

# MARBURY AND THE RETREAT FROM JUDICIAL SUPREMACY

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## I. INTRODUCTION: EVER SINCE *MARBURY*

For many long years, conventional wisdom had it that *Marbury v. Madison* invented the modern practice of judicial review, by which we mean a practice of regularly submitting constitutional disputes to courts for final resolution in the context of ordinary litigation. Most lawyers and judges (and a surprising number of academics) apparently still hold this view—the Supreme Court itself being among the most persistent offenders in this regard. “No doubt the political branches have a role in interpreting and applying the Constitution,” Chief Justice Rehnquist recently wrote, “but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text.”<sup>1</sup> Rarely cited before the second half of the twentieth century, *Marbury* has become the keystone to the present Court’s jurisprudence, the main source of its claim to supremacy and sometimes exclusivity in the domain of constitutional law and interpretation.

Those who follow historical scholarship have a different view of the case: one in which *Marbury* confirmed an existing practice that might be called “judicial review” but that bears little resemblance to what passes for review today and that certainly recognized nothing like the modern doctrine of judicial supremacy.<sup>2</sup> Yet the relationship between *Marbury* and the

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1. *United States v. Morrison*, 529 U.S. 598, 616 (2000).

2. Chief credit for initiating the revisionist understanding of *Marbury* belongs to Sylvia Snowiss, who developed the argument in her book *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* (1990). Other scholars had previously argued that the mod-

modern practice nevertheless remains important. Revisionist scholars have, for the most part, assumed that an idea like judicial supremacy was not yet available when Marshall wrote, reasoning that it emerged only in subsequent decades.<sup>3</sup> *Marbury*, in this conception, reflected an immature state in the development of judicial power that was fleshed out and refined with experience. Though many of the scholars who make this sort of argument are not particular fans of the judiciary, their work has nevertheless contributed to a new mythology in which judicial supremacy is treated as the logical and inexorable endpoint of a beneficent progress.<sup>4</sup>

In fact, as I will argue below, the claim that judges had special authority for interpreting the Constitution and that judicial decisions were meant to be final and binding on everyone was fully developed by the middle of the 1790s. Politically controversial from the start, this position was decisively rejected by the American public in the elections of 1800 and 1802. Read in context, *Marbury* is best understood as a *retreat* from judicial supremacy—a self-conscious backing away from the claim that constitutional interpretation is a uniquely legal and judicial responsibility. The current Supreme Court's reliance on Marshall's opinion for this very claim could hardly be more ironic.

## II. POPULAR CONSTITUTIONALISM AND THE ORIGINS OF JUDICIAL REVIEW

The revisionist story of *Marbury* begins before the Constitution was adopted, before even Independence was declared, for colonial Americans brought with them from England a concept of constitutionalism that provided the crucial background conditions in which an idea of judicial review would develop. The

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ern practice of judicial review emerged later than *Marbury*, though none with the sophistication of Snowiss's account. See CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW* (rev. ed. 1994); J.M. SOSIN, *THE ARISTOCRACY OF THE LONG ROBE: THE ORIGINS OF JUDICIAL REVIEW IN AMERICA* (1989). I published my own version of this story in *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001), which is significantly reworked and elaborated in a forthcoming book, *THE PEOPLE THEMSELVES*, cited in the introductory note.

3. See *infra* notes 31-32 and accompanying text.

4. See, e.g., H. Jefferson Powell, *Enslaved to Judicial Supremacy?*, 106 HARV. L. REV. 1197, 1197 (1993) (“[f]or most of our history, most Americans have seen the Supreme Court as the ultimate interpreter of the Constitution on the states, the other branches of the federal government, and the people”); RONALD DWORKIN, *FREEDOM'S LAW* 34-35 (1996) (“interpretive authority is already distributed by history” which “shows that our judges have final interpretive authority”).

critical feature of this eighteenth-century British constitution was that it rested on the consent of the governed. In American eyes, this meant the constitution was superior to any action by the government, which had no authority unilaterally to alter or abrogate its terms. The British constitution was law made by the people to govern their governors. It was interpreted and enforced by the people themselves, speaking through the full array of eighteenth-century devices available to register the will of the community: elections, petitions, conventions, juries, mobs, and the like. There was no notion of judicial review because courts, like every other agency of government, were the constitution's targets: the regulated. Final responsibility for interpreting and enforcing constitutional law necessarily lay outside the government, in the community itself.

This system, which I and others have elsewhere named "popular constitutionalism," rested on social conditions and practices whose significance becomes evident only in hindsight. Chief among these was a distinction between law and politics that ordinary citizens as well as community leaders could recognize and understand and that both groups took seriously. In addition, the world of the eighteenth-century constitution was one in which intense constitutional conflict was rare—a product, among other things, of the narrowness of fundamental law and the limited role of government. What conflicts arose were kept in check by a "well born" elite to which ordinary citizens deferred. Deference was crucial not only in keeping popular action under control, but also in helping contemporaries distinguish legitimate extralegal opposition from an ordinary riot. Notwithstanding its popular basis, the British constitution was a fundamentally conservative institution, a means for ordinary people guided by their social betters to preserve customary ways of doing things and to counter abuses by the Crown.

The American Revolution arose out of a series of disagreements over the meaning and proper interpretation of this constitution. It was, in essence, a rebellion fought to preserve an existing understanding of constitutionalism, an understanding Americans did not suddenly decide to abandon or repudiate upon achieving independence. Written constitutions took their place within and alongside those portions of the existing constitution that had not necessarily been abrogated by the break with Great Britain, and substantive doctrines and arguments from before the Revolution continued to apply. More important for present purposes, everyone took for granted that responsibility for

constitutional interpretation and enforcement remained with the community.

All that notwithstanding, the Revolution inevitably produced changes that exerted pressure on existing practices of constitutional law, and from these emerged a first approximation of judicial review. Suddenly America's legislatures found themselves doing far more than before: a product not only of Britain's withdrawal, but also of war and of new demands for government action in a variety of domains. Together with the greater explicitness of written constitutions, this created many more opportunities for constitutional conflict than had formerly existed. Plus, the process of upholding the British constitution against the claims of Parliamentary sovereignty had deepened Americans' commitment to a constitution's basis in popular sovereignty—a reaction enhanced in turn by the experience of drafting new constitutions in the states. Infused with Revolutionary fervor, the American understanding of constitutionalism became less conservative and more reformist in nature, again increasing the likelihood of constitutional conflict.

The men who crafted America's new constitutions offered a variety of devices to handle the increased volume of constitutional law and disagreement. These included everything from provisions for formal amendment to councils of censors and councils of revision to periodic conventions of the people, executive vetoes, and more. A few people suggested a role for courts. Reasoning from within the still unchallenged premises of popular constitutionalism, they argued that because a constitution embodied the voice of the people, its obligations and limitations were binding on every branch of the government. A legislature that enacted a law inconsistent with constitutional commands was acting unlawfully; it might be the people's responsibility to mete out punishment, but a court that enforced this law was making itself an accomplice to the same illegal act. By instead refusing to enforce unconstitutional laws, judges could serve not only as the people's faithful agent but also as their proxy, supplying a peaceful remedy that might make popular action from the community unnecessary.

The argument, in other words, was that judges *no less* than anyone else should resist unconstitutional laws. This obligation did not arise from any special competence that judges possessed as judges, and it certainly was not based on the notion that a constitution was just so much law subject to judicial control. It was, rather, simply another instance of the right and responsibil-

ity of every citizen to oppose unconstitutional government action.

This embryonic version of judicial review played only a small role in the Constitutional Convention of 1787 and virtually none in the subsequent debate over ratification. The idea was novel and not widely publicized, and it had proved controversial and unreliable in the few cases in which it had been raised. The Framers did assign judges a role policing unconstitutional state laws—something acceptable to opponents of a strong federal government precisely because a judicial check was thought to be weak and tenuous—but they otherwise paid scant attention to judicial review. When it came to policing federal action, the Founders focused on more established, better known ways of preserving constitutional limits, such as a council of revision (which they rejected) and an array of now-familiar political checks including bicameralism, federalism, and an executive veto.

None of this is surprising once we recognize that the movement to adopt a new Federal Constitution was not a rejection of popular constitutionalism. On the contrary, the Framers and Founders took popular constitutionalism for granted and were no more likely to question it than we today would be to question our own commitment to a very different notion of democracy. Even this formulation is misleading if it implies that something was up for grabs, for the principles of popular constitutionalism were so widely shared among the Revolutionary generation as to be largely invisible. They were background assumptions, a shared baseline from which reformers developed their ideas for reform.

The new Constitution was thus an effort made from *within* a system of popular constitutionalism to respond to lessons learned since the Revolution. In securing a stable central government, Federalist leaders hoped also to counter some of this system's excesses and to restore its balance, at least at the federal level.<sup>5</sup> Federalists perceived this balance as having been upset in the states by the erosion of deference and the rise of a new class of less worthy leaders.<sup>6</sup> It could be restored, Federalists hoped, by two features of the new government. First, the sheer

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5. See Larry Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 674-75 (1999).

6. See Gordon S. Wood, *Interests and Disinterestedness in the Making of the Constitution*, in BEYOND CONFEDERATION 69 (Richard Beeman, Stephen Botein & Edward C. Carter, III, eds. 1987).

size of federal electoral districts would help to ensure that only men of proper character and virtue were elected, thus removing a major source of friction and reducing the frequency with which questionable laws were enacted.<sup>7</sup> Second, separation of powers within the government would make it possible to settle whatever constitutional disputes might still arise by accommodation among the branches, making direct resort to the people unnecessary except on rare occasions.<sup>8</sup>

This last point is important and should be emphasized. No one in 1789 questioned that, as Madison said in *Federalist 49*, “the people themselves . . . as the grantors of the [Constitution’s] commission, can alone declare its true meaning and enforce its observance.”<sup>9</sup> What *Federalist* leaders sought were ways to minimize the frequency with which this grantor would need to be called upon—much as we today try to minimize the frequency of litigation by creating opportunities for parties to settle their disputes out of court. But everyone knew where legitimate authority lay if a dispute could not be settled this way: it remained, as always, with “the people themselves.”

### III. ACCEPTING JUDICIAL REVIEW

The 1790s were difficult years for the young Republic. The *Federalists* who spearheaded the drive for a new Constitution had not misdiagnosed the problem, but they had mistaken the cure. Deference was indeed eroding as common people demanded to control what their government did, but this was not something that could be stopped by making the government more distant and elite. Indeed, it was not something that could be stopped at all. Terrible strains emerged as Americans divided over contentious issues of finance and foreign policy, and political leaders on different sides of the issues found themselves forced to reach out to the community for support.<sup>10</sup> Former Fed-

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7. *Id.*; JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 214-27 (1996); JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 46-66 (1990). I have argued elsewhere that this was the only aspect of Madison’s famous theory of the extended republic that his fellow Framers and Founders seem to have comprehended. See Kramer, *supra* note 5, *passim* & esp. 658.

8. The classic cite here is Madison’s line of essays in *THE FEDERALIST NOS. 49-51*, though this general point about separation of powers was ubiquitous in the debates surrounding the new Constitution.

9. *THE FEDERALIST NO. 49*, at 339 (Jacob E. Cooke ed., 1961).

10. See Michael Wallace, *Changing Concepts of Party in the United States: New York, 1815-1828*, 74 *AM. HIST. REV.* 453, 455 & n.5 (1968) (citing authorities).

eralists and Anti-Federalists reshuffled their alliances as the first political parties formed.

Yet disagreements about Hamilton's bank or the French Revolution were themselves byproducts of a more fundamental disagreement about the proper role of ordinary citizens in day-to-day governance. Under the leadership of Jefferson and Madison, Republicans championed an expansive ideal of popular authority, insisting on the people's right to control their representatives at all times and on all issues. Hamilton's Federalists, in contrast, became progressively more conservative and anti-populist, defending a philosophy that acknowledged the political power of ordinary citizens on election days but called upon them between elections to defer passively and unquestioningly to "constituted authorities."<sup>11</sup> This was, in a sense, a logical extension of the Federalist ideology of the 1780s, but the anti-democratic strands in Federalist thinking became much more pronounced in the 1790s—a product not only of unexpectedly fierce political opposition at home but also of fear from watching events unfold in France.

Judicial review was a sideshow in this larger struggle. Indeed, the main development of the 1790s respecting judicial authority over the Constitution consisted of widespread acceptance of the limited argument for review developed in the 1780s. Hence, rather than claim authority on the ground that constitutional interpretation is a uniquely judicial task, courts emphasized that unconstitutional laws were void and insisted that courts were no less obligated than the other branches to attend to this fact. As expressed by the Virginia court in the well-known case of *Kamper v. Hawkins*, the constitution applied to the judiciary "as well as" to the other branches, and judges could not permit themselves to be made "fit agents" in abetting legislative illegality but should instead uphold constitutional values "on behalf of the people"—though only if the legislative violation was "plain and clear."<sup>12</sup>

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11. James P. Martin, *When Repression is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798*, 66 U. CHI. L. REV. 117, 130-76 (1999).

12. *Kamper v. Hawkins*, 3 Va. (1 Va. Cases) 20, 39, 61, 65-66, 78-79 (1793) (opinions of St. George Tucker, Spencer Roane, John Tyler). *Kamper* was the most well known and influential decision on judicial review prior to *Marbury*—partly because it came from the respected Virginia court, and partly because it was published in pamphlet form and was thus more accessible than other opinions in an age before official reports were common. See CHARLES GROVE HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 104 (1914); Margaret V. Nelson, *The Cases of the Judges: Fact or Fiction?*,

## A. DEPARTMENTALISM

The emergence of judicial review, even in this limited and restrained form, still needed to be fit into a theory of the Constitution. This was accomplished by a “departmental” approach to separation of powers, which recognized that all three branches might have a say, though always subject to popular oversight expressed primarily but not exclusively in elections. Madison himself was among the earliest and strongest proponents of this approach. During the 1789 debate over the President’s removal power, Madison conceded the basic argument for judicial review. “I acknowledge, in the ordinary course of government, that the exposition of the laws and constitution devolves upon the judicial,” he said. It did not follow, however, that judicial decisions should therefore acquire any special stature or status:

But, I beg to know, upon what principle it can be contended that any one department draws from the constitution greater powers than another, in marking out the limits of the powers of the several departments. The constitution is the charter of the people to the government; it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the constitutional boundary of either be brought into question, I do not see that any one of these independent departments has more right than another to declare their sentiments on that point.<sup>13</sup>

Thomas Jefferson, who embraced this theory throughout his political life,<sup>14</sup> expressed the idea succinctly: “[E]ach of the three

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31 VA. L. REV. 243, 251 (1945).

13. Speech by James Madison to the House of Representatives on the Removal Power of the President (June 17, 1789), in 12 *THE PAPERS OF JAMES MADISON* 232, 238 (Robert A. Rutledge et al. eds, 1979). See also James Madison, “Helvidius” Number 2 (August 31, 1793), in 15 *PAPERS OF MADISON*, *supra*, at 80, 83 (“It may happen also that different independent departments, the legislative and executive, for example, may in the exercise of their functions, interpret the constitution differently, and thence lay claim each to the same power. This difference of opinion is an inconvenience not entirely to be avoided. It results from what may be called, if it be thought fit, a *concurrent* right to expound the constitution.”).

14. See DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 257-94 (1994). As Mayer observes, Jefferson’s emphasis shifted over time—from an early confidence in the reliability of courts to a late-life belief that federal judges were an irresponsible “corps of sappers and miners” working to undermine the Constitution’s careful balancing act. Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), in 10 *THE WRITINGS OF THOMAS JEFFERSON* 169-70 (Paul Leicester Ford ed., 1898). But these were changes in tone that occurred within the same departmentalist framework, a framework Jefferson restated on numerous occasions over the course of three decades. See Letter from Thomas Jefferson to Mrs. Adams (Sept. 11, 1804), in 4 *MEMOIRS, CORRESPONDENCE AND MISCELLANIES FROM THE PAPERS OF THOMAS*



departments has equally the right to decide for itself what is its duty under the constitution, without regard to what the others may have decided for themselves under a similar question."<sup>15</sup>

Kentucky Senator John Breckinridge described how this departmental theory would work in practice. "Although . . . the courts may take upon them to give decisions which impeach the constitutionality of a law, and thereby, for a time, obstruct its operations," he explained:

[Y]et I contend that such a law is not the less obligatory because the organ through which it is to be executed has refused its aid. A pertinacious adherence of both departments to their opinions, would soon bring the question to issue, in whom the sovereign power of legislation resided, and whose construction of the law-making power should prevail.<sup>16</sup>

By "bring the question to issue," Breckinridge meant that "pertinacious adherence" by different branches to conflicting views would force the public to decide. Ideally, this would seldom be necessary and disputes would be settled (as most disputes were) by the branches themselves, without a need for popular intervention. But if a dispute could not be settled and needed authoritative resolution, politics was the proper forum and the people were the proper agent.

### B. *MARBURY V. MADISON*

John Marshall's opinion in *Marbury* was not merely consistent with this departmental approach, but explicit in embracing its underlying theory of judicial review. Like other writers of the period, Marshall began with the principle that the Constitution is "a superior, paramount law," and that, therefore, "an act of the

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JEFFERSON 26, 27 (Thomas Jefferson Randolph ed., 1829); Letter from Thomas Jefferson to George Hay (June 2, 1807), *in id.* at 75, 75; Letter from Thomas Jefferson to W.H. Torrance (June 11, 1815), *in* 9 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 516, 517-18; Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), *in* 10 *id.* at 140, 141-42; Letter from Thomas Jefferson to William Jarvis Short (Sept. 28, 1820), *in id.* at 160, 160-61.

15. Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), *in* 10 THE WRITINGS OF JEFFERSON, *supra* note 14, at 140, 142. Jefferson recognized that certain questions were, by their very nature, not subject to come before all the branches and that, with respect to such questions, one branch or another might be able to act "ultimately and without appeal" (except to the people). See Letter from Thomas Jefferson to William Torrance (June 11, 1815), *in* 9 THE WRITINGS OF JEFFERSON, *supra* note 14, at 517-18. The departmental theory applied to all those questions subject to concurrent jurisdiction, and as to these Jefferson felt no compunction leaving things that way and made no effort to assign every question to one authority for final resolution.

16. Speech by John Breckinridge, *in* 11 ANNALS OF CONG. 179-80 (1802).

legislature, repugnant to the constitution, is void.”<sup>17</sup> He then asked, again like other writers, “does [such a law], notwithstanding its invalidity, bind the courts, and oblige them to give it effect?”<sup>18</sup> Though this would seem, “at first view, an absurdity too gross to be insisted on,”<sup>19</sup> Marshall proposed nevertheless to say more and explain why. Then, the famous line: “It is emphatically the province and duty of the judicial department to say what the law is.”<sup>20</sup>

Read in context, this sentence did not say what, to modern eyes, it seems to say when read in isolation. That is, it did not say “it is the job of courts, alone, to say what the Constitution means.” Nor did it say, “it is the job of courts, more so than others, to say what the Constitution means.” What it said was “courts, too, can say what the Constitution means.” Marshall thus immediately followed his celebrated sentence with the same explanation as that previously offered by Republican judges St. George Tucker and Spencer Roane in *Kemper v. Hawkins*. A constitution, Tucker had observed a decade earlier is a rule “to all the departments of the government.” The legislature and executive were obliged to consider it in discharging their responsibilities for making and executing laws. But how, Tucker asked, could judges discharge *their* duty, which was to expound the law, “if that which is the supreme law of the land be withheld from their view?”<sup>21</sup> Roane had agreed with Tucker that it was illogical to say that judges must blind themselves to constitutional considerations. “In expounding laws,” he observed,

the judiciary considers *every* law which relates to the subject: would you have them to shut their eyes against that law which is of the highest authority of any, or against a part of that law, which either by its words or by its spirit, denies to any but the people the power to change it?<sup>22</sup>

Now listen to Marshall, who virtually plagiarized their opinions in *Marbury*:

Those who apply the rule to particular cases, must of necessity expound and interpret that rule. . . . Those then who controvert the principle that the constitution is to be considered, in

17. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (quotes at p. 177).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Kemper*, 3 Va. (1 Va. Cases) at 78-79.

22. *Id.* at 38-39.

court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.<sup>23</sup>

Marshall added a textual argument. Federal judicial power extends to cases “arising under” the Constitution.<sup>24</sup> “Could it be,” he asked incredulously, “[t]hat a case arising under the constitution should be decided without examining the instrument under which it arises?”<sup>25</sup> To anyone still unpersuaded of the “extravagan[ce]” of such a supposition, Marshall offered a list of blatantly unconstitutional laws that would have to be enforced by courts if judges were directed to ignore questions of constitutionality.<sup>26</sup> “From these, and many other selections which might be made,” he concluded, “it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, *as well as of the legislature.*”<sup>27</sup> Marshall reiterated this insistence that courts were not less responsible for the Constitution than the other branches and had concurrent constitutional authority in his closing: a law repugnant to the Constitution is void, and “courts, *as well as other departments*, are bound by that instrument.”<sup>28</sup>

There may be respects in which Marshall’s reasoning in *Marbury* was unique,<sup>29</sup> but they are small and unimportant and what truly stands out in the opinion is its lack of originality. Marshall himself acknowledged as much, for he was being neither ironic nor misleading when he introduced the question of judicial review by observing that it was “not of an intricacy proportioned to its interest” and could be decided by “certain principles, supposed to have been long and well established.”<sup>30</sup> *Marbury* broke no new ground in the theory of judicial review. It simply reiterated the modest idea developed in the 1780s and established in the 1790s: the judiciary was no less obligated than the other branches of government to take the Constitution into account, no less obligated to do its best to understand and follow the people’s commands—always subject, however, like these

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23. 5 U.S. (1 Cranch) at 177-178.

24. U.S. CONST. art. III, § 2.

25. 5 U.S. (1 Cranch) at 179.

26. *Id.*

27. *Id.* at 179-80 (emphasis added).

28. *Id.* at 180 (emphasis added).

29. See SNOWISS, *supra* note 2, at 125, 139.

30. 5 U.S. (1 Cranch) at 176.

other branches, to oversight from the body with ultimate interpretive authority, “the people themselves.”

### III. REJECTING JUDICIAL SUPREMACY

A puzzle remains. If not in *Marbury*, when did Americans begin to argue that constitutional disputes should ordinarily be resolved in litigation and that judicial decisions should be deemed to settle these disputes once and for all? According to some scholars, such ideas were not conceived until decades after *Marbury*, becoming respectable only in the 1820s or 1830s.<sup>31</sup> Others say the modern doctrine emerged later still, only after Reconstruction, in the 1870s and 1880s.<sup>32</sup> In fact, the argument for judicial supremacy was fully developed by the mid-1790s, and understanding how and why it emerged—as well as how and why it was rejected—sheds additional light on *Marbury* and lends further support to the revisionist reading of the case.

#### A. FEDERALISM IN THE 1790S

We like our Founding Fathers to be steady and heroic. We like to picture them having fully developed their theory of government by the time they wrote the Constitution, and we like to read what they said in ways that still seem attractive today. We also like to believe that our heroes did not change their minds simply because the Constitution was ratified and had to be put into effect.

Of course, none of these things is true. The Founding Fathers were still formulating their ideas about government when the opportunity to write a new Constitution presented itself. And not only were their partly-formed ideas distinctly unlike our ideas today, but the experience of actually governing continued to shape the Founders’ thinking in ways that made these ideas unlike what they had been just a few years earlier. In the case of the Federalists, or those former Anti-Federalists who became Federalists, this meant a shift from moderate anxiety about the risks of republican politics to an extreme conservatism that swung sharply back toward the monarchical social order the Revolution had purported to abandon.

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31. See SNOWISS, *supra* note 2; G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835*, at 594 (1988).

32. See MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 19 (1992); WOLFE, *supra* note 2, at 4; ROBERT LOWRY CLINTON, *MARBUY V. MADISON AND JUDICIAL REVIEW* x (1989).

Federalism was from the first a rejection of the unruly style of popular politics that Revolutionary leaders had practiced against England in the 1760s. It was an effort to preserve the tradition of deference that, in the eyes of the elite, was essential to keep republican politics from spinning out of control.<sup>33</sup> Somewhat muted in the 1780s, this mild conservatism became increasingly pronounced as time passed. Federalists never wanted to anoint a King or create a hereditary aristocracy, as Republicans sometimes charged. But the "democracy" they believed in was, as Gordon Wood has put it, "a patrician-led classical democracy in which 'virtue exemplified in government will diffuse its salutary influence through[out] the society.'"<sup>34</sup> Federalists witnessed the effects of the Revolution, observed their leadership being challenged by farmers, mechanics, and shopkeepers, and did not like what they saw.

In the Federalist world view, particularly as it emerged after ratification, ordinary citizens had no business trying to influence the direction of government outside of election day.<sup>35</sup> Individuals might offer a "decent manly statement of opinion,"<sup>36</sup> but free speech did not go so far as to include the right to publish something whose "professed design is the superintendence of [the] government" or whose "evident tendency, by obtaining an influence, is to lessen the power of officers of government, and to lead, or rather to drive, the legislature, where ever they please."<sup>37</sup> Such speech must be stopped, Samuel Kendal warned, lest it "prove destructive to 'liberty with order.'"<sup>38</sup> Oliver Wolcott went so far as to say it was "unlawful" for any group or organization to assemble "for the avowed purpose of a general influence and control upon the measures of government."<sup>39</sup>

Federalists recognized that they needed permission to rule, permission that had to be sought in free republican elections. But once this permission had been granted, ordinary citizens

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33. See DAVID HACKETT FISCHER, *THE REVOLUTION OF AMERICAN CONSERVATISM* 2-17 (1965); David Waldstreicher, *Federalism, the Styles of Politics, and the Politics of Style*, in *FEDERALISTS RECONSIDERED* 99, 109-111 (Doron Ben Atar & Barbara B. Oberg eds. 1998); Wood, *supra* note 6, at 69.

34. *Id.* at 83; Martin, *supra* note 11, at 130-76; Michael Les Benedict, *The Jeffersonian Republicans and Civil Liberty*, in *ESSAYS IN THE HISTORY OF LIBERTY* 23 (1988).

35. Martin, *supra* note 11, at 160-66.

36. SAMUEL KENDAL, *A SERMON DELIVERED ON THE DAY OF NATIONAL THANKSGIVING* 30 (Samuel Hall 1795).

37. *To the Vigil*, *GAZETTE OF THE UNITED STATES* 2 (Dec. 6, 1794).

38. KENDAL, *supra* note 36, at 30.

39. *Quoted in* 1 *MEMOIRS OF THE ADMINISTRATIONS OF WASHINGTON AND JOHN ADAMS* 178, 179 (George Gibbs ed., 1846) (Oliver Wolcott, March 26, 1795).

were supposed to lose their political agency. “[T]he *sovereignty of the people* is delegated to those whom they have *freely appointed* to administer [the] constitution, and by them alone can be rightly exercised, save at the stated period of election, when the sovereignty is again at the disposal of the *whole people*.”<sup>40</sup> Between elections, the people needed only to listen and to obey. Unity, “respectability,” order, and, above all, reverence for “constituted authorities” were the hallmarks Federalists looked for in a well-functioning political system.<sup>41</sup>

Particularly after 1793, as news spread of the Terror in France, this anxiety to contain popular politics veered toward hysteria. Federalists became obsessed with the need to make citizens show “respect” and “deference” and “obedience” to constituted authorities. Nathaniel Emmons preached a sermon in 1799 whose talk about what “subjects” owe their “rulers” makes Republican suspicions about the Federalists’ monarchical aims appear almost reasonable:

The duty of submission naturally results from the relations, which subjects bear to their rulers. There would be no propriety in calling the body of the people subjects, unless they were under obligation to obey those in the administration of government. Every people, either directly or indirectly promise submission to their rulers. Those, who choose their civil magistrates, do voluntarily pledge their obedience, whether they take the oath of allegiance or not. By putting power into the hands of their rulers, they put it out of their own; by choosing and authorizing them to govern, they practically declare, that they are willing to be governed; and by declaring their willingness to be governed, they equally declare their intention and readiness to obey.<sup>42</sup>

## B. RETHINKING THE ROLE OF THE JUDICIARY

With such a philosophy, in a world where ordinary citizens were increasingly vehement (and successful) in demanding to control their government, is it any wonder that Federalists began casting about for new ways to blunt popular participation?

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40. *Order*, COLUMBIAN CENTINEL 1 (Sept. 3, 1794).

41. Waldstreicher, *supra* note 33, at 101, 109; Martin, *supra* note 11, at 143-52; Benedict, *supra* note 34, at 26-29.

42. Nathaniel Emmons, *A Discourse Delivered on the National Fast (1799)*, in 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1023, 1027 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

Within just a few years, they found themselves championing a novel and radically different role for courts.

Though many examples could be cited to illustrate the change in Federalist thinking, James Kent's 1794 introductory law lectures are typical. Unlike earlier writers on judicial review, Kent (at the time a 31-year old novice law professor) placed great emphasis on the need for "the firmness and moderation of the Judicial department" to protect "the equal rights of a minor faction" from "the passions of a fierce and vindictive majority."<sup>43</sup> This fear of majority tyranny had always been a critical element of the Federalists' philosophy, but it had not previously been emphasized in connection with judicial review. Some earlier writers had referred in passing to problems of faction while discussing the courts' role in enforcing the Constitution, but their references were brief because earlier backers of judicial review were thinking mostly about legislative mistakes or efforts by legislators to aggrandize their own power at the people's expense.<sup>44</sup> That this should have been so is unsurprising given judicial review's original basis in eighteenth-century forms of popular constitutionalism and resistance.

Kent, in contrast, made majority tyranny the heart of his argument for judicial review; and unlike prior writers, he offered it as the best and most important reason to prefer judges to legislators when it came to interpreting the Constitution. More even than this, Kent turned the fear of faction into an argument also against relying on "the force of public opinion":

[S]ad experience has sufficiently taught mankind, that opinion is not an infallible standard of safety. When powerful rivalries prevail in the Community, and Parties become highly disciplined and hostile, every measure of the major part of the Legislature is sure to receive the sanction of that Party among their Constituents to which they belong. Every Step of the minor Party, it is equally certain will be approved by their immediate adherents, as well as indiscriminately misrepresented or condemned by the prevailing voice.<sup>45</sup>

This was different from, and more radical than, what courts and judges had been saying. Judicial review in Kent's hands was

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43. James Kent, *An Introductory Lecture to a Court of Law Lectures*, in *id.* at 941.

44. The only previous writer to make anything of the point was Alexander Hamilton in *Federalist* 78, though even he offered it as a secondary justification, after protecting the people from "legislative encroachments." THE FEDERALIST NO. 78, *supra* note 9, at 527-28.

45. Kent, *supra* note 43, at 942.

not a substitute for popular resistance that would be difficult to organize, nor was it a peaceful means of rendering such resistance unnecessary. It was a check on the whims and caprice of an easily led mob.

The polemical drift in Federalist thinking reflected in Kent's argument—a shift from seeing judicial review mainly as a device to protect the people from their governors, to viewing it first and foremost as a means of guarding the Constitution from the people—might have been just a matter of time given the Federalists' general predilections and prejudices. A need for judicial review to serve as a check on faction, seen only hazily at first, could eventually have come into sharper focus no matter what. But political developments in the 1790s intervened to give this line of reasoning a powerful boost, generating (or perhaps merely accelerating) a heightened appreciation among Federalists of the potential usefulness of courts in securing constitutional limits from the threat posed by a partisan majority. As the Federalists' naive expectation peaceably to govern a quiescent population collapsed amidst growing partisan acrimony, an enhanced role for courts protecting the Constitution from faction must have seemed obvious, almost natural—as if the federal judiciary had been deliberately constructed with precisely this purpose in mind. Courts, Kent concluded, because they are “organized with peculiar advantages to exempt them from the baneful influence of Faction,” were “the most proper power in the Government to . . . maintain the Authority of the Constitution.”<sup>46</sup>

This was so, Kent continued, for a second reason as well: separation of powers. The three departments of government, he observed, are kept “as far as possible separate and distinct” in order to prevent the introduction of “Tyranny into the Administration.” It followed that interpretive authority should be vested exclusively in courts of law:

[T]he interpretation or construction of the Constitution is as much a JUDICIAL act, and requires the exercise of the same LEGAL DISCRETION, as the interpretation or construction of a Law. The Courts are indeed bound to regard the Constitution [as] what it truly is, a Law of the highest nature, to which every inferior derivative regulation must conform.<sup>47</sup>

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46. *Id.* at 942.

47. *Id.* at 942-43.



Here was another newfound claim: a constitution is just so much ordinary law. And because constitutional interpretation is an ordinary judicial and legal act, it is not an act to be performed by legislative or executive officials. Judges, Kent repeated, are “the proper and intended Guardians of our limited Constitutions.”<sup>48</sup>

By the late 1790s, ideas such as these were no longer being expressed only by pamphleteers and politicians, some Federalist judges had begun voicing the new theory from the bench. Presiding over the seditious libel prosecution of Matthew Lyon, Justice William Paterson instructed the jury that it could not pass on the constitutionality of the Sedition Act. Jurors must treat the law as valid, Paterson insisted, unless and until it was “declared null and void by a tribunal competent for the purpose.”<sup>49</sup> Samuel Chase preached an even stronger line in charging a Pennsylvania Grand Jury. “The Judicial Power,” he said, “are the only *proper* and *competent* authority to decide whether any Law made by Congress; or any of the State Legislatures is contrary to or in Violation of the *federal* Constitution.”<sup>50</sup> Chase, too, was as good as his word when presiding at trial—lecturing John Fries that questions of constitutionality were the sole province of the judiciary as he sentenced him to death for leading a mob protest against federal taxes,<sup>51</sup> and refusing to permit Thomas Callendar’s defense attorney to argue to the jury the unconstitutionality of the Sedition Act.<sup>52</sup>

Republicans were horrified. They were willing to acknowledge that courts should take notice of the Constitution, but only within the terms of their departmental theory. Judicial interpretations, on this view, had no more intrinsic weight than those of Congress or the executive, and all were subordinate to the “will of the community,” which retained final interpretive authority. To say this authority was vested in life-tenured judges was to

48. *Id.* at 944.

49. FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 336 (1849).

50. Samuel Chase’s Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania (April 12, 1800), in 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1780-1800, at 408, 412 (Maeva Marcus ed., 1990) [hereinafter cited as DHSC].

51. See WHARTON, *supra* note 49, at 637-38; STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 696-99 (1993).

52. See 3 DHSC, *supra* note 50, at 405; JAMES HAW, STORMY PATRIOT: THE LIFE OF SAMUEL CHASE 203-06 (1980).

contradict and repudiate the republican nature of American government.

This split in views was nowhere more apparent than in the controversy over the Alien and Sedition Acts. The Republican-controlled legislatures of Virginia and Kentucky sought to rouse opposition to the acts by promulgating resolutions calling upon the states jointly to urge federal lawmakers to repeal the offending laws. Federalist-dominated legislatures in ten of the fourteen other states opposed their efforts, with several insisting that “state legislatures are not the proper tribunals to determine the constitutionality of the laws of the general government” because “the duty of such decision is properly and exclusively confided to the judicial department.”<sup>53</sup> James Madison offered the Republican reply to these claims of judicial supremacy in his famous Report of 1800 for the legislature of Virginia, which denied “that the judicial authority is to be regarded as the sole expositor of the constitution” and reasserted the theory of departmentalism and the principle of popular constitutionalism.<sup>54</sup> “The authority of constitutions over governments, and of the sovereignty of the people over constitutions,” Madison urged, “are truths which are at all times necessary to be kept in mind.”

With lines thus clearly drawn between a Republican Constitution and a Federalist one, the two parties squared off in the election of 1800. This pivotal contest exhibited something rarely seen in national elections in the United States: a choice between well-defined alternatives, both clear and clearly understood. Like the question of a national bank in 1832 or the New Deal in 1936, Republicans and Federalists in 1800 offered the public sharply drawn, alternative visions of the Constitution. And the Federalists were decisively, indeed, overwhelmingly, repudiated.<sup>55</sup> The American public, or at least that portion of it permitted to vote, opted for Republican principles and the Republican understanding of constitutionalism. So complete was the rout

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53. Answers of the Several State Legislatures, in 4 JONATHON ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS AND THE ADOPTION OF THE FEDERAL CONSTITUTION 538, 539 (1888 ed.) (New Hampshire); see also *id.* at 533 (Rhode Island), 539 (Vermont).

54. Report on the Alien and Sedition Acts (Jan. 7, 1800), in JAMES MADISON: WRITINGS 608, 613 (Jack N. Rakove ed., 1999).

55. Because of peculiarities in the way electors were chosen, the best measure of how sweeping a victory Jefferson's party had won is found in elections to the House of Representatives. Going into the election, Federalists held 63 seats to the Republicans' 43. The vote in 1800 more than reversed these numbers, leaving the Republicans with a 65-41 edge and a clear mandate to change the government's direction. See MANNING J. DAUER, THE ADAMS FEDERALISTS 273, 274 tbls. 21 & 22 (1953).

that Jefferson's party would dominate American politics for the next generation.

### C. THE REPEAL DEBATE AND THE DEATH OF FEDERALISM

Federalists made one last stab at selling their vision of the judicial power to the American people, during the fight over repeal of the Judiciary Act of 1801. This closely watched contest reprised and elaborated the arguments made in the late 1790s. Both sides detailed their views in greater depth than before, exposing how far apart their respective positions had become. It was, as it turned out, the last gasp of what we might call the first Federalism movement, at least as an intellectual force.<sup>56</sup>

Treating repeal as a thinly disguised effort to destroy judicial independence, Federalist speakers urged the necessity of an effective judicial check on Congress and on politics generally. Predictably, their first concern was for preserving order. Judicial supremacy was imperative, they said, because the alternative was violence and bloodshed. "What security is there to an individual, if the Legislature of the Union or any particular State, should pass [an unconstitutional] law?" asked Uriah Tracy in the Senate. "None in the world but by an appeal to the Judiciary of the United States, where he will obtain a decision that the law itself is unconstitutional and void, or by a resort to revolutionary principles, and exciting a civil war."<sup>57</sup> Roger Griswold made the same argument while avoiding histrionics. Everyone on both sides conceded that some kind of check on Congress was needed, he observed, and "[i]f this power of checking the unconstitutional acts of the Legislature is necessary, where can it reside with so much propriety as in your courts?"<sup>58</sup>

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56. On the disillusionment of these first generation Federalists after 1800, see LINDA K. KERBER, *FEDERALISTS IN DISSENT: IMAGERY AND IDEOLOGY IN JEFFERSONIAN AMERICA* (1970). David Hackett Fisher and, more recently, Marshall Foletta have, in different ways, described the efforts of next generation Federalists to reinvent themselves—Fisher in politics, where they had little success, and Foletta in intellectual pursuits, where their impact was somewhat greater. FISCHER, *supra* note 33; MARSHALL FOLETTA, *COMING TO TERMS WITH DEMOCRACY: FEDERALIST INTELLECTUALS AND THE SHAPING OF AN AMERICAN CULTURE* (2001). Daniel Hulsebosch depicts the later Federalists' quite substantial success in changing the legal profession and practice of law. See DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF FEDERALISM IN THE ATLANTIC WORLD* chs. 7-8 (forthcoming 2004) (manuscript on file with author).

57. Speech by Uriah Tracy, 11 *ANNALS OF CONG.*, *supra* note 16, at 56.

58. Speech by Roger Griswold, *in id.* at 783.

With the people themselves, answered Republicans—a reply that seemed to infuriate Federalists. “Not so, sir, is the case with us,” John Rutledge, Jr., snarled:

[W]e do not wish to guard the Constitution by appeals to the people; we will do nothing calculated to produce insurrection; we do not want to protect the great charter of our rights by the bayonet. No, sir, we rely on honest and legitimate means of defence; we wish to check these gentlemen only with Constitutional checks.<sup>59</sup>

And “Constitutional checks,” Rutledge and numerous other Federalists made clear, meant primarily, and ultimately, the judiciary.

Gouverneur Morris offered the most strongly worded defense of judicial supremacy. A number of Republicans suggested that judicial review lacked any constitutional basis. “If it is derived from the Constitution,” said John Breckinridge, “I ask gentlemen to point out the clause which grants it. I can find no such grant.”<sup>60</sup> Most Federalists responded by citing precedent or by pointing to the Supremacy Clause or to the clause that grants jurisdiction over cases “arising under” the Constitution.<sup>61</sup> But Morris was too exasperated by this point to worry about technicalities:

And he asks where judges got their pretended power of deciding on the constitutionality of laws? If it be in the Constitution (says he) let it be pointed out. I answer, they derived that power from authority higher than this Constitution. They derive it from the constitution of man, from the nature of things, from the necessary progress of human affairs. When you have enacted a law, when process thereon has been issued, and suit brought, it becomes eventually necessary that the judges decide on the case before them, and declare what the law is. They must, of course, determine whether that which is produced and relied on, has indeed the binding force of law. The decision of the Supreme Court is, and, of necessity, must be final. This, Sir, is the principle, and the source of the right for which we contend.<sup>62</sup>

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59. Speech by John Rutledge, Jr., *in id.* at 743.

60. Speech of John Breckinridge, *in id.* at 179.

61. See, e.g., Speech by Calvin Goddard, *in id.* at 727; Speech by Roger Griswold, *in id.* at 783; Speech by Samuel Dana, *in id.* at 920-26.

62. Speech of Gouverneur Morris, *in id.* at 180.

Of course, most Federalists—including Morris in his calmer moments—defended judicial review without invoking “the constitution of man,” by repeating the same argument that had been made since the 1780s: courts had a duty to “pronounce on the validity of acts of Congress” because the Constitution is “paramount, and limits as well the power of the Legislature as the power of the court.”<sup>63</sup>

What Federalists now added to this familiar argument, reflecting concerns like those that had motivated James Kent, was an insistence that “the Judiciary decide at last, and their decision [be] final,”<sup>64</sup> together with an emphasis on faction and majority tyranny by way of justification. “Legislatures will, in violent times, enact laws manifestly unjust, oppressive, and unconstitutional,” explained Calvin Goddard, “and that, too, under the specious pretext of relieving the burdens of the people. Such laws, it is the business of the judges, elevated above the influence of party, to control.”<sup>65</sup>

For just this reason, Federalists argued, in 1788 the people of America “had vested in the judges a check . . . a check of the first necessity, to prevent an invasion of the Constitution by unconstitutional laws—a check which might prevent any faction from intimidating or annihilating the tribunals themselves.”<sup>66</sup> John Rutledge, Jr., said much the same, insisting that the federal judiciary had been specifically and self-consciously “designed” to control what the legislature and executive might do to the Constitution.<sup>67</sup> This was pure revisionism, of course; in fact, very little attention or emphasis had been given to judicial review when the Constitution was written and ratified. But things looked different now. Speaking for his party, Rutledge waxed poetic in limning the new Federalist consensus on the centrality of courts in the scheme of the Constitution:

We say it is the sheet-anchor which will enable us to ride out the tornado and the tempest, and that if we part from it there is no safety left; that it is the only thing which can preserve us from the perilous lee-shore, the rocks and the quicksands, where all other Republics have perished. The Judiciary is the

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63. Speech of Samuel Dana, *in id.* at 920; speech of Roger Griswold, *in id.* at 783; *see also, e.g.*, speech of Joseph Hemphill, *in id.* at 542; speech of Calvin Goddard, *in id.* at 727-28.

64. Speech of Joseph Hemphill, *in id.* at 543.

65. Speech of Calvin Goddard, *in id.* at 728.

66. Speech by Gouverneur Morris, *in id.* at 38.

67. Speech by John Rutledge, Jr., *in id.* at 743.

ballast of the national ship; throw it overboard and she must upset.<sup>68</sup>

Republicans answered these arguments, of course, laying out their own, alternative vision of popular constitutionalism and departmentalism. But the issue was never seriously in doubt. Jefferson's party was firmly in control, and repeal of the Judiciary Act was actually quite popular.<sup>69</sup> The vote was close in the Senate, reflecting electoral lag due to its staggered terms rather than real political strength.<sup>70</sup> More indicative of public sentiment was the vote in the House, where the measure carried by almost 2-1.<sup>71</sup> More indicative still was the public's total indifference to Federalist efforts to arouse indignation over repeal or to make it an issue in the 1802 midterm elections. Rather than being discredited, Republicans gained ground everywhere in the country except for a single district in Delaware.<sup>72</sup>

#### IV. REAPPRAISING *MARBURY*

Understanding this background helps us to resolve several questions about *Marbury* that have long puzzled commentators.

##### A. THE DECISION TO ADDRESS JUDICIAL REVIEW

It helps us understand, first, why the Court stretched as hard as it did to address the matter of judicial review. Everyone who teaches *Marbury* loves pointing out to students how easily Marshall could have reached the same result in the case—that the Court lacked original jurisdiction to entertain Marbury's petition—by interpreting the Judiciary Act not to authorize writs of mandamus unless the Court otherwise had jurisdiction.<sup>73</sup> Mar-

68. *Id.*

69. GEORGE LEE HASKINS & HERBERT A. JOHNSON, 2 *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT—FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815*, at 156-63 (1981).

70. See RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 47-51 (1971).

71. See 11 *ANNALS OF CONG.*, *supra* note 16, at 982 (repeal approved by a vote of 59-32).

72. See DUMAS MALONE, *JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805*, at 140-41 (1970).

73. Indeed, this was a stronger legal position than the one Marshall actually took, for (as countless scholars have argued) Marshall's conclusion that Article III prohibited Congress from enlarging the Supreme Court's original jurisdiction was anything but obvious. DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS* 67-69 (1985); James O'Fallon, *Marbury*, 44 *STAN. L. REV.* 219, 255-56 (1992); R. KENT NEWMAYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE*

shall plainly decided to force the question of review. But why, particularly at this highly charged moment, when the Supreme Court's political position was so precarious?

The answer may be that the very precariousness of the Court's position is what led Marshall to do something about judicial review. The repeal of the Judiciary Act had been a major blow to the federal courts, but the Republicans' anger was not yet sated. In the course of debating repeal, the concept of judicial review had been attacked in words and with a ferocity not heard since before the Constitution was adopted; a few Republicans had gone so far as to question its existence in any form and on any terms.<sup>74</sup> Suddenly, a practice that had seemed so uncontroversial throughout the 1790s no longer seemed immune to attack.

Most Republicans were not prepared to reject judicial review outright—not yet, at least. Most, including the President himself, accepted the more moderate departmental theory and were willing to live with review on its limited terms. This was the moment, Marshall apparently decided, to make a statement: before more extreme sentiments against judicial authority spread and grew into something more threatening. Yet such a statement would be effective only if the Court could make it in a way that dampened rather than inflamed further hostility. Marshall's goal was, in effect, to get judicial review into the record. Not to create it, for it already existed, but to deflect an incipient movement to delegitimize it. Dean Alfange captured the likely drift of Marshall's thinking thus:

[I]t was important to invoke the power of judicial review in order to establish a precedent for its later use and to include in the Reports of the Supreme Court a statement of the reasoning by which the power could be shown to be absolutely necessary. Thus, since judicial review could not safely have been used to invalidate a law that the Republicans cared about, it was necessary to find a law that the Republicans did not care about. And what more perfect law could have been

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SUPREME COURT 167-70 (2001).

74. See *id.* at 167; Ellis, *supra* note 70, at 58; 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 215-16 (1922). For examples of speeches denouncing judicial review, see Speech by Stevens Thomas Mason, 11 *ANNALS OF CONG.*, *supra* note 16, at 59; Speech by John Breckinridge, *id.* at 178-80; Speech by John Randolph, *id.* at 661; Speech by Nathaniel Macon, *id.* at 710, 717-20.

found for this purpose than § 13 of the Judiciary Act of 1789?<sup>75</sup>

We cannot judge whether Marshall's gambit was necessary, because we do not know how judicial review might have fared without *Marbury*. Maybe Marshall's fears were overstated. Maybe judicial review would have continued to evolve as it did without this push from the Court. Or maybe not. At the very least, it seems fair to say, by asserting and exercising the power of judicial review at just this moment, Marshall may have helped to preserve a practice that could otherwise have been forced down a dead end road.

### B. THE RETREAT FROM JUDICIAL SUPREMACY

At just this moment, but also in just this way. For the language Marshall used to justify judicial review is also quite telling—especially against the background of the public's decisive rejection of the Federalist argument for judicial supremacy. That Marshall personally believed in the Court's supremacy seems clear.<sup>76</sup> Yet in writing *Marbury*, Marshall conspicuously and self-consciously shied away from saying anything that could be read to endorse such an idea. None of the by-then common arguments that had been made by Federalists since the mid-1790s are found in *Marbury*. Nowhere does Marshall say, as James Kent did, that courts were “the most proper power in the Government to . . . maintain the Authority of the Constitution”<sup>77</sup> or that “the interpretation or construction of the Constitution . . . requires the exercise of the same LEGAL DISCRETION, as the interpretation or construction of a Law.”<sup>78</sup> Nowhere does he assert, like Calvin Goddard, that “it is the business of the judges, elevated above the influence of party, to control” the other branches of government.<sup>79</sup> Nor does he even hint, as Samuel Chase had said explicitly in 1800, that courts are “the *only* proper and competent authority to decide whether any Law made by Congress” is constitutional,<sup>80</sup> much less that a decision

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75. Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 367-68.

76. See *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819); [John Marshall] *A Friend of the Constitution IX*, ALEXANDRIA GAZETTE (July 15, 1819), in GERALD GUNTHER, JOHN MARSHALL'S DEFENSE OF McCULLOCH V. MARYLAND 138 (1969).

77. Kent, *supra* note 43, at 942.

78. *Id.* at 942-43.

79. Speech of Calvin Goddard, in 11 ANNALS OF CONG., *supra* note 16, at 728.

80. Samuel Chase's Charge to the Grand Jury of the Circuit Court for the District



of the Supreme Court "is, and, of necessity, must be final," as Gouverneur Morris asserted during the debate over repeal.<sup>81</sup>

Instead of saying anything that might smack of these unpopular Federalist ideas, Marshall carefully and deliberately used only comfortable and familiar Republican arguments and Republican language. In most important respects, his opinion simply parroted arguments made by the Virginia judges in *Kemper v. Hawkins*, especially in emphasizing that the Court's power was concurrent with that of the other branches, that "courts, as well as other departments" could engage in constitutional interpretation. Marshall thus justified judicial review in terms that Republican moderates not only could accept, but with which they agreed.

Among these moderates was Thomas Jefferson, who was greatly vexed by the lecture Marshall gave him in dictum but who had nothing bad to say about the Court's discussion of judicial review. This was not because, as conventional wisdom has long held, Marshall cleverly chose to exercise review in the service of scaling back the Court's jurisdiction. Jefferson was not stupid. He was perfectly capable of anticipating and appreciating that other uses could be made of judicial review. But he also was not opposed to it—not in the modest form presented by Marshall in *Marbury*.

Bottom line: read in context, Marshall's opinion in *Marbury* cannot possibly be used as authority for judicial supremacy. Quite the opposite, it was an *abandonment* of the idea and an endorsement of the Jeffersonian theory of departmentalism. The current Supreme Court could hardly be more wrong when it cites *Marbury* as authority to reject that very theory.

## V. CONCLUSION: THE CONTINUING STRUGGLE FOR POPULAR CONSTITUTIONALISM

Given the American people's overwhelming rejection of judicial supremacy, one might have expected the idea to expire with the Federalist Party. But it never disappeared entirely. The very diffuseness and decentralization of popular constitutionalism made it possible for advocates of judicial authority to continue nursing their claims. Driven out of respectable public debate for a time, the idea of judicial supremacy eventually

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of Pennsylvania (April 12, 1800), in 3 DHSC, *supra* note 50, at 412.

81. Speech of Gouverneur Morris, in 11 ANNALS OF CONG., *supra* note 16, at 180.

reemerged from hibernation. Popular constitutionalism and judicial supremacy then shared space in American political culture, co-existing in an uncertain and sometimes tense relationship. The result was a dialectical tug of war that continues even today.

How this happened and how it has played out over time is a long and complicated story, told elsewhere.<sup>82</sup> Here, we need say only the following: For most of American history, popular constitutionalism probably reflected the dominant public understanding, and it was the clear victor each time matters came to a head, as they did, for example, in 1832, in 1857, and in 1937. Whether popular constitutionalism would still prevail today—whether the American people in 2003 would follow their forbears by insisting on their right to control the Constitution, or would instead hand control over to what Martin Van Buren once condemned as “the selfish and contracted rule of a judicial oligarchy”<sup>83</sup>—seems an open question. We should, however, at least recognize that the question *is* open. Judicial supremacy is not the logical or inevitable product of experience and progress. It remains now, as it was in the beginning, but one side in a recurrent and ongoing struggle to determine the proper role of ordinary citizens in a republic.

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82. Readers who have made it this far will, hopefully, find themselves intrigued enough to read *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (forthcoming Oxford, 2004), which more fully recounts the historical course of debates about judicial review and judicial supremacy from the Revolution until today.

83. MARTIN VAN BUREN, *INQUIRY INTO THE ORIGIN AND COURSE OF POLITICAL PARTIES IN THE UNITED STATES* 376 (1867).