

Chapter 14
Chief Justice John Marshall and the
Origins of Judicial Review
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Just as the Republican party was divided between its radical and moderate factions, so too was the Federalist party. And the most important moderate Federalist in 1801 was newly appointed Chief Justice John Marshall. Marshall had opposed the Alien and Sedition Acts and had been uneasy over Justice Chase's behavior. Yet like other Federalists he feared the popular excesses of the Republicans, and in 1801 he set out to save the Supreme Court and the federal judiciary from these popular Republican passions. As chief justice he was in a position to drain some of the bitterness from the controversy over the judiciary. In doing so not only did he help to lay the basis for what came to be called judicial review, but he also contributed mightily to the development of an independent judiciary. More than any other single judge, Marshall helped to carve out an exclusive sphere of activity for the judiciary that was separate from politics and popular legislative power.

Marshall (1755-1835) was born in what became the frontier county of Fauquier, Virginia, bordering the Blue Ridge Mountains. His father, Thomas Marshall, was descended from Welsh yeomanry and began as a surveyor and rose to prominence as one of the largest landowners in the county. Marshall's father married an heir of the

Randolphs, the most distinguished family in all of Virginia, and eventually became his county's first magistrate and its representative in the colonial assembly. Marshall's father's career followed the same pattern of another Welsh backcountry surveyor and farmer, Peter Jefferson, father of the future president. Indeed, the resemblance of Marshall's background to that of his distant cousin and life-long enemy Thomas Jefferson is remarkable.

Unlike Jefferson, however, Marshall never acquired the cultivated elegance of his Randolph forebears and in fact never shed the rough but genial manners of his frontier father. He had simple tastes and a common touch that Jefferson never had, a popular style that Jefferson snidely attributed to "his lax lounging manners." Marshall was unassuming and easy-going with a ready humor and twinkling black eyes. Indeed, his extraordinary amiability was the source of much of his success. "I love his laugh," his colleague on the Court Joseph Story (1779-1845) said of him; "it is too hearty for an intriguer."¹

Although Marshall attended the College of William and Mary for only three months and never acquired the vast erudition of Jefferson, he certainly did not lack learning. Indeed, he had an extraordinary knowledge of literature and the law, and was anything but the unlettered country lawyer

relying on only native genius that he sometimes has been pictured to be. Although he admitted that his legal learning was "not equal to that of many of the great masters in the profession," he was widely read in the classics and in English literature, including William Blackstone's Commentaries on the Laws of England. Jane Austen was one of his favorite writers.

Yet there is no doubt that his natural abilities were what most distinguished from other lawyers and jurists. "His head," said Senator Rufus King, "is the best organized of anyone I have known."² Marshall could grasp a subject in its whole and yet simultaneously analyze its parts and relate them to the whole. He could move progressively and efficiently from premise to conclusion in a logical and rigorous manner and extract the essence of the law from the mass of particulars. In the words of Justice Story, he had the remarkable ability to seize, "as it were by intuition, the very spirit of juridical doctrines." Even Jefferson acknowledged Marshall's talent, but he scarcely respected it. Jefferson told Story that "when conversing with Marshall, I never admit anything. So sure as you admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone. So great is his sophistry you must never give him an affirmative

answer, or you will be forced to grant his conclusion. Why, if he were to ask me whether it were daylight or not, I'd reply, 'Sir, I don't know, I can't tell.'" ³

The enmity between the two cousins began during the Revolutionary War. Unlike Jefferson, Marshall saw military action and suffered with Washington at Valley Forge in the winter of 1777-1778, and apparently regarded Jefferson as a shirker. Marshall's service as a captain in the Continental Army, he later said, made a nationalist of him, confirming him "in the habit of considering America as my country, and Congress as my government." It also convinced him that George Washington was "the greatest man on earth." ⁴

After the war Marshall practiced law in Richmond and soon became the leader of the Virginia bar. He dabbled in Virginia politics and in the 1780s served in the executive council of state and in the state assembly. The high point of his early career, however, was his participation on behalf of the Constitution in the Virginia ratifying convention of 1788. Having helped to create the new national government, he remained throughout his life emotionally committed to it. Even when most people in Virginia moved into the Jeffersonian Republican ranks in the 1790s, Marshall remained a loyal Federalist, though never a high-toned one.

Although his fellow Federalists urged him to get more involved in national politics, Marshall was reluctant to give up his lucrative law practice in Richmond. Even his acceptance of his appointment by President John Adams to be one of the three envoys to negotiate the end of mounting hostilities with France in 1797 was apparently in part based on his desire to raise some Dutch loans for a prospective land purchase. Marshall's dispatches to the United States telling of the French government's attempts to elicit bribes from the envoys, through agents X, Y, and Z, electrified the nation and made Marshall an instant celebrity. The many toasts and banquets honoring him coupled with the sudden revival of the declining fortunes of the Federalist party convinced Marshall to join the Congress and later the Adams administration as secretary of state. By 1800 Jefferson thought that the spirit of "Marshallism" had come to dominate the Federalist party, at least in Virginia, and "nothing," Jefferson told James Monroe, "should be spared to eradicate" such a "spirit."⁵

Marshall's opposition to the Alien and Sedition Acts in 1798 separated him from the most extreme Federalists and drew him closer to the beleaguered President Adams. Having lost the election of 1800 to the Republicans, Adams was already a lame-duck president in January 1801 when he had

the opportunity to appoint a new chief justice of the United States. His first choice, John Jay, who had served earlier as chief justice, declined. Not wanting to delay further and allow his Republican successor the appointment, Adams offered the position in person to Marshall, who, according to Adams, "was pleased as well as surprised, and bowed in silence." Marshall was confirmed by the Senate on January 27, 1801. He was forty-five years old.

When Jefferson's election became hung up in the House of Representatives in early January, Marshall had tended to favor Burr over Jefferson, even though he knew nothing about Burr. He had, he told Alexander Hamilton, "almost insuperable objections" to Jefferson's becoming president. Jefferson's prejudices in favor of France rendered him "totally unfit for the chief magistracy" of the United States. Jefferson, he said, will play to the popular House of Representatives, increase his personal power, and weaken the presidency. "He will diminish his responsibility, sap the fundamental principles of the government & become the leader of that party which is about to constitute the majority of the legislature." Even when Hamilton assured him that Jefferson was preferable to Burr, the most Marshall would promise was that he would do nothing to aid

Burr. "I cannot bring my self to aid Mr. Jefferson." Now, on March 4, 1801, only a bit over a month after he himself had been confirmed as chief justice of the United States, he had to administer the oath of office of president to this man he disliked so much. All he could do to show his displeasure was to turn his back on Jefferson while administering the oath of office.⁶

Marshall, as he told Charles Cotesworth Pinckney on the day of Jefferson's inauguration, had believed in "the importance of the judiciary at all times," but he was "especially" impressed with its importance at "the present." And he promised "in the new office to which I am called not to disappoint my friends."⁷ He would go on to become the most important chief justice of the Supreme Court in American history. John Adams had every right to believe that his appointment of Marshall as chief justice was "the proudest act of his life."⁸ During Marshall's long career (1801-1835) that spanned the administrations of five presidents, he laid the foundations both for the Court's eventual independence and for the constitutional supremacy of the national government over the states.

In 1801, however, that future for the Court and the national government would have been hard to predict. The Republicans were in control of the legislature and the

executive, and the Court was still relatively weak and vulnerable. Although the Federalist Court between 1789 and 1801 had decided only sixty-three cases, it certainly had done much to establish its position in the national government. It had claimed that the criminal common law ran in the federal courts, and it had sought to carve out an expanded definition of treason against the United States in order to bolster federal authority. It had as well enlarged its jurisdiction at the expense of the state courts, protected vested rights against state intrusion, and asserted the supremacy of federal statutes over state law. Besides beginning the task of creating its rules of procedure, the Court had gone a long way toward working out its relationship with the lower federal courts and state judiciaries. All in all, the Court had achieved a great deal in a short time.

Despite its successful development as a Federalist institution, however, it still remained "the weakest branch" of the government, and was far from having the final word on constitutional interpretation. Congress had claimed to be an equally important interpreter of the Constitution, and so had the states. As America became more democratic, the Supreme Court, like all courts, seemed increasingly aristocratic and vulnerable to popular attack.

The Court was correctly seen to be a Federalist institution, and as the prospects of the Federalists declined, so did those of the Court. Finding able men to sit on it became more difficult. Since 1789 twelve men had served on the Court, and five of them, including two chief justices, had resigned. The Court had trouble gathering a quorum, forcing cases to be carried over and occasionally sessions to be cancelled entirely. Morale on the Court had become poor, and the justices were more and more disorganized. John Jay, in declining Adams's offer of reappointment as chief justice in 1801, explained that the Court had none of the necessary "Energy, weight and Dignity" to support the national government and little likelihood of acquiring any.⁹

Marshall set out to rectify this situation. He sought to solidify the Court by cutting down on the previous practice of each justice issuing his own opinion seriatim, a practice that was customary in both the eighteenth-century English courts and American state courts. Instead, he convinced the associate justices in most cases to reach a collective decision (usually written by him), thus enhancing the Court's authority by getting it to speak with one voice. His convivial and robust personality and his

instinct for compromise gave him an extraordinary dominance over the Court.

It was not that he imposed his opinions on his strong-minded colleagues. That he could never have done. Instead, he turned the Court into "a band of brothers" and worked at building consensus through friendly discussion and more than an occasional glass of wine. The Court had a rule that it would indulge in wine-drinking only if it were raining. Marshall would look out the window on a sunny day and decide that wine-drinking was permissible since "our jurisdiction extends over so large a territory that the doctrine of chances makes it certain that it must be raining somewhere." During the first four years of Marshall's tenure, from 1801 to 1805, the Court made forty-six written decisions, all of which were unanimous. Marshall participated in forty-two, and in each of these he wrote the opinion of the Court. Even after 1810, when there were more Republican than Federalist justices, Marshall continued his amiable dominance. Joseph Story, who had entered the Court in 1811 as a Republican and a teetotaler, quickly succumbed to Marshall's charm and wine-drinking and became a fervent supporter. All in all between 1801 and 1815 Marshall wrote 209 of the Court's 378 opinions.¹⁰

Ultimately Marshall greatest achievement was maintaining the Court's existence and asserting its independence in a hostile Republican climate. He began by changing the high-toned image of the Court. Under the Federalists the justices had tended to wear either individual academic gowns or robes of scarlet and ermine in imitation of the king's bench of England--dress that one Republican senator called the "party-colored robes" of an oppressive judiciary.¹¹ Instead, Marshall induced his colleagues into wearing the plain black republican-style robes that the Virginia judges used.

This symbolic rejection of monarchism was only the first step in Marshall's efforts to escape from the partisan politics of the 1790s. He strenuously sought to reach some sort of accommodation with the other branches of the government, and for the period at least up to the War of 1812 he tried to avoid any direct confrontation with the Republicans. All of his evasion and caution, as he later told Justice Story, was based on his quite sensible fear that the justices might be "condemned as a pack of consolidating aristocrats."¹²

In a series of decisions the Court asserted the authority of the president and the Congress over foreign affairs and matters of war and retreated from the advanced

positions the Federalists had tried to establish for the judiciary and federal law in the 1790s. Since the fiery partisan charges to grand juries by Federalist judges and justices, especially those of Justice Chase, had aroused the political passions of the Republicans, the chief justice quickly set about trying to change Federalist judicial behavior. He very self-consciously refrained from injecting political statements in his grand jury charges and refused to have them published in the newspapers, "saying that he had laid it down as a rule from which he did not intend to depart."¹³

In a variety of ways Marshall sought to pull in the Federalist horns. As early as 1800 he suggested that the English common law was no part of American law, and blamed the currency of "this strange & absurd doctrine" on "some frothy newspaper publications."¹⁴ This was a bit disingenuous, since many distinguished Federalists in the 1790s had argued that the common law of crimes did run in the federal courts. But Marshall denied the presence only of "the common law of England"; he agreed that versions of an American common law existed in each state which judges of both the state and federal courts could invoke. But even this was too exposed a position, and in several decisions between 1807 and 1811 Marshall's Court declared

that "the jurisdiction of the courts of the United States depends, exclusively, on the constitution and laws of the United States."¹⁵ Finally in the United States v. Hudson (1812) the Court decided that the federal courts did not possess criminal common law jurisdiction after all.

Although this decision swept away a number of lower federal court precedents and reversed two decades of Federalist claims, it was probably inevitable. The issue, as the Court said, had been "long since settled in public opinion."¹⁶

Even in the 1807 trial of Aaron Burr, which Marshall regarded as "the most unpleasant case which has ever been brought before a Judge in this or perhaps in any other country which affected to be governed by laws," the chief justice subtly undermined earlier Federalist positions.¹⁷ In his decision he rejected the broad definition of treason the Federalists had used in the 1790s in prosecuting the Whiskey Rebellion and Fries Rebellion and instead interpreted the Constitution's definition of treason very strictly and narrowly. The Republicans supported their president who had brought the case to court and denounced Marshall for writing "a Treatise on the best way of committing treason without detection or punishment" and for "conniving in the escape of the traitor." By not allowing

the case to go to the jury, Marshall, they said, had undermined that sacred and popular institution. So angry were the Republicans with the decision that they overlooked the fact that Marshall had repudiated the constructive view of treason exploited by Federalists in the 1790s. All they could see in the decision were judicial arrogance and usurpation, and many vowed once again to reduce the Court "to its proper limits." For his part Jefferson thought the decision demonstrated "the original error of establishing a judiciary independent of the nation."¹⁸

Although Marshall's effigy was hanged by a Republican mob in Baltimore, much of the furor over the Burr decision soon subsided, as Marshall's efforts to accommodate the Court to the other branches of government gradually took effect, especially as more and more Republican justices were added to the Court.

Actually, at the very outset of his tenure as chief justice Marshall had revealed his strategy of retrenchment and conciliation and his genius for compromise. He knew that the Republicans' take-over of the Congress and presidency in 1801 posed a serious threat to the judiciary, and he meant to blunt that threat. Although some Federalists were urging Marshall and the Court to confront the Republicans directly and declare their repeal in 1802

of the Judiciary Act of 1801 unconstitutional, Marshall realized that such a direct clash could seriously harm the Court. Already Republicans in Congress were daring the Court to try and disavow the repeal of the Judiciary Act. "If the Supreme Court shall arrogate this power to themselves, and declare our law to be unconstitutional, it will then behoove us to act," asserted Congressman John Nicholas of Virginia. "Our duty is clear."¹⁹

Some such legislative reprisal against the Court was precisely what Marshall was trying to avoid. Hearing the case Stuart v. Laird in circuit court in 1802, he accepted the legitimacy of the Congress's repeal of the Judiciary Act of 1801, a position later endorsed by the Supreme Court on appeal. If Marshall were to assert the Court's authority amid this Republican anti-judicial climate, he knew it had to be done subtly and obliquely. The case of Marbury v. Madison (1803) gave him the opportunity.

William Marbury was one of the "midnight judges" appointed at the last minute by President Adams to be a justice of the peace for the District of Columbia. Adams, however, left office before Marbury's commission could be delivered, and Jefferson, when he became president, refused to deliver it. Marbury then brought suit in the Supreme

Court seeking a writ of mandamus (a judicial command) requiring Secretary of State Madison to deliver his commission. (It was Secretary of State Marshall who had failed to deliver Marbury's commission on time, which made it awkward, to say the least, for Chief Justice Marshall to hear the case.) Many thought that the Court might openly challenge the authority of the President. But the Marshall Court could only lose a direct contest with the President: if the Court refused to order Jefferson to deliver the commission, the Republicans would win by default; if however, the Court did order the President to do so and he refused, the Court would be humiliated. The Court thus had to move in a roundabout way to assert its authority.

The Court's opinion set forth in 1803 answered several key questions. Was Marbury entitled to his commission? And if so, did the law afford him a remedy? Yes, answered Marshall to both questions. Marbury had a vested right in the office for the term fixed by statute, and the law had to provide a remedy for a violation of a vested legal right. The first officer of the nation, said Marshall, "cannot at his discretion sport away the vested rights of others." A collision with President Jefferson seemed imminent, but when Marshall asked and answered his third question he wisely evaded it. Was the remedy for this

violation of Marbury's right a writ of mandamus issued by the Supreme Court? No, said Marshall. The Supreme Court could not issue such writs because Section 13 of the 1789 Judiciary Act authorizing that power was unconstitutional: Congress did not have the authority to alter the original jurisdiction of the Supreme Court contained in Section III of the Constitution.²⁰

By posing the questions in this unusual order Marshall was able to make his point without having to suffer the consequences of it. As Jefferson and other Republicans pointed out, the Court in its final question disclaimed all cognizance of the case, but in the first two questions declared what its opinion would have been if it had had cognizance of it.²¹

Thus Marshall indirectly asserted the Court's role in overseeing the Constitution without the serious political repercussions that would have followed from a head-on collision with the Republicans. Since the American people regarded their written Constitution as "the fundamental and paramount law of the nation," wrote Marshall for the Court, then it followed that "a law repugnant to the Constitution," such as part of the 1789 Judiciary Act, "is void; and that courts, as well as other departments, are bound by that instrument."²²

Although Marshall's decision in Marbury v. Madison has since taken on immense historical significance as the first assertion by the Supreme Court of its right to declare acts of Congress unconstitutional, few in 1803 saw its far-reaching implications. Certainly most Republicans were not troubled by it. If Marshall wanted to circumscribe the power of his Court, as he did in the Marbury decision, then he had every right to do so. But, said Jefferson, the judiciary was not the only branch of the government that had the right to interpret the Constitution. The executive and legislature could too. To grant the courts the exclusive authority to decide what laws were constitutional, declared Jefferson in 1804, "would make the judiciary a despotic branch."²³ Since Marshall had not explicitly claimed that the Court was the only part of the government with the right and duty to interpret the Constitution, his assertion of judicial authority in the Marbury decision was limited and ambiguous. In fact, it was the only time in Marshall's long tenure as chief justice in which the Supreme Court declared an act of Congress unconstitutional. Probably Marshall's Marbury decision can be best understood as another example of his policy of restraint and of getting the Court out of harm's

way. It did not and could not by itself create the practice of judicial review.

Alexander Hamilton writing in the Federalist in 1788 may have called the judiciary the "weakest" branch of the newly proposed federal government, but today we know better. To us not only does the unelected, life-tenured judiciary seem remarkably strong, but also it actually seems at times 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 periodically have to face an electorate, exercise an extraordinary degree of authority over America's society and culture. The Supreme Court not only sets aside laws passed by popularly elected legislatures but also interprets and construes the law with a freedom that sometimes is virtually legislative in scope. No where else in the modern world do courts wield as much power in shaping the contours of life as the Supreme Court does in the United States.

We have usually given the name "judicial review" to this sweeping judicial authority. But if we mean by judicial review only the power of the Supreme Court 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 broader manipulative power exercised by the Court over wide areas of American life.

Some historians have claimed that the origins of the modern practice of judicial review can best be found, not in the Court of John Marshall, but in the history of the last century or so. Indeed, the term itself was apparently only coined by constitutional scholar Edward Corwin in 1910. Certainly much of the extraordinary image of Marshall as the originator of judicial review was a creation of the post-Civil War era--an image that perhaps culminated in the publication in 1916 of the four-volume biography of Marshall by Albert Beverage.

Yet it would be a mistake to conclude that the American Revolution, John Marshall, or any of the other Founders made little or no contribution to the beginnings of judicial review.²⁴ Quite the contrary. However important the post-Civil War period and the past two generations have been in the development of judicial review, the essential foundations of the practice were laid in the late eighteenth and early nineteenth centuries. The remarkable reputation of the Marshall Court may be largely an invention of the late nineteenth and early twentieth centuries, but it is by no means a false or undeserved

reputation. Although members of the founding generation could not have anticipated the enlarged role the courts now play in American life, they did create the sources out of which that enlarged role and the practice of judicial review eventually emerged.

Historians and constitutional scholars have often emphasized some early examples of judicial review in the immediate aftermath of the Revolution. As a consequence of what some saw as legislative tyranny in the 1780s, judges in several states--New Jersey, Virginia, New York, and North Carolina--gingerly and ambiguously began moving in isolated but important decisions to impose restraints on what these legislatures were enacting as law. They attempted to say to the legislatures, as Judge George Wythe of Virginia declared in 1782, "Here is the limit of your authority, and, hither, shall you go, but no further."²⁵ Yet cautious and tentative as they were, such attempts by the judiciary, like Wythe's opinion in Virginia, "to declare the nullity of a law passed in its forms by the legislative power, without exercising the power of that branch," were not easily justified; for they raised, in the words of Wythe's Virginia colleague, Judge Edmund Pendleton, "a deep, and important, and... tremendous

question, the decision of which might involve consequences to which gentlemen may not have extended their ideas."²⁶

Even those who agreed that many of the laws passed by the state legislatures in the 1780s were unjust and even unconstitutional, nevertheless, could not agree that judges ought to have the authority to declare such legislation void. Allowing unelected judges to declare laws enacted by popularly elected legislatures unconstitutional and invalid seemed flagrantly inconsistent with free popular government. Such judicial usurpation, said Richard Spraight of North Carolina in 1787, was "absurd," and "operated as an absolute negative on the proceedings of the Legislature, which no judiciary ought ever to possess." Instead of being governed by their representatives in the assembly, the people would be subject to the will of a few individuals in the court, "who united in their own persons the legislative and judiciary powers." This, said Spraight, made for despotism more insufferable than that of the Roman decemvirate or of any monarchy in Europe.²⁷

Most Americans, even those deeply concerned with the legislative abuses of the 1780s, were too fully aware of the modern positivist conception of law (law as legislative command made famous by William Blackstone in his Commentaries of the Laws of England), too deeply committed

to consent as the basis for law, and from their colonial experience too apprehensive of the possible arbitrariness and uncertainties of judicial discretion to permit judges to 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."²⁸

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 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 can never fully explain its origins.

The sources of something as significant and forbidding as judicial review could never 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. Probably the most obvious source of judicial

review was the idea of fundamental law and its embodiment in a written constitution.

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 from one another as John Locke and Lord Bolingbroke referred alike to the basic principles of the constitution as fundamental law. 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 Parliament was limited by what he called an overriding natural law.

Yet all these theoretical references to the principles of 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 was really 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.²⁹

The written constitutions of 1776-77, however, gave Revolutionary Americans a concrete handle with which to grasp this otherwise insubstantial fundamental law. Suddenly, with these written documents the fundamental law and the first principles that Englishmen had referred to for generations had gained a degree of explicitness and reality that they never before quite had. The constitution in America, said James Iredell of North Carolina in 1787, had therefore become not "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 witfully blind themselves."³⁰

But were the judges to have an exclusive authority to examine these fundamental laws and to determine what was constitutional and what was not? All Americans agreed

that the written constitution, as Edmund Pendleton conceded in 1782, "must be considered as a rule obligatory upon every department, not to be departed from on any occasion."³¹ It was not immediately evident to Pendleton or to others, however, that the judiciary had any special or unique power to invoke this obligatory rule in order to limit the other departments of the government, particularly the legislatures. In other words, it was clear by the 1780s 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. "The great argument is," said Iredell in 1786, in summarizing the position of those opposed to judicial review, "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."³²

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. Members of the Philadelphia Convention, according to Madison's notes, "generally supposed the jurisdiction given [to the Court] was constructively limited to cases of a Judiciary nature." Madison later 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 executive or legislature. 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."³³

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." 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 since 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 themselves.³⁴

In other words, many Revolutionaries and 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 political action the people themselves would take if they could.³⁵

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." This is also why many others in the Convention, including James Wilson and George Mason, wanted to join the judges

with the executive in a council of revision (modeled on that of New York) and thus give the judiciary a double negative over the laws.³⁶ They considered that the power of the judges alone to declare unconstitutional laws void was too extreme, too exceptional, and too fearful an act to be used against all those ordinary unjust, unwise, and dangerous laws that were nevertheless not "so unconstitutional as to justify the Judges in refusing to give them effect."³⁷

Such remarks suggest that most of the framers, even when they conceded the authority of judges to void unconstitutional legislation in very clear cases, scarcely conceived of such an authority in modern terms. As much as they accepted in theory the superiority of constitutions over legislation, many American leaders simply could not yet imagine the courts' having the power to expound constitutions in a routine judicial manner. For this reason some congressmen in 1792 debated establishing a regular procedure for federal judges to notify Congress officially when they declared a law unconstitutional--so nervous were they over the gravity of such an action.³⁸

When the federal circuit court of Pennsylvania in 1792 in Hayburn's case declared Congress' Invalid Pension Act unconstitutional on the grounds that it violated the

separation of powers, it did so in a hesitant and apologetic manner. What they did, the 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 again." Congress quickly modified the Pension Act in order to avoid the crisis that would result if the Supreme Court declared the act unconstitutional.³⁹ One newspaper that favored judicial review in Hayburn's case nonetheless suggested that perhaps all the circuit court justices should be consulted before a law could be declared unconstitutional.⁴⁰

Everyone thus sensed that setting aside legislative acts could be no ordinary matter. As Justice Samuel Chase said in Hylton v. United States (1796), if the constitutionality of Congress' law had been "doubtful," he would have been bound "to receive the construction of the legislature."⁴¹ As late as 1800 in Cooper v. Telfair Associate Justices Bushrod Washington and William Paterson agreed that judicial review was an exceptional act, to be only infrequently exercised. "The presumption...must always be in favour of the validity of laws, if the contrary is not clearly demonstrated," declared Washington.

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."⁴²

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

Thus the idea of fundamental written law, important as it was, could not by itself have led to the development of America's judicial review. Other countries since the eighteenth century have had formal rigid and written constitutions--Belgium and France, for example--without allowing their courts on a regular basis to set aside legislative acts that conflict with these written constitutions, not to mention construing these constitutions in order to do justice. What in the final analysis gives significance to the Americans' unusual

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 federal and state 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.

Some countries with written constitutions--Brazil, for example--permit their supreme courts to pass on the constitutionality of legislation before it is enacted into law. But exercising super-public or super-judicial authority in this way is not how most American courts operate. Judicial review results from two litigants contesting an issue using routine legal processes in the regular court system. The fact that America's written fundamental constitutions, its public laws, are interpreted and construed in a routine fashion in the ordinary court system, and not in some super-public supreme constitutional court, is crucial to the peculiar practice of judicial review.

Thus the source of judicial review as we understand it today lay not in the idea of fundamental law or in written constitutions, but in the transformation of this written fundamental law into the kind of law that could be

expounded and construed in the ordinary court system. This transformation was made possible by Americans' exploiting the discretionary authority that English common law judges had always exercised, especially, as we have seen, in setting aside the bylaws of corporations that were repugnant to the prerogatives of the king or the common law of the land.⁴³ During the eighteenth-century British judges, especially Blackstone and Lord Mansfield, had expanded the power of the courts to interpret the law in accord with equity, reason, and good sense, and American judges now followed their lead. They took this enhanced interpretative power of English common law jurisprudence and ran with it.

In dealing with the plethora of confused and ill-drafted parliamentary legislation in mid-century England Blackstone had been compelled to work out a complex set of rules for construing statutes in order to fit them into the body of the common law.⁴⁴ American jurists now took these rules--rules that Hamilton in The Federalist No. 83 called "rules of common sense, adopted by the courts in the construction of the laws"--and applied them to both the state and federal constitutions. They thus collapsed the earlier distinction between fundamental and ordinary law. American judges could now construe the all-too brief words

of the Constitution in relation to subject-matter, intention, context, and reasonableness, as if they were the words of an ordinary statute. 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.

What one scholar has called the "legalization of fundamental law" 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.⁴⁵ Considering the Constitution as a kind of law that was cognizable in the regular courts permitted judges not only to expound and 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.⁴⁶

The implications of this transformation were momentous. Once the Constitution became a legal rather than a political document, judicial review, although not judicial supremacy, became inevitable.⁴⁷ The secret of Marshall's success in his Marbury decision was his

unquestioned assumption that the Constitution was simply a law.⁴⁸ Because, as he said, it was "emphatically the province and duty of the judicial department to say what the law is," treating the Constitution as mere law that had to be expounded and interpreted and applied to particular cases gave special constitutional authority to American judges not shared by judges elsewhere in the world.⁴⁹

Jefferson would have none of this. For him the Constitution remained primarily a political document and judges had no monopoly in interpreting it. Indeed, he believed that judges' ability to interpret any law ought to be strictly limited. Statutes ought to be precisely drawn, and judges ought to be bound by the letter of these statutes. "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 uncertain." Jefferson rejected out-of-hand the eighteenth-century "revolution" in jurisprudence that Blackstone and Mansfield had worked in England, dismissing their efforts to construe the common law equitably and to broaden judicial discretion as dangerous to liberty. The goal of judges was supposed to be "to render the law more & more certain." The goal of Mansfield and Blackstone, according to Jefferson, had been the exact opposite. They intended "to render it more

uncertain under pretense of rendering it more reasonable." Jefferson realized that these English advocates of judicial flexibility had a powerful influence on American judicial thinking and practice. He never ceased complaining that "the honeyed Mansfieldism of Blackstone" had forced young American to slide into "toryism" to the point where they "no longer know what whigism or republicanism means."⁵⁰

Ultimately, what made all of this new thinking about the judiciary comprehensible--what gave the judiciary equality with the legislative and executive branches in a tripartite system of government--was the Americans' peculiar conception of representation, that is, the unusual way that American people embodied themselves in the institutions of government. By the time the new federal judiciary was being established in 1789, some Federalists were coming to regard judges as another kind of agent or representative of the people.

Such a remarkable conclusion followed from the logic of the Americans' conception of actual representation that had been expressed in the debate with Britain in the 1760s and 1770s. In that debate most Americans rejected the British view that the colonists were virtually represented in Parliament even though they, like many subjects in

England itself, did not actually vote for any members of Parliament. The English idea of virtual representation supposed that people were represented in Parliament not by the process of election, which was considered incidental to representation, but rather by the mutual interests that members of Parliament were presumed to share with all Englishmen for whom they spoke--including those, like the colonists, who did not actually vote for them. But in America the mutuality of interests that made virtual representation meaningful in England was in America so weak and tenuous that the representatives could not be trusted to speak for the interests of their constituents unless they actually voted for them. Actual representation thus made the process of election not incidental but central to representation.⁵¹

This notion of actual representation became the key to the peculiarities of American constitutionalism and government. Not only did Americans demand the most explicit and broadest kind of consent, which generally meant actually voting for their representatives, but they wanted those representatives to be like them in every way, not only in ideas but in religion, ethnicity, or social class. The people in Philadelphia in 1775, for example, called for so many Presbyterians, so many artisans, and so many

Germans on the revolutionary committees. Already Americans were expressing the idea that the elected representatives not only had to be for the people, they also had to be of the people.⁵²

The people's mistrust of those they elected became the source of American democracy. Indeed, the mistrust at times became so great that the representative process itself was brought into question, and mobs and extra-legal associations emerged to claim to speak more authentically for the people than their elected representatives. The people, it seemed, could be represented in a variety of ways and in a variety of institutions. But no officials, however many votes they received, could ever fully embody the people.

Ultimately, these contrasting ideas of representation separated the English and American constitutional systems. In England Parliament came to possess sovereignty--the final, supreme, and indivisible lawmaking authority in the state--because it embodied the whole society, all the estates of the realm, within itself, and nothing existed outside of it. In America, however, sovereignty remained with the people themselves--and not with any of their agents or even with all their agents put together. The

American people, unlike the English, were never eclipsed by the process of representation.

When Americans referred to the sovereignty of the people, they did not just mean that all government was derived from the people. Instead, they meant that the final, supreme, and indivisible lawmaking authority of the society remained with the people themselves, not with their representatives or with any of their agents. In American thinking all public officials became delegated and mistrusted agents of the people, temporarily holding bits and pieces of the people's power, out, so to speak, on always recallable loan.

Only by conceiving of sovereignty remaining with the people could Americans make sense of their new constitutional achievements such as federalism, that is, the remarkable division of power between central and provincial governments, and the ideas of special constitution-making conventions and the process of popular ratification of constitutions. Such a conception of sovereignty remaining with the people also eventually made possible the emergence of peculiar institutions and processes of the early twentieth century and indeed of our own time. The primaries, referendums, recall of officials, and ballot initiatives introduced by Progressive reformers

at the beginning of the twentieth century and used with great effectiveness in our own time were only extensions of the ideas of popular sovereignty and acute actual representation created at the Founding.

In America the notion that sovereignty rested in the people was therefore not just a convenient political fiction; the American people, unlike the English, retained an actual law-making authority. All of this new thinking about representation and popular sovereignty was thus bound to have important implications for Americans' attitudes toward their judiciaries. Indeed, it made possible the conception of judges as just another representative agent of the people.

In 1776 most Americans had thought of the lower houses of their new state legislatures as the exclusive embodiments of the people, which is why nearly all of them had been called the "house of representatives." During the following decade, partly as a result of the heavy criticism of their legislative abuses, the lower houses began to lose their exclusive authority as representatives of the people. Some Americans now began to regard the upper houses, or senates, as being just as representative of the people as the lower houses, which had not been the case in 1776. Originally, the senates had not been considered

representative bodies at all. They were supposed to be composed of the wisest and most distinguished members of the society; consequently, even when they were elected, they presumably had no constituents.

It was soon apparent, however, that justifying a senate or upper house as an embodiment of the wisest and most distinguished members of the society smacked of "aristocracy," and was too politically incorrect to be used publicly. Instead, those who wished to justify senates now had to argue that they were simply "double representations" of the people. But if the people could be represented twice, then, of course, they could be represented in three or four ways as well. As a result, all elected officials, including senators and governors, soon came to be thought of as representatives of the people, and the term originally applied to the various "houses of representatives" in the Revolutionary state constitutions and in the federal Constitution became awkward reminders that Americans had once thought of representation as the English had, as confined to the lower houses of their legislatures.

Having all governmental institutions representative agents of the people fit in with the emerging notion of sovereignty, even legal sovereignty, remaining with the

people at large. Consequently, many Americans were now able to regard the state legislatures as simply another kind of magistracy, and the supposed law-making of the legislatures as simply the promulgation of decrees to which the people, standing outside the entire government, had never given their full and unqualified assent. Therefore, it was possible now to argue, as one Rhode Islander did in 1787, that all acts of a legislature were in effect temporary edicts. These edicts were still "liable to examination and scrutiny by the people, that is, by the Supreme Judiciary, their servants for this purpose; and those that militate with the fundamental laws, or impugn the principles of the constitution, are to be judicially set aside as void, and of no effect."⁵³

It was left, however, to Alexander Hamilton to draw out fully the implications for the judiciary of these new views of representation. The so-called representatives of the people in the state legislatures, wrote Hamilton in Federalist No. 78, did not really embody the people, as Parliament, for example, presumably embodied the people of Britain. On the contrary, they were really 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 allowing "the representatives of the people to

substitute their will to that of their constituents." In fact, it was "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 their authority."

Judges thus became just another kind of servant of the sovereign people. Therefore, said Hamilton, the authority of the judges to set aside acts of the legislatures lay in the fact that in America real and ultimate sovereignty rested with the people themselves, not with their representative agents in the legislatures. Judicial review, said Hamilton, did not "by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people, declared in the constitution, the judges...ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."⁵⁴

In his "Lectures on Law" presented in 1790-1791 James Wilson expanded the logic of seeing all parts of the government as agents of the sovereign people. Some individuals call the legislature "the people's representatives," complained Wilson; they seem to imply by

that term "that the executive and judicial powers are not connected with the people by a relation so strong, or near, or dear. But it is high time that we should chastise our prejudices," said Wilson; "and that we should look upon the different parts of the government with a just and impartial eye. The executive and judicial powers are now drawn from the same source, are now animated by the same principles, and are now directed to the same ends, with the legislative authority: they who execute, and they who administer the laws, are as much the servants, and therefore as much the friends of the people, as they who make them."⁵⁵

Some Americans saw the implications of judges being just another kind of agent or servant of the people and concluded that they therefore should be elected as other agents were. Although this logic would not be followed out in actual practice until the middle decades of the nineteenth century, the Republican radical John Leland made this point very explicitly in 1805. "The election of all officers, to fill all parts of the government," he said, "is the natural genius that presides over the United States. . . . If men are incompetent to elect their judges, they are equally incompetent to appoint others to do it for them." Judges should not be immune to the

authority of the people. "A judicial monarch is a character as abhorrent as an executive or legislative monarch."⁵⁶

In the succeeding decades many of the states, especially the new states of the West, began electing their judges. And today at least thirty-nine states elect their judges in one way or another, which presumably helps to guarantee their independence from the other parts of the government. Certainly making the judiciary an equal part of a modern tripartite representative government in the early Republic helped to strengthen judicial authority and to justify judicial independence.

Many Federalist in the 1790s had accepted most of the principles that made for an understanding of judicial review. They had identified fundamental law with a written constitution; they had agreed that constitutions, as the political work of the people directly, were superior to ordinary legislation. Many of them likewise accepted the judiciary as the institution that acted as an alternative agent of the people and that had the responsibility of comparing the written constitutions with ordinary laws and of declaring that laws repugnant to the constitutions were void. All of these principles the Federalists approved and espoused.⁵⁷ Yet in the 1790s these principles of judicial

review remained largely partisan--acceptable to most Federalists but unacceptable to most Republicans and perhaps the bulk of the American people. To make judicial review something more than an instrument of the Federalist cause, something else was needed--some radical change in the politics of adjudication, some separation of law from politics.

If the higher law of the Constitution were to be brought down to the level of a lowly statute, and if setting aside statutes as unconstitutional 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 the passions and interests of politics and from legislative tampering. Somehow or other judges had to carve out for themselves an exclusive sphere of disinterested professional legal activity.

After 1800 this was precisely what happened. Judges shed their traditional broad and ill-defined political and magisterial roles that had previously identified them with the executive branch or chief magistracy and adopted roles that were much more exclusively legal. The practices of judges' politically haranguing juries from the bench and of justices' performing diplomatic missions while sitting on

the Court were not duplicated. Separation of powers and the independence of the judiciary now took on enhanced meanings that they had not had earlier. Judges increasingly saw themselves as professional jurists, separated from politics, and qualified only for hearing cases and interpreting the law.

As early as Hayburn's Case in 1792 the federal circuit for the district of Pennsylvania protested the Congress's Invalid Pension Act for violating the separation of powers. The act had given the judges of the United States circuit courts the administrative task of deciding the pension claims of veterans injured in the Revolutionary War. Their decisions, however, were subject to review and reversal by the secretary of war and the Congress. The circuit court, which comprised two Supreme Court justices and the district judge, refused to hear William Hayburn's petition for a pension and declared the Pension Act unconstitutional on the grounds that engaging in non-judicial activities that were subject to revision by other branches of government violated judicial independence. Although the judges were still uneasy about their decision and apologized for it, they nonetheless expressed a clear understanding of their distinctive judicial status. No longer did they want to be

considered as political magistrates with administrative responsibilities.⁵⁸

With the spread of this kind of thinking judges increasingly withdrew from politics and limited their activities to the regular courts, which became more 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. 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. These decisions helped to make the Court into a more purely judicial body.⁵⁹

Yet even after 1800 the withdrawal of judges from politics did not occur quickly. Of the ten justices that served between 1802 and 1823 on New York's Supreme Court, for example, four of them had tried to become governor and three of them had succeeded. The fact that New York's justices of the supreme court sat with the chancellor and governor on the state's peculiar council of revision (which

was abolished in 1821) no doubt contributed to their greater political activity.

Despite these vestiges of an earlier era, however, more and more judges everywhere tended to avoid partisan politics and to pride themselves on their judicial expertise and impartiality. They supported the publishing of judicial opinions and the collecting of law reports. In 1798 Alexander J. Dallas published the first volume of cases decided by the Supreme Court of the United States, and in 1804 William Cranch began publication of his Supreme Court Reports. It was hoped, said one newspaper at the time, that Cranch's publication would "operate as an incentive to legal gentlemen in different parts of the Union towards lending their aid to similar publications." But the states themselves were already busy publishing reports of their court decisions. By 1821 Justice Story estimated that more than 150 volumes of American reports already existed, "containing," he said, "a mass of decisions which evince uncommon ambition to acquire the highest professional character."⁶⁰

Everywhere jurists published treatises and promoted the emergence of law as a science known best by trained impartial experts. The more complicated the law, the more expertise needed. Hamilton in Federalist No. 78 had

pointed out "that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government." Since all these laws "demand long and laborious study to acquire a competent knowledge of them,. . . there can be but few men in the society who will have sufficient skill in the laws to qualify them for the station of judges."⁶¹

The states tried to comply with this view by erecting new qualifications for entrance to the bar. New Hampshire required at least two years of practice before the Court of Common Pleas for admittance. In Delaware and Maryland three years of law study were needed followed by examinations. Universities added professors of law to their faculties, and some jurists called for the establishment of separate law schools to teach the new science of law.⁶²

As jurists became more professional and the law was increasingly regarded as a special science, the courts tried to withdraw from politics and to avoid the most explosive and partisan political issues. Certainly that was the secret of much of the success of the Marshall Court in these years. Not only did the Court retreat from the advanced and exposed political positions that the Federalists had tried to stake out for the national judiciary in the 1790s, but it also sought at every turn,

at least up to the War of 1812, to avoid serious confrontations with the Republicans. Even the Court's decision to issue a single anonymous "opinion of the Court" in place of the earlier practice of each justice delivering his own opinion tended to dampen controversy and to give the impression of more consensus than existed in fact. In many of its decisions the Court sought to curtail governmental power--something that Marshall and other Federalists knew that would be acceptable to many Republicans who were eager to expand the areas of individual freedom.

In other words, prior to 1819 the Marshall Court did not attempt to build up the power of the federal government positively. That enhancement of governmental power would have aroused Republican hostility everywhere. Instead, it moved to reduce governmental power, not at the federal but at the state level. It declared a large number of state judicial interpretations and state laws invalid because they violated the national Constitution. In doing so it indirectly augmented the supremacy of the nation and its own authority as well. In series of decisions beginning with United States v. Peters (1809) and proceeding through Martin V. Hunter's Lessee (1816) the Supreme Court established its right to review and reverse decisions of

state courts and state legislatures involving interpretations of federal law and the federal Constitution. At the same time the Court's insistence on the rule of law binding the entire country worked to strengthen people's feeling of being citizens of the United States and not just their individual state.⁶³

In the Peters case the Pennsylvania state legislature had ignored a federal district court decision and had claimed the right by itself to interpret federal law. In a powerful opinion Marshall declared that a state legislature could not annul the judgments of the courts of the United States in this way or else the Constitution would become "a solemn mockery." The nation, if it were to be one, had to have "the means of enforcing its laws by the instrumentality of its own tribunals." When Pennsylvania appealed to President Madison for help in resisting this judgment, Madison refused, fearing the effect it would have on the New England states that were resisting federal law.⁶⁴

In the Martin case the Virginia Court of Appeals had refused to obey an earlier decision of the U.S. Supreme Court. But it also had denied the right of Congress in the Judiciary Act of 1789 to grant authority to the Supreme Court to hear appeals from the state courts. In a masterful opinion written by Justice Joseph Story (with

Marshall absenting himself because of a conflict of interest), the Court asserted the supremacy of the nation. It said that the people, not the states, had created the Constitution, and therefore they had the right to grant to the national government whatever powers they chose and to prevent the states from exercising powers they believed incompatible with the authority of the central government. From these premises the Court went on to declare that no state decision involving federal matters could be final. To enforce the supremacy clause of the Constitution and to maintain the uniformity of national law throughout the country, the Supreme Court had to have the ultimate authority to hear appeals from state courts on federal issues. This became the cornerstone of the American judicial system.

At the same time, following the first test in Fletcher v. Peck (1810), the Court overturned a series of state laws that interfered with private contracts and thus violated Article I, Section 10 of the Constitution. The Fletcher case was the result of a twenty-year process of legal and political manipulations arising out of the Yazoo land scandal of the 1790s. In 1795 the corrupted Georgia legislature had sold thirty-five million acres of land to several Yazoo land companies for \$500,000, the price adding

up to something less than two cents an acre. In 1796 the outraged voters of Georgia elected a new legislature that voided the sale and publicly burned all records of it. In the meantime, however, the speculative land companies had sold many acres to good faith buyers, many of whom were New Englanders. Confusion and law suits followed. The Jefferson administration tried to work out a compromise among the various interests, which enraged John Randolph, who, according to William Plumer, lashed out at everyone, "demo's and feds indiscriminately," in the most "coarse & vulgar" manner, charging everyone "with speculation, bribery, & corruption."⁶⁵ By 1810 the Supreme Court had received a contrived case that sought to settle the whole matter, at least legally.⁶⁶

In his opinion in the Fletcher case Marshall decided that the Georgia legislature's rescinding of a previous corrupt legislative sale of the Yazoo lands had violated the contract clause in Article I, Section 10 of the Constitution, and was thus invalid. The legislature's original sale, however corrupt, was in the nature of a contract that gave the buyers vested rights in the property, and no subsequent state law could divest those rights. Not only was this the first major Supreme Court decision to declare a state statute in violation of the

Constitution, but Marshall also shrewdly stated that the Court had no business getting into the motives of the Georgia legislature, thus helping to underline the idea that law and politics were separate spheres.

In the Fletcher decision Marshall also argued that it was not simply "the particular provisions of the Constitution of the United States" that nullified the Georgia statute but also those "general principles which are common to our free institutions." In other words, he suggested that there was a kind of common law "based on the nature of society and of government" that the Court could draw upon to protect individual rights from the "sudden and strong passions" of the popular state legislatures. The Constitution, said Marshall, contained "what may be deemed a bill of rights for the people of each state." Justice William Johnson in a concurring opinion carried this point of fundamental principles much further. He agreed with Marshall that the state of Georgia did not have the power to revoke its grant once made. He agreed, however, not on the basis of the contract clause of the Constitution but "on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity."⁶⁷

These kinds of judicial appeals to reason and the nature of things became increasingly common in the early Republic. They grew out of the Americans' ambiguous and unusually instrumental attitude toward law that had its roots in the colonial period. The confusion and uncertainties of American legal conditions in the colonies had worked to exaggerate the inherent malleability of the English common law. Since the colonies had derived their law haphazardly both from their provincial legislatures and courts and from various English sources, they tended to equate law not with what English judges and legal authorities said it was, but with what made sense in America's local circumstances. Although colonial law by the middle of the eighteenth century had approached the sophistication of English law very closely, approximating the English common law forms without actually duplicating them had compelled Americans time and again to justify minor deviations and irregularities in the name of reason, justice, or utility. They thus developed a particularly pragmatic attitude toward law that was intensified in the decades following the Revolution. The examples of what Blackstone and Lord Mansfield had done in Britain to expand judicial creativity and flexibility offered additional

justification for the development of American judicial authority.

In the first decades of the early Republic each of the states began developing its own non-statutory body of rules and procedures--its own common law, stripped, as we have seen, of what were called its feudal English trappings. In place of the customs and technicalities of the English common law, the courts offered prudent and pragmatic regulations and justified them by what Connecticut jurist Jesse Root in 1798 called the "the reasonableness and utility of their operation."⁶⁸ By the early decades of the nineteenth century some Americans regarded their common law as something that could be self-consciously created and manipulated, but of course only in a piecemeal fashion; indeed, some were even expanding Lord Mansfield's view that judges ought to be the chief agents of legal change. Only the courts, Zephaniah Swift (1759-1823), chief justice of the Connecticut supreme court, declared in 1810, "possess a discretion of shaping the rules...[and] furnishing remedies according to the growing wants, and varying circumstances of men,...without waiting for the slow progress of Legislative interference."⁶⁹

Although most judges continued to deny that they made law in the way legislatures did, it became increasingly

obvious that they did something more than simply discover it in the precedents and customs of the past. Indeed, many judges soon came to realize that the forms and precedents of the past could no longer be binding in such a rapidly developing society and that they had the primary responsibility to make new law to meet new circumstances.⁷⁰ Law in America, rooted in the consent and sovereignty of the people, was designed to serve the needs of that people, and when it did not it was the obligation of judges to interpret it in such a way that it did, even if their interpreting of the law turned them into legislators. Judges could justify this extraordinary role for themselves only by claiming that they were pulling back from overt participation in politics and by designating as issues of law some particular things that were now within their special jurisdiction.

Jurists and politicians in the early Republic 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 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.⁷¹

This was an extraordinary argument, to say the least, and it did not 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." 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."⁷²

This was the traditional view. 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 it had never been thought necessary to protect these rights

against the power of the people themselves, that is, against the legislative power of Parliament itself. The great eighteenth-century English jurist William Blackstone had agreed that the one of the absolute rights of individuals 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"--which, of course, for Blackstone included those laws enacted by Parliament.⁷³

This was no longer true for Hamilton and other Americans. As far many Federalists were concerned, the laws of the land concerning individual rights now belonged exclusively to the courts. To get the American people to believe this was a remarkable achievement, and Marshall contributed greatly to this effort. In his Marbury decision Marshall defined this reduced but exclusive role for the courts as forcefully as anyone. Some questions were political, he said; "they respect the nation, not individual rights," and thus were "only politically examinable." But questions involving the vested rights of individuals were different; they were in their "nature, judicial, and must be tried by the judicial authority."⁷⁴ 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 the authority of judges, "kept strictly to their own department," to protect the rights of individuals. Of course, Jefferson had not anticipated Marshall's expansive notion of rights.⁷⁵

Although Marshall had the extraordinary rhetorical ability to make everything he said seem natural and inevitable, his separation of law from politics would not have been possible without large numbers of influential people becoming increasingly disillusioned with the kind of legislative democracy that was emerging in the early Republic. This abhorrence of democratic politics and reliance on the judiciary were, of course, much easier for Federalists who were having more and more difficulty getting elected. As St. George Tucker pointed out in 1803, because 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 necessarily had to look to the law for security.⁷⁶

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.⁷⁷ Everywhere the growth of

democracy encouraged the insulating of legal issues from democratic politics; "for," as Marshall put it, "nothing is more to be deprecated than the transfer of party politics to the seat of Justice."⁷⁸ But even Marshall did not foresee the all the implications of what was happening. In 1805, on the eve of the impeachment trial of Justice Samuel Chase, Marshall continued to concede that a legislature possessed judicial capacities and could overturn judicial opinions that it deemed unsound. So the separation of legislation from jurisprudence, politics from law, came hard to those reared in the old-fashioned tradition that legislatures were at heart just courts.

In the end, however, it became more and more clear that only by separating law from popular politics could the rights of individuals be protected. Many members of Jefferson's own party began to accept the Marshall Court's message that all issues involving property rights and contracts were legal questions cognizable only by the courts. 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 the private vested rights of property.⁷⁹

As American society became more commercial, with increasing numbers caught up in buying and selling and

creating new modern sorts of property--property as venture capital, as a product of a person's labor and entrepreneurial skills--the judiciary's role in protecting property from capricious and irresponsible popular legislatures at both the state and federal levels became increasingly attractive to more and more people.⁸⁰ Consequently, even many members of Jefferson's own party began to accept the Marshall Court's message that all issues involving property rights and contracts were legal questions cognizable only by the courts, in effect, isolating these issues from partisan debate and the clashes of interest-group politics.

Even most chartered corporations came to be seen as vested rights of private property. Indeed, turning the charters of corporations into vested rights of private property immune to government tampering was the most important legal development during the first decade and a half or so of the Marshall Court.

This legal development was not at all anticipated. In 1776 the Revolutionary republics had carved out exclusively public spheres for the promotion of republican state power. Unlike their previous monarchical governments, the new states or commonwealths had sought to promote a res

publica, a public good, that was clearly distinguishable from the many private interests in their societies. The Revolutionaries expected the state and local governments, not private individuals chartered by the state, would do things, from cleaning streets to building roads and canals. Yet by conceiving of a separate public sphere of activity in this way, the Revolutionaries had implied that a private sphere existed as well--a private sphere of individual rights that many now claimed was to be the domain solely of judges.

The idea that there was a sphere of private rights that lay absolutely beyond the authority of the people themselves, was a remarkable innovation: there was virtually no precedents for such an idea in English law or in American colonial experience. Few colonists had ever believed that there were individual rights that could stand against the united will of the community expressed in its representative assemblies. But the Revolution had prepared Americans to accept this innovation in their understanding of rights. And it had done so with its radical commitment to the right of religious freedom. Once Americans were able to limit state authority in religious matters--an area of such importance that no state in history had ever denied itself the power to regulate--they set in motion the

principle that there were some realms of private rights and individual liberties into which executives and legislatures had no business intruding. If religious corporations earlier created by the state as public entities now became private voluntary associations immune from further state tampering, then why could not other public corporations be treated in a like manner?⁸¹

Americans were familiar with the use of public corporate charters. In the past the English crown and the colonial governments had often granted monopolistic charters of incorporation to private persons and associations to carry out a wide variety of endeavors presumably beneficial to the whole society, such as founding a colony, maintaining a college, or creating a bank. In 1606 the English crown had given just such charter to the Virginia Company to settle parts of North America. These corporate privileges had not been frequently granted or widely available; they had been made at the initiative of the government, not private interests; and they had recognized no sharp distinction between public and private. Although the Virginia Company had been composed of private entrepreneurs, it was as much public as it was private. The same was true of Harvard, Yale, Dartmouth, and all the other colonial colleges chartered in the seventeenth and

eighteenth centuries. Although in the nineteenth century most of them eventually became private institutions, at the time of the Revolution they were still regarded as public institutions with communal responsibilities, and as such they received tax money and public support.

Since these corporate charters tended to be exclusive monopolies given to a favored few, most of the American Revolutionary leaders in 1776 had viewed them with suspicion. In a republic, they believed, no person should be allowed to exploit the public's authority for private gain. Consequently, several of the states had written into their Revolutionary constitutions prohibitions against any man or group of men receiving special privileges from the community. The North Carolina constitution of 1776 had declared that "perpetuities and monopolies are contrary to the genius of a State and ought not to be allowed." The Massachusetts constitution of 1780 stated that "no man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from the those of the community, than what arises from the consideration of services rendered to the public."

Although the new Revolutionary states had expected to involve themselves directly in the economy and education, they soon discovered that what they wanted to do was more

than they could handle, both administratively and fiscally. Because the new democratically elected legislatures were often unwilling to raise taxes to pay for all that the governmental leaders desired to do, the states were forced to fall back on the traditional pre-modern practice of enlisting private wealth to carry out public ends. Instead of doing the tasks themselves, as many devout republicans had expected, the states ended up doing what the crown and all pre-modern governments had done--granting charters of incorporation to private associations and groups to carry out a wide variety of endeavors presumably beneficial to the public, in banking, transportation, insurance, education, and other enterprises. The states did not intend to abandon their republican responsibility to promote the public good; they simply lacked the money to do it directly. And of course there were many private interests that were only too eager to acquire these corporate privileges.

Yet because of a republican aversion to chartered monopolies, the creation of corporations in the years following the Revolution provoked strenuous opposition and heated debate. In the decades following the Revolution, attempts by the states to grant such corporate privileges to select individuals and groups immediately raised storms

of protest.⁸² Critics charged that such grants, even when their public purpose seemed obvious, such as those for the College of Philadelphia or the Bank of North America or the city of Philadelphia, were repugnant to the spirit of American republicanism, "which does not admit of granting peculiar privileges to any body of men." Such franchises and privileged grants may have made sense in monarchies as devices serving "to circumscribe and limit absolute power." Certainly the colonists had seen their various crown and corporate charters in just this defensive way. But now that only the people ruled, these grants of corporate privileges seemed pernicious, for, as Justice John Hobart of ^{New} York declared, "all incorporations imply a privilege given to one order of citizens which others do not enjoy, and are so far destructive of the principle of equal liberty which should subsist in every community."⁸³

As a consequence of this kind of opposition, these corporations were radically transformed. As American society, in the North at least, became more democratic, it became increasingly difficult for the state legislatures to resist appeals to bestow these corporate privileges ever more widely, especially since many of their members were themselves involved in the businesses they were incorporating. With a huge proportion of the

representatives in the state legislatures turning over annually, each special interest in society began clamoring for its own cluster of legal privileges. Eventually the corporate charter became, as James Sullivan of Massachusetts complained in 1792, merely "an indulgence to a few men in the state, who happened to ask the legislature to grant it to them."⁸⁴ What one community or group of entrepreneurs had, others wanted as well, and so the corporate charters multiplied in ever increasing numbers.

There had been only about a half dozen business corporations chartered in the entire colonial period. Now such corporate grants for businesses virtually turned into popular entitlements. The legislatures incorporated not just banks but insurance companies and manufacturing concerns, and they licensed entrepreneurs to operate bridges, roads, and canals. The states issued eleven charters of incorporation between 1781 and 1785, twenty-two more between 1786 and 1790, and 114 between 1791 and 1795. Between 1800 and 1817 they granted nearly 1800 corporate charters. Massachusetts alone had thirty times more business corporations than the half dozen or so that existed in all of Europe. New York, the fastest growing state, issued 220 corporate charters between 1800 and 1810.

It seemed clear as early as 1805, as a committee of

New York City justifying multiple ferry leases put it, that "the only effectual method of accommodating the public is by the creation of rival establishments." "Thus," as one American noted in 1806, "if two baking companies are thereby permitted, where there was but one, bread may be cheaper in consequence; or if there are two banks thus instituted, and neither of them taxed, more of the people will be favoured by loans, than where there is but one bank; and a further increase will reduce even the rate of interest." Competition among corporations now seemed the best way of promoting the welfare of the whole community. In other words, the thinking behind the Charles River Bridge decision of the Supreme Court in 1837 was already present a generation earlier.⁸⁵

Eventually the pressure to dispense these corporate charters among special interests became so great that some states sought to ease the entire process by establishing general incorporation laws. Instead of requiring special acts of the legislature for each charter specifying the persons, location, and capitalization involved, the legislatures opened up the legal privileges to all who desired them. Beginning first with religious associations in the 1780s, the states, led by New York in 1811, extended the privileges of corporation to manufacturers, and later

to banks and other entrepreneurial activities. With this multiplication not only was the traditional exclusivity of the corporate charters destroyed, but the public power of the state governments was dispersed. As early as 1802, the Massachusetts attorney-general warned that "the creation of a great variety of corporate interests. . . must have a direct tendency to weaken the powers of government." But the numbers only increased to point where the governor of Massachusetts expressed the fear that so many corporate grants were being created "unsparingly and with an unguarded hand" that there was a real danger of the state government's ending up with "only the very shadow of sovereignty."⁸⁶

Once granted, could these multiplying corporations be subsequently revoked or regulated by the legislatures that had created them? This was the question that bedeviled much of the state politics in the first several decades of the early Republic.

Sooner or later the Supreme Court had to try to sort the matter out. In 1804 the Supreme Court under Chief Justice John Marshall grappled with the issue of a corporation for the first time. In Head v. Providence Insurance Company, Marshall stressed the traditional view of a corporation, that it was a public entity that

presumably could be changed by the legislature that originally chartered it. By a corporation the Court meant all entities chartered for public purposes--towns, turnpikes, canals, insurance companies, and colleges.

This stress on the need for a "public purpose" behind the state's activity, however, eventually forced the Supreme Court in Terrett v. Taylor (1815) to separate corporations into two kinds, public and private, a distinction new to American law. Legislatures could modify charters of public corporations, declared Justice Joseph Storey, who wrote the decision; but such public corporations included only counties, towns, and cities. The charters of all the other corporations, including businesses and colleges, were private property.

If corporations such as banks and other businesses were indeed private, and not public, then it could be intelligibly argued that their charters, once granted, were actually kinds of private property protected from subsequent violation or regulation by state authority. No one doubted the capacity of the legislature to take private property for public purposes, but this power, it was now argued, could not be extended so far as to abridge rights expressly vested prior to the legislature's assertion of its power--at least not without some sort of compensation

for such abridgements.⁸⁷ "In granting charters," declared William Robinson in the Pennsylvania assembly in 1786 in defense of the charter of the Bank of North America, "the legislature acts in a ministerial capacity"; that is, it acted as the crown had acted in mobilizing private resources for public purposes. This bestowing of charters, said Robinson, "is totally distinct from the power of making laws, and it is a novel doctrine in Pennsylvania that they can abrogate those charters so solemnly granted." There was a difference between laws and charters. Laws were general rules for the whole community; charters, declared Robinson, "bestow particular privileges upon a certain number of people.... Charters are a species of property. When they are obtained, they are of value. Their forfeiture belongs solely to the courts of justice."⁸⁸ It was a strained, premature argument, and it did not immediately take hold; but it pointed the way to the future.

By 1802 Hamilton was contending that legislatures could not violate charters once granted. "The proposition, that a power to do, includes virtually, a power to undo, as applied to a legislative body," he wrote, "is generally but not universally true. All vested rights from an exception to the rule."⁸⁹ When state legislatures in North Carolina,

Virginia, Massachusetts, and New Hampshire tried to change the charters of colleges they had once granted, the boards of trustees contended that their charters were vested rights that could no longer be tampered with. Yet many believed that institutions chartered to fulfill a public purpose had to be responsible to the public. "It seems difficult to conceive of a corporation established for merely private purposes," declared a North Carolina judge in 1805. "In every institution of that kind the ground of the establishment is some public good or purpose to be promoted."⁹⁰ With so many contrary legal arguments flying about, the issue had to be resolved at the highest level.

The stage was set for the famous case, Dartmouth College v. Woodward, decided by the Supreme Court in 1819. Dartmouth College had been incorporated by a royal charter in 1769. In 1815 the trustees of the college, who were Congregationalists and Federalists, removed John Wheelock, who was a Presbyterian and Republican, from the presidency of the college. Wheelock appealed to the legislature of New Hampshire, which revoked the old charter of 1769 and created a new corporation, Dartmouth University with a new set of trustees who reinstated Wheelock to the presidency. The old Federalist trustees sued, arguing that the state legislature had violated their vested rights. The state

supreme court rejected their argument, declaring in traditional fashion that Dartmouth was a public corporation subject to state control and regulation in the public interest. This decision was appealed to the Supreme Court of the United States.

In his very creative decision Marshall contended that Dartmouth was a private corporation as defined by Story in Terret v. Taylor. He then went on to declare (he said "it can require no argument") that the college's original charter was a contract under Article I, Section 10, of the United States Constitution and was thus immune to any state violation.⁹¹ Actually the idea that a charter was a kind of contract had been part of Federalist thinking for several decades. In 1802 Senator Gouverneur Morris had used the presumed similarity of a charter and a contract to oppose the Jeffersonian Republicans' elimination of the circuit court positions created by the Federalists' Judiciary Act of 1801. When you give an individual the right to make a toll road or bridge, said Morris, "can you, by a subsequent law, take it away? No; when you make a compact, you are bound by it."⁹²

Although Marshall and his Court could scarcely have grasped the momentous implications for American business of their Dartmouth College decision, the decision did result

in placing all private corporations under the protection of the United States Constitution. All private corporations, not just the four dozen or so educational institutions existing in 1819 but the hundreds of business corporations that had been created since the Revolution, had become very different from their monarchical predecessors: they were no longer exclusive monopolies and they were no longer public. They became private property belonging to individuals, not the state.

When Jefferson learned as early as 1816 of the argument the Federalist attorneys, including Daniel Webster, were making--that corporations were vested rights immune to subsequent legislative changes--he was furious. He could not believe that such an idea had any standing whatsoever. The notion that charters once publicly granted were beyond legislature tampering "may be a salutary provision against the abuses of a monarch," he told Governor William Plumer of New Hampshire, "but is most absurd against the nation itself." Such a doctrine, inculcated by "our lawyers and priests," he said, supposed "that preceding generations held the earth more freely than we do; had a right to impose laws on us, unalterable by ourselves, and that we, in like manner, can make laws and impose burdens on future generations, which they will have

no right to alter; in fine, that the earth belongs to the dead and not the living."⁹³

There was a curious paradox in these legal developments. Just as the private rights of individuals expanded in these years of the early Republic, so too did the public power of the states and municipal governments. Despite the generous bestowal of corporate charters on private interests, the republican belief that the government should have a distinct and autonomous sphere of public activity remained strong, especially among the new states west of the Appalachian Mountains.⁹⁴ Even in the older states many Americans retained a republican faith in the power of government to promote a public good. Those who sought to protect the rights of individuals and private corporations did not deny the public prerogatives of the states. In fact, the heightened concern for the private vested rights of persons was a direct consequence of the enhanced public power the republican Revolution had given to the states and municipalities. Although the power of the federal government certainly declined in the decades following Jefferson's election as president, the public authority and the police powers and regulatory rights of the states and their municipalities grew stronger.

Separating the political from the legal, the public from the private individual, actually allowed for more vigorous state action as long as that action remained within the public realm and served what was called a "public purpose." Individuals may have had rights, but the public had rights as well--rights that grew out of the sovereignty of the state and its legitimate power to police the society. The state of New York, for example, remained deeply involved in the society and economy. Not only did the state government of New York distribute its largess to individual businessmen and groups in the form of bounties, subsidies, stock ownership, loans, corporate grants, and franchises, but it also assumed direct responsibility for some economic activities, including building the Erie Canal.⁹⁵

Even when the states began dissipating their modern public power by reverting to the pre-modern practice of enlisting private wealth to carry out public ends by issuing increasing numbers of corporate charters, they continued to use their ancient police power to regulate their economies. Between 1780 and 1814 the Massachusetts legislature, for example, enacted a multitude of laws regulating the marketing of a variety of products--everything from lumber, fish, tobacco, and shoes, to

butter, bread, nails, and firearms. The states never lost their inherited responsibility for the safety, economy, morality, and health of their societies.⁹⁶ The idea of a public good that might override private rights remained alive.

Despite all this state police power legislation and regulation, however, it was usually left to the courts to sort out and mediate the conflicting claims of public authority and the private rights of individuals. The more the state legislatures enacted statutes to manage and regulate the economy, the more judges found it necessary to exert their authority in order to do justice between individuals and make sense of what was happening. Precisely because of the excessively democratic nature of American politics, the judiciary right from the nation's beginning acquired a special power that it has never lost.

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- ¹ Albert J. Beverage, The Life of John Marshall (Boston, 1919), 4: 81.
- ² Jean Edward Smith, John Marshall: Definer of a Nation (New York, 1996), 5.
- ³ Charles F. Hobson, The Great Chief Justice: John Marshall and the Rule of Law (Lawrence, KS, 1996), 15; R. Kent Newmyer, John Marshall and the Heroic Age of the Supreme Court (Baton Rouge, 2001), 80; Diary and Letters of Rutherford B. Hayes, ed. Charles R. Williams (Columbus, OH, 1922-1926), 1: 116.
- ⁴ Hobson, The Great Chief Justice: John Marshall, 20.
- ⁵ TJ to Monroe, 13 Apr. 1800, L and B, eds., Writings of Jefferson, 19: 120.
- ⁶ Marshall to AH, 1 Jan 1801, Papers of Marshall, 6: 46-47; editorial note, ibid., 379.
- ⁷ Marshall to Pinckney, 4 Mar. 1801, Papers of Marshall, 6: 89.
- ⁸ George L. Haskins, "Law Versus Politics in the Early Years of the Marshall Court," University of Pennsylvania Law Review, 130 (1981), 2.
- ⁹ John Jay to JA, 2 Jan. 1801, in Maeva Marcus et al., eds., The Documentary History of the United States Supreme

Court (New York, 1992) 4:664; R. Kent Newmyer, The Supreme Court under Marshall and Taney (Arlington Heights, IL, 1968), 26, 37.

¹⁰ Smith, John Marshall, 403; George L. Haskins and Herbert A. Johnson, Foundations of Power: John Marshall, 1801-1815: The History of the Supreme Court of the United States of America (New York, 1981), 652.

¹¹ Smith, John Marshall, 285-86.

¹² Haskins and Johnson, Foundations of Power: Marshall, 74.

¹³ Editorial note, The United States Circuit Court for North Carolina (1803), Papers of Marshall, 6: 144.

¹⁴ Marshall to St. George Tucker, 27 Nov. 1800, Papers of Marshall, 6: 23

¹⁵ Smith, John Marshall, 284n.

¹⁶ Stephen B. Presser, The Original Misunderstanding" The English, the Americans and the Dialectic of Federalist Jurisprudence (Durham, 1991), 81, 97

¹⁷ Marshall to Richard Peters, 23 Nov. 1807, Papers of Marshall, 7: 165.

¹⁸ Editorial note, United States v. Burr (1807), Papers of Marshall, 7: 3-11, quotations at 9, 10; TJ to Eppes, 28 May 1807, Ford, ed., Writings of Jefferson, 9: 67-68.

¹⁹ Smith, John Marshall, 313; Newmyr, John Marshall and the Heroic Age of the Supreme Court, 157-75I.

²⁰ Actually, despite Marshall's statement, the Congress had not added to the Court's original jurisdiction. All the 1789 statute had said, according to one distinguished constitutional scholar, was that "if and when the Court already had jurisdiction (whether original or appellate), the justices would be empowered to issue certain technical writs--in particular writs of prohibition and mandamus." Akhil Reed Amar, The American Constitution A Biography (New York, 2005), 232-33.

²¹ Dumas Malone, Jefferson the President: The First Term, 1801-1805 (Boston, 1970), 149.

²² Marbury v. Madison (1803), William Cranch, ed., U.S. Supreme Court Reports (Washington, 1804), 177.

²³ Malone, Jefferson the President: The First Term, 155.

²⁴ For revisionist studies of the history of judicial review, and particularly the history of Marbury v. Madison, see Christopher Wolfe, The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law (New York, 1986); J.M. Sosin, The Aristocracy of the Long Robe: The Origins of Judicial Review in America (Westport, CT,

1989); Robert Lowry Clinton, Marbury v. Madison and Judicial Review (Lawrence, KS, 1989); and William E. Nelson, Marbury v. Madison: The Origins and Legacy of Judicial Review (Lawrence, KS, 2000).

²⁵ Commonwealth of Va. v. Caton and Others (Nov. 1782), Peter Call, ed., Reports of Cases Argued and Decided in the Court of Appeals of Virginia (Richmond, 1833), 4: 8.

²⁶ Commonwealth of Va. v. Caton, in Call, ed., Reports, 4: 17-18.

²⁷ Richard Spraight to James Iredell, 12 Aug. 1787, in Griffith J. McRee, Life and Correspondence of James Iredell (New York, 1857-1858), 2: 169-70.

²⁸ Madison's Observations on Jefferson's Draft of a Constitution for Virginia, 1788, Papers of Jefferson, 6: 315.

²⁹ J.W. Gough, Fundamental Law in English Constitutional History (Oxford, UK, 1955, 1961), 186-190, 206, 214.

³⁰ James Iredell to Richard Spraight, 26 Aug. 1787, McRee, Life of James Iredell, 2: 172-176.

³¹ Commonwealth of Va. v. Caton, in Call, ed., Reports, 4: 17.

³² Iredell, "To the Public," 17 Aug. 1786, McRee, Life of Iredell, 2: 147.

³³ Max Farrand, ed., The Records of the Federal Convention of 1787 (New Haven, 1911, 1937), 2: 430; JM, quoted in Maeva Marcus, "Judicial Review in the Early Republic," in Ronald Hoffman and Peter J. Albert, eds., Launching the 'Extended Republic,': The Federalist Era (Charlottesville, 1996), 31; JM, "Helvidius No. II," 1793, Guillard Hunt, ed., The Writings of James Madison (New York, 1900-1910), 6: 155; TJ to Spencer Roane, 6 Sept. 1819, Jefferson: Writings, 1425-28.

³⁴ The Federalist, No. 49.

³⁵ Sylvia Snowiss, Judicial Review and the Law of the Constitution (New Haven, 1990), 74.

³⁶ Jeff Roedel, "Stoking the Doctrinal Furnace: Judicial Review and the New York Council of Revision," New York History 69 (1988), 261-283.

³⁷ Farrand, ed., Records of the Federal Convention, 1: 97, 73.

³⁸ Annals, 2nd Congress, 1st Session (April, 1792), III, 557.

³⁹ Marcus, "Judicial Review," Hoffman and Albert, eds., Launching the 'Extended Republic,' 36-37.

⁴⁰ G.S. Rowe, "Judicial Tyrant and Vox Populi: Pennsylvanians View Their State Supreme Court, 1777-1799," Pa. Mag. of Hist. and Biog., 118 (1994), 55.

⁴¹ Hylton v. United States, 3 Dallas 171 (1796).

⁴² Cooper v. Telfair, 4 Dallas 18 (1800).

⁴³ Mary Sarah Bilder, "The Corporate Origins of Judicial Review," Yale Law Journal, 116 (2006), 502-66.

⁴⁴ David Lieberman, The Province of Legislation Determined: Legal Theory in Eighteenth-Century (Cambridge, UK, 1989), 16-20.

⁴⁵ Snowiss, Judicial Review, 64.

⁴⁶ Gerald Gunther, "Judicial Review," Leonard W. Levy, ed., Encyclopedia of the American Constitution (New York, 1986), 1055; Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (New York, 2004), 150, 155.

⁴⁷ For the important distinction between judicial review and judicial supremacy see Kramer, The People Themselves.

⁴⁸ L. H. LaRue, Constitutional Law as Fiction: Narrative in the Rhetoric of Authority ((University Park, PA, 1995), 56-69.

⁴⁹ Marbury v. Madison (1803), William Cranch, ed., U.S. Supreme Court Reports (Washington, 1804), 177.

⁵⁰ TJ to Phillip Mazzei, 28 Nov. 1785, Papers of Jefferson, 9: 67-72; TJ to JM, 17 Feb. 1826, Jefferson: Writings, 1513-14.

⁵¹ For a full discussion of representation, see Gordon S. Wood, Representation in the American Revolution (Charlottesville, 2008).

⁵² Richard A. Ryerson, The Revolution is Now Begun: The Radical Committees of Philadelphia, 1765-1776 (Philadelphia, 1978), 31-33, 47, 50, 66, 73, 75.

⁵³ Providence Gazette, 12 May 1787.

⁵⁴ AH, The Federalist No. 78.

⁵⁵ James Wilson, "Lectures on Law" (1790-1791), The Works of James Wilson, ed. Robert Green McCloskey (Cambridge, MA, 1967), 293.

⁵⁶ William A. Robinson, Jeffersonian Democracy in New England (New Haven, 1916), 120.

⁵⁷ For the widespread acceptance of judicial review in the 1790s, see Nelson, "Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860," University of Pennsylvania Law Review,

120 (1972), 1166, 1169-70; Marcus, "Judicial Review," 25-53; Kramer, The People Themselves, 148

⁵⁸ Marcus, "Judicial Review," Hoffman and Albert, eds., Launching the 'Extended Republic,' 36-37

⁵⁹ Charles Warren, The Supreme Court in United States History (Boston, 1937), 1: 52-53, 110-11.

⁶⁰ Anaton-Hermann Chroust, The Rise of the Legal Profession in America (Norman, OK, 1965), 2: 75-77.

⁶¹ AH, The Federalist, No. 78.

⁶² Chroust, Rise of the Legal Profession, 2: 36-37, 173-223.

⁶³ Haskins, "Law versus Politics," University of Pennsylvania Law Review, 130 (1981), 24.

⁶⁴ Haskins and Johnson, Foundations of Power: John Marshall, 322-331.

⁶⁵ Everett Somerville Brown, ed., William Plumer's Memorandum of Proceedings in the United States Senate, 1803-1807 (London, 1923), 269.

⁶⁶ C. Peter Magrath, Yazoo: Law and Politics in the New Republic: The Case of Fletcher v. Peck (New York, 1967).

⁶⁷ Carl Brent Swisher, American Constitutional Development, 2nd ed. (Cambridge, MA, 1954), 153-54; Haskins and Johnson, Foundations of Power: John Marshall, 597.

⁶⁸ Morton J. Horwitz, The Transformation of American Law, 1780-1860 (Cambridge, MA, 1977), 21

⁶⁹ Horwitz, Transformation of American Law, 23.

⁷⁰ William E. Nelson, Americanization of the Common Law: the Impact of Legal Change on Massachusetts Society, 1760-1830 (Cambridge, MA, 1975)172, Horwitz, Transformation of American Law, 23-26.

⁷¹ Hamilton, Remarks in New York Assembly, 6 Feb. 1787, Papers of Hamilton, 4: 35.

⁷² Edward S. Corwin, "The Doctrine of Due Process of Law Before the Civil War," Harvard Law Review, 24 (1911), 371-372;

⁷³ Edward S. Corwin, "The Basic Doctrine of American Constitutional Law," Michigan Law Review, 12 (1914), 254.

⁷⁴ Marbury v Madison (1803), Cranch, ed., U.S. Supreme Court Reports, 166, 167;

⁷⁵ TJ to JM, 15 Mar. 1789, Republic of Letters, 587.

⁷⁶ St. George Tucker, Blackstone's Commentaries: With Notes of Reference to the Constitution and laws of the

Federal Government and of the Commonwealth of Virginia

(Philadelphia, 1803), I, Pt. 1, xxv.

⁷⁷ Marshall to C.C. Pinckney, 21 Nov 1802, Papers of Marshall, 6: 125.

⁷⁸ Marshall to Timothy Pickering, 28 Feb. 1811, Papers of Marshall, 7: 270.

⁷⁹ Haskins, "Law Versus Politics," University of Pennsylvania Law Review, 130 (1981), 19-20.

⁸⁰ Horwitz, Transformation of American Law, 31-62. For Marshall's conception of property, see Richard A. Brisbin, Jr., "John Marshall and the Nature of Law in the Early Republic," Virginia Mag. of Hist. and Biog., 98 (1990), 62-71; Edward S. Corwin, "The Basic Doctrine of American Constitutional Law," Michigan Law Review, 12 (1914), 247-76.

⁸¹ Johann N. Neem, "Politics and the Origins of the Nonprofit Corporation in Massachusetts and New Hampshire, 1780-1820," Nonprofit and Voluntary Sector Quarterly, 32 (2003), 344-65; Barry Shane, The Myth of American Individualism: The Protestant Origins of American Political Thought (Princeton, 1994), 193-240.

⁸² When in the Philadelphia Convention James Madison

proposed that the federal government be given the explicit power to grant charters of incorporation, the framers decided to finesse the issue by saying nothing in the Constitution about incorporations out of fear of arousing popular opposition to "mercantile monopolies." Frank Bourgin, The Great Challenge: The Myth of Laissez-Faire in the Early Republic (New York, 1989), 44.

⁸³ Pennsylvania Packet, 2, 10 Sept. 1783, 7, 23 Aug.. 25 Sept. 1786; Hendrik Hartog, Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870 (Chapel Hill, 1983), 90.

⁸⁴ [James Sullivan], The Path to Riches: An Inquiry into the Origin and Use of Money; and into the Principles of Stocks and Banks (Boston, 1792), 37-38, 10, 43.

⁸⁵ Cochran, Frontiers of Change, 21; Hartog, Public Property and Private Power, 153; [Samuel Blodget], Economica: A Statistical Manual for the United States of America, (Washington, DC, 1806), 17.

⁸⁶ Oscar and Mary Handlin, Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861 (Cambridge, 1947, 1969), 106-133;

E. Merrick Dodd, American Business Corporations until 1860, with Special Reference to Massachusetts (Cambridge, MA, 1954); Ronald E. Seavoy, The Origins of the American Business Corporation, 1784-1855: Broadening the Concept of Public Service during Industrialization (Westport, Conn., 1982); Pauline Maier, "The Revolutionary Origins of the American Corporation," WMQ, 50 (1993), 68-69.

⁸⁷ In 1776 most of the Revolutionary state constitutions did not provide for just compensation for the public taking of private property; but, following the adoption of the Fifth Amendment to the federal Constitution in 1791, this provision was explicitly added in nearly all the constitutions of states subsequently admitted to the union. In the following years where such a specific reference to just compensation remained absent from the constitutions of the original states, judicial interpretation often inserted it. J.A.C. Grant, "The 'Higher Law' Background of the Law of Eminent Domain," Wisconsin Law Review, 6 (1930-31), 70.

⁸⁸ Mathew Carey, ed., Debates and Proceedings of the General Assembly of Pennsylvania. . . (Philadelphia, 1786), 11-12.

⁸⁹ AH, "The Examination," 23 Feb. 1802, Papers of Hamilton, 25: 533. Edward S. Corwin called the protection of vested rights "the basic doctrine of American constitutional law." Corwin, "The Basic Doctrine of American Constitutional Law," Michigan Law Review, 12 (1914), 247-276.

⁹⁰ Harry N. Scheiber, "Public Rights and the Rule of Law in American Legal History," California Law Review, 72 (1984), 217-51.

⁹¹ Newmyer, Justice Joseph Story, 127-37; R. Kent Newmyer, John Marshall and the Heroic Age of the Supreme Court (Baton Rouge, 2001), 246-50.

⁹² Debates in the Senate of the United States on the Judiciary during the First Session of the Seventh Congress (Philadelphia, 1802), 39.

⁹³ TJ to William Plumer, 21 July 1816, L and B, eds., Writings of Jefferson, 15: 46-47.

⁹⁴ Sandra F. VanBurkleo, "'The Paws of Banks': The Origins and Significance of Kentucky's Decision to Tax Federal Bankers, 1818-1820," JER, 9 (1989), 480-487; Sandra F. Van Burkleo, "'That Our Pure Republican Principles Might Not Wither': Kentucky's Relief Crisis and the Pursuit of

Moral Justice, 1818-1826" (Ph.D. Diss., University of Minnesota, 1988), ch. 6.

⁹⁵ L. Ray Gunn, The Decline of Authority: Public Economic Policy and Political Development in New York, 1800-1860 (Ithaca, 1988).

⁹⁶ William J. Novak, The People's Welfare: Law and Regulation in Nineteenth-Century America (Chapel Hill, 1996), 15, 88.