Championing the Rebirth of Constitutional History

"I believe that career choices are often fortuitous, especially if one has a number of interests and is resisting growing up," said Ted White. "I qualified on both counts." After graduating from Amherst in 1963, White entered a doctoral program in American studies at Yale, more or less because it seemed the thing to do. At the time, higher education was booming, many of his classmates were headed to graduate school, and he had enjoyed American studies in college. White soon found, however, that the Ph.D. program was not nearly as much fun. "I had to act like a professional headed for a career in liberal arts teaching, and that meant dressing up for class, not leaving athletic equipment lying about, and trying to pay attention as one’s colleagues talked shop with their professors," he said.

Nevertheless, at graduate school White discovered that he liked academic research and writing. While many of his peers hated the exercise of writing a dissertation, White flourished in the task, and...
did it so successfully that he could easily have found a place at a good school as an assistant professor of American studies or history. That he did not do so reflected his disinterest for the hierarchical structure of graduate school, where students had to cultivate professors because professors got students jobs. White found himself uneasy about the prospect of joining a departmental faculty to perpetuate the hierarchical practices that he so disliked. Only 25 years old, he was reluctant to commit his future to an environment that he did not find completely comfortable.

White’s election to study law instead resulted in part from a chance encounter with a store that refused to take back goods he had found to be defective. White’s pleas were met by a clerk mindlessly repeating, “That’s our policy, sir.” “It occurred to me that my law school friends were developing weapons against such treatment,” White said. “I talked to one of them and repeated the arguments I had made to the clerk. My friend suggested that I was discovering the difference between legal and bureaucratic reasoning.” When White told his dissertation adviser that he was thinking of going to law school, the professor, who might properly have felt let down, instead encouraged him to do so. “It occurred to me later,” says White, “that he might not have wanted to be too closely associated with my entry into the history profession, but at the time his response clinched my decision.” In the fall of 1967, White matriculated at the Harvard Law School.

For the new first-year student, Harvard Law School proved to be a large, alienating environment. White, recently married, was a trained scholar determined to develop a professional identity. Most of his classmates lived in dorms and seemed “hysterical or not yet out of college.” Moreover, graduate school learning techniques and habits did not work well in law. “If I did not understand a legal issue in class,” White recalls, “I would go to the library and look up articles on the subject, trying to find an authoritative guide to that particular field of knowledge,” more or less as a graduate student would seek an obscure monograph or unpublished dissertation to nail down an unfamiliar point. Instead, White found elaborate arguments demonstrating the complexities of legal issues rather than providing settled answers. As White recalls, “These contributions just confused me. I never thought of seeking guidance or clarification from my professors, as they seemed unapproachable.”

In White’s second year, the experience improved. Yale University Press published his dissertation as a book, and some faculty took note. They invited him to join an informal legal history group newly created in an effort to foster a community of future legal historians. By his third year, White had decided to become a law professor specializing in American legal and constitutional history. The problem was that legal history, as then practiced, focused on the relation of private law to economic development. White wanted to write about public law and cultural development. He wanted to fuse legal analysis with American studies in an interdisciplinary approach to the history of law and ideas. At the time, no one was much interested in that kind of project, and White found the job market unresponsive. He spent a year as a scholar in residence at the American Bar Foundation, and thereafter was hired as a law clerk by former Chief Justice Earl Warren.

During his year at the Supreme Court, White published “The Rise and Fall of Justice Holmes,” 39 University of Chicago Law Review 51 (1971). This article surveyed the changing historical images of Justice Holmes in American culture, thereby replicating for a major legal figure an approach that had already been used, for example, in a landmark study of Thomas Jefferson by Virginia’s own Merrill Peterson. The success of this article convinced White that he could apply the interpretive techniques of intellectual and cultural history to the thought of certain legal figures—including influential judges and commentators—without unduly distorting or simplifying their contributions to the law. This terrain was then largely unexplored. With few exceptions, intellectual and cultural historians found legal materials intimidating, and legal historians focused chiefly on the evolution of doctrine rather than the history of ideas.

White joined the Virginia Law School faculty in 1972, immediately after clerking for Warren. He quickly launched

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two intellectual campaigns. First, he set out to "historicize" twentieth-century jurisprudence, which had lost energy through constant reworking of such philosophical puzzles as the nature of law or the relation of law to morality, by thinking about successive American jurisprudential movements ("formalism," "sociological jurisprudence," "realism," "process theory," etc.) as episodes in intellectual and cultural history. This approach produced a series of articles that eventually became *Patterns of American Legal Thought*, published by Bobbs-Merrill in 1978 and winner of the American Bar Association Gavel Award the next year.

Second, White set out to rehabilitate American constitutional history. In the late 1960s, legal history focused on private law and its relation to underlying economic developments. This emphasis implicitly devalued constitutional history as unrigorous and old-fashioned. White thought that one way to reestablish the centrality of constitutional and public law in the field of legal history was to examine the lives of leading judges, with emphasis on the connections between the judge's jurisprudence and the intellectual and cultural setting of his work. This approach produced an ongoing stream of law review articles and an important book, *The American Judicial Tradition*, whose first edition was published by Oxford University Press in 1976. Additionally, White has published two acclaimed full-length judicial biographies, *Earl Warren: A Public Life* (Oxford, 1982) and *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford, 1993). Both books received the American Bar Association's Gavel Award. Additionally, the Holmes biography won the American Historical Association Littleton-Griswold Prize, the Scribes Award, and the Association of American Publishers Award in 1994.

Judicial biography, which enjoyed something of a renaissance in the 1980s and 1990s, was not the only force helping to revive constitutional history. Equally important were two contemporary intellectual movements, coming from opposite ends of the political spectrum but combining to support a revivification of the field.

The first was the use of intellectual history techniques pioneered by Thomas Kuhn and his enthusiasts and by structuralist scholars. These techniques emphasized the extent to which the intellectual contributions of various disciplines rest on shared, largely unexamined, and historically contingent starting premises. By the early 1980s, this approach surfaced in the then-burgeoning critical legal studies movement, as well as in White's *Tort Law in America: An Intellectual History* (Oxford, 1980). The domestication of "boundary theory"—the claim that scholarship ordinarily proceeds within implicit confines of "approved" inquiry and expression—freed the history of ideas from its idealist connotations and appealed to those who approached legal reasoning more skeptically.

An intersecting commitment to constitutional history

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came from the opposite end of the political spectrum. "New right" scholars and theorists began to look to constitutional history as a source of universal and determinate cultural values. Specifically, they sought to invoke the "original intent of the Framers" as the touchstone of constitutional interpretation. As White noted, "Anyone with historical training would recognize the search for original intent as a complex, perhaps elusive enterprise." That "original intent" was nevertheless taken as a guide to modern constitutional interpretation reflected a powerfully felt need to restore determinacy and common grounding to constitutional law. Under the onslaught of structuralism, hermeneutics, deconstruction, and critical "unpacking," constitutional texts seemed on the verge of disappearing as sources of authority. The search for original intent was one way of trying to reestablish the rule of law as a foundational concept in American culture.

The adaptation of the techniques of intellectual history to constitutional law and the renewed interest in original intent combined to energize American constitutional history. The first development gave constitutional historians a battery of techniques to recover the unarticulated starting assumptions of previous generations of judges and commentators. The second development ascribed to the process of recovering those assumptions a contemporary vitality and urgency. In the increasingly fragmented and abstract world of late-twentieth-century constitutional jurisprudence, historical studies stood out as grounded, concrete exercises. As such, they engaged the ambition of a growing number of legal scholars.

White was not only an early proponent of the rebirth of constitutional history; he remains one of its most prolific and accomplished practitioners. In 1988, he published volume three of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States, entitled The Marshall Court and Cultural Change, 1815-1835 (Macmillan, 1988), an award-winning work on the era of Chief Justice Marshall described in more detail on page 33. Next came Intervention and Detachment: Essays in Legal History and Jurisprudence, published by Oxford University Press in 1994. In this book, White used a series of topics in intellectual and constitutional history to illustrate the complicated relationship of historians and their sources to the current culture in which historians work. Two years later, White applied the techniques of a cultural historian to a sport he loves in Creating the National Pastime: Baseball Transforms Itself, 1903 - 1953 (Princeton, 1996). The stature of White's work was recognized by the Association of American Law Schools with its Triennial Order of the Coif Award for distinguished legal scholarship in 1996, with his Holmes Devise History of the Marshall Court and his biography of Justice Holmes being singled out.

White's latest book, entitled The Constitution and the New Deal: A Reassessment (Harvard, forthcoming 2000), demonstrates that contemporary understanding of the development of constitutional law in this century is "New Deal-centered." By that phrase, White signals his belief that we have created an account of constitutional history in the twentieth century implicitly designed to legitimate the New Deal. In doing so, the conventional account of constitutional history has reinforced the dominant trends in American government from the 1940s through the 1970s, including a vastly expanded domestic governmental apparatus, a relatively limited role for the Supreme Court as a constitutional overseer of economic regulation, and a conception of judges as political actors whose countermajoritarian role in a democratic society is taken to create the central "difficulty" of contemporary American constitutional jurisprudence. White argues that the durability of this "New Deal-centered" narrative of early twentieth-century history reflects a tacit assumption that the world that gave birth to the New Deal is still largely intact at the close of the century. In addition to revising a number of historical stereotypes embedded in the conventional account of twentieth-century constitutional history, White questions the suitability of the New Deal as a model of governance in the century to come.

Ted White may be right in thinking that career choices are often fortuitous, but White's own choices have been either extraordinarily far-sighted or outlandishly lucky. The marriage of cultural history and constitutional law has proved to be one of the most fruitful intellectual unions of the past three decades. In the 1970s, White positioned himself at the forefront of a scholarly movement that steadily grew in strength and influence. Today, White remains at the forefront, a scholar of amazing energy, broad reach, and a distinctive intellectual style, and the senior and most prominent of a new generation of constitutional historians.
The Oliver Wendell Holmes Devise History of the Supreme Court

Ted White’s *The Marshall Court and Cultural Change, 1815-35* (Macmillan Publishing Co., 1988) is by any standard a triumphant achievement. It has been dubbed a “landmark in legal and constitutional history”¹ and praised as a “brilliant interpretation of John Marshall, and of the Court over which he presided, masterfully

White’s book was an unexpectedly successful product of what has aptly been called “one of the oddest, if not indeed most bizarre, projects in the history of the American Academy.”

When Justice Holmes died at the age of 93 on March 6, 1935, he left to the United States an unrestricted bequest of $263,000, a sum equivalent to more than $3 million in current dollars. Many years later, Justice Felix Frankfurter discovered the money, sitting idle in a U.S. Treasury account that did not even pay interest. Frankfurter conceived the idea of using Holmes’s bequest to fund an authoritative history of the Supreme Court. Congress agreed and in 1955 created the Oliver Wendell Holmes Devise History, to be supervised by a Permanent Committee chaired ex officio by the Librarian of Congress. Paul Freund, professor of constitutional law at Harvard, became the series’ general editor.

Frankfurter, Freund, and a small group of Harvard-based legal scholars made the initial selection of authors. Neither Frankfurter nor Freund were trained historians, but they were history buffs and of course well connected at elite law schools. They recruited former Frankfurter clerk Phil Neal of Chicago to write a volume covering the years of Chief Justice Melville Fuller (1888-1910). Another former Frankfurter clerk, Alexander Bickel, then an eminent constitutional scholar at Yale, was assigned the Chief Justiceships of Edward White (1910-1921) and William Howard Taft (1921-1930). Freund himself undertook to write a volume on the New Deal era of Chief Justice Charles Evans Hughes (1930-1941). Two (of three) volumes on the all-important Chief Justiceship of John Marshall were assigned to Gerald Gunther, then a professor at Columbia and later at Stanford.

All of these volumes encountered difficulties. In the mid-1970s, Phil Neal’s volume was reassigned to Owen Fiss of Yale, who eventually published Triumphant Beginnings of the Modern State, 1888-1910. When Bickel died in 1974, he had not yet completed the first of his two volumes. They were reassigned to Benno C. Schmidt, Jr., of Columbia, who, after an additional seven years, published The Judiciary and Responsible Government, 1910-21 as Bickel’s co-author. The second of Bickel’s volumes was then given to Robert Cover of Yale, who died before completing the project.

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That volume has since been reassigned to Robert Post of Berkeley. Paul Freund never completed anything. At his death in 1992, the Hughes Court volume was reassigned to Richard Friedman of Michigan.

Before Gerald Gunther relinquished authorship of his two volumes on the Marshall Court because of the pressure of other responsibilities, he was able to collect a mass of material and produce lengthy portions of a draft manuscript. When Ted White took over the project from him in 1983, he received Gunther’s research files and his manuscript drafts. Nevertheless, the finished product is uniquely White’s. As White wrote in the preface to his book *The Marshall Court and Cultural Change*, he profited from Gunther’s research, but added his own and adopted a different interpretive framework. He proceeded from the assumption that the Marshall Court’s decisions during the years 1815-1835 should be presented in an integrated, single-volume history, instead of the two separate volumes that Gunther had conceived. In order to preserve the original numbering, the book is listed as volumes III and IV of the series.

The most remarkable aspect of White’s achievement, however, is signaled by the title, *The Marshall Court and Cultural Change*. Earlier constitutional histories, especially those in the Oliver Wendell Holmes Devise series, were narrowly focused on the Supreme Court and legal doctrine. Law was presented in isolation from other historical approaches, as a “virtually autonomous” discipline “unrelated to the world outside.”

This approach is not only dry and wooden; it also risks pervasive anachronism as the decisions and pronouncements of a vastly different era are interpreted as if they were rendered today. White’s great achievement was “to historicize the Marshall Court, to make us realize the important differences between its assumptions and those of his readers,” and in so doing to remind us “that, in one respect or another, all courts are courts of their time.”

In short, White integrated constitutional and cultural history. The result has been termed a “new and vastly more sophisticated approach to the writing of constitutional history than has dominated the field until now.”

In truth, White’s is the first volume to fulfill the promise of the Holmes Devise.

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4 Konefsky, 160 Virginia Law Quarterly at 162.
5 Levinson, 75 Virginia Law Review at 1432.
6 Konefsky, 160 Virginia Law Quarterly at 167.
7 Powell, 87 Michigan Law Review at 1535.
The Constitution and the New Deal: A Reassessment

by G. Edward White

The general argument of this book is that the conventional account of early twentieth-century American constitutional history is both inaccurate and deeply interesting. Its inaccuracies result from a set of anachronistic readings of the constitutional jurisprudence of the period, which have produced selective and monolithic interpretations of areas of constitutional law in the first three decades of the twentieth century. At one level, this study can be viewed as an effort to recover a more complicated world of early twentieth-century constitutional opinions and commentary than that portrayed in the conventional account.

This work is also an examination of the collective investment generations of commentators have made in the New Deal as a transforma-
tive constitutional event, an investment that can be shown to be connected to the deficiencies in the conventional account. Although, in a broad sense, most commentators who have contributed to the conventional account have seen themselves as “liberals,” sympathetic to New Deal policies and hostile to constitutional opposition to those policies, the conventional account, with its interlocking parts, has been more than a particularistic spin on history. It has been a story so widely and broadly accepted as to amount to dogma, and its remarkable durability can be traced to the symbolic role of the New Deal as a formative period in twentieth-century American culture.

In my effort to get beyond the tendencies of the conventional narrative, and to provide a more authentic view of the state of early twentieth-century constitutional jurisprudence, I have attempted to detach myself from the starting premises of scholars who have taken the New Deal’s provisional resolutions as universal reconfigurations, and the New Deal as a formative episode in modern governance. I have then attempted to determine what courts and commentators thought should be the governing rules and preferred analytical methods in the principal areas of early twentieth-century constitutional jurisprudence, and why they might have thought in that fashion. I have tried, so far as possible, to reconstruct how they—not subsequent generations—sought to make the Constitution fit with the world they were experiencing.

The result, for me, has been startling. A lost world of constitutional jurisprudence has emerged. The conventional account of early twentieth-century constitutional history has largely misread or lost sight of that world. Recovering that world not only helps complicate the narrative of constitutional change in twentieth-century America, it reveals a time in which the New Deal was far from an inspirational example, and in which none of the familiar characteristics of late twentieth-century constitutional jurisprudence had achieved the status of orthodoxy.


The conventional account of early twentieth-century American constitutional history is both inaccurate and deeply interesting.
Publications of G. Edward White

**Books**


**Chapters in Books**


**Articles**


ARTICLES (CONTINUED)


