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978-0-521-76663-0 - The Marshall Court and Cultural Change, 1815-1835, Volumes III-IV

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Excerpt

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Introduction

THE MARSHALL COURT has repeatedly been characterized, but it has rarely been studied. This work, which appears more than 150 years after Marshall's death, represents the first attempt at a detailed description of the Court's internal deliberations, the first effort to survey the Court's nonconstitutional cases between 1815 and 1835, and the first detailed investigation of the intellectual legal culture in which the Court's decisions were grounded. Often the Court has merely been noted in passing, by historians surveying early American culture, or by political scientists studying American governmental institutions, or by lawyers analyzing the evolution of constitutional doctrines.

The result of this tendency to consider analysis of the Marshall Court as an exercise tangential to other, more central scholarly pursuits has been the emergence and persistence of certain talismanic labels that in the aggregate have produced a historiographical image for the Court. The Court has been regularly labeled "nationalist," "Federalist," "property-conscious," and "Chief Justice-dominated." I have, in another place, discussed the origins and shifting emphasis of those labels.¹ A review of that discussion seems unnecessary here, but some summary comments are in order, by way of placing the emphasis of this study in context.

In brief, each of the labels advances a particular characterization of the Marshall Court. The label "nationalist" identifies the Court with a political ideology that promoted the growth and spread of the powers of the federal government and, concomitantly, sought to restrict and compress the powers of the states. The label "Federalist" identifies the Court

¹ G. White, "The Art of Revising History: Revisiting the Marshall Court," *Suffolk U.L. Rev.*, 16:659 (1982). Among the sources discussed in that article are A. Beveridge, *The Life of John Marshall* (4 vols., 1916-19); C. Warren, *The Supreme Court in United States History* (3 vols., 1922); C. Haines, *The Role of the Supreme Court in American Government and Politics* (2 vols., 1944); H. Laski, *The State in Theory and Practice* (1935); M. Jones, ed., *Chief Justice John Mar-*

shall: A Reappraisal (1956); R. Faulkner, *The Jurisprudence of John Marshall* (1968); and G. White, *The American Judicial Tradition* (1976). A cogent review of Marshall Court historiography can be found in R. Clinton, "The Populist-Progressive Interpretation of American Constitutional History" (Ph.D. diss., University of Texas at Austin, 1984), 1-37. My thanks to Professor Clinton for letting me see his work in advance of its publication.

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with the political party that came into being in the latter years of the Washington administration and had as its central goal the maintenance of the identity and influence of the newly created federal government. The label “property-conscious” identifies the Court with the belief that the ownership and use of property was a prerequisite to civic virtue and human happiness, and that one of the first objects of government should be the preservation of property rights. The label “Chief Justice-dominated” identifies the Court with its Chief Justice, suggesting that John Marshall was the most important and influential member of the Court, and that to a large extent the Court’s views on legal issues were the equivalent of Marshall’s views.

When I began this study I had a sense that these labels amounted to oversimplifications, and that a revision of the Court’s image was probably necessary. I also believed that the starting point for the revision lay in the considerable amount of recent scholarship that has explored the importance of the ideology of republicanism as a central belief structure for late-eighteenth- and early-nineteenth-century American culture.² I suspected that the Marshall Court, like other institutions in that period, had been affected by republicanism, and that by considering the relationship between the Court’s decisions and the central issues and paradoxes of republican thought a new perspective on the Court might be gained.

I have pursued that effort in this study; one might say I have explored the possibilities of attaching another label—“republican”—to the Marshall Court. I will subsequently give a brief outline of my efforts and the historiographical consequences, but at this point a caveat is in order. Entrenched historical labels do not survive merely out of inertia; they survive because they contain a modicum of truth. The difficulty with the entrenched labels for the Marshall Court is not that they mischaracterize but that they oversimplify: they conceal complexities and in the process blunt rather than sharpen understanding.

The Court’s “nationalism,” for example, was an eighteenth-century, anachronistic variety, oriented primarily toward preserving the federal government against centrifugal encroachments, and only secondarily toward expanding national power. Its “Federalism” was not so much a conventional partisan ideology as a collective attitude toward the proper locus of sovereignty in the American republic, an attitude that was complex and not always consistent. Labeling the Court “property-conscious” conceals the most important feature of its decisions affecting property rights, the fact that the decisions represented accommodations between two quite different conceptions of property, one of which was inimical

² I have listed the sources that have influenced my understanding of rep-

licanism and liberalism in early America in Chapter I.

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to the idea of property as a commodity to be exchanged in a market economy. A characterization of the Court as dominated by its Chief Justice fails to take into account the significance of other Justices, such as Story and Johnson, who regularly contributed to the Court's opinions, and fails to emphasize the importance of the Court's internal deliberative process, which placed a high value on the contributions of "silent" Justices, whose votes or opinions were not revealed in the Court's formal decisions.

I have therefore not employed entrenched labels in this study, except where I have deliberately sought to complicate their meaning. As part of that process I have asked whether the meaning of the labels might be deepened or enhanced by considering the Court as an institution functioning in a culture composed of the entrenched belief structure of republicanism and the emerging oppositionist belief structure of liberalism. In the process of exploring that question I have discerned that the label "republican," when applied to the institution of the Supreme Court of the United States, itself conceals significant complexities. An initial complexity is the simultaneous uniqueness and diversity of the ideology of republicanism itself. From a modern vantage point, republicanism can be made to appear wholly distant from modern thought in certain of its metaphysical assumptions, such as its theory of cultural change or its attitudes toward social stratification. The gap between such assumptions and those of moderns helps convey the time-boundedness of republicanism and emphasizes the degree to which dominant ideologies establish tacit boundaries on thought and discourse. But while a recognition of ideology as a cultural system is important, that recognition tends to obscure the diversity of viewpoints that can be held within the boundaries of an ideological universe, the extent to which ideology continually confronts, reshapes, and is reshaped by cultural experience, and the presence of potentially competitive ideologies in the same time frame. I have responded to this initial complexity by suggesting that the ideological ethos of the early nineteenth century can most accurately be described as an amalgamation of republican and liberal ideologies, with other ingredients, such as the belief that America was an exceptional and unique culture, being added to the mix.

A more basic complexity was raised by the difficulty of making meaningful correlations between ideological positions and the judgments rendered by courts. Courts are, first of all, not static entities: their personnel and the composition of their dockets change, sometimes drastically, over time. In America appellate courts, such as the Supreme Court of the United States, typically render collective judgments which de-emphasize individual beliefs and emphasize "authoritative" legal sources that are taken to be neutral, apolitical, and nonideological. How does one assess the ideological posture of a court whose members try to conceal

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their belief structures and to suggest that their judgments have nothing to do with ideology?

I have sought to respond to these complexities in several ways. First, I have made an effort to reconstruct, as far as possible, internal evidence about the Marshall Court's deliberative processes, and I have attempted to show that the working life of the Court—the manner in which cases came to it, the setting of its deliberations, its deliberative practices themselves—can be seen as having an ideological character. The working life of the Court reveals that a particular jurisprudential issue—the problem of judicial “discretion” and the related problem of distinguishing the judicial declaration of legal principles from partisan political activity—was foremost in the minds of Marshall and his contemporaries. A surprising amount of internal evidence relevant to this issue has survived, and I have employed it to reconstruct those dimensions of cases and formulations of doctrine that revealed the Justices' concern with “discretion.”

Second, I have sought to penetrate the legal doctrines of the Court through certain reading techniques. One of these has been to identify words that occupied places of significance in the language of early-nineteenth-century republicanism and liberalism—words such as “property,” “Union,” and “commerce”—and to compare the use of such words in Marshall Court decisions with their use in the culture at large. These sorts of words may be considered as cultural signifiers, words intended to convey a bundle of associations and thereby to invoke an appeal to values perceived to be of great importance in the culture.

Another technique has been to identify, in cases raising legal disputes, the propositions opponents regarded as beyond dispute—that is, the common starting premises from which advocates of differing points of view developed their arguments. An example can be seen in the Court's decisions comprising the meaning of the Contract Clause of the Constitution, in which the question of the degree of protection for “vested” rights of property was raised. While those decisions provoked severe disagreement within the Court on how much legislative interference with property should be tolerated, and what sorts of property could be restricted, no one challenged the proposition that private property rights in a republic were entitled to autonomy and protection.

A third reading technique I have employed is to ascertain which jurisprudential issues the Marshall Court regarded as significant and controversial, and which it tacitly dismissed as settled or trivial. The Marshall Court, because of its place in history and its own deliberative practices, had a significant amount of freedom to facilitate the placement of certain cases on its docket. Many of the Court's significant constitutional cases, we shall see, were cases that the Justices arranged to hear, through use of their discretionary power to shepherd lower court cases up to the Court.

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The disproportionate number of certain kinds of cases on the Court's docket (sovereignty cases, especially those testing the scope of the Court's own power to review the judgments of state courts, admiralty jurisdiction cases, piracy cases, real property cases) and the virtual or total absence of other kinds of cases (slavery cases, free speech cases, gender discrimination cases) furnish another index of those issues whose resolution the Justices regarded as pressing and significant and those issues that the Justices tacitly concluded were beyond dispute, insignificant, or too complex or diverse to merit resolution. Those sets of judgments can, of course, be seen as having ideological ramifications.

Finally, I have assumed that the formulation of legal doctrine can itself be read as an ideological exercise. The ideological dimension of Marshall Court opinions was accentuated by the place of the Court in history. The Court came into existence at a time when very few authoritative sources of legal doctrine existed in America. In 1815 there were comparatively few reported decisions of courts, relatively few interpretations of the Constitution by the Court itself, and almost no legal treatises written by American authors. By 1836 all three of those sources had significantly increased, and in many instances Marshall Court Justices had themselves been responsible for that increase. Marshall Court Justices, we will see, played an important role in the growth of reported decisions, published their own circuit opinions, wrote treatises, and added to the decisions interpreting the Constitution. In the process one can often see their starting presuppositions laid bare.

My assessment of the Court's internal deliberations and my readings of its doctrinal pronouncements have led me to advance a characterization of the role the Court occupied in early-nineteenth-century American culture. Evidence supporting the characterization will be presented throughout the study; at this juncture I offer it in stark outline.

The cultural context in which the Court did its work was composed, I believe, of three central features. One was the conception of American culture that prevailed in the early nineteenth century: that of America as a new and a republican society, freed from the feudal institutions and practices of Europe, committed to a novel form of government in which sovereignty rested in the people, who were endowed with a virgin continent and abundant resources. In the exceptional setting of the American continent, contemporaries reasoned, a republic might be created that would break the cycle of institutional decay and become permanently fixed in time, just as the burgeoning economic opportunities in America had broken European patterns of status and deference. Americans might be truly free: free from the determinism of history, free from the hierarchies of class, free from the corruption of courtiers, free to buy and sell goods and commodities in a market that was unaffected by status or influence.

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The event that early-nineteenth-century observers most commonly associated with this sense of American exceptionalism and promise was the Revolution. In that gesture of independence, symbolic as well as real, Americans had severed themselves from the tyranny, corruption, and feudalism of the Old World. But in reflecting on the Revolution, contemporaries of the Marshall Court encountered the second pervasive feature of their time: the sense that the Revolutionary generation had passed. Fifty years spanned the Declaration of Independence and the John Quincy Adams administration; one by one the war heroes, the patriots, the Founding Fathers had died or were dying. It was apparent that the America from which the movement for independence had arisen was not the America of the 1820s: the landscape, the population, the modes of transportation and communication, even the territorial expanse of the nation had undergone massive changes. The seminal, identifying years of American culture were passing into history.

The simultaneous perception that American culture was new, free, and exceptional, but that the period most symbolic of its unique qualities was being relegated to a memory, evoked a sense of uneasiness among contemporaries of the Marshall Court. That unease was accentuated by the third central feature of early-nineteenth-century American culture: the absence of a historicist theory of cultural change. Early-nineteenth-century Americans did not embrace the idea that change was a given in social organization and that the history of cultures was, therefore, the progression of qualitative change. The absence of a historicist sensibility among Marshall's contemporaries meant that they tended to characterize evidence of change as part of a cyclical pattern of events, in which cultures were born, matured, decayed, and were dissolved. They also tended to ascribe to certain institutions or cultures a potential for being "outside time," that is, for resisting, because of their inherent soundness or their exceptional character, the inexorable process of decay.

The perception of American exceptionalism, the sense of distance from the Revolutionary experience, and the lack of a historicist sensibility fused in early-nineteenth-century Americans to create a distinctive attitude toward the relationship between the past and the future. The attitude emphasized the ability of exceptional ideas or institutions to perfect themselves over time and thereby to resist the cycle of decay. In the case of America, the cycle could be broken if successive generations would recast the insights of the Revolutionary generation as lessons to be derived from the past and applied to the future. Recasting first principles was thus a way of avoiding the full implications of permanent qualitative change.

The idea that the past could be preserved and the exceptionalism of America made permanent seemed particularly applicable to American jurisprudence. Two of the major sources of American law were the Constitution, a document written in and embodying the assumptions of the

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Revolutionary period, and the common law, typically characterized by Marshall's contemporaries as a repository of principles whose authoritativeness was reaffirmed by their application to new situations. The process of legal interpretation in America, then, appeared to be simply a version of the idea of recasting itself: the derivation of first principles and their restatement as lessons for the future.

The purpose of recasting first principles was, of course, to ensure their permanence in a changing cultural environment, and here the idea of interpretation, especially judicial interpretation, appeared to raise problems for contemporaries of the Marshall Court. Judges, by virtue of the decision in *Marbury v. Madison*³ and by virtue of their gradual displacement of juries as finders and declarers of legal principles, had by the close of the War of 1812 solidly established themselves as the principal exponents of common law and constitutional principles. But was their interpretation of those principles faithful to the principles themselves?

The principles embedded in the Constitution served as a case in point. Republican theorists could point to the Constitution as the source of three permanent principles: the "anticorruption" principle, embodied in the separation of legislative, executive, and judicial powers; the "antityranny" principle, embodied in the idea of a written Constitution; and the "federalism" principle, embodied in the creation of two sovereign entities, the states and the federal government, each of whose powers was limited by the other. Corruption, tyranny, and the concentration of power in one sovereign had all been evils republican government was designed to prevent. The separation of powers was intended to ensure that one group in a government could not corrupt others through its influence; the promulgation of written laws to ensure that republican citizens knew their rights and obligations, and would not be susceptible to the fiats of tyrants; and the creation of divided sovereignties to ensure that American governments could neither ignore nor become dominated by local attitudes and interests.

It is arguable, however, that the interpretation and declaration of legal principles by federal judges, so far from ensuring the permanence of these constitutional principles, violated each of them. Federal judges owed their appointments to the executive; they tended to be members of the same political party as those who appointed them. Might their decisions not merely reflect the partisan views of their patrons and thus violate the anticorruption principle? Moreover, federal judges, in fashioning their decisions, might, even in local matters, ignore the findings of state courts or legislatures, thus violating the federalism principle. Finally, federal judges, in an age in which not all judicial decisions were reported, might produce a body of unwritten common law, thus failing to give republican

³ 1 Cranch 137 (1803).

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citizens notice of their legal rights and responsibilities and violating the antityranny principle.

In the period of the Marshall Court one can see this concern about the dangers of interpretation by federal judges crystallized in two code words: “discretion” and “consolidation.” “Discretion” referred to the opportunities for federal judges to make partisan decisions or to make unwritten decisions without having to account for their actions. “Consolidation” referred to the opportunities for federal judges to usurp the prerogatives of state courts or state legislatures and thereby “consolidate” the power of the Union. We will notice throughout this work the strategies developed by Marshall Court Justices to deal with criticism that their decisions were unduly “discretionary” and “consolidationist.” In a nutshell, those strategies amounted to an argument that any “discretion” the federal courts possessed was a “mere legal discretion,” that is, a discretion to find and declare the appropriate legal authorities, and nothing more; and an argument that the purported “consolidationist” decisions of the Court were merely applications of the language and spirit of the Constitution.

The problems for federal judges were not, however, limited to disabusing their critics about their discretion and their tendency to embrace consolidation. Their problems were basically those of all early-nineteenth-century Americans who perceived a need to preserve the special character of American culture in light of an increased distance between the Revolutionary experience and the present. Their concern, notwithstanding its legal emphasis, was the same concern exhibited by other interpreters of their time: how to invest the past with meaning for the present and future, and thereby preserve the exceptional version of American republicanism against decay, while modifying it to accommodate social and economic change.

I will be suggesting in the course of this work that the Marshall Court adopted a three-pronged response to the cultural problem outlined above. The first prong of the response was to recast the language of the Constitution, so that extracted principles could be made applicable to an altered cultural environment. The principal technique for this recasting was a linguistic analysis of the Constitution’s text, developed by Chief Justice Marshall and employed by other Justices as well. By means of this analysis certain critical words in the Constitution, such as “contract” and “commerce,” were given a universalistic meaning and thus converted into permanent principles. The words replaced nontextual sources of principles and were packed with nontextual meanings, such as those derived from natural law. In each of the great constitutional cases that came before the Marshall Court a critical word or group of words in the Constitution’s text was recast through this technique, converted into a principle, and made applicable to a situation not explicitly contemplated by the Framers.

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The second prong of the Court's response was to recast doctrine in nonconstitutional cases as it recast textual language in constitutional cases. Rather than words being packed with meaning, universalized, and converted into principles, prior common law decisions were converted to authorities and at the same time Americanized. Thus the process of recasting doctrine often meant its modification to conform to new conditions, but the recast doctrines were treated as if they were enduring principles that had been extracted from the authorities of the past. Just as the Court did not treat its recasting of the Constitution as making new law, it did not treat its recasting of common law doctrines as lawmaking. In both areas modifications of language or doctrine were presented as the promulgation and clarification of settled principles.

The third prong of the Court's response was the creation of mechanisms to promote selective, collegial, and confidential decisionmaking, so that the discretionary features of judging would not be exposed to public scrutiny. Those mechanisms, developed during the early years of Marshall's tenure and perfected in the so-called "Golden Age" of the Court, from 1812 to 1823, when the number and identity of Justices remained constant, affected the manner in which cases came to the Court, the process by which they were decided, and the techniques for their delivery, publication, and dissemination. The primary purpose of the mechanisms was to preserve the appearance of unanimity and continuity in the Court's decisions so as to emphasize the nondiscretionary nature of the principles and authorities the Court was extracting.

It is possible to see these responses of the Marshall Court as emblematic of a broader set of responses early-nineteenth-century Americans were seeking to make to the contradictions they perceived in their cultural environment. Early-nineteenth-century Americans were anxious to preserve the institutions and principles of the Revolutionary experience in the face of an altered cultural landscape. They were anxious to maintain the uniqueness and exceptionalism of the American republic against the inevitability of decay and the prospect of change. Unwilling fully to embrace qualitative change yet aware of the distance between themselves and the generation of the Declaration and the Constitution, they sought devices to establish that change could be a perfecting process, by which first principles of republican government were periodically restated so as to ensure their permanence. The Court's treatment of constitutional language and legal doctrines, and the Court's refinement of its internal deliberative practices, can be seen as examples of such devices. In this vein, the Court can be seen as an institution whose central self-defined function was that of preserving, perfecting, and modifying the exceptional American version of republicanism in the face of cultural change.

This book thus argues that a new characterization of the Marshall Court can be made. The point of the characterization is not to label the

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Court as “republican” in its ideology—the various strands of republican theory extant in early-nineteenth-century America suggest that such a label would obfuscate rather than clarify the Court’s stance—but to emphasize that the Court was an institution responding to contradictions in the culture of its time. The boundaries of ideology and cultural experience meant that there were certain issues that the Marshall Court could have decided only in one fashion; certain issues that it did not think worth deciding; certain issues that so revealed the internal contradictions of the Court’s belief structure as to make it unable to decide. The characterization invites us to see the Marshall Court as an important reflection of the distinctive cultural attitudes of early-nineteenth-century literate America, no less a cultural artifact because of its character as a legal institution. The Marshall Court was a phase in the history of the Supreme Court of the United States, but it was, more significantly, a Court of its age.