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Alexander Hamilton called the judiciary the "weakest branch" of the three branches of government,[1] but today we know better. To us not only does the unelected, life-tenured federal judiciary seem remarkably strong, but at times it actually seems bolder and more capable than the two elective branches in setting social policy. Certainly the federal judges, and especially the Justices of the Supreme Court, precisely because they do not have periodically to face an electorate, exercise an extraordinary degree of authority over our society and culture. The Supreme Court not only sets aside laws that popularly elected legislatures pass, but also interprets and construes the law with a freedom that sometimes is virtually legislative in scope. But it is not just the Supreme Court and other federal courts that are so powerful. Even the state courts, many of which are elected periodically, are extremely influential. Indeed, as Charles Ingersall pointed out as early as 1826, no where else in the modern world do courts wield as much power in shaping the contours of life as do the American courts.[2]

We have usually given the name "judicial review" to this sweeping judicial authority. But if by judicial review we mean only the power of the Supreme Court and of other courts to set aside legislative acts in violation of the Constitution, then the term is too narrow, for voiding legislation is only the most prominent part of a broader manipulative power that courts exercise over wide areas of American life.

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1. *See* THE FEDERALIST NO. 78, at 522 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (evaluating judiciary's role in American political system).

2. *See* Charles Jared Ingersall, *The Influence of America on the Mind*, *in* AMERICAN PHILOSOPHIC ADDRESSES, 1700-1900, at 17, 41 (Joseph L. Blau ed., 1946) (noting that early American courts had broader powers than their English counterparts).

Commentators often have given the major responsibility for creating this power of judicial review to John Marshall, the great Chief Justice of the United States who served from 1801 to 1835. Marshall, nearly everyone acknowledges, was the greatest Chief Justice in American history. During his long career as Chief Justice of the Supreme Court, which spanned the administrations of five presidents, he helped to lay the foundations for both the Supreme Court's eventual independence and the constitutional supremacy of the national government over the states. But more important, at a stroke, his decision in *Marbury v. Madison*[3] was supposed to have created the practice of judicial review. Even a constitutional scholar as sophisticated as Alexander M. Bickel thought that Marshall had done it all. "If any social process can be said to have been 'done' at a given time and by a given act," Bickel wrote in 1962, "it is Marshall's achievement. The time was 1803; the act was the decision in the case of *Marbury v. Madison*."[4]

Perhaps this is the way that many lawyers and jurists prefer to explain things. Perhaps they like to ransack the past in order to discover specific moments or concrete precedents, usually court decisions, which created important subsequent judicial practices and processes. The problem with this jurisprudential and unhistorical way of thinking is that it leaves its practitioners vulnerable to critics who can find other, more important precedents and moments in accounting for a practice or process. This has been the case recently with Marshall and judicial review. A number of revisionist legal scholars, including Christopher Wolfe, J.M. Sosin, and Robert Lowry Clinton, have argued that Marshall, in *Marbury v. Madison* or elsewhere, did not create the modern practice of judicial review.[5]

These revisionist scholars contend that the origins of judicial review can best be located in the years following the Marshall Court, in the post Civil-War era at the end of the nineteenth century. In these years, revisionist scholars argue, the modern image of the greatness of the Marshall Court was elaborated and expanded, culminating in Albert J. Beverage's monumental four-volume *Life of John Marshall*.[6] Not until the late nineteenth century did the Supreme Court cite the *Marbury* decision as a precedent for judicial

3. 5 U.S. (1 Cranch) 137 (1803).

4. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1 (1962).

5. For recent revisionist studies of the history of judicial review, and particularly the history of *Marbury v. Madison*, see generally ROBERT LOWRY CLINTON, *MARBURY V. MADISON* AND JUDICIAL REVIEW (1989); J.M. SOSIN, THE ARISTOCRACY OF THE LONG ROBE: THE ORIGINS OF JUDICIAL REVIEW IN AMERICA (1989); and CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW (1986).

6. *See generally* ALBERT J. BEVERIDGE, 1-4 THE LIFE OF JOHN MARSHALL (1916) (recounting life of Chief Justice John Marshall).

review, and only in 1910 did the distinguished historian of the judiciary Edward Corwin actually coin the term "judicial review." From the early twentieth century on, the power of the Supreme Court and other courts grew, but perhaps only during the last half of this century has the judiciary's authority expanded to the remarkable extent that we see today.

There is a lot of conservative anti-Court politics in these recent revisionist accounts, to be sure, but there is a lot of truth, too. Certainly the Marshall Court never advocated a role for the courts that we see today. It never would have agreed with Archibald Cox when he declared in 1967 that judicial review "calls upon the Court to go over the very social, political, and economic questions committed to the Congress and State legislatures."[7] The twentieth century certainly has witnessed an extraordinary expansion of the Court's power, an expansion that has gone beyond anything that Marshall or his colleagues even could have imagined. Yet somehow or other Marshall's place in history remains undiminished. Even critics concede that Marshall was there at the beginning, in the formative period of the country's history, and that he had a powerful influence on the creation of the Supreme Court's authority. And the hagiography of Marshall was not simply a product of the post-Civil War era; it began earlier – with Joseph Story in the 1830s.[8] Although Marshall by himself could not have created judicial review, he obviously had something to do with its beginnings. But we do not have a lot of agreement on what that something was – despite a multitude of works on the subject of judicial review.

In this brief lecture I could not begin to settle all the disagreements about judicial review, but I hope after I am finished you will have a better idea of what happened than when I began. What I have to say will not be new to many scholars, especially to my three distinguished commentators, but I hope I will be able to clarify some of the historical circumstances out of which judicial review arose.

We know that judges were not highly regarded in the colonial period. Indeed, given what we believe today about the role of the judiciary, it is difficult to recapture a clear image of judges in the colonial period. Perhaps that is why we have not a single book-length work on the colonial judiciary, even though we have long possessed institutional studies of the colonial governors and the colonial assemblies. Colonial America considered judges

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7. CLINTON, *supra* note 5, at 7 (quoting Archibald Cox, *The Role of the Supreme Court in American Society*, 50 MARQ. L. REV. 575, 582 (1967)).

8. *See* R. Kent Newmyer, *Harvard Law School, New England Legal Culture, and the Antebellum Origins of American Jurisprudence*, 74 J. AM. HIST. 814, 832 (1987-88) (noting that Story's writings on Marshall made him into "mythic hero of northern constitutional nationalism").

dangerous because they regarded judges essentially as appendages or extensions of royal authority embodied in the governors, or chief magistrates.[9] As such, they had no independence of the crown, not even the independence that judges in England had. Unlike their counterparts in the mother country who as a consequence of the Glorious Revolution had won tenure during good behavior, the colonial judges continued to hold office at the pleasure of the king.[10] This impression of the judiciary was one reason why the colonists mistrusted their judges and tried to curb their authority by enhancing the power of juries.[11] Most colonists identified the judges, or magistrates, as they were often called, with the royal governors, or chief magistrates. Consequently, most colonists concluded, as John Adams did in 1766, that there were really only two constitutional powers in government, "those of legislation and those of execution," with "the administration of justice" resting in "the executive part of the constitution."[12]

Not only had the colonial judges been closely connected with the governors, but because of the confusion over the sources of colonial law, the judges had exercised an enormous amount of discretionary authority. Their actions, said Jefferson in 1776, had been simply "the eccentric impulses of whimsical, capricious designing man."[13] The solution to the problem was codification. By having the new state legislatures write down the laws in black and white, many of the revolutionaries aimed to turn the judge into what Jefferson hoped would be "a mere machine."[14]

Consequently, at the Revolution nearly all the states began weeding out archaic English laws and legal technicalities and simplifying and codifying parts of the common law in the Enlightenment spirit of Beccaria.[15] Although the states passed a multitude of statutes, nothing worked out quite as the revolutionary leaders anticipated. Within a decade following the Declaration of Independence many of them began to realize that all their legislation and

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9. *See* SHANNON STIMSON, THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL 49-50 (1990) (discussing judges' authority under crown).

10. *See id.* (explaining tenure of colonial judges).

11. *See id.* at 48-56 (describing role of judges and juries in colonial America); William E. Nelson, *The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 903-05 (1978) (explaining judges' roles in colonial America).

12. *The Earl of Clarendon to William Pym*, BOSTON GAZETTE, Jan. 27, 1766, *reprinted in* 3 THE WORKS OF JOHN ADAMS 477, 480-82 (Charles F. Adams ed., 1851).

13. Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), *in* 1 THE PAPERS OF THOMAS JEFFERSON 503, 505 (Julian P. Boyd ed., 1950).

14. *Id.*

15. *See* RUDIMENTS OF LAW AND GOVERNMENT, DEDUCED FROM THE LAW OF NATURE 35 (1783) (citing Beccarria on creating "clear, simple, and intelligible laws" so as to be just).

their plans for legal reform and simplification were going awry. Many statutes were enacted and many laws were printed but rarely in the way reformers like Jefferson and Madison had expected. Unstable, annually-elected, and log-rolling democratic legislatures broke apart plans for comprehensive legal codes and passed statutes in such confused and piecemeal ways that defeated the purpose of simplicity and clarity; "for every new law . . . acts as rubbish, under which we bury the former."[16] State legislatures passed more laws than anyone could keep up with; in fact, declared a disgruntled James Madison in 1786, they passed more laws in the ten years following the Declaration of Independence than in the entire colonial period. Not only did the laws proliferate in ever increasing numbers, but also many of the new statutes were poorly drafted and filled with inaccuracies and inconsistencies. The multiplicity, mutability, and injustices of all this legislation meant that judicial discretion, far from diminishing, became more prevalent than it had been before the Revolution as judges tried to make sense of the legal chaos.

By the 1780s many Americans already were having serious second thoughts about their earlier confidence in their popularly-elected legislatures and were beginning to reevaluate their former hostility to judicial power and discretion. When every circumstance required enactment of a particular statute, said Connecticut clergyman Moses Mather as early as 1781, the laws proliferated and resulted in a confusion that wicked men turned to their private advantage.[17] All the legislatures really should do was enact a few plain general rules of equity and leave their interpretation to the courts. "Indeed," said Mather, "where civil justice is to be administered not by particular statutes, but by the application of general rules of equity, much will depend upon the wisdom and integrity of the judges."[18] This was a far cry from the Beccarian reformist sentiments of 1776 and represented the extent to which experience since the Declaration of Independence had changed American thinking.

By the 1780s many Americans concluded that their popular state assemblies not only were incapable of simplifying and codifying the law but, more alarming, had become a major threat to minority rights and individual liberties and the principal source of injustice in the society.[19] In his analysis of the

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16. *Id.*

17. *See* Moses Mather, Sermon, Preached in the Audience of the General Assembly of the State of Connecticut in Hartford on the Day of Their Anniversary Election (May 10, 1781), at 7-8 (1781), *microformed on* Early Am. Imprints, 1639-1800 (American Antiquarian Society ed.) (discussing possibility that men could use laws wrongly).

18. *Id.* at 8.

19. *See, e.g.*, A. Gillon, *To Christopher Gasden, Esquire*, THE GAZETTE OF THE STATE OF S.C., Sept. 8, 1784 (criticizing legislator for singling out citizens for punishment).

problem in *Federalist* No. 10, Madison accepted the fact that the regulation of different commercial interests had become the principal task of modern legislation.[20] This meant, wrote Madison, that in the future, the spirit of party and faction was likely to be involved in the ordinary operations of government. Since he continued to think of all legislative acts as "so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens," he could only conclude pessimistically that legislators would become "both judges and parties at the same time."[21] The best solution he could offer to prevent these parties from becoming judges in their own causes and legislating majoritarian tyranny was to create a system that would ensure that only disinterested and impartial men exercised power.[22] Thus he hoped against hope that the new, elevated federal government might assume a judicial-like character and become a "disinterested and dispassionate umpire in disputes between different interests" within the individual states.[23]

Other American leaders were not so confident that the new national government could play this role. Many concluded that if impartial judicial-like umpires were what were needed to deal with the excesses of democratic politics in the states, then why not rely on judges themselves? Indeed, many gentry leaders now looked to the once-feared judiciary as a principal means of restraining the rampaging and unstable popular legislatures. As early as 1786, William Plummer, a future U.S. senator and a governor of New Hampshire, concluded that the very "existence" of America's elective governments had come to depend upon the judiciary: "That is the only body of men who will have an effective check upon a numerous Assembly."[24]

This was the beginning of a massive rethinking that eventually transformed the position of the judiciary in American life. From the much scorned and insignificant appendages of crown authority, Americans turned judges into one of "the three capital powers of Government."[25] From minor magis-

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20. *See* THE FEDERALIST NO. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961) (describing role of government as settling disputes between economic interests).

21. *Id.*

22. *See id.* at 59-60 (contemplating advantages of republic versus pure democracy).

23. Letter from James Madison to George Washington (April 16, 1787), *in* 9 PAPERS OF JAMES MADISON 382, 384 (Robert Rutland et al. eds., 1975).

24. LYNN W. TURNER, WILLIAM PLUMMER OF NEW HAMPSHIRE, 1759-1850, at 34-35 (1962) (quoting Letter from William Plummer to William Coleman).

25. Address of the Convention (March 1780), *in* THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, at 434, 437 (Oscar Handlin & Mary Handlin eds., 1966) (examining formation of Massachusetts government).

trates identified with the colonial executives, the courts became an equal and independent part of a modern tripartite government.[26]

It was a remarkable transformation, taking place as it did in such a relatively short period of time. And it was all the more remarkable because it flew in the face of much conventional eighteenth-century popular wisdom. Getting Americans to believe that judges appointed for life were an integral and independent part of their democratic governments – equal in status and authority to the popularly elected executives and legislatures – was no mean accomplishment. Even more remarkable was getting many Americans to accept what came to be called "judicial review," that is, granting judges the authority to interpret and set aside laws made by the elected representatives of the people. "This," said a perplexed James Madison in 1788, "makes the Judiciary Department paramount in fact to the Legislature, which was never intended and can never be proper."[27]

Yet we know that judicial review of some form did develop in these early decades of the new Republic. What was it? And how did it arise? No doubt the founders were confused over judicial review: some said it was improper and dangerous, while others seem to justify it. Given this confusion, simply adding up, as some historians and jurists are apt to do, the several examples during the 1780s and 1790s in which the courts set aside legislative acts as unconstitutional never can fully explain the origins of judicial review. The sources of something as significant and forbidding as judicial review never could lie in the accumulation of a few sporadic judicial precedents, or even in the decision of *Marbury v. Madison*, but had to flow from fundamental changes taking place in the Americans' ideas of government and law.

Perhaps the most crucial of these changes involved reducing the representative character of the people's agents in the legislatures and enhancing the representative character of judges. Hamilton's argument in *Federalist* No. 78 was only the most prominent of efforts to do just this. The judges, Hamilton argued, had a right to oversee the acts of the presumably sovereign legislatures and to construe statutes and even set some of them aside if they thought they conflicted with either the federal or state constitutions.[28] And the judges could do all this because the legislators were not really sovereign; they did not fully embody the people the way Parliament embodied the people of Britain. In America real and ultimate sovereignty rested with the people themselves, not

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26. *See id.* at 439 (speaking of judges' duties in their important office).

27. *See* Madison's Observations on Jefferson's Draft of a Constitution for Virginia (1788), *in* 6 THE PAPERS OF THOMAS JEFFERSON 308, 315 (Julian P. Boyd ed., 1950) (envisioning role for judiciary in checking laws against Constitution).

28. *See* THE FEDERALIST NO. 78, at 524-26 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (defending role of judiciary in invalidating acts of legislature).

with their representatives in the legislatures.[29] Thus the legislators were not the people, but only one kind of servant of the people with a limited delegated authority to act on their behalf. Americans, said Hamilton, had no intention of enabling "the representatives of the people to substitute their *will* to that of their constituents."[30] It was in fact "far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[31] Hamilton implied, and others drew out the implication much more fully in subsequent years, that the judges, though not elected, resembled the legislators and executives in being agents or servants of the people with a responsibility equal to that of the other two branches of government to carry out the people's will, even to the point of sharing in the making of law.[32] Indeed, just such logic eventually would lead to the election of judges in many states. If the judges were agents of the people, not all that different from their other agents in the government, then by rights the people ought to elect them.

Redefining judges as agents of the sovereign people somehow equal in authority with the legislators and executives fundamentally altered the character of the judiciary in America and deeply affected its role in interpreting the law. But by itself it was not enough to create judicial review. Some historians and constitutional theorists have assumed that the idea of fundamental law and its embodiment in a written constitution were crucial as well.

Almost all eighteenth-century Englishmen on both sides of the Atlantic had recognized something called fundamental law as a guide to the moral rightness and constitutionality of ordinary law and politics. Nearly everyone repeatedly invoked Magna Carta and other fundamental laws of the English constitution. Theorists as different as Locke and Bolingbroke referred equally to the basic principles of the constitution as fundamental law.[33] Even the rise of legislative sovereignty in eighteenth-century England – that is, the idea that law was the command of the legislature – did not displace this prevalent notion of fundamental law. Blackstone himself, despite his commitment to legislative sovereignty, believed that what he called an overriding natural law limited Parliament.[34] Yet all these theoretical references to the principles of

29. *See id.* at 525 (describing judiciary as intermediary between people and legislature).

30. *Id.*

31. *Id.*

32. *See id.* (contemplating judges' reliance on people and fundamental law in making decisions).

33. *See* J.W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 167-68, 186-90, 206-14 (1955) (discussing theories of Locke and Bolingbroke about natural law).

34. *See id.* at 206-14 (outlining Blackstone's opinions on limits on parliamentary powers).

the constitution and fundamental law could not have much day-to-day practical importance. For most, this fundamental or natural law of the English constitution was seen as a kind of moral inhibition or conscience existing in the minds of legislators and others. It was so basic and primal, so imposing and political, that it really was enforceable only by the popular elective process or ultimately by the people's right of revolution. Eighteenth-century Englishmen talked about fundamental or natural law, invoked it constantly in their rhetoric, but despite the efforts of some jurists, they had difficulty calling upon this fundamental law in their everyday political and legal business.

The written constitutions of 1776 and 1777, however, gave revolutionary Americans a handle with which to grasp this otherwise insubstantial fundamental law. Suddenly the fundamental law and the first principles that Englishmen had referred to for generations had a degree of explicitness and reality that they never before quite had. The Constitution in America, said James Iredell of North Carolina in 1787, was not therefore "a mere imaginary thing, about which ten thousand different opinions may be formed, but a written document to which all may have recourse, and to which, therefore, the judges cannot wilfully blind themselves."[35]

But were the judges to have an exclusive authority to examine these fundamental laws and to determine what was constitutional and what was not? By the 1780s it seemed clear to many that legislatures in America were bound by explicitly written constitutions in ways that the English Parliament was not. But it was not yet clear that the courts by themselves were able to enforce those boundaries upon the legislatures. Said Iredell in 1786, summarizing the position of those opposed to judicial review,

> The great argument is that the Assembly have not a *right* to violate the constitution, yet if they *in fact* do so, the only remedy is, either by a humble petition that the law may be repealed, or a universal resistance of the people. But that in the mean time, their act, whatever it is, is to be obeyed as a law; for the judicial power is not to presume to question the power of an act of Assembly.[36]

Both Jefferson and Madison thought that judges might act as the guardians of popular rights and might resist encroachments on these rights, but they never believed that judges had any special or unique power to interpret the Constitution. Madison admitted that "in the *ordinary course of Government*" the judiciary might interpret the laws and the Constitution, but surely, he said, it had no more right to determine the limits of the Constitution than did the

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35. Letter from James Iredell to Richard Spraight (Aug. 26, 1787), *in* 2 GRIFFITH J. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 172, 174 (1857).

36. James Iredell, To the Public (Aug. 17, 1786), *in* MCREE, *supra* note 36, at 145, 147.

executive or legislature.[37] Both Jefferson and Madison remained convinced to the end of their lives that all parts of America's governments had equal authority to interpret the fundamental law of the Constitution – all departments had what Madison called "a *concurrent* right to expound the constitution."[38] And when the several departments disagreed in their understanding of the fundamental law, wrote Madison in *Federalist* No. 49, only "an appeal to the people themselves, . . . can alone declare its true meaning, and enforce its observance."[39] Written constitutions, including the Bill of Rights, remained for Jefferson and Madison a set of great first principles that the several governmental departments, including the judiciary, could appeal to in those extraordinary occasions of violation. But because none of these departments could "pretend to an exclusive or superior right of settling the boundaries between their respective powers," the ultimate appeal in these quasi-revolutionary situations had to be to the people.[40]

In other words, many revolutionaries or founders still thought that fundamental law, even when expressed in a written constitution, was so fundamental, so different in kind from ordinary law, that its invocation had to be essentially an exceptional and awesomely delicate political exercise. The courts might on occasion set aside legislation that violated fundamental law, but such an act could not be a part of routine judicial business. It necessarily had to be an extraordinary, even revolutionary, expression of public authority, the kind of extreme and remarkable action the people themselves would take if they could. This kind of judicial review, as Sylvia Snowiss has aptly described it, was "a substitute for revolution."[41]

This is why many of the delegates to the Philadelphia Convention in 1787 still regarded judicial nullification of legislation with a sense of awe and wonder, impressed, as Elbridge Gerry was, that "in some States, the Judges had actually set aside laws as being against the Constitution."[42] This is also

37. *See* Maeva Marcus, *Judicial Review in the Early Republic*, *in* LAUNCHING THE "EXTENDED REPUBLIC": THE FEDERALIST ERA 25, 31-32 (Ronald Hoffman & Peter J. Albert eds., 1996) (reflecting Madison's view of constitutional review for all three branches).

38. James Madison, Letters of Helvidius No. II (1793), *in* 6 THE WRITINGS OF JAMES MADISON 138, 155 (Gaillard Hunt ed., 1906); *see also* Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), *in* THOMAS JEFFERSON: WRITINGS 1425, 1426-28 (Merrill Peterson ed., 1984) (portraying Jefferson's view of Constitution and its interpretation).

39. THE FEDERALIST NO. 49, at 339 (James Madison) (Jacob E. Cooke ed., 1961).

40. *Id.* (reflecting Madison's opinion that people are superior to government).

41. SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 74 (1990). Although Snowiss's argument is overly schematic and too precious at times, her sense of judicial review as a quasi-revolutionary process that had to be tamed seems to me to be right on target.

42. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 97 (Max Farrand ed., 1937).

why many others in the Convention, including James Wilson, James Madison, and George Mason, wanted to join the judges with the executive in a council of revision and thus give the judiciary a double negative over the laws.[43] They considered that the power of the judges alone to declare unconstitutional laws void was too extreme and too fearful an act to be invoked regularly. Wilson thought that judges needed the authority to protect not just their own constitutional rights but the rights of the people as well.[44] Only if they were allied with the executive would they be able to move against all those laws that were unjust, unwise, and dangerous but that were nevertheless not "so unconstitutional as to justify the Judges in refusing to give them effect."[45] Although William Treanor has contended recently that some jurists in the Virginia case of the prisoners[46] believed that courts had the power to void statutes, his argument actually reveals that this was a much contested minority position. Not only did those few who favored some sort of judicial review in 1782 do so cautiously and hesitantly, but also newspapers described the very possibility of the court's setting aside a statute as "the great constitutional question."[47] Indeed, it seems in the end that only the court's prudent avoidance of a clash with the legislature prevented a constitutional crisis.[48]

All of this suggests that most of the founders were not thinking of judicial review in modern terms. Maeva Marcus recently has offered several examples of Federalists in the 1790s asserting that the federal judiciary had the power of judicial review. Yet these assertions never presumed that the courts had the authority of judicial review as a matter of routine judicial business. Marcus, for example, makes a great deal of the fact that the federal circuit court of Pennsylvania in 1792 declared Congress's Invalid Pension Act unconstitutional on the grounds that it violated the separation of powers.[49] Yet she concedes that the court acted in a very hesitant and apologetic manner. Declaring the act unconstitutional, the federal circuit judges said, "was far from being pleasant. To be obliged to act contrary, either to the obvious directions of Congress, or to a constitutional principle, in our judgment equally obvious, excited feelings in us, which we hope never to experience

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43. *See id.* (recounting debate between members of Federal Convention over scope and form of judicial review).

44. *See id.* (reflecting debate in Congress over proper role for judiciary).

45. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 73 (Max Farrand ed., 1937).

46. *See generally* Commonwealth v. Caton, 18 Va. (4 Call.) 5 (1782).

47. William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491, 538 (1994-95).

48. *See id.* at 539 (reviewing aftermath of prisoners' case).

49. *See* Marcus, *supra* note 38, at 36 (addressing Invalid Pension Act case).

again."[50] Congress quickly modified the Invalid Pension Act in order to avoid the crisis that would result if the Supreme Court on appeal declared the act unconstitutional.[51]

Everyone knew that setting aside legislative acts could be no ordinary matter. In *Calder v. Bull*,[52] Justice Iredell admitted that the Supreme Court possessed the authority to declare a legislative act void, but he believed that doing so was of such "a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case."[53] Some congressmen actually debated establishing a regular procedure for federal judges to notify Congress officially when a court declared a law unconstitutional – so nervous were they over the gravity of such an action.[54]

Judges realized that the burden of proving a legislative act unconstitutional beyond any doubt lay entirely with them. As Justice Samuel Chase said in *Hylton v. United States*,[55] if the constitutionality of Congress's tax on carriages had been "*doubtful*," he would have been bound "to receive the construction of the legislature."[56] As late as 1800 in *Cooper v. Telfair*,[57] Justices Bushrod Washington and William Paterson agreed that judicial review was an exceptional act, to be exercised only infrequently.[58] "The presumption . . . must always be in favour of the validity of laws, if the contrary is not clearly demonstrated," declared Washington.[59] For the Supreme Court "to pronounce any law void," said Paterson, there "must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative implication."[60]

Thus for many Americans in the 1790s judicial review of some sort did exist. But it remained an extraordinary and solemn political action, akin perhaps to the interposition of the states that Jefferson and Madison suggested in the Kentucky and Virginia Resolutions of 1798 – something to be invoked

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50. Hayburn's Case, 2 U.S. (2 Dall.) 409, 412 (1792).

51. *See* Marcus, *supra* note 38, at 39-40 (reflecting congressional action in wake of court ruling on constitutionality of pensions act).

52. 3 U.S. (3 Dall.) 386 (1798).

53. Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798).

54. *See* 3 ANNALS OF CONG. 557 (1792) (recording motion to create process for judiciary to report unconstitutional law to Congress).

55. 3 U.S. (3 Dall.) 171 (1796).

56. Hylton v. United States, 3 U.S. (3 Dall.) 171, 173 (1796).

57. 4 U.S. (4 Dall.) 14 (1800).

58. *See* Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 18-19 (1800) (upholding validity of Georgia's construction of tax law).

59. *Id.* at 18.

60. *Id.* at 19.

only on the rare occasions of flagrant and unequivocal violations of the Constitution. It was not to be exercised in doubtful cases of unconstitutionality and was not yet accepted as an aspect of ordinary judicial activity.

This is where we begin to appreciate the achievement of the Marshall Court and other courts in the years following the Jeffersonian Republican revolution of 1800. The idea of fundamental law embodied in a written constitution by itself could never have accounted for the development of judicial review; indeed, emphasis on the fundamental character of the Constitution tended to inhibit the use of judicial review. Judicial review needed to be made less threatening, needed to become a normal and regular part of judicial business: This is, in fact, what the Marshall Court and other courts accomplished in the years after 1800.

In order for this to happen several things had to take place. First, America's written fundamental constitutions, its public laws, had to be transformed into laws that courts could interpret and construe as if they were routine statutes in the ordinary court system. What gives significance to our peculiar notion of a constitution is not that it is written or that it is fundamental, but rather that it runs in the ordinary court system. America's constitutions may be higher laws, special acts of the people in their sovereign capacity, but they are just like all the other lowly laws in that they are implemented through the normal practice of adversarial justice in the regular courts.

How did Americans transform their written fundamental law into the kind of law that an ordinary court system could expound and construe? In an important sense, one thing they did was follow the lead of eighteenth-century British judges, especially Blackstone and Lord Mansfield, in emphasizing the power of the courts to interpret the common law in accord with equity, reason, and good sense. In a recent article, Jack Rakove has indicated the relevance for our understanding of the origins of judicial review of what he rightly calls David Lieberman's "wonderful book on eighteenth-century British legal theory."[61] In the mid-eighteenth century the needs of commerce and the demands for improvement had led the English Parliament to enact a flood of often inconsistent and contradictory statutes. Lieberman points out that by the era of George III, Parliament was enacting four times the number of statutes that it had in the era of William III, and many of them were poorly formulated and carelessly drafted.[62] Although this proliferation of laws was often justified as the necessary consequence of a free government, the resultant legal

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61. Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1055 (1997) (commenting on DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN (1989)).

62. *See* LIEBERMAN, *supra* note 62, at 13, 28 (examining proliferation of legislation in eighteenth-century England).

confusion aroused increasing criticism and led some British jurists to seek solutions.

The acclaim accorded William Blackstone's *Commentaries* (1765-69) came from its attempt to bring order out of the legal disorder of eighteenth-century England. In his book, Lieberman offers us the best and most subtle reading of Blackstone that I have ever encountered. In his *Commentaries*, Blackstone sought to demonstrate that the common law was a rational and coherent system, a "science," that parliamentary legislators in the future could study and learn.[63] Although Blackstone certainly accepted the modern idea of parliamentary sovereignty, that is, law as the command of the legislature, it was, says Lieberman, an uneasy acceptance. Blackstone severely criticized the ways Parliament's statutes had mangled and mutilated the common law in the past, destroying its symmetry and distorting its simplicity.[64] And at the same time he praised England's judges for having salvaged whatever harmony and beauty still existed in the common law. Although Blackstone could never concede the judges' right to challenge Parliament's legislative will, he did allow them an extraordinary authority to adapt and construe statutory law and fit it into the common law.[65] Judges could discover new law when no customs or statutes existed, and they could use legal fictions to adapt the law to new social circumstances, as they did, for example, in developing the law of real property.[66]

Lord Mansfield, as chief justice of the Court of King's Bench from 1756 to 1788, carved out an even more impressive role for eighteenth-century British judges. Although Mansfield, like Blackstone, accepted Parliament's legislative sovereignty, he nonetheless repeatedly claimed that judges in their multiplicity of piecemeal decisions could control and transform the law more rationally than Parliament.[67] Mansfield played down the authority of precedents in his judicial decisions and instead emphasized reason, equity, and convenience in order to bring the common law into accord with the new commercial needs of mid-eighteenth century British society.[68] If an improving society needed certainty in the law, then the courts, he said, were more capable than the legislature in assuring it.[69]

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63. *See id.* at 32 (commenting on Blackstone's ability to present "English law as a rational and coherent system").

64. *See id.* at 52-57 (reflecting Blackstone's comments on legislative powers).

65. *See id.* at 61-63 (discussing Blackstone's assessment of judges' abilities to maintain common law).

66. *See id.* (discussing development of law of real property).

67. *See id.* at 123-24 (discussing Mansfield's opinion of superiority of common law mechanism).

68. *See id.* at 126-27 (commenting on Mansfield's disregard of precedent).

69. *See id.* at 121 (illustrating Mansfield's idea of gradual improvements through judicial mechanism).

In the decades following the Revolution, many Americans, confronted with similar legal problems, took this heightened interpretative power of English common law jurisprudence and ran with it. John Marshall, as Charles Hobson has pointed out, especially admired Mansfield's approach to adjudication. Marshall thought Mansfield – "one of the greatest Judges who ever sat on any bench" – had "done more than any other to remove those technical impediments which grew out of a different state of society, & too long continued to obstruct the course of substantial justice."[70] Not only did American judges like Marshall follow Mansfield in adapting the common law to new and fast-moving commercial circumstances, sacrificing precedents for the sake of principle, but they also took Blackstone's complex set of rules for construing and fitting statutes into the body of the common law and applied them to the state and federal constitutions.[71] Like Blackstone confronted with the statutory commands of the sovereign Parliament, American judges now treated the constitutions as commands of the sovereign people, super-statutes, if you will, that needed to be interpreted and integrated into the body of the law. In the process of reconciling constitutions and statutes, often in the name of reason and equity, courts tended to collapse the traditional distinction between fundamental and ordinary law. American judges now could construe the all-too brief words of the state and federal constitutions in relation to subject-matter, intention, context, and reasonableness as if they were the words of an ordinary statute. It was one of Marshall's great achievements, says Hobson, to apply "the familiar tools and methods of statutory construction . . . [t]o the novel task of expounding the Constitution of the United States."[72] The result was the beginning of the creation of a special body of textual exegeses and legal expositions and precedents that we have come to call constitutional law. This accumulative body of constitutional law in America is now over two hundred years old; there is nothing quite like it anywhere else in the world.

This "legalization" of fundamental law, as Sylvia Snowiss has called it, domesticated the Constitution; it tamed what had hitherto been an object of fearful significance and wonder to the point where it could routinely run in the ordinary court system.[73] Considering the Constitution as a kind of law that was cognizable in the regular courts permitted judges not only to expound and

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70. CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 37 (1996) (quoting John Marshall).

71. *See id.* at 181-91 (analyzing Blackstone's legal construction); LIEBERMAN, *supra* note 62, at 16-20 (examining proliferation of statutes in eighteenth-century Britain).

72. HOBSON, *supra* note 71, at 199.

73. *See* SNOWISS, *supra* note 42, at 64-65 (describing doubtful case rule and legalization of constitutional law).

construe the Constitution as if it were an ordinary statute, but also to expect regular enforcement of the Constitution as if it were a simple statute.[74] It was a momentous transformation. Because, in John Marshall's words, it was "emphatically the province and duty of the judicial department to say what the law is,"[75] treating the Constitution as mere law that judges had to expound and interpret and apply to particular cases gave special constitutional authority to American judges that judges elsewhere in the world did not share.

Jefferson, like many other Republicans, of course, never accepted any of this. He was dedicated to reducing law to precise texts as much as possible, and thus he never could concede this judicial interpretative authority. "Relieve the judges from the rigour of text law, and permit them to wander into its equity," he said, "and the whole legal system becomes incertain." [76] He rejected out-of-hand the eighteenth-century "revolution" in jurisprudence that Blackstone and Mansfield had created in England, dismissing their efforts to construe the common law equitably and to broaden judicial discretion as dangerous to liberty. The goal of judges, he said, was supposed to be "to render the law more and more certain."[77] But in his mind the goal of Mansfield and Blackstone was the exact opposite. They intended "to render it more uncertain under pretense of rendering it more reasonable."[78] Jefferson realized that these English advocates of judicial flexibility had a powerful influence on American judicial thinking and practice. To his dying day he never ceased complaining that "the honeyed Mansfieldism of Blackstone" had

74. *See* Gerald Gunther, *Judicial Review*, *in* 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1054, 1055 (Leonard W. Levy ed., 1986) (looking at development of Constitution as legal tool).

75. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Robert Clinton seems to believe that treating the Constitution as law, as the framers did, formed no basis for modern judicial review; statutory construction of the Constitution, he says, does not "inexorably" lead to modern judicial activism. *See* CLINTON, *supra* note 5, at 23 (postulating that putting law beside constitution does not lead to judicial activism). Perhaps not "inexorably," but legalizing the Constitution was surely the most important and requisite initial step in making possible judicial review, including modern judicial activism. Clinton, moreover, does not seem to appreciate the extraordinary degree of interpretative power wielded by the English common law judges within their restricted domain of "statutory construction." Knowing the words of a statute in English jurisprudence is not the same as knowing the law; in a like manner knowing the words of the Constitution is not the same as knowing constitutional law. In both cases judicial interpretation of texts requires extensive knowledge of whole legal systems and involves the continual creation of new legal meanings; indeed, English judges have been accused of making the law as a legislator does almost as often as American judges. Thus for American judges to treat the federal Constitution and the state constitutions as a species of law to be brought within the domain of "statutory construction" was no minor achievement.

76. Letter from Thomas Jefferson to Phillip Mazei (Nov. 1785), *in* 9 THE PAPERS OF THOMAS JEFFERSON 67, 71 (Julian P. Boyd ed., 1954).

77. *Id.*

78. *Id.*

forced young Americans to slide into "toryism" to the point where they "no longer know what whigism or republicanism means."[79]

It was not enough, however, that constitutions run in the regular court system and be interpreted like ordinary statutes for judicial review to become acceptable. Something else was needed. If expounding constitutional law were to be simply part of the routine business of legal interpretation and not an earth-shaking political exercise, then it followed that the entire process of adjudication had to be removed from politics and from legislative tampering. Somehow or other judges had to carve out for themselves an exclusive sphere of professional legal activity.

After 1800 this is precisely what happened. Judges shed what had been a traditional political and magisterial role and adopted one that was much more exclusively legal. In the colonial period and in the two decades immediately following the Revolution, judges were anything but independent, modern, trained professionals. Men were appointed to the courts not because they had been to law school or had any special legal expertise but because of their social and political rank and influence. And as magistrates, they necessarily were involved in politics and governing to an extent that we today find astonishing. Thomas Hutchinson of Massachusetts, for example, who was no lawyer, was in the 1760s chief justice of the superior court, lieutenant governor, a member of the council, and judge of probate of Suffolk County all at the same time.[80] Even after the Founders created the Constitution, some of this older magisterial role of the judges lingered. During the 1790s both John Jay and Oliver Ellsworth performed diplomatic missions while sitting as Justices of the Supreme Court;[81] indeed, while waiting for Jefferson's return from France in 1789, Jay served simultaneously as secretary of state and Chief Justice of the Supreme Court. Supreme Court Justices Samuel Chase and Bushrod Washington saw nothing wrong with their open politicking on behalf of the Federalist cause.[82] Because many people in the 1790s continued to regard the federal judges as political magistrates, the early Congresses assigned a surprisingly large number of nonjudicial duties to them, including conducting the census and serving on commissions to reduce the public debt.[83]

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79. Letter from Thomas Jefferson to James Madison (Feb. 17, 1826), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 39, at 1512, 1513-14.

80. *See* ELLEN E. BRENNAN, PLURAL OFFICE-HOLDING IN MASSACHUSETTS 1760-1780, at 31 (1945) (recalling Hutchinson's varied and simultaneous offices in Suffolk County).

81. *See* Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 123 (noting diplomatic activities of Jay and Ellsworth).

82. *See id.* (discussing Chase and Washington's political activities).

83. *See* 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 723-29 (Maeva Marcus et al. eds., 1992) (outlining administrative duties given early Justices).

In nearly all cases the judges willingly accepted these administrative responsibilities.[84] Of the twenty-eight men who sat on the federal district courts in the 1790s only eight had held high judicial office in their states; but nearly all of them had been prominent political figures, having served in notable state offices and in the Continental Congress. The judges saw their service on the court as simply an extension of their general political activity; some of them even continued to exercise political influence and to pass on Federalist patronage in their districts while sitting on the bench. Such judges were political authorities, not professional legal experts.[85]

By the early nineteenth century, however, judges began shedding their traditional broad and ill-defined political and magisterial roles that previously had identified them with the executive branch and adopting roles that were much more exclusively legal. Judges did not duplicate the behavior of Chase in politically haranguing juries from the bench or of Jay and Ellsworth in performing diplomatic missions while sitting as Justices of the Supreme Court. And in Hayburn's Case of 1792, several Justices of the Supreme Court actually protested against the Congress's assigning administrative and magisterial duties to them on the grounds that it violated the separation of powers.[86]

Judges withdrew from politics, promoted the development of law as a mysterious science known best by trained experts, and limited their activities to the regular courts, which became increasingly professional and less burdened by popular juries. Even at the outset the Supreme Court had avoided giving an opinion that did not arise out of an actual litigation between parties. In 1790, Chief Justice John Jay refused a request from Secretary of the Treasury Hamilton for the Court to take a stand against Virginia's opposition to the federal assumption of state debts.[87] Then again in 1793 the Court turned down President Washington's request for extra-judicial opinions on matters relating to international law, neutrality, and the British and French treaties.[88] This, according to Charles Warren, established the Court "as a purely judicial body."[89]

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84. *See id.* at 723 (commenting that judges rarely objected to administrative duties).

85. *See* Sandra Frances VanBurkleo, *"Honour, Justice, and Interest": John Jay's Republican Politics and Statesmanship on the Federal Bench*, 4 J. OF THE EARLY REPUBLIC 239, 263-64, 269 (1984) (discussing Jay's activities while on federal bench); Wheeler, *supra* note 82, at 123-58 (recounting judges' nonjudicial activities).

86. *See* Wheeler, *supra* note 82, at 135 (examining judicial complaints related to administrative assignments).

87. *See* CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 52-53 (1923) (relating Jay's refusal to comment on Hamilton's request for Court to review federal government's role in absolving Virginia's debt).

88. *See id.* at 110-11 (recalling Court's decision against rendering advisory opinions).

89. *Id.* at 111.

Warren was jumping the gun here, but the tendency was there; and after 1800, with the Federalists confronting a hostile Republican world, that tendency to make the courts purely judicial bodies increased dramatically.[90] More and more, law grew separate from politics, all part of a larger separation between the private and public spheres that took place in these years. This separation meant that the courts now tended to concentrate on individual cases and to avoid the most explosive and partisan political issues. Certainly the Marshall Court succeeded as well as it did because it retreated from the advanced and exposed political positions that the Federalists had tried to stake out for the national judiciary in the 1790s. In the 1807 trial of Aaron Burr, for example, Marshall rejected the broad definition of treason that the Federalists had used in the 1790s against the rebels in Pennsylvania and instead interpreted the Constitution's definition of treason very strictly and narrowly.[91]

The strategy behind the Marshall Court's judgments was always that less is more. The Court denied the belief of many Federalists that the common law of crimes ran in the federal court system, which was a major retreat, and it went out of its way to avoid any direct confrontation with the Republicans. In a series of conciliatory decisions, Marshall's Court recognized the authority of the Republican president and the Republican Congress over foreign affairs and matters of war. As Kent Newmyer has suggested, Marshall was so often able to get consensus out of what soon became a Republican-dominated Court because he used many of the Court's decisions to curtail governmental power – something that many Republicans eager to expand the areas of individual freedom could accept.[92] In other words, the Marshall Court did not attempt to build up the power of the federal government, which immediately would have aroused Republican hostility everywhere. Instead, it moved to reduce governmental power, not at the federal but at the state level. By declaring a large number of *state* judicial interpretations and *state* laws invalid because they violated the national Constitution, the Court indirectly enhanced the supremacy of the nation and its own authority as well.

Even in the famous case of *Marbury v. Madison*[93] in 1803, Marshall retreated rather than attacked.[94] Many of the Federalists wanted Marshall to declare the Republicans' repeal of the judiciary act of 1801 unconstitutional

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90. On the full development of this tendency in antebellum New England, see Newmyer, *supra* note 8, at 814-35.

91. *See* R. KENT NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 33-34 (1968) (describing Marshall's handling of Aaron Burr treason trial).

92. *See id.* at 35 (noting how Marshall's strategy on dealing with individual rights was acceptable to Republicans).

93. 5 U.S. (1 Cranch) 137 (1803).

94. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (invalidating power granted to court by Congress as violating Constitution).

for having abrogated the tenure of federal judges. But Marshall wisely realized that such a direct challenge to the Republicans could only harm the Court. Instead, he asserted the Court's authority to interpret the Constitution subtly and obliquely by declaring a portion of the earlier 1789 judiciary act unconstitutional for having granted the Supreme Court some original jurisdiction to which the Constitution had not entitled it.[95]

The decision was so subtle and so oblique that most people did not see its implications. The Republicans actually liked the decision better than the Federalists. They thought that if Marshall wanted to circumscribe the original jurisdiction of his Court, then he had every right to do so. Even Jefferson conceded the right of the Court to interpret the Constitution in matters pertaining to the judiciary, but he continued to believe that the executive and the Congress retained equal authority to interpret the Constitution. In his Marbury decision Marshall did not explicitly disagree with Jefferson's position. Marshall in 1803 was not embarking on a crusade for judicial supremacy. His aim was to isolate the judiciary from partisan politics as much as possible.

The Marbury decision was all about separating legal issues from politics. As Marshall said, some questions were political; "they respect the nation, not individual rights," and thus were "only politically examinable."[96] But questions involving the vested rights of individuals were different; vested rights were in their "nature, judicial, and must be tried by the judicial authority."[97] By turning all questions of individual rights into exclusively judicial issues, Marshall appropriated an enormous amount of authority for the courts. After all, even Jefferson in 1789 had conceded that judges, "kept strictly to their own department," had the authority to protect the rights of individuals.[98] Of course, Jefferson had not anticipated Marshall's expansive notion of rights.

Although Marshall, as Professor LaRue has pointed out, had the extraordinary rhetorical ability to make everything he said seem natural and inevitable, Marshall could not have separated law from politics all by himself.[99] Others too began to draw lines around what was political or legislative and what was legal or judicial and to explain the distinctions by the doctrine of separation of powers. As early as 1787 Alexander Hamilton argued in the New York assembly that the state constitution prevented anyone from being

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95. *See id.* (reflecting Marshall's tactic to avoid direct conflict with Jefferson's position by voiding Congress's action in Judiciary Act).

96. *Id.* at 166.

97. *Id.* at 167.

98. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *in* 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826, at 586, 587 (James Morton Smith ed., 1995).

99. *See* L.H. LARUE, CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY 42-69 (1995) (discussing Marshall's ability to weave rhetoric to create truth).

deprived of his rights except "by the *law of the land*" or, as a recent act of the assembly had put it, "by *due process of law*," which, said Hamilton in an astonishing and novel twist, had "a precise technical import"; these words were now "only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature," even though the legislature had written them.[100]

This was an extraordinary argument, to say the least, and one of the first of many imaginative readings in our history to be given to that important phrase, "due process of law." The rights of Englishmen, including their property rights, had always been protected from the crown's encroachments. That was what the Bill of Rights of 1689 had been all about. But Englishmen had never thought it necessary to protect these rights from the power of the people themselves, that is, from the legislative power of Parliament. Blackstone had agreed that one of the absolute rights of an individual was "the right of property: which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, *save only by the laws of the land*."[101]

Of course, for Blackstone the laws of the land included those laws that the legislature, that is, Parliament, enacted. Not so for Hamilton and many other Americans.[102] As far as most Federalists were concerned, the laws of the land concerning individual rights now belonged exclusively to the courts. Getting the American people to believe this was a remarkable achievement, and the Marshall Court contributed greatly to this effort. But it would not have been possible without large numbers of influential people becoming

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100. Alexander Hamilton, New York Assembly Remarks on an Act for Regulating Elections (Feb. 6, 1787), *in* 4 THE PAPERS OF ALEXANDER HAMILTON 34, 35 (Harold C. Syrett ed., 1961) (reflecting Hamilton's reluctance to prevent legislature from commenting on Constitution). The view expressed by Hamilton did not of course immediately take hold. The attorney-general of North Carolina, for example, argued in 1794 that the clauses of the state constitution referring to due process and the law of the land were not limitations on the legislature; they were "declarations the people thought proper to make of their rights, not against a power they supposed their own representatives might usurp, but against oppression and usurpation in general . . . by a pretended prerogative against or without the authority of law." Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 371-72 (1911). Thus the phrase that no one could be deprived of his property except by the law of the land meant simply "a law for the people of North Carolina, made or adopted by themselves by the intervention of their own legislature." *Id.* at 372. The North Carolina superior court accepted this view. *See id.* at 372 (discussing North Carolina court's conclusion).

101. Edward S. Corwin, *Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 254 (1914) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *129-37).

102. *See* Alexander Hamilton, The Examination No. XII (Feb. 23, 1802), *in* 25 THE PAPERS OF ALEXANDER HAMILTON 529, 533 (Harold C. Syrett ed., 1961) (containing Hamilton's opinion on role of legislature). Hamilton wrote of legislative powers: "The proposition that a power to do, includes virtually, a power to undo, as applied to a legislative body is generally but not universally true. All *vested rights* form an exception to the rule." *Id.*

increasingly disillusioned with the kind of democratic legislative politics that was emerging in the early Republic. As St. George Tucker pointed out in 1803, since the men of greatest talents, education, and virtue were not able to compete as well as others in the new scrambling, pushy, and interest-mongering world of popular electoral politics, they could best promote the science of the law in the judiciary.[103] Marshall himself, like all "honest men who have honorable feelings," was increasingly "disgusted with . . . the political world" he saw around him, and was "much more gloomy" about the future.[104] Everywhere the growth of democracy encouraged the insulating of legal issues from politics; "for," as Marshall put it, "nothing is more to be deprecated than the transfer of party politics to the seat of Justice."[105] Only separating law from popular politics could protect the rights of individuals. Even the strongly Jeffersonian Virginia Court of Appeals in 1804 took the position that the state legislature could do many things, but it could not violate private vested rights of property.[106]

Placing legal boundaries around issues such as property rights and contracts tended to isolate them from popular tampering, partisan debate, and clashes of interest-group politics. Of course, the withdrawal from politics was much easier for Federalists who were having difficulty getting elected and who like Marshall saw only "evil times" everywhere.[107] But as American society became more democratic, even some of Jefferson's own party came to fear the legal confusion and chaos that popular legislatures could create and looked to the judiciary for salvation. Without the protection of the courts and the mysterious intricacies of the common law, Alexander Dallas argued on behalf of moderate Republicans in Pennsylvania in 1805, "rights would remain forever without remedies and wrongs without redress."[108] Americans could no longer count on their popularly-elected legislature to solve many of the problems of their lives. "For the varying exigencies of social life, for the

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103. 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE xiv-xviii (St. George Tucker ed., Philadelphia, 1803).

104. Letter from John Marshall to Charles Coatworth Pinckney (Nov. 21, 1802), *in* 6 THE PAPERS OF JOHN MARSHALL 124, 125 (Charles F. Hobson et al. eds., 1990) (reflecting Marshall's mood about political climate).

105. Letter from John Marshall to Timothy Pickering (Feb. 28, 1811), *in* 7 THE PAPERS OF JOHN MARSHALL 270 (Charles F. Hobson et al. eds., 1993).

106. *See* George L. Haskins, *Law Versus Politics in the Early Years of the Marshall Court*, 130 U. PA. L. REV. 1, 19-20 (1981) (commenting on Virginia court's reluctance to take property of individual).

107. *See* Letter from John Marshall to Charles Coatworth Pinckney (Sept. 21, 1808), *in* 7 THE PAPERS OF JOHN MARSHALL, *supra* note 106, at 182, 182-83 (remarking on perilous times facing young Republic).

108. RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 179 (1971) (quoting THE REPERTORY (1805)).

complicated interests of an enterprising nation," said Dallas, "the positive acts of the legislature can provide little. . . ."[109] This was a long way from the 1776 revolutionary confidence in popular legislative law-making and represented a severe indictment of democracy.

In the late 1780s Madison had yearned for some enlightened and impartial men who somehow would transcend the interest-group politics that plagued the state legislatures and make disinterested decisions. Now in the early decades of the nineteenth century he, along with many other Americans, had concluded that judges were perhaps the only governmental officials that even came close to playing this role.[110]

Many had come to believe that a society as enterprising, unruly, and democratic as America's not only required institutions and legal processes that could adapt readily to fast-moving economic circumstances, but needed as well the moderating influence of an aristocracy.[111] Outside of the South, however, an American aristocracy was hard to come by; but necessity invented one. As Tocqueville later pointed out, lawyers in the early nineteenth century had come to constitute whatever aristocracy America possessed, at least in the North.[112] Through their influence on the judiciary they tempered America's turbulent majoritarian governments and protected the rights of individuals and minorities from legislative abuse. "The courts of justice," Tocqueville said, "are the visible organs by which the legal profession is enabled to control the democracy."[113]

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109. *Id.* (quoting Alexander J. Dallas); *see* Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, *in* 3 LAW & HIST. REV. 293, 323-26 (1985) (reviewing vested rights and legislative takings of private property).

110. For a discussion of Madison's view of the Court late in his life, see HOBSON, *supra* note 71, at 208-12.

111. *See* Newmyer, *supra* note 8, at 823-28 (discussing role of Harvard Law School in creating aristocratic class in New England).

112. *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 288 (Phillip Bradley ed., 1954) (describing lawyers as American aristocracy).

113. *Id.* at 289. Tocqueville has a remarkable analysis of the American judiciary that captures as well as any account the achievement of Marshall and his generation of jurists to American adjudication. He points out that American judges possessed an immense degree of political power, yet this power was subtle and hidden from view. *See id.* at 104. When an American judge makes a decision in his court, said Tocqueville, he shuns politics and avoids becoming the champion or antagonist of a party and thus prevents himself from confronting the legislators and their law directly. To do so "would have brought the hostile passions of the nation into the conflict." *Id.* at 106. Instead, the American judge censures the law indirectly. "When a judge contests a law in an obscure debate on some particular case, the importance of his attack is concealed from public notice; his decision bears upon the interest of an individual, and the law is slighted only incidentally." *Id.*