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RECOVERING THE WORLD OF THE MARSHALL COURT

G. EDWARD WHITE*

I.

In 1982, I delivered a lecture[1] which was subsequently reprinted in a 1994 book of essays,[2] in which I outlined four "talismanic" historiographical labels for the Marshall Court and commented on their persistence over time, despite their descriptive and analytical difficulties.[3] I also explored the usefulness of introducing a fifth label to characterize the Marshall Court, concluding that notwithstanding the general limitations of such labels, they could provide points of entry into historical worlds quite different from our own.[4] Six years after delivering the lecture, I published a history of the Marshall Court in the Oliver Wendell Holmes Devise History series[5] in which I made considerable use of the fifth label.

The talismanic labels for the Marshall Court I identified in 1982 were "nationalistic," "Federalist," "property-conscious," and "Chief Justice-dominated."[6] I suggested that each of the labels ranged from oversimplifications to anachronistic distortions of the Court's jurisprudential tendencies and institutional identity, but that their very endurance—they appeared in commentary from at

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1. G. Edward White, Donahue Lecture at the Suffolk Law School (1982), a version of which appears in G. Edward White, *The Art of Revising History: Revisiting the Marshall Court*, 16 SUFFOLK L. REV. 659 (1982).

2. G. Edward White, *The Art of Revising History: Revisiting the Marshall Court, in* INTERVENTION AND DETACHMENT: ESSAYS IN LEGAL HISTORY AND JURISPRUDENCE 50 (1994) [hereinafter White, INTERVENTION AND DETACHMENT].

3. White, *supra* note 1, at 671-80; White, INTERVENTION AND DETACHMENT, *supra* note 2, at 59-66.

4. White, *supra* note 1, at 682; White, INTERVENTION AND DETACHMENT, *supra* note 2, at 66.

5. 3 G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835 (1988) [hereinafter WHITE, THE MARSHALL COURT AND CULTURAL CHANGE].

6. *Id.* at 671.

least the 1920s through the 1980s, and still continue to appear—needed to be explained.[7] I gave only a preliminary and partial explanation of their endurance in the lecture, suggesting that their continued resonance with scholars meant that they were still capturing a nascent "shared sense" among twentieth-century observers about the Court: a sense that the contributions of Chief Justice Marshall overwhelmed those of his fellow Justices; that the Court's decisions reflected support for the national government and for political ideologies associated with the Federalist party; and that the Court took the protection for property rights against legislative interference to be a fundamental constitutional principle.[8] I did not attempt to explore, in any full way, the sources of the labels' continued resonance for much of the twentieth century.

I eventually want to undertake that exploration in this essay. However, I first want to revisit the fifth label I proposed in the lecture, and in the course of that inquiry to propose a framework for recovering the Marshall Court. The label was "republican": it was intended to suggest that the Marshall Court could be seen as a legal institution reflecting and implementing the starting assumptions of the belief system of republicanism in late eighteenth and nineteenth-century America.[9] I had introduced that label because a line of scholarship, stretching from the late 1960s to the 1980s,[10] had convinced me that one could not adequately make sense of the American Revolution, the framing of the American Constitution, or the political and economic culture of the early American republic, without recognizing the importance of republican theory—I mean to use the word "theory" in as deep and broad a sense as it will bear—in helping shape the course of those phenomena.

I continue to believe that the belief system of republicanism was a germinal force in defining and shaping the course of the new American nation. But as I began the process of translating "republicanism," in its various forms, into a legal and constitutional ideology—into a set of working jurisprudential assumptions useful in the process of deciding legal cases, interpreting constitutional provisions, and writing persuasive judicial opinions—I found that the label was just as susceptible to

7. *Id.* at 683.

8. White, *supra* note 1, at 671-80; White, INTERVENTION AND DETACHMENT, *supra* note 2, at 59-66.

9. White, *supra* note 1, at 682; White, INTERVENTION AND DETACHMENT, *supra* note 2, at 66-68.

10. *See generally* THE AMERICAN REVOLUTION: EXPLORATIONS IN THE HISTORY OF AMERICAN RADICALISM (Alfred Fabian Young ed., 1976); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); JOHN GREVILLE AGARD POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975).

oversimplification, or to fostering distorted views of historical phenomena, as the other four labels.

First, there was the problem of constructing a definition of republican theory which had sufficient breadth, but at the same time sufficient discreteness, to serve as a baseline concept for analysis. This construction turned out to be nearly impossible to do; not only were there many varieties of republicanism being articulated in late eighteenth and early nineteenth-century America, but the state of theoretical discourse was constantly changing. Moreover, there was the puzzling, but important, relationship of republicanism to a belief system historians had characterized as "liberalism," a system which, in some formulations, was based on radically different starting assumptions about governance, social status, and political economy, and, in other formulations, was simply a version (perhaps the most futuristic or visionary version) of republicanism.[11] I finally settled on stressing the influence of what I called a "modified" version of republican theory, with some "liberal" overtones, on the Marshall Court's jurisprudence,[12] but by then I had realized that additional themes of great importance to understanding the Court's work needed to be pursued, and the relation of those themes to republican theory needed to be clarified. In the years since *The Marshall Court and Cultural Change* appeared, I have pursued those themes and examined their possible connections to republicanism, and in the process I have modified the framework from which I have approached the Marshall Court. This essay describes the origins of that framework, seeks to explain why I believe that it focuses on themes that are central to an understanding of that Court's historical identity, and discusses its historiographical implications, particularly its relationship to the four talismanic labels I have associated with previous studies of the Court.

II.

There are two themes of the Marshall Court which I identified, but did not connect, in *The Marshall Court and Cultural Change*. The first was the presence of a number of practices, conventions, and professional conceptions about the role

11. For a discussion of the relevant sources, see WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 5, at 48-49.

12. This decision was not uniformly well received by reviewers. *See* David W. Raack, *The Marshall Court and Cultural Change*, 15 OHIO N.U.L. REV. 175 (1989)(stating that White's efforts to demonstrate the relevance of republicanism sometimes seems forced); Stephen A. Siegel, *History of the Supreme Court of the United States*, 67 TEXAS L. REV. 903 (1989)(critiquing White's description of republicanism as ambiguous and arguing that White's analysis of the influence of republicanism is unpersuasive).

of a judge, and the office of a Supreme Court justice in America, that were subscribed to, and sometimes initiated, by Marshall and his fellow Justices, but which are no longer considered appropriate dimensions of Supreme Court judging. The second was the existence of a conception of what I called cultural change, also subscribed to by Marshall and his contemporaries, which forms no part of the consciousness of contemporary judges. By cultural change I meant the process by which a nation's present experiences, and the present experiences of its citizens, differ from the experiences of its and their collective past. Furthermore, by a concept of cultural change I meant a commonly held set of explanations for how the present detaches itself from the past, and why.

Consider, with respect to the first theme, some sets of facts about the internal deliberative process, and the judicial and extra-judicial practices, of Marshall and his fellow Justices. The first set provides evidence that Marshall and his fellow Supreme Court Justices consciously intervened in the process by which cases from lower courts reached the Supreme Court. Two principal ways existed by which a case could get on the Supreme Court's docket during Marshall's tenure (1801-1835): by certificate of division from a lower federal court (Circuit Courts, composed of two judges, the Supreme Court Justice assigned to the Circuit and the local federal district court judge), and by a petition for a writ of error under Section 25 of the Judiciary Act of 1789, which permitted the appeal of cases, from lower federal courts or from the highest courts of states, where the validity or construction of the Constitution of the United States formed the basis of the lower court's decision.[13] Marshall Court Justices participated actively in both procedures, helping shepherd cases up to the Court in which they had a particular jurisprudential, or even personal, interest.[14]

13. Writs were available in some other instances, including mandamus, prohibition, habeas corpus, certiorari, and procedendo. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789); Act of March 2, 1793, ch. 22, 1 Stat. 333 (1793); Act of April 29, 1802, ch. 31, 2 Stat. 156 (1802). *See also* A. CONKLING, A TREATISE ON THE ORGANIZATION AND JURISDICTION OF THE SUPREME, CIRCUIT, AND DISTRICT COURTS OF THE UNITED STATES (2d ed. 1842).

14. There are two examples on which the greatest amount of evidence currently exists. One involves Chief Justice Marshall's authorship of the writ of error petition in *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304 (1816), and Justice Bushrod Washington's approval of that writ petition, knowing that Marshall, who was a member of the land syndicate which was one of the litigants in the case, had drafted it. (Marshall recused himself in the case, and had previously, when sitting in his capacity as a Circuit Judge of the Fourth Circuit, recused himself in an 1805 case in which the issues were nearly identical to those in *Martin.*) For more detail, see WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 5, at 165-73.

The other involves Justice Joseph Story's efforts to secure a definitive ruling on one of the issues in the case of *Trustees of Dartmouth College v.*

In some instances, after helping litigants get a case on the Court's docket, a Justice recused himself from hearing that case; in other instances he did not.

The next set of facts concerns the extra-judicial activities of Marshall Court Justices. Some Justices openly engaged in advising other branches of government, or even performing tasks conventionally assigned to those branches. Justice Joseph Story, for example, regularly exchanged letters with Senator Daniel Webster about policy proposals advanced by Webster in Congress, and advised President John Quincy Adams on domestic and foreign policy issues. Story also drafted proposed national bankruptcy legislation, which was twice unsuccessfully introduced in Congress during Story's tenure on the Court. Other Justices, and the Court's Reporter, Henry Wheaton, participated in the process of publishing anonymous defenses of the Court's positions in constitutional cases where the Court's opinions had drawn criticism. The best-known example of those anonymous defenses was Marshall's lengthy rejoinders to two Virginia critics, published in a Philadelphia and an Alexandria, Virginia newspaper. In both cases, Justice Bushrod Washington, a native of Alexandria whose Circuit-riding duties took him to Philadelphia, served as liaison between Marshall and the newspaper publishers.

Today, these sets of activities would be perceived as raising serious questions of judicial ethics. Some, such as Marshall's drafting of the writ of error petition in *Martin*, would very likely be regarded as requiring a Justice to resign from the Court or face impeachment. Not only did the Marshall Court Justices engage in

Woodward, 17 U.S. (4 Wheat.) 518 (1819). That issue was whether the New Hampshire legislature, in an 1816 statute changing the name of Dartmouth College to Dartmouth University and providing for periodic inspections of the College by state officials, had deprived the Trustees of Dartmouth College of vested rights in an eleemosynary institution. *Id.* at 550-69. That issue was not, strictly speaking, a constitutional issue, and could only reach the Court through its certificate of division procedure. With the full knowledge and cooperation of Story, who was one of the two Circuit Justices assigned to the case, Daniel Webster structured a suit between three citizens of Vermont, to which the College Trustees had leased College land, and officials of Dartmouth University, who, under the 1816 legislation, were taken as having ejected the Vermont citizens from their land. This produced a diversity-based suit in Story's Circuit, which Story and the district judge for the Circuit agreed to certify up to the Marshall Court, claiming (without any accompanying opinions) that they disagreed on the ejectment issue. The purpose of the certification was to get the "vested rights" issue—whether the New Hampshire legislature could take land from the Vermont citizens and give it to Dartmouth University—before the full Marshall Court. Story had already signaled to Webster that he would be sympathetic to a "vested rights" argument. For more detail, see WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 5, at 174-80.

those activities, they took no pains, or few pains, to conceal their involvement. The principle source for information about Story's advice to Webster, and to Adams, on domestic and foreign policy issues, and about his drafting of national bankruptcy legislation, was a filiopietistic biography authored by his son, William Wetmore Story, which appeared in 1851. William Wetmore Story proudly noted his father's activities, as well as not finding it unusual that his father continued to serve as the President of a Massachusetts bank, or as a member of the board of overseers of Harvard College, when both the bank and Harvard had an interest in litigation before his Judicial Circuit or the Supreme Court of the United States.[15]

The other previously mentioned activities which would today raise ethical concerns were less conspicuously publicized, but they were not fully concealed from public view. The petition written by Marshall in *Martin v. Hunter's Lessee* was openly submitted to Bushrod Washington, a frequent correspondent of Marshall's who surely knew his handwriting, and filed with the Clerk's Office, where it would have been available to other lawyers in the case and would be preserved for posterity. Marshall could have dictated the petition to one of the lawyers representing his syndicate, but he chose to write it himself. Similarly, Story could have insisted that all of his communications with Daniel Webster on the *Dartmouth College* diversity cases be kept completely out of the public eye, and was in a position to have such confidential communications with Webster, since he and Webster were both in Washington and in New England at the time the cases were pending. Instead, Story's conversations with Webster, and with his co-counsel Jeremiah Mason, were sufficiently well-known that Joseph Hopkinson, one of the lawyers for Dartmouth College, heard that Story was acting as "a feed counselor" in the case, and that should Story sit on the case, that information could potentially be damaging to the College's prospects, since it was "an abuse of power and office."[16] The last comment suggests that at

15. For example, in the case of *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge,* 36 U.S. (11 Pet.) 420 (1837), the Supreme Court entertained the question whether a legislature, once it had given a charter of rights to one toll bridge, but not made those rights exclusive, could, consistent with the Contract Clause of the Constitution, subsequently charter a competitor bridge company. *Id.* at 429. Story was a member of the board of overseers of Harvard College, who had originally held ferry rights across the Charles River and thus received a portion of the toll revenues of the original franchise holder, the Charles River Bridge Company. He not only sat on the case, he wrote a dissenting opinion supporting the position of the Charles River Bridge Company. *Id.* at 583-650.

16. Letter from Joseph Hopkinson to Charles Marsh (Dec. 31, 1817), *quoted in* JOHN M. SHIRLEY, THE DARTMOUTH COLLEGE CAUSES AND THE SUPREME COURT OF THE UNITED STATES 274-75 (1895).

least some of Story's contemporaries thought his involvement unethical, but Story took no special pains to conceal it. Marshall, Washington, and Wheaton did not, of course, publicly identify their participation in the newspaper essays defending the Court's decisions, but they wrote each other letters about the essays, and the process of getting them published, which made their involvement crystal clear, and the letters were preserved in their private papers after their deaths.

The final set of suggestive facts pertains to the practices employed by the Court in hearing arguments, rendering decisions, and making those decisions public. The Court's time in Washington hearing cases, for the duration of Marshall's tenure, ranged from six to eight weeks, typically the middle of February (later the end of January) to the end of March. Although this work was not the sum total of the Court's business, since the Justices rode Circuit to hold court in their respective Circuits in the spring and the fall, and cases from those circuits were regularly certified to the full Court, the formal Term of the Court was conspicuously brief. During most of Marshall's tenure, the Justices lived and held informal conferences in a Capitol Hill boarding house, repairing to the basement of the Capitol only to hear cases. Although the time frame of the Court's docket was short, the number of cases it heard, between 1815 and 1835, was comparatively high, and lawyers appearing before the Court were given unlimited time to present their arguments, often going on for several days while the Justices, many taking notes, listened virtually without interruption.[17]

Despite the limited duration of its Terms, and the unlimited time accorded to arguments, the Marshall Court was, by today's standards, remarkably quick in rendering its decisions. Through an analysis of the Court's Minutes for the period between 1815 and 1835, the Court handed down decisions in 17 out of 66 constitutional cases argued in that period, five days or less after the conclusion of the lawyers' arguments.[18] Also, in the last 20 years of Marshall's tenure, in which the great majority of the

17. Between 1815 and 1835 the Supreme Court sat from the first Monday in February or the second Monday in January through the second or third week in March. Despite these brief sessions, the Justices rendered an average of forty majority opinions a year. This is less than a third of the 139 opinions the Court averaged between 1970 and 1980. However, the Marshall Court had less than a fourth of the time to consider a case than that available to the Court in 1970-1980. *See* WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 5, at 159.

18. *Id.* at 181. Included in this time frame were a number of significant cases, including *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

Marshall Court's major constitutional cases were decided, only a handful of cases were continued to succeeding Terms. In most years, the Court cleared its entire docket, including rendering opinions, by the end of March.

The ability of the Court to render opinions quickly, and to clear its docket readily, especially given its limited sitting time and the absence of time limits on oral argument, becomes less puzzling if one introduces some additional facts about its internal deliberations. First, lawyers did not have to file written briefs before the Court, and most of the judicial note-taking during oral argument was to provide the Justices with sources of authority for what would become the Court's opinions. On several instances the arguments of counsel were closely tracked in opinions.[19] Second, although some Justices might have been taking notes during oral argument, other Justices apparently were doing more than that: they were mapping out the structure of a potential opinion. Here, once again, Justice Story may have revealed more about the Court and himself than he should have. He wrote a friend, on first joining the Marshall Court in 1812:

> The mode of arguing causes in the Supreme Court is excessively prolix and tedious; but generally the subject is exhausted, and it is not very difficult to perceive at the close of the cause, in many cases, where the press of the argument and of the law lies. We moot every question as we proceed, and [our] familiar conferences at our lodgings often come to a very quick, and I trust, a very accurate opinion, in a few hours.[20]

Finally, the assignment of opinions on the Marshall Court, and the participation of the various Justices in the opinion-drafting process, was utterly different than current practice. Marshall, being Chief Justice, was afforded the opportunity to write the "majority" opinion in *every* case in which he was a member of that majority. In most cases, including constitutional cases, the "majority" included all the Justices. Moreover, even in cases where a judge expressed himself as taking a position opposed to that of the majority, the Court had a practice of "silent acquiescence," in which a dissenting judge did not write an opinion, and the "opinion of the Court," written by a member of the majority, did not reveal whether the decision was unanimous or not. The practice of "silent acquiescence" was not universal. Sometimes, in fact, there was no "opinion of the Court," the Justices writing seriatim opinions, as they had before Marshall assumed the Chief Justiceship.[21] However, in the great majority of

19. WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 5, at 182-83.

20. Letter from Joseph Story to Samuel P. Fay (Feb. 24, 1812), *reprinted in* WILLIAM STORY, THE LIFE AND LETTERS OF JOSEPH STORY 215-16 (1851).

21. For an example of the "silent acquiescence" practice under strain, see

Marshall Court cases, the "opinion of the Court" was the product of one justice, very often Marshall, and did not reveal the votes, let alone the opinions, of any of the other Court members.

In addition, only the judge to whom the "opinion of the Court" had been assigned, and one other person, saw the text of that opinion before it was printed in the Court's official Reports. The other person was the Court's Reporter, either William Cranch, Henry Wheaton, or Richard Peters. The Reporter took a handwritten draft opinion from the judge who had authored it, made stylistic and sometimes substantive changes, added source references, and arranged for the opinion's publication at the close of the Court's Term. Draft opinions were regularly delivered orally in Court, in connection with the announcement of the Court's decision in a case, and were frequently reported, sometimes very fully, in early nineteenth-century newspapers. Sometimes a comparison of the text of an opinion in a newspaper with that in the Court's official Reports reveals only slight changes. Whether or not a draft opinion was delivered orally, or whether or not the final published product resembled that draft, the other Justices of the Court typically *did not see* the text of the "opinion of the Court." It was the product of its author and the Reporter, and the Justices' "mooting" of a case did not involve a discussion of how arguments supporting a decision should be reflected in an opinion.[22]

This internal deliberative process produced an astonishing

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the sequence of cases beginning with *Rose v. Himely*, 8 U.S. (4 Cranch) 241 (1808), and including *Hudson v. Guestler*, 8 U.S. (4 Cranch) 293 (1808) and, on reargument, *Hudson v. Guestler*, 10 U.S. (6 Cranch) 281 (1810). The cases involved the very ticklish issue of American prize court jurisdiction on the high seas at a time when the Atlantic Ocean was filled with ships from belligerent and neutral nations. They were further complicated by the departure of Samuel Chase and William Cushing, two of the seven Justices who had participated in the 1808 cases. Chase's and Cushing's seats on the Court remained vacant in 1810, resulting in only five Justices deciding the second *Guestler* case. One of those Justices, Thomas Todd, who had been added to the Court in 1807, claimed in the second *Guestler* case that he had dissented from the Court's opinion in *Rose v. Himely*, but Professor Herbert Johnson, after reviewing the Court's Minutes in the National Archives, concluded that although Todd was present for the argument in *Rose*, there is no record of his having voted.

The *Rose-Guestler* sequence was unusual in combining changes of personnel with a vexing non-constitutional issue, the scope of American prize court jurisdiction. It also featured an opinion of the Court, that of Justice Brockholst Livingston in the second *Guestler* case, which misunderstood the two earlier opinions in the sequence (both written by Marshall), and in which Marshall silently acquiesced. For a fuller discussion, see 2 GEORGE HASKINS AND HERBERT LEE JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, at 435-42 (1981).

22. WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 5, at 184-88.

asymmetry between the opinions authored by Marshall Court Justices. In the thirty-four years in which Marshall was Chief Justice of the United States, he wrote 547 opinions of the Court. The other Justices in that time period, combined, produced 574 such opinions. Justice Gabriel Duvall served consecutively with Marshall for twenty-three years; he authored a total of fifteen opinions of the Court. Justice Thomas Todd was a colleague of Marshall's for eighteen years; he produced fourteen. In seventeen years, Justice Brockholst Livingston produced a total of forty-nine opinions, including concurrences and dissents.[23] The process meant that a casual observer of the Court, for the great bulk of Marshall's tenure, would have the impression, especially in constitutional cases, of a unanimous Court subscribing to the positions laid down in an opinion by its Chief Justice.

How can a modern student of the Supreme Court, its Justices, its canons of judicial behavior, its deliberative process, and the procedures by which cases come to it make sense of the above sets of facts? Why were lawyers not given time limits for their arguments before the Court? Why was the Court's session so attenuated? Why did the Justices live together in a boardinghouse, whose residents also regularly included lawyers arguing cases before the Court? Why did Marshall's colleagues not press for a more balanced allocation of opinions? Why were some Justices content to remain virtually anonymous figures? Why did Marshall's fellow judges, who clearly recognized the contentious nature of many Supreme Court cases, and who differed with their colleagues about how some cases should be decided, agree to silently acquiesce once they were outvoted? Why was so much deference given to Marshall in the assignment and writing of opinions? Why did Marshall's colleagues not ask the author of an "opinion of the Court" to circulate it before sending it to the Reporter, since the author's reasoning in the opinion might not parallel that of other Justices? Why were Marshall's colleagues content to be identified with a Supreme Court opinion *whose legal reasoning they had never seen*?

Why did Story's son, and Story himself, since he left ample evidence available in his papers, regard Story's extra-judicial advice to members of Congress and the Executive, and his participation in the drafting of Congressional legislation that could well have been challenged before the Supreme Court, take pride in those activities, rather than seek to prevent their disclosure from potential critics? Why did Marshall, Washington, and Story not employ more covert methods to shepherd cases up to the Court in which they had an obvious personal interest? Why did they not ask others, not directly connected with the Court's constitutional

23. *Id.* at 329.

decisions, to write defenses of them in the popular press? Why did they leave such obvious evidence of their participation in activities that would currently raise serious issues of judicial misconduct?

One general proposition serves as a response to all of the above questions; if it does not fully "answer" them, it places them in context. Marshall and his contemporaries did not think that any of the internal deliberations, practices, or procedures of the Marshall Court, or any of the extra-judicial activities described above, amounted to substitutions of the "will of the judge" for the "will of the law." To the contrary, they thought that all the matters described above were matters of "judicial discretion," a discretion stemming from the role of the judge as a savant, and not from the role of the judge as a partisan.

In order to understand how Marshall and his contemporaries could have thought that way, it is necessary to remind ourselves that their conception of "law" was that of a body of fixed principles, derived from authoritative written sources such as the Constitution, statutes, judicial decisions, or from authoritative unwritten sources such as custom, Reason, "the nature of things," or "first principles of free republican governments." They did not think that "law" was a static entity, incapable of change, but that its changes were changes in *application* rather than changes in the essence of principles. Thus, when Marshall described the Constitution as requiring "expounding," and being "adapted to the various crises of human affairs," he did not mean that the Constitution's principles changed with time. He meant, instead, that because the surfacing of newly contested legal issues was an endemic feature of American society, the continuing application of constitutional first principles to new disputes would be required. His technique, in all of his major constitutional opinions, was to resolve a novel question of constitutional interpretation by, as he put it, engaging in "recourse to first principles" and applying those principles to resolve the question.[24]

Judicial application of fixed and fundamental legal principles was *not* perceived as creative judicial policymaking, the equivalent of legislative activity. Although some early nineteenth-century commentators spoke forebodingly of "judicial discretion" and even used the term "judicial legislation,"[25] they made a distinction

24. *See* G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 25-33 (1988); *see also* WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 5, at 73-74.

25. For an example of the use of the term "judicial discretion" in early nineteenth-century commentary, see JOHN MILTON GOODENOW, HISTORICAL SKETCHES OF THE PRINCIPAL MAXIMS OF AMERICAN JURISPRUDENCE, IN CONTRAST WITH THE DOCTRINES OF THE ENGLISH COMMON LAW ON THE SUBJECT OF CRIMES AND PUNISHMENTS 288 (1819). For an example of the term "judicial legislation," see TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW 53 (1837). A fuller discussion of Walker's work, and the issues

between the general technique by which judges promulgated legal rules in their decisions, a legitimate and necessary part of the process of judicial application of "the law," and the occasional "incorrect" judicial decision, whose rule could be shown to be inconsistent with a line of analogous previous decisions, the plain meaning of a statute or constitutional provision, Reason, or natural justice. That decision's "incorrectness" could spring from a number of sources, but one potential source was partisanship. Story referred to such decisions as "peculiar" or "complexional" in their reasoning.[26]

There was, then, a fundamental intellectual and cultural constraint on every judicial decision. Decisions—exercises in the novel application of existing legal principles—had to be "correct." It was possible for savant observers to ascertain any decision's correctness, because the principles of the law were discoverable to savants and were in conformity to Reason, the nature of things, and first principles of republican government. Decisions not in conformity to those intelligible sources of law were not "bad" law; they were not law at all.[27] They needed to be "corrected" by judges.

Thus, the partisan judicial decision, reflecting the "will of the judge" rather than the "will of the law," would be easily recognizable to contemporary savants. With the checks of intellectual and cultural "correctness" in place, the necessarily partisan dimensions of human conduct were not an argument against judicial "discretion" to engage in the application of legal principles to novel disputes. Consequently, *it did not really matter* whether a judge helped cases come to the docket of his court, whether a court decided to preserve the appearance of unanimity

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of determinacy and indeterminacy in early nineteenth-century American jurisprudence, appears in Caleb E. Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. (forthcoming in Feb. 2001). I am indebted to Professor Nelson for pointing out Walker's language, as well as language of some additional early nineteenth-century commentators.

26. Joseph Story, *Law, Legislation, and Codes*, 7 ENCYCLOPEDIA AMERICANA 576 (1831), *reprinted in* JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 350, 358-59 (1971). Story's language was also called to my attention by Caleb Nelson.

27. For an influential version of this distinction, see 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 69-70 (1765), in which Blackstone asserted that if a former decision was "most evidently contrary to reason," or to "the divine law," a court could declare "not that it was *bad law*, but that it was *not law*," because "the established custom of the realm [had] been erroneously determined." In a late eighteenth-century treatise, Zephaniah Swift repeated the distinction, adding that the ability of judges to discern that a prior decision had not conformed to reason, divine law, or natural justice helped purify the common law, since such judicial savancy "corrects all errors and rectifies all mistakes." 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 41 (1795). Swift retained that comment in an abridged 1822 edition of the treatise. *See* 1 ZEPHANIAH SWIFT, A DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 10 (1822).

in its decisions when those decisions were sometimes less than unanimous, whether one judge wrote most of the opinions handed down by a six or seven-member Supreme Court, whether only one judge was responsible for the reasoning in an "opinion of the Court," or whether some judges drafted legislation, advised Presidents, and defended their own opinions in the press.

All of those practices and activities could have been seen as potentially partisan, so most of them were not overtly publicized. However, the practices were not thought of as being on the wrong side of the line between "the will of the law" and "the will of the judge,"[28] because they were not thought of as decisively affecting, or even being able to affect, the central judicial task of law application. Only when the practices produced "incorrect" applications of legal principles was the specter of judicial partisanship raised, and where such "peculiar," "complexioned," and ultimately "incorrect" decisions were made, those decisions were not law at all.

One cannot understand the jurisprudential world of the Marshall Court without understanding this overriding conception of law and judging which drove the work of the Court's Judges and the reaction to that work by their professional contemporaries. At this point, before turning to the second major theme I am identifying with the Marshall Court, I want to engage in a brief discussion of the origins of that conception, and its relationship to the belief system conventionally labeled republicanism.

Another way of understanding the centrality of the distinction between the "will of the law" and the "will of the judge" to Marshall and his contemporaries is to connect it to another distinction they took to be fundamental: that between the authority of the law and that of those charged with interpreting and applying law's fundamental principles. We have seen that Marshall and his contemporaries conceived of the authority of law as external to human will in the same sense that "nature," history, the will of God, and certain "iron laws" of political economy were external. Those authorities were forces in the universe which humans could not meaningfully control. Causal agency in the universe, according to the dominant epistemological presuppositions of Marshall's time, primarily consisted of such external forces, not of purposive human conduct. Not only were such external causal agents permanent features of human experience, the nature or the scope of their causal primacy could not be significantly modified by humans. Law was such a force: a timeless repository of universal principles that itself reflected the

28. The distinction between the "will of the judge" and the "will of the law" appears in Marshall's opinion in *Osborn v. Bank*, 22 U.S. (9 Wheat.) 738, 866 (1824).

permanence of other such forces.

I have elsewhere called this shared conception of the locus of causal agency in the universe "premodern," emphasizing its radical differences from a "modern" conception of causal agency that came, over time, to supplant it as orthodoxy.[29] The principal shift from a premodern to a modern consciousness in America came at the level of causal attribution. Humans replaced external causal agents as the moving powers behind change in the external world, and human will replaced divine will, or other permanent, foundational laws, as the principal force shaping human destiny. But although that shift needs to be taken into account in any scholarly inquiry about the Marshall Court, because it has decisively influenced the historiographical characterizations of that court, it did not take place during that Court's tenure. Indeed it did not fully take place, in the sense of modernist theories of causal attribution fully supplanting premodernist theories, for nearly a hundred years after Marshall's death in 1835.[30]

A bright-line distinction between the authority of law and the authority of legal interpreters can readily be connected to premodernist assumptions about causal attribution. For those holding such assumptions, the authority of law came from its essentialist, universal status as a causal agent, embodying both the "will" or power of other causal agents (custom, Reason, and "the nature of things"), and its own role as the fundamental cement holding together peaceful forms of social organization. The authority of legal interpreters, by contrast, did not come from their human, partisan "wills," but from their status as savants, trained agents whose cultural and professional roles were to discern and to apply the law's fundamental principles, whose meaning was

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29. My most extended discussion of the term "premodern" appears in G. Edward White, *The Canonization of Holmes and Brandeis*, 70 N.Y.U. L. REV. 576, 579 n.11 (1995). In this essay I am using the term in a more limited sense, to represent conceptions of law and judging which were predicated on an implicit theory of causal agency in the universe.

30. I recognize that this argument is controversial, since the conventional view of early nineteenth-century American constitutional history is that "modern" attitudes toward causal agency, law, and judging were in place shortly after the American Revolution. *See, e.g.*, GORDON S. WOOD, THE RADICIALISM OF THE AMERICAN REVOLUTION 6-7 (1992). I will subsequently have more to say about that conventional view.

In a forthcoming book, THE CONSTITUTION AND THE NEW DEAL (Harvard University Press, 2000), I suggest that although modernist conceptions of law and judging appeared in legal and constitutional discourse as early as the 1870s, those conceptions were not accepted as orthodoxies until the early 1940s. That suggestion is relevant to my claims in this essay in that it provides a basis for the consistently anachronistic character of mid- and late-twentieth-century scholarship on the Marshall Court, but the details of my argument in THE CONSTITUTION AND THE NEW DEAL are beyond this essay's scope.

sometimes mysterious or obscure to average persons.

The authority of legal savants was reinforced by republican theory. In republican societies, the Marshall Court Justices and their contemporaries believed, such savants were vital and necessary figures. This belief existed, first, because the conception of governance that accompanied republican theory had discarded, as illegitimate, governmental authorities whose claims to power were grounded on divine right, monarchical office, or the two elements combined. Power, in a republic, ultimately rested in the citizenry at large. However, the mass of the public could not be expected to understand the sources of fundamental legal principles, or to be able to apply them to concrete legal disputes. Just as the people at large required "representatives," largely drawn from the elite sectors of the population, to implement their decisions about government, so they required savants to discern and to apply the legal principles underlying the American republic.[31]

Legal savants were also necessary because the American Constitution was a quintessentially republican version of an authoritative legal source, a collection of permanent, fundamental principles that had been written down, but were of sufficient generality to be "adapted" to new legal disputes as they arose. The Constitution had been written down so that there could be no mistaking what the sources of fundamental law in America were, and thus tyrannical or corrupt officials could not substitute their

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31. The shift in the location of sovereignty associated with republican theory has tempted many scholars to see the emergence of republican models of governance in America as an illustration that in relocating governmental authority from the externally derived, "divine right" of kings to the human-centered "rights of the people," the framers of the Declaration of Independence and the Constitution were exhibiting a "modern," democratically oriented sensibility. More careful formulations of the framers' attitudes, such as those represented in RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION 3-17 (1948), have been replaced by those such as in WOOD, *supra* note 30, and Jurgen Heideking, *The Pattern of American Nationalism From the Revolution to the Civil War*, 129 DAEDALUS 219-47 (Winter, 2000).

But the belief system of republicanism influencing the framers of the new American nation was not the equivalent of modernist-inspired democratic theory. Republican theory retained older assumptions that humans were innately partisan and corruptible, and that those tendencies, as well as the continued primacy of external causal agents, continued to limit the tendency of humans to control their own destinies. *See* HOFSTADTER at 7-11. Although the framers necessarily had confidence in their ability to design a form of government which had the promise of replacing monarchical forms, they were not entirely confident that such a government could survive. Many of the structural features of American constitutional republicanism in America were designed to institutionalize constraints on human will, lest "the people," in their capacity as civic participants, succumb to partisanship or corruption, which would result in tyranny and the destruction of republican forms of government. For a fuller discussion, see POCOCK, *supra* note 10, at 525-31.

will for that of the sovereign people. But the fact that under the Constitution the people, as an abstraction, were sovereign did not mean that the people, as a collection of individuals, were capable of discerning the Constitution's meaning in specific cases involving the application of its provisions. This notion was all the more true because many of the Constitution's provisions were couched in general terms and were expected to be applied to new circumstances over time. Thus, for the people to continue to grasp the Constitution's foundational principles, a class of educated and trained interpreters of the Constitution—discerners, expounders, and appliers of the principles which were embodied in its provisions—was required. In accordance with republican theory, the constitutional interpretations of that class of savants were expected to take written forms.[32]

Judges were the most common examples of that class of savants, but they were not the only ones: treatise writers, legal educators, and legislators also could perform savant roles. Also, the role of savants as legal interpreters was not confined to explanations and applications of constitutional provisions. Savants were expected to discern and apply the law as a general entity, whether "law," in a given context, meant common law principles, statutes, or the Constitution.

The authority of savants was thus twofold: they performed a vital cultural role in a republican form of government, and they were learned in the process of understanding the peculiarly technical and recondite language and reasoning of the legal profession. They were thus better than persons not possessed of their learning in discerning what the law was, and one group of them, judges, were also experienced at applying the law they or others had discerned to legal disputes. The authority of judicial interpreters was a combination of their cultural and professional roles, their posited training, and their posited experience. Those factors did not make judges wholly free from partisanship, or even from incompetence. On the contrary, there were checks against

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32. *See generally* DREW R. MCCOY, THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA (1980). One of the principal objections to a "general" common law of crimes, which the Marshall Court rejected for the federal courts in *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32 (1812), was that some opinions by federal judges might not be written down, given the imperfect state of early nineteenth-century reporting of cases. Certain opponents of a federal common law of crimes, while voicing this objection, seemed less concerned about the possibility of state judges deciding common law criminal cases. The Virginia legislature in 1800, for example, passed a resolution that "a new tribunal for the trial of crimes," by which they meant a federal court, might "open a new code of sanguinary criminal law, both obsolete and unknown." St. George Tucker quoted this resolution in his 1803 edition of Blackstone's COMMENTARIES. *See* BLACKSTONE'S COMMENTARIES 1, App. E, 405 (St. George Tucker ed., 5 vols., 1803).

those tendencies. They gave judicial decisions a presumption of authoritativeness.

The savant authority of judges as legal interpreters, however, did not make their decisions the equivalent of law. As Justice Story said in *Swift v. Tyson*, judicial decisions were not "laws," merely evidence of the law.[33] Law—that "mysterious" mix of principles drawn from custom, nature, religion, and certain positive documents enacted by sovereigns, such as statutes or the Constitution—retained an identity apart from the judicial decisions in which legal principles were "laid down" because an alternative view of those decisions—that they were identical to "the law"—was incoherent. The alternative view was incoherent because if judicial decisions were the law, then they were either "correct" for all time, and could never be distinguished, overruled or discarded, or they were the law only because the judge making the decisions had said so, and there was no distinction between the will of the judge and the will of the law. The former of those inferences flew in the face of the assumption that legal principles had the capacity to be adapted to new cases, and the latter inference suggested that judicial decisions were simply willful, partisan fiats, which republican government was designed to prevent.

Republican theories about law and judging, then, were premised on the premodern epistemological assumptions previously described. The partisan "will of the judge" *could not* be the equivalent of the "will of the law" in a universe in which the primary causal agents were external to human conduct, and the essentialist authority of law separate from the savant authority of judges. Moreover, the "will of the judge" *should not* be the equivalent of the "will of the law," because fusion of the two "wills" would inevitably lead to tyranny, corruption, and the decay of republics.

It is thus fair to label the Marshall Court as a "republican" court in the sense that its Justices shared premodern epistemological assumptions about law and judging that were part of the belief system on which republican ideology was founded. Beyond that the label, "republican," with its connotations of an alternative perspective to that of "liberalism," or even of a set of beliefs identified with the Republican faction in early nineteenth-century politics, begins to lose its usefulness as a descriptive tool for understanding Marshall Court jurisprudence. But there is another label which I have found to be very useful in getting a sense of the character of the Marshall Court, and which helps to encapsulate the second theme which I am claiming is central to an understanding of the work of that Court. The label is

33. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18-19 (1842).

"prehistoricist," and the theme is the premodern conception of cultural change held by Marshall and his contemporaries.

III.

The dominant explanatory mechanism for making sense of change over time during the years of Marshall's tenure was the cyclical theory of history. It posited that systems of government, like humans, went through fixed cycles of birth, growth to maturity, and decay, culminating in death for humans, and oblivion for governmental systems. New members of the human species replaced their ancestors, so the species itself did not necessarily become extinct, and new governmental systems replaced their predecessors. However, the replacements were just as subject to the cycle of birth, maturity, and decay as the persons or systems they replaced. Observable change in a society, then, was as readily explicable as observable change in an individual. It was part of a predetermined cycle.[34]

Even those early nineteenth-century Americans who believed that a republican form of government was a qualitative improvement over monarchical or oligarchical forms did not believe that republics were free from the cycle of birth, maturity, and decay. They did, however, believe that one of the reasons why republics were superior to monarchies or oligarchies was that they contained a greater potential to postpone decay for longer periods of time than those forms. The comparative advantages of republics in postponing their eventual oblivion were the same advantages they possessed over monarchies and oligarchies in the first place. By diffusing power and establishing structural checks on its exercise, republics, according to those who believed in them, forestalled corruption, factional unrest, tyranny, and "luxury," the tendency of humans to have their civic energies sapped by the temptation of wealth and material possessions.[35] The language of the Federalist Papers, and of the Anti-Federalist tracts as well, is filled with arguments outlining the superiority of republican forms of government in erecting barriers against the forces which would eventually cause any governmental system to decay.[36]

In outlining the comparative advantages of a republican form of government, and in waxing enthusiastic about the new American experiment in constitutional republicanism, the framing generations in America did not see themselves as necessarily disengaging the nation they were founding from the inevitable

34. *See* MAJOR L. WILSON, SPACE, TIME AND FREEDOM: THE QUEST FOR NATIONALITY AND THE IRREPRESSIBLE CONFLICT 1815-1861 7-8 (1974).

35. *See* POCOCK, *supra* note 10, at 530-32.

36. For samples of this belief, see THE FEDERALIST PAPERS (Clinton Rossiter, ed. 1999). *See also* HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST (1981).

cycles of history. In fact "history," for them, was not a progression toward ideal life forms and social arrangements. On the contrary, it was a confirmation of the endemic frailties and limitations of humankind, and of governmental systems in which humans participated. Thus, the central questions about the future of America were not how the new nation, with its federal Union created out of a confederation of states, could be made eternal, but how it could be defended against its external and its internal enemies, including its inherent tendency toward eventual disintegration.[37]

A sense of the ambiguous posture of early nineteenth-century republican theorists toward the phenomenon of historical change can be gleaned from their use of the terms "improvement" and "progress." Consider Justice Joseph Story's 1821 address to the members of the Suffolk County (Boston) bar, in which he characterized the laws of "free governments" as embodying "a gradual adaptation. . .to the increasing wants and employments of society, and a substantial improvement corresponding with their advancement in the refinements and elegancies of life."[38] Story also spoke of changes in the law as representing "a regular progress from age to age," noting that "[t]he punishment of crimes, at first arbitrary, is gradually moulded in a system, and moderated in its severity."[39] These comments appear to reflect a sensibility which equates historical change with something like "progress."

However, in the same address Story made the following comment:

> [The laws and customs of Europe] have undergone the most extraordinary revolutions[,] attaining at one period great refinement and equity, then sinking from that elevation into deep obscurity and barbarism under the northern invaders, and rising again from the ruins of ancient grandeur to achieve a new perfection and beauty, which first softened the features, and then extinguished the spirit of the feudal system.[40]

Here, one sees the cyclical theory of history in place: cultural change is a series of regular "risings" and "sinkings." The juxtaposition of a "progressive" and a cyclical theory of history, in the same speech, conveys the following implicit argument. Either societies whose laws reveal them to be "free governments" can *postpone* the inevitable sinking of all governments into corruption,

37. *See* MCCOY, *supra* note 32, at 241-52; WILSON, *supra* note 34, at 7-12; PAUL F. NAGEL, ONE NATION INDIVISIBLE 13-29 (1964).

38. Joseph Story, *An Address Delivered Before the Members of the Suffolk Bar, at Their Anniversary, on the Fourth of September, 1821*, 1 AM. JURIST 1, 2 (1829). Thanks to Caleb Nelson for calling this passage to my attention.

39. *Id.*

40. *Id.* at 3.

tyranny, and ultimately "deep obscurity and barbarism," or such societies can *break* the cycle of decay.

Whether the United States was an exceptional republic, whose physical and material resources distinguished it from all other nations was a central question for early nineteenth-century American social and political elites.[41] Some of Story's contemporaries embraced the emergence of industrial development and competitive capitalism more fully than he,[42] but their understanding of cultural change was still constrained by a disinclination to see history as the equivalent of continuous, "progressive," qualitative change.[43]

Further, even those Americans who, by the middle of the nineteenth century, had begun to embrace a limited conception of cultural change as a form of progress,[44] had not yet fully embraced the related idea that progressive changes in cultural artifacts were predominantly fashioned by humans. They continued to attribute the changing features of American society which they observed to externally based "laws" of economics, politics, social organization, nature, or religion. Population growth, the dispersion of the population westward, the cultivation of wilderness land, even the relocation or extermination of aboriginal tribes were inevitable manifestations of human nature, God's plan, or the ethnological, physical, or economic laws of the universe. The rapid pace of

41. *See* DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE (1991) (discussing the theme of the potential of American exceptionalism to break the cycle of historical rise and decay).

42. *See* Story's opinion in *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837)(testing the constitutionality of a Massachusetts statute granting competitive franchise rights to a bridge company where a previous legislature had given exclusive rights to another bridge company). Story dissented from the Court's opinion, upholding the statute on the ground, as he had put it in his COMMENTARIES ON THE CONSTITUTION (3 vols., 1833), that "[a government could] scarcely be deemed to be free where the rights of property are left solely dependent on a legislative body, without any restraint." "The fundamental maxims of a free government," Story asserted, "seem to require that the rights of personal liberty and private property should be held sacred." 1 *Id.* at 268. In contrast, Chief Justice Taney's opinion of the Court spoke of the costs of "being thrown back" to "the last century," or of "standing still," should the statue be invalidated. 36 U.S. (11 Pet.) at 553.

43. *See* ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE, *supra* note 41, at 26-28 (containing a nuanced discussion of early nineteenth-century American elite attitudes toward the exceptional promise of America and the inevitability of cyclical change).

44. *See* RUSH WELTER, THE MIND OF AMERICA, 1820-1860, at 8 [part 1] (1975)(suggesting that "progress" was understood as consisting only of "the elaboration and extension of institutions the Americans had already introduced."). For a more detailed discussion, see Dorothy Ross, *Historical Consciousness in Nineteenth Century America*, 89 AM. HISTR. REV. 909-28 (1984).

observable external changes in the American landscape suggested that qualitative change over time might well be a continuous process, but the belief that change and progress were permanent defining features of history had not, by the middle of the nineteenth century, reached a place of respectability on the epistemological continuum of elite Americans. Nor had the related, but distinguishable belief, that historical change was primarily a human-directed rather than an externally-directed phenomenon.[45]

Let us assume that one is persuaded that, through the entire scope of Marshall's tenure on the Supreme Court, and deep into Story's tenure, American elites had not fully embraced the idea of progress, although they had given ample attention to rapid, observable external change and had characterized certain changes as improvements. How would one then describe their initial assumptions about historical change, their nascent philosophy of history? For me, the most useful label to capture those assumptions, and that nascent philosophy, is pre-historicist.[46]

I am using the term historicism to mean an "understanding of history as a process of qualitative change, moved and ordered by forces that lay within itself."[47] In *The Marshall Court and Cultural Change*, I suggested that one of the defining features of early nineteenth-century American culture was "the absence of a historicist theory of cultural change," and that Americans of that time period "did not embrace the idea that change was a given in social organization and that the history of cultures was, therefore, a progression of qualitative change."[48] I did not comment on the second element of a historicist sensibility, the belief that history was a phenomenon of independent causal force. That element is equally important in understanding what I mean by a pre-historicist conception of history.

The cyclical theory of history attributed the source of cycles of birth, maturity, decay, and rebirth to sets of causal forces which were external to the individuals or nations passing through stages of a cycle. The ultimate message of the theory was that cycles could not be broken because they were part of some divine entity's

45. *See, e.g.*, JOSEPH W. MOULTON, ANALYSIS OF AMERICAN LAW 11 (1859) (describing God as the "Supreme First Cause, and Cause of causes" in the American legal universe). I am indebted to Caleb Nelson for this quotation.

46. As far as I can determine, that term was first employed by Dorothy Ross in *Historical Consciousness in Nineteenth Century America*, *supra* note 44. *See also* WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 5; ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE, *supra* note 41.

47. DOROTHY ROSS, MODERNIST IMPULSES IN THE HUMAN SCIENCES 1870-1930 7 (1994)(analyzing the terms historicism and modernism, in general, in America).

48. WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 5, at 6.

master plan, or the inevitable products of universal laws, or the preordained destiny of humans and nations. Historicism not only suggested that the path from the past through the present to the future might be linear, and the cycles of history thus breakable, it posited an explanation for change which was centered in human observation and interpretation of external phenomena. A historicist theory of cultural change presupposed that it was no longer necessary to interpret the meaning of changed circumstances by reference to some external deity or omniscient force; it was possible to interpret their meaning by human assessment of their causal weight.

This change was a major shift in attitudes toward causal attribution in the universe, but the shift, taking place when it did, needs to be understood in reference to the spectrum of early nineteenth-century beliefs described above. All the beliefs presupposed that humans were capable of observing and identifying changes in their environment, but they posited quite different "meanings" for those changes. Pre-historicist beliefs took changes over time to be elaborations and extensions of "fundamental" existing institutions, such as republican constitutional government, or threats to the continued vitality of those institutions, harbingers of future decay. Historicist attitudes toward change over time, by contrast, embraced qualitative change as a given, embracing the possibility that alterations in the American environment might stimulate massive institutional changes which were not necessarily evidence of cultural decline.

Furthermore, there was a third possible "meaning" of change over time, which was eventually to surface as a powerful dimension of twentieth-century American thought. That "meaning" was consistent with an attitude—commonly labeled meliorism—which not only embraced the idea of history as continuous qualitative change over time, but also posited that human actors could control the scope and pace of that change, thereby affecting their own destinies and making their futures better than their pasts.[49] The full logic of meliorism shifted the central locus of causal agency in the universe from external phenomena, including the cycle of history, to human actors.

Meliorism, as a theory of causal agency, was not part of the starting presuppositions of American republican theorists at the time of the Marshall Court. To be sure, the creation of the American republic, although regularly attributed to God or "the nature of things," had been effectuated by humans, and the

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49. *See* Norman A. Graebner, *The Limits of Meliorism in Foreign Affairs*, 76 VA. Q. REV. 20-37 (2000)(discussing meliorism and the concept of making one's future better than one's past).

framers of that republic believed its form to be an "improvement" over monarchical forms. But early nineteenth century republican theorists, in looking back at the founding, did not conclude that since America was the creation of one human-designed shift in the form of government, that form of government would necessarily get better in the future, or even that humans had the capacity to make it better. On the contrary, they concluded that the republican form of government might decay and that there was comparatively little humans could do about it.

Eventually, in the years after the Civil War, historicist attitudes toward cultural change were to interact with meliorist attitudes toward human causal agency to produce, by the early years of the twentieth century, a widespread belief among American elites that the physical and behavioral sciences could be employed by humans to shape the future, and that this combination of scientific knowledge and human agency was the epistemological center of the modern universe. The emergence of this distinctive belief—which I will be calling modernism—as an orthodoxy in American elite thought, including legal thought, did not take place until approximately one hundred years after the close of John Marshall's tenure.[50]

As noted, during the years of the Marshall Court a conception of history as linear "progress" had not yet displaced history as preordained cycles. The fears for the future which Marshall expressed in the late years of his tenure were fears of cultural disintegration: the break-up of the Union and the end of the republican government in America, from the leveling pressures of popular sovereignty and the balkanizing pressures of local and state interest and power.[51] Story shared those fears, and continued to articulate them until his death ten years after Marshall's.[52] In the eyes of many elite commentators, the sectional discord which lead to the Civil War, and the War itself, demonstrated that the American republic had passed the midpoint of a cycle, with decay and oblivion to come.[53]

By the years immediately after the Civil War, American elites were much more inclined to characterize historical change in descriptions which presupposed that change was linear, and could

50. For a discussion of the relationship of historicism to modernism in early twentieth-century thought, see ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE, *supra* note 41, at 314-16.

51. WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 5, at 194-95, 585-92.

52. *See* R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 218-35 (1985).

53. *See* ROSS, THE EMERGENCE OF AMERICAN SOCIAL SCIENCE, *supra* note 41, at 20-50 (analyzing the struggle of mid-nineteenth-century elite commentators to reconcile the ideas of exceptionalism and progress with pre-historicist conceptions of cultural change).

be seen as a form of "progress," that the American republic's passage from maturity to decay might be postponed, or escaped altogether, and that "scientific" models of historical observation and generalization could explain historical change. Those descriptions revealed the emergence, in the ordinary discourse of educated Americans, of historicist sensibilities. Many members of American elites had come to believe that history was a linear process of qualitative change, and that all the materials for understanding history lay in the observable, recordable phenomena of the past and present.[54] Did the emergence of a historicist sensibility also signify a fundamental rejection of the "premodern," externally based, theories of causal attribution on which earlier theories of history had been based?

With this question, we have reached the point where I believe a great many of historiographical leaps of faith and logic occurred, with the consequent oversimplification of much of nineteenth-century constitutional history. The shift from pre-historicist to historicist conceptions of historical change, or from cyclical to linear theories of history, cannot fairly be seen as evidence of an embrace of meliorist attitudes toward causal responsibility in the universe. It was possible for nineteenth, and even early twentieth-century members of American elites to believe that history was in a continuous state of linear qualitative change, that humans could observe and make sense of those changes, and that observable changes from the past to the present could accurately be characterized as "progress," without fully embracing the belief that "progress" was invariably human-directed. Late nineteenth and early twentieth-century Americans, in short, could be historicists without being meliorists. In fact, they could be historicists and retain a strong sense that historical change was the product of universal external forces over which humans had comparatively little control.

I have spent a little time tracing the nineteenth-century evolution of attitudes about historical change and causal attribution because I will subsequently be arguing that a failure to make close distinctions between pre-historicist, historicist, and meliorist theories of cultural change and causal attribution has had a powerful effect on the twentieth-century historiography of the Marshall Court. However, at this point I want to conclude my characterizations of that Court by summarizing why I think the label "pre-historicist" is so central to understanding its historical identity.

A historical actor with a pre-historicist sensibility, I have suggested, does not believe that history is a process of qualitative

54. *See id.* at 143-71 (discussing the commentary of various post-Civil War commentators).

change, nor that the sources for observing and making sense of historical change lie in historical data themselves. Late eighteenth and early nineteenth-century American actors with that sensibility believed that history was a series of preordained cycles, and that the sources for making sense of historical change lay in a series of potent nonhuman "forces" whose causal power humans could recognize, but not fully explain, any more than they could explain why they were born, matured, and died.

"Law," as a collection of universal, sometimes mysterious principles, was one such potent force. Law held that status because of the role it played in operating and maintaining peaceful, benign forms of social organization, and because its principles were themselves the codification of the other omnipotent forces in the universe. God's will was reflected in law; the iron laws of politics and economics were reflected in law; the necessary constraints on human passion and willfulness were reflected in law, and so on. Thus, when a nation's citizens produced a fundamental document intended to embody "the law" in written form, such as the United States Constitution, that document signified those citizens' best understanding of the fundamental causal agents in their universe. The document was a human creation, but it also reflected the limited capacity of humans to alter their destinies.

At the time of the Marshall Court, its Justices were participating in a distinctive epoch in American history. Although that epoch can be characterized in various ways, I have chosen to characterize it as a time in which American elites were confronted with what they took to be stark, and increasing, evidence of visible cultural change. They saw about them dramatic alterations in transportation, communication, population, voting practices, relations between Americans from Western Europe and Americans from Africa or Native Americans, and the use of land. They recognized those alterations as evidence that a future America might look different from its present, and as reminders that their present looked, and felt, different from their past. Lacking a historicist sensibility, they did not detach their past from their present or their present from their future. Instead, they merged those time frames into a cyclical theory of history.[55]

One set of such actors, the Justices of the Marshall Court, occupied the early nineteenth-century cultural role of American legal savants. They, and others, saw their role as applying a set of fundamental, externally-based principles—"law"—to novel disputes that were arising as American culture changed. They

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55. The claims in the next several paragraphs receive extensive documentation in WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 5.

expected their applications of principles, whether the principles were codified in the Constitution or were to be extracted from custom, Reason, first principles of free republican institutions, or other sources of law, to result in some novel legal decisions or interpretations of those sources. They did not believe that in so doing they were altering the universal character of the principles themselves. Indeed, those principles, as I previously suggested, should not or could not be altered by judges, who, like other human beings, were fated to be passionate and partisan.

The pre-historicist sensibility of the Marshall Court Justices made their task of distinguishing the "will of the judge" from the "will of the law" easier than it would have been had they been historicists, and much easier than it would have been had they been both historicists and meliorists. They believed that the universality, and potency, of legal principles would ensure that judicial decisions incorrectly applying them would be corrected, and they believed that the very universality of legal principles made them the nation's best hope to ward off the destructive phases in the cycle of history. Although their view of history caused some of them to look upon the future with foreboding, and to despair of the permanence of the Union or even of the Constitution, it provided them with a methodology for "adapting" law to "the crises of human affairs," namely the restatement of the law's first principles in the course of applying them to new situations. Their savant role enabled them to discern the principles; their sense of the obvious and necessary distinction between the "will of the judge" and the "will of the law" gave them confidence about their applications of those principles. Their limited view of historical change reinforced their sense that law, despite its mysterious and inaccessible qualities, would remain a potent force over time.

With all these constraints upon the partisan, willful exercise of judging built into their sensibility, and with their sense of the relatively humble role of savant judges being reinforced by their sense of the relative powerlessness of humans to transform their experience and alter their future destinies, small wonder that the Marshall Court Justices, on the whole, did not give the serious attention to potential ethical conflicts, or conflicts with the powers of other branches of government, that twentieth-century judges have given. Their primary ethical concern was with transgressing the line between savantry and partisanship, and their relative lack of concern even with that line suggests that they believed that the problem of the willful, partisan judge would, in most instances, correct itself in the flow of judicial decisions over time.

We thus recover the Marshall Court as a historical institution with an identity radically different from its modern successors, influenced by presuppositions about law, judging, and the

relationship of law to cultural and historical change which twentieth-century American elites so thoroughly abandoned as to make them, for a time, historiographically invisible. This notion leads us back to the sources of the twentieth-century labels applied to the Court, the point where this essay began.

IV.

In my earlier brief discussion of the emergence of meliorism in late nineteenth and early twentieth-century America, I made the argument that constitutional historians have regularly conflated the distinction between a historical actor who believes that history is a process of self-generated qualitative change (a historicist) and a historical actor who believes that not only can change be equated with progress, but that humans can control the qualities of change and, thus, make the future better than the past (a meliorist). At this point, I want to flesh out that argument by making two additional claims and refining some terms. I then want to connect up my claims about the altered sensibilities of twentieth-century scholars to the difficulties they have faced in recovering the Marshall Court's historical identity.

My first claim is that meliorism, which I am treating as a starting assumption of many early twentieth-century elite commentators on law, became a relatively common belief among twentieth-century American elites in the first three decades of that century, and a virtual orthodoxy from the 1930s through most of the rest of the century.[56] My second claim is that the overwhelming number of historians writing on the Marshall Court from the 1920s through the late 1960s were meliorists as well as modernists, and that the four common labels they attached to the

56. A historical actor can be a modernist—in my terms, one who holds a human-centered theory of causal attribution in the universe—without being a meliorist, one who assumes not only that humans can control their destinies but can, and will, make their futures qualitatively better than their pasts. A defining characteristic of a certain class of American elite commentators, many of whom were enthusiastic about the Progressive Movement of the early twentieth century, about the New Deal, and about other post-New Deal efforts to enlist government as a sponsor of political reforms predicated on democratic theory, was that they were not only modernists but also meliorists. *See* WHITE, THE CONSTITUTION AND THE NEW DEAL, *supra* note 30 (discussing several of those commentators, focusing on constitutional jurisprudence between 1900 and the 1980s).

A large number of twentieth-century commentators on the Marshall Court, from the 1920s on, were members of that class. Some historians of twentieth-century legal thought have applied the label "progressive" to this class of commentators, and distinguished them from "conservative" judges or commentators. *See, e.g.*, MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 (1991). I find the labels "progressive" and "conservative," as applied to attitudes toward historical change and causal agency, too imprecise to be helpful.

Marshall Court were products of their meliorist assumptions, which they revealed in the form of implicit ideological postures toward their subject. In the final analysis, it is those assumptions, translated into implicit postures, which have resulted in the historical identity of the Marshall Court having been lost, and thus being in need of recovery.

Like the conceptual shift from a cyclical to a linear theory of historical change, and that from a pre-historicist to a historicist sensibility, the shift from externally grounded to human-centered theories of causal attribution was an epistemological development with mammoth ramifications. By claiming that humans had the capacity to control their own destinies, and were likely to make their futures qualitatively better than their pasts, meliorists were revealing their commitment to a set of initial epistemological principles that I, and others, have labeled modernist. Although the terms modernist, modernism, and modernity have been used with sufficient frequency and variety to approach unintelligibility, I believe that a core, and limited, historical meaning can be given to modernism: the belief that the capacity of humans to generate advanced structures of thought and feeling, when combined with their capacity to accumulate and to exercise power, make the cognitive and aesthetic goals of humans "all that counts" as causal forces in the universe.[57]

Modernist assumptions are capable of sustaining a great variety of governmental systems, from ultrademocratic to ultratotalitarian, and of being consistent with a variety of normative postures toward human-directed change. I am here referring to modernism and meliorism in their American versions, constrained by the unique features of American culture, which include a tradition of republican or democratic constitutional government. Finally, I am only concerned with the relationship of modernist, or meliorist, beliefs to assumptions about law and judging, and, more specifically, to assumptions about the role of Supreme Court Justices.

With these constraints in mind, I am prepared to advance the following claim about the historiography of the Marshall Court for much of the twentieth century. The twentieth-century commentators on the Marshall Court who formed the sources for my talismanic labels of that Court shared an American modernist worldview, and also shared a meliorist attitude toward historical change and the role of human actors in precipitating that change. From these initial perspectives, they constructed a collective image of the Marshall Court as a Court with modern actors, playing roles comparable to those of twentieth-century Justices,

57. ROSS, MODERNIST IMPULSES IN THE HUMAN SCIENCES, *supra* note 47, at 6-8.

who happened to live in the distant past. Thus, the Marshall Court Justices, necessarily, could not be expected to hold the more enlightened, more "progressive" attitudes of their twentieth-century counterparts, but, at the same time, needed to be exposed as partisans with antiquated political and constitutional theories.

This collective image of the Marshall Court, reflected in the labels of "nationalist," "Federalist," "property-conscious," and "Chief Justice-dominated," resulted in an anachronistic historiographical portrait which stands in the way of an understanding of the Court's historical identity. But at the same time the collective image has been remarkably coherent and enduring over time, remaining as unchallenged conventional wisdom from the 1920s through the 1960s and persisting, only slightly modified, in many contemporary treatments. The reasons for the image's anachronistic quality are the same as the reasons for its endurance. Its labels are the product of meliorist theories of historical change and modernist-inspired historiographical visions, and those theories and visions have informed much of the writing on American constitutional history from the 1920s onward.

In my 1982 lecture, I explored several examples of twentieth-century historical literature on the Marshall Court in the process of extracting the labels. I will not repeat that discussion here, and I ask the reader to treat my labels as conveying a fair and largely accurate description of the historiographical tendencies of the most visible studies of the Court.[58] I am interested, in this essay, in the starting assumptions embedded in the labels, and how those starting assumptions combine to give an anachronistic character to the collective image of the Marshall Court which the labels engendered.

The label "Federalist" conveys two impressions about the Court. One is that it ratified, as constitutional doctrines, the political goals of the Federalist party. The other is that the Marshall Court Justices were, at the core, political actors in the conventional sense of that term: partisan participants in national politics, not essentially different from elected officials of the Federalist party. Both impressions are deceptive, but the latter one is the principal source of anachronistic labeling.

In order to conclude that the Marshall Court was a

58. The process of extracting historiographic labels invariably requires a certain amount of selectivity and consequently produces a certain degree of oversimplification. However, when labels, such as "nationalist" or "Chief Justice-dominated," are widely employed, and are treated less as historical arguments than as conclusions which are beyond dispute, they provide clues to the unarticulated initial assumptions which help define a scholarly commentator's sensibility. The resonance of the labels, in fact, comes from their being perceived as indisputably accurate by a wide variety of commentators.

"Federalist" Court, one would have to believe that two nominal Federalist party members, Marshall and Bushrod Washington, persuaded all the other Marshall Court Justices who sat with them from 1801 to 1835 to support Federalist goals. Some commentators have suggested that this actually occurred, but that suggestion presupposes that for every legal issue which the Court decided there was an unmistakably clear "Federalist" and "Republican" position, and that "Federalist" positions were still clear after the official demise of the Federalist party after the War of 1812. Indeed, as the sample of Marshall Court cases widens and the time frame of the Marshall Court expands, the suggestion becomes ludicrously unmanageable. It appears that, at best, the label "Federalist Court" is intended to explain a few constitutional cases in the years between 1801 and 1815. It makes very poor sense even of those cases, because the concordance between Federalist party ideology and the actual constitutional questions decided by the Marshall Court is imperfect: even Alexander Hamilton at his most prescient did not anticipate all of the outcomes in early Marshall Court constitutional cases.

That weak sense of "Federalist" is not the principal difficulty with the label. The difficulty is with "Federalist" in the stronger sense of an American Supreme Court Justice, in Marshall's time, necessarily being, thinking, and acting like an elected official, a Federalist member of the Executive branch or Congress. Here, we encounter an apparently insurmountable difficulty: neither Marshall, nor his fellow Justices, nor his acolytes (or opponents) within the legal profession or in other educated elites, thought of law and politics as being inseparable, or of Supreme Court Justices as being the equivalent of legislators or members of the Executive. All of those groups thought of Supreme Court Justices as partisans, as were all humans, and as members of the Federal government, as distinguished from officials of state governments. They expected Supreme Court Justices to be "interested" and "passionate" individuals, and they expected them to be inclined to further the "interest" of the Federal government when it clashed with that of the states. At the same time, they did not expect Supreme Court Justices to be able to translate their partisan interests into law unless those interests happened to coincide with the foundational principles of the Constitution or of the common law. They did not, in short, think that Supreme Court Justices "made law" in the sense of infusing their political ideologies into legal rules and doctrines. They did not believe that legal interpretation and application could be described in that fashion.

Thus, any characterization of the Marshall Court which treats its Justices as political actors, indistinguishable from the elected members of other branches of government, has to confront the fact that none of those Justices thought of themselves in that

fashion, nor did their most bitter critics. But a modernist-inspired commentator might have a ready response to that argument. The response would suggest that the official rhetorical characterizations of "law," and judging, by members of the legal profession, and especially by judges, should be seen as obfuscationist and self-serving, ratiocinations masking concealed ideological preferences. Thus, someone reading commentary on law and judging from such figures needs to strip away the rhetoric and focus on the "real" goals of judges, goals related to partisan political motivations that judges, and even lawyers, have no interest in bringing to light.

At one level, such an argument is conversation stopping, since human motivation is sufficiently complex that unearthing the "real" motivations for a decision by an official holding legal power are necessarily elusive. If one believes strenuously enough that judges are the precise equivalent of legislators, and that both judges and legislators are invariably party-oriented partisan ideologues, one is not likely to be dissuaded if judges, or their critics, make distinctions between the "will of the judge" and the "will of the law." The fact still remains that at the time of the Marshall Court Justices, legal and lay commentators made those distinctions and derived logical arguments based on a bright line between legal principles and their judicial application in cases. The fact also remains that many of the twentieth-century legal and lay commentators, and judges as well, have not made those distinctions so starkly, nor have they drawn that line so brightly.

Thus, the question of what the Marshall Court Justices thought about the connection between Federalist party politics and constitutional interpretation cannot glibly be answered by positing a universalistic model of judicial behavior. Had Marshall Court Justices been moderns, they might have emphasized the degree of human creativity incumbent in a judicial application, and found that a conception of law as a potent external force in the universe lacked intelligibility. They might have spoken, as Holmes did, of the fallacy of thinking of law as "a brooding omnipresence in the sky."[59] They were not modernists, and they did not think in that fashion. It is anachronistic to assume that because many elite members of the legal profession in twentieth-century America were finding the distinction between "the will of the judge" and the "will of the law" less than perfectly clear, the Justices on the Marshall Court found it murky as well, or should have found it so.

The term "Federalist," as applied to the Marshall Court by

59. Southern Pacific v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (stating that "[t]he common law is not a brooding omnipresence in the sky, but the voice of some sovereign or quasi-sovereign that can be identified.").

twentieth-century historians, signifies a sense that the Court's Justices were political actors, and political actors who embraced ideologies which eventually ceased to resonate. The label treats the Justices as moderns, but as moderns whose views have become obsolete. Instead of fully distancing the Court from twentieth-century actors, it only partially distances them: "Federalist" becomes an intelligible, but at the same time a pejorative, term.

My view of the Marshall Court Justices as possessing a premodern collective sensibility, in contrast, makes the label "Federalist" of extremely limited utility in characterizing the Court's decisions. Even on those occasions where, using "Federalist" in a weak sense, one could find concordance between an ideological tenet of the Federalist party and a constitutional decision of the Marshall Court, the causal connection between the tenet and the decision might well prove elusive, especially if Republicans on the Court embraced the decision, as they regularly did. More importantly, the label, by transposing a modernist conception of the dim lines between judging and lawmaking onto an era whose judicial actors did not hold that conception, invites questions about the decision-making calculus of Marshall Court Justices that those Justices did not themselves ask. The label is thus anachronistic in every sense of that word. It evaluates historical actors by standards they did not conceive of, let alone hold, and it stands in the way of understanding the conceptions of law and judging which framed their decisions and influenced the reasons they advanced as justifications for those decisions.

I will not discuss the anachronistic character of the labels "Nationalist," "property-conscious," and "Chief Justice-dominated" at comparable length. Suffice it to say that those labels, like the label "Federalist," were employed by my sample of twentieth-century historians in "weak" and "strong" senses, with the weak version of the label serving as a historical description and the strong version serving as an implicit normative characterization. Although the weak version of the label can be shown to be deceptive in the sense of being historically misleading, the strong version of the label can be shown to be more fundamentally deceptive, being a projection of modernist-inspired assumptions about law and judging, a historicist theory of constitutional change, and meliorist assumptions about the "progress" in American law and jurisprudence since the Marshall Court.

Thus, the label "Nationalist" conveys the sense that the Marshall Court consistently favored federal powers over state powers when the two came into conflict, when in fact the Court's record was much more mixed, with some decisions articulating a powerful commitment to the concept, in the Constitution's design, of a residuum of state power out of which a small set of

enumerated federal powers had been carved.[60] More significantly, the label projects a twentieth-century model of an expansive federal government engaging in affirmative regulation of many sectors in American society onto the Marshall Court period, in which federal power was seen, by its supporters, as a bulwark against the disintegrative and licentious tendencies of unrestrained state sovereignty in the American republic. The projection of twentieth-century conceptions of domestic "nationalism" on the Marshall Court has tempted some historians with a "progressive" historiographical vision to see the Court's decisions as appropriately mindful of the need for strong centralized power to regulate the economy.[61]

The label "property-conscious" provides a quite vivid example of the phenomenon of anachronistic projection. In one sense that label captured a fundamental characteristic of the Marshall Court: all of its Justices believed that the acquisition and use of property was a fundamental, pre-social right, and that one of the purposes of republican government was to secure it. But since this belief was also shared by opponents of the Marshall Court, and virtually all educated Americans in the early nineteenth century, to call the Court "property-conscious" in that sense would be the equivalent of calling it "a Court that believed in the independent sovereignty of the American nation."

Twentieth-century "progressive" historians did not use the label in that fashion. They used it to signify a "new philosophy of capitalistic exploitation," in which "business men," "financial interests," and "numerous corporations," were encouraged "to exploit the resources of the state."[62] They also used it to illustrate, as Harold Laski put it in 1935, that "the purpose of the [Marshall Court] Judges was to protect the vested interests of property from invasion by state legislatures."[63] "Property-conscious" thus became a label encapsulating the claims that the Marshall Court not only protected property against governmental encroachment, it

60. *See, e.g.*, Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820); Willson v. Black-Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829); Craig v. Missouri, 29 U.S. (4 Pet.) 410 (1830).

61. Consider *McCulloch v. Maryland*, 17 U.S. 316 (1819), which concluded that Congress had the power to create a national bank and the states could not tax that bank's operations within their borders. From the perspective of a historian with a meliorist sensibility, mindful of early twentieth-century efforts in federal regulation of banks, the decision could appear as a prescient approach to the banking industry. But of course the decision had nothing to do with *federal* regulation of the Bank of the United States, which was virtually nonexistent in the early nineteenth century; it was about, in part, *state* regulation of a federal banking institution.

62. *See* the sources cited in White, INTERVENTION AND DETACHMENT, *supra* note 2, at 61.

63. *Id.* at 63.

encouraged government to subsidize propertied interests. In the context of twentieth-century governmental efforts to regulate property ownership or to redistribute the assets of "vested interests," the label took on pejorative connotations.

Of course the label, as employed by "progressive" historians, has extremely limited utility as a historiographical characterization. On many occasions, the Marshall Court confronted cases in which a conception of property as "vested rights" of ownership was pitted against a conception of property as a commodity in a capitalist system. Legislatures granted land or franchises to individuals or corporations. Subsequent legislatures sought to annul the grants or grant franchises to competing corporations in order to promote economic development or transfer assets from one group of citizens to another. The Marshall Court Justices were repeatedly asked to decide which conception of "property" the Constitution protected, and they did not give uniform answers.[64] To claim that the Court indiscriminately protected "property," in whatever form, is to obscure one of the central conflicts in its constitutional jurisprudence.

But the label is more interesting, for my purposes, as a pejorative epithet. By calling the Marshall Court "property conscious," twentieth-century historians have implied that it held an undiscriminating affinity for wealth, capitalism, and "vested interests," and an equally undiscriminating antipathy toward non-propertied persons, democratic institutions, and efforts to make the capitalist system more inclusive. In light of the apparent difficulties such attitudes had engendered in the early twentieth century—a stock market crash, a depressed economy, and a failure in the wealthy and powerful classes to provide economic or moral leadership—the label condemned the Marshall Court to obsolescence. Its "property consciousness" placed it in a category of historical actors with antiquated and corrosive theories about the relationship between government, wealth, and the economy. As twentieth-century American government moved forward to regulate economic activity, redistribute economic benefits, and require those with "vested rights" to contribute to the social good of all citizens, the Marshall Court could be seen as a symbol of resistance to those trends. In the hands of "progressive" historians, it was not so much a premodern Court as a Court whose justices had been unreflective enough to embrace wrongheaded attitudes about the role of private property in a

64. *Compare* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) *with* the line of cases leading to Charles River Bridge v. Warren Bridge 30 U.S. (11 Pet.) 420 (1837), including Jackson v. Lampshire, 28 U.S. (3 Pet.) 280 (1830); Providence Bank v. Billings, 29 U.S. (4 Pet.) 514 (1830); Beaty v. Lessee of Knowles, 29 U.S. (4 Pet.) 152 (1830); United States v. Arredondo, 31 U.S. (6 Pet.) 691 (1832); and Mumma v. Potomac Co., 33 U.S. (8 Pet.) 281 (1834).

democratic society.

At first glance, the label "Chief Justice-dominated" would not seem to be a product of the same anachronistic historiographical projections. As a historical characterization, the label seems intuitively accurate. As previously noted, Marshall wrote far more opinions, and especially far more opinions in constitutional cases that his contemporaries considered important, than any of his colleagues. He was also, along with Bushrod Washington, responsible for changing the Court's practice of rendering opinions from something resembling the British model of seriatim opinions[65] to the "opinion of the Court" practice, in which one Justice authored the "majority" opinion and dissenters silently acquiesced except on rare occasions. In addition, the few occasions in which the Marshall Court departed from the "opinion of the Court" practice in constitutional cases tended to be instances in which Marshall had either recused himself or disagreed with a majority of his colleagues. Finally, Marshall's contemporaries, most notably Jefferson, repeatedly suggested that Marshall was a dominating, even irresistible, influence among his fellow Justices.[66]

But the label "Chief Justice-dominated," as employed by twentieth-century historians with "progressive" sensibilities, nonetheless conveys some anachronistic messages. Since the label is typically combined with other labels identifying John Marshall as a Federalist, a "nationalist," and someone interested in "protecting property from governmental encroachment,"[67] its thrust is to suggest that Marshall persuaded, or bullied, his fellow Justices into endorsing his ideological positions. The image of the Court presented is that of a group of political actors competing with one another for ideological influence: Marshall's "dominance" thus helps explain the other labels.

Moreover, the label has typically been employed without attention to two other features of the Marshall Court which might help to place it in context. The first feature is the very great

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65. I say "something resembling" the British practice because from the Supreme Court's first Term on, its Justices adhered to a practice of writing a brief per curiam statement disposing of the questions appealed or certified to it. This opinion, typically unsigned before Marshall's tenure, was accompanied by opinions from individual Justices. Not all the Justices wrote opinions in every case, and the length of the per curiam statement varied. This practice was in evidence from 1792, the Court's first Term, through the 1800 Term. *See* HASKINS AND JOHNSON, FOUNDATIONS OF POWER, *supra* note 21, at 382-87.

66. Letter from Thomas Jefferson to William Johnson (June 12, 1823), *in* 12 WRITINGS OF THOMAS JEFFERSON, at 254 (P. Ford ed., 1905) (on file with author).

67. Max Lerner, *John Marshall and the Campaign of History*, 39 COLUM. L. REV. 396, 420 (1939).

significance attributed to seniority by the Court's internal practices. Evidence supplied by Justice William Johnson, who joined the Court in 1808, suggests that in the first years of his tenure Marshall's fellow Justices assumed that he, as Chief Justice and thus most senior figure, had the authority to write every opinion of the Court if he so chose. Johnson even suggested that Marshall wrote opinions which were contrary to his own inclination and vote. Although Johnson listed, among his reasons, the laziness or incompetence of some of the Court's early Justices, he also stressed that their acquiescence to Marshall's authority to write opinions for the Court came out of a respect for his position.

The other feature not commonly mentioned in twentieth-century studies attaching the label "Chief Justice-dominated" to the Marshall Court is the tendency of the "opinion of the Court" practice to be followed less rigorously over the course of its tenure. In *The Marshall Court and Cultural Change*, I examined letters between Marshall and his fellow Justices in the late 1820s and early 1830s which demonstrate that Marshall was concerned about increasingly open divisions in the Court, and was particularly apprehensive that if the Justices' custom of living together in the same Washington boardinghouse was not retained, the "opinion of the Court" practice might be harder to maintain, and the Court's appearance of unanimity might break down.[68] These letters suggest that Marshall may have believed that intimate living arrangements might provide a strong incentive on the part of the Justices not to enter into disagreements which might produce open personal animosity or estrangement. One might surmise that the "opinion of the Court" practice, the relatively short duration of the Court's Terms, boardinghouse residency, and the "dominance" of the Marshall Court's Chief Justice were closely linked. In a setting in which the Justices were not only working together but living together for a brief span of time, concentrating on disposing of cases on their docket so that they could return to their residences, harmony and deference to the person with the greatest institutional authority in their group might have been highly prized values. In this vein, it is suggestive that more dissenting and concurring opinions in constitutional cases began to appear at precisely the time when some Marshall Court Justices began to live by themselves during the Courts' time in Washington.[69]

One could, of course, interpret these additional features of the Marshall Court's experience as confirming Marshall's dominance. His fellow Justices, after all, were not required to accept the

68. WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 5, at 190-91.

69. *Id.* at 193-95.

opinion of the Court practice, or to maintain the presumption of deference to the Chief Justice. Had Marshall possessed a less gifted intellect, or a less likable and impressive personality, his fellow Justices might have been less inclined to go along with his idea that they quarter at the same boardinghouse—Marshall typically made the arrangements from year to year[70]—or that he write "opinions of the Court" whenever he chose to do so. But the fact remains that the institutional features which may have contributed to Marshall's influence cannot be easily connected to his political affiliation or his views on legal issues. The evidence about those features may reinforce a sense that Marshall was liked and respected by his colleagues, but it does not aid any claim that the Marshall Court became "Federalist," "nationalist," or "property-conscious" because Marshall was all those things.

If Marshall's purported "dominance" on the Marshall Court was a result of his ideological positions, how does one explain his writing opinions for the Court where his inclination had been to reach a different result from that announced in those opinions? Here the anachronistic dimensions of the label become most evident. If Marshall dominated the Marshall Court because he was a fanatical, cajoling, bullying, manipulative "Federalist" and "nationalist," one would have to believe, in those instances where he wrote opinions "contrary to his Vote,"[71] that he was doing so as part of a larger strategic agenda which anticipated that he would, as a result of that concession, be able to call in favors later. Otherwise why not simply assert his dominance and secure a different outcome?

This view of the interactions between Marshall and his fellow Justices flies in the face of a simple proposition. If all of them believed that the "will of the law" was distinct from the "will of the judge," then certain inclinations that any judge had in the exercise of legal application might be "incorrect," possibly because they were evidence of a "peculiar" or "complexioned" response on the part of the judge to a case. Where a judge whose institutional authority entitled him to a presumptive deference among his colleagues could not persuade them that his view of a case was correct, that was evidence that he had failed properly to discern the appropriate legal principles governing the case: that his instinct had been "incorrect." In such instances, if the judge was in the habit of writing most of the opinions accompanying collective decisions reached by him and his colleagues, his writing one in a case handing down a result which he had not supported confirmed that he had acknowledged the majority's decision to be

70. *Id.* at 191.

71. Letter from William Johnson to Thomas Jefferson (Dec. 10, 1822), *in* THOMAS JEFFERSON PAPERS (on file with Library of Congress), *quoted in* WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 5, at 332.

"correct," and thus that he understood the distinction between the "will of the judge" and the "will of the law."

Thus, once again, a label with twentieth-century connotations has obscured, rather than illuminated, the historical identity of the Marshall Court. The question this exercise in label application ultimately raises is what, precisely, can be done about the phenomenon of anachronistic projection in legal and constitutional history. Are we fated, even in the process of revising deceptive treatments of the past, to create our own? Even if we abandon the labels of previous generations, can we ever truly recover the world of past legal actors? I conclude with a few observations on that apparent conundrum.

V.

It seems, at a point in time when we are increasingly aware of the tendency of humans to construct experience, and increasingly self-conscious about the limiting factors of time, place, and culture on human sensibilities, that it might be appropriate to treat the process of historical investigation as an endless series of anachronistic projections. I have asserted, throughout this essay, that there is a qualitative difference between recovering the Marshall Court as a premodern institution, reflecting and exhibiting premodernist attitudes about law, judging, and causal agency in the universe, and attaching anachronistic labels to that Court which, in the end, are primarily instructive as evidence of the meliorist assumptions and "progressive" historiographical visions of twentieth-century modernist-inspired commentators. In other words, I have claimed that an approach to the Marshall Court which emphasizes how radically distant that Court's culture and collective sensibility was from our own is far more promising than one which simply projects widely-held twentieth-century assumptions on those who did not share those assumptions.

In order to make a claim that the former approach is qualitatively superior to the latter, I first need to state the substance of that claim more precisely. The claim is not the equivalent of two longstanding canons of the historical profession: "avoid presentism" and "render the past objectively." I believe that those canons, taken literally, are unattainable. Human actors in a contemporary world are necessarily affected by the experience of that world, by the culture they inhabit, and by the explanatory beliefs and theories that are currently taken to be coherent and resonant. They cannot but see the past through contemporary lenses, and it is quixotic to pretend that they can. Hence, a dimension of presentism in historical investigation is inevitable.[72]

72. White, INTERVENTION AND DETACHMENT, *supra* note 2, at 3-13, 50.

Nor is historiographical "objectivity," in the strong sense of that word, attainable.[73] It is not obtainable because the process by which humans interpret experience cannot be analogized to that of a conduit for the flow of electricity. Historians do not simply record data from the past and transmit it, in wholesale form, to a present audience. They select data, they construct interpretations of the data, and they advance those interpretations with the goal of engaging and persuading contemporary audiences. If objectivity means the submerging of the self in the process of recording experience, historians are never objective, and would not want to be.

What, then, is left of the canons of presentism and objectivity in historical interpretation, and why should not one view historiography as a continuous series of anachronistic projections, inspired by the necessarily presentist and subjective stance of the historian? In my view, presentism and objectivity, in weaker versions, should survive as historiographical canons, and the unintelligibility of those canons in their strong forms need not spawn a logical progression which culminates in the inevitability of anachronism.

My argument begins by positing, as a given, that the way in which humans make sense of their experience, including the legal institutions in their world, radically changes over time. I believe that the most causal survey of sources can demonstrate that eighteenth-century, nineteenth-century, and twentieth-century Americans have held quite different views about the relationship of law and politics to judging, or the course of history, or the causal primacy of humans and inanimate forces in the universe, and that such a demonstration would be intuitively obvious to most of us. It follows from this assumption about the capacity of explanatory models to radically change with time that one would not expect the governing conceptions of law or judging held by American elites in the twentieth century to necessarily resemble those held by comparable elites in the early nineteenth century.

At this point the argument may appear to resemble the mere restatement of a truism. But if it is the case that the governing explanatory models of law and judging at the time of the Marshall Court are radically unlike the governing models of most of the twentieth century, two problems are immediately created for historians who seek to recover the Court's historical identity. One is that if the governing twentieth-century model represents a *conscious repudiation* of the earlier model, twentieth-century historians may have difficulty taking the earlier model seriously,

73. *See generally* PETER NOVICK, THAT NOBLE DREAM: THE OBJECTIVITY QUESTION AND THE AMERICAN HISTORICAL PROFESSION (1988); White, INTERVENTION AND DETACHMENT, *supra* note 2, at 3-13.

implicitly asking themselves how a sensible actor could possibly believe its cardinal tenets, such as a bright-line distinction between the will of the judge and the will of the law. The other is that if this failure to take the early model's assumptions seriously becomes entrenched, twentieth-century historians may search for other "causes" of the motivation or actions of earlier legal or judicial figures. They may dismiss rhetoric justifying judicial decisions, or legal arguments, as concealing rather than revealing the "true" motivation of the historical actors. They may introduce causal explanations which resonate with them, as residents of the twentieth century, even though those explanations were not even suggested by early nineteenth-century contemporaries.

When this happens —and my analysis of the common twentieth-century labels for the Marshall Court is intended to suggest that it has frequently happened— presentism has overwhelmed historical analysis, and objectivity, in any form, has been lost. There has been a complete failure to understand what motivated historical actors to do what they did, or to understand their explanations of justifications for their actions. This failure seems particularly troubling when the actors, being lawyers and judges, left ample records in which they sought explanations and justifications of legal decisions.

Thus, the beginning of a process of recovering the historical identity of the Marshall Court needs to begin with a repudiation of the implicit claim that the explanatory theory of causal attribution in the universe shared by Marshall and his contemporaries, a theory which was intimately connected to their conceptions of law and judging, was *inferior* to the radically different theory and conceptions which became orthodoxy in the early years of the twentieth century. The posited "inferiority" of premodern theories of causal attribution is simply another way of expressing one's modernist sensibility and meliorist assumptions about human-generated change in American culture. So long as a historian is incapable of getting beyond the tacit belief that he or she knows more about what law "really is," and judging is "really like," than historical actors who did not have the benefits of "progress" in American knowledge, he or she will not be able to recover the Marshall Court. He or she will simply convert that Court into the equivalent of a rather foolish and reactionary group of modern judges.

The antidote to an inevitable progression of histories as anachronistic projections, then, lies in the effort to engage in a suspension of contemporary belief. This task, although not fully possible at the deepest levels of consciousness, is surely possible as a sort of modest exercise in self-abnegation, as an actor "gets into" another human's self, a resonant traveler contemplates an alien culture, or a writer of historical fiction searches for "authenticity."

In my view, the suspension of belief makes all the difference in understanding the Marshall Court. To make sense, in some clarifying and enduring way, of its practices, the motivation of its Justices, and its starting conceptions of law and judging, one has to distance oneself from one's current world, and, as far as possible, from the things one takes for granted, strongly believes in, and deplores. That posture is not quite objectivity, and it is not a full suspension of presentism, but it should help us, as historians, avoid the more indiscriminate forms of anachronistic projection. I believe that it may also help us recover the Marshall Court. Although we cannot escape history, perhaps it should be given a head start in trying to escape us.