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Toward a New Deal Legal History

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TOWARD A NEW DEAL LEGAL HISTORY

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INTRODUCTION

WITH this article, Barry Cushman continues the project begun in earlier writings,[1] leading ultimately to a thoroughgoing reconsideration of the legal history of the New Deal. The present work, perhaps the most important to appear so far, brings Cushman's evolving argument up against the most stable—if not altogether the most convincing—element of the traditional history of the New Deal Court. The "Constitutional Revolution of 1937" is now open for reconsideration or, more precisely, the famous "switch in time" that realigned the Supreme Court with the demands of the Roosevelt administration. Cushman argues powerfully—by and large quite successfully—that the long-accepted narrative of events in the Supreme Court's 1936 Term is inadequate and misleading. He urges us to discard, on grounds of insufficient evidence, the concept of a Court radically altering its position in response to the results of the 1936 election and the announcement of Roosevelt's plan to expand the membership of the Court. He offers for our consideration the outline of an internalist approach to the history of the doctrinal shift, in which the Supreme Court's rejection of much of the First New Deal is seen as a response to the poor draftsmanship and poor litigation strategy of the administration in the creation and defense of its program. And, as though these were insufficient achievements for a short article, Cushman goes further, presenting a larger historiographic claim about the deficiencies in contemporary constitutional history.

Against the odds—given the scope of the challenges relative to the scale of the article—Cushman has attained a remarkable suc-

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[1] See Barry Cushman, Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow-Dog Contract, 1992 Sup. Ct. Rev. 235; Barry Cushman, A Stream of Legal Consciousness: The Current of Commerce Doctrine from *Swift* to *Jones & Laughlin*, 61 Fordham L. Rev. 105 (1992).

cess. Though in a number of respects his arguments are far from conclusive, he has pointedly asked the essential questions and showed the deficiencies of the enormous body of existing literature. Taken together with other work already published, this article shows the force of the argument that Cushman's book will present; already, I believe, it is impossible for writers to consider the great constitutional episode of the New Deal era without meeting directly the issues Cushman has raised. Fortunately for me, I am not presently working in New Deal history, and so this Commentary does not require me either to defend my own approaches against Cushman's trenchant criticisms or to enlist in his army of revision. As a proclaimed noncombatant, my vantage point combines the luxury of relative ignorance with the responsibility of substantial impartiality. I am convinced by much of Cushman's specific argument in derogation of the received wisdom, though I feel bound to voice a few doubts at places where I think his case overargued. I share altogether his belief that the internalist legal history of the New Deal has been unjustifiably ignored at the cost of flat misunderstanding of the developments. On the largest questions of interpretation raised by his article, I find myself torn between the instincts of the internalist historian that Cushman adroitly describes and the Realist premises that he strongly argues led to the historiographic errors in the first place. The following three Parts take up in turn those elements of this profoundly stimulating article.

I. Political Explanations of the Switch in Time

Cushman devotes the bulk of his article to a demonstration that neither the announcement and campaign for the passage of FDR's Court-packing plan nor the results of the 1936 elections can by themselves or in combination account for the decisions rendered in the Court's 1936 Term. It is Cushman's basic claim that the apparently invariable pattern of narration, in which these two external political forces bring an unwilling Court to a dignified climb-down, is factually untenable. While I believe that his basic conclusions are correct, I do not find his argument absolutely convincing for two reasons. In the first place, I think the evidence adduced is sufficient to destroy the very strongest version of the received wisdom, in which these forces alone operated to bring about the

perceived effects in the Court's decisional law. But I do not think this strongest of causal theories is the most plausible version of the story Cushman urges us to discard. In the second place, I believe Cushman has himself chosen a method of historical description—in recounting the political developments of the first half of 1937—that overargues his case and perhaps violates his own methodological prescriptions. Nonetheless, once the appropriate discounts have been applied to his results, I think Cushman has cleared the brush quite effectively, and the vista thereby revealed is one that will send any believer in the traditional explanation back to the sources for a thorough reconsideration.

Because it is the Court-packing plan that receives most of Cushman's attention, it is appropriate to begin there. Cushman's most important point, as I see his argument, is both small and precise, founded on chronology. The decision in *West Coast Hotel Co. v. Parrish*,[2] the most direct break with the legal past authored during the 1936 Term, was effectively made at a conference vote on December 19, 1936. Had Justice Harlan Fiske Stone not been suffering from dysentery and unable to cast the ninth (albeit technically nondecisive) vote, the opinion reversing *Adkins v. Children's Hospital*[3] might well have been formally announced before the Court-packing initiative; as it was, Chief Justice Charles Evans Hughes delayed publication of the opinion precisely to avoid the appearance too close an accidental synchrony would have created.[4] To the strongest form of the "climb-down thesis," in which only the threat of Court packing generated a retreat from *Adkins*, this small point spells curtains. As Jim Field, who taught me diplomatic history at Swarthmore, once memorably said: "It is a cardinal and simplifying rule of historical explanation, sometimes disregarded, that the thing that happens second doesn't influence the thing that happens first." If the Court's reversal on minimum-wage legislation and "liberty of contract" was the center of the revolution, as it has certainly been the center of the story of the switch in time, then the Court-packing plan in no legitimate historical sense "caused" the revolution.

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[2] 300 U.S. 379 (1937).

[3] 261 U.S. 525 (1923).

[4] See Barry Cushman, Rethinking the New Deal Court, 80 Va. L. Rev. 201, 227 (1994).

But this strongest form of the climb-down thesis is not the only existing variety, and I think it is probably not the one with greatest appeal to historically minded observers who believe that the Supreme Court is among other things a political institution. Cushman devotes much space in his article to a retelling of the congressional political history leading to the defeat of the Court-packing plan. He carefully delineates the forces inside and outside Congress that lined up in opposition to the plan; he narrates the succession of leadership defections that hobbled FDR's campaign for votes; and he shows how the plan's congressional opponents dovetailed their own activities with those of the Justices themselves—particularly in relation to Chief Justice Hughes' letter concerning the Court's workload and the announcement of Justice Willis Van Devanter's retirement—to isolate the White House politically, with increasing success, through the spring of 1937. Cushman needs to add this rather lengthy sortie through the published sources precisely because a weaker form of the climb-down thesis also requires his attention—that the Court's broader behavior in the 1936 Term, not just the crucial decision to abandon *Adkins*, derived from the strong show of political will represented by the Court-packing plan. Cushman's narration is directed at causing us to pass through the following mental process: first, the Court-packing plan was a virtual nonstarter from the moment of its introduction; second, the Court had ignored other legislative attempts to deprive it of jurisdiction or increase its membership for ideological purposes throughout the 1920s and 1930s; third, there was no significant difference between the doomed Presidential initiative and those earlier congressional attempts; therefore, fourth, any hypothesis that the Court was concerned enough over the plan to alter its collective behavior is implausible. The first and third links in this chain seem to me suspect.

Cushman's narrative of opposition to the Court-packing plan is adroit and comprehensive. It demonstrates beyond dispute that the plan was opposed early and often by an array of political forces difficult even for a confident and powerful President to overcome. But Cushman's narration is also superlatively one-sided. He does not devote attention to the activities of the administration publicists, lobbyists, and supporters engaged in favor of the plan. He does not narrate the congressional activities of the plan's propo-

nents or discuss the nature of their strategies for securing its passage. Cushman's is, in short, "victor's history," in which only the activities of the prevailing side are described.[5]

This is not an intrinsically unsuitable form of narration. But it begs what Cushman is at pains to remind us elsewhere is the real question—the process of mapping the relation between external events and the personal "constitutional consciousness" of the individual Justices. The Court-packing plan did not resemble the earlier congressional attempts to limit appellate jurisdiction or alter the membership of the Supreme Court in one crucial respect—the active, indeed urgent, support of the overwhelmingly popular President. As Cushman himself points out, FDR fought the 1936 campaign without any direct mention of the Supreme Court as an obstructive force. But, as his sharp rhetoric in the immediate aftermath of the decision in *A.L.A. Schechter Poultry Corp. v. United States*[6] showed, FDR was not prevented by principle or scruple from directing public ire at the Court as a device for relieving pressure on his administration. To understand the relation between external events and the behavior of the Justices, one would have to restore to the events of 1937 their historical contingency—what affected people, including Justices, at the time was their inability to know whether the plan would succeed or fail, and what FDR might do in response to its failure. The perception of contingency is the hardest vantage point for historians to assume—it is our misfortune, in this context, that we always know how the story comes out, and this knowledge is hard to put aside.

A somewhat similar effect is achieved by Cushman's account of the aftermath of FDR's first reelection. Conceding as he must that Roosevelt himself enjoyed a remarkable personal endorsement at the polls, following upon the resounding victory in the off-year elections of 1934, Cushman argues at length that the events of 1937 and 1938 left FDR so politically weakened that there is no sound basis for theorizing that the Court was following the election

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[5] For my own recent reeducation in the proponents' activities during the Court-packing debate, I am indebted to a forthcoming J.S.D. thesis by my student Steven S. Alton (on file with the Virginia Law Review Association), which most directly concerns the activities of Robert H. Jackson in lobbying in support of the plan, but which also makes use of the hitherto-unconsulted papers of Attorney General Homer Cummings.

[6] 295 U.S. 495 (1935).

returns in continuing to uphold the legislative output of the Second New Deal. The Court was not fazed in its invalidation of First New Deal legislation by the success at the polls in 1934, Cushman argues, and therefore it was no more likely to be swayed in the other direction by the events of 1936. This is a perfectly tenable reconstruction of the significance of the election of 1936, so long as the recession of 1937 is not enlisted as an influence on the Court's behavior during the crucial second half of the 1936 Term: the recession, with its politically damaging effect on morale, could hardly be used to explain events that occurred before the public was aware of the worsening economic situation. But while a plausible interpretation, Cushman's is by his own methodological declaration irrelevant—being merely a juxtaposition of events—unless it reflects the thought processes of the Justices themselves. And on this point Cushman has no evidence to offer. Mr. Dooley's oft-quoted comment on the *Insular Cases*[7]—"no matther whether th' constitution follows th' flag or not, th' supreme coort follows th' iliction returns"[8]—was and is self-evidently true, in the sense that the Justices are fully aware who wins elections. That the Justices follow the returns in the more mandatory sense is just as self-evidently false. Between the two meanings of Mr. Dooley's pun lies much of the terrain of constitutional history. Cushman's political history of the period from 1936 through 1938, including his detailed consideration of the opposition to the Court-packing plan, is valuable in calling attention to severe if not fatal weaknesses in what has become the conventional account. But the very principles of explanation that Cushman employs to criticize the received wisdom substantially limit the broader utility of his accounts for the purposes to which he sometimes seems to be putting them, that is, to discredit altogether any externalist counection between the Court's behavior and the exogenous political situation.

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[7] Downes v. Bidwell, 182 U.S. 244 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Dooley v. United States, 182 U.S. 222 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901).

[8] Finley P. Dunne, Mr. Dooley's Opinions 26 (1901).

II. Internalist Legal History of the New Deal

Cushman's rejection of the traditional politically focused accounts of the Supreme Court's behavior after January 1937 depends upon his belief that the decisions of the Supreme Court have, as he mildly maintains, "something to do with law."[9] This insistence on treating the legal culture as partially autonomous, responding to intellectual and cultural stimuli discrete from those of the larger enclosing society, represents a fundamental mood in the writing of legal history. This mood is in opposition to the various approaches which, as Cushman rightly says, have seen law-stuff as "superstructure," or output of other material or social determinisms. Perhaps even more valuable than the present destruction of some internally weak explanations of Supreme Court behavior of a purely externalist kind is Cushman's determined effort to provide a basis for a law-centered interpretation of the Court's activity.

This effort too requires brush clearing, in this case a recapitulation of the reasons why primarily political labels (such as "liberal" and "conservative") are of little descriptive value in defining the positions taken by judges. Cushman makes this reasonably well-known point with restraint and clarity, though here too there are occasional signs of forcing. To be told, for example, that Sutherland was not a true conservative because as a Utah state legislator he supported free silver and bolted to Bryan in 1896 seems rather a stretch: an electoral politician in silver-mining country who opposed free silver was not conservative—he was moribund. But Cushman is undoubtedly entirely correct in concluding, from the juxtaposition of "liberal" and "conservative" results in the voting records of all the relevant Justices, that factors other than programmatic orientation motivated the results in particular cases.

With that in mind, Cushman is prepared to call our attention to what is probably his most important interpretive proposition—that the fate of the First New Deal in the Supreme Court differed from that of the Second primarily because the legislation of the first term was badly drafted and poorly defended in the courts. Presented with legislation not drawn with an eye to securing positive judicial review, in factual settings disadvantageous to the government's theoretical propositions, even Justices politically

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[9] Cushman, supra note 4, at 249.

sympathetic to the administration's aims often found themselves unable to accept the technical propositions necessary to uphold the statutes. This, as Cushman rightly points out, is the conclusion to be drawn from the very large number of cases during FDR's first term in which the Government lost unanimously or convinced only one Justice of the propriety of its position. The myth of the Four Horsemen was a convenient political icon of the time, but its durability in the historical accounts seems to be, as Cushman suggests in his concluding lines, one of those "bedtime stories for the tired bar."[10]

Certainly the absence of qualitative analysis of the lawyering in the First New Deal is an astounding property of most of the history we have. Only the publication of Peter Irons' path-breaking work, *The New Deal Lawyers*, in 1982 made the legal personnel and machinery of the New Deal a subject of searching critical examination. Cushman rightly takes Irons' work as his guide to this crucial terrain, down to the use of Irons' perceptive chapter titles, contrasting the "Legal Politicians" who made the NIRA with the "Legal Craftsmen" who drafted and defended the Wagner Act. Cushman has correctly perceived that Irons' insights are central to any sophisticated retelling of the story of the Supreme Court in the 1930s. His anecdotal evidence that a majority of Justices believed individual pieces of FDR's program would have survived had they been more ably drafted and defended by the Justice Department is absolutely convincing. To be credible, future historical accounts must deal with this element of the story; for this alone we should be grateful to Cushman.

It should be stressed, perhaps more than Cushman's article does, that this is not merely a story of the incompetence of Homer Cummings' Justice Department. The burst of governmental activity that followed the collapse of the economy strained the existing professional infrastructure of American government. Both the legislative and executive branches of the federal government were called upon for efforts unprecedented in their history. But legislators are less challenged by the need for rapid expansion of the legal order than their executive colleagues—at worst, as recent decades have

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[10] Karl N. Llewellyn, A Realistic Jurisprudence—The Next Step, 30 Colum. L. Rev. 431, 435 n.3 (1930).

shown with astonishing consistency, one can always pass legislation without reading it. For the draftsmen, litigators, and administrators the situation could not be so easily resolved. The legal history of the New Deal is the story of a wholesale change in personnel and organizational technology, as—in perfect Marxian theory—the quantitative changes in the government legal sector became qualitative ones. The internalist history of the New Deal Court, for reasons Cushman's article suggests without elucidating in detail, will require also a fuller exposition of the changes in the personnel of the Government's legal staffs, their educational and ethnic backgrounds, the nature of the technology they employed to manufacture and distribute legal information, and the organizational techniques that coordinated their enterprise. The connecting link between these subjects and the fate of the New Deal program in the Supreme Court has been explored by Irons, and Cushman now fits that exploration into a larger synthetic context.

But even as Cushman's internalist perspective leads him to call attention to the sociology of drafting and litigation as components of the legal history, it also puts him at some distance from those elements. He asks us, finally, to accord primacy to intellectual rather than social factors in the shaping of the Court's decisions, and in the wider reconstruction of American law that went on during the 1930s. As his closing pages make clear, the interplay of ideas themselves and their effect on the structure of the "system of thought" are the primary agents in his form of historical explanation.[11] Some of the implications of this approach, in which ideas "impacted," "prompted," or most disconcertingly "exerted an impact,"[12] on other ideas, I find uncongenial. The impersonal approach to intellectual history, in which ideas rather than the people having them are agents of activity, and structures of ideas behave architectonically, transmitting forces or suffering "structural ripple effects,"[13] seems to me to lie uneasily abed with the vision of legal history as the interaction of "statutory formulations, test case fact patterns, and legal theories" with "the constitutional consciousness[es] of the individual Justices" that appears in earlier

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[11] Cushman, supra note 4, at 261.
[12] Id. at 260-61.
[13] Id. at 260.

pages.[14] That vision seems to call upon us to place the Justices and their individual legal minds in the context of the intellectual environment surrounding them. The ideas brought to fruition in the Wagner Act, for example, had a rich history of their own, and the Justices voting on the disposition of *NLRB v. Jones & Laughlin Steel Corp.*[15] had not only the careful drafting and adept lawyering of the President's "legal craftsmen" before them but also their own relationship to those antecedent ideas. The legal history of the New Deal Court should consider the rich new intellectual history of the Wagner Act,[16] drawing the sorts of direct connections to the minds of the Justices themselves that Cushman calls for everywhere but in his closing pages. This, rather than the impersonal and unconvincing talk of ideas "impacting" on one another seems the real fulfillment of the project Cushman sets before us. Cushman has shown us more than adroitly what is wrong with the traditional constitutional history of the New Deal. The elements of the new explanatory structure that will replace it are perhaps a little less evident from the present article. The problem, I think, may rest in Cushman's own uncertainties about the Realist outlook that he believes motivated the historiography he urges us to put aside.

III. Realism and the Problem of Modern Constitutional History

According to Cushman, the received historical wisdom about the constitutional realignment of 1937 was generated "at a point in history when the field of constitutional commentary was dominated by New Deal partisans who were inclined to explain judicial behavior in political terms."[17] The Realist insistence that law is a product of social forces, Cushman is warning us, seems to deprive the historian of any opportunity to consider internalist explanations of legal development. If we believe judges merely rationalize in their opinions results exogenously arrived at, then the history of law will be reduced to a history of how the judges were swayed by nonlegal

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[14] Id. at 258.

[15] 301 U.S. 1 (1937).

[16] Preeminently the work of Mark Barenberg. See Mark Barenberg, The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation, 106 Harv. L. Rev. 1379 (1993).

[17] Cushman, supra note 4, at 205.

considerations in the decision of the cases before them. This, Cushman evidently believes, is what has happened, to the manifest impoverishment of our recent constitutional history. Agreeing with him as I do that we are overdue for serious reconsideration of the issues he raises, I want to offer a few concluding remarks on his implied relationship between Realism and bad constitutional history.

The great peculiarity of American constitutional law is that so much of it seems to be the direct product of the behavior of a very small number of—until 1981—men. To this extent, the constitutional historian risks having to undertake what for any historian is the most difficult and methodologically unrewarding of tasks: explaining the contingent behavior of individuals in systematic terms. If law is, in Holmes' famous phrase, nothing more than the prophecy of what the judges will do in fact,[18] constitutional history is in constant danger of reduction to an explanation of what the Justices in fact did.

Cushman's perspective on the history of the New Deal Court is at least as Justice-centered as the interpretations from which it differs; in some significant respects, as I have already pointed out, it is much more so. Cushman argues, however, that his Justice-centered constitutional history escapes the reductionism he associates with the historical accounts by the Realist supporters of the New Deal in restoring the tenacity of the taught tradition to our understanding of the wellsprings of judicial behavior. I agree with him entirely that judges decide cases based on the constraints imposed by their tradition as they conceive it, and I think it is coherent to discuss the individual "constitutional consciousness" of the Justice—more so in fact, as I have already indicated, than it is to discuss the constitutional ideas and their "impact" on one another as though legal ideas existed as historical agents apart from the people having or criticizing them. But I think Cushman's historiographic passages draw too sharp a distinction between his own methods and those of the historians he criticizes, thus giving the wrong reason for the impoverishment of the historical literature we presently have. The taught tradition too, after all, is the outcome

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[18] See Oliver W. Holmes, Jr., The Path of the Law, *in* Collected Legal Papers 167, 173 (Harold J. Laski ed., 1920).

of a social process, subject to shaping forces capable of economic and sociological description. The educations of the judges, on and off the bench, formal and informal, contribute to the formation of the individual constitutional consciousness and are subject to sophisticated historical description—in this way constitutional law ceases to be merely the explanation of what five Justices did and four Justices resented.

Moreover, as the most successfully constructive part of Cushman's article shows, constitutional law is not just the output of Supreme Court opinions but also the litigation behavior of large numbers of individuals, organizations, and governmental entities that bring cases before the courts. Why the Justices are interested in certain fact patterns to be slotted into their individual constitutional philosophies is an interesting problem, but at least as interesting is the question why certain classes of cases come before the Justices in the first place. Rex Lee, speaking in memory of Thurgood Marshall at the Supreme Court on November 15, 1993, called Marshall's long, carefully modulated campaign to present cases concerning the racial segregation of public education "the most successful, sustained, strategically sophisticated act of Supreme Court advocacy in the history of the United States."[19] The campaign of the NAACP Legal Defense and Education Fund was itself the outcome of a complex of social processes, but its goal was to alter the Justices' perception of the relation between their own individual constitutional consciousnesses and the facts of de jure racial segregation in the public schools. The constitutional history of *Brown v. Board of Education*[20] has become more sophisticated, in the wake of studies by Richard Kluger, Mark Tushnet, and others, than our history of the New Deal Court, but we still have a substantial distance to go.[21] Neither a purely internalist nor a purely externalist perspective will produce the most plausible

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[19] Rex Lee, Remarks at the Meeting of the Bar of the Supreme Court of the United States in Memory of Justice Thurgood Marshall (Nov. 15, 1993), *in* 510 U.S. (forthcoming).

[20] 347 U.S. 483 (1954).

[21] See Richard Kluger, Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality (1975); Mark V. Tushnet, The NAACP's Legal Strategy Against Segregated Education, 1925-1950 (1987). See generally Eben Moglen, Our World With Thurgood Marshall, 69 N.Y.U. L. Rev. (reviewing Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961 (1994)) (forthcoming fall/winter 1994).

narrative reconstruction of our constitutional tradition. Despite Cushman's plea for internalist reconsideration of the history of the New Deal Court, my own feeling is that, on balance, it is the externalist perspectives on our recent constitutional history that have been most deficient. The effect of the *Holmes Devise* on the history of the Supreme Court has been largely to reward a disproportionately internalist account of the Court's own behavior, at the expense of broader historical inquiry into the effects of changes in behavior by other actors in the legal process on the shape of our constitutional law.[22] Our recent constitutional history has tended not to join forces with the sophisticated advances in labor and social history in the past quarter-century, despite the enormous increases in explanatory power that would result from consideration of such material in analyzing, among other possible subjects, the history of church-state doctrine in relation to the rise in political power of American Catholics, or changes in the structure of American labor unions in relation to the intersection between the statutory labor law and the First Amendment in the Supreme Court. On these and other similar subjects a few salutary exceptions might be cited, but the bulk of our constitutional history literature seems to me to suffer not from excess externalism, but from too little. This, I think, Cushman demonstrates powerfully in practice, though he is more ambiguous in precept. Overall, the Realist (perhaps more precisely, antiformalist) lesson that law should be studied by the historian embedded horizontally in its larger social context is not dead—it is, to draw one more image from this richly rewarding article, merely sleeping.

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[22] But cf. G. Edward White, The Marshall Court and Cultural Change, 1815-35 (1988) (considering Court history in a broader intellectual and social context).