind of “last word” syndrome. Being charged with the responsibility of writing the definitive, exhaustive study often meant extensive research into primary sources so that one could be absolutely confident about the documentary record before putting pen to paper. Writing under this burden also meant special care and evaluation of the record before judgments were made and defended. Most of the volumes were assigned to law professors, who tend to be very cautious anyway about what they write. Writing for the ages not surprisingly has taken ages.

Second, the volumes were organized basically around the somewhat arbitrary category of the tenure of the chief justices. This practice had the virtue of imposing manageable guidelines and demarcations on the authors; one knew where one was supposed to begin and end. The problem is that not all history can be placed in such tidy settings; events do not just begin and end; sometimes they overlap, disappear and reappear, are transformed and recast. History, of course, has the nasty habit of escaping from the clutches of even the most convincing of labels, particularly those imposed for the most artificial of reasons. The emphasis on using various “courts”—the Marshall Court, the Taney Court—as the organizing premise for the writing of a definitive history, has, ironically, rendered the historical record occasionally ahistorical.

Finally, some of the volumes, written over a long period of time, have not sufficiently taken into account contemporary scholarship outside of law that might have illuminated un-

derstanding of legal or constitutional matters. The studies have tended to be highly detailed with little or no organizing theory. For example, Professor Julius Goebel's volume on the early years of the Court, though written with his characteristic technical facility and virtuosity, made virtually no mention of modern scholarship on the political and ideological controversies in the immediate post-Revolutionary period. Law was rendered as virtually autonomous, unrelated to the world outside.

In striking contrast stands G. Edward White's exceptional contribution to the Holmes Devise, volumes 3 and 4 (bound together) in the series, *The Marshall Court and Cultural Change, 1815–1835*. (In the early history of the series, the Marshall Court years were divided, and the years 1801–1815 were placed in a previous volume, separately authored, number 2 in the series.) Though assigned authorship to the two volumes just within this decade, White finished them with dispatch. Trained in both law and history, White brings his command of both disciplines to this book. In particular, he provides his insight not only to historical theory, but also to the relationship between history and law. The product is clearly the best of the Holmes Devise volumes to date, and more generally, if separated from the series, an important landmark in legal and constitutional history.

Why is White's volume so successful? Primarily because White has managed to apply lessons gathered from critical debates about the methodology and substantive content of early 19th-century American legal and constitutional history. He has insisted that the writing of an internal, autonomous legal history, focusing purely on doctrinal or institutional history, is not sufficient. There must be other modes of historical explanation that help us to understand how legal events are shaped and understood. The primary intellectual framework for this book about law remains essentially outside of law, though law is clearly embedded within the framework. This is not to say that technical legal problems and developments are overlooked, but even technical con-

cerns, though explained within their own terms, are opened up to larger modes and categories of explanation. And, in organizing his inquiry, White has placed substantial emphasis on developments in the legal historiography of the last half-century or so—particularly law and culture, and the related sphere of law and politics.

White begins his description of the Marshall Court by stipulating that “[t]he extended argument of this study is that the decisions of the Marshall Court cannot be separated from the distinctive cultural ethos in which they originated.” To this end, he starts his search for the cultural ethos not in law, or judicial opinions, or legal rules (as one might expect in a book about law), but in James Fenimore Cooper’s novels. Why? Because White seeks through literature to ascertain what ideas and beliefs were most widely disseminated throughout society during the period of the Marshall Court. By analyzing literature and other sources, White identifies the central cultural idea around which he believes the Marshall Court organized its legal thought—republicanism.

The subject of republicanism has dominated the historiography of the early republic for the last two decades. The inquiries have been both backward looking and forward looking. In both history and law, scholars have offered explanations attempting to give meaning and understanding to the past. In law, particularly constitutional law, renewed intellectual interest in republicanism has also pointed toward the future. Republicanism in the hands of modernists has emerged as a “new” social theory, a possible model for future discourse, centering around the tension between community and individual. The scholarly debate has been prolix and complex on a number of fronts. Controversy has emerged over a sophisticated, working definition of republicanism, the relationship between republicanism and economic liberalism, and the general impact of republicanism on early American society. Drawing on these academic discussions, White has made at least two important contributions to our understanding of republicanism: he has summarized and presented

the most useful strands of the argument about the meaning of republicanism, and he has demonstrated how a version of republican ideology had an impact on law and the Marshall Court. We might occasionally quibble with White over particular definitions and interpretations, but this would not detract from his overall argument. White has a theory about how the Marshall Court operated, and his evidence is presented impressively.

White argues that "Marshall Court jurisprudence can be seen as heavily influenced by a special version of republicanism, a version that represented a fusion of classical republicanism and other trans-Atlantic ideologies." He is also aware of what he terms the "accommodation of republican theory to cultural change." In his presentation of republicanism, White emphasizes "classical" elements focusing on civic virtue and participation coupled with wide distribution of property, in a republic administered by an educated hierarchy fending off corruption. White believes that over time this pure classical form increasingly "fused," or at least found itself "in awkward juxtaposition" with the rise of economic liberalism. The fusion helped create America's "special version of republicanism." Rather than the classic republican subordination of "individual self-interest to the good of society as a whole," liberalism "was founded on the premise that individual self-fulfillment could be best encouraged by allowing individuals to pursue their . . . self-interests." In particular White argues that the tensions between classical republicanism and liberalism often focused on the meaning of property rights and the content and scope of commerce. He notes that,

[W]hile liberalism shared with classical republicanism a sense that property was an important foundation of society, its advocates tended to emphasize the role of property as a source of economic freedom and productivity rather than as a source of political and social stability. Liberalism also tended to encourage the pursuit of commerce for both individual self-fulfillment and social improvement; commerce has been

identified by classical republicanism as a source of luxury and decay.

White finds within this fusion or tension, placed in the context of a spreading market economy, the principal constituent elements of the cultural influences on Marshall Court jurisprudence.

But the tension between overlapping ideologies does not necessarily resolve the question about why particular results were reached in individual Supreme Court cases. Rather, as White so ably demonstrates, the recognition of the Court's attempt to fuse traditions assists us in understanding how the ideological parameters were formed for debate within the Marshall Court. As readers, we get to see the choices the justices faced, and not the inevitability of the outcomes. In other words, White helps us see the cases as the Court saw them, sometimes as confused, garbled, and incoherent; sometimes clear as crystal. As a result, some traditional interpretations of landmark cases—for instance in the contract clause, commerce clause, and natural law and racial minority (slavery and Indians) areas—take on new light. White forces us to rethink old categories, and, though we might disagree (sometimes the republican framework might appear forced), the evidence is compelling enough to stimulate us to reconsider old ways of thinking.

Since the Marshall Court in White's hands is uniquely situated as "a Court of its time"—that is as a court heavily influenced by the cultural ethos of its period—it should come as no surprise that the Court was perceived by some contemporaries, and perceived itself, as an important political actor in the early history of the republic. But historical reverence for the Marshall Court as one of our nation's primary judicial and institutional artifacts is in part based on assumptions about the Court's apolitical and neutral nature. White perceptively notes the tightrope the Court walked:

To conclude, therefore, that the Court succeeded in separating law from politics, or in establishing itself as a neutral

nonpartisan force is to read only some of the contemporary commentary and to emphasize only some of the Court's language. It is clear that during Marshall's tenure the Court had an interest in fostering an impression of itself as removed from politics and faithful to the impersonal dictates of the law. It is also clear that the Court succeeded remarkably in establishing that impression in public consciousness. But it is not at all clear that the Court's opinions were nonpartisan, or even that they were so perceived by those who followed its actions closely. Perhaps the most one can say is that Marshall and his colleagues were convinced that the de-emphasis of overt partisanship and the emphasis of a judicial obligation to subordinate individual discretionary choice to the "discretion of the law" was an important means of gaining legitimacy for their pronouncements. To say that is not to say that the Court elevated law about politics. It is rather to say that the Court established a strategy whose purpose was to distinguish law from politics, and that the distinction between law and politics, and between legal and individual discretion, was accepted as a respectable intellectual proposition by the Court's contemporaries.

The Marshall Court relished its participation in the cultural fray, because as a body it sensed that important political principles were at stake. White helps us to identify these "distinctive" cultural features that forged the Court's "intellectual assumptions."

That culture was one in which an established belief structure was confronting unmistakable evidence of social change. The attitudes of the belief structure toward change were themselves distinctive, and three such attitudes have received particular emphasis. . . . One was the unresolved tension between an assumption that change represented progress and an assumption that change should be equated with cultural decay and disintegration. A second was the effort to respond to change by the systematization and organization of areas of knowledge, reflected in the attempts of jurists to articulate scientific legal principles. A third was the rediscovery and recasting of the revolutionary history of the American republic reflected in Marshall Court opinions and in contemporary apologists for the Court. What



links these three developments? One linkage, I would suggest, can be found in a distinctive attitude toward the past as a source of guidance for the present. The exercise of looking backward in time was not an exercise that yielded, for Marshall's contemporaries, the insight that civilization was in a constant process of change, nor the insight that the future could never fully replicate the past. The exercise of contrasting the past to the present and recasting the past was, for early-nineteenth-century Americans, a way of identifying and reasserting first principles, that is, values, beliefs, and rules that remained unchanged over time.

To focus merely on White's argument and intellectual structure in these volumes may, in a curious way, underestimate his considerable achievement. This is a definitive volume, prodigiously researched and gracefully written. In addition to addressing all the critical and famous constitutional cases in their contexts, White has exhaustively analyzed nonconstitutional and private law cases so frequently ignored. He has offered sound insights into the working life of the Court and shrewd judgments about interactions among the justices which contribute to a reassessment of Marshall's personal influence on the Court. White has also provided deft and subtle portraits of each of the judges, the (often overlooked) court reporters, as well as the prominent lawyers who dominated the dockets. We should be grateful to White for producing a volume that fulfills the promise of the Holmes Devise. He has convincingly presented a theory about law and cultural change, emphasizing the time-bound quality of law, demonstrating the futility of pursuing its autonomous nature, and reminding us that, in one respect or another, all courts are courts of their time.