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# THE PACE AND CAUSE OF CHANGE

LARRY D. KRAMER\*

Lawyers hate change. That's a generalization, of course, and there are plenty of situations in which lawyers have not only embraced change but led the charge. Still, legal training nurtures a predisposition to preserve the familiar, while providing assorted tools with which to do so. Packaged attractively in the adage about putting new wine in old bottles, the most common manifestation of this lawyerly disability is our reluctance to shed doctrines that long ago outgrew the conditions that called them into existence. Rather than accept and abandon, we invent new rationales and look for new justifications to retain forms that have become comfortable.

If the treatment of *Marbury v. Madison* is any evidence, legal historians suffer this same disability. For having finally, thoroughly, and with little room left for disagreement, demolished the myth that *Marbury* was important in creating judicial review, historians of the case seem unable to stop searching for other reasons to celebrate Marshall's opinion—unwilling, it seems, to drop from the canon of constitutional law a decision that was for so many years its centerpiece.

The work of my colleague William Nelson is a case in point. Among the most notable and influential scholars in undoing the myth of *Marbury* and judicial review,<sup>1</sup> Nelson still finds himself drawn irresistibly into the hunt for new ways to say that the case was a landmark. In a recent book, Nelson argued that *Marbury* was important because it “took [the Court] out of politics.”<sup>2</sup> Here, he argues for additional significance by suggesting that *Marbury's* doctrine of judicial review somehow furthered or operated in conjunction with a successful Federalist campaign to “seize from juries the power to find law.”<sup>3</sup>

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1. See WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 1-53 (2000) [hereinafter NELSON, *MARBURY*]; William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893 (1978).

2. NELSON, *MARBURY*, *supra* note 1, at 71.

3. William E. Nelson, *The Province of the Judiciary*, 37 J. MARSHALL L.

There is something striking about juxtaposing the separation of courts from politics and the stripping from juries of power to find law, which legal scholars have seldom linked or treated as closely associated. They are, we can immediately see, intimately related: two parts of a single development that might be described as “the legalization of the judiciary.” Putting it this way probably sounds peculiar to modern lawyers, who are accustomed to thinking of courts and legality as overlapping if not indeed identical categories. But the relationship of law to politics, and of both to the different branches of government, was less clear and less settled in the eighteenth century.<sup>4</sup> Creating the modern judicial function—which assigns courts control over the interpretation and application of positive law—called for significant adjustments in what judges were accustomed to doing in colonial and Revolutionary America. They had to give up some things while assuming greater responsibility for others.

What judges had to give up was their role as active partisans. Commentators today often accuse judges of being political, meaning either that political preferences influence decisions or, more strongly, that judicial opinions mask political preferences in legal forms. But that sort of stuff pales in comparison to the activities of judges in the Early Republic, whose politics were neither hidden nor subtle. Even before Congress enacted the Sedition Act, for example, Federalist judges tried independently to muzzle their Republican opponents by actively instituting common law sedition actions against newspaper editors who criticized Adams administration policies.<sup>5</sup> Some continued to do so even after the Federalists had been routed in the election of 1800.<sup>6</sup> Many of the same judges freely used their office to promote a nakedly partisan agenda, haranguing juries in blatantly political charges delivered with an eye to broader circulation in the press. Justice Samuel Chase used his charge to a grand jury in Maryland to urge jurors (and others) to vote against Republicans in the next

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REV. 317, 317 (2004).

4. See Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381 (1998).

5. STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS, AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* 96 (1991).

6. Not long after the election, Federalist judges in the new District of Columbia circuit court instituted a common law libel prosecution against the editor of the Republican *National Intelligencer*. The matter was dropped when the Grand Jury refused to indict and the District Attorney declined to prosecute, but Republicans saw the incident as evidence of how Federalists planned to use their hold on the judiciary, and it helped spur the successful effort to abolish the new courts in 1802. See 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 194-98 (Fred B. Rothman & Co. 1987) (1922); RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 40 (1971).

election, simultaneously denouncing universal suffrage and other proposed changes in state law as dangerous steps toward "mobocracy."<sup>7</sup> It was the abandonment of this kind of unapologetic partisan activity that presumably lies behind Nelson's claim that Marshall used the opinion in *Marbury* to draw "a line between law and politics."<sup>8</sup> In so doing, Nelson suggests, Marshall and the Court effectively struck a bargain with the political branches: we stop using our office to influence partisan conflicts and advance administration policy, you leave the interpretation and application of law to us.

But fashioning the modern judiciary entailed more than getting judges to cease openly using the bench as a platform for explicitly partisan ends. It also required finding a way to give judges more control over the law. In the context of eighteenth-century America, this meant first and foremost taking that control away from juries, which (as Nelson has shown elsewhere) "had vast power to find both the law and the facts" in nearly every case.<sup>9</sup> Hence, the other half of what Nelson portrays as Marshall's effort to redefine the judicial function entailed successfully creating and establishing the modern adjudicatory process—in which juries find facts and judges find law, and in which a jury that ignores the judge's instructions is (in civil cases, at least) subject to direct judicial control.

That both these developments occurred is incontrovertible. That *Marbury* had much to do with either of them is more doubtful.

#### I. MARBURY AND THE SEPARATION OF LAW AND POLITICS

In his book about *Marbury v. Madison*, Nelson portrays Marshall and his brethren as striving courageously to "distinguish[] between the domain of law and the domain of politics."<sup>10</sup> The Justices refused to be drawn into making the Court a tool for advancing Federalist political goals, on the one hand, he says, while simultaneously making clear that the Court would protect the law and the Constitution, on the other. Marshall did this, Nelson claims, by distinguishing in his opinion "between political matters, to be resolved by the legislative and executive branches in the new democratic, majoritarian style, and legal matters, to be resolved by the judiciary in the government-by-consensus style that had prevailed in most eighteenth-century

7. 2 SAMUEL SMITH, TRIAL OF SAMUEL CHASE, AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES vi (Da Capo Press 1970) (1805).

8. NELSON, MARBURY, *supra* note 1, at 60.

9. WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 21 (1975) [hereinafter NELSON, AMERICANIZATION]

10. NELSON, MARBURY, *supra* note 1, at 59.

American courts.”<sup>11</sup>

There is a technical sense in which Nelson is indubitably correct. The *Marbury* Court did say that it could do some things and that it could not do others, and it explained the difference in terms of a line between law and politics. Marshall thus observed, in an oft-quoted passage that Nelson also emphasizes, that whether Jefferson’s act of not delivering Marbury’s commission was “examinable in a court of justice” depended on “the nature of that act”:

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. . . .

But when the legislature proceeds to impose on [an executive] officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.<sup>12</sup>

That sounds very nice, but what does it actually say? What kind of “distinction” was Marshall making? Commentators have long puzzled over the meaning of this language, their confusion compounded by Marshall’s oracular elaboration and examples. “The application of this remark[,]” he explained, “will be perceived by adverting to the act of congress for establishing the department of foreign affairs.”<sup>13</sup> Insofar as that act provided for the Secretary of State “to conform precisely to the will of the President[,]” the Secretary is “the mere organ by whom that [presidential] will is communicated” and his acts “can never be examined by the courts.”<sup>14</sup> Or again, “where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.”<sup>15</sup> Or yet again, this time a more specific example: “The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be

11. *Id.*

12. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803), *quoted in part in NELSON, MARBURY, supra* note 1, at 61.

13. *Marbury*, 5 U.S. (1 Cranch) at 166.

14. *Id.*

15. *Id.*

exercised by the President according to his own discretion.”<sup>16</sup>

Without purporting to resolve the many obscurities in these passages, two points are, I think, apparent. First, on its face, the “line” Marshall drew between law and politics did little to limit the Court’s power. An act was “only politically examinable” if it was something as to which the “executive possesse[d] a constitutional or legal discretion”—that is, if it was something not governed by positive law. But who was to decide that? The courts, of course. There were, to be sure, cases that would be easy and obvious. A statute or the Constitution might make clear that a particular act was within an executive officer’s discretion, as with Marshall’s example of the President’s appointment power. But apart from these relatively rare situations, the fact that the president’s acts could not be examined if he possessed “a constitutional or legal discretion” amounted to little so long as courts got to say whether or not he did. And Marshall was decidedly opaque and non-committal in explaining how such determinations were to be made.<sup>17</sup>

Second, to the extent the Court was announcing a principle of restraint or limitation, it was a trivial one, concerning only matters as to which there had never been any controversy. Consider again Marshall’s examples: No judge had ever been asked to order the president to nominate someone or to require the Secretary of State to engage or not engage in something like treaty negotiations. This is because, while the line between law and politics may have been murky, there was nevertheless a line, even then. And nothing Marshall said about defining that line in *Marbury* was either new or especially significant.

The kind of judicial involvement in politics that *was* controversial—the kind that actually mattered at the time—was of a different order altogether. It consisted of judges using their office for explicitly partisan purposes, with an eye toward influencing electoral politics.<sup>18</sup> And viewed from that perspective, *Marbury* was as nakedly “political” as anything that preceded it, tempered only by the fact that the Republicans were now in office and, if pushed too far, could be counted on to retaliate. In its original context, in other words, *Marbury* was anything but a

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16. *Id.* at 167.

17. The “political question” doctrine that subsequently developed was, in fact, very broad: much broader than its anemic descendant today. See 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 346-47 (Carolina Academic Press 1987) (1833).

It would be a mistake, however, to assume that this broad understanding of political questions was already immanent in Marshall’s opinion in *Marbury*. Struggle over the scope of judicial power was constant throughout the early decades of the nineteenth century, resulting in a continual process of redefinition and refinement.

18. See *supra* notes 5-7 and accompanying text.

retreat or a withdrawal from politics. It was an overt Federalist counterpunch aimed at the Jefferson Administration: a weak counterpunch, to be sure, but the best the politically astute Marshall could manage under the circumstances.

Certainly this is how it was received at the time. No one paid much attention to the Court's exercise of judicial review, which Marshall framed modestly in terms that even his critics endorsed.<sup>19</sup> What attracted notice when *Marbury* was decided was Marshall's discussion of how Adams's signature completed the appointment and entitled Marbury to have the commission delivered—an aspect of the opinion Nelson brushes past as “a narrow and technical ruling.”<sup>20</sup> This was not actually a “ruling,” of course, given the Court's conclusion that it lacked subject matter jurisdiction. It was, rather, an elaborate dictum, included contrary to good judicial practice for the sole purpose of publicly scolding the Jefferson Administration.

This aspect of Marshall's opinion “received widespread comment” at the time.<sup>21</sup> Jefferson was furious, perceiving Marshall's legally superfluous lecture as a politically motivated attack on his presidency. “The case of *Marbury v. Madison* has been cited,” Jefferson was still seething four years later, “and I think it material to stop at the threshold the citing [of] that case as authority, and to have it denied to be law.”<sup>22</sup> Urging that Marshall's opinion was both “extrajudicial, and as such of no authority” and “against law,” Jefferson disclosed that he had “long wished for a proper occasion to have the gratuitous opinion in *Marbury v. Madison* brought before the public, and denounced as not law.”<sup>23</sup> Fifteen more years passed and Jefferson was still vexed by the way Marshall had played politics with the case, irritably telling William Johnson that what Marshall had done in *Marbury* was “very irregular and very censurable” and should be condemned as a “perversion of law.”<sup>24</sup>

Nor was Jefferson alone in reading *Marbury* as an overtly political decision. Federalists celebrated the opinion for justly censuring what they regarded as a wicked administration. “Constitution violated by the President,” the *New York Evening Post* proclaimed triumphantly in an editorial published shortly

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19. Larry Kramer, *Marbury and the Retreat From Judicial Supremacy*, 20 CONST. COMMENT. (forthcoming 2003).

20. NELSON, *MARBURY*, *supra* note 1, at 60.

21. 1 WARREN, *supra* note 6, at 245.

22. Letter from Thomas Jefferson to George Hay (June 2, 1807), in 4 MEMOIRS, CORRESPONDENCE, AND PRIVATE PAPERS OF THOMAS JEFFERSON 76 (Thomas Randolph Jefferson ed., 1829).

23. *Id.* at 76-77.

24. Letter from Thomas Jefferson to William Johnson (June 12, 1823), in 10 THE WRITINGS OF THOMAS JEFFERSON 1816-1826, at 226, 230 (Paul Leicester Ford ed., 1899).

after the decision.<sup>25</sup> “What falsehood! What mockery! What insolence!” the indignant editorialist cried.<sup>26</sup> “Behold a subtle and smooth-faced hypocrisy concealing an ambition the most criminal, the most enormous, the most unprincipled.”<sup>27</sup> The *Washington Federalist* likewise read Marshall’s opinion as condemning the Republican administration and its supporters. “Let such men read this opinion and blush,” the paper’s editors solemnly intoned, “if the power of blushing still remains with them. It will remain as a monument of the wisdom, impartiality and independence of the Supreme Court, long after the names of its petty revilers shall have sunk into oblivion.”<sup>28</sup> Other Federalist papers said much the same, finding in *Marbury* welcome relief from the relentless political beating they were otherwise taking at the hands of Jefferson and his followers.

Republicans were quieter on their side, a product no doubt of confidence in their popular support and their firm control of affairs. They were not silent, however, and they “bitterly resented” the action of Marshall and the Court in issuing this singularly inappropriate and uncalled for reprimand.<sup>29</sup> One correspondent to Boston’s *Independent Chronicle* wrote sardonically, “I take it for granted that the Supreme Court of the Nation would not, from party motives, volunteer an extra-judicial opinion for the sake of criminating a rival department of government; and yet, in all my reading, I have not been able to find either principle or precedent for such a practice.”<sup>30</sup> Others were more forthright about rebuking Marshall and the other Justices for their decidedly non-judicial behavior.<sup>31</sup> “Littleton” wrote in the *Virginia Argus* that the decision “perplexes as much as it astonishes the thinking mind” and insisted that good lawyers viewed *Marbury* as “a hideous monster.”<sup>32</sup>

To understand why it was so apparent to everyone at the time that Marshall had produced a piece of political propaganda, we need briefly to recall the history and context of the case. Having lost control of both the executive and legislative branches in the election of 1800, lame duck Federalists in Congress acted quickly to secure supporters a sanctuary in the judiciary. Their last months in office thus witnessed a flurry of legislative activity designed to restructure the third branch.<sup>33</sup> The main feature of the

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25. See 1 WARREN, *supra* note 6, at 247.

26. *Id.* at 248.

27. *Id.*

28. *Id.* at 246.

29. *Id.* at 244.

30. *Id.* at 252.

31. *Id.* at 248-55.

32. 1 WARREN, *supra* note 6, at 249-50.

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



Judiciary Act of 1801 consisted of relieving the Supreme Court Justices of circuit-riding duties by creating six new circuit courts staffed by sixteen new judges; the Supreme Court was at the same time reduced in size from six to five beginning with the next vacancy.<sup>34</sup> Additional legislation, enacted just four days before Jefferson's inauguration, created yet another circuit court with three more judges in the District of Columbia, while also authorizing the President to nominate as many justices of the peace as he deemed "expedient."<sup>35</sup> By this none-too-subtle means, the Federalists rewarded themselves with numerous appointments to the inferior courts—not just the judges, but also the marshals, clerks, federal attorneys, and other supporting personnel attached to a court—while simultaneously requiring the incoming Republican Administration to wait for two vacancies on the Supreme Court before it could make its first appointment there.

Republicans were furious, and many in the party urged the new president to act immediately to undo this eleventh-hour legislative outrage. But Jefferson was not anxious to begin his term in office by plunging into what promised to be a bitter partisan affair. He and most of his supporters were prepared to live and let live if the newly appointed officeholders would act honorably and responsibly.<sup>36</sup> Jefferson went out of his way to be conciliatory in his inaugural address, and he pursued (at some considerable political cost) a restrained policy with respect to patronage. Of relevance to *Marbury*, for example, Jefferson reduced the number of justices of the peace in the District of Columbia from the forty-two created by Adams to just thirty, but he included twenty-five of Adams's original appointees in this group.<sup>37</sup>

Then, in December 1801, Secretary of State James Madison was served with notice that a motion would be made in the Supreme Court asking Madison to show cause why a writ of mandamus should not be issued directing him to deliver commissions as justices of the peace to William Marbury and three other disappointed candidates. Madison ignored the summons, and Chief Justice Marshall granted the motion to show cause,

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351-52; Kathryn Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 WM. & MARY Q. 3, 15-21 (1965).

34. Judiciary Act of 1801, ch. 4, §§ 3, 6-7, 2 Stat. 89-90.

35. Act of Feb. 27, 1801, ch. 15, §§ 3, 11, 2 Stat. 105, 107.

36. 1 WARREN, *supra* note 6, at 204; ELLIS, *supra* note 6, at 34-35, 41-43; Alfange, *supra* note 33, at 355-56.

37. See DUMAS MALONE, *JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805*, at 17-28, 69-89, 144 (1970). A recent article on William Marbury appears to suggest that this number may have been lower, perhaps twenty-two. See David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace*, 45 CATH. U. L. REV. 349, 400-02 & n.271 (1996).

setting the case for argument the following term. Republicans were indignant, interpreting the Court's show cause order as confirmation of how Federalists planned to use the judiciary to obstruct Jefferson's administration. Indeed, filing *Marbury* turned out to be the crucial act that united Republicans behind the repeal effort. "The conduct of the Judges on this occasion," Virginia Senator Stevens Thomas Mason told Madison, "has excited a very general indignation and will secure the repeal of the Judiciary Law of the last session about the propriety of which some of our Republican friends were hesitating."<sup>38</sup>

The repeal debate proved to be every bit as ugly and contentious as moderate Republicans had feared. Both sides referred to the pending *Marbury* case—Republicans offering it as evidence of judicial overreaching, Federalists citing it as an example of why an independent judiciary was necessary.<sup>39</sup> But the Republicans controlled both houses of Congress and were, in addition, supported by the public. Hence, in the end, which came on March 3, 1802, the Act was of course repealed.<sup>40</sup>

A small coterie of ultra-Federalists—Jefferson called them "the bitterest cup of the remains of Federalism rendered desperate and furious by despair"<sup>41</sup>—would not accept defeat and embarked on a campaign to sabotage the Republicans' victory. They formulated a three-pronged attack. First, they sought to drum up public support by circulating a pamphlet entitled *The Solemn Protest of the Honorable Judge Bassett*. Written by the father-in-law of Federalist stalwart James Bayard (who tried to talk him out of it), Judge Bassett claimed to speak for all the removed judges in rehashing the arguments made against repeal and calling upon the Supreme Court to declare the repeal act unconstitutional. Second, eleven of the removed circuit judges petitioned Congress for a redress of grievances, hoping in this way to revive divisions in the Republicans' ranks.<sup>42</sup> Finally, a number of test cases were brought challenging the repeal act in the restored federal circuit courts.

38. See ELLIS, *supra* note 6, at 44 (quoting Letter from Stevens Thomas Mason to James Madison (Dec. 21, 1801)).

39. See, e.g., speech by James A. Bayard, in 11 ANNALS OF CONG. 614-15 (1802); speech by John Randolph, *in id.* at 661-62; speech by Samuel W. Dana, *in id.* at 903-06.

40. The Senate had voted for repeal a month earlier by the uncomfortably close margin of a single vote—a byproduct of the fact that only a third of the Senate turned over in any given election. Also following party lines, the House vote more accurately reflected the Republicans' control of Congress and was 59-32. *Id.* at 982.

41. Letter from Thomas Jefferson to Joel Barlow (May 3, 1802), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 24, at 148-49.

42. See Linda K. Kerber, *Oliver Wolcott: Midnight Judge*, 32 CONN. HIST. SOC'Y BULLETIN 25, 29 (1967).

Nothing came of these efforts. The public relations campaign failed, owing partly to the ham-fisted and insulting manner in which the Federalists presented their case, but even more to the fact that the repeal was genuinely popular.<sup>43</sup> The results in Congress were still more disheartening. Republicans in the House of Representatives turned down the judges' request without dissension on the very day it was filed; the Senate took somewhat longer but reached the same result on a party-line vote. But the most crushing blow came when the Federalists' various court actions challenging repeal were summarily rejected in the circuit courts.

Anticipating the possibility of such challenges, the Republican Congress had already passed legislation designed to put off a ruling from the Supreme Court. This was accomplished by legislation adopted in early April that abolished the Supreme Court's June and December terms, thus delaying the Court's next sitting until February 1803, by which time Jefferson hoped that tempers in the capital would have cooled.<sup>44</sup> An incidental effect of this legislation was to put off the hearing in *Marbury v. Madison*, which otherwise would have been heard in June.

Undeterred, some of the diehard Federalists challenged the constitutionality of repeal in four lower court cases. They argued, first, that Congress had no power to order the transfer of actions already pending in courts established under the Judiciary Act of 1801. Second, they said it was unconstitutional for Supreme Court Justices also to sit as judges in the circuit courts. But mainly they argued that Congress had no power to remove judges who were guilty of no malfeasance or dereliction in office. In three of these challenges—presided over by Justices Washington and Cushing and by Chief Justice Marshall—their arguments were rejected on the spot.<sup>45</sup> In the fourth, heard by Justice Paterson, the proceedings were adjourned overnight, leaving time for conversations that led a “very much mortified” Theophilus Parsons to withdraw his plea the next morning.<sup>46</sup>

Though four of six Supreme Court Justices had now indicated their unwillingness to rule against the Republican administration, the Federalists pressed on by appealing Chief Justice Marshall's ruling to the full Court. The argument and decision in the case,

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43. On the popularity of repeal, see 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815*, at 156-63 (1981).

44. ELLIS, *supra* note 6, at 58-59.

45. See *id.* at 62-63; JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* 310-11 (1996).

46. ELLIS, *supra* note 6, at 63 (The quote is from a letter by Levi Lincoln to Jefferson).

captioned *Stuart v. Laird*, trailed those in *Marbury* by a few days each. Predictably, given what they had already said and done, the Justices affirmed the lower court. Justice Paterson's opinion for a unanimous Court was brief and not fully to the point. It was clear that Congress could abolish the inferior courts set up in the Judiciary Act of 1801 and transfer their cases to a different tribunal, the Court said, there being "no words in the constitution to prohibit or restrain" Congress's authority to "establish from time to time such inferior tribunals as they may think proper."<sup>47</sup> As for the objection that Supreme Court Justices could not sit on circuit courts, "it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. . . . [T]he question is at rest, and ought not to be disturbed."<sup>48</sup> Remarkably, Paterson and the Court ignored the appellant's most fundamental objection, which was that Congress could not remove Article III judges by any means other than impeachment or for any reasons other than misbehavior in office. But that argument was no longer essential to decide the case once the Court had concluded that Congress could transfer pending actions from one court to another, and the Justices chose in *Stuart* to say no more than was absolutely necessary to decide the case before them.

We are now, finally, in a position to understand the many-sided calculation that lay behind Chief Justice Marshall's enigmatic opinion in *Marbury*. Like every Federalist, Marshall worried about how far Republicans would go to dismantle the political order established under the leadership of Washington and Hamilton. Bear in mind that disagreements between the parties were not confined to questions of policy, but reflected profoundly different social philosophies.<sup>49</sup> A major organizing principle of Federalism was fear of populism and demagoguery. In its most extreme manifestations, Federalism exhibited open contempt for ordinary citizens and a sure conviction that republicanism would fail unless such citizens left problems of governing to their social and intellectual betters. Gouverneur Morris perfectly expressed

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47. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

48. *Id.*

49. See LINDA K. KERBER, *FEDERALISTS IN DISSENT: IMAGERY AND IDEOLOGY IN JEFFERSONIAN AMERICA* (1980); JAMES M. BANNER, JR., *TO THE HARTFORD CONVENTION: THE FEDERALISTS AND THE ORIGINS OF PARTY POLITICS IN MASSACHUSETTS, 1789-1815* (1970); DAVID HACKETT FISCHER, *THE REVOLUTION OF AMERICAN CONSERVATISM: THE FEDERALIST PARTY IN THE ERA OF JEFFERSONIAN DEMOCRACY 1-49* (1965); David Waldstreicher, *Federalism, the Style of Politics, and the Politics of Style*, in *FEDERALISTS RECONSIDERED* 99 (Doron Ben-Atar & Barbara B. Oberg eds., 1998). On Republican interpretations and reactions, see DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* (1980).

this tenet during the debate over repeal: "Look into the records of time, see what has been the ruin of every Republic. The vile love of popularity. Why are we here? To save the people from their most dangerous enemy; to save them from themselves."<sup>50</sup> Marshall himself seldom spoke this bluntly, and he was generally moderate when it came to particular policies. But he shared with all Federalists these core convictions as well as the belief that Jefferson and the Republicans pandered too much to popular opinion.

Marshall was, at the same time, reasonably certain that any attempt by the Court to stand in Jefferson's way would be crushed. What doubts he may have harbored in this respect, moreover, were presumably laid to rest when, just before the Court reconvened in February, Jefferson asked the House of Representatives to look into whether New Hampshire District Judge John Pickering's erratic behavior warranted impeachment.<sup>51</sup> There was, as a result, a new "overhanging threat" to unsettle the Justices as they sat down to decide *Stuart* and *Marbury*.<sup>52</sup>

Of the two cases, *Stuart v. Laird* represented the greater dilemma and more intractable problem, for the repeal act challenged more fundamental constitutional values and reflected a much greater threat to judicial independence than the administration's failure to deliver some commissions in the circumstances of *Marbury's* case. Plus, Federalists and Republicans alike cared far more about the fate of Jefferson's repeal than they did about *Marbury*, and they were watching closely to see what the Supreme Court would do—which is why there was never really any question that the Court would do nothing. As Dean Alfange explains:

*Stuart v. Laird* was manifestly not an example of nonpartisan fairness, but of craven unwillingness on the part of the Court even to admit the existence of the principal constitutional issue presented by the case. The Court refused to consider this constitutional question even though the author of its opinion had earlier categorically written that he believed the law to be invalid for precisely the reasons that he here chose not even to mention. The Court acted out of a fully justified fear of the political consequences of doing otherwise, not out of an overriding compulsion to reach the correct legal result at whatever sacrifice of their own political preferences.<sup>53</sup>

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50. 11 ANNALS OF CONG., *supra* note 39, at 41.

51. Jefferson's message, dated February 3, 1803, was received by the House of Representatives on February 4, just prior to the commencement of the Court's long-delayed term. See 7 ANNALS OF CONG. 460 (1803); MALONE, *supra* note 39, at 147-48.

52. Alfange, *supra* note 33, at 364-65.

53. *Id.* at 363-64.

As much as the Court may have wanted to say something that signaled its opposition to what the Republicans had done and were doing, it was abundantly clear that anything less than total submission to the repeal act would be suicidal.

Effectively silenced in *Stuart, Marbury* became the Court's only outlet for making a statement. Yet the prospects for getting away with something here were scarcely more promising than in *Stuart*. Secretary of State Madison had ignored the initial motion to show cause, and he displayed the same disregard for the Court's proceedings on whether to grant the petitioners' request—not bothering to appear or even to offer an argument. It was abundantly clear that an order directing Madison to deliver the commissions would likewise be ignored. Unwilling to say that Jefferson was right, but also not wanting to have its impotence openly put on display, the Court decided instead to dismiss for lack of jurisdiction.

Yet Marshall could not bring himself simply to rule that *Marbury* and his co-petitioners were entitled to no relief. This would have meant letting Jefferson completely off the hook in both cases, and that was to concede too much to the Republicans. Marshall deemed it imperative to make *some* kind of statement. Marshall therefore prefaced his jurisdictional ruling with a lengthy dissertation explaining why the administration had acted unlawfully by withholding the petitioners' commissions. By coupling this essay with a dismissal for want of jurisdiction, Marshall was, in effect, leaving open the question whether the Court would stand up to the executive. He was also, as one biographer has put it, "throwing a sop to the High Federalists," offering something to take the edge off their disappointment.<sup>54</sup>

It was a risky strategy. As we have seen, Marshall's lecture infuriated Jefferson and the Republicans. And not just because, having already decided that the Court lacked jurisdiction, Marshall's discussion was gratuitous and wholly improper (which it was). But also because, in Jefferson's eyes, Marshall was so obviously wrong on the merits (which he was).<sup>55</sup> Marshall nevertheless decided to gamble. Richard Ellis explains:

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54. Smith, *supra* note 43, at 319.

55. Among other things, Marshall assumed without explanation that justices of the peace were not removable at will by the executive, contrary to the rule established in 1789. He also held that the petitioners acquired a property right in their office once their commissions were signed by the President, whereas most legal historians agree with Jefferson that delivery was essential to make the commissions valid. See UNITED STATES SENATE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 454 (Edward S. Corwin ed., 1953) (Jefferson's "is probably the correct doctrine"); MALONE, *supra* note 37, at 144 ("But for the distortions of partisan politics [Jefferson's] supposition would probably have been generally accepted at the time as natural and reasonable").

[T]he Chief Justice was an experienced politician, and he probably realized that Jefferson, preoccupied as he was with the diplomatic intricacies of the Louisiana Purchase and with the clashing interests within the Republican party, was not likely to get into a fight over a lecture that had no practical meaning.<sup>56</sup>

Marshall's gamble paid off, and he succeeded in rebuking Jefferson without eliciting from Republicans more than strongly worded condemnations in the press.<sup>57</sup>

Against this background, it seems implausible to describe *Marbury* as a case in which the Court decreed its withdrawal or separation from politics. Marshall's opinion may contain some language concerning a law/politics distinction, but if *Marbury* has come to stand for the impropriety of judicial involvement in politics,<sup>58</sup> that is wholly a product of what subsequent courts and scholars have made of the case by ignoring its actual history—a mistake very much like the similarly misconceived tendency to treat *Marbury* as an important source of judicial review. This is not to say that Marshall may not have favored a separation between law and politics; nor is it to deny that he may have worked to achieve such a separation during his tenure on the bench. It is only to say that *Marbury* was not one of the places where this work was done.

Keith Whittington has argued, persuasively in my view, that the pivotal event reshaping the role of judges in politics was the failed effort to impeach Justice Samuel Chase.<sup>59</sup> Conventional wisdom long treated Chase's impeachment as part of a larger campaign by Jefferson and the Republicans to subordinate the judiciary to Congress. Whittington argues that most Republicans—and in particular the moderates who held the balance of power in Congress—had something less radical in mind. They objected to what they saw as the Federalists' aggressive politicization of the courts, identifying Justice Chase as the most extreme and uncompromising culprit. Rather than seeking to make judges pawns of the legislature, they wanted only to depoliticize the bench by "its institutional removal from partisan conflicts and its disentanglement from administration politics."<sup>60</sup> The decision of the House to impeach was a "signal to the judiciary . . . that partisanship in the conduct of . . . official duties

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56. ELLIS, *supra* note 6, at 67.

57. See MALONE, *supra* note 37, at 151; SMITH, *supra* note 43, at 325.

58. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION 144 (4th ed. 2003); Richard H. Fallon, *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1, 28-29 (2003). This idea is itself quite old. See MAURICE FINKELSTEIN, CASES ON CONSTITUTIONAL LAW 88 (1927).

59. KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWER AND CONSTITUTIONAL MEANING 20-71 (1999).

60. *Id.* at 49.

would not be tolerated,<sup>61</sup> and the eventual decision of Republican moderates in the Senate to acquit reflected a kind of implicit bargain: “Good Behaviour” was redefined to mean refraining from openly partisan or political activities, while “judicial independence” was redefined to mean safety from impeachment for judges who respected the new norm (and did not otherwise commit serious crimes or malfeasances). Taking the hint, “federal judges rapidly and obviously moved to a more neutral position relative to ‘political’ conflicts.”<sup>62</sup>

What Whittington calls the resulting “constitutional construction” of the judicial role has proved impressively durable—making it possible (among other things) to begin for the first time thinking seriously about the more refined kind of line between law and politics that Nelson apparently has in mind. Certainly John Marshall was important in drawing this line. Perhaps he was even thinking about it when he wrote in *Marbury* that there were actions for which the president is “accountable only to his country in his political character.”<sup>63</sup> But embedded as these remarks were in a portion of the opinion that was itself extrajudicial and blatantly political, such language about the proper role of the Court could have little meaning or credibility. It was only after and in the wake of Chase’s impeachment that Marshall and others could begin this work in earnest.

## II. *Marbury and the Power of Juries to Find Law*

Professor Nelson’s main focus here is on the power of juries to find law. Federalists with whom Marshall was allied, he says, deliberately set about to “tame” the civil jury, and as a result of their efforts juries had lost their lawmaking power by 1804. This profound change in legal practice was thus produced by a concerted campaign begun sometime in the mid-to-late 1790s and successfully completed in less than a decade.

That there was some such campaign is well known. Historians have long been aware of efforts by elite lawyers to “professionalize” the law in America.<sup>64</sup> Pressure to do so built

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61. *Id.* at 41.

62. *Id.*

63. *Marbury*, 5 U.S. (1 Cranch) at 166.

64. See ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA: THE REVOLUTIONARY AND POST-REVOLUTIONARY ERA* (1965); MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876* (1976); GERARD W. GAWALT, *THE PROMISE OF POWER: THE LEGAL PROFESSION IN MASSACHUSETTS, 1760-1840*, at 7-35 (1979); Charles R. McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 J. LEGAL EDUC. 124 (1976). Nelson himself has already been a major contributor to this debate. See NELSON, *AMERICANIZATION*, *supra* note 9. Two new efforts to expand our knowledge of these developments—both to be published soon—deserve special mention: John



gradually throughout the eighteenth century, as the legal profession grew and expanded its influence. This pressure slackened during the Revolution, which wreaked havoc on the established bar and nurtured a more populist jurisprudence, but demand for reform reemerged after adoption of the Constitution. The demand was not strictly a partisan affair, and it was supported by at least some Republicans who were also members of the elite bar.<sup>65</sup> But, as Nelson suggests, the strongly anti-populist ideology of Federalism made its adherents far more likely than Republicans to support measures that reduced the role of laymen.

Bear in mind that this process of professionalization involved much more than just announcing that judicial instructions were binding and granting new trials more frequently. Juries may have been the principal device securing popular control over the administration of law, but the eighteenth-century jury was situated within a procedural system and a legal culture whose every feature helped underscore and reinforce the centrality of lay control. Nelson's paper hints at this when he mentions efforts to change such practices as circuit riding, seriatim opinions, and the publication of official reports. But the point is sufficiently central to his argument that we should take a moment to lay out more systematically certain critical features of eighteenth-century legal practice.

Start with personnel: the number of trained lawyers increased throughout the eighteenth century,<sup>66</sup> but at the time the Constitution was adopted, untrained or poorly trained lawyers were still by and large the rule. Bar associations were virtually non-existent outside New England, and even there the requirements for admission were minimal and haphazard.<sup>67</sup> Formal legal education was in its infancy, with few law schools teaching few students and an unregulated system of apprenticeship providing what little legal training most lawyers received.<sup>68</sup>

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Reid's study of New Hampshire and Daniel Hulsebosch's discussion of the Federalists in New York. See John Phillip Reid, *Controlling the Law: Legal Politics in Early National New Hampshire* (manuscript on file with author); Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World* 376-419 (manuscript on file with author).

65. GAWALT, *supra* note 64, at 95-96.

66. Stanley N. Katz, *Looking Backward: The Early History of American Law*, 33 U. CHI. L. REV. 867, 869, 874 (1966).

67. See BLOOMFIELD, *supra* note 64, at 139; LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 355 (1973); ALFRED Z. REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 67-103 (1921).

68. See FRIEDMAN, *supra* note 67, at 84-85; MCKIRDY, *supra* note 64, at 124-26; Hoyt P. Canady, *Legal Education in Colonial South Carolina*, in *SOUTH CAROLINA LEGAL HISTORY* 101, 101-04 (Herbert Johnson ed., 1980).

Judges, too, were not generally trained in the law, and there was no telling what the “ministers, would-be theologians, physicians, shoemakers, tailors, and farmers [who] became judges” might tell a jury.<sup>69</sup> The low prestige of being a judge, combined with nettlesome circuit-riding duties and low salaries, were such that many of these lay judges ironically turned out to be better lawyers than the judges who had legal training.<sup>70</sup>

Even apart from issues of personnel, the judiciary was ill-suited to exercise significant control over the law. Trials were presided over by multi-member panels, with each judge required to instruct the jury separately.<sup>71</sup> Their instructions were not yet binding, and the frequency with which members of the panel disagreed—an occurrence made likely by lack of professional training and a dearth of published precedent—weakened even the persuasive effect of the court’s legal exegesis. Rules of evidence were more informal and less controlling than today, diminishing the judges’ ability to shape what happened at trial, while the absence of special pleading left the court few opportunities to take a case from the jury.<sup>72</sup> Once a jury decided, its judgment was almost always final, for there were as yet few grounds upon which to order a new trial and none permitting the court to direct a jury verdict.

Nor were judges in a position to develop the law even when appeals could be taken. Many courts had only a single term, which meant that legal issues had to be decided at the same time the judges were hearing trials, leaving them little time to consult or reflect. Worse, because rulings on questions of law had to be made while the court was riding circuit, the judges were unable to do research unless they happened to be in a place where someone owned a legal library.<sup>73</sup> It goes without saying that such libraries were rare.<sup>74</sup>

Even had there been time to do research and a library to use, the judges would have found little to consult. Written opinions were virtually non-existent. Few judges published their decisions, and the only available sources of American case law consisted of handwritten manuscripts, which could be copied but were seldom widely available; partisan pamphlets; and unreliable newspaper accounts from a handful of notorious cases.<sup>75</sup> The first unofficial

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69. ELLIS, *supra* note 6, at 115; FRIEDMAN, *supra* note 67, at 124-27.

70. WILLIAM PLUMER, JR., LIFE OF WILLIAM PLUMER 183-84 (1857); see Reid, *supra* note 64, at 71-72.

71. See PLUMER, *supra* note 70, at 236; NELSON, AMERICANIZATION, *supra* note 9, at 26; Reid, *supra* note 64, at 109.

72. See NELSON, AMERICANIZATION, *supra* note 9, at 21-28.

73. See Reid, *supra* note 64, at 143-156.

74. FRIEDMAN, *supra* note 67, at 88-90.

75. See J.M. SOSIN, THE ARISTOCRACY OF THE LONG ROBE 203 (1989).

reporter did not appear until 1789, when Ephraim Kirby published a volume of decisions of the high court of Connecticut, followed the next year by Alexander Dallas in Pennsylvania.<sup>76</sup> As late as 1805, the appearance of the first volumes of official reports in Massachusetts and New York was considered so noteworthy an event that the leading New England journal published reviews written by the likes of rising star Daniel Webster and New Hampshire's Chief Justice Jeremiah Smith.<sup>77</sup> Nor were there, as yet, treatises or systematic digests of American law to which lawyers and judges could turn in lieu of official reports. There was only Blackstone, who became important almost by default. But even Blackstone was of limited utility given prevailing sentiments against English law and the widespread belief in American exceptionalism: what was right and good for England simply was not automatically right or good for America.<sup>78</sup>

Obviously, not every colony's or state's legal system shared all these traits. The structure of legal practice differed from place to place, as did the pace of development. But the overall pattern was everywhere the same, and it made the jury powerful indeed. Making no effort to hide his disapproval, one mid-nineteenth century commentator described how things had looked at the turn of the century:

The justice of the case was held up as the law of the case; and the jury were to judge both of the law and the fact. Of course there could be no uniformity in the decisions. There were no fixed principles; but each case must have been decided according to the impulse of the jury, who could have no rule but their own fluctuating ideas of justice.<sup>79</sup>

Concerned lawyers began pressing for reform in some states as early as 1791, a movement that spread and escalated in urgency in the ensuing years.<sup>80</sup> But the reformers were hardly

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76. See ELLIS, *supra* note 6, at 118-19; Alan V. Briceland, *Ephraim Kirby: Pioneer of American Law Reporting, 1789*, 16 AM. J. LEGAL HIST. 297, 297 (1972); Edward Dumbauld, *Legal Records in English and American Courts*, 36 THE AM. ARCHIVIST 28-29 (1973).

77. See Reid, *supra* note 64, at 157-70. Their reviews were published in *The Monthly Anthology and Boston Review*. *Id.* Later, other distinguished lawyers—including not only Webster, but also Caleb Cushing, Joseph Story, and Henry Wheaton—reviewed volumes of judicial reports in *The North American Review*, the leading monthly journal of its kind. *Id.*

78. See FRIEDMAN, *supra* note 67, at 88-89, 98, 146.

79. JOHN H. MORISON, *LIFE OF THE HON. JEREMIAH SMITH 174* (1845).

80. For studies of the politics of legal reform in the early republic, see ELLIS, *supra* note 6, at 111-229 (Kentucky, Pennsylvania, and Massachusetts); Reid, *supra* note 64, at 33-55 (New Hampshire); GAWALT, *supra* note 64 (Massachusetts); A.G. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810*, at 160-261 (1981). In addition, G. Edward White touches on some of the broader themes in introducing the legal culture of the Marshall Court. See G. EDWARD WHITE,

unopposed, and little they sought to accomplish would come easily. The nation was, in fact, badly divided on the question of law reform. On one side were lawyers and businessmen who wanted to increase predictability in the law, especially in commercial law, by reducing popular control. They fought for greater professionalism on the bench and at the bar, as well as for an array of other changes designed to make the legal process more orderly. Opposing them were all those people who continued to view the legal system as serving “an essentially arbitral function” in which “[o]rdinary people, applying common sense notions of right and wrong, could resolve the disputes of life in localized and informal ways.”<sup>81</sup>

The confrontation between these groups took place on many fronts and over many years. In part, the battle was intellectual. Understanding “the laws and constitution of our own country,” Blackstone had said, is a “science”<sup>82</sup>—a view that became increasingly fashionable among professionals in the early nineteenth century.<sup>83</sup> Law was more than a haphazard aggregation of holdings and statutes, they believed, more than just common sense and common justice. Law was a system of principles: an intelligible, harmonious ordering whose organic structure and dynamic rules could be understood and taught using the same methods practiced in other sciences.

For those who embraced it, this view of law as science had profound implications. It meant that legal outcomes were not things generated impulsively in and for each new case, but rather something that could be predicted based on knowledge of the appropriate principles—principles that could themselves be organized in a coherent, digestible fashion. Champions of this view set out to prove their claim, too, producing a steady stream of treatises, digests, and specialized texts covering nearly every aspect of American law.<sup>84</sup>

But the principles of the law were intricate and complex, not at all the sort of thing that could be grasped intuitively by the untrained. Special knowledge and long hours of study were required. Hence, professionals in the early nineteenth century

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THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, at 76-156 (1988).

81. John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 566 (1993).

82. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*3 (Univ. of Chicago ed., 1979) (1765).

83. See WHITE, *supra* note 80, at 79-83; WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGINS OF MODERN LEGAL EDUCATION 29-38 (1994); GAWALT, *supra* note 64, at 81-82.

84. See WHITE, *supra* note 80, at 86-95; LAPIANA, *supra* note 83, at 40-41; Hulsebosch, *supra* note 61, at 394, 397; Daniel J. Hulsebosch, *Writs to Rights: Navigability and the Transformation of the Common Law in the Nineteenth Century*, 23 CARDOZO L. REV. 1049, 1061 (2002).

worked hard to reform legal education: founding new law schools, changing the curriculum and style of teaching, and lobbying to make formal schooling a prerequisite to joining the bar.<sup>85</sup> And, of course, if law really was a complicated science that required intense study and special training, it could not be left to the common sense of laymen. Hence, the professionals sought to replace lay judges, to beef up requirements for admission to the bar, and to limit the authority and discretion of juries.<sup>86</sup>

Most of what this legal reform movement targeted for change were practical aspects of day-to-day administration.<sup>87</sup> The professionals sought to change—and their opponents to preserve or extend—virtually every feature of the system outlined above. There were fights over whether to allow a single judge to preside at trial or, barring that, to allow a single charge to the jury; whether to continue appointing lay judges or to appoint only lawyers to the bench; whether to make jury instructions binding and limit the jury's role to factfinding; whether to institute a system of special pleading and incorporate other procedures enabling courts more easily to dispose of cases without submission to a jury; whether to abolish the common law writ system; whether to have a separate term for hearing appeals; whether to produce official reports or at least permit the publication of written opinions; and whether to hire court reporters.

In the end, the professionals triumphed, though their progress was slow and uneven and they suffered many setbacks along the way, especially in the south and west. Nevertheless, by the 1830s the process of professionalization was far advanced throughout the nation. The Jacksonians staged what amounted to a last ditch effort to stave off the triumph of the lawyers, but it was already too late. They had little choice but to concede control to the professionals, and they tried instead to make the professional bench and bar more accountable—mainly through a movement to codify law and by the enactment in many states of

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85. See LAPIANA, *supra* note 83, at 29-78; R. Kent Newmyer, *Harvard Law School, New England Culture, and the Antebellum Origins of American Jurisprudence*, 74 J. AMER. HIST. 814 (1987).

86. See GAWALT, *supra* note 64, at 98-99, 105-07; Reid, *supra* note 64, at 115-30; NELSON, AMERICANIZATION, *supra* note 9, at 165-74.

87. Unless otherwise indicated, the points in this paragraph and the next are drawn from ELLIS, *supra* note 6, at 111-266, who describes the politics of judicial reform in a number of states; and Reid, *supra* note 64, *passim*, who closely studies one state (New Hampshire). The broad framework suggested by these authors, particularly Reid, is supported by William Nelson's and Gerard Gawalt's studies of Massachusetts and by A.G. Roeber's study of Virginia. See NELSON, AMERICANIZATION, *supra* note 9; GAWALT, *supra* note 64; ROEBER, *supra* note 80. See also WHITE, *supra* note 80; BLOOMFIELD, *supra* note 64, at 33-90; FRIEDMAN, *supra* note 67. It is unfortunate that we lack equally intensive studies of other states, though the sporadic evidence that exists suggests a process that was similar nationally in its essentials.

provisions for an elective judiciary. But their uphill struggle to recapture popular control of substantive law by codification never came close to displacing the common law.<sup>88</sup> Judicial elections, in the meantime, may have had both good and bad consequences—though nothing “so earthshaking . . . as proponents had hoped and opponents feared”<sup>89</sup>—but they did nothing to weaken the commitment to a professional bench or to shake the legal profession’s monopoly on judicial posts.<sup>90</sup>

Placing Nelson’s claim in the context of this larger story suggests two respects in which his argument may need to be modified. The first concerns the matter of timing. One simply cannot say, as he does, that “by 1804 at the latest, the civil jury had been tamed.”<sup>91</sup> The most one can say is that an argument for controlling the jury had been developed by this date, and that a group of influential judges had begun taking steps to make this argument a reality. But precisely because lay deliberation was secured and reinforced by so many other elements of the existing legal culture, successfully reining in the civil jury required first achieving various related reforms as well. These included, among other things, changing the courts (especially the state courts, which heard the vast majority of cases) by appointing judges who shared these High Federalist aspirations. It required changing the bar by increasing the number of lawyers who agreed that juries should not decide law and generating a sufficient body of published precedent to make this sort of supervision possible. It required modifying procedural rules to facilitate judicial superintendence, especially by reforming rules of evidence and pleading. Most important, it required enlarging the grounds available for judges to take a case from the jury. Granting new trials was a crude and ineffective solution, even after the grounds had been enlarged, though it had to do for many long years. Eventually, judges found more effective ways of avoiding or overturning what they regarded as erroneous jury verdicts, but it took many more years for them to develop something recognizable as the power to award a judgment *non obstante veredicto*.<sup>92</sup>

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88. See BLOOMFIELD, *supra* note 64, at 84; GAWALT, *supra* note 64, at 182-83; CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* (1981); PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 239-65 (1965); Robert W. Gordon, *Charles M. Cook’s The American Codification Movement: A Study of Antebellum Legal Reform*, 36 VAND. L. REV. 431, 435-36 (1983) (book review).

89. FRIEDMAN, *supra* note 67, at 323.

90. See 1 LOUIS BOUDIN, *GOVERNMENT BY JUDICIARY* 317-405 (1968); FRIEDMAN, *supra* note 67, at 323-24, 371-73; JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 140 (1950).

91. Nelson, *supra* note 3, at 327.

92. 9A CHARLES ALLAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE*

When all is said and done, it is not possible to say precisely when the civil jury was “tamed.” Certainly judges had obtained control of the law in civil cases in most states by the 1830s. But whether we can date the change earlier (and, if so, how much earlier) requires further study. The pace of change was different in different parts of the country, and judicial control over civil juries was accomplished earlier in some states than in others. It was, however, a slow and unsteady process that was still just beginning in 1804.

That this was so seems clear from Nelson’s own evidence, which includes at least two instances around the time he says the process was completed in which judicial efforts to deprive juries of their traditional authority were rather peremptorily rebuffed by legislation—the Judiciary Act of 1802 at the federal level, and the New York legislature’s response to the 1804 case of *People v. Croswell*.<sup>93</sup> It may well be, as Nelson asserts, that this merely forced the judges to search for different ways to achieve their ends. My point is merely that they could not do so in an instant and that it took them considerable time.

A second respect in which Nelson may need to qualify the argument is his description of causes. Nelson attributes the effort to strip juries of lawfinding power to two principal sources: the Revolution, which he says fostered a new sense that citizens spoke through their elected legislatures, thus undermining any notion of juries as “the Voice of the People”; and the partisan split of the 1790s, which Nelson argues exacerbated elite discomfort over the breakdown in deference, thus reinforcing this elite’s worries about the dangers of popular influence. These developments, Nelson urges, motivated Federalists to seek to reduce popular control over the law: ergo, their effort to take away the jury’s lawfinding power.

Both of the developments Nelson describes undoubtedly occurred, but there is little reason to believe that either was integrally related to what happened to the civil jury. Consider first the role of the Revolution in changing popular perceptions about how “the people” spoke. Emphasizing a republican polity’s ability to act through the government definitely put pressure on some traditional forms of popular expression, especially those associated with violence by the people out-of-doors. Mob activity had a long, almost distinguished pedigree in the Atlantic world, and crowd action had formed a crucial part of America’s resistance to England in the years before Independence.<sup>94</sup> Yet as early as

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AND PROCEDURE § 2522 (1995).

93. See Nelson, *supra* note 3, at 327.

94. PAULINE MAIER, FROM RESISTANCE TO REVOLUTION (1972); John Phillip Reid, *In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution*, 49 N.Y.U. L. REV. 1043

1784, we find Samuel Adams—arguably the most prominent and effective mob leader of the Revolutionary era—criticizing the activities of mobs in western Massachusetts (what would subsequently become known as Shays’s Rebellion) on the ground that “as we now have constitutional & regular Governments and all our Men in Authority depend upon the annual & free Elections of the People, we are safe without them.”<sup>95</sup>

By no means did mobbing disappear. Even the Shaysites evoked mixed reactions.<sup>96</sup> There was, moreover, plenty of mob activity in the 1790s and beyond: from the Whiskey Rebellion to the continued activities of frontier “regulators” to Fries Rebellion, opposition to the Jay Treaty and Alien and Sedition Acts, and the Baltimore Riots of 1812.<sup>97</sup> But for many, Republicans and Federalists alike, erecting popular governments made this sort of behavior less acceptable. Whatever may once have been the case, they said, the proper means by which to express and measure public opinion had become elections, petitions, and non-violent forms of political pressure or protest.<sup>98</sup>

(1974); EDMUND S. MORGAN & HELEN M. MORGAN, *THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION* (1995).

95. Letter from Samuel Adams to Noah Webster (April 30, 1784), in 4 *THE WRITINGS OF SAMUEL ADAMS* 305 (Harry A. Cushing ed., 1968). On Adams’s activities in the years before Independence, see BERNARD BAILYN, *THE ORDEAL OF THOMAS HUTCHINSON* (1974).

96. DAVID J. SIEMERS, *RATIFYING THE REPUBLIC: ANTIFEDERALISTS AND FEDERALISTS IN CONSTITUTIONAL TIME* 13 (2002); Michael Lienesch, *Reinterpreting Rebellion: The Influence of Shays’s Rebellion on American Political Thought*, in *IN DEBT TO SHAYS* 161-82 (Robert A. Gross ed., 1993); LEONARD L. RICHARDS, *SHAYS’S REBELLION: THE AMERICAN REVOLUTION’S FINAL BATTLE* 117-38 (2002).

97. *RIOT AND REVELRY IN EARLY AMERICA* 9 (William Pencak et al. eds., 2002). On the Whiskey Rebellion, see THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* (1986); on regulator activity, see Alan Taylor, *Agrarian Independence: Northern Land Rioters After the Revolution*, in *BEYOND THE AMERICAN REVOLUTION: EXPLORATIONS IN THE HISTORY OF AMERICAN RADICALISM* 221-45 (Alfred F. Young ed., 1993); on <sup>94</sup> Fries Rebellion, see Robert H. Churchill, *Popular Nullification, Fries’ Rebellion, and the Waning of Radical Republicanism*, 67 *PENN. HIST.* 105 (2000); on Jay’s Treaty and the Alien and Sedition Acts, see JAMES ROGER SHARP, *AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS* 117-37, 187-225 (1993); on the Baltimore riots, see Paul A. Gilje, *The Baltimore Riots of 1812 and the Breakdown of the Anglo-American Mob Tradition*, 13 *J. SOC. HIST.* 547 (1980).

98. One should not overstate the extent of the changes taking place. New and old attitudes about popular uprisings continued to coexist, and support for or condemnation of mob activity remained (as it had always been) partly a matter of whether one supported or opposed the mob’s cause. But, increasingly, even those who shared the discontent of insurrectionists were troubled by their use of violent extralegal means. A dozen years after Shays’s Rebellion, as Republican leaders conferred about tactics to use against the Alien and Sedition Acts, Jefferson responded to word of Fries Rebellion in Pennsylvania by counseling caution and patience. “[W]e fear that the ill



Yet while republicanism may have had this effect on some institutions, I see little reason to count the jury among them. Nelson's only evidence—a quote from *Administrator of Moore v. Cherry*—hardly provides decisive support, and while his interpretation of the opinion is not implausible, neither is it obvious or clear.<sup>99</sup> I am, moreover, unaware of any instances in which anyone directly or expressly contested the jury's lawfinding power as inconsistent with republicanism (as Adams and many others did, for example, when it came to mobs).

Perhaps this is because the jury had always been conceptualized as supplementary to an elected and accountable legislature: a paradigmatically republican institution that protected the community from courts and judges. Where the franchise constituted “the Part which the People are by the Constitution appointed to take, in the passing and Execution of Laws,” John Adams wrote in 1771, juries played a homologous role in the administration of justice:

As the Constitution requires, that, the popular Branch of the Legislature, should have an absolute Check so as to put a peremptory Negative upon every Act of the Government, it requires that the common People should have as compleat a Controul, as decisive a Negative, in every Judgment of a Court of Judicature.<sup>100</sup>

The importance of the jury as a crucially republican institution is evident from its centrality in the debates over ratifying the Constitution. There is no hint anywhere in the deliberations that adopting a republican constitution called in any way for rethinking or changing the traditional role of juries as finders of both fact and law. On the contrary, the mere possibility that the proposed charter failed strictly to preserve the right became one of the Anti-Federalists' most effective arguments against ratification.<sup>101</sup> Federalists responded by conceding the role

designing may produce insurrection,” he worried in a letter to Edmund Pendleton. “Nothing could be so fatal”:

Anything like force would check the progress of the public opinion & rally them round the government. This is not the kind of opposition the American people will permit. But keep away all show of force, and they will bear down the evil propensities of the government, by the constitutional means of election & petition.

Letter from Thomas Jefferson to Edmund Pendleton (Feb. 14, 1799), in 7 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 24, at 356.

99. See Nelson, *supra* note 3, at 320.

100. John Adams, Diary Notes on the Right of Juries (Feb. 12, 1771), in 1 LEGAL PAPERS OF JOHN ADAMS 228-29 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

101. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 318-25 (1996); WILLIAM H. RIKER, THE STRATEGY OF RHETORIC: CAMPAIGNING FOR THE AMERICAN CONSTITUTION 85-90, 104 (1996).

and importance of the civil jury in a republican government, and they bent over backwards to assure the public that “[t]he friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury,” while hastening to comfort skeptics that the right “will be in no degree altered or influenced by the adoption of the plan under consideration.”<sup>102</sup> Federalists explained the Constitution’s failure expressly to protect the civil jury on the ground that practice varied from state to state, which they said made it unwise to impose a uniform national rule—a point they subsequently yielded in the Seventh Amendment.<sup>103</sup>

It is, I suppose, possible that people came to see the traditional jury as inconsistent with republican government soon after the Constitution was ratified—though, again, it seems remarkable, if this was true, that no one bothered to say so. There are, moreover, still other reasons to doubt Nelson’s claim that civil juries lost the power to find law because “the people” now spoke through their republican legislatures.

To begin with, only a very small portion of litigation involved statutes. The overwhelming majority of cases were still based on common law—a fact that remained unchanged for at least another century. That being so, it seems unlikely that protecting the legislature’s work-product from arbitrary jury verdicts could have been a major concern motivating this profound change in the jury’s role. In fact, what judges were mainly trying to do by limiting the power of juries was to seize control of the common law. Yet no one argued, or could plausibly have argued, that judicial interpretations of common law reflected the voice of a republican people better than a jury. The argument, rather, was that common law embodied a highly developed organic system that only the legally trained could master and hope to understand. The argument was, in other words, profoundly anti-democratic, which is why Republicans resisted it and why Jacksonians sought to defeat it by codification and judicial elections.

More telling still, the concern Nelson highlights about properly identifying who speaks with “the voice of the people” would have been no less applicable to the criminal jury than to the civil one. Indeed, anxiety about the need to prevent runaway juries from “interpos[ing] their ‘private opinion’ in the path of legislation reflecting the public’s will”<sup>104</sup> would presumably have been *more* compelling in the context of criminal cases given the special role of criminal law as an expression of community will. Yet, as Nelson’s own evidence makes clear, only the power of the

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102. THE FEDERALIST NO. 83 (Alexander Hamilton).

103. *Id.*

104. Nelson, *supra* note 3, at 321.

civil jury changed in this period. The criminal jury retained its control over the law as well as the facts until at least the late nineteenth century.<sup>105</sup> Writing in 1832, for example, Benjamin Oliver observed in his middle-of-the-road treatise on the “Rights of an American Citizen” that “if, after hearing the prisoner’s argument, and the charge of the court, the jury should be *clearly of opinion*, that the law is according to the argument, and the judge’s charge is wrong, it will be their duty to acquit the prisoner.”<sup>106</sup>

The second cause identified by Nelson—Federalist worries about partisan conflict and a breakdown in deference—appears at first blush to be more closely related to changes in jury practice, though I believe that it, too, ultimately had little direct effect. As Nelson observes, the 1790s were not at all what Federalists had anticipated when the Constitution was adopted. Most Federalists expected amicably to govern a quiescent population content to follow their wise leadership. Instead, they found themselves wrestling with an unruly democracy-in-the-making.<sup>107</sup> Suddenly everyone apparently felt entitled to express an opinion—more felt that “constituted authorities” should be listening to what they had to say. Sharp fault lines opened as people divided on incendiary issues like Hamilton’s financial program or whether to side with England or France in the European wars. Federalist leaders were caught flat-footed, unsure how to cope with this confusing new world in which, as James Kent put it, “powerful rivalries prevail in the Community; and Parties become highly disciplined and hostile.”<sup>108</sup>

Alarmed Federalists watched in dismay as the opposition threat grew with each passing year. Jefferson’s supporters seemed to capture state after state, also taking possession of the House of Representatives and threatening, eventually, to control the Senate and maybe even the presidency as well. No one had expected this. Certainly not at the federal level, where size and complexity were supposed to ensure harmonious rule by (in the words of former ally

105. *Sparf v. United States*, 156 U.S. 51, 110-83 (1895) (Gray, J., dissenting); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1938); CLAY S. CONRAD, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE* 65-115 (1998).

106. BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN; WITH A COMMENTARY ON STATE RIGHTS, AND ON THE CONSTITUTION AND POLICY OF THE UNITED STATES* 280 (Books for Libraries Press 1970) (1832).

107. See DAVID WALDSTREICHER, *IN THE MIDST OF PERPETUAL FETES: THE MAKING OF AMERICAN NATIONALISM* (1997); SIMON P. NEWMAN, *PARADES AND THE POLITICS OF THE STREETS: FESTIVE CULTURE IN THE EARLY REPUBLIC* (1997); SAUL A. CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA* (1999); GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 229-305 (1991).

108. James Kent, *An Introductory Lecture to a Court of Law Lectures (1794)*, in 2 *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805*, at 936, 942 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

James Madison) “representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and to schemes of injustice.”<sup>109</sup>

As these expectations collapsed amidst the growing partisan acrimony, some Federalists found themselves thinking about a new role for courts. An argument for judicial review had first developed in the 1780s, but it was significantly more restrained than what we think of as judicial review today. There was no notion that judges were more responsible for interpreting the Constitution than any other branch of government, nor a principle that the interpretations of any of the branches were final or authoritative. Government officials were the regulated, not the regulators, when it came to the Constitution. Their interpretations were subject to direct supervision and oversight from the people themselves.<sup>110</sup> Judicial review, on this view, was required by the judges’ independent obligation to obey the people, but it had the additional advantage of enabling courts to assist the community by rendering popular resistance unnecessary when a constitutional violation by one of the other branches was “beyond dispute.”<sup>111</sup>

Political developments in the 1790s led Federalists to rethink these ideas. Although fear of tyrannical majorities had always been a critical part of Federalist ideology, it had not previously been emphasized in connection with judicial review. Some earlier writers had referred in passing to problems of faction while discussing the courts’ role in enforcing the Constitution. But these references were brief, because earlier backers of judicial review were thinking mostly about legislative mistakes or efforts by legislators to aggrandize their own power at the people’s expense.<sup>112</sup> Now, suddenly, things looked different, and Federalists developed a heightened appreciation for the potential usefulness of courts in securing constitutional limits from the threat posed by a partisan majority—as if the federal judiciary had been deliberately constructed with this purpose in mind. It was the courts, Kent wrote in 1794, because they are “organized with peculiar advantages to exempt them from the baneful influence of Faction, [that were] the most proper power in the Government to . . .

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109. THE FEDERALIST NO. 10 (James Madison).

110. Larry D. Kramer, *The Supreme Court 2000 Term: Foreword: We the Court*, 115 HARV. L. REV. 4, 16-60 (2001); Kramer, *supra* note 19.

111. Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), in 2 GRIFFITH J. MCCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 172, 175 (Peter Smith 1949) (1857).

112. The only previous writer to make anything of the point was Alexander Hamilton in Federalist No. 78, though even he offered it as a secondary justification, after protecting the people from “legislative encroachments.” THE FEDERALIST NO. 78 (Alexander Hamilton).

maintain the Authority of the Constitution.”<sup>113</sup> Within a few short years, this had become the orthodox position of High Federalism. Rather than seeing judicial review mainly as a device to protect the people from their governors, Federalists came to view it above all as a means of guarding the Constitution from the people. Thus was born the modern idea of judicial supremacy.

At first expressed only in pamphlets or by politicians, by the late 1790s some Federalist judges had begun voicing the new constitutional theory from the bench. Given the nature and structure of the legal system, moreover, the practical application of this theory first arose in connection with controlling juries. Hence, as Nelson points out, certain Federalist judges acted in prosecutions under the Sedition Act to deny juries any opportunity to pass on the law’s constitutionality. They did so by refusing to permit defendants to argue such matters to the jury and by instructing jurors that “[t]he Judicial power . . . [is] 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>114</sup>

For several reasons, however, we must be careful not to overstate the significance of such cases for what Nelson has described as the “taming” of the civil jury. First, these precocious judicial gestures toward the courts’ supremacy were sporadic, highly localized, and obviously wrapped up in Federalist anxieties over America’s quasi-war with France. Fear that the French Revolution was about to reach American shores unbalanced many normally sensible politicians in the late 1790s, and it was apparently also enough to induce some otherwise level-headed judges to espouse what, at the time, was still an extreme position. Efforts made to take constitutional questions from the jury at this particular moment, in other words, reflected Federalist skittishness as much as some sort of determined judicial commitment—which is why they occurred only in cases involving the Sedition Act or other war-related matters, and why even judges who took this position did not adhere to it consistently. In less politically charged cases, some of the same judges continued to recognize the jury’s traditional discretion respecting constitutional decision making. Nelson quotes Justice Paterson, for example, telling jurors in Matthew Lyons’s case that they had no authority over constitutional questions.<sup>115</sup> Yet, as he also acknowledges, just three days earlier, Paterson charged the jury in another case—this

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113. Kent, *supra* note 108, at 942.

114. Samuel Chase’s Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania (April 12, 1800), in 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 408, 412 (Maeva Marcus ed., 1990) [hereinafter 3 DHSC]; Nelson, *supra* note 3, at 323.

115. Nelson, *supra* note 3, at 322.

one challenging a statutory land confiscation—that “if legislatures assumed to themselves the power to enact unconstitutional laws they ought not to be binding upon juries; and . . . courts and juries were the proper bodies to decide on the constitutionality of laws.”<sup>116</sup>

More important, the Sedition Act cases are not so much about the respective roles of judges and juries generally as they are about their roles in deciding questions of constitutionality in particular. This is because, in context, the issue was framed not by the need to control the jury, but rather by the need to control the Constitution. Chase and Paterson were claiming exclusive authority for judges (and no one else) to declare an act of legislation void on grounds of inconsistency with the Constitution. Their argument for locating this authority in courts—the argument outlined by Kent in his “Introductory Lectures”—turned on considerations uniquely applicable to constitutional law. It encompassed juries only because and insofar as they *too* claimed authority to interpret the Constitution, but Congress, the executive, and the states were equally targets of the argument. Hence, Chase and Paterson were acting to limit the jury in criminal prosecutions for seditious libel, whereas the reform described by Nelson dealt with limiting the power of civil juries and was not generally extended to criminal cases. This is clear from Chase’s opinion in James Callender’s case, which conceded that juries have “a right . . . to determine what the law is in the case before them” while drawing a line at the “very different thing” involved in “determin[ing] that the statute produced is no law,” *viz.*, is unconstitutional.<sup>117</sup>

We should also note that Chase’s and Paterson’s argument was decisively rejected at the time. It was rejected in the sense, noted above, that the criminal jury retained its control over law for many decades to come. But it was also rejected in the broader sense that the election of 1800 (together with the subsequent repeal of the Judiciary Act of 1801 and the midterm election of 1802) amounted to an overwhelming political repudiation of judicial supremacy and a resounding reaffirmation of popular constitutionalism, of which the jury was an essential part.<sup>118</sup> This is why John Marshall’s 1803 opinion in *Marbury* contained no talk about how courts alone could interpret the Constitution and said only that “courts, as well as other departments” were authorized to do so.<sup>119</sup> It is, indeed, striking how carefully and deliberately Marshall avoided saying anything that might smack of unpopular Federalist ideas, writing an opinion that closely tracked the

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116. See 3 DHSC, *supra* note 114, at 236 n.24 (quoting the AURORA (Phila. Nov. 9, 1798)).

117. *United States v. Callender*, 25 F. Cas. 239, 255 (C.C.D. Va. 1800).

118. *Kramer*, *supra* note 19.

119. *Marbury*, 5 U.S. (1 Cranch) at 180.

Jeffersonian line on the scope and justification of judicial review.

None of which is to suggest that factors like those Nelson points to were wholly irrelevant as regards the movement to rein in the civil jury. But their role was more indirect and attenuated than he suggests. They were background influences: part of a broader, more complex tapestry of forces that (usually unself-consciously) tugged people in different directions and helped shade their responses to events. For some, already sensitive to the hazards of popular control, developments like a perceived breakdown in deference undoubtedly reinforced their sense of a need to act. But for the reasons described above, I doubt such changes had any greater or more direct influence than this.

So what was the immediate motivation for taking from civil juries the power to find law? As just suggested, no one influence can be said to have “caused” this change. The factors that made it possible to deprive juries of this traditional power were myriad and overlapping, as this was but a small part of more sweeping changes that gradually overtook the legal system in the early decades of the nineteenth century. Still, if any single factor predominated in bringing this particular change about—at least in the eyes of those who pushed for reform—it seems to have been a growing appreciation of the need to have predictable rules in civil cases.

This is a point Nelson himself made in his earlier book *The Americanization of the Common Law*.<sup>120</sup> It is, moreover, the argument emphasized by his sources here. Hence, Nelson quotes Theodore Sedgwick (and others) talking about the need for judges to control the law so as to provide litigants with “expedition” and “certainty” as opposed to “the fluctuating estimates of juries.”<sup>121</sup> The reasons for this concern were straightforward. Economic development in the Early Republic had fueled changes in the expected role of law and legal services. “Law now had to serve business interests,” John Reid tells us. “Agreements had to be enforced to carry out the wills of the parties, not the morality of the community.”<sup>122</sup> Demand for legal rules that could reliably be known beforehand—something the eighteenth-century’s jury-dominated system was manifestly incapable of providing—grew increasingly insistent.<sup>123</sup> Nelson quotes James Kent complaining about the absence of published opinions, which was indeed a major concern in this regard. But the capriciousness of unregulated juries was of greater concern still. “Decisions formed at one term

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120. NELSON, *AMERICANIZATION*, *supra* note 9, at 165-74.

121. Nelson, *supra* note 3, at 332 (quoting Sedgwick from ELLIS, *supra* note 6, at 190; *Cogswell v. Essex Mill Corp.*, 23 Mass. (6 Pick.) 94, 96 (1827) (argument of counsel)).

122. Reid, *supra* note 64.

123. See Newmyer, *supra* note 85, at 822.

were not only no precedent for cases precisely similar at the next term," complained a Portsmouth correspondent, "but not even for those occurring the next day, nor perhaps even the next hour."<sup>124</sup> The problem was obvious to businessmen and politicians alike: "If similar questions are to be determined differently in different cases, then no counsel can advise his clients with confidence."<sup>125</sup> It was this intensely practical concern that seems to have been at the forefront of the movement to limit the power of civil juries.

### III. THE BEST LAID PLANS

In the concluding section of his paper, Professor Nelson speculates briefly about how judicial review and jury control might have been linked in Federalist ideology and in "the larger configuration of John Marshall's jurisprudence."<sup>126</sup> As Nelson explains it, the problem of governing in eighteenth-century America required finding a balance between two potentially conflicting principles. One was what we would today call the principle of democracy; that is, the idea that "all law springs from popular will."<sup>127</sup> The other was the belief that law must conform to fundamental and unchanging principles of right and justice. In Federalist ideology, it was the task of the aristocracy—an elite of well-born and wealthy gentlemen—to ensure that this balance was properly preserved. Before the Revolution, equilibrium was maintained through deference by ordinary citizens. Democratic juries might have unbridled power to declare the law, but this power was unthreatening so long as jurors deferred to instructions from elite judges about what law to declare. And, Nelson says, "[m]ost 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>128</sup>

Things changed after the Constitution was ratified. New issues arose: national issues, in which the stakes were higher and the harm from local interference greater. Worse, deference itself began rapidly to break down, as democratic forces unleashed by the Revolution took their toll on the social structure of colonial America. Juries started going their own way: giving free rein to local passions and prejudices, and ignoring instructions and law more frequently. A new balance was needed, and (Nelson hypothesizes) Federalists led by John Marshall were there to construct it. Since the country could no longer trust juries that had become capricious, elite judges had to act more aggressively

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124. A Friend to Justice, *On the Judicial Act*, PORTSMOUTH ORACLE, July 17, 1813, at p. 2, col. 1.

125. CHARLES H. BELL, *THE BENCH AND BAR OF NEW HAMPSHIRE* 37 (1894).

126. Nelson, *supra* note 3, at 341.

127. *Id.* at 343.

128. *Id.* at (49).



themselves to protect vested rights and fundamental principles of law. Hence, they took lawfinding power away from juries and sought to secure control over the Constitution through judicial review. Their object was not to destroy or undermine democracy, however. On the contrary, Nelson says, Marshall “understood and was in sympathy with the workings of American democracy.”<sup>129</sup> Rather than squelch it, Marshall sought only to rechannel popular energy from the jury to the legislature:

[J]udicially 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 v. Madison* 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.<sup>130</sup>

Several premises of this argument seem questionable. Nelson’s account of eighteenth-century juries obediently following the instructions of gentlemen judges, for example, is at odds with his own account of colonial juries in Massachusetts, as well as with what we know generally of the judiciary in pre-Revolutionary America.<sup>131</sup> The power of eighteenth-century juries, as noted above, rested partly on the fact that judges were not lawyers and often were not especially wealthy, and partly on the frequency with which multi-judge panels offered conflicting accounts of the law.<sup>132</sup> More important, while Nelson is certainly correct that *Marbury’s* theory of judicial review was narrow, Marshall adopted this theory only reluctantly and against his better judgment. Like most Federalists in 1803, Marshall favored a stronger version of judicial authority—one that did, indeed, resemble the modern system in claiming for the Court final and ultimate say over the Constitution. He was forced to articulate a narrower theory in *Marbury* because to do otherwise was to invite certain retaliation from the Republican president and Congress.<sup>133</sup> But Marshall never gave up his hopes for establishing judicial supremacy, which he tried subsequently to institute in *McCulloch v. Maryland*, and which he defended in anonymous newspaper essays supporting that decision.<sup>134</sup>

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129. *Id.* at (48).

130. *Id.* at X.

131. NELSON, AMERICANIZATION, *supra* note 9, at 26, 28.

132. *See supra* notes 69-72 and accompanying text.

133. Kramer, *supra* note 19.

134. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 315, 401 (1819); [John Marshall] A Friend of the Constitution IX, *Alexandria Gazette* (July 15, 1819), reprinted in GERALD GUNTHER, JOHN MARSHALL’S DEFENSE OF MCCULLOCH

The point is not just that Nelson's effort to construct a story that ties these developments together has flaws. It is that any such story is inevitably too pat. It may be less neat and elegant to say that *Marbury* and the establishment of judicial review had little to do with rolling back the civil jury's lawfinding power, that these were, essentially, unrelated developments. But, then, history is seldom neat or elegant. The fact is that *Marbury's* narrow theory of judicial review emerged in the mid-1780s and long predated any moves against the jury. Beginning in the mid-1790s, Federalists revised their understanding of judicial review and tried to convert it from a device that protected the people from their legislatures to a device that protected the Constitution from the people. But this understanding, which Marshall shared, was decisively rejected in the political battles that ended with Jefferson's election. Rather than being part and parcel of a coherent Federalist plan to restore some lost balance between law and democracy, *Marbury's* theory of judicial review was, from the perspective of Federalism, a defeat and a concession to the Republicans. One could, I suppose, put aside the actual beliefs of those who lived through these events, urging that, whatever they themselves may have thought, the resulting system miraculously worked to restore a proper balance. But such claims, in my view, are just a bit too whiggish to be persuasive.

