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

G. Edward White

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HISTORY OF THE SUPREME COURT OF THE UNITED STATES

The Marshall Court and Cultural Change, 1815–1835 comprises the third and fourth volumes of the *Oliver Wendell Holmes Devise History of the Supreme Court of the United States*. G. Edward White completes the series' coverage of the Marshall Court, tracing the last two decades of John Marshall's term as Chief Justice. White describes the intellectual climate of the Marshall Court's work and analyzes the Court's decisions. Throughout, White stresses that the Marshall Court, despite its much-celebrated influence, must be seen as part of a unique cultural period when the heritage of the Revolution confronted the radical political, demographic, and intellectual changes of the nineteenth century. The Marshall Court itself was also unique and unlike the modern Court in that it used an informal set of deliberative procedures that gave the justices' personal predilections more influence in the Court's rulings than at any other time in Supreme Court history.

G. Edward White is David and Mary Harrison Distinguished Professor of Law at the University of Virginia School of Law. He is the author of numerous articles and books, most recently *History and the Constitution: Collected Essays* (2007), *Oliver Wendell Holmes, Jr.* (2006), *The Constitution and the New Deal* (2000), and *Oliver Wendell Holmes: Sage of the Supreme Court* (1999). He also edited *The Common Law* by Oliver Wendell Holmes (2009).

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VOLUMES III–IV

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and Cultural Change,
1815–1835

By G. Edward White

With the aid of Gerald Gunther



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For
John F. Davis

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Thomas Jefferson
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Foreword to the Cambridge Edition

WHEN JUSTICE OLIVER WENDELL HOLMES died, he left his entire estate to the Congress of the United States, which, after a long lapse, established the Permanent Committee for the Oliver Wendell Holmes Devise. The Committee consists of five members, four appointed by the President of the United States and the fifth, the chair, by the Librarian of Congress. More than half a century ago the Committee decided that its principal purpose would be to commission a multi-volume history of the Supreme Court of the United States. The Holmes Devise History was originally envisioned as an eleven-volume series, concluding with a volume on the Hughes Court and ending in 1941. More recently, the Committee decided to extend the coverage of the series and commissioned new volumes, one on the Stone and Vinson Courts, and another on the Warren Court. It is possible that further volumes will be commissioned for subsequent Courts.

The Holmes Devise History has had a complicated history. A few of the initially commissioned volumes appeared fairly promptly, but many were long delayed. A few of the authors abandoned their volumes. Others passed away before they could complete their volumes, and new authors were appointed. As of 2009, two of the original volumes, as well as the recently commissioned volume on the Warren Court, have yet to appear, though we hope to see them within the next few years. The series was initially published by Macmillan, but after that firm ceased to do business, the Committee was fortunate enough to be able to contract with Cambridge University Press to publish the remaining volumes—and, remarkably, to put the earlier volumes back into print. The Committee is deeply grateful to Cambridge for undertaking this large and important publishing project.

The conception of the Holmes Devise History has also changed substantially over the years. Under its original Editor in Chief, Professor Paul Freund of Harvard Law School, the individual volumes were conceived of as nearly encyclopedic. Authors were expected to cover all of the most significant cases

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FOREWORD TO THE CAMBRIDGE EDITION

decided by the Supreme Court of the United States, as well as to provide exhaustive biographical accounts of the Justices. After I became the Co-Editor with Paul Freund in 1978, however, authors were asked to take a more focused and analytical approach. More recent volumes are somewhat shorter and significantly more thematic, though I hope it is fair to say that each volume remains the major account of the Supreme Court during the period it covers.

I have been the Editor in Chief since 1990, and it gives me special pleasure to know that the entire series is now back in print and available to readers. The Holmes Devise project is one of the most ambitious in the history of American law, and I believe it is true to say of the Holmes Devise History that the whole is much more than the sum of its parts. While I cannot describe myself as a neutral party (I was, after all, a member of the Permanent Committee from 1974 until 1980), I also think it likely that Justice Holmes would have admired both the seriousness and comprehensiveness of the History of the United States Supreme Court, for it is much more than a handsome set for one's library shelves! I trust that it will prove useful to scholars, lawyers, and general readers for many years to come.

Stanley N. Katz

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Foreword

THE *History of the Supreme Court of the United States* is being prepared under the auspices of the Permanent Committee for the Oliver Wendell Holmes Devise with the aid of the estate left by Mr. Justice Oliver Wendell Holmes, Jr. Mr. Justice Holmes died in 1935 and the Permanent Committee for the Devise was created by Act of Congress in 1955. Members of the Committee are appointed by the President of the United States, with the Librarian of Congress, an *ex officio* member, as Chairman. The present volume is the third and fourth in the series. The Committee hopes to complete the history expeditiously while maintaining the high quality of the scholarship. The volumes in the Holmes Devise *History of the Supreme Court of the United States* bring to this subject some of the best legal scholarship of the decades since Mr. Justice Holmes' death. We hope that, when completed, the series will widen and deepen our understanding of the Supreme Court and bring honor to the memory of one of its great Justices.

Daniel J. Boorstin

LIBRARIAN OF CONGRESS

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Editor's Foreword

THIS IS THE FIRST VOLUME in the Holmes Devise series for which I have had primary responsibility, although I became co-editor in 1978. I do not flatter myself that I can replace Paul Freund, the nation's pre-eminent constitutional scholar. All intelligent readers will appreciate Professor Freund's intelligence and scholarly acumen. Only those who have been privileged to know him personally will understand the full extent of his civility and humanity. I can only aspire to meet the standards Professor Freund has set in editing the first six volumes.

This volume also constitutes the last published under Daniel Boorstin's chairmanship of the Permanent Committee on the Holmes Devise. It goes without saying that the Committee was singularly fortunate that the Librarian of Congress, *ex officio* chairman of the Holmes Devise, should have been both a lawyer and a historian. That the Librarian should also have been so passionately concerned with the progress of the *History of the Supreme Court* was a decisive factor in the reorganization and revitalization of the project. Dan has been a hard task-master and an inspiration.

The present volume has had a long and unusual history. It was originally assigned by the Permanent Committee to the eminent Stanford Law School constitutional scholar Gerald Gunther. Professor Gunther undertook a painstaking and exhaustive investigation of the existing manuscript and printed sources for the last half of the Marshall Court. He also prepared drafts of long sections of both volumes, before concluding that long-standing commitments to other scholarly projects would prevent his timely completion of Volumes III and IV of the Holmes Devise History in the comprehensive manner originally presented by the Committee. The Committee therefore agreed to seek a new author for the volumes, on the understanding that Professor Gunther's notes and drafts would be available to his successor. The manner in which the two scholars cooperated is described by Professor White in his Preface.

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EDITOR'S FOREWORD

G. Edward White, like Daniel Boorstin, has earned both a doctorate in history (Yale) and a law degree (Harvard). He teaches both constitutional law and American legal history at the University of Virginia Law School, where he has distinguished himself as the John B. Minor Professor of Law and History. White thus represents the new approach to legal/constitutional history that has developed over the past twenty years, an approach that attempts to place legal ideas and institutions squarely in the context of general social and political history.

White has adopted a more monographic approach than was originally stipulated by the Committee, hence the assimilation of the original design of two volumes into this single book bearing both of the assigned volume numbers. He has placed Marshall and the other members of his Court in a broad political context, reflecting the considerable quantity of scholarship produced by general historians of the early national period over the past generation. In particular, he has attempted to redefine the character and position of the Marshall Court without resort to the traditional labels that have for so long stereotyped the Court's performance. The result is a highly readable, revisionist account of the later Marshall years, which promises to set a new style and new standards for the writing of constitutional history. Ted White has produced a most appropriate gift to the Court and the nation in this bicentennial year.

Stanley N. Katz

Preface

THIS WORKS 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

¹ Benno Schmidt in A. Bickel and B. Schmidt, *The Judiciary and Responsible Gov-*

ernment, 1910–21 (1984), 723.

PREFACE

been short, and there have been some false starts and adjustments along the way. I came into the Holmes Devise series with 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, 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

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).

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PREFACE

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

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PREFACE

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

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A Note on Capitalization

Some readers, especially those with legal training, may find the use of lowercase letters in connection with certain civil titles and offices unusual. This volume follows the *Chicago Manual of Style* usage, with two exceptions: the word Term, signifying a term of the Supreme Court of the United States, and references to justices and offices of the Supreme Court of the United States.

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