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## The Province of the Judiciary, 37 J. Marshall L. Rev. 325 (2004)

William E. Nelson

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# THE PROVINCE OF THE JUDICIARY

WILLIAM E. NELSON\*

There is a famous sentence in *Marbury v. Madison*,<sup>1</sup> where Chief Justice John Marshall wrote, "It is emphatically the province and duty of the judicial department to say what the law is."<sup>2</sup> My plan for this Article is to rip Marshall's sentence out of the context of *Marbury* and judicial review and to examine it instead in the context of the turn-of-the-century effort by mainly Federalist judges to seize from juries the power to find law. I will suggest that John Marshall played a significant role in that effort. After doing that, I will return to *Marbury* and ask more generally how the judiciary's seizure of lawfinding power from juries might have been related to the contemporaneously emerging doctrine of judicial review.

## I. THE LAWFINDING POWER OF EIGHTEENTH-CENTURY JURIES

In mid-eighteenth-century British North America, juries determined law as well as fact in the cases that came before them.<sup>3</sup> They were free to ignore judges' instructions on the law, for it was "not only [every juror's] right but his Duty in that Case to find the Verdict according to his own best Understanding, Judgment and Conscience, tho [sic] in Direct opposition to the Direction of the Court."<sup>4</sup> The jury system was valued precisely because it introduced into the "executive branch . . . a mixture of popular

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\* Edward Weinfeld Professor of Law and Professor of History, New York University. A.B., Hamilton College, 1962; LL.B., New York University, 1965; Ph.D., Harvard University, 1971. The author is indebted to the members of the Legal History Colloquium at New York University for their comments and criticisms and especially to Larry D. Kramer for his help and insights over the course of the past several years on the issues raised by this paper. The author also wishes to thank the Filomen D'Agostino Faculty Research Fund of New York University School of Law for its research support.

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

2. *Marbury*, 5 U.S. (1 Cranch) at 177.

3. See WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 21-30 (1975) [hereinafter NELSON, *AMERICANIZATION OF THE COMMON LAW*]; William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 904-17 (1978) [hereinafter Nelson, *The Eighteenth-Century Background*].

4. 1 THE LEGAL PAPERS OF JOHN ADAMS 230 (Kinvin Woods & Hiller B. Zobel eds., 1965).

power;” as a result, “the subject . . . [was] guarded in the execution of the laws,”<sup>5</sup> and “no Man [could] be condemned of Life, or Limb, or Property or Reputation, without the Concurrence of the Voice of the People.”<sup>6</sup> On the eve of the American Revolution, the power of the jury to control the law was recognized up and down the Atlantic Coast, from Georgia to New Hampshire, and was fundamental to the democratic order existing on the western shore of the Atlantic.<sup>7</sup>

Faith in juries persisted throughout the Revolutionary era and emerged with uncommon fervor during the debates on ratification of the Constitution. Many anti-Federalists expressed concern that a powerful federal judiciary would infringe on the power of juries to determine law as well as fact<sup>8</sup>—a power that they continued to regard as essential to the preservation of liberty.<sup>9</sup> “Judges unincumbered [sic] by juries,”<sup>10</sup> one anti-Federalist feared, were “much better friends to government than to the people.”<sup>11</sup> As Richard Henry Lee explained, “in spite of their own natural integrity,” judges possessed “an involuntary bias towards those of their own rank and dignity.”<sup>12</sup> “[T]he established right of the jury by the common law, and the fundamental law of this country, . . . to decide both as to law and fact,”<sup>13</sup> according to another anti-Federalist, “secure[d] to the people at large, their just and rightful controul [sic] in the judicial department.”<sup>14</sup> Even if “the freemen of a country [were] not always minutely skilled in laws,” he added, they possessed “common sense in its purity,

5. John Adams, *The Earl of Clarendon to William Pym. No. 3*, BOSTON GAZETTE, Jan. 27, 1766, reprinted in 3 THE WORKS OF JOHN ADAMS 477, 481 (Boston, Charles C. Little & James Brown 1851).

6. 1 THE LEGAL PAPERS OF JOHN ADAMS, *supra* note 4, at 229.

7. See WILLIAM E. NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 16-19 (2000).

8. See SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM & THE DISSENTING TRADITION IN AMERICA, 1788-1828, at 66-68, 87-92 (1999).

9. See *id.* at 66-68, 87-92.

10. *Id.* at 87.

11. *Id.* at 88 (quoting an Old Whig [George Bryan, John Smilie, and James Hutchinson?], no. 1, INDEPENDENT GAZETTEER, Oct. 12, 1787, in 3 THE COMPLETE ANTI-FEDERALIST 19 (Herbert J. Storing, ed., 1981); An Old Whig [George Bryan, John Smilie, and James Hutchinson?], no. 2, INDEPENDENT GAZETTEER, Oct. 17, 1787, in 3 THE COMPLETE ANTI-FEDERALIST, *supra* at 24).

12. *Id.* at 68 (quoting a Letter from Richard Henry Lee to Edmund Pendleton (May 26, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 878-79 (Merrill Jensen et al., eds., 1976)).

13. *Id.* at 91 (quoting *Letters from the Federal Farmer [Melancton Smith?]*, An Additional Number of Letters from the Federal Farmer to the Republican . . . , no. 15 (New York, 1788) in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 11, at 315, 319-20).

14. *Id.*

which seldom or never err[ed] in making and applying laws to the condition of the people."<sup>15</sup> These, and other like concerns, led to the jury-trial protections included in the Bill of Rights.<sup>16</sup>

As late as the early 1790s, the pre-Revolutionary understanding of the jury's ultimate power to determine law as well as fact persisted not only in state courts, but in the newly established federal courts as well.<sup>17</sup> The 1791 law lectures of Supreme Court Justice James Wilson, an eminent Federalist thinker, constitute one prominent piece of evidence.<sup>18</sup>

On the surface, Wilson was clear that judges determined law and juries fact. In his words,

To a question of law the judges, not the jury, shall answer: so, to a question of fact, the jury, not the judges, shall answer.<sup>19</sup>

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But, in many cases, the question of law is intimately and inseparably blended with the question of fact: and when this is the case, the decision of one necessarily involves the decision of the other. When this is the case, it is incumbent on the judges to inform the jury concerning the law; and it is incumbent on the jury to pay much regard to the information, which they receive from the judges. But now the difficulty, in this interesting subject, begins to press upon us. Suppose that, after all the precautions taken to avoid it, a difference of sentiment takes place between the judges and the jury, with regard to a point of law: . . . [W]hat must the jury do?—The jury must do their duty, and their whole duty: they must decide the law as well as the fact.<sup>20</sup>

Wilson understood that juries could make mistakes, even "gross ones," but "their errors and mistakes can never grow into a dangerous system."<sup>21</sup> The "esprit du corps" existing among judges,<sup>22</sup> who, as Richard Henry Lee had observed, possessed "an involuntary bias towards those of their own rank and dignity,"<sup>23</sup> simply did not exist among juries, which could "not be bent under the weight of precedent and authority."<sup>24</sup> To prevent the elaboration of judge-made law oppressive to the people, Wilson, in

15. *Id.*

16. See generally ROBERT A. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791* (Northeastern Univ. Press 1983) (1955).

17. *Id.* at 100.

18. See generally 2 *THE WORKS OF JAMES WILSON* (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896) (1895).

19. *Id.* at 194.

20. *Id.* at 219-20.

21. *Id.* at 222.

22. *Id.*

23. CORNELL, *supra* note 8, at 68 (quoting a Letter from Richard Henry Lee to Edmund Pendelton (May 26, 1788)).

24. 2 *THE WORKS OF JAMES WILSON*, *supra* note 18, at 222.

short, thought it necessary to defer to the lawmaking power of the jury.<sup>25</sup>

He was not alone. One year after Wilson's lectures, in the 1794 case of *Georgia v. Brailsford*,<sup>26</sup> Chief Justice John Jay instructed a jury and summed up the accepted law as follows:

It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay the respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still both objects are lawfully, within your power of decision.<sup>27</sup>

## II. THE DESTABILIZATION OF EIGHTEENTH-CENTURY LAW

Within the next decade, however, changes in national politics completely destabilized Wilson's and Jay's statements of the law. One change, which was nonpartisan, was dictated by the political theory of the Revolution, as the 1792 South Carolina case of *Administrators of Moore v. Cherry*<sup>28</sup> illustrates.

The plaintiff in *Moore* was a Loyalist who brought suit to recover a slave taken from him during the Revolutionary War by a Patriot scouting party and then sold to the defendant.<sup>29</sup> Ignoring instructions that the plaintiff, pursuant to the 1783 peace treaty with Great Britain and a statute passed by the South Carolina legislature, was entitled to recovery of his slave, a jury found for the defendant.<sup>30</sup> After a new trial had been granted, a second jury did the same.<sup>31</sup> On appeal, the court granted yet a third trial, with one judge declaring, "God forbid then that the verdicts of two juries should make the law," since "[l]egislators as well as judges would both then be useless;" and we "would be governed by such rules as private opinion would occasionally dictate."<sup>32</sup>

This language, I believe, shows a shift in the understanding of what constituted "the Voice of the People"—the voice by which juries had prevented pre-Revolutionary judges from imposing

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25. *Id.* at 222-23.

26. 3 U.S. (3 Dall.) 1 (1794).

27. *Brailsford*, 3 U.S. (3 Dall.) at 4.

28. 1 S.C.L. (1 Bay) 269 (1792).

29. *Moore*, 1 S.C.L. (1 Bay) at 269.

30. *Id.*

31. *Id.*

32. *Id.* at 271.

oppressive law.<sup>33</sup> As a result of the War for Independence, the people had begun to speak instead through their sovereign legislatures. Thus, allowing juries to determine law would not merely prevent arbitrary judicial lawmaking; juries also would be able to interpose their “private opinion” in the path of legislation reflecting the public’s will.<sup>34</sup>

The emerging understanding that the people spoke through legislatures rather than juries had less of an impact, however, than a second development of the 1790s—the emergence of partisan conflict between Federalists and Jeffersonians. The assumption of the mid-eighteenth century had been that the people, after consulting deferentially with their leaders, would speak with a uniform voice. That assumption lay at the foundation of John Jay’s and James Wilson’s understandings of the workings of the jury. Both thought that juries would listen attentively and pay careful heed to judicial instructions before returning their unanimous verdicts.<sup>35</sup>

When national political divisions erupted in the mid-1790s, it appeared to many that the common people had stopped listening deferentially to their betters.<sup>36</sup> Instead, the people seemed to set out on paths of their own, often in opposition to what their betters had directed them to do.<sup>37</sup> In response, elites took steps to subject the people to the control of the law. This effort to use law as a vehicle to control the people, rather than to envision law as a mechanism by which elites worked with their subordinates to empower communities, emerges most clearly in the context of the Sedition Act of 1798<sup>38</sup> and several prosecutions thereunder.

The Sedition Act sought to clamp down on popular turmoil. The number of newspapers in the United States had expanded rapidly during the 1790s, and most were politically aligned.<sup>39</sup> They engaged in raucous political debate, harshly criticizing government officials whom they opposed.<sup>40</sup> Moreover, their criticism occurred at a time when the United States was threatened with war and perhaps even foreign invasion.<sup>41</sup> The quantity and vehemence of critical political rhetoric, especially in

33. 1 THE LEGAL PAPERS OF JOHN ADAMS, *supra* note 4, at 229.

34. *Moore*, 1 S.C.L. (1 Bay) at 271.

35. See 2 THE WORKS OF JAMES WILSON, *supra* note 18, at 220.

36. See generally Nelson, *The Eighteenth-Century Background*, *supra* note 3, at 924-32.

37. *Id.*

38. An Act in Addition to the Act, Entitled “An Act for the Punishment of Certain Crimes Against the United States,” ch. 74, §§ 1-2, 1 Stat. 596 (1798).

39. JAMES MORTON SMITH, *FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 107-12 (Cornell Univ. Press 1963) (1956).

40. *Id.*

41. See *id.* at 3-8.

view of the high stakes, simply shocked the Federalists who controlled Congress and led them to pass the 1798 Act making seditious libel a federal crime.<sup>42</sup>

Of course, the Jeffersonian Republican opposition claimed that the Sedition Act was an unconstitutional violation of the First Amendment's clause protecting freedom of the press.<sup>43</sup> Jefferson and his main co-worker, James Madison, pursued their argument of unconstitutionality in the Kentucky and Virginia Resolutions of 1798, in the presidential election of 1800 and in other political forums.<sup>44</sup> Meanwhile, Jeffersonian editors who were indicted under the Act raised the claim of unconstitutionality as a legal defense to the government's proceedings.<sup>45</sup>

Federalist judges who tried the proceedings were concerned that juries might accept the defendants' arguments.<sup>46</sup> If they did, the Jeffersonian editors would be acquitted and the raucous political debate legitimized. Thus, the Federalist judges began to instruct juries that legal issues about the constitutionality of the Sedition Act were solely for the courts;<sup>47</sup> they pulled away from the formulation of Chief Justice Jay and Justice Wilson that only a few years earlier had left issues of law to the jury.

The first to speak, although somewhat confusingly, was Supreme Court Justice William Paterson while riding circuit in Vermont in October 1798.<sup>48</sup> In a case arising out of an indictment against a Republican Congressman, Matthew Lyon, who was also a newspaper editor and frequent publisher of political tracts, Justice Paterson directed the jury that it must treat the Sedition Act as constitutional, unless and until it was "declared null and void by a tribunal competent for the purpose"—namely, a court.<sup>49</sup> Although the jury in this criminal case, by virtue of its capacity to return a general verdict of not guilty, had power to ignore Paterson's instruction, the Justice did not so inform the jury.<sup>50</sup> He certainly did not tell the jurors, as Chief Justice Jay had in *Brailsford*, that they had a right to ignore his charge.<sup>51</sup> On the other hand, Paterson was not yet ready to restrict jury power in all

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42. See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 590-99, 700-05 (1993); SMITH, *supra* note 39, at 95-96.

43. SMITH, *supra* note 39, at 96.

44. See ELKINS & MCKITRICK, *supra* note 42, at 721-26.

45. See *id.*

46. See FRANCIS WHARTON, *STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS* 335-36 (Burt Franklin ed., 1970) (1849).

47. *Id.* at 336.

48. *Id.* at 334-37.

49. *Id.* at 336.

50. *Id.*

51. *Brailsford*, 3 U.S. (3 Dall.) at 7-9.

cases. Only a few days before his charge in the *Lyon* case,<sup>52</sup> he had told a different jury in a land confiscation case that both “courts and juries were the proper bodies to decide on the constitutionality of laws.”<sup>53</sup>

Justice Samuel Chase took a more consistent position on restricting juries while riding circuit in 1800 and trying two highly publicized criminal cases. He began in late April, when he told a grand jury in Pennsylvania that:

the Judges of the Supreme, and District Courts are bound by their *Oath of Office*, to regulate their Decisions *agreeably to the Constitution*. The Judicial power, therefore, are the only *proper* and *competent* authority to decide whether any Law made by Congress; or any of the State Legislatures is contrary to or in Violation of the *federal Constitution*.<sup>54</sup>

He applied his view several days later during the treason trial of John Fries, who had led an armed mob in a protest against payment of a federal tax on windows.<sup>55</sup>

Fries had been tried and convicted for treason during the previous term of court, but the conviction had been set aside for procedural reasons and a new trial ordered.<sup>56</sup> At the first trial, counsel had argued the law to the jury, maintaining that mere resistance to the collection of taxes did not amount to levying war against the United States and thus did not constitute treason.<sup>57</sup> At the retrial, however, it soon became clear that Justice Chase did not plan to permit counsel to make that argument again.<sup>58</sup>

As the proceedings opened, Chase handed out three copies of a written opinion—one to defense counsel, one to the prosecutor, and one to the jury—containing his analysis of the law of treason.<sup>59</sup> Although Chase said he was “*willing and desirous’ to hear counsel’s [argument] on the law,*” which could be presented “either with the Jury or any other Way,” he also indicated that “he would not permit improper or irrelevant authorities” to be offered.<sup>60</sup> He

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52. Cir. Ct., D. Vt., Oct. 7, 1798, in WHARTON, *supra* note 46, at 333.

53. 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 236 n.24 (Maeva Marcus ed., 1990) (quoting the AURORA (Phila.), Nov. 9, 1798).

54. *Id.* at 412. See *id.* at 408-17 (explaining Samuel Chase’s Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania, Apr. 12, 1800).

55. Case of Fries, 9 F. Cas. 924 (C.C.D. Pa. 1800) (No. 5,127).

56. See STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE 107 (1991).

57. See *id.* at 105-06.

58. *Id.* at 109-10.

59. *Fries*, 9 F. Cas. at 941.

60. PRESSER, *supra* note 56, at 111 (citing Testimony of Alexander Dallas before United States Senate in the Impeachment of Samuel Chase, reported in



believed it his duty "to guard the jury against erroneous impressions respecting the laws of the land."<sup>61</sup> As to his issuance of a written ruling at the opening of trial, without even hearing argument from counsel, he said:

[H]e valued it not. It was an opinion he adopted on great Consideration it having been settled by the Judges . . . who still continued in that opinion. If he could not make up an Opinion without Argument on the general Principles of Law, he was not fit to Sit there. All Judges of law did this.<sup>62</sup>

A month later, at the seditious libel prosecution of James T. Callender in the circuit court in Richmond, Virginia, Justice Chase again interrupted counsel and delivered a prepared opinion.<sup>63</sup> When counsel for the defense rose to urge the jury that the Sedition Act was unconstitutional, Chase twice interrupted him and finally ordered him to take his seat.<sup>64</sup> Chase then delivered his opinion, which he called "the result of mature reflection,"<sup>65</sup> upholding the Act's constitutionality as a matter of law, denying the right of the jury to consider the issue, and refusing to allow counsel to argue it.<sup>66</sup>

Chase began by admitting that the jury had "a right . . . to determine what the law is in the case before them."<sup>67</sup> But this meant only that the jury should "compare the statute with the facts proved, and then . . . decide whether the acts done are prohibited by the law."<sup>68</sup> This power, according to Chase, "the jury necessarily possesses, in order to enable them to decide on the guilt or innocence of the person accused."<sup>69</sup>

The power to fit the facts within the law was "a very different thing," however, from the power "to determine that the statute produced is no law."<sup>70</sup> Chase could not conceive—could not "possibly believe that [C]ongress intended [the Sedition Act] to grant a right to a petit jury to declare a statute void."<sup>71</sup> Indeed, he found the claim for jury power "entirely novel" and "very absurd and dangerous, in direct opposition to, and a breach of the

*Fries*, 9 F. Cas. at 941).

61. *Fries*, 9 F. Cas. at 937.

62. PRESSER, *supra* note 57, at 110-11 (quoting a Letter from Richard Peters to Timothy Pickering (Jan. 24, 1804)).

63. *United States v. Callender*, 25 F. Cas. 239, 253 (C.C.D. Va. 1800) (No. 14,709).

64. *Id.* at 252-53.

65. *Id.* at 253.

66. *Id.*

67. *Id.* at 255.

68. *Id.*

69. *Id.*

70. *Callender*, 25 F. Cas. at 255.

71. *Id.*

constitution."<sup>72</sup> He explained, in language reminiscent of the holding of the judges in *Moore*:

If this power be once admitted, petit jurors will be superior to the national legislature, and its laws will be subject to their control. . . . The evident consequences of this right in juries will be, that a law of congress will be in operation in one state and not in another. A law to impose taxes will be obeyed in one state, and not in another, unless force be employed to compel submission. . . . It appears to me that the right now claimed has a direct tendency to dissolve the union of the United States.<sup>73</sup>

In contrast, the "decisions in the district or circuit courts of the United States [would] be uniform, or they [would] become so by the revision and correction of the supreme court."<sup>74</sup>

There is no question that Chase's preparation and delivery of written opinions as soon as the issue of jury lawfinding power arose was novel, and Jeffersonian Republicans, who were livid at the practice, impeached Chase for engaging in it.<sup>75</sup> But, as we are about to see, Chase was not alone in taking this new approach.

### III. SEIZING CONTROL OF THE LAW

#### A. *James Kent and New York*

In the spring of 1798, Governor John Jay of New York appointed the then thirty-four year-old James Kent, a protégé of Alexander Hamilton, to a seat on the Supreme Court of the State of New York.<sup>76</sup> Upon his appointment, Kent found both the court and the law chaotic. He found the decisions of the court were not the product

of a mature consideration. It was evident that they were not the fruit of that careful and laborious investigation which is essential to the proper discharge of the judicial functions; and the authority they might otherwise have claimed was greatly impaired by those frequent differences in opinion that are the necessary result of imperfect examination and study. It was seldom that the opinions of the judges, even in the most important cases, were reduced to writing, and as no reports were then published, and no records preserved of the grounds on which their decisions were placed, the cases were numerous in which they had no rules to direct, no

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72. *Id.* at 257.

73. *Id.* at 256.

74. *Id.* at 257.

75. See 2 GEORGE L. HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, at 238-39 (1981).

76. MEMOIRS AND LETTERS OF JAMES KENT, LL.D. 31-33 (William Kent ed., 1898) [hereinafter KENT]; Letter from Moss Kent to James Kent (Feb. 25, 1798), *in id.* at 110-11.

precedents to govern them.<sup>77</sup>

As Kent himself wrote, "there were no reports or State precedents. The opinions from the Bench were delivered *ore tenus*. We had no law of our own, and nobody knew what it [i.e., the law] was."<sup>78</sup> Under the circumstances, it was not surprising that juries felt no compunction in ignoring what little guidance they received on the law from the court.

Kent set out to give New York a coherent body of jurisprudence. He decided that:

he would examine for himself every case not decided on the hearing; and in such examination would not confine himself to the cases and authorities cited on the argument, but would embrace in his researches all the law justly applicable to the questions to be determined; and that in each case he would embody the result of his examination in a written opinion. Accordingly, at the second term that followed his appointment, in his first meeting for consultation with his brethren, and to their great astonishment, he produced a written opinion in every case that had been reserved for decision; and as these opinions were carefully prepared, were clear in style, forcible in reasoning, and well sustained by a reference to authorities, his brethren . . . were in no condition to controvert and oppose them.<sup>79</sup>

With his introduction of "a thorough examination of cases and written opinions," Kent "acquired preponderating influence" on the court.<sup>80</sup> As he wrote about one typical early case, "I presented and read my written opinion . . . and they all gave up to me, and so I read it in court as it stands."<sup>81</sup>

But it was not always that easy. As Kent wrote:

Many of the cases decided during the sixteen years I was in the Supreme Court were labored by me most unmercifully, but it was necessary under the circumstances, in order to subdue opposition. We had but few American precedents. . . . English authority did not stand very high in those early feverish times, and this led me a hundred times to attempt to bear down opposition, or shame it by exhaustive research and overwhelming authority. Our jurisprudence was, on the whole, improved by it.<sup>82</sup>

Like Justice Chase, Kent understood the key fact that in a legal system "governed by precedents, and customs, and authorities, and maxims" binding on judge and jury alike,<sup>83</sup> preparation of a written opinion reflecting thought and research

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77. *Id.* at 112-13.

78. *Id.* at 117.

79. *Id.* at 113-14.

80. *Id.* at 117.

81. *Id.*

82. *Id.* at 118.

83. 2 THE WORKS OF JAMES WILSON, *supra* note 18, at 223.

would give a judicial author a comparative advantage over those of his brethren who had not prepared their positions with equal care.<sup>84</sup> As Kent explained, his turn to legal research and to the preparation of written opinions “was the commencement of a new plan[,] . . . the first stone in the subsequently erected temple of our jurisprudence.”<sup>85</sup>

The next step was to assure authoritative publication of the court’s opinions. Kent obtained the services of his friend, William Johnson, who began publishing and selling *Johnson’s Reports* commercially.<sup>86</sup> Soon Kent’s concern that nobody knew what the law was, that English precedents were poorly regarded, and that New York precedent did not exist was alleviated. By the time Kent was appointed chancellor of New York in 1814,<sup>87</sup> the state’s law was fixed in precedent and well known to the practicing bar.

The final step in Kent’s plan was to deprive the jury of its power to find law and restrict it only to the facts. No clear evidence exists of how this final step was accomplished, but it is clear that by 1804, at the latest, the civil jury had been tamed. By that year, the courts were routinely granting new trials in civil cases where the jury had ignored the court’s instructions.<sup>88</sup> In the same year, the Supreme Court also heard an appeal in *People v. Croswell*,<sup>89</sup> a seditious libel case in which the trial court had instructed the jury that it had no power to determine the law.<sup>90</sup> Pursuant to that instruction, the jury in *Croswell* returned a verdict of guilty, which was affirmed by an equally divided court.<sup>91</sup> The legislature responded, however, with a statute authorizing the jury to find law in criminal libel cases.<sup>92</sup>

### *B. Federal Judicial Reform and the 1801 Judiciary Act*

No one talked as explicitly as did Kent about the process by which the judiciary seized control of the law from the jury. But there was talk at the federal level about problems with the judicial

84. KENT, *supra* note 76, at 117.

85. *Id.*

86. *See id.* at 124-25.

87. *See id.* at 157.

88. *See* Mumford v. Smith, 1 Cai. R. 520, 523 (N.Y. Sup. Ct. 1804); Jackson v. Bowen, 1 Cai. R. 358, 363 (N.Y. Sup. Ct. 1803); Dow v. Smith, 1 Cai. R. 32, 36 (N.Y. Sup. Ct. 1803).

89. 3 Johns. Cas. 337 (N.Y. Sup. Ct. 1804). The case is analyzed in detail in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 775-867 (Julius Goebel Jr., ed., 1964) [hereinafter LAW PRACTICE OF ALEXANDER HAMILTON].

90. *Croswell*, 3 Johns. Cas. at 363.

91. *See* 1 LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 89, at 789, 843-44.

92. *See id.* at 846 n.124.

system established by the Judiciary Act of 1789,<sup>93</sup> and there were efforts, culminating in the Judiciary Act of 1801,<sup>94</sup> to fashion reforms comparable to those of Kent. The 1801 Act, as we know, was a failure,<sup>95</sup> but those involved in its preliminary drafting nonetheless imposed many of its reforms from the bench.

Dissatisfaction with having Supreme Court justices ride circuit began to emerge as early as the mid-1790s.<sup>96</sup> It was not simply that circuit riding was tiring and unpleasant.<sup>97</sup> The problem “in more than one Instance [was] that Questions in the Circuit Courts [that were] decided by one Set of Judges in the affirmative, ha[d] afterwards . . . been decided by others in the negative.”<sup>98</sup> Typically, there was no way to bring these issues to the full Supreme Court by writ of error, which, as the justices themselves noted in a communication to Congress, “tend[ed] to render the law unsettled and uncertain, and thereby create[d] apprehension and diffidence in the public mind.”<sup>99</sup>

According to Attorney General Edmund Randolph, the “detaching of the judges to different circuits” deprived the Court of “the benefit of an unprejudiced consultation” among the justices and prevented “[t]he delivery of a solemn opinion in court [that] commit[ted] them” to a permanent, reasoned view of the law.<sup>100</sup> In short, James Kent’s 1799 idea that judicial opinions should be the product “of a mature consideration” and of “careful and laborious investigation” by the bench as a whole and that “the authority” of judge-made law “was greatly impaired by those frequent differences in opinion that are the necessary result of imperfect examination and study”<sup>101</sup> was beginning to take shape in connection with the federal judiciary. Congress, however, was busy with other matters, and no action was taken for several years.

It was James Kent’s mentor, Alexander Hamilton, who pushed Congress into action when, in 1799, he presented a proposal for judicial reform to Jonathan Dayton, the Speaker of

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93. 1 Stat. 73 (1789).

94. 2 Stat. 89 (1801) (*repealed by* Judiciary Act of 1802, 2 Stat. 132 (1802)).

95. The 1801 Act was repealed by the Judiciary Act of 1802, 2 Stat. 132 (1802).

96. See 2 HASKINS & JOHNSON, *supra* note 75, at 115.

97. For a discussion on the hardships of circuit riding, see *id.* at 114-15.

98. *Id.* at 115 (quoting a Letter from John Jay to Rufus King (Dec. 19, 1793)).

99. *Id.* at 115-16 (quoting a Letter from the Chief Justice and the Associate Justices of the Supreme Court of the United States to the Congress of the United States (Feb. 1794)).

100. *Id.* at 118 (quoting Edmund Randolph, *Judiciary System*, in 1 AMERICAN STATE PAPERS: MISCELLANEOUS 23-24 (Walter Lowrie & Walter S. Franklin, eds., Washington, Gales & Seaton, 1834)).

101. KENT, *supra* note 76, at 112.

the House, and Theodore Sedgwick, who had served on the Senate Judiciary Committee and was about to replace Dayton as Speaker.<sup>102</sup> Other proposals for reconfiguring the federal judiciary followed Hamilton's, and both houses of Congress promptly appointed special committees to address them.<sup>103</sup> John Marshall, who had just been elected to Congress, was one of five members of the House of Representatives committee.<sup>104</sup> Ultimately, the Judiciary Act of 1801 emerged out of the committee's deliberations.<sup>105</sup>

No record remains of the committee's discussions, but there is reason to believe that, as the Federalist leaders of Congress developed their specific legislative agenda leading up to the 1801 Act, they also matured their ideas of how a well-functioning judicial system would operate. John Marshall, it should be noted, remained a key player throughout. He defended committee proposals on the floor of the House in the spring of 1800, where he "entered into a lengthy defence [sic] of the [proposed] new system."<sup>106</sup> When he joined the Adams administration a few weeks later as Secretary of State, he became an important advisor to the President on judicial matters.<sup>107</sup> In that role, Marshall drafted Adams' November 1800 message to Congress,<sup>108</sup> which urged Congress to give "serious consideration" to "the Judiciary system of the United States"<sup>109</sup> and finally led to the passage of the Act of 1801.<sup>110</sup>

The 1801 Act, which never took effect because it was repealed immediately by the Judiciary Act of 1802,<sup>111</sup> contained a number of provisions comparable to the reforms that James Kent had put into operation in New York. The "most essential feature" of the Act, according to John Marshall, was "the separation of the Judges of the supreme from those of the circuit courts,"<sup>112</sup> a reform that would have given the Supreme Court "the benefit of an unprejudiced consultation" among the justices and enabled them

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102. See Kathryn Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 WM. & M.Q. (3d ser.) 3, 9-10, 22 (1965).

103. *Id.* at 10.

104. *Id.*

105. See *id.* at 9-10, 22.

106. 10 ANNALS OF CONGRESS 646 (1800).

107. Letter from John Marshall to John Adams (Nov. 17, 1800), in 6 THE PAPERS OF JOHN MARSHALL 11 (Charles F. Hobson ed., 1990).

108. *Id.*

109. *Id.* at 12.

110. An Act to Provide for the More Convenient Organization of the Courts of the United States, ch. 4, § 31, 2 Stat. 89, 98 (1801).

111. An Act to Repeal Certain Acts Respecting the Organization of the Courts of the United States; and for Other Purposes, ch. 8, §§ 1-2, 2 Stat. 132 (1802).

112. Letter from John Marshall to William Paterson (Feb. 2, 1801), in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 107, at 65.

to deliver "a solemn opinion in court commit[ting] them" to a permanent, reasoned view of the law.<sup>113</sup> Two additional changes would have given the judiciary greater control over juries.

The first of these changes expanded the power of circuit judges to grant new trials. Under the Judiciary Act of 1789, judges possessed "power to grant new trials . . . for reasons for which new trials have usually been granted in the courts of law."<sup>114</sup> Arguably, the power did not comprehend control over the lawfinding authority of juries because, as of 1789, there was little American judicial authority for granting new trials on the ground that a jury had misapplied the law.<sup>115</sup> The 1801 Act broadened judges' jurisdiction by "authoriz[ing] and empower[ing]" them "to grant new trials and rehearings, on motion and cause shown."<sup>116</sup> The vagueness of this language necessarily broadened the scope of new trial motions beyond the narrow confines authorized under the 1789 Act.

The second additional change was in the scope of the writ of error, the procedural device by which civil actions at law were appealed from the circuit courts to the Supreme Court.<sup>117</sup> The Judiciary Act of 1789 had contained a provision that no case could be reversed on a writ of error "for any error in fact."<sup>118</sup> The 1801 Act contained no such limitation on the Supreme Court's authority to reverse a judgment below.<sup>119</sup>

To the extent that the Judiciary Act of 1801 reflected the thinking of the Congressional committee on which John Marshall sat in the winter of 1799-1800,<sup>120</sup> it appears that the committee sought to achieve for the federal courts what James Kent had begun to bring about in New York. Step one was the creation of a

113. 2 HASKINS & JOHNSON, *supra* note 75, at 118 (quoting Edmund Randolph, *Judiciary System*, in 1 AMERICAN STATE PAPERS: MISCELLANEOUS, *supra* note 100, at 24).

114. An Act to Establish the Judicial Courts of the United States, ch. 20, §17, 1 Stat. 73, 83 (1789).

115. Indeed, I know of only one case, *Steinmetz v. Currey*, 1 Dall. 234 (Pa. 1788). As of 1789, however, the reporter in which the case now appears had not yet been published, and it seems unlikely that the case was widely known to the members of Congress, who were much more likely to be familiar with the then widely followed rule that juries had power to determine law as well as fact.

116. An Act to Provide for the More Convenient Organization of the Courts of the United States, ch. 4, § 31, 2 Stat. at 98.

117. *Id.*

118. An Act to Establish the Judicial Courts of the United States, ch. 20, §22, 1 Stat. at 85.

119. See An Act to Provide for the More Convenient Organization of the Courts of the United States, ch. 4, § 34, 2 Stat. at 99.

120. According to Marshall, the legislation proposed in 1800 was "substantially the same" as that enacted in 1801. Letter From John Marshall to William Paterson (Feb. 2, 1801), in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 107, at 65.

Supreme Court with "the province and duty . . . to say what the law is."<sup>121</sup> Step two was the development of procedures internal to the Court to facilitate the exercise of its "province and duty."<sup>122</sup> Step three was the transfer of lawfinding power, at least in civil cases, from juries to judges.<sup>123</sup>

### C. Theodore Sedgwick and Massachusetts

Theodore Sedgwick became a member of the Senate Judiciary Committee and then Speaker of the House of Representatives during the years leading up to the passage of the Judiciary Act of 1801.<sup>124</sup> An able lawyer, he undoubtedly participated in the discussions among Federalists that led to the 1801 Act. Following the Jeffersonian triumph in 1800, however, Sedgwick retired from national politics and turned his attention to his own state, Massachusetts.<sup>125</sup> Probably agreeing with Fisher Ames that the Federalists might "need the state tribunals as sanctuaries when Jacobinism comes to rob and slay,"<sup>126</sup> he obtained an appointment to the Massachusetts Supreme Judicial Court.<sup>127</sup>

Once on the court, Sedgwick emulated Kent's plan. First, he sought a change in the court's practice of having all its judges ride circuit together and resolve questions of law at the session in which they arose.<sup>128</sup> He proposed that judges ride circuit individually to preside over trials and then assemble collectively at special law terms, where a library would be available and the court would have time to study the issues presented.<sup>129</sup> The General Court enacted the necessary legislation in 1804-1805.<sup>130</sup> The first volume of published *Massachusetts Reports* also appeared at the same time.<sup>131</sup> The two developments quickly gave birth to a body of decisional law for the Commonwealth.

Sedgwick also campaigned to put an end to the power of the jury to determine law. As he argued:

In all instances where trial by jury has been practiced, and a separation of the law from the fact has taken place, there have been expedition, certainty, system and their consequences, general

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121. *Marbury*, 5 U.S. (1 Cranch) at 177.

122. *Id.*

123. *Id.*

124. ELKINS & MCKITRICK, *supra* note 42, at 728.

125. See RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 187-88* (1971).

126. *Id.* at 188 (quoting a Letter from Fisher Ames to Christopher Gore (Feb. 24, 1803), in 1 *WORKS OF FISHER AMES* 321 (Seth Ames ed. Boston 1854)).

127. *See id.*

128. *Id.* at 189.

129. *Id.* at 188-91.

130. *Id.* at 191.

131. See NELSON, *AMERICANIZATION OF THE COMMON LAW*, *supra* note 3, at 168.



approbation. Where this has not been the case, neither expedition, certainty nor system have prevailed.<sup>132</sup>

An emerging class of entrepreneurs, who needed to plan their investment strategies, agreed. Businesses were disturbed at having their rights and liabilities determined by “the fluctuating estimates of juries”<sup>133</sup> whose “utterly indefinite and uncertain” behavior provided investors with “no rule for their future conduct.”<sup>134</sup> Counsel accordingly argued “that juries ought by the court to be restrained and kept within the proper and established rules.”<sup>135</sup> By the end of the first decade of the nineteenth century, the verdicts of Massachusetts juries were being set aside routinely when they were contrary to law or to the evidence.<sup>136</sup>

#### *D. The Federalist Program in Other States*

The Federalist plan for seizing control of the law from the lay public and placing it in the hands of legal professionals was carried out from state to state in the early years of the nineteenth century. Another leading Federalist was Jeremiah Smith, whom President John Adams had appointed as the midnight circuit judge for New Hampshire.<sup>137</sup> When it became clear that Smith would not serve on the federal bench, he instead became Chief Judge of New Hampshire in 1802,<sup>138</sup> where he set about professionalizing the law of his own state.

His first step was to end the practice of having two or more judges preside over trials on circuit, where with some frequency they would give conflicting instructions to juries and thereby leave juries “free to reach verdicts on personal considerations, such as their dislike of one of the parties or their feeling for what was fair.”<sup>139</sup> His second step, in 1806, was to assert the court’s power to set aside jury verdicts that were contrary to law or evidence, thereby giving the court “the whole control of the case” and making it “effectually . . . judge and jury in the trial.”<sup>140</sup> Of course, the implicit element of his plan was to have issues of law resolved

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132. ELLIS, *supra* note 125, at 190.

133. NELSON, AMERICANIZATION OF THE COMMON LAW, *supra* note 3, at 165 (quoting *Cogswell v. Essex Mill Corp.*, 23 Mass. (6 Pick.) 94, 96 (1827) (argument of counsel)).

134. *Id.* (quoting *Gay v. Whiting*, Norfolk County Court of Common Pleas (Dec. 1810)).

135. *Id.* (quoting *Wait v. M’Neil*, 7 Mass. (6 Tyng) 261, 262 (1811) (argument of counsel)).

136. *See id.* at 168-69.

137. *See* JOHN PHILLIP REID, CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE (forthcoming 2004) (manuscript at 59-60).

138. *Id.* (manuscript at 61).

139. *Id.* (manuscript at 108). *See generally id.* (manuscript at 107-17).

140. *Id.* (manuscript at 116) (quoting *Law and Evidence*, N.H. GAZETTE, Oct. 13, 1807, col. 3). *See generally id.* (manuscript at 115-30).

by the full court meeting in law terms.

Even the capstone of the plan—professional legal education—took off during the first decade of the nineteenth century, when Tapping Reeve, a Federalist judge on the Connecticut Supreme Court, transformed his law school at Litchfield into a national institution designed to train future leaders of the profession not only for New England but for the nation as a whole.<sup>141</sup> Reeve and his associate, James Gould, used their school “to forward a Federalist conception of the proper role of law in society and the proper organization of society more generally.”<sup>142</sup> In particular, they understood that “[t]he laws of a given society [were] not the arbitrary determinations . . . of people, but an expression of a ‘permanent, uniform and universal’ code.”<sup>143</sup> Along with other Federalists, Reeve and Gould transformed law from a community enterprise of ordinary men into a rigorous intellectual discipline for trained professionals.

The Federalists, of course, did not dominate politics in every state. Where they did not control, Jeffersonians determined the course of judicial reform. In Kentucky, for example, where radical Jeffersonians controlled the state legislature, the opposite of the Federalist platform was enacted: the judiciary was decentralized and deprofessionalized.<sup>144</sup> Each county was given a circuit court, consisting of one legally trained circuit judge and two lay assistants who could and often did outvote him, and the circuit judges were given little opportunity to communicate with each other so as to maintain legal uniformity. This system remained in place for fifteen years following its adoption in 1801.<sup>145</sup>

A radical Jeffersonian majority in the state legislature also stymied Federalist efforts in Pennsylvania. The radicals found “lawyers law”<sup>146</sup> and the legal profession “a subject of the most serious concern.”<sup>147</sup> They continued:

[T]he loose principles of persons of that profession; their practice of defending right and wrong indifferently, for reward; their open enmity to the principles of free government, because free

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141. See Andrew M. Siegel, “To Learn and Make Respectable Hereafter”: *The Litchfield Law School in Cultural Context*, 73 N.Y.U.L. REV. 1978, 2003 (1998).

142. *Id.* at 2012.

143. *Id.* at 2014.

144. See ELLIS, *supra* note 125, at 150.

145. See *id.* at 152-56.

146. *Id.* at 176 (quoting 2 THE COMPLETE WRITINGS OF THOMAS PAINE 1004 (Philip S. Foner ed., 1945)).

147. *Id.* at 177 (quoting JESSE HIGGINS, SAMPSON AGAINST THE PHILISTINES, OR THE REFORMATION OF LAWSUITS; AND JUSTICE MADE CHEAP, SPEEDY, AND BROUGHT HOME TO EVERY MAN'S DOOR; AGREEABLY TO THE PRINCIPLES OF THE ANCIENT TRIAL BY JURY, BEFORE THE SAME WAS INNOVATED BY JUDGES AND LAWYERS iv, 12 (Phila., 2d ed. 1805)).

government is irreconcilable to the abuses upon which they thrive; the tyranny which they display in the courts; and in too many cases the too obvious understanding and collusion which prevails among the members of the bench, the bar, and the officers of the court, demand the most serious interference of the legislature, and the jealousy of the people.<sup>148</sup>

In 1805, however, a coalition of moderate Jeffersonians and Federalists won the governorship and control of the legislature<sup>149</sup> and promptly enacted a judiciary law, modeled on the federal Judiciary Act of 1801.<sup>150</sup> The 1806 Pennsylvania legislation increased the number of trial courts, limited the original jurisdiction of the state's Supreme Court and required the appellate court to meet annually in Pittsburgh and twice a year in Philadelphia in order to "ensure greater uniformity of decisions among the lower courts."<sup>151</sup> During this time, judicial decisions were already being published, and a Federalist, William Tilghman, was appointed Chief Justice of the state's highest court.<sup>152</sup>

In his first year on the bench, Tilghman upheld the power of the court to grant a new trial in instances when the jury had decided against the law and the weight of the evidence.<sup>153</sup> Even counsel arguing in favor of upholding a verdict conceded that "[w]hen juries assume upon themselves to decide against the known law, they become as dangerous as any set of tyrants, and all certainty and security in the administration of justice are banished from society, unless the judges interpose their summary powers."<sup>154</sup> Tilghman remained Chief Justice for the next twenty-one years, over the course of which he consolidated the various changes instituted after the 1805 election.<sup>155</sup>

Unfortunately, without significant archival research, the picture of change is hazy in the most important state, Virginia. We do know that between 1787 and 1809, county courts, which were a carryover from the colonial era and which continued to be staffed by lay judges, were gradually superceded by district and later superior courts, the judges of which were professional

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148. *Id.*

149. *See id.* at 180-81.

150. *Id.* at 182.

151. ELLIS, *supra* note 125, at 182. *See generally id.* at 171-83.

152. *Id.* at 183.

153. *See Swearingen v. Birch*, 4 Yeates 322, 325 (Pa. 1806). At least one earlier case had upheld the granting of a new trial when a verdict was contrary to law and evidence, *Steinmetz v. Currey*, 1 Dall. 234 (Pa. 1788), and another upheld the court's power in dictum. *See Cowperthwaite v. Jones*, 2 U.S. (2 Dall.) 55 (1796).

154. *Swearingen*, 4 Yeates at 322.

155. *See ELLIS*, *supra* note 125, at 183.

lawyers.<sup>156</sup> Legislation also established a Supreme Court of Appeals, which could hammer out statewide solutions to the legal issues that professional judges confronted on circuit.<sup>157</sup> We also know that James Callender's distinguished Virginia attorneys—William Wirt, George Hay and Phillip Nicholas—argued that Virginia law gave juries the power to find both law and fact.<sup>158</sup> Finally, we know that an 1811 anti-lawyer tract proposed, among other things, that “jury trials be restored to a place of eminence.”<sup>159</sup> All this led the leading scholar of post-Revolutionary Virginia law to conclude that the “basic function of law in the commonwealth had changed. Law, as opposed to antiquated notions of country justice, existed to enforce statutory prescriptions, to execute speedy and efficient decisions on debt [collection], and to prosecute serious criminals.”<sup>160</sup> By 1810, if not before, the old “idea that law ought to be concerned with investigating and enforcing the moral standards of a local community whose interests were homogeneous and whose overseers were the gentlemen justices of Virginia” was nothing but a hope of a dissident minority of radical Republicans.<sup>161</sup>

Developments in Virginia thus appear parallel to those in the North, but considerable archival research is needed to know for sure. Similar research is required to know, even vaguely, what occurred in many other states. What is clear is that in the first decade of the nineteenth century, the Federalists, with the support of the business community and with help, when needed, from moderate Jeffersonians, put the program of judicial reform elaborated most explicitly by James Kent into place in every major coastal state north of the Mason-Dixon Line. Issues of law were reserved for state appellate courts, which began to resolve those issues with a single voice and to publish their opinions. Juries were deprived of the power to find law in civil cases.<sup>162</sup> The law came to be seen as a profession, for which all members required training and the leaders of which—the judges—should be drawn from among those with the highest professional attainments.

#### *E. John Marshall and the Province of the Federal Judiciary*

Where was John Marshall in this process? The answer, it

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156. See A.G. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810, at 201-07, 249 (1981).

157. *Id.*

158. See PRESSER, *supra* note 56, at 136-37.

159. ROEBER, *supra* note 156, at 242-43.

160. *Id.* at 216.

161. *Id.*

162. That power persisted in criminal cases, however, well into the nineteenth century. See generally Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1938).

appears, is that Marshall was in the very center of things. He was a member of the Congressional committee that drafted the predecessor to the Judiciary Act of 1801 and the defender of that predecessor legislation on the House floor. He corresponded with Alexander Hamilton, who was James Kent's mentor, while the presidential election of 1800 was pending in the House.<sup>163</sup> At the time, Marshall was Adams's Secretary of State; as such, he had significant contact with Theodore Sedgwick, then Speaker of the House.<sup>164</sup> Finally, Jeremiah Smith, who would lead the effort in New Hampshire to obtain professional control over the law, lobbied John Marshall, by letter and through Fisher Ames and the Essex Junto, for a judicial appointment in the waning days of the Adams administration and thanked Marshall by letter when he received one.<sup>165</sup>

Thus, it is not surprising that once John Marshall became Chief Justice of the United States, he did what he could to put the Federalist program into place. He took a first step in the spring of 1802, after Congress had repealed the Judiciary Act of 1801 and restored the older circuit-riding duties of the justices.<sup>166</sup> The justices then had to decide whether to obey Congress' command—"a subject," in Marshall's words, "not to be lightly resolved on."<sup>167</sup> "The burthen of deciding so momentous a question . . . would be very great on all the Judges assembled: but an individual Judge . . . must sink under it."<sup>168</sup> Marshall accordingly proposed that the justices communicate with each other by letter, act collectively if they could reach agreement on whether or not to reassume circuit duties and meet in Washington if they could not.<sup>169</sup>

With the immediate crisis resolved after 1803, Marshall instituted more permanent practices to ensure the Court's collegiality and cooperation. He arranged, for example, to have all the justices board and dine together in the same hotel or inn.<sup>170</sup> There they engaged constantly in the discussion of pending

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163. See Letter from John Marshall to Alexander Hamilton (Jan. 1, 1801), in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 107, at 46.

164. See Letter from John Marshall to Theodore Sedgwick (Feb. 27, 1801), in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 107, at 85.

165. REID, *supra* note 137 (manuscript at 71-81).

166. See 2 HASKINS & JOHNSON, *supra* note 75, at 170; NELSON, *supra* note 7, at 68-69.

167. 2 HASKINS & JOHNSON, *supra* note 75, at 170 (quoting a Letter from John Marshall to William Paterson (Apr. 19, 1802)).

168. *Id.* at 172 n.182 (quoting a Letter from Samuel Chase to John Marshall (Apr. 24, 1802)).

169. See *id.* at 170-71 (quoting a Letter from John Marshall to William Paterson (May 3, 1802)).

170. See THE SUPREME COURT IN CONFERENCE (1940-1985), at 31 (Del Dickson ed., 2001) [hereinafter SUPREME COURT IN CONFERENCE]. See also 2 HASKINS & JOHNSON, *supra* note 75, at 85.

matters in order to come to a consensus. As Marshall wrote in turning down a dinner invitation, "I cannot absent myself from our daily consultation without interrupting the course of the business."<sup>171</sup> Marshall also abolished seriatim opinions by Supreme Court justices and instituted the practice of having the Court formulate a single opinion in private and then issue it as the opinion of all.<sup>172</sup> Until 1812, Marshall, as Chief Justice, or whatever justice was presiding in his absence, "almost invariably announced the opinion of the Court, whether or not he wrote" it.<sup>173</sup> Marshall also discouraged dissents because he appreciated how "the habit of delivering dissenting opinions . . . weaken[ed] the authority of the Court, and [was] of no public benefit."<sup>174</sup> William Johnson, the first Jeffersonian appointed to the Court, delivered his first dissent and

during the rest of the session . . . heard nothing but lectures on the indecency of judges cutting at each other, and the loss of reputation which the Virginia appellate court had sustained by pursuing such a course, etc. At length I found I must either submit . . . or become a cypher in our consultations as to effect no good at all. I therefore bent to the current.<sup>175</sup>

Even when the majority of the Court disagreed with a point made in a Marshall opinion, it suppressed its disagreement. And, Marshall, in turn, wrote and delivered opinions with which he did not fully agree, and he almost never dissented, doing so only eight times and just once in a constitutional case during his thirty-four years on the bench.<sup>176</sup> Marshall, as well as anyone, knew that in order to give law the intellectual respectability and political power he wanted it to have, the Supreme Court had to work together to formulate rules on which all could place their imprimatur.<sup>177</sup>

Like other Federalists, John Marshall also was vigorously protecting private property rights, as evidenced by his dictum in *Marbury* assimilating office holding to property and declaring that the President had no power to deprive a man of property<sup>178</sup> and by later holdings in cases like *Fletcher v. Peck*<sup>179</sup> and *Trustees of*

171. SUPREME COURT IN CONFERENCE, *supra* note 170, at 33 n.36 (quoting a Letter from John Marshall to John Randolph (Mar. 4, 1816), in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 107, at 127).

172. See 2 HASKINS & JOHNSON, *supra* note 75, at 105.

173. SUPREME COURT IN CONFERENCE, *supra* note 170, at 34.

174. *Id.* at 34 (quoting a Letter from Joseph Story to Henry Wheaton (1818)).

175. *Id.* at 35 (quoting a Letter from William Johnson to Thomas Jefferson (Dec. 10, 1822), quoted in EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835, at 189 (1988)).

176. See *id.*

177. See *id.* at 31-32.

178. See NELSON, *supra* note 7, at 60.

179. 10 U.S. (6 Cranch) 87 (1810).

*Dartmouth College v. Woodward*.<sup>180</sup> And, about the same time that he wrote in *Marbury* that “[i]t is emphatically the province and duty of the judicial department to say what the law is,”<sup>181</sup> he put his language into practice by asserting the judiciary’s power to take issues of law away from civil juries.

Four cases that Marshall heard while riding circuit, covering the time span from December 1802 (two months before *Marbury*) to December 1803 (ten months after *Marbury*), need to be analyzed. Unfortunately, the records remaining from the cases are incomplete and less than fully lucid; hence conflicting interpretations are possible. However, together the four cases establish that Chief Justice Marshall was prepared to set aside verdicts if the jury in a civil case misapplied the law or considered inappropriate evidence.

The case from December 1802 was *Stone v. Reeves*.<sup>182</sup> The record establishes that the defendant moved for a new trial and that the circuit court granted the motion.<sup>183</sup> It is also clear that the ground for the motion was a statement made by one of the jurors that the jury had erred in estimating damages.<sup>184</sup> The jury had assumed erroneously that if tobacco had been sold in a certain time, place, and manner, it would have brought a certain price, and it based its verdict on the difference between that assumed price and the actual price at which the tobacco was sold.<sup>185</sup> What is unclear is whether the jury’s error was one of law or fact: that is, whether the jury had made a legal error in assuming that the tobacco should have been sold in the time, place, and manner it identified, or whether the jury had made a factual error as to the price it would have brought then and there. The file papers contain no testimony or depositions about tobacco prices at the time, place, and manner in question, which points to a conclusion that the issue on which the jury erred was one of law rather than fact. If so, error of law was the ground for which a new trial was granted, but it is impossible to be sure.

The second case, *Sanders v. Hamilton*,<sup>186</sup> is somewhat clearer. In the first trial, which was a suit for damages in connection with the recovery of slaves, Marshall ruled that a particular item of evidence could come in only for a limited purpose,<sup>187</sup> following which the jury returned a verdict for the plaintiff—a verdict that

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180. 17 U.S. (4 Wheat.) 518 (1819).

181. *Marbury*, 5 U.S. (1 Cranch) at 177.

182. Cir. Ct., D. Va., Dec. 4, 1802 (on record with the Library of Va., Richmond, Va.).

183. *Id.*

184. *Id.*

185. *Id.*

186. 21 F. Cas. 320 (C.C.D. N.C. 1802) (No. 12,294).

187. *Sanders*, 21 F. Cas. 321.

Marshall thereupon set aside.<sup>188</sup> It is possible that the court set the verdict aside and granted a new trial because the jury had misused the evidence, but the report of the case makes this possibility unlikely. Instead, the report of the second trial in the case<sup>189</sup> suggests that the jury, after resolving the substantive issue, also assessed damages and did so on a wrong theory of law.<sup>190</sup> “The question was whether the jury should assess the damages according to the value of the slaves at the time Streeter recovered them against Sanders or at their present value,”<sup>191</sup> and Marshall declared that “[t]he jury should assess damages according to the value at the time of recovery.”<sup>192</sup> Thus, I read *Sanders* as a case where Marshall set aside a jury verdict resting on a wrong theory of law, although it is not clear that the jury had ignored instructions in arriving at its verdict.

The issue in the third case, *Owen v. Adams*,<sup>193</sup> was one of evidence. The suit was brought on a merchant’s book account, which was proved by an exact copy of the account book.<sup>194</sup> The standard rule of evidence, however, also required that the clerk who had made the entry testify to its making or, if the clerk was dead, as was the case in *Owen*, that someone attest to the clerk’s handwriting.<sup>195</sup> There was no such attestation.<sup>196</sup>

Nonetheless, the jury returned a verdict directing that the merchant recover the account,<sup>197</sup> although it is not certain whether the jury ignored instructions in so doing. In granting a new trial, Marshall wrote:

I . . . was at first disposd [sic] . . . to permit the present verdict to stand, altho [sic] directly against my own opinion. But upon reflection I think myself obliged to change that opinion [and] to set aside this verdict. I feel no doubts concerning the law of the case. I have no doubts but that the amount of a debt can only be established by testimony which is in itself legal[.] . . . I think it of the most dangerous tendency to admit such evidence, [and] as there is a difference between decisions which meerly [sic] respect the rules of evidence [and] those which affect rights; [and] also between a single decision subject to revision, [and] a series of decisions which may be considerd [sic] as fixing the law of the land; and as it is in my opinion of much importance that exact uniformity should be

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188. See 6 THE PAPERS OF JOHN MARSHALL, *supra* note 107, at 145 n.2.

189. See *id.* at 190.

190. *Id.*

191. *Id.* at 190 n.1.

192. *Id.* at 190.

193. Cir. Ct., D. Va., Dec. 7, 1803, in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 107, at 206.

194. *Id.* at 206-07.

195. *Id.* at 207.

196. *Id.*

197. *Id.* at 206 n.1.



observed in decisions on that testimony which will be required [sic] by the court in order to support a claim on account, which is best to be obtained [sic] by an inflexible observance of the rules established by law, [and] not by deviating occasionally from them on circumstances perpetually varying in slight unimportant degrees; I think it right to adhere to the safe [and] well understood rules of the common law [and] shall therefore direct a new trial in this case.<sup>198</sup>

Although *Owen* arose on a point of evidence rather than because a jury had ignored instructions on the law, the concerns stated by Marshall were almost identical to those stated by other judges who set aside verdicts after juries had ignored instructions. Thus, *Owen* and those cases are functionally, though not precisely, the same.

The fourth case, *Flemming & Co. v. Murfree*,<sup>199</sup> also involved an issue of evidence with strong substantive overtones. The issue was whether the plaintiff had sued to recover a debt within the proper limitation period.<sup>200</sup> He clearly had not done so, unless an acknowledgment of the debt by the administrators of the debtor had extended the period.<sup>201</sup> The jury returned a verdict for the plaintiff creditor, but that verdict was recorded "subject to the Court's opinion on the right of the plaintiff to give in evidence an acknowledgment of the debt by the administrator so as to avoid statute of limitations."<sup>202</sup> A few days later, following argument on the motion, Chief Justice Marshall set the verdict aside and granted a new trial.<sup>203</sup> Again, the case is functionally equivalent to cases granting new trials when juries ignore instructions, in that it "emphatically [asserted] the province and duty of the judicial department to say what the law is."<sup>204</sup> But it did so in a context involving the admissibility of evidence, not instructions, and a context in which the mistake on the first trial may have been that of the court, not the jury.

Marshall, however, seems to have thought the similarities were more important than the differences. In January 1805, in a letter to Justice Samuel Chase, Marshall simply took for granted the propriety of granting a new trial for "a jury finding a verdict against the law of the case,"<sup>205</sup> and in a published 1811 opinion,

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198. *Id.* at 208.

199. Cir. Ct., D. N.C., June 21, 1803, in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 107, at 190.

200. *Id.*

201. *Id.* at 190-91.

202. *Id.* at 191 n.1.

203. *Id.* at 191 n.5.

204. *Marbury*, 5 U.S. (1 Cranch) at 177.

205. Letter from John Marshall to Samuel Chase (Jan. 23, 1805), in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 107, at 347. Note that Marshall's characterization is consistent with what he did in the *Owen* and *Flemming* cases, where he set aside verdicts against the law of the case, but not contrary

*Letcher v. Woodson*,<sup>206</sup> he explicitly stated that should “a jury . . . find a verdict against law,” the court had power to “set it aside and award a new trial.”<sup>207</sup>

In short, John Marshall, who was part of a network of Federalist judges that included James Kent, Tapping Reeve, Theodore Sedgwick and Jeremiah Smith, took essentially the same actions they took to make it “emphatically the province and duty of the judicial department to say what the law is.”<sup>208</sup> He abolished seriatim opinions, insisted that courts render collective judgments reflecting the opinion of the court as a whole, suppressed dissent, strove to develop law through lines of precedent and set aside jury verdicts inconsistent with judge-made law in civil cases. Marshall left no papers, as Kent did, which establish that his actions were part of a coherent political plan to defeat the aspirations of radical Jeffersonians to further democratize American law. But, in light of those with whom he worked and of the origins of their program in reform discussions in which Marshall participated as a Congressman, it is plausible to conclude that he acted in response to those discussions.

#### IV. *MARBURY*, DEMOCRACY, AND THE PROVINCE OF JUDGES

In fitting the early nineteenth century’s transfer of lawfinding power from civil juries to judges into the larger configuration of John Marshall’s jurisprudence, we must be careful to avoid anachronistic thinking. Marshall grew up, learned to think about the law and participated in the political battles of the eighteenth century. When he ascended the bench, he had no idea what the nineteenth and twentieth centuries would bring. He was not the Chief Justice of a Supreme Court that had already decided *Brown v. Board of Education*<sup>209</sup> and *Roe v. Wade*,<sup>210</sup> or the tenth Justice sitting in *Bush v. Gore*.<sup>211</sup> The most important case decided by the Court to which John Marshall was appointed probably was *Chisholm v. Georgia*,<sup>212</sup> precisely because it had been overturned by a constitutional amendment.<sup>213</sup>

I have argued in my book on *Marbury*<sup>214</sup> that Marshall

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to instructions by the court. If we see “verdicts contrary to instructions” as merely one subset of the broader category of “verdict[s] against the law of the case,” then Marshall’s behavior was totally analogous to that of northern state judges like Kent, Sedgwick and Smith. *Id.*

206. 15 F. Cas. 401 (Cir. Ct. Va. 1811) (No. 8,280).

207. *Letcher*, 15 F. Cas. at 403.

208. *Marbury*, 5 U.S. (1 Cranch) at 177.

209. 347 U.S. 483 (1954).

210. 410 U.S. 113 (1973).

211. 531 U.S. 98 (2000).

212. 2 U.S. (2 Dall.) 419 (1793).

213. See U.S. CONST. amend. XI, § 1.

214. See NELSON, *supra* note 7. Portions of this Article have been excerpted

understood and was sympathetic to the workings of American democracy.<sup>215</sup> Throughout the 1790s and during the election of 1800, he was a political moderate who strove to build consensus.<sup>216</sup> In the context of this Article, it is also necessary to understand how Marshall thought juries functioned in the eighteenth century. Marshall never wrote about this topic, but with a little historical imagination, we can reconstruct what he probably understood.

Eighteenth-century juries, as we have already seen, were a democratic force that “secure[d] to the people at large, their just and rightful controul [sic] in the judicial department.”<sup>217</sup> But they were not an unbridled force. As James Wilson observed, it was “incumbent on the judges to inform the jury concerning the law; and it [was] incumbent on the jury to pay much regard to the information, which they receive[d] from the judges.”<sup>218</sup> Most of the time, it appears that democratic juries did, in fact, pay heed and give deference to the fixed principles of law of which the judges informed them.<sup>219</sup> Democracy and the rule of law thus functioned in tandem to govern Great Britain’s North American colonies, as, I suspect, John Marshall well understood.

The War of Independence significantly reshaped American politics, however, by introducing a new political style in stark contrast to the mid-eighteenth-century style. First, the Continental Congress and later, the Confederation Congress had to resolve issues of war and peace, to place national power on a firm constitutional footing and to govern the trans-Appalachian territories acquired from Great Britain in the 1783 peace treaty acknowledging American independence. In performing these tasks, Congress and other national officials had to make choices among possible policies that were in conflict with each other—choices that favored some American interests over others and thus could not be made on the basis of principles or values with which nearly everyone agreed.<sup>220</sup>

These national issues impacted local politics.<sup>221</sup> One important issue throughout the 1780s and 1790s, for example, concerned the right of former Loyalists to recover lands and

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from the author’s prior works, including his book *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW*.

215. *Id.* at 45.

216. *Id.* at 45-53.

217. CORNELL, *supra* note 8, at 91 (quoting Letters from the Federal Farmer, [Melancton Smith?], *An Additional Number of Letters from the Federal Farmer to the Republican* . . . , no. 15 (New York, 1788), in 2 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 8, at 315, 319-20).

218. 2 *THE WORKS OF JAMES WILSON*, *supra* note 18, at 220.

219. There is little evidence of conflict in the eighteenth century between the bench and the jury.

220. NELSON, *supra* note 7, at 30.

221. *Id.*

debts—a right guaranteed by the treaty of 1783. Several states, however, refused to honor the treaty and placed various impediments in the path of the Loyalists. The British government responded by refusing to evacuate outposts in the western portions of the United States, while prospective lenders in Great Britain, fearing that they would face future impediments as creditors, reacted by tightening credit. As a result, Americans seeking to borrow money found it more difficult and expensive to do so, and those seeking to settle or otherwise exploit the West found the British army and its Indian allies in their path. Of course, they came into conflict with those who had procured the state legislation that had upset Britain and thereby generated their problems.<sup>222</sup>

The revolutionary struggle and the attainment of independence also transformed American society and politics ideologically. In discarding British rule and reconstituting their governments, Americans proclaimed that all law springs from the popular will as codified in legislation.<sup>223</sup> If the people could remake their government, it followed that lawmaking power, in general, must be “original, inherent, and unlimited by human authority.”<sup>224</sup> A preacher who spoke to the Massachusetts legislature in 1782 identified popular will as “the only rational source of power,”<sup>225</sup> while in the next year, the *Connecticut Courant* wrote that there was “an original, underived and incommunicable authority and supremacy in the collective body of the people, to whom all delegated power must submit, and from whom there is no appeal.”<sup>226</sup> This concept of legislation as the creation of new law by the people proved practically significant as groups like religious dissenters used it to promote their interests.<sup>227</sup>

This transformation occurred, however, in a society unprepared to abandon blithely the pre-Revolutionary ideal that human law must conform to fundamental principles of divine or natural law. Post-Revolutionary Americans continued to maintain that they could rationally “define the rights of nature” and learn “how to search into, to distinguish, and to comprehend, the

222. See *id.* at 30-31.

223. *Id.* at 32.

224. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 371 (1969) (quoting Samuel Chase, [BALT.] MD. J., Feb. 20, 1787).

225. Zabdiel Adams, Sermon Preached Before His Excellency John Hancock, Esq; Governour; His Honor Thomas Cushing, Esq; The Honorable the Council, and The Honorable the Senate, and House of Representatives of the Commonwealth of Massachusetts, May 29, 1782, Being the Day of General Election 20 (May 29, 1782) (transcript available at the Tulane Univ. Library).

226. Solomon Whitman, *At a Meeting of the Inhabitants of the Town of Farmington, on the fourth day of August, 1783*, CONN. COURANT & WEEKLY INTELLIGENCER, Aug. 12, 1783, at 2, col. 3.

227. See NELSON, *supra* note 7, at 32.

principles of physical, moral, religious, and civil liberty."<sup>228</sup> Believing, like Alexander Hamilton, in "eternal principles of social justice,"<sup>229</sup> Americans in the mid-1780s objected to legislation "founded not upon the principles of Justice, but upon the Right of the Sword" and for which "no other Reason [could] be given . . . than because the Legislature had the Power and Will to enact such a Law."<sup>230</sup> According to a 1786 article in the *Providence Gazette*, legislators who enacted laws that "violate[d] . . . fundamental principles . . . [were] substituting *power* for *right*."<sup>231</sup> Thinkers like James Madison, arguing at the time of the Constitutional Convention for a congressional power to negate state legislation, accordingly noted in a letter to George Washington that America needed "some disinterested [and] dispassionate umpire [to control] disputes between different passions [and] interests in the State[s]."<sup>232</sup>

Madison, among others, hoped that the new federal government could be the umpire, but as the 1790s progressed, it became clear it could not. On the contrary, by creating national political institutions, the Constitution of 1787 led to the flowering of national political strife as different groups struggled to control new federal political entities. The Constitution simply transferred democratic political pressure from the state to the national level.

By the mid-1790s, two national political groups—the Federalists and the Jeffersonian Republicans—had emerged in response to the French Revolution and the signing of Jay's Treaty with Great Britain.<sup>233</sup> The two groups had ideological differences as well. "For example, the Federalists saw in Jefferson and the Republicans many of the threats to religion, life, and property that they found so horrifying in French revolutionaries."<sup>234</sup> Thus, the election of 1800, according to one Federalist campaign tract, would require voters to select either "GOD—AND A RELIGIOUS PRESIDENT; or impiously declare for JEFFERSON—AND NO GOD!!!"<sup>235</sup> Federalists feared that if "the restraints of religion

228. William Pierce, An Oration, Delivered at Christ Church, Savannah, on the 4th July, 1788, in Commemoration of the Anniversary of American Independence 6 (July 4, 1788) (transcript available in the University of Georgia Library).

229. Hamilton's Second Letter from Phocion (Apr. 1784), in 3 THE PAPERS OF ALEXANDER HAMILTON 530, 550 (Harold C. Syrett ed., 1962).

230. WOOD, *supra* note 224, at 406 n.22 (citing RICHARD PATRICK MCCORMICK, EXPERIMENT IN INDEPENDENCE: NEW JERSEY IN THE CRITICAL PERIOD, 1781-1789, at 183 (1950) (quoting Petition of Salem (Oct. 12, 1784))).

231. PROVIDENCE GAZETTE & COUNTRY J., Aug. 5, 1786, at 2, col. 2.

232. Letter from James Madison to George Washington (Apr. 16, 1787), in 2 THE WRITINGS OF JAMES MADISON 344, 346 (Gaillard Hunt ed., 1901).

233. See NELSON, *supra* note 7, at 38.

234. *Id.*

235. JOHN C. MILLER, THE FEDERALIST ERA 1789-1801, at 265 n.34 (1960) (quoting a campaign placard).

[were] once broken down, as they infallibly would be, by leaving the subject of public worship to the humors of the multitude, . . . we might well defy all human wisdom and power, to support and preserve order and government in the State[s].<sup>236</sup>

If the Federalists were convinced that conferral of power upon Republicans would subvert morality and lead to violence and anarchy, the Republicans were equally convinced that, if allowed to retain power, the Federalists would subvert republican liberties and rule autocratically. The Alien and Sedition Acts, the imposition of a direct tax and the establishment of a standing army during the administration of President John Adams only confirmed these fears.<sup>237</sup>

In short, partisan divisions had emerged by the second half of the 1790s. On one side stood the Republicans, avowing, in the words of James Madison, “the doctrine that mankind are capable of governing themselves,”<sup>238</sup> and accused by their opponents of scheming “to introduce a new order of things as it respects *morals* and *politics, social* and *civil duties*.”<sup>239</sup> Opposite them stood the Federalists, claiming to preserve “that virtue [which] is the only permanent basis of a [R]epublic,”<sup>240</sup> and accused of attempting to restore a monarchical government.

When Thomas Jefferson and his party won the election of 1800, it became clear to the Federalists that they could not protect fixed and fundamental principles of law and justice from the whims and humors of the democratic multitude through control of the executive and legislative branches of the national government. The Federalists’ next effort, through the Judiciary Act of 1801, was to create a robust national judiciary as a bulwark against the masses. But when the Jeffersonian Congress repealed the 1801 Act and the Supreme Court, in *Stuart v. Laird*,<sup>241</sup> sustained the constitutionality of the repeal,<sup>242</sup> that effort also failed. Dictum in *Marbury* said, and *Stuart* held, that the Supreme Court would not overturn a considered policy judgment of the democratically

236. *Government and Liberty Described; and Ecclesiastical Tyranny Exposed*, in ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM 349, 353 (William S. McLoughlin ed., 1968) (quoting Phillips Payson’s address to the election assembly).

237. See ELKINS & MCKITRICK, *supra* note 42, at 711-19.

238. Letter from James Madison to Edmund Randolph (Sept. 13, 1792), in 6 WRITINGS OF JAMES MADISON, *supra* note 232, at 116, 118.

239. David Daggett, *Sunbeams May Be Extracted from Cucumbers, But the Process Is Tedious* (1799), in THE RISING GLORY OF AMERICA 1760-1815, at 176, 184 (Gordon S. Wood ed., 1971).

240. JAMES M. BANNER JR., TO THE HARTFORD CONVENTION: THE FEDERALISTS AND THE ORIGINS OF PARTY POLITICS IN MASSACHUSETTS, 1789-1815, at 26 (1970) (quoting the [BOSTON] NEW ENGLAND PALLADIUM, Apr. 1, 1806, at 2, col.3).

241. 5 U.S. (1 Cranch) 299 (1803).

242. *Stuart*, 5 U.S. (1 Cranch) at 309.

chosen Congress of the United States.<sup>243</sup>

This led the Federalists to their final line of defense—professionalization—the claim that law, an accumulation of fixed and fundamental rules and practices originating in the past, could be apprehended only by the research and analysis of trained individuals, namely lawyers and judges. Law was not something that lay people could intuit on a day-to-day basis as they sat on juries and decided cases by reference to their personal policy preferences. Only by making law the province of professional lawyers and ultimately of the judiciary could the tyranny of the mob be prevented and the certainty and stability needed for economic growth be maintained.

Thus, the Jeffersonians were right when they accused the Federalists of striving “to exalt the Judiciary . . . and to give that favorite department a political character [and] influence.”<sup>244</sup> But the exaltation of the judiciary did not obliterate the power of democracy. It may have become “the province and duty of the judicial department to say what the law is,”<sup>245</sup> but it remained within the power and the right of the legislative department to change the law the judiciary declared. And, if the people mobilized themselves in support of the change, *Marbury* said and *Stuart* held, that the change would be understood as political rather than legal and hence beyond the Supreme Court’s power of judicial review.<sup>246</sup> John Marshall’s limited version of judicial review allowed professionals to seize control over the substance of the law only to the extent that the people, through democratic political processes, did not object.

The power of professionals also was restricted in another respect. To announce that “[i]t is emphatically the province and duty of the judicial department to say what the law is”<sup>247</sup> did not mean that judges could make the law anything they wanted it to be, either in a jury instruction or in a constitutional decision. Kent, Sedgwick and others understood that their power to speak the law rested on their superior ability to research traditional professional sources and thereby find preexisting law. They, along with John Marshall, did not claim, and they knew they had no basis for claiming, that anyone other than the people had power “to establish . . . such principles as, in their opinion, shall most conduce to their own happiness.”<sup>248</sup>

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243. *Id.* at 307-08; *Marbury*, 5 U.S. (5 Cranch) at 176-79.

244. Nelson, The Eighteenth-Century Bankground, *supra* note 3, at 933 (quoting [BOSTON] INDEPENDENT CHRONICLE, Mar. 10, 1803).

245. *Marbury*, 5 U.S. (1 Cranch) at 177.

246. *Stuart*, 5 U.S. (1 Cranch) at 304-08; *Marbury*, 5 U.S. (1 Cranch) at 165-67.

247. *Marbury*, 5 U.S. (1 Cranch) at 177.

248. *Id.* at 176.

In conclusion, it is important to understand that the changes I have been discussing—the professionalization of law and the development of judicial review—did not make the judiciary sovereign. The changes merely restored the ancient balance between the fixed and fundamental principles of law and the power of the people. With a little imagination, we can see that the eighteenth-century American legal order was simultaneously anchored in unchanging principles and subject to democratic control: local elites sitting as judges typically would guide their fellow subjects in apprehending preexisting law, but ultimately those subjects sitting as jurors would determine whether they would follow that law. Certainty and stability were preserved because the people typically accepted elite guidance, and life accordingly went on largely as it always had, but ultimately the people could make changes if they wanted. As a result, both elite leaders and the common people felt comfortable that they were in control.

Under the system adopted in the early nineteenth century, judicially administered common law became a default norm that civil juries could not surmount. Certainty and stability thus were preserved, and elites routinely remained in a position to guide the direction of society. But the people could change law through politics if they organized and made the necessary effort to change it, and the narrow doctrine of judicial review proclaimed in *Marbury* gave judges virtually no power to resist once the people had made up their minds. Something akin to the balance of the eighteenth century thus was restored.

The limited nature of *Marbury's* vision of judicial review, it might even be said, made professionalization possible. The seizure of law from juries and its transformation into a matter for professional elaboration and control would have been profoundly antidemocratic if Chief Justice Marshall had not conceded “[t]hat the people have an original right” to choose what they want for their law.<sup>249</sup> If John Marshall had treated the Constitution as embodying the policy choices he thought proper and thereby barred legislatures from adopting different choices, his imposition of control over juries would have deprived the people of all lawmaking capacity. It is impossible to imagine that the people and their Jeffersonian servants in Washington, in the aftermath of the election of 1800, would have accepted such a deprivation. Marshall, however, did not deprive the people of their sovereign lawmaking power. On the contrary, he reassured them that they could exercise their power in Congress and state legislatures. His reassurance made it possible for the professionalizers to tell them that they no longer could exercise lawmaking power as jurors.

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249. *Id.*



In short, Chief Justice John Marshall did not mount an attack on democracy, and *Marbury* did not assume for the Supreme Court the role of choosing the social policies that would govern America. Choosing the policies that would “most conduce to their own happiness”<sup>250</sup> remained within the power of the people. Thus, *Marbury* is not important because it made the Marshall Court supreme; it did not. *Marbury* is important because it was one part of a larger process of constitutional development that directed the people to exercise their sovereign lawmaking power through centralized legislative institutions, like Congress, rather than through local entities like juries.

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250. *Id.*