Northwestern University
History Department and School of Law

Colloquium on the Legal and Constitutional History of the United States

Organized by:
Gordon S. Wood, Board of Trustees Professor of Law and History
and Claire Priest, Assistant Professor of Law

“The People Themselves
Popular Constitutionalism and Judicial Review”

Larry D. Kramer
New York University, School of Law

Monday, October 20, 2003

Law School Faculty Commons
4:00 p.m. to 6:00 p.m.

Contact Claire Priest (c-priest@law.northwestern.edu) with questions.
Memorandum

To: Workshop Participants

From: Larry Kramer

Date: October 2, 2003

Re: *The People Themselves: Popular Constitutionalism and Judicial Review*

Attached are excerpts from a book that will be published by Oxford Press in 2004. What you have here is the introduction, and chapters two and four. To understand these, I need briefly to describe the content of chapter one, which recreates the world of the customary constitution that governed colonial America—a system in which no one imagined a special role for courts interpreting and enforcing the constitution since this was a matter for “the people themselves.” The people expressed their views and enforced their will through the whole range of devices available in eighteenth-century politics. This included not only elections, but also petitions, mobbing, jury nullification, and the fact that law enforcement necessarily depended on active support from the community. These various devices (together with some others described in the first chapter) reflected and manifested the overarching theme of the customary constitution, which was its essential character as what we might call “popular law.”

Constitutional law was different from ordinary law, or what we typically think of today as ordinary law, both in its conceptual underpinnings and in actual operation. It was law created by the people to regulate and restrain the government, as opposed to ordinary law, which is law enacted by the government to regulate and restrain the people. This inversion, in turn, inverted what today we take to be the usual assignment of authority to interpret and enforce. Government officials are our authoritative interpreters of ordinary law. We have indirect control over what laws the government promulgates by virtue of our ability to elect and remove most lawmakers. But once a law has been enacted, ordinary citizens assume a subordinate position relative to government officials in ascertaining its meaning and imposing sanctions. We must still decide what we think a law requires or commands—that is, we must still interpret the law to determine what obligations it enjoins. But our interpretations are mere projections, efforts to comply that lack formal legal significance or effect. If challenged, these interpretations are submitted to designated public officials (administrators, prosecutors, judges, and the like) who decide if we are right or wrong and arrange an appropriate punishment if the answer is wrong. When it comes to ordinary law, in other words, the government regulates us.

This relationship was, in effect, reversed when it came to fundamental law. “A Constitution,” wrote Judge William Nelson of Virginia in the 1790s, “is to the governors, or
rather to the departments of government, what a law is to individuals."¹ The object of fundamental law was to regulate public officials, who were thus in the position of ordinary citizens with respect to it and required to do their best to ascertain its meaning while going about the daily business of governing. But their interpretations were not authoritative. They were now the projections, subject to direct supervision and correction by the superior authority of “the people”—conceived in this context, it should be remembered, as a collective body capable of independent action and expression. It was this inversion of interpretive authority, this turning upside-down of the structure of legal interpretation, that accounted for the various features of fundamental law described above: its uncertain content, its fluid modes of revision, its varied popular enforcement mechanisms.

What emerges is a constitutional system that was self-consciously legal in nature, but in a manner foreign to modern sensibilities about the makeup of legality. For us, legality is crucially (though, of course, not solely) a matter of authority. We expect to find a rule of recognition that assigns someone the power to resolve controversies with a degree of certainty and finality: so at the end of the day we have something we can point to and say “yes, that is the law.” Eighteenth-century constitutionalism was less concerned with quick, clear resolutions. Its notion of legality was less rigid and more diffuse—more willing to tolerate ongoing controversy over competing plausible interpretations of the constitution, more willing to ascribe authority to an idea as unfocused as “the people.” It was, as Christine Desan has recently observed, a system “in which many actors participated in determining law,” and in which processes we think of today as only and necessarily “political” were understood by participants “to produce legality as opposed to acts of will, power, or grace.”²

This system of constitutionalism rested and relied on a culture in which public officials, community leaders, and ordinary citizens believed in a distinction between law and politics, shared a set of conventions about how to argue within each domain, and took seriously the role difference thus produced. Desan names this “the public faith” and describes it as a “commitment that bound members of a political community together,” a commitment ultimately perpetuated and enforced in the public sphere though continued participation (or not) in the life of the community.³ John Reid, who has done the most to help us recover this system’s formal structure and language, refers to it as “whig law”—a set of understandings and conventions about rights and liberty that, as we have seen, yielded a framework for argument rather than a fixed program of identifiable outcomes.⁴

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² Desan, supra note 12, at 1463. Desan’s careful and nuanced recreation of this culture focuses on the practice of legislative adjudication in the early eighteenth century but remains apt.
³ Id.
⁴ Reid first developed the idea of whig law in Reid, In a Defiant Stance, supra note 87. For one prominent historian’s skepticism, see Barbara Black, Review, 24 Am. J. Legal Hist. 367 (1980).
What is most critical is understanding that participants in this culture took seriously the distinction between fundamental law and mere politics and responded to different arguments in each setting, giving the community at large a credible interpretive voice when it came to the constitution. Problems of fundamental law—what we would call questions of constitutional interpretation—were thought of as “legal” problems, but also as problems that could be authoritatively settled only by “the people” expressing themselves through the popular devices described above. Constitutional law in such a setting might sometimes be hard to identify, but this uncertainty seems not to have troubled anyone overmuch. Ultimately, the constitution was, as Reid argues, “whatever could be plausibly argued and forcibly maintained.”

Chapters two and four relate how Americans after the Revolution adapted this system of constitutionalism to their new conditions and how an idea of judicial review first emerged in this context. Chapter two focuses on the 1780s, while chapter four discusses the 1790s up to and including *Marbury* in 1803. I have omitted chapter three, which describes the Philadelphia Convention and ratification debates and shows their consistency with these developments.

The remainder of the book carries the story forward. Chapter five tells the story of the 1790s from the Federalists’ side, including the development and rejection of an argument for judicial supremacy. Chapters six and seven cover the period 1803-1840 and describe how an argument for judicial supremacy reemerged and was repudiated again in the early 1830s. Chapter eight and nine take readers up to the Rehnquist Court and attempt to place this history in the context of current constitutional controversies over the proper role of the Court.

I am happy to talk about any or all of this. I have circulated the early historical materials because these revise many prevailing myths about the Founders and about the origins of judicial review. But, in addition, the materials describe how we could imagine a system of judicial review without judicial supremacy—a normative rather than historical matter about which we can also talk.

5 Reid, Defensive Rage, supra note 75, at 1087 (quoted supra text accompanying note 23).
THE PEOPLE THEMSELVES

Popular Constitutionalism and Judicial Review

Larry D. Kramer
Who Are the Best Keepers of the People’s Liberties?

Republican.—The People themselves. The sacred trust can be nowhere so safe as in the hands most interested in preserving it.

Anti-republican.—The people are stupid, suspicious, licentious. They cannot safely trust themselves. When they have established government they should think of nothing but obedience, leaving the care of their liberties to their wiser rulers.

James Madison

*National Gazette*, December 22, 1792.
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POPULAR CONSTITUTIONALISM

Some snapshots from the early American republic:

Monday, July 29, 1793. A jury acquitted Gideon Henfield of charges that he violated the law of nations by serving aboard a French privateer.1 The facts of Henfield’s case were uncontested, and his defense turned on a point of law. Henfield argued that it was unconstitutional to prosecute him because his actions were not proscribed by any existing statute or law of the United States. The court—consisting of Supreme Court Justices James Wilson and James Iredell and District Court Judge Richard Peters—instructed jurors that Henfield’s defense was legally frivolous. It was the “joint and unanimous opinion of the court,” Wilson told them, that Henfield’s acts might be culpable as common law offenses against the United States.2 The jury disagreed, and its verdict triggered celebrations throughout the nation. John Marshall reports that Henfield’s acquittal was greeted with “extravagant marks of joy and exultation” by a public that doubted the administration’s position.3 Bonfires were lit and feasts held in cities and towns from Maine to Georgia. In Charleston, South Carolina, a “number of respectable citizens” followed an evening of “great hilarity and harmony” by toasting “[t]he patriotic jury of


Philadelphia who acquitted Gideon Henfield, and supported the rights of man. (Three cheers.)

The National Gazette praised Henfield’s jury for upholding the Constitution against a court and an administration whose views had been corrupted by “motives of policy”:

When the seven bishops (good and celebrated men) were tried for petitioning James the Second, a similar difference of opinion arose between the bench and the jury, the people then as the people now exulted in the verdict of acquittal; and our posterity will, probably, venerate this as we venerate that jury, for adding to the security of the rights and liberties of mankind.

* * *

Saturday, July 18, 1795. At least 5000 people gathered in front of Federal Hall in New York City to protest the Jay Treaty. Planned for weeks by Republicans anxious to see the treaty condemned, the crowd of mostly tradesmen and laborers was unexpectedly joined by some of the city’s elite, hastily assembled by Federalist merchants under the leadership of Alexander Hamilton. The determined Federalists tried to take over the rally. As the meeting was about to commence, Hamilton mounted the steps of a nearby building surrounded by supporters and began to speak. Republican leaders asked him to yield, which Hamilton haughtily refused to do. The crowd reacted angrily, drowning Hamilton out with “hissings, coughings, and hootings.”

Hamilton offered a written resolution, which he urged be adopted as reflecting the true sense of

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6 For fuller accounts of this meeting, see Alfred F. Young, The Democratic-Republicans of New York 449-54 (1967); Joanne B. Freeman, Affairs of Honor: National Politics in the New Republic xiii-xv (2001).

7 The Argus, or Greenleaf’s New Daily Advertiser, July 20, 1795.
the city. The crowd paused to listen, but exploded in fury upon hearing that it was “unnecessary to give an opinion on the treaty” because the people had “full confidence in the wisdom and virtue of the President of the United States, to whom, in conjunction with the Senate, the discussion of the question constitutionally belongs.” Hamilton and his companions were driven away amidst shouts of “we’ll hear no more of it” and “tear it up.” Someone in the crowd allegedly threw a rock that hit Hamilton in the head. Similar scenes were repeated around the country.

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July 2, 1798. During a debate in Congress over whether to adopt the Alien Act—which gave the president unilateral power to imprison or deport aliens, even in peacetime—New York’s Edward Livingston reproached the bill’s supporters. “If we are ready to violate the constitution we have sworn to defend,” he warned, “will the people submit to our unauthorized acts? Will the states sanction our usurped powers? Sir, they ought not to submit. They would deserve the chains which these measures are for them if they did not resist.” Responses to Livingston’s admonition were immediate and widespread. Public meetings in Kentucky, Virginia, and throughout the Middle Atlantic states denounced the Alien and Sedition Acts and declared them null and void. A militia company in one Virginia county announced that it

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8 Quoted in Freeman, supra note 6, at xiii, and John C. Miller, Alexander Hamilton: Portrait in Paradox 424 (1959).

9 Young, supra note 6, at 450.

10 Speech of Edward Livingston to the House of Representatives, quoted in the Washington Herald of Liberty, August 16, 1798.

would not assist in enforcing the laws, while a regiment in Madison County, Kentucky, resolved that such acts “are infringements of the Constitution and of natural rights, and . . . we cannot approve or submit to them.” Federalists responded to these and similar declarations by pleading that judgments of constitutionality be left for courts to make, a position their opponents fiercely denied. To say that “a decision as to the constitutionality of all legislative acts, lies solely with the judiciary,” wrote a correspondent in the *Albany Register*, “is removing the cornerstone on which our federal compact rests; it is taking from the people the ultimate sovereignty.”

* * *

In these and countless similar scenes, Americans of the Founding era reveal how they understood their role in popular government in ways that we, who take so much for granted, do not. The United States was then the only country in the world with a government founded explicitly on the consent of its people, given in a distinct and identifiable act, and the people who gave that consent were intensely, profoundly conscious of the fact. And proud. This pride, this awareness of the fragility and importance of their venture in popular government, informed everything the Founding generation did. It was, as Gordon Wood has said, “the deeply felt meaning of the Revolution.”

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12 Resolutions of the Seventh Regiment and Citizens of Madison County, Aurora, Jan. 4, 1799, quoted in id.

13 Quoted in id.

Modern commentators, especially legal commentators, read the Founders’ letters and speeches anachronistically, giving too much weight, or the wrong kind of weight, to complaints about “the excess of democracy.”15 We depict the men who framed and ratified the Constitution as striving to create a self-correcting system of checks and balances whose fundamental operations could all take place from within the government itself, with minimal involvement or interference from the people. Our political grammar is saturated with this reading of the Founding, which sees the movement to write a new Constitution almost exclusively in anti-democratic terms. Our Constitution on this view—a view that pervades both legal and historical scholarship on the subject—was adopted first and foremost to put a check on the people, to minimize their role in governing, to shove them as far offstage as possible without technically abandoning republicanism.

There is, of course, an element of truth to this characterization. Having overvalued the capacity of an unchecked legislature to govern during the wave of romantic enthusiasm that swept the country with the Declaration of Independence, America’s leadership relearned the hard way in the 1780s why it was necessary to fragment and separate power within the government. Yet we must be careful, lest we exaggerate the extent and nature of the reaction by focusing too narrowly on its direction.

Equally important, we must not judge the words and actions of men of the eighteenth century by our own standards of what it means to be a “democrat.” The views of even the most “anti” of Anti-Federalists would be reactionary today, very far outside the political mainstream in most respects. In their own time, however, and especially against the background of the

greater Atlantic world, America’s Founders were at the other end of the political spectrum: wild-eyed radicals taking a risky gamble on popular rule. The debate between Federalists and Anti-Federalists was, in effect, an argument between factions on the democratic left; even “high-toned” Federalists were populist under prevailing views, which deemed stable government without a monarch or formal aristocracy out of the question. America’s Founding generation, in daring contrast, embraced a political ideology that celebrated the central role of “the people” in supplying government with its energy and direction, an ideal that remained at all times in the forefront of their thinking—Federalist and Anti-Federalist alike. Preserving liberty demanded a constitution whose internal architecture was carefully arranged to check power, just as it demanded leaders of sufficient “character” and “virtue.” But structural innovations and virtuous leadership were “auxiliary devices” to channel and control popular politics, not to isolate or eliminate it. The people themselves remained responsible for making things work.

This was especially true when it came to a constitution, the most direct expression of the people’s voice. Listen to St. George Tucker, in the appendix to his 1803 edition of Blackstone’s Commentaries:

[T]he American Revolution has formed a new epoch in the history of civil institutions, by reducing to practice, what, before, had been supposed to exist only in the visionary speculations of theoretical writers. . . . The world, for the first time since the annals of its inhabitants began, saw an original written compact formed by the free and deliberate voices of the individuals disposed to unite in the same social bonds; thus exhibiting a political phenomenon unknown to former ages. . . . [T]he powers of the several branches of government are defined, and the excess of them, as well in the legislature, as in the other branches, finds
limits, which cannot be transgressed without offending against the greater power from whom all authority, among us, is derived; to wit, the PEOPLE.16

When Tucker and his contemporaries invoked “the people,” moreover, they were not conjuring an empty abstraction or describing a mythic philosophical justification for government. “The people” they knew could speak, and had done so. “The people” they knew had fought a revolution, expressed dissatisfaction with the first fruits of independence, and debated and adopted a new charter to govern themselves. Certainly the Founders were concerned about the dangers of popular government, some of them obsessively so. But they were also captivated by its possibilities and in awe of its importance. Their Constitution remained, fundamentally, an act of popular will: the people’s charter, made by the people. And, as we shall see, it was “the people themselves”—working through and responding to their agents in the government—who were responsible for seeing that it was properly interpreted and implemented. The idea of turning this responsibility over to judges was simply unthinkable.

A practice of judicial review did emerge, and early on—well before Marbury v. Madison, which mostly repeated arguments already developed by others. Among the objectives of this book is to elucidate the nature of this early practice, which bore little resemblance to judicial review today. But the story that follows is more than a revisionist history of the origins of judicial review (though it is certainly that). For the efforts to define a role for courts are part of a larger and more fundamental struggle to maintain the authority of ordinary citizens over their Constitution. Time and again, the Founding generation and its successors responded to evolving social, political, and cultural conditions by improvising institutional and intellectual solutions to

preserve popular control over the course of constitutional law—a kind of control we seem to have lost, or surrendered, today.

We in the twentieth-first century tend to divide the world into two distinct domains: a domain of politics and a domain of law. In politics, the people rule. But not in law. Law is set aside for a trained elite of judges and lawyers whose professional task is to implement the formal decisions produced in and by politics. The Constitution, in this modern understanding, is a species of law—special only inasmuch as it sets the boundaries within which politics takes place. As law, the Constitution is set aside for this same elite to handle, subject to paramount supervision from the United States Supreme Court. Constitutional politics, in which the people have a role, is the process by which new constitutional law is made. It is distinguished from interpreting and enforcing existing constitutional law—tasks ultimately and authoritatively done for us in courts and by judges. Gerald Leonard puts the point nicely in observing how we are inclined today “to see politics as working within a constitutional order rather than working out that constitutional order.”

This modern understanding is, as we shall see, of surprisingly recent vintage. It reflects neither the original conception of constitutionalism nor its course over most of American history. Both in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution. Final interpretive authority rested with “the people themselves,” and courts no less than elected representatives were subordinate to their judgments. It is the story of this practice of “popular constitutionalism” that emerges through our study of judicial review. Many, perhaps most, scholars today believe that

“popular sovereignty” is and can be expressed only at rare moments, that “the people” are otherwise either absent or present only as an abstraction. Such was the belief of neither our Founding Fathers nor of their children nor of their children’s children, and in charting how they constructed an idea of judicial review we will also be charting their efforts to explain and preserve the active sovereignty of the people over the Constitution. And along the way, perhaps, we may find some reasons to reawaken our own seemingly deadened sensibilities in this respect.
Chapter Two

A Rule Obligatory Upon Every Department

THE ORIGINS OF JUDICIAL REVIEW

The foregoing description of eighteenth-century constitutionalism is misleading in one respect: it privileges a version embraced by American whigs. Their understanding was at one time close to that held by whigs in England, but Englishmen and Americans faced different problems and had to address their problems in different institutional settings. Not surprisingly, they came over time to see the customary constitution through different lenses. The concept of fundamental law in the mother country and in the colonies diverged, evolving gradually in England into the system of legislative sovereignty so famously celebrated by Blackstone. This development was by no means unheeded or unopposed, and pockets of resistance could be found even in London well into the nineteenth century. But holdouts were few in number, and by the middle of the eighteenth century the orthodox view in England located sovereignty in Parliament rather than in the people out-of-doors. And with this development, the tradition of constitutionalism described above began to lose its grip, particularly the idea of “legal”


resistance to unconstitutional legislative measures. This is why many in England were genuinely puzzled, and not merely angered, by the rebellion in America.4

Americans whigs never accepted the idea of Parliamentary sovereignty. For them, the Glorious Revolution was both a reaffirmation of popular sovereignty and a confirmation of the continuing viability of the customary constitution as a check on government.5 The colonists were informed about events across the Atlantic, but conveniently inattentive to their potential significance. They managed, through impressively persistent and clever political maneuvering, to keep both King and Parliament at bay and so avoid any major confrontations until the early 1760s.6 By then, six decades of nearly continuous war had strained even the powerful British finance system, and Britain needed money.7 Parliament cracked down on smuggling and tried to force the colonies to bear a reasonable share of the expenses of empire.8 Americans awoke, startled and anxious, to discover that they could no longer ignore their differences with Britain. Within a decade, and much to their own amazement, they found themselves declaring independence.

“In Order to Support Its Fundamental, Constitutional Law.”


5 David S. Lovejoy, The Glorious Revolution in America 378 (1972); Greene, supra note 1, at 43-54; Desan, supra note X, at 1403-04.

6 The general story of these years is told in Greene, supra note 1, at 18-76; see also Richard L. Bushman, King and People in Provincial Massachusetts 88-132 (1985).


We need note only two things about the controversies leading up to 1776. First, the period 1763-1776 consisted of a series of disagreements about the meaning and proper interpretation of the customary constitution.9 This does not mean that the Revolution was caused by these disagreements. An event this wrenching—one that shredded lifelong community bonds, that forced colonials to reconstitute their identities, to abandon their Britishness and become “Americans”—plainly had multiple and complex causes: social, cultural, economic, and political, as well as legal. But the triggering events in the eyes of the Americans themselves consisted of Great Britain’s persistent and repeated efforts to deprive them of what they viewed as their constitutional rights. Writing in 1824, an aged Thomas Jefferson romantically credited the American Revolution to the laws of nature. “We had no occasion,” he mused, “to search into musty records, to hunt up royal parchments, or to investigate the laws and institutions of a semi-barbarous ancestry.”10 Yet the influential Summary View of the Rights of British America that Jefferson penned in 1774 did precisely that, and it reads just like a lawyer’s and a historian’s brief asserting the legal and constitutional rights of Americans.11 This is equally if not more true

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10 Letter from Thomas Jefferson to Major John Cartwright (June 5, 1824), in 4 Memoirs, Correspondence and Miscellanies from the Papers of Thomas Jefferson 393, 394 (Thomas Jefferson Randolph ed., 1829).

of the more famous Declaration that Jefferson authored two years later. John Reid rightly brands the claim that American independence was based on natural law “one of the most widely repeated errors of American history”:

Anyone giving a reasonable reading to the entire Declaration of Independence, not just to the rhetorical preamble where “nature and nature’s God” are mentioned, will readily see that document accused the King of Great Britain of violating only the legal and constitutional rights of American colonists. It did not, in a single instance, accuse George III of violating a natural right. In fact, natural law was never cited by an official colonial governmental body to identify a right claimed, except rights that were also claimed as constitutional rights. Natural law simply was not a significant part of the American whig constitutional case; certainly not nearly as important as some twentieth-century writers have assumed.12

The colonists made their case and presented their grievances in legal and constitutional terms right up to and including the moment they declared independence, seeing themselves always as defenders of ancient liberties and the British constitution from the malefic scheming of corrupt imperial authorities. America became an independent nation, James Varnum observed a few years later, only “in order to support its fundamental, constitutional law, against the encroachments of Great Britain.”13 This matters, because it tells us what to look for in examining the constitutions Americans created after the Revolution. It was a rebellion in defense of a concept of constitutionalism, a concept Americans did not suddenly decide to abandon or repudiate upon achieving independence.


13 James Varnum, The Case, Trevett against Weedon 28 (Providence 1787).
A second point to note about the Revolution is that American opposition to England was not only defended and justified in terms of the traditional constitution: it was also waged on such terms. What Americans did, as well as how they explained their actions, offers a detailed portrait of the eighteenth-century British constitution in action. A crucial check was missing, inasmuch as Americans had no actual or even virtual representation in Parliament and so could not use elections or instructions to affect imperial policy.\footnote{A few hopeful reformers, including Massachusetts governor Sir Francis Bernard, toyed with the idea of allowing Americans to send representatives to Parliament, but this suggestion met with little enthusiasm on either side of the Atlantic. See Morgan & Morgan, supra note 8, at 12-20; Bernard Bailyn, The Ordeal of Thomas Hutchinson 86-96 (1974).} Lacking the ability to change law peaceably from within, Americans resorted to the full array of alternatives—peaceable and otherwise—for combating unconstitutional government action. They were successful for a time, too. The Stamp Act was repealed, and Britain’s every other effort to tax or regulate was either similarly withdrawn or effectively disabled by local opposition.

Unfortunately, because London viewed American resistance as illegitimate and illegal, it kept raising the stakes—culminating eventually in the Coercive Acts (or, as Americans called them, the Intolerable Acts), which led the colonies to invoke their ultimate right of revolution. Yet the Declaration of Independence was less a failure of constitutional process than evidence of genuinely irreconcilable differences: differences so little understood by the combatants on either side that their repeated efforts to bridge the gap only succeeded in making it wider. For our purposes, in any event, we need simply to observe that Americans saw themselves as having conducted a struggle to preserve constitutional rule through the use of constitutional forms of opposition.
We might also note that no one, at any time, seems ever to have considered bringing these constitutional disputes before a judge to have them settled—a point so obvious one would be embarrassed to mention it, but for the need to underscore the absence of anything resembling modern judicial review before the Declaration of Independence. Constitutional issues did crop up in a few court proceedings, usually as arguments to a jury. 15 Such arguments were an accepted feature of the customary constitution, an appeal to “the Voice of the People” and so an instance of the same “political-legal” opposition to unconstitutional laws as that engaged in by whig mobs or by merchants enforcing non-importation agreements.

In at least one instance, moreover, the call for resistance in the courtroom extended beyond jurors to include the judges as well. Most of the documents that required stamps under the Stamp Act were for use in legal proceedings. Whig mobs could (and did) ensure that stamped paper was unavailable, but the efficacy of their action would be blunted if the courts responded by shutting down, since this could be interpreted as signaling the judiciary’s acceptance of the Act’s constitutionality. “A suspense from business implies a tacit acquaintance [i.e., recognition] of the law,” worried Charles Carroll of Carrollton, “or at least the right of the power of imposing such laws upon us.” 16 Opposition leaders therefore urged judges to join their protest instead, by remaining open and conducting business without stamped paper. 17 Because the Stamp Act is “utterly void, and of no binding Force upon us,” the whigs of

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15 In an unusual twist, John Adams challenged the jurisdiction of a vice-admiralty court on the ground that a proceeding in admiralty deprived the defendant of his constitutional right to argue to a jury that a statute was unconstitutional and should not be enforced. Shannon C. Stimson, The American Revolution in the Law 78 (1990).

16 Quoted in Charles A. Barker, The Background of the Revolution in Maryland 309 (1940). See Morgan & Morgan, supra note 8, at 185; Grey, supra note 9, at 879.

17 See Morgan & Morgan, supra note 8, at 126, 145-49, 175-86.
Boston reasoned, “therefore in a legal sense we know Nothing of it.””¹⁸ It followed that “therefore [the judges] should pay no Regard to it.”¹⁹ Similar entreaties were made throughout the colonies.²⁰

The argument met with only limited success,²¹ mainly because lawyers and judges feared that “if the Parliament of England should determine to force the Act down our Throats, they would immediately set Prosecutions on foot against the principal civil-officers who had ventured to risque the Penalties.”²² But lack of success in persuading judges to embrace civil disobedience and risk punishment at this early stage is less significant than what the argument portended for the future. For here we see the beginnings of something that would subsequently evolve into a first approximation of judicial review: an argument that judges, no less than anyone else, should resist unconstitutional laws. This obligation did not arise from any special competence the judges possessed as judges, and it certainly was not based on the notion that constitutional law was ordinary law subject to judicial control. It was, rather, simply another


²¹ Although some courts in Massachusetts remained open, only in Rhode Island did courts continue to do business without interruption. Courts in New Hampshire, Maryland, and Delaware closed temporarily, but reopened before news of the Stamp Act’s repeal reached the colonies. See Morgan & Morgan, supra note 8, at 180-84. Bear in mind that patriots in many communities were more than happy to see the courts close, since this allowed debtors and other potential defendants to avoid judgment. Id. at 175-78.

²² Letter from Edward Shippen, Jr., to Edward Shippen (Oct. 17, 1765), quoted in id. at 180.
instance of the right of every citizen to refuse to recognize the validity of unconstitutional laws—a “political-legal” duty and responsibility rather than a strictly legal one.


Many things started to change after the colonies declared their independence. With respect to constitutional law, the most important turn was, of course, the drafting of new constitutions in the states. This was a legal as well as a practical necessity because, by proclaiming independence, Americans had abrogated their existing constitutions—not just the imperial constitution that governed relations with England, but also each individual colony’s internal constitution, which was embodied in a charter granted by the Crown.23

Some Americans had begun to question the continued authority of royal government even before July 4. “The Continuing to Swear Allegiance to the power that is Cutting our throats is Certainly absurd,” offered Caesar Rodney of Delaware.24 In making American independence official, however, the Continental Congress left no doubt that every trace of imperial authority was to be effaced. On May 15, 1776, the delegates smoothed the way for their more famous declaration of July 4 with a resolution recommending the establishment of new state governments. The preamble declared that it was “necessary that the exercise of every kind of

23 American constitutional theory held that there were multiple constitutions governing the different parts of the empire. England had a constitution of its own, establishing the powers of King and Parliament over the people of England. Each colony had a similar constitution, typically embodied in a royal charter. Finally, the imperial constitution regulated relations between England and the colonies as well as among the colonies. See Greene, supra note 1, at 67-68. The essential character of all these constitutions was the same, though their particular terms differed, reflecting their different domains. Of course, English authorities were having none of this: in their eyes, there was but one constitution for the British empire, and it made Parliament (or, more precisely, the King-in-Parliament) sovereign.

24 Letter from Caesar Rodney to John Haslet (May 17, 1776), in Letters to and From Caesar Rodney, 1756-1784, at 80 (George Herbert Ryden, ed. 1933).
authority under the said crown should be totally suppressed, and all the powers of government, exerted under the authority of the people of the colonies.”

The initial reason for preparing written constitutions was thus to fill a gap created by having renounced allegiance to the Crown.

It followed that the main order of business was to replace what had been abolished by reestablishing the basic structures needed to govern: new legislatures, new executives, and new judiciaries. A few states added Declarations of Rights, while others embedded rights in the text, the more clearly to establish and expand upon the fundamental liberties that Great Britain had tried to deny them. At the level of structuring institutions, radical experiments were tried in “new-modeling” state government—mostly things that had been well-mooted in the Revolutionary and pre-Revolutionary pamphlet literature but never before tried in practice. The new states were all to be republican, of course; there would be no kings or nobles in the United States. The executive power was drastically limited, with most authority transferred to the popularly-elected lower houses of the legislature (the body that, at the time, was thought most trustworthy in safeguarding liberty). Pennsylvania, followed for a short time by Georgia and Vermont, went so far as to eliminate an upper house altogether, establishing unicameral legislatures subject to frequent election. Other innovations were also tried, varying from state to state.

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26 Only six states created formal bills of rights: Virginia, Delaware, Pennsylvania, Maryland, North Carolina, and Massachusetts. The territory of Vermont, still fighting for its own independence from New York and New Hampshire, copied the Pennsylvania declaration (along with the rest of Pennsylvania’s handiwork) in its state constitution. In states that neither wrote a bill of rights nor embedded rights in the body of their constitutions, the legislatures sometimes adopted lists of rights by ordinary legislative means. See Marc W. Krumen, Between Authority and Liberty: State Constitution Making in Revolutionary America 37 (1997); Willi Paul Adams, The First American Constitutions: Republican Ideology and the Making of State Constitutions in the Revolutionary Era 144 n.58 (expanded ed. 2001).
state, but including such measures as a broadened suffrage, explicit guarantees of the right to instruct, required rotation in office, and a formal process for revising the constitution.

These were, beyond doubt, momentous changes. The various experiments in institutional form, not to mention ongoing debates about such issues as how to adopt and change a written constitution, testify to how earnestly Americans in this period wrestled with basic problems of constitutional formation and meaning. Historians disagree about how quickly they came to a robust and mature understanding of what it meant to create a written constitution, but all agree that the change thus produced in their thinking was profound.27

At the same time, and equally important though too often ignored, is what did not change. The men who crafted new state constitutions were building on an existing heritage: a theory and practice of constitutionalism many of whose fundamental premises were undisturbed. Far from being overturned, these premises continued to be taken for granted. Americans did not for the first time abruptly realize the benefits of having a constitution in 1776, nor did they write constitutions out of some newly discovered desire to have written charters or a sudden appreciation of the advantages of a central text. New constitutions were needed in the states to replace those parts of the old ones that had been abrogated, to substitute new institutions for institutions that no longer worked or did not fit republican ideals. But the texts were situated

27 Compare Gordon S. Wood, The Creation of the American Republic, 1776-1787 (1969)(arguing that the new American science of politics emerged only in 1789), with Kruman, supra note 26 (arguing that much or most of this was fully developed at the beginning of the Revolution). For a detailed portrait of the intellectual process that is generally consistent with Wood’s account, see Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (1996).
within an established constitutional tradition, and they took their place alongside existing practices and understandings, many of which remained viable.28

For this reason, Connecticut and Rhode Island concluded that they did not even need new constitutions, because their existing charters already provided for the popular election of statewide officers. Lacking any necessity to replace royal officials or fabricate new institutions, these former colonies needed only to establish that their existing ones rested on the consent of the people and not the authority of the Crown. This was achieved in Connecticut by means of an ordinary statute confirming that the charter was still in effect, while Rhode Island resolved to substitute the name of the state for that of the King on official documents.29 That accomplished, the traditional constitutional practice was simply continued in both states, and not until well into the nineteenth century did either replace its charter.

Evidence abounds of the ongoing vitality of the customary constitution after the Declaration of Independence and drafting of new state constitutions. The most obvious indication of the viability of its substantive principles is, ironically, the lawyers’ arguments and judges’ opinions in some of the earliest cases purporting to exercise judicial review (to which we will return below). In the 1780 case of Holmes v. Walton, the New Jersey Supreme Court relied on seventeenth-century sources and traditions respecting the “Laws of the Land” in refusing to apply a state statute that required loyalists whose property had been seized to challenge the

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28 Kruman, supra note 26, at 7-8; Daniel J. Hulsebosch, Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World (forthcoming)(mss. at 250-51).

29 See Adams, supra note 26, at 64-65.
seizure before a six-person jury. And in *Trevett v. Weeden*, James Varnum cited Norman precedent in urging the court to accept jurisdiction to decide whether a statute denying trial by jury altogether violated the state’s constitution. Responding to a claim that Rhode Island did not have a constitution, Varnum snarled, “Constitution!—We have none:—Who dares to say that?—None but a British emissary, or a traitor to his country.” Varnum cited a 1663 colonial statute providing for trial by jury and explained:

> This act . . . was not creative of a new law, but declaratory of the rights of all the people, as derived through the Charter from their progenitors, time out of mind. It exhibited the most valuable part of their political constitution, and formed a sacred stipulation that it should never be violated.”

Additional examples abound. A series of South Carolina cases turned on Magna Carta, including one in 1792 that invalidated a land grant under its authority. Oliver Ellsworth opposed a prohibition on ex post facto laws in the Federal Convention because “there was no lawyer, no civilian who would not say that ex post facto laws were void of themselves. It cannot be necessary to prohibit them.” James Wilson went a step further, saying that to include such a prohibition would “bring reflexions on the Constitution—and proclaim that we are ignorant of

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30 The opinion in this case was delivered orally and was not contemporaneously reported. The principal record is a recounting in State v. Parkhurst, 9 N.J.L. 427, 444 (1802). See Wayne D. Moore, Written and Unwritten Constitutional Law in the Early Founding Period: The Early New Jersey Cases, 7 Const. Commentary 341 (1990); Austin Scott, Holmes v. Walton: The New Jersey Precedent, 4 Am. Hist. Rev. 456, 458-60 (1899).

31 Once again, there is no official report, and the main record of the case is from a pamphlet published by Weeden’s attorney, Revolutionary leader James Varnum, after the fact. See Varnum, supra note 13, at 8.

32 Id. at 25

33 Id. at 15.

34 Bowman v. Middleton, 1 Bay 252, 254-55 (S. Car. 1792); see also Ham v. McLaws, 1 Bay 93, 96-98 (1789); Lindsay v. Commissioners, 2 Bay 38, 57, 61-62 (1796).

the first principles of Legislation, or are constituting a Government which will be so.”

As William Treanor has shown, reasoning of this sort—extratextual and based on custom and tradition—was a pervasive feature of constitutional argument in the 1780s and 90s. Other scholars have traced the use of such reasoning well beyond that, into the nineteenth century.

Failure to appreciate the persistence of the customary constitution after the Revolution has led modern scholars to misunderstand or misinterpret important events of the Founding era. Consider the now-famous debate between Justices Chase and Iredell in the 1798 case of *Calder v. Bull.* The Connecticut legislature had set aside a probate decree in Bull’s favor and ordered a new trial. A unanimous Supreme Court rebuffed Bull’s argument that this act violated the Ex Post Facto Clause of the Federal Constitution, which the Court said was limited to criminal legislation. In the course of his opinion, Justice Chase observed in dictum:

> There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power. . . . An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.

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36 Id.


39 See Grey, supra note 12, at 146-49.

Agreeing with Chase on the outcome of the case, Justice Iredell nevertheless repudiated his colleague’s account of judicial authority. Some “speculative jurists” may have reasoned that “a legislative act against natural justice must, in itself, be void,” Iredell conceded, but it did not follow that “any Court of Justice would possess a power to declare it so.”41 Because “[t]he ideas of natural justice are regulated by no fixed standard” and “the ablest and the purest men have differed upon the subject,” judges could have no basis for preferring their understanding of its “abstract principles” to those of the Legislature. Judicial review was limited to written constitutions, which “define with precision the objects of the legislative power” and “restrain its exercise within marked and settled boundaries.”42

Modern scholars have frequently wondered about Chase’s seeming embrace of natural law as an independent ground for judicial invalidation of legislation, finding Iredell’s text-bound positivism more familiar and comforting. Some simply refuse to believe that Chase departed from the modern tenet that constitutional principles must be derived, either directly or indirectly, exclusively from the text. John Hart Ely worked zealously to bring Chase into the fold, insisting that Chase recognized “no judicially enforceable notion of natural law other than what the terms of the Constitution provide”; Chase’s reference to “great first principles,” Ely concluded, meant no more than principles “embodied in our Constitution.”43 Other scholars find Ely’s

41 Id. at 398.
42 Id. At 399.
interpretation forced, unperturbed to find that Chase was measuring Connecticut’s law against
natural justice as well as the Constitution.44

As we saw in chapter one, however, while few lawyers in the eighteenth century doubted
either the existence of natural law or the importance of nature as a source of rights, these rights
were rarely conceived as having positive authority independent of their incorporation into
fundamental law.45 Arguments based on natural law were part of a centuries-old constitutional
tradition that presumed a concordance between principles of the customary constitution and
those of natural law, enabling legal actors to draw interchangeably on both. The arguments thus
remained grounded in a kind of positive law, albeit one based on custom, prescription, and
implicit popular consent. This, in fact, was Chase’s position, for he said, after elaborating with
examples of laws contrary to “great first principles”:

It is against all reason and justice, for a people to entrust a Legislature with such
powers; and, therefore, it cannot be presumed that they have done it. The genius,
the nature, and the spirit, of our State Governments, amount to a prohibition of
such acts of legislation; and the general principles of law and reason forbid them.
. . . To maintain that our Federal, or State, Legislature possesses such powers, if
they had not been expressly restrained; would, in my opinion, be a political
heresy, altogether inadmissible in our free republican governments.46

This distinction between fundamental and natural law may seem overly fine to modern
sensibilities, particularly as contemporary actors felt so little compunction to emphasize it. The

44 See Currie, supra note 38, at 46-47; for a sophisticated exposition of Chase’s jurisprudence, albeit one that
grounds his position in natural law, see Stephen B. Presser, The Original Misunderstanding: The English, the Americans,

45 See John Phillip Reid, Constitutional History of the American Revolution: The Authority of Rights 87-95
(1986)[hereinafter Reid, The Authority of Rights]; Rakove, supra note 27, at 290-93. As Reid points out, eighteenth-
century legal theory offered little support for the proposition that nature could convert natural rights into positive rights,
which is why Americans always tied their particular claims of natural right to the customary constitution.

point, however, is not to apologize for eighteenth-century constitutionalism so much as to identify its features and show how these help us to understand better the basis of Chase’s position. Chase’s argument fit squarely within the customary constitutional tradition, and his opinion evidences its persistence after the Revolution and the adoption of written texts.

Iredell’s response should similarly be understood through this lens. For Iredell does not deny that laws against “great first principles” are void; he denies only that such laws can be declared so by courts. The newfangled practice of judicial enforceability, in Iredell’s view, is a product of (and so limited to) written constitutions—a point to which we will return below.

The decision to include the Ninth Amendment in the Bill of Rights can also be explained by the continued vitality of principles derived from the customary constitution. Modern commentators are often baffled by this amendment, which most mistakenly conclude was meant to preserve recognition of some ill-defined body of natural rights.47 Once again, however, natural law was a source of enforceable positive rights only in conjunction with and through incorporation into the customary constitution. Rights under this constitution were drawn from a variety of sources, moreover, of which natural law was only one, and not necessarily the most important one at that.48 The most logical reading of the Ninth Amendment’s reference to “other” rights “retained by the people,” then, is to rights already or potentially secured within the customary constitutional tradition.49

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48 Reid lists ten separate sources of rights relied upon by Americans in their quarrels with England. Reid, The Authority of Rights, supra note 45, at 293.

Of greater interest than these legal arguments is the persistence of the customary constitution’s methods of popular enforcement—evidence that constitutions continued to be seen in their traditional light, as a form of popular and not ordinary law. In his 1791 “Lectures on Law,” for example, James Wilson described how the most powerful force in government, the legislative power, was controlled in the American system:

The effects of its extravagancies may be prevented, sometimes by the executive, sometimes by the judicial authority of the governments; sometimes even by a private citizen, and, at all times, by the superintending power of the people at large. . . . [T]his general position may be hazarded—that whoever would be obliged to obey a constitutional law, is justified in refusing to obey an unconstitutional act of the legislature—and that, when a question, even of this delicate nature, occurs, every one who is called to act, has a right to judge: he must, it is true, abide by the consequences of a wrong judgment.  

Numerous instances of popular enforcement could be cited (for politics in the 1780s and 90s was often an unruly affair), but the point is sufficiently illustrated by an example involving the Virginia judiciary. In 1788, the state legislature enacted a law requiring judges of the court of appeals to sit on a newly-created district court. The judges concluded that this amounted to a constitutionally-prohibited diminution in their salary. They refused to appoint clerks (making it effectively impossible to transact business) and issued “The Respectful Remonstrance of the Court of Appeals,” drafted by Chancellor Edmund Pendleton. 


51 Nor was organized popular resistance confined to constitutional matters, for the radical impulses unleashed by the Revolution challenged the tradition of deference that had dominated colonial politics, and voters became more assertive about controlling what their representatives did in office. The story of these years is recounted with typical elegance and power in Gordon S. Wood, The Radicalism of the American Revolution 95-286 (1991).

52 See 8 Va. (4 Call) 141-147 (1788). The Remonstrance is also reprinted as an appendix to the opinion in Kamper v. Hawkins, 3 Va. (1 Va. Cases) 20, 99-108 (1793), in which the same court faced another question regarding the legislature’s power to regulate the courts, this time choosing to address it through the newly developing concept of judicial review.
General Assembly, it was in reality written for the benefit of the public. The Remonstrance laid out the judges’ concerns about the law and appealed to state legislators to rectify their error. Failing that, the judges concluded:

They see no other alternative for a decision between the legislature and judiciary than an appeal to the people, whose servants both are, and for whose sakes both were created, and who may exercise their original and supreme power whencsoever they think proper. To that tribunal, therefore, the court, in that case, commit themselves, conscious of perfect integrity in their intentions, however they may have been mistaken in their judgment.53

The legislature responded by suspending the challenged act and passing a new court reorganization law designed to meet the judges’ objections.54

The content of the Remonstrance (not to mention its mere existence) embodies and perfectly reflects the basic structure of popular constitutionalism described above—particularly the inversion of interpretive authority that distinguished constitutional law from ordinary law. The legislature and the judiciary are, the remonstrants say, the people’s “servants.” As such, acting with proper intentions and exercising their best judgment, they must try to comply with the constitution. If conflicts arise, however, it is “the people” who constitute the authoritative “tribunal” to whom such conflicts must be submitted. And make no mistake: this was neither empty rhetoric nor a veiled threat of revolution. It was the invocation of a very real, very available legal remedy, albeit one not to be called upon lightly.

This view of the people’s role in constitutional law pervaded political and legal debate throughout the 1780s, and it remained the dominant understanding until well into the nineteenth

53 1 Va. Cases at 108.

century. It is this conception, for example, that lay behind Jefferson’s proposal, in his 1783 draft of a constitution for Virginia, to permit the calling of a convention whenever “[a]ny two of the three branches of government concur[] in opinion . . . that a convention is necessary for altering this constitution, or correcting breaches of it.”55 Jefferson hoped by this means to formalize the people’s role in supervising constitutional law while at the same time bringing some regularity to the process.

Madison went out of his way to criticize his friend’s proposal in Federalist 49-50, and we should take a moment to examine Madison’s argument, if for no other reason than it was among the most elaborate statements on popular constitutionalism of the Founding era.56 In these oft-quoted essays, Madison surprisingly argued against popular participation in interpreting and enforcing a constitution: a position that resonates with scholars today, who tend to be skeptical of robust democratic participation, especially when it comes to matters of fundamental law. Yet it would be wrong to read Madison as repudiating or disavowing popular constitutionalism. Quite the contrary, as a careful reading makes clear, Madison—like Jefferson, like everyone else at the time—took the principle for granted. His quarrel was not with the idea of popular constitutionalism, but with how best to make it operational.

Consistent with views expressed throughout his lifetime, Jefferson wanted popular politics to be the first and major line of defense in securing constitutional limits. Madison disagreed, and he offered three pragmatic objections by way of explanation. First, as we saw in


56 I am indebted to Jack Rakove both for pointing out the importance of Federalist 49-50 and, though our views are somewhat different, for helping me to understand Madison’s thinking. Rakove’s interpretation of Madison’s argument is found in Rakove, supra note 27, at 140-42, 280–82.
chapter one, he worried that a too-frequent appeal to the people would “deprive the government of that veneration, which time bestows on every thing, and without which perhaps the wisest and freest government would not possess the requisite stability.” Second, he said, “[t]he danger of disturbing the public tranquility by interesting too strongly the public passions, is a still more serious objection against a frequent reference of constitutional questions, to the decision of the whole society.” But “the greatest objection of all,” according to Madison, was that the people could not be trusted because they would invariably side with the legislature in any conflict:

The members of the legislative department . . . are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship and of acquaintance, embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people. With these advantages, it can hardly be supposed that the adverse party would have an equal chance for a favorable issue.57

It is worth noting that these arguments were penned in February of 1788, when Madison’s anxiety about popular politics and elected legislatures was at its peak. Having recently completed three frustrating years in the Virginia assembly, Madison was thoroughly disgusted with politics as it was then being practiced in his state.58 His correspondence from these years bristles with contempt for legislators who lack “liberality or light” and barely suppressed fury at “those who mask a secret aversion to any reform under a zeal for such a one as they know will be rejected.”59 It was at this moment, still angry and bruised by his lack of


success as a state legislator, that Madison led the movement to adopt a national constitution. The point deserves mention because scholars have too seldom appreciated that Madison’s feelings about republican politics in the years immediately following this unhappy experience were uncharacteristically negative and pessimistic. Madison never wholly abandoned his fear of unbridled populism or legislative aggrandizement, but his alarm diminished in intensity over time—especially after he saw what someone like Alexander Hamilton could do with executive power if left unchecked by the people.60

Yet even in 1788, when the perilousness of popular politics loomed largest in Madison’s eyes, he recognized that constitutional disputes could not ultimately be resolved “without an appeal to the people themselves, who, as grantors of the commission, can alone declare its true meaning and enforce its observance.”61 This was not inconsistent with Madison’s simultaneous rejection of Jefferson’s proposal, which Madison regarded as unworkable. He felt that Jefferson failed adequately to appreciate just how ticklish and problematic constant unmediated appeals to the people could become. The trick, as Madison saw it, was to devise a system that would reduce the need for such appeals—a problem he thought could be solved at the national level (he went on to explain in Federalist 51) by institutional design, that is, “by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”62 This meant, in particular, such

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61 The Federalist No. 49, supra note 57, at 339.

62 The Federalist No. 51, id. at 347-48.
things as extensive size, bicameralism, an executive veto, and federalism. Through such means, Madison reasoned, ambition could be made to counteract ambition, most constitutional usurpations could be checked at their inception, and resort to the people would be necessary only on “certain great and extraordinary occasions.”

Madison was typical of Federalist leaders in this respect. The men who led the campaign for a new Constitution were not fans of the people out-of-doors; they preferred a more sedate style of politics, safely controlled by gentlemen like themselves. Signs of popular unrest, of which Shays’s rebellion was only the most famous example, made them nervous. Their hope, and the impetus behind their reform effort, was to devise institutional solutions that could discourage these frequent popular interventions by “refining” them or otherwise rendering them unnecessary.

Yet that is a far cry from being anti-democratic. “A dependence on the people is no doubt the primary control on the government,” Madison wrote in Federalist 51. Structural innovations were just “auxiliary precautions,” contingent devices to forestall conflict, not an abandonment of the more basic commitment to popular constitutionalism. Certainly the Father of the Constitution never wavered in his belief that final authority to resolve disagreements over its meaning must always rest exclusively with the people. As he reiterated in 1789, during the debate over the President’s removal power:

63 Rakove, Original Meanings, supra note 27, at 282.

64 The Federalist No. 49, supra note 57, at 339.


66 The Federalist No. 51, supra note 27, at 349.

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There is not one government on the face of the earth, so far as I recollect, there is not one in the United States, in which provision is made for a particular authority to determine the limits of the constitutional division of power between the branches of the government. In all systems there are points which must be adjusted by the departments themselves, to which no one of them is competent. If it cannot be determined in this way, there is no resource left but the will of the community, to be collected in some mode to be provided by the constitution, or one dictated by the necessity of the case.\textsuperscript{67}

Christopher Wolfe observes, rightly it seems, that Madison meant the amendment process when he referred to a “mode . . . provided by the constitution,” and elections, impeachments and other forms of political action when he referred to a mode “dictated by the necessity of the case.”\textsuperscript{68}

Recall, too, that Madison was not wholly allergic to popular appeals even in 1788. \textit{Federalist 49-50} dealt only with “keeping the several departments of power within their constitutional limits”\textsuperscript{69}—that is, with separation of powers within the federal government. As we have seen, Madison worried that appealing to the people in this context would fail because the community would too often back the legislature, encouraging it to draw ever more power into “its impetuous vortex.”\textsuperscript{70} In sharp contrast, Madison embraced the potential for appealing to the people when it came to keeping the new federal government from swallowing the states. In the context of federalism, Madison no longer feared that conventional forms of popular constitutionalism might work against the Constitution’s design, because—as he explained in \textit{Federalist 45-46}—“the first and most natural attachment of the people will be to the

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  \item \textsuperscript{67} Comments on the Removal Power of the President (June 17, 1789), reprinted in 12 Papers of Madison, supra note 59, at 238.
  \item \textsuperscript{68} See Christopher Wolfe, The Rise of Modern Judicial Review 95 (rev. ed. 1994).
  \item \textsuperscript{69} The Federalist No. 49, supra note 59, at 339.
  \item \textsuperscript{70} The Federalist No. 48, id. at 333 (Madison).
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governments of their respective states,” thus according states complete security from any risk of federal overreaching.71

Countless other examples can be cited similarly attesting to the persistence of popular constitutionalism in the early Republic. The people’s interpretive authority—their active control over the meaning and enforcement of their constitutions—is what James Wilson had in mind in 1787, when he exulted that “the people possess, over our constitutions, control in act, as well as in right.”72 It is what John Randolph meant when he insisted, in 1802, that while the branches may try to check one another, the people control the constitution through elections, “the true check; every other check is at variance with the principle, that a free people are capable of self-government.”73 “[A]n appeal . . . through the elections,” Randolph explained, ensured that constitutional limits on power were interpreted by “the nation, to whom alone, and not a few privileged individuals, it belongs to decide, in the last resort, on the Constitution.”74 It is what President James Madison was referring to in 1815, when he declined to veto the bill establishing a Second Bank of the United States on constitutional grounds, because—though his own views of its unconstitutionality remained unaltered—the matter was “precluded . . . by repeated recognitions under varied circumstances of the validity of such an institution in the acts of the legislative, executive, and judicial branches of the Government, accompanied by indications . . .

71 The Federalist No. 46, id. at 316 (Madison); see Larry Kramer, Putting the Politics Back Into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215, 257-65 (2000).

72 Speech by James Wilson to the Pennsylvania Ratifying Convention (Nov. 24, 1787), in 2 Documentary History of the Ratification of the Constitution 350, 362 (Merrill Jensen et al. eds., 1976)(version reported by Thomas Lloyd)[hereinafter cited as DHRC].

73 11 Annals of Congress 660 (Feb, 1802).

74 Id. at 661
of a concurrence of the general will of the nation.”75 And it is why, in 1819, Thomas Jefferson could, without being the least bit ironic, describe his own election two decades earlier as “the revolution of 1800.”76 The great controversies of the 1790s had been constitutional controversies: the power to incorporate a bank or encourage manufactures, the question of neutrality, the proper handling of the Whiskey rebellion, the Jay Treaty, the Alien and Sedition Acts, the election deadlock—these all raised or were entangled in constitutional questions. The issues before the country in these years were constitutional issues: strict versus broad construction, federal versus state power, the existence or not of federal common law, the meaning of freedom of the press. The escalating party struggles of the 1790s were, in Jefferson’s eyes, an extended national referendum on whose views of the Constitution were correct, a referendum that reached its climax in the fiercely contested election of 1800. The people’s unequivocal choice in that election had been for Republican principles and the Republican Constitution. Jefferson was thus being both literal and sincere in calling the rejection of Federalism:

[A]s real a revolution in the principles of our government as that of 1776 was in its form; not effected indeed by the sword, as that, but by the rational and peaceable instrument of reform, the suffrage of the people. The nation declared its will by dismissing functionaries of one principle, and electing those of another, in the two branches, executive and legislative, submitted to their election.77

75 Veto Message (Jan. 30, 1815), in 1 James D. Richardson, ed., A Compilation of the Messages and Papers of the Presidents 555 (1900). Madison vetoed the bill on policy grounds, but a year later signed into law another bill for chartering a bank that answered his objections. See Drew R. McCoy, The Last of the Fathers: James Madison and the Republican Legacy 81 (1989).

76 Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), in 10 Writings of Jefferson, supra note 11, at 140. Daniel Sisson speaks of Jefferson’s commitment to “revolutionary” rather than “constitutional” principles, but he is referring to the the same thing: the fundamental principles that constitute the society and government. Daniel Sisson, The American Revolution of 1800, at 21 (1974).

77 Letter from Thomas Jefferson to Spencer Roane, supra note 76, at 140.
Popular Constitutionalism, circa 1786.

The continued vitality of these traditional constitutional understandings and practices—particularly the understanding of constitutions as popular rather than ordinary law—is hardly surprising. Firmly-rooted beliefs and deep-seated background assumptions seldom change quickly. Certainly they never do so unless something specifically forces those who share them to undertake a reexamination. If anything, however, the opposite was true of the American Revolution: its whole point had been, in a sense, to affirm the principles of popular sovereignty and the customary constitution. Nevertheless, the practicalities of reestablishing government after independence inevitably produced changes and exerted pressure on existing understandings and practices of fundamental law. Four factors, in particular, were significant in this respect, and from these emerged the first concept of judicial review.

First, with independence came responsibility to govern. Suddenly, and for the first time, Americans had to handle for themselves all those matters that were formerly dealt with by Great Britain. This was obvious at the national level, where inexperienced officers of a new and uncertain federal government had to manage and finance a war, deal with foreign affairs and interstate disputes, and find solutions to a variety of other thorny problems. But it was equally true in the states, which similarly found themselves forced to address numerous matters that had

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78 The best study of the problems of national government during the Confederation period is Jack N. Rakove, The Beginnings of National Politics: An Interpretive History of the Continental Congress (1979). Other works covering this period include Richard B. Morris, The Forging of the Union: 1781-1789 (1987), which tends to celebrate the Federalists a bit too much; and Merrill Jensen, The New Nation: A History of the United States During the Confederation (1950), which tilts in the opposite direction and shows excessive traces of Charles Beard’s continuing influence. Despite considerable recent work challenging its major premises, Gordon Wood, Creation of the American Republic, supra note 27, remains essential reading to understand the intellectual and social forces shaping the period.
formerly been handled by imperial authorities. Plus, the Revolution changed the demands that were made of government, as modern conceptions of public power replaced older notions of monarchical government. Gordon Wood explains:

From the outset the new republican states thus tended to view with suspicion the traditional monarchical practice of enlisting private wealth and energy for public purposes by issuing corporate privileges and licenses to private persons. . . . Consequently, the republican state governments sought to assert their newly enhanced public power in direct and unprecedented ways—doing for themselves what they had earlier commissioned private persons to do. They carved out exclusively public spheres of action and responsibility where none had existed before. They now drew up plans for replacing everything from trade and commerce to roads and waterworks and helped to create a science of political economy for Americans. And they formed their own public organizations with paid professional staffs supported by tax money, not private labor.79

It was precisely this rage for reform that Madison lamented in his memo on the Vices of the Political System of the United States, complaining of a “luxuriancy of legislation” that had, in a few short years, “filled as many pages as the century which preceded it.”80 Madison’s explanation for the phenomenon—that state legislatures were too responsive to the whims of majorities—simply underscores the point: with independence, and for better or worse, America’s legislatures found themselves doing far more than ever before.

Second, the new constitutions were written. Contrary to a common misperception among present-day constitutional lawyers, putting a constitution into writing was not thought to alter its


80 Vices of the Political System of the United States, in 9 Papers of Madison, supra note 59, at 345, 353.
fundamental character. As we have already seen, customary constitutional law regularly drew on written sources, while lawyers and statesmen continued to rely on customary sources even after formal texts had been drafted. The chief effect of writing constitutional principles down, as the Founding generation saw it, was to give these principles a degree of explicitness and clarity that was new. Recall that, while there was consensus about many principles of the customary constitution, it necessarily suffered the debility of uncertainty that inheres in all forms of customary law. “But, with us,” boasted St. George Tucker in Kamper v. Hawkins, “the constitution is not an ‘ideal thing,’ but a real existence: it can be ‘produced in a visible form:’ its principles can be ascertained from the living letter, not from obscure reasonings or deductions only.” William Paterson made the same point in his charge to the jury in Vanhorne’s Lessee v. Dorrance:

It is difficult to say what the Constitution of England is; because, not being reduced to written certainty and precision, it lies entirely at the mercy of the Parliament: It bends to every governmental exigency; it varies and is blown about by every breeze of legislative humor or political caprice. . . . Besides, in England there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America the case is widely different: Every State in the Union has its constitution reduced to written exactitude and precision.

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82 See also Daniel J. Hulsebosch, Constituting Empire: New York and the Transformation of Constitutionality in the Atlantic World (forthcoming)(mss. at 13).

83 3 Va. (1 Va. Cases) 20, 78 (1793).

84 2 U.S. (2 Dall.) 304, 308 (C.C.A. 1795). See also Letter from James Iredell to Richard Spaight (Aug. 26, 1787), in 2 Griffith J. McRee, Life and Correspondence of James Iredell 172, 174 (1857)(the Constitution is not “a mere imaginary thing, about which ten thousand different opinions may be formed, but a written document to which all may have recourse, and to which, therefore, the judges cannot wilfully blind themselves.”).
Paterson was, of course, exaggerating in both directions. The customary constitution was unambiguous in many respects, while two centuries of wrestling with written texts has made their imprecision abundantly clear. There was, nevertheless, a difference in degree that mattered, and by reducing their constitutions to writing, Americans made that much more immediately, easily useable.

One byproduct of the new explicitness and clarity associated with written constitutions was the decision to create formal provisions for amending them. A distinction between “making” and “interpreting” fundamental law already existed under the customary constitution, part of an intellectual tradition stretching back to the ancients that had been carried forward in the work of such figures as Machiavelli, Locke, Montesquieu, and Rousseau. Yet the distinction had little practical significance. The foundational principles of the Ancient Constitution were thought to be immutable; improvements and alterations were possible only in their instantiation and application. Correction along these lines, in the meantime, occurred mainly through prescription and the accretion of precedent—a process of gradual evolution that was seen more as adaptation to changing circumstances than the making of new law. Abrupt revisions were unusual, happening mostly during violent upheavals like the Glorious Revolution, and even these were justified on grounds of protecting or restoring ancient liberties. In short,

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circumstances and fortuity had deflected the need to worry much about any conceptual
distinction between interpreting existing law and making new law.

Reducing constitutions to writing put new pressure on the distinction by making the
terms of fundamental law specific and more easily demonstrable, and thus narrowing the space
for “improvements” that were not undeniably alterations. The difficulty, moreover, was not
just that written constitutions were more certain and precise, but also that the new American
constitutions hazarded numerous innovations. This made it virtually certain, as Elbridge Gerry
was to note during the debates over framing a new Federal Constitution, that “periodical
revision” would be necessary because of “[t]he novelty & difficulty of the experiment.”

One could have left such problems to be handled by the people at large, as they always
had been; Charles Pinckney said during the same debate as Gerry that he “doubted the propriety
or necessity” of a formal amendment mechanism. But most Americans associated precipitous
changes in fundamental law with violence and revolution, and many immediately perceived the
benefits of creating a regular process to alter established law peacefully—a process that, as the
townsfolk of Lexington put it in objecting to its absence from an early draft of the Massachusetts
constitution, “might give Satisfaction to the People; and be an happy Means, under Providence,

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87 No one had anticipated this problem, and many people missed it at first. Fewer than half of the states had
adopted amending procedures by 1780, for example, and five (Virginia, North Carolina, New York, Connecticut, and
Rhode Island) still had no formal process in place as late as 1787, when the Federal Convention met See Bernstein,
supra note 85, at 8-9; Kruman, supra note 26, at 55; Adams, supra note 26, at 138-39. Nevertheless, awareness of the
problem was widespread by the mid-1780s.

88 1 Farrand, supra note 35, at 122 (Madison’s notes, June 5, 1787).

89 Id. at 121.
George Mason made the case succinctly in supporting an amendment provision at the Federal Convention: “The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular, and Constitutional way than to trust to chance and violence.”

Lawyers and scholars today generally misunderstand the part these amendment provisions originally played in a constitutional scheme. We imagine “the people” only as law makers—constitutional legislators for a day, as it were—but nothing more. Ratification makes a constitution “law,” but also turns the constitution over to government agents (mainly judges) who assume responsibility for its interpretation and enforcement. The people retain authority to correct mistakes or change courses, but only by again exercising their original power to make law. That power might exist even without a formal mechanism for amendment, though such provisions are useful in a constitution because they make the people’s authority explicit and establish known procedures for its exercise. Either way, this revisionary, law-making power is seen as the sole means of direct popular control of constitutional law.

Eighteenth-century Americans had a less cramped image of popular constitutionalism. They took for granted the people’s responsibility not only for making, but also for interpreting and enforcing their constitutions—a background norm so widely shared and deeply ingrained that specific expression in the constitution was unnecessary. Constitutional provisions for amendment made sense within this framework to deal with a new problem created by having


91 1 Farrand, supra note 35, at 202-03 (Madison’s notes, June 11, 1787).
embarked on a course of constitutional experimentation in written form. Anticipating a need for frequent revision of clearly established constitutional rules, the drafters of the new constitutions deemed it expedient to provide an easier, more orderly mechanism for changing them. This was intended not to limit, but rather to respect and preserve popular authority over constitutions, while simultaneously reducing the prospect of political unrest.

Striking a proper balance among these various concerns was no simple task. Many participants worried that the amendment process could stir up more trouble than it prevented if it were made too easy. Gently chiding Jefferson for his harebrained proposal to have the laws and constitutions expire every nineteen years, Madison reiterated his arguments from *Federalist 49* while adding a warning about the danger of “engender[ing] pernicious factions that might not otherwise come into existence.”92 Different compromises with respect to the ease or difficulty of making amendments were reflected in the various approaches taken in different states and in the Federal Constitution.93 But in every case, choices were imagined and ultimately made against a background of unmediated popular intervention, which provided the implicit baseline for measuring legitimacy.

By the same token, adopting formal procedures to change fundamental law in no way altered the people’s role when it came to conventional problems of constitutional interpretation. As we have seen above (and will see again below), if a constitution was unclear, government officials were expected to do their best to ascertain and follow its requirements, subject to

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92 Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), in 13 Papers of Madison, supra note 59, at 19. Madison is responding to the famous letter in which Jefferson proclaimed “that the earth belongs in usufruct to the living.” Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 5 Writings of Jefferson, supra note 11, at 115.

93 See Bernstein, supra note 85, at 4-13; Kruman, supra note 26, at 54-59; Adams, supra note 26, at 137-42.
popular oversight and review expressed by a range of “political-legal” means. A separate problem arose when a constitution was clear—either because its text was unmistakable or because an ambiguity had been resolved through a course of popular reactions—but what was once clearly mandated no longer seemed desirable. Relying on traditional popular means to overturn entrenched rules or reform established institutions was difficult at best, often inviting violence and civil unrest. So Americans chose instead to address this problem by creating, in Mason’s words, “an easy, regular and Constitutional way” to make such changes. The amendment device could also be used to cure ambiguities, but this was neither its motivation nor its main purpose. The possibility of amendment was thus situated in a political and intellectual framework in which interpretive authority remained where it had always been, with the people at large.

The synergy between these first two changes—more active government, on the one hand, and more explicit constitutions, on the other—produced yet a third. There were now many more opportunities for constitutional conflict: more problems to address, more questions that might arise, more disputes likely to become manifest. A number of additional factors exacerbated this state of affairs. It was a revolutionary time whose radical overtones did not fade quickly; institutions throughout the society were being overturned, sharpening an incipient class conflict as well as the ordinary tussle of competing interests. It was, moreover, a time of economic hardship and dislocation, with the inevitable concomitant pressures to stretch the law to provide


relief. Then there was the matter of loyalists and others who had backed the wrong side, as Americans proved no more capable than anyone else at keeping bitter memories and vindictive urges from overwhelming ordinary legal process, giving in to what Alexander Hamilton called a “popular phrenzy” of punitive legislation.96 Lastly, as already noted, the new constitutions contained numerous innovations— institutions and ideas whose very novelty left their operation uncertain. In some instances, such as relations between the state and federal governments, Americans knew they were in uncharted waters. In others, such as separation of powers, they did not discover how little they understood until they attempted to implement what they had written.

The fourth and most important change produced by the Revolution was the new nation’s explicit, emphatic embrace of popular sovereignty. This was not a new idea, for Americans believed it had always been a feature of their constitutions. But this belief was not put to the test until the Revolutionary crisis of 1763-1776, from which popular sovereignty emerged more clearly defined as the central principle of American constitutionalism—producing that initial rage for republicanism documented by Gordon Wood in The Creation of the American Republic.97 The concept of popular sovereignty predated 1776 by more than a century, but in American hands, and through the crucible of the American Revolution, it acquired a

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97 See Wood, supra note 27, at 46-124; a more succinct version is presented in Wood, Radicalism, supra note 51, at 169-89. Many aspects of Wood’s argument have been challenged since he first advanced it in 1969, and there is still controversy and uncertainty about what the Founding generation meant by “republicanism.” But Wood is clearly right about the outburst of enthusiasm for republicanism understood in its most stripped-down form—a government in which authority derives explicitly and exclusively from the people.
concreteness and importance that was wholly new and wholly different. Gerald Stourzh elaborates:

The rise of the constitution as the paramount law, reigning supreme and therefore invalidating, if procedurally possible, any law of a lower level in the hierarchy of legal norms, including “ordinary” legislator-made law, is the great innovation and achievement of American eighteenth-century constitutionalism. Awareness of this innovation, not of constitutions reduced to written documents, was what evoked the proud commentary of eighteenth-century Americans such as Tom Paine, James Iredell, and James Madison.

As it emerged, moreover, the principle of popular sovereignty was subtly transformed. Its movement from wings to center stage gave the principle an immediate serviceableness that it had not previously possessed. No longer just a background norm or explanation of original authority, the idea of popular sovereignty was right there on the surface, an immanent, impendent force to be dealt with.

While Stourzh is right, moreover, that putting constitutions into writing was not seen as a profound innovation, the process of doing so nevertheless gave a powerful boost to the new awareness of popular sovereignty. Reducing constitutions to writing may have begun as a matter of practical necessity, but it did not end that way. The work itself infused “the people” with an immediacy and tangibleness that penetrated beyond the conscious, beyond the intellectual, to invigorate the affective side of the Revolution. “You and I, my dear friend, have been sent into life at a time when the greatest lawgivers of antiquity would have wished to live,” marveled John Adams:

How few of the human race have ever enjoyed an opportunity of making an election of government, more than of air, soil, or climate, for themselves or their

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children! When, before the present epocha, had three millions of people full power and a fair opportunity to form and establish the wisest and happiest government that human wisdom can contrive?\textsuperscript{99}

Similar expressions of euphoria and awe were ubiquitous as men threw themselves into the work of writing new constitutions.\textsuperscript{100}

This heightened awareness of popular sovereignty—the sense of “the people” as a palpable, active entity making conscious choices—transformed certain implicit understandings about the nature of a constitution. The customary constitution was popular law, but of a fundamentally conservative cast. Its defining tropes were all about antiquity, settled practice, and custom established since “time out of mind.” It changed constantly, but changes were seen (and more importantly, were felt) primarily in terms of preservation: responses to events undertaken in order to maintain an ancient, unchanging balance between liberty and power. Infused with Revolutionary fervor, the new American understanding of constitutionalism was active, reformist, optimistic, and progressive. In short, the customary constitution metamorphosed into something that could, for the first time, truly be called a popular constitution.

The new provisions for amendment were perhaps the clearest and most obvious manifestation of the new attitude.\textsuperscript{101} Haunted by the specter of “corruption” of the British constitution, whig writers in the colonial period had directed all their energies toward

\textsuperscript{99} John Adams, Thoughts on Government (Boston 1776), in 1 American Political Writing During the Founding Era, 1760-1805, at 401, 408-09 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

\textsuperscript{100} See Kruman, supra note 26, at 17-19.

\textsuperscript{101} Id. at 53-55, has an excellent discussion of the new progressivism expressed in provisions for changing a constitution. In contrast, Adams, supra note 26, at 140-42, emphasizes the conservative side of the same provisions.
preservation—toward restoring (as Jefferson once described it) “that happy system of our ancestors, the wisest and most perfect ever yet devised by the wit of man, as it stood before the 8th century.” Now, Americans looked eagerly forward, toward the future, instead of backward—trusting in their abilities to adjust and adapt and improve. One function of amendment remained to protect the purity of the constitution, and no one doubted that a “frequent recurrence to fundamental principles” was “absolutely necessary to preserve the blessings of liberty.” But the old preservationist mood was rapidly supplanted by a buoyant new willingness to experiment, of which the ease of making amendments was an integral part. Fear not the possibility of mistakes, urged the drafters of Massachusetts’s 1780 constitution, for we can make repairs at a later date in whatever manner “Experience, that best Instructor, shall then point out to be expedient or necessary.”

The new possibility of amendment was just one reflection of the changing temper of the time. A sense of popular empowerment was pervasive, as Americans confidently decided that they could fashion their own constitution and government and control their own destinies. Madison hit this note perfectly in rebuking opponents of the Federal Constitution for dreading its novelty:

102 Letter from Thomas Jefferson to Edmund Pendleton (August 13, 1776), in 1 The Papers of Thomas Jefferson 492 (Julian Boyd, ed. 1952).

103 North Carolina Declaration of Rights; see also Virginia Declaration of Rights, § 15 (June 12, 1776)(“That no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles”). On the significance of this political concept generally, see Gerald Stourzh, Alexander Hamilton and the Idea of Republican Government ch. 1 (1970).

104 Address to the Convention, March 1780, in The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780, at 435 (Oscar Handlin & Mary Handlin eds., 1966).

But why is the experiment of an extended republic to be rejected merely because it may comprise what is new? Is it not the glory of the people of America, that whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience? . . . Happily for America, happily we trust for the whole human race, [the Revolutionary generation] pursued a new and more noble course. They accomplished a revolution which has no parallel in the annals of human society: They reared the fabrics of governments which have no model on the face of the globe. They formed the design of a great confederacy, which it is incumbent on their successors to improve and perpetuate.106

With so much in flux, complications were inevitable. Constrained as they were by the exigencies of war with England, and lacking useful precedents other than the problematic example of 1688, it took Americans a few years to work out a theory of the proper way to ratify a constitution and make it supreme, paramount law.107 In most states, new constitutions were adopted by ordinary legislative means, without either direct submission to the people or a special convention called solely for the purpose of creating fundamental law.108 The actual status of some of these first state constitutions thus remained ambiguous, with authorities as esteemed as John Adams and Thomas Jefferson suggesting that theirs could be altered by ordinary legislation.109 More commonly, factors like those discussed above—revenge against loyalists,

106 The Federalist No. 14, supra note 57, at 88-89.
107 Rakove, Original Meanings, supra note 27, at 96-108.
108 See id. at 97; see also Adams, supra note 26 at 61-90 (state-by-state description of process).
109 See Jefferson, Notes on The State of Virginia, supra note 55, at 121-25 (the existing Virginia constitution “is alterable by the ordinary legislature”); John Adams, Thoughts on Government, supra note 99, at 406 (“if by experiment [the constitution’s provisions for electing officers] should be found inconvenient, the legislature may, at its leisure, devise other methods of creating them”). These were minority views. Indeed, the main issue in Kamper v. Hawkins, 1 Va. Cases 20 (1793), often cited for its discussion of judicial review, was to refute Jefferson on this point and make clear that the Virginia constitution was properly deemed supreme, fundamental law; each of the judges addressed this issue at length in his opinion.
economic hardship, and the like—induced state legislators to ignore clear commands of their constitutions without bothering to make any fancy claims of authority to do so. Either way, blatantly unconstitutional laws became a too-common feature of politics in the 1780s. James Madison placed the “numerous” state violations of the Articles of Confederation at the top of his list of “Vices,” and he complained to Jefferson of “[r]epeated” transgressions of bills of rights committed “by overbearing majorities in every State.”  

Alarm at just this sort of development provided one of the chief motivations for Federalist leaders in 1787.  

“Being Judges For the Benefit of the Whole People”

This combination of factors—more active government, more explicit constitutions, more constitutional conflict and arguably unconstitutional laws, and, above all, a heightened sense of popular sovereignty—could be interpreted in different ways, and it pulled men in different directions as they confronted the new experience of managing a constitutional republic. The resulting tensions shaped the first concept of judicial review.

To many, respect for popular sovereignty demanded that judges enforce duly enacted laws and leave constitutional questions to be settled elsewhere. No one doubted that a properly ratified constitution was, as Edmund Pendleton observed, “a rule obligatory upon every department, not to be departed from on any occasion.”  It did not follow, however, that the judiciary could therefore invoke the constitution’s authority against another department. No one

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110 See Vices of the Political System of the United States, supra note 80, at 348-49; Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 Papers of Madison, supra note 59, at 295, 297.

111 See Wood, supra note 65.

112 Commonwealth v. Caton, 8 Va. (4 Call) 5, 17 (1782).
of the branches was meant to be superior to any other, unless it were the legislature, and when it came to constitutional law, all were meant to be subordinate to the people. Just as it is not your place to punish me for violating ordinary law, so too in a regime of popular constitutionalism it was not the judiciary’s responsibility to enforce the constitution against the legislature. It was the people’s responsibility: a responsibility they discharged mainly through elections, but also, if necessary, by other, extralegal means. For courts to interfere, to presume to judge the actions of a coordinate branch, was to meddle in affairs that were none of their business. Worse, it was to imply, as Judge William Nelson characterized the argument in *Kamper v. Hawkins*, “that the judiciary . . . claims a superiority over the legislature” on matters peculiarly within the legislative arena, which encompassed decisions respecting the constitutionality of legislation as well as its necessity.113 This is what was meant when people said, as St. George Tucker put it in the same case, that “the constitution of a state is a rule to the legislature only.”114

We need to be clear on this argument, which is critical if we are to understand the setting in which judicial review eventually emerged. In suggesting that the constitutionality of legislation was not a matter for judicial cognizance, no one was saying that the authoritative interpreter of the constitution was the legislature rather than the judiciary. That would have been inconsistent with the whole framework of popular constitutionalism, because it would have assumed that final interpretive authority rested with one or another of these public agencies. In fact, neither branch was authoritative, because interpretive authority remained with the people.


114 Id. at 77 (noting that some writers “affirm, that the constitution of a state is a rule to the legislature only, and not to the judiciary, or the executive: the legislature being bound not to transgress it; but that neither the executive nor the judiciary can resort to it to enquire whether they do transgress it, or not.) Tucker rejected the argument as a “sophism,” relying on the theory described below.
Of course, public officials still had to interpret the constitution in going about their business, since they were the regulated entities (again, just as we must interpret ordinary law in going about our business). But underlying the argument described by Nelson and Tucker was an assumption that the people’s restrictions on which laws could be enacted were directed to the lawmaking branch, and not to the other branches. It was the legislature’s delegated responsibility to decide whether a proposed law was constitutionally authorized, subject to oversight by the people. Courts simply had nothing to do with it, and they were acting as interlopers if they tried to second-guess the legislature’s decision. It would be as if the people had hired two agents to perform distinct tasks and one agent kept interfering with the other agent’s job, insisting that it knew better.

Judging by the public response to early decisions exploring judicial review, this was the position of most Americans prior to the 1790s. Their reactions are hardly surprising given the premises of popular constitutionalism and the lack of any previous experience with, or practice of, judicial monitoring of fundamental law. To be sure, some of those who rejected judicial review were uncomfortable having to rely so heavily on traditional “political-legal” means of enforcing constitutional limits. These might have worked during the colonial era, when issues of fundamental law arose only rarely, and they remained essential for combating profound, pervasive usurpations, like those that led to the Revolutions of 1688 and 1776. But could these traditional devices control the numerous smaller unconstitutional measures that seemed daily to issue from state legislatures? Could they be relied upon to prevent laws that were supported by a majority of the community, such as paper-money laws or legislation confiscating the property of

loyalists? Richard Dobbs Spaight fervidly rejected judicial nullification as “absurd, and contrary to the practice of all the world,” but he acknowledged that some kind of better check might be “absolutely necessary to our well-being.” He just could not think of one; “the only one that I know of,” he confessed, “is the annual election.”

Others were more imaginative. Many of the changes adopted by state constitution writers were at least partly about constitutional control—not just annual elections, but also rotation in office, the right to instruct, bicameralism, and the like. Still other innovations were developed specifically and exclusively with the problem of preventing unconstitutional action in mind. We have already considered Jefferson’s proposal to “correct breaches” of the constitution by allowing any two branches to call a convention of the people. The anonymous author of *Four Letters on Interesting Subjects* thought that “preserving a Constitution” could easily be accomplished by electing at some fixed interval “a Provincial Jury . . . to enquire if any inroads have been made in the Constitution [with] power to remove them”—a proposal adopted in slightly modified form by Pennsylvania and Vermont, both of which provided for a “council of censors” to review the state of the constitution every seven years and recommend changes to the people. The drafters of the New York constitution came up with the idea of a delaying veto, a

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116 Letter from Richard Dobbs Spaight to James Iredell (Aug. 12, 1787), in 2 Correspondence of Iredell, supra note 84, at 168, 169. Writing from Philadelphia where he was a delegate to the Federal Convention, Spaight found the argument for judicial review incomprehensible, “as [the judges] would have operated as an absolute negative on the proceedings of the Legislature, which no judiciary ought ever to possess: and the State, instead of being governed by the representatives in general Assembly, would be subject to the will of three individuals. . . .” Id.

117 Id. at 169-70.


119 See Adams, supra note 26, at 267-68; Charles Grove Haines, The American Doctrine of Judicial Supremacy 124-33 (1914); 1 Julius Goebel, Jr., The Oliver Wendell Holmes Devise—History of the Supreme Court: Antecedents and Beginnings to 1801, at 102-03 (1971).
sort of preemptive strike on potentially unconstitutional laws. New bills were submitted to a “council to revise” that consisted of the governor, chancellor, and high court judges and was empowered to investigate proposed legislation for its constitutionality; the council’s veto could be overridden only by a two-thirds majority in both houses of the legislature. Madison heartily approved this measure, which he urged at one time or another (though never successfully) on Kentucky, Virginia, and the Federal Convention. He later devised the most imaginative solution of the period, deciding that still more and better protection could be provided simply by enlarging the sphere of the republic. The legislature of an extensive territory, Madison reasoned (though, once again, he failed to persuade others), would be less likely to enact unconstitutional laws and could be entrusted with a veto over the laws of the states.

Not everyone agreed that judicial enforcement of a constitution was improper, however. Interpreting the same events and circumstances differently, a few people reasoned that respect

122 See Madison’s Observations on Jefferson’s Proposed Revision of the Virginia Constitution, in 6 Papers of Jefferson, supra note 102, at 308, 315. Madison’s thinking had evolved by the time he made these observations in 1788, and he recommended changes from the proposals he made to Kentucky and the Federal Convention. These changes were designed to strengthen the revisionary power. He now proposed to give both the executive and the judiciary a veto, subject to a 2/3 legislative override if only one branch objected and a 3/4 override if both did so. If either or both branches objected on constitutional grounds, Madison wanted to suspend the bill until after the next election cycle, at which time it would have to be repassed by the same 2/3 or 3/4 vote. Id.
123 See 1 Farrand, supra note 35, at 21 (8th resolution of the Virginia Plan) (Madison’s notes, May 29, 1787); id. at 97-104, 138-40 (Madison’s notes June 4, 6, 1787) (debate on council of revision); 2 id. at 73-80 (Madison’s notes, July 21, 1787) (same); Rakove, Original Meanings, supra note 27, at 261-62.
124 The Federalist No. 10, supra note 57, at 59. See Kramer, Madison’s Audience, 112 Harv. L. Rev. 611, 628-36, 656 (1999); on the uncomprehending reactions of others to Madison’s novel arguments, see id. at 637-78.
for popular sovereignty actually required judicial review. If the constitution was supreme, fundamental law, then legislative acts contravening its terms were ultra vires and void: not law at all. Judges before whom such acts were brought could not just ignore this fact. The principle of popular sovereignty demanded that they treat such laws as the nullities they were. Here was a truly novel idea. For unlike the Americans’ other innovations, which they had expressly incorporated in the texts of their constitutions and which had long been part of whig political tradition, no one before had proposed relying on courts for general constitutional enforcement.

The most thoughtful presentation of this new principle, which began making sporadic appearances in the early 1780s, was penned by future Supreme Court Justice James Iredell in 1786. Iredell was, at the time, representing a client whose property had been confiscated without a jury in a case still pending before the North Carolina courts. Writing pseudonymously as “An Elector,” he published a newspaper essay in which he argued in favor of judicial authority to declare an unconstitutional law void; the court was evidently persuaded, for it ruled in his favor when it heard the case a year later.

Iredell began his argument with a proposition that even he conceded no one was denying: that the state’s constitution was “the fundamental law, and unalterable by the legislature, which derives all its power from it.” Writing for rhetorical effect, he reminded readers of “the

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125 Instructions to Chowan County Representatives (Sept. 1783), in 2 The Papers of James Iredell 446, 449 (Don Higginbotham ed., 1976) (urging the state legislature to provide judges with “liberal Salaries” in 1783 so they could serve faithfully as “guardians and protectors” of the state’s constitution); Gourveneur Morris, An Address on the Bank of North America (1785), in 3 The Life of Gouverneur Morris With Selections From His Correspondence and Miscellaneous Papers 438 (Jared Sparks ed., 1832) (noting that the legislature is not omnipotent and cannot change the constitution and that “[a] law was once passed in New Jersey, which the judges pronounced to be unconstitutional, and therefore void”).

126 Bayard v. Singleton, 1 N.C. (Mart.) 48 (1787). It is unclear whether Iredell was representing the plaintiffs or serving as a “friend of the court.” See Willis P. Whichard, Justice James Iredell 10-11 (2000).

127 An Elector, To the Public, in 2 Correspondence of Iredell, supra note 84, at 145, 148.
extreme anxiety in which all of us were agitated in forming the constitution,” having been “sickened and disgusted for years with the high and almost impious language from Great Britain” respecting Parliament’s supreme authority over the people. But things were otherwise in North Carolina, where the legislature could act only as permitted by the constitution, “for we have as much agreed to be governed by the Turkish Divan as by our own General Assembly, otherwise than on the express terms prescribed.”128 That established, Iredell moved on to what he called “[t]he great argument”:

[T]hat though the Assembly have not a right to violate the constitution, yet if they in fact do so, the only remedy is, either by a humble petition that the law may be repealed, or a universal resistance of the people. But that in the mean time, their act, whatever it is, is to be obeyed as a law [by the judges]; for the judicial power is not to presume to question the power of an act of Assembly.129

Iredell “not unconfidently” rejected these remedies as insufficient.130 The “remedy by petition” presupposed “that the electors hold their rights by the favor of their representatives,” a claim so insulting the “mere stating of this is surely sufficient to excite any man’s indignation.” Popular resistance, on the other hand, was a proper remedy, but undesirable and deficient as an exclusive one. “We well know how difficult it is to excite the resistance of a whole people,” which is why resort to such measures must be considered a “dreadful expedient” and a “calamitous contingency.” Besides, since widespread popular resistance could be expected only where there was “universal oppression,” many unconstitutional acts would go unredressed. “A thousand injuries may be suffered, and many hundreds ruined, before this can be brought about.”

128 Id. at 145-46.
129 Id. at 147.
130 Id. The remainder of the quotes in this paragraph are from the same page.
In the meantime, individuals and minorities would suffer, and the only safe citizens would be those who managed always to stay in the majority, whom Iredell contemptuously dismissed as “sycophants that will for ever sacrifice reason, conscience, and duty, to the preservation of a temporary popular favor.”

Having proved the inadequacy of these traditional remedies, Iredell argued that judicial review followed naturally from the supposition that the constitution expressed the sovereignty of the people:

For that reason, an act of Assembly, inconsistent with the constitution, is void, and cannot be obeyed, without disobeying the superior law to which we were previously and irrevocably bound. The judges, therefore, must take care at their peril, that every act of Assembly they presume to enforce is warranted by the constitution, since if it is not, they act without lawful authority. This is not a usurped or a discretionary power, but one inevitably resulting from the constitution of their office, they being judges for the benefit of the whole people, not mere servants of the Assembly.131

A number of observations are appropriate at this point. First, a word of caution: The whole idea of judicial review was new, and however obvious it may seem to us, only a small number encountered and understood the arguments purporting to justify it. No more than five or six cases arose prior to 1787 in which a question of judicial review was clearly presented, and courts ducked the issue in most of these.132 Regularly published reports did not yet exist,133 and

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131 Id. at 148. As mentioned above, supra note 125, Iredell had previously recognized that courts might have a role to play in enforcing the constitution.

132 These cases are surveyed in Treanor, Judicial Review in State Courts Before Marbury, supra note 37, at 4-37; Robert Lowry Clinton, Marbury v. Madison and Judicial Review 48-55 (1989); and J.M. Sosin, The Aristocracy of the Long Robe 203-26 (1989). Different scholars count the cases differently; the literature includes estimates as high as nine cases and as low as four.

133 The first published law reports of a state did not appear until Ephraim Kirby published a volume of Connecticut decisions in 1789, followed by Alexander Dallas for Pennsylvania in 1790. Sosin, supra note 132, at 203-04.
what was known about the cases came mostly from sketchy newspaper accounts or from letters and pamphlets written by lawyers who had sought judicial protection for their clients. The handful of men who were pondering judicial review had not yet worked out the theory’s kinks, as they themselves well knew. This was part of the reason Edmund Pendleton chose not to address the matter in Commonwealth v. Caton, explaining that “how far this court . . . shall have power to declare the nullity of a law passed in its forms by the legislative power . . . is indeed a deep, important, and I will add, a tremendous question, the decision of which might involve consequences to which gentlemen may not have extended their ideas.”\textsuperscript{134}

This uncertainty about the precise terms of judicial review existed not only in the 1780s, but for a number of additional decades to come. Judicial review was a moving target, one small piece in a much larger transformation of the role of the judiciary in American life.\textsuperscript{135} There was, at every moment, a range of views both as to its propriety and its justifications. Movement was in the direction of increasing acceptance, fairly rapidly so after 1790, but accurately describing just \textit{what} was being accepted is complicated by the diversity of ideas about fundamentals.

That said, Iredell’s 1786 essay is useful because it was the clearest and best-reasoned presentation of the initial justification for judicial review and because, in most respects, it reflected basic assumptions that were shared by most proponents. Chief among these were the assumptions of popular constitutionalism: the same assumptions made by those who rejected judicial review. The constitution was fundamental law (that is, law made by the people to regulate their rulers) and so not like ordinary law at all. Iredell never suggested, or even hinted,  

\textsuperscript{134} 8 Va. (4 Call) 5, 17 (1782).

\textsuperscript{135} Wood, supra note 115, at 792-93.
that courts should exercise judicial review because they possessed some special competence for
the task, or because interpreting and enforcing laws is what courts do. Rather, he argued that
courts must exercise judicial review, because they are the people’s agents too. To ignore the
unconstitutionality of a law presented in the course of litigation would be to violate their agency.
Hence, they must “take care at their peril” to enforce only constitutional laws or they themselves
would be lawbreakers, acting “without lawful authority.” Rather than overstepping its bounds or
intruding on legislative turf, a court that refused to enforce an unconstitutional law was
following the people’s command—acting within the scope of responsibilities delegated by the
people to the judiciary, which encompassed adjudication.

Nor was this all, for judicial review offered significant pragmatic benefits as well. By
exercising review, judges could act on behalf of the people, supplying a peaceful remedy that
substituted for the “dreadful expedient” of popular resistance and offered relief in circumstances
where it might not otherwise be available.136 James Varnum likewise emphasized this last point
in his argument to the court in *Trevett v. Weeden*:

> But as the Legislative is the supreme power in government, who is to judge
whether they have violated the constitutional rights of the people?—I answer . . .
the people themselves will judge, as the only resort in the last stages of
oppression. But when [legislators] proceed no further than merely to enact what
they may call laws, and refer those to the Judiciary Courts for determination, then,
(in discharge of the great trust reposed in them, and to prevent the horrors of a
civil war, as in the present case) the Judges can, and we trust your Honours will,
decide upon them.137

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136 See Snowiss, supra note 81, at 50

137 See Varnum, supra note 13, at 26. See also Letter from Edmund Randolph to James Madison (Oct. 26, 1782), in 5 Papers of Madison, supra note 59, at 217, 218 (favoring judicial review because “without an accommodation fou[n]ded upon a reasonable construction of the constitution, the appeal must be made to the people”.

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Judicial review, in other words, was not an act of ordinary legal interpretation. It was a *political*—perhaps we should say a “political-legal”—act of resistance. Gordon Wood rightly describes it as “akin perhaps to the interposition of the states that Jefferson and Madison suggested in the Kentucky and Virginia Resolutions of 1798.” Even closer to the point is the resistance to the Stamp Act sought by rebel leaders in 1765, when they urged courts to remain open and carry on business without stamped paper. In refusing to enforce unconstitutional laws, judges were exercising the people’s authority to resist, providing a supplemental remedy for ultra vires legislative acts that averted the need to mobilize popular opposition.

Early proponents of judicial review were quite self-conscious in recognizing the “political-legal” nature of what they were doing. Edmund Randolph initially rejected judicial review when he considered the issue for the first time while preparing to argue for the state in *Commonwealth v. Caton*. Randolph changed his mind as he worked through the issues, but recognizing the extraordinary nature of what he was proposing, stepped out of his role as state attorney general and ascribed the position favoring judicial review to himself alone. He said:

> Do I tremble at the decision of my own mind, that a law against the constitution may be declared void? or do I dread the resentment of the court, when I bear testimony against their competency to pronounce the invalidity of the law?

> No! The revolution has given me a coat of mail for my defense, while I adhere to its principles. That bench too is reared on the revolution, and will arrogate no undue power.

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138 Wood, supra note 115, at 798.

139 See supra notes 16-22 and accompanying text.

140 See Treanor, The Case of the Prisoners, supra note 37, at 511-12.

141 Id. at 512.
George Wythe, who sat as a judge in the same case, was still more candid, melodramatically proclaiming that, if ever a branch of the legislature should overstep its constitutional boundaries:

I shall not hesitate, sitting in this place, to say, to the general court, *Fiat justitia, ruat coelum*; and, to the usurping branch of the legislature, you attempt worse than a vain thing; for, although, you cannot succeed, you set an example, which may convulse society to its centre. Nay more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds, prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further.

The clash between these opposing views of judicial review shaped the doctrine as it emerged. Those who rejected judicial nullification were plainly in the ascendant, as their position more closely conformed to conventional wisdom and expectations. Judicial review was, in the context of the times, such a radical departure from experience that even proponents

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142 Edmund Randolph, Rough Draft of Argument in Respondent v. Lamb, quoted in id. at 512.

143 Commonwealth v. Caton, 8 Va. (4 Call) 5, 8 (1782). In fairness to Wythe, this awful, purple prose may not be his. The report of the case was published by Daniel Call in 1827, some forty-five years after the fact, when everyone connected with the case—including the judges whose opinions Call reported—was dead. See Sosin, supra note 133, at 207. Significant reasons exist to doubt the reliability of Call’s reporting. See 1 Louis B. Boudin, Government By Judiciary 533-34 (1932). Having said that, Wythe’s fellow judge, Edmund Pendleton kept his own notes of the case, and while these are brief, they support the same general interpretation of Wythe’s analysis. Pendleton records Wythe urging “several strong and sensible reasons of the nature of those used by Lord Abblington” in favor of treating the law as void. Edmund Pendleton, Pendleton’s Account of “The Case of the Prisoners,” in 2 The Letters and Papers of Edmund Pendleton, 1734-1803, at 426 (David J. Mays, ed., 1967). As William Treanor explains:

Lord Abingdon’s 1777 *Thoughts on the Letter of Edmund Burke to the Sheriffs of Bristol on Affairs in America* argued that no duty of obedience existed to laws inconsistent with the constitution. Thus, there is at least a possibility that the actual opinion delivered by Wythe reflected a notion of judicial review that was based on the older English-based notion of constitutionality. . . . Under the older view, the citizen had no obligation to obey the unconstitutional statute because that statute violated the compact between governed and governors; disobedience was justified, but it was also tantamount to an act of rebellion.

Treanor, supra note 37, at 534.
regarded its possibility with what Gordon Wood describes as “a sense of awe and wonder.”

“Most Americans,” he says, “even those deeply concerned with the legislative abuses of the 1780s, were too fully aware of the modern positivist conception of law (made famous by Blackstone in his *Commentaries of the Laws of England*), too deeply committed to consent as the basis of law, and from their colonial experience too apprehensive of the possible arbitrariness and uncertainties of judicial discretion to permit judges to set aside laws made by the elected representatives of the people.”

Hence, James Monroe can be found informing Madison as late as 1788 that the Virginia legislature avoided discussing the issue “as calculated to create heats & animosities that will produce harm.”

Advocates of judicial power were thus cautious in formulating the limits of the principle. “In all doubtful cases . . . the Act ought to be supported,” James Iredell conceded in a letter justifying his position to an incensed Richard Dobbs Spaight, “it should be unconstitutional beyond dispute before it is pronounced such.” This limiting principle instantly became an article of faith among the supporters of judicial review, accompanying virtually every statement of the doctrine. We should understand it, moreover, as grounded in something other than simple defensiveness. The principle that laws should be declared void only if “unconstitutional beyond dispute” was a logical corollary given the rationale for judicial action. Judges might be justified in acting as the people’s proxy, to avert reliance on dangerous and undefendable forms of

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144 Wood, supra notes 116, at 796.

145 Wood, supra note 81, at 158.

146 Letter from James Monroe to James Madison (Nov. 22, 1788), in 1 Stanislaus Murray Hamilton, ed., The Writings of James Monroe 196 (1898).

147 Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), in 2 Correspondence of Iredell, supra note 84, at 172, 175.
popular resistance. But they remained mere agents, acting in a manner they presumed their principal had commanded. Such presumptuousness could not be indulged lightly, but should await conditions of near certainty because the principal was capable of acting on its own and retained primary responsibility for doing so.

"Such power in courts would be destructive of liberty."

Even thus confined, early efforts to exercise judicial review drew stinging rebukes. 

Rutgers v. Waddington involved a statute that precluded defendants in trespass actions from pleading in justification that their use of plaintiff’s property was authorized by military order of the occupying British forces. Representing the defendant, Alexander Hamilton urged, first that the statute was inconsistent with the law of nations, which he maintained was incorporated into the New York constitution; and second that it violated the Treaty of Paris, which Hamilton said was binding national law. Following a suggestion in Hamilton’s brief, the court side-stepped the problem, finding it unnecessary to rule on the validity of the Trespass Act because the statute did not explicitly say that it revoked the law of nations or should apply if inconsistent with the treaty. James Duane’s rambling opinion for the court is pure Blackstone, the heart of his analysis lifted straight from the great British jurist’s Commentaries:

The supremacy of the Legislature need not be called into question; if they think fit positively to enact a law, there is no power which can controul them. When the main object of such a law is clearly expressed, and the intention manifest, the Judges are not at liberty, altho’ it appears to them to be

148 If the law violated either the treaty or the law of nations, Hamilton wrote, citing Bonham’s Case, “the act is void . . .—But let us see whether there are not rules of construction which [render] this extremity unnecessary.” The Law Practice of Alexander Hamilton 382 (Julius Goebel et al., eds. 1964)
unreasonable, to reject it: for this were to set the judicial above the legislative, which would be subversive of all government.

But when a law is expressed in general words, and some collateral matter, which happens to arise from these words is unreasonable, there the Judges are in decency to conclude that the consequences were not foreseen by the Legislature; and therefore they are at liberty to expound the statute by equity, and only quodd hoc to disregard it.

When the judicial make these distinctions, they do not controul the Legislature; they endeavor to give their intention it’s proper effect. 149

Notwithstanding Duane’s jurisprudential conservatism, merely exercising this aggressive form of statutory interpretation elicited outrage. The state legislature adopted a resolution denouncing the opinion as “in its tendency subversive of all law and good order, and lead[ing] directly to anarchy and confusion,” 150 which was apparently just enough to blunt a subsequent effort to impeach the judges as well. Shortly thereafter, The New York Packet and the American Advertiser printed an open letter from a committee of nine prominent citizens. Occupying nearly four full columns, the letter accused the court of exercising “a power to set aside an act of the state,” and warned:

That there should be a power vested in courts of judicature whereby they might controul the supreme Legislative power we think is absurd in itself. Such power in courts would be destructive of liberty, and remove all security of property. The design of courts of justice in our government, from the very nature of their institutions, is to declare laws, not to alter them.

149 There is no official report of the case, which can be found in id. at 393-419. The language quoted in text is at page 415. Compare Duane’s recitation to Blackstone’s tenth rule of construction, of which it is a paraphrase. See 1 Blackstone, supra note 2, at *91.

Whenever they depart from this design of their institution, they confound legislative and judicial powers.151

The same reactions followed the refusal of a New Hampshire court to enforce a law eliminating trial by jury in cases for sums of less than ten pounds:152 local newspapers published editorials condemning the decision, and the legislature received petitions demanding that the judges be impeached. A motion to impeach was entertained but narrowly defeated. Instead, state legislators adopted a resolution affirming the law’s constitutionality (by a vote of 44 to 14).153 Six months later, and in the face of continuing pressure, the legislature entertained a motion to impeach that was narrowly defeated, after which they decided to repeal the troublesome law.154 This initiated a tug of war between the branches in which the legislature continued to insist on its prerogatives despite the judiciary’s protests; it took nearly thirty-five years, until 1818-19, before judicial review was firmly established in New Hampshire.155

The case that lay behind James Iredell’s essay, Bayard v. Singleton,156 provoked a similar controversy in North Carolina. In May 1786, Bayard brought an action to recover property

151 The New York Packet and the American Advertiser, Nov. 4, 1784, quoted in id. at 313-14. This letter had been written earlier, at a meeting in a tavern held in September, at which time it was sent to the legislature. Id. at 313 n. 85.

152 The name of the case is unknown, as there was no opinion or official report. Knowledge of the proceedings is based on contemporaneous newspaper accounts. See Clinton, supra note 132, at 53-54.

153 See 2 William Winslow Crosskey, Politics and the Constitution in the History of the United States 970 (1953); Sosin, supra note 132, at 211-12.

154 See id.


156 1 Martin 42 (N.C. 1787).
confiscated by state authorities in 1777. A year before Bayard’s suit had been commenced, the North Carolina legislature enacted a provision requiring the state’s courts to dismiss actions by loyalists seeking to recover property taken during the War. When judges hearing Bayard’s case failed promptly to grant the defendant’s motion to dismiss under this law, they were ordered to appear before the legislature. A committee that included two future delegates to the Federal Convention (William Davie, who was representing Bayard, and Richard Dobbs Spaight) found the judges guilty of the facts charged against them, though they did not recommend any formal sanction.157

Expecting this none-too-subtle legislative message to produce a more agreeable outcome the second time around, the defendant renewed his motion to dismiss. The judges struggled to avoid ruling, trying by various means to persuade the parties to settle.158 Their efforts failed, and in May 1787, “after every reasonable endeavour had been used in vain for avoiding a disagreeable difference between the Legislature, and the judicial powers”—and just as the Federal Convention was getting under way—the court “with much apparent reluctance, but with great deliberation and firmness” denied the defendant’s motion on constitutional grounds.159 Its action incited a violent protest throughout the state and provoked the legislature to deny the judges a pay increase, though the controversy died down after a sympathetic jury promptly returned a verdict for the defendant.160

157 2 Crosskey, supra note 153, at 971-72.

158 These efforts are described in Martin’s report of the case. 1 Martin at 49.

159 Id.

160 Haines, supra note 119, at 206; 2 Crosskey, supra note 153, at 972; Whichard, supra note 125, at 13.
And then there was *Trevett v. Weeden*. James Varnum argued to the court that Rhode Island’s law requiring merchants to accept paper money at face value was unconstitutional because it could be enforced in civil trials without a jury; the court appeared to avoid the issue by dismissing for lack of jurisdiction instead.161 Although the judges had neither declared the law unconstitutional nor even stated forthrightly that they had the power to do so, the governor convened a special session of the legislature, which summoned the court to explain its actions. At first, the judges refused to answer, boldly asserting that they were “accountable only to God and [their] own consciences.”162 After further prodding, they tried to placate the irate legislators by explaining how they had not actually declared the law unconstitutional. The assembly nevertheless formally recorded its dissatisfaction and entertained a motion to dismiss the entire bench. The judges petitioned for an additional hearing, accompanied by a written memorial “disclaim[ing] and totally disavow[ing] any the least power or authority, or the appearance thereof, to contravene or controul the constitutional laws of the State.”163 This ambiguous declaration appeased the assembly just long enough for the judges to keep their seats until the next election, at which time all but one were turned out of office.164

Similar reactions were recorded throughout the 1780s whenever and wherever a court considered exercising review, with the possible exception of Virginia.165 The issue arose early in

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161 See Varnum, supra note 13, at 15-18, 38-39 ("The plea of the defendant, in a matter of mere surplussage, mentions the act of the General Assembly as ‘unconstitutional, and so void;’ but the judgment of the Court simply is, ‘that the information is not cognizable before them.’")

162 Id. at 38.

163 Id. at 45.

164 Sosin, supra note 132, at 217-18.

165 See Treanor, Case of the Prisoners, supra note 37, at 499-500.
that state, in the 1782 case of *Commonwealth v. Caton*. Three prisoners condemned to death for treason petitioned the House of Delegates for a pardon. The House granted their petition, but the Senate demurred. Under the Treason Act, both houses had to approve a pardon, whereas the state constitution appeared to vest this power in either the governor or the House of Delegates. Lawyers for the defendants asked the court to declare the statute void and grant their pardon under the House resolution. The case achieved a degree of notoriety in the state, with letters and newspaper accounts anticipating and debating what was soon being referred to as “[t]he great constitutional question.” Ultimately, the Virginia court, too, avoided having to decide by interpreting the state constitution to permit the act. A number of the court’s members nevertheless opined on their power to set aside unconstitutional legislation, with one (Peter Lyons) firmly opposed, two (George Wythe and James Mercer) just as firmly in favor, and five others undecided or unwilling to address a question that was not necessary to decide the merits.

Unlike in other states, no public outcry followed. William Treanor reports that “[t]here is no record of popular criticism of the two judges who asserted that the judiciary had the power to invalidate statues. There was no move in the Senate against them. Moreover, the Senate joined the House in providing the three prisoners the relief they had sought from the outset.” Treanor attributes this to the unique structure of Virginia politics, whose controlling elite looked more

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166 8 Va. (4 Call) 5 (1782).

167 See Letter from Edmund Pendleton to James Madison (Nov. 8, 1782), in 5 Papers of Madison, supra note 59, at 260, 261 (describing the resolution of “[t]he great constitutional question, as it was called in our papers”); Treanor, Case of the Prisoners, supra note 37, at 504-05.

168 For an exceptionally useful and enlightening discussion of the case, see id. at 500-540.

169 Id. at 539-40.
favorably on lawyers and lawyering than in other states. But while this may have been sufficient to dampen public displays of opposition, it did not mean there was none—as indicated by Monroe’s report to Madison that state legislators avoided discussing the issue because it made people too angry.\textsuperscript{170} In any event, the Virginia experience was unique, and, elsewhere, talk of judicial review predictably embroiled courts in controversy.

The status of judicial review on the eve of the Federal Convention was thus uncertain at best. It was not even clear just what the argument was. There had been few cases, and no court had yet published an opinion affirmatively explaining, much less defending, judicial authority to nullify legislation. Although one or two courts had actually refused to enforce a law on constitutional grounds, most had avoided the issue. The extra-judicial literature was barely more informative. There was James Iredell’s written justification, which made arguments similar to those advanced by James Varnum in \textit{Trevett v. Weeden}. Both men’s views had been published, but neither publication circulated widely. Certainly there is nothing to suggest that theirs was a dominant view, even among those who might have looked favorably on judicial intervention.

A number of scholars have suggested that the doctrine of judicial review that emerged in the 1780s was limited to laws regulating courts and judicial process.\textsuperscript{171} They rely mainly on the fact that four of the six Revolutionary era cases involved the right to trial by jury,\textsuperscript{172} while one

\begin{footnotesize}
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\item \textsuperscript{170} See supra note 146 and accompanying text.
\item \textsuperscript{172} The cases are \textit{Holmes v. Walton} in New Jersey, the so-called Ten Pound Act cases in New Hampshire, \textit{Trevett v. Weeden} in Rhode Island, and \textit{Bayard v. Singleton} in North Carolina. There is some question about whether \textit{Bayard} should be classified as a jury case. The law at issue in the case did more than deprive a class of plaintiffs of their right to a jury: it stripped the state court of power to hear their cases altogether. Nevertheless, the judges based their
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other (Rutgers v. Waddington) technically concerned a pleading rule. Certain statements made at the time appear to support this narrow understanding of the doctrine. Elbridge Gerry observed at the Federal Convention that judges had “a sufficient check agst. encroachments on their own department by their exposition of the laws which involved a power of deciding on their Constitutionality,” while James Wilson wanted a Council of Revision because, even assuming judicial review, “[t]he Judiciary ought to have an opportunity of remonstrating agst projected encroachments on the people as well as on themselves.” Against the background of the actual decisions, such statements make it seem plausible to assume the existence of a “middle” position confining review to laws directly regulating courts.

Yet on closer inspection, it seems unlikely that anyone at the time was thinking in these terms. Most of the cases may have involved questions that would today be classified under the rubric of adjudicatory process, but not all of them. Commonwealth v. Caton concerned the right to a pardon, which is a non-judicial right, and the defendant’s actual challenge in Rutgers v. Waddington was to the legislature’s power to eliminate a substantive justification for his conduct. Given the small number of cases involved, these are telling exceptions.

Even the jury cases provide little support for the notion that judicial review was restricted to laws regulating courts. Today, we think of the jury mainly as a procedural device, but the

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173 1 Farrand, supra note 35, at 97 (Madison’s Notes, June 4, 1787).

174 2 id. at 73 (Madison’s Notes, July 21, 1787).

175 I made this argument myself in earlier work. See Larry Kramer, The Supreme Court, 2000 Term—Foreword: We the Court, 115 Harv. L. Rev. 4, 59-60 (2001).
eighteenth century view was more complex. Juries existed first and foremost to protect the people from the government, including courts. Laws restricting the right to a jury were seen not as legislative encroachments on judicial power, but rather as governmental efforts to “destroy the Power of the People.” ¹⁷⁶ One might just as well deprive citizens of the right to vote as deprive them of trial by jury, John Adams explained, for both rights equally prevented “Arbitrary Government” by requiring “the Concurrence of the Voice of the People.”¹⁷⁷ Where the franchise constituted “the Part which the People are by the Constitution appointed to take, in the passing and Execution of Laws,” 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 Controil, as decisive a Negative, in every Judgment of a Court of Judicature.¹⁷⁸

All of which is not to deny that juries were part of the judicial process. But because juries were so much more, one cannot infer anything about the scope of judicial review from the fact that many of the early cases were concerned with them.

Read in context, even the remarks quoted above from Elbridge Gerry and James Wilson do not support a view of judicial review as limited to laws regulating courts and process. Consider Wilson’s discussion of the Council of Revision. The first thing one notices is that others in the same discussion described judicial review in broader terms, yet did not seem to


¹⁷⁷ Id. at 228-29.

¹⁷⁸ Id.
understand themselves (and were not understood by others) to be making a different point. 179

The same is true of statements Wilson himself made after the Convention, which likewise refer
to judicial review with no hint that it is limited to laws regulating judicial process. 180 It is
possible, of course, that Wilson changed his mind during the course of the discussions in
Philadelphia and that he was persuaded to embrace a broader understanding of judicial review.
It seems more likely, however, that he was saying the same thing both times. To describe
judicial review in terms of departmental self-defense was an eighteenth-century phrasing that
meant nothing more or different than judicial power to consider the constitutionality of laws
generally.

Recall that the dispute over judicial review revolved mainly around questions of agency
and delegated authority. Those who opposed the practice believed that constitutional limits were
a direction from the people to the legislature alone; if the legislature overstepped its bounds, that
was a matter for the people themselves to address. By investigating the constitutionality of a
statute, courts were meddling in legislative affairs. On the other side, a small group of
sophisticated legal thinkers had concluded that constitutional limits became a judicial matter
whenever a potentially unconstitutional law was relied on in litigation. They pointed out that the
constitution delegated responsibility for adjudication to the judiciary, which was acting within its
proper arena when enforcing constitutional limits in the context of adjudication—which was,

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179 Both Luther Martin and George Mason suggested that judicial review would guard against unconstitutional
laws generally, disagreeing only about the desirability of a Council for additional protection against unwise ones. See
2 Farrand, supra note 35, at 76 (Madison’s Notes, July 21, 1787)(remarks of Luther Martin); id. at 78 (remarks of George
Mason).

180 See James Wilson, Speech at the Pennsylvania Convention (Dec. 1, 1787), in 2 DHRC, supra note 72, at 450-51.
indeed, required to enforce constitutional limits in that context. For the legislature to expect, much less to require, a court to ignore constitutional limits was tantamount to forcing judges to act illegally, thereby corrupting the process of adjudication. This is what Wilson and Gerry meant when referring to judicial review in terms of encroachments on the judiciary: protecting adjudication from legislative corruption through the medium of unconstitutional laws. But their concern encompassed any unconstitutional law, without regard for its subject matter—which is why no court at any time ever drew the suggested distinction or implied that judicial review was applicable to less than the full panoply of constitutional measures.

In saying all this, we must be careful not to lose sight of how seldom the issue came up in the years before the Federal Convention. Obsessive attention to the minutiae of judicial review in the early 1780s can easily mislead. An argument to assign courts a role in enforcing the constitution may have been in the air, but it was hardly one that had achieved widespread notice or approbation or that could be called established. Our intensive focus on the question is an artifact of what judicial review subsequently became and of our natural curiosity, as a result, to understand its origins. In trying to get a sense of the historical context, however, it is important not to exaggerate the significance of what was, in fact, insignificant to the vast majority of Americans. For most, including most politicians and public leaders, the focus remained on traditional popular means of enforcing the constitution, the major change being a new emphasis on elections. Judicial review was either something they had never heard of or thought about, or, at most, a barely audible note in the background that had not, as yet, attracted their attention in a serious way.
Chapter Four

Courts, as Well as Other Departments, Are Bound By That Instrument

ACCEPTING JUDICIAL REVIEW

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The United States experienced a period of dizzying economic growth in the 1790s. Propelled by war in Europe, demand for American produce and raw materials skyrocketed.\(^1\) Profiting as well from Alexander Hamilton’s brilliant stewardship of the Treasury Department, not to mention the advantage accruing to the United States as possessor of the world’s largest neutral fleet, the value of domestic exports more than tripled, while the value of re-exports increased by fifty-fold and earnings from the carrier trades quadrupled. New wealth seeped into every sector of the economy and every region of the country as demand for skilled and unskilled labor mushroomed and wages soared.\(^2\)

All the more remarkable in the face of this unparalleled good fortune, the 1790s were also a time of “vicious party warfare” and “almost hysterical fear.”\(^3\) Federalists delivered precisely the kind of good government they had promised during the ratification campaign, yet domestic political conflict achieved a level of ferocity exceeded only by the Civil War in its

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paranoid and frenzied overtones. Reassessing these years in 1813, Thomas Jefferson and John Adams disagreed about which side bore the greater blame, but concurred that “terror” and “terrorism” were apt descriptions of what had transpired.4

The source of all this turmoil lay in an escalating series of political and constitutional crises, as men who had collaborated for nearly two decades to create a stable Union suddenly discovered they had profoundly different ideas about what to do with it. Along the way, the Federalists of the late 1780s saw all their careful plans for bringing politics under their control fail, and they learned that almost everything they had thought about how the new government would function was wrong. Enlarging the sphere of the Republic did not produce a filtration of talent, did not “extract from the mass of Society the purest and noblest characters” to serve in government.5 Nor did it frustrate the operation of factions, as political parties of a kind the Founding generation never imagined (and still did not want) rapidly began to form.6 An important impetus for this development was the unexpectedly dominant role assumed by the Chief Magistrate, whose cabinet also upended assumptions about separation of powers by using “the art and address of ministerial management” to control Congress’s agenda.7 Federalism, too,


7 See Joanne B. Freeman, “The Art and Address of Ministerial Management”: Secretary of the Treasury Alexander Hamilton and Congress, in Neither Separate Nor Equal: Congress in the 1790s, at 269-93 (Kenneth R. Bowling & Donald R. Kennon, eds. 2000).
failed to work as expected. Rather than suspiciously eyeing each other from opposite sides of a natural divide of ambition and institutional interest, state and federal officials were absorbed into the emerging parties and worked together or in opposition based on party rather than institutional affiliation. The nation survived, barely, due in no small part to the pragmatism and flexibility of its Founding Fathers, who proved to be better politicians than political philosophers and who found ways to make the Constitution work even amidst their bitter conflicts and despite their earlier miscalculations. (A fact that ought to make one wonder why any sensible person, even a lawyer, would privilege the speculative writings of the 1780s over the hard-earned experience of subsequent decades.)

The controversies of these years are familiar, having been recounted in detail by many fine historians. Each new crisis raised or was entwined with constitutional questions. All were fought with the tools of popular constitutionalism, though these were modified some as the decade proceeded and traditional forms of politics were absorbed by the developing parties. None of the major constitutional issues made its way into court. In a decade noteworthy for its many constitutional crises, the validity of a federal tax on carriages was, literally, the most momentous constitutional question to be faced by the Supreme Court. A handful of other

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8 See Larry Kramer, Putting the Politics Back Into the Political Safeguards of Federalism, 100 Colum. L. Rev., 215, 274-78 (2000).

9 Some of the better-known, and better, political histories of the 1790s include Elkins & McKitrick, supra note 1; Sharp, supra note 3; John C. Miller, The Federalist Era (1960); Stephen G. Kurtz, The Presidency of John Adams (1957); Manning J. Dauer, The Adams Federalists (1953).


11 Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796).
constitutional issues made their way to the High Court during these years, of which the most significant was the Justices’ decision to uphold jurisdiction in an action by a private party against the state of Georgia.\(^\text{12}\) The stir this created led to the adoption of the Eleventh Amendment a few years later. The question of federal common law was also controversial in the 1790s, though the controversy as it emerged partly involved fears that, if the common law was available as a source of federal law, then Congress could alter it (as federal legislators attempted to do in the Sedition Act). Hence, the focus of political concern centered as much on the behavior of Congress as that of courts—though courts too became a sore point for Republicans. In any event, the role of judges remained a peripheral matter until the end of the decade, when certain federal (and Federalist) judges made the mistake of too eagerly promoting prosecutions under the Sedition Act. It was a mistake for which the Republicans would make them pay after Jefferson’s election.

“A Matter of High Gratification to Every Republican and Friend of Liberty.”

Though federal courts remained mostly on the sidelines during the major battles of the Federalist era, it was not as if nothing happened to them. But where the 1790s were a time of tremendous revision and reformation for other organs of the federal government, they were mainly years of consolidation for the judiciary—at least with respect to judicial review, as the controversial new practice began to find more widespread acceptance. In contrast to the handful of cases in the first decade after independence, the second decade produced some twenty cases in the state courts in which at least one judge asserted the courts’ power to invalidate a statute.

\(^{12}\) Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).
There were also a dozen or so cases in the new federal circuit courts, plus perhaps another half dozen or more in the Supreme Court.\textsuperscript{13}

Some of these cases provoked criticism, but nothing compared to the 1780s. By way of illustration, consider the controversy surrounding\textit{Hayburn’s Case}, in which federal judges for the first time questioned the constitutionality of an act of Congress. Under the \textit{Invalid Pensions Act}, adopted in March 1792, injured veterans could apply for benefits to their state’s federal circuit court, which was comprised of a district court judge joined by two Supreme Court Justices “riding circuit.” The circuit court was supposed to determine whether an applicant was eligible (that is, whether the alleged disability was due to injuries sustained in the war) and to submit its findings in writing to the Secretary of War. The Secretary was authorized to review the court’s determination and to withhold payment if he had “cause to suspect imposition or mistake.”\textsuperscript{14}

Within just a few months, all three federal circuit courts—comprising every Supreme Court Justice—had questioned the Act’s constitutionality on separation-of-powers grounds, objecting that non-judicial duties had been assigned to federal judges acting in their judicial capacity.\textsuperscript{15} Significantly, and still more evidence of the persistence of popular constitutionalism, none of these courts exercised judicial review in the context of deciding a case or ruling on an application. Instead, all three chose to proceed as the Virginia court of appeals had done in its

\footnotesize{\textsuperscript{13} See Maeva Marcus, Judicial Review in the Early Republic, in Launching the “Extended Republic”: The Federalist Era 25 (Ronald J. Hoffman & Peter J. Albert eds., 1996); William Michael Treanor, Judicial Review in State Courts Before Marbury 37 (unpublished manuscript on file with author); William Michael Treanor, Judicial Review in Federal Courts Before Marbury (unpublished manuscript on file with author).}

\footnotesize{\textsuperscript{14} Act of Mar. 23, 1792, ch. 11, 1 Stat. 243 (1792).}

\footnotesize{\textsuperscript{15} See Maeva Marcus & Robert Teir, Hayburn’s Case: A Misinterpretation of Precedent, 1988 Wisc. L. Rev. 527, 529-34.}
“Respectful Remonstrance” of 1788: by writing formal letters of protest addressed to the appropriate political official. In this instance, that official was President Washington because, as the judges of the Middle Circuit explained, “[t]o you it officially belongs to ‘take care that the laws’ of the United States ‘be faithfully executed.” A subsequent effort by Attorney General Edmund Randolph to force a decision from the Supreme Court was first rebuffed on procedural grounds and then delayed while Congress solved the problem with new legislation. There was, as a result, no formal decision from the Supreme Court declaring a federal statute unconstitutional. But the views expressed by the Justices in their letters—as well as the refusal of some to proceed under the act—were publicly known, and the matter attracted attention both inside and outside of Congress.

Many disapproved, but their reactions were surprisingly mild. Fisher Ames reported that the judges’ actions were “generally censured as indiscreet and erroneous.” William Vans Murray wrote that “without entering on th[e] great question” whether a court should ever refuse to enforce a properly enacted law, “[i]t seems pretty generally admitted that the Judges chose

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18 A number of the Justices found a way around their constitutional objections by interpreting the statute to appoint them as commissioners in a non-judicial capacity. Justice Wilson, at least, refused to go through a charade and declined to hear any petitions. See Casto, supra note 10, at 176-77.


rather a singular occasion – as it is merely a personal duty which they avoid by the exercise of the right.”

Newspaper opinion was divided. The pro-Administration Gazette of the United States adopted a neutral stance, observing only that “[i]t might be arrogant to express a doubt whether the opinion [the judges] have expressed be sound,” while plaintively “hop[ing] that the invalids will not be neglected.” The opposition National Gazette, in the meantime, had nothing but praise for the judges, calling their actions a “matter of high gratification to every republican and friend of liberty.” The General Advertiser recorded only that “the novelty of the case produced a variety of opinions.” But no one was heard shrieking about a usurpation of power, and there were no calls for anyone’s impeachment, at least none that were taken seriously. One irritated supporter of the judges, who complained in the General Advertiser about “high-fliers, in and out of Congress” who “talk of nothing but impeachment! impeachment! impeachment!” was answered the very next day by “Camden,” who insisted this was “not true” while also wondering why anyone would assume that three circuit judges were more capable than Congress at interpreting the Constitution.

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22 Gazette of the United States, May 9, 1792, in id. at 58.
23 National Gazette, April 16, 1792, in id. at 51, 52; see also National Gazette, May 10, 1792, in id. at 59 (exercise of judicial review “may be contemplated under some very pleasing aspects”).
24 General Advertiser, April 13, 1792, in id. at 48.
25 General Advertiser, April 20, 1792, in id. at 54; Camden, General Advertiser, April 21, 1792, in id. at 55.
More indicative of the new mood was the reaction to the 1792 decision in *Champion & Dickason v. Casey*, in which a federal circuit court for the first time invalidated a state law on Contract Clause grounds—in this instance, a Rhode Island law retroactively extending the time to pay a debt. In sharp contrast to *Trevett v. Weeden*, not only was there no public outcry, but the Rhode Island legislature resolved that “[i]n conformity to [the] decision of the Circuit Court,” in the future it “would not grant to any individual an exemption from arrests and attachments for his private debts, for any term of time.”

Similarly, when a federal circuit court in Connecticut struck down a state statute depriving British creditors of interest accrued during the war, its actions were praised as giving “general satisfaction,” and one newspaper hoped that the law struck down “might never rise again in this world to our shame, or the world to come to our confusion.”

One should not exaggerate the degree of change: very few laws were actually struck down. But attitudes were definitely changing.

Particularly telling in this regard were the deliberations in Congress, which attest to the widening acceptance of the possibility and rightness of judicial review as an element of the

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26 There is no official report. The case is described in Charles Warren, Earliest Cases of Judicial Review by Federal Court, 32 Yale L.J. 15, 26-28 (1922). See also Julius S. Goebel, 1 The Oliver Wendell Holmes Devise—History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 589 (1971).


28 Maryland Journal (Baltimore), May 17, 1791, quoted in 6 DHSC, supra note 16, at 123.

29 Columbian Centinel (Boston), May 11, 1791, quoted in id. n.6.

30 See Treanor, Judicial Review in State Courts Before Marbury, supra note 13, at 37, 43, 49. Most of the federal cases involved questions pertaining to the supremacy of federal over state law and so were easy under the Supremacy Clause—though only four decisions went against state law. The only federal laws called into question were the Invalid Pension Act at issue in Hayburn’s Case, 2 U.S. (2 Dall.) 409 (C.C.D. Pa.1792), and the carriage tax addressed in Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796).
constitutional system. A lengthy debate in the House of Representatives over the President’s removal power in June 1789 generated considerable discussion of the courts’ role. There was a great deal of ambiguity and confusion about the scope of judicial review—with a broad range of theories and understandings represented—but most speakers accepted or assumed its existence. This was true throughout the decade. In his first long speech explaining the reasoning behind a Bill of Rights, James Madison picked up on a remark made to him in a letter from Jefferson and argued that, if certain rights were incorporated into the Constitution, “independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights.” And in protesting the willingness of some members of the House of Representatives to take up a Quaker petition on slavery, Georgia Representative Abraham Baldwin declared himself without fear that the House could interfere with the South’s peculiar institution because, even if such a bill got past the Senate and the President, it would still need “the approbation of the Supreme Court of the United States . . . probably one of the most respectable Courts on earth.” During the famous debate over Hamilton’s Bank bill, a number of speakers on both sides of the question referred to the judiciary’s power to review the constitutionality of the law. Similar remarks

31 See Marcus, supra note 13, at 33-35.
32 See 11 Documentary History of the First Federal Congress 842-939 (Charles Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds 1992)(hereafter cites as DHFFC)(debates in the House of Representatives, June 16-17, 1789), see especially comments by William Smith at 849, 876, 935-36; Alexander White at 873, 957; Elbridge Gerry at 879, 931, 976, 1022; Fisher Ames at 884; Michael Jenifer Stone at 893, 918; John Laurence at 911; Theodore Sedgwick at 946; Abraham Baldwin at 996, 1007-08; Peter Silvester at 1010.
33 Amendments to the Constitution, in 12 Papers of Madison, supra note 5, at 196, 207 (speech to the House of Representatives, June 8, 1789); see Letter from Thomas Jefferson to James Madison (March 15, 1789), in id. at 13.
34 Speech to the House of Representatives, March 18, 1790, quoted in Marcus, supra note 13, at 34.
35 See, e.g., Speech by John Laurance, February 4, 1791, in 14 DHFFC, supra note 31, at 404; Speech by Michael Jenifer Stone, February 5, 1791, in id. at 431; Speech by Elias Boudinot, February 5, 1791, in id. at 440-41.
were made during debates on a variety of other matters as well, including the Post Office Bill, the Carriage Tax Bill, the Foreign Intercourse Bill, and the Sedition Act.36

As political divisions sharpened and grew bitter, first one side then the other might opportunistically invoke or oppose the authority of the Supreme Court to invalidate particular legislation. But acceptance of the Court’s general power to examine the constitutionality of laws was at all times, if not uncontroversial, at least acknowledged. It was only at the close of the decade, after Republicans learned what a determined Federalist bench could do with the Sedition Act, that some of Jefferson’s supporters began to rethink the practice more globally, though even then seldom to the point of denying the propriety of review altogether. A few of the most radical Republicans questioned the legitimacy of judicial review in any form during the debate over repeal of the Judiciary Act of 1801,37 but most were content to assert the inferiority and subordination of any judicial check to politics, leaving courts free to dare to exercise review with a threat of impeachment hanging over their heads.38 As one Representative put it, “although [refusing to enforce unconstitutional laws] is a right of which every officer of the United States, as such, is constitutionally possessed, for the due exercise of this, as also of all other such rights, he is responsible. He is not vested with a right to do wrong.”39

36 See quotations collected in Charles Warren, Congress, the Constitution, and the Supreme Court 105-18 (1935).


38 See, e.g., speech of Stevens Thomas Mason, in 11 Annals of Congress, supra note 37, at 59; speech of Josiah Smith, in id. at 698-99.

39 Speech of John Bacon, in id. at 983.
“Do Actually Decide On Behalf of the People.”

Modern commentators often seem surprised at the volume of evidence supporting judicial review before *Marbury*, as well as baffled by the apparent absence of significant controversy. They should not be. For what achieved acceptance in these years was not new; nor was it what we think of today as judicial review. What achieved acceptance in the 1790s was the theory of review formulated by men like James Iredell in the 1780s. Representatives in Congress might prattle on about the power of courts to do this or that, thinking only of the bill in front of them and whether they liked it or not. But judges tended to be more circumspect in explaining and acting on their newfound authority, and the practice as it actually emerged in the courts closely tracked the model articulated in the years leading up to the adoption of the Federal Constitution—a model whose defining characteristics were thoroughly grounded in popular constitutionalism. Courts exercising judicial review in the 1790s made no claims of special or exclusive responsibility for interpreting the Constitution. They justified their refusal to enforce laws as a “political-legal” act on behalf of the people, a responsibility required by their position as the people’s faithful agents. Judicial review was a substitute for popular action, a device to maintain popular sovereignty without the need for civil unrest. It was, moreover, a power to be employed cautiously, only where the unconstitutionality of a law was clear beyond doubt—though in making these determinations judges did not confine themselves strictly to the text but drew on well-established principles of the customary constitution as well.

James Wilson’s “Lectures on Law” of 1791, among the decade’s most significant scholarly treatments of judicial review, illustrate this conception. Given in honor of his

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40 See, e.g., Goebel, supra note 26, at 589-92; Currie, supra note 10, at 33, 39-41.
appointment as a law professor at the College of Pennsylvania, Justice Wilson had grand
ambitions for these inaugural lectures, which were delivered to an audience of notables that
included both the President and Vice President of the United States. Wilson wanted nothing less
than to produce a complete philosophy of American law, grounded in psychology and theology
as well as jurisprudence. The resulting lectures, which were published only posthumously, did
not live up to these high aspirations. There are moments of real brilliance, but Wilson’s analysis
is uneven in quality, often pedantic, and occasionally quite strange.

Wilson drifted into a discussion of judicial review near the end of a lecture comparing the
constitutions of the United States and Great Britain. Despite his stature as a Justice on the first
Supreme Court, not to mention his important role in framing and ratifying the Constitution,
Wilson’s argument for judicial review has attracted far less attention than Hamilton’s better-
known Federalist 78 or even Iredell’s newspaper essay. This is probably due partly to the
failure of Wilson’s lectures generally and partly to posterity’s inexplicable neglect of this
crucially important Founder. But the explanation could also be that Wilson mainly regurgitated
Hamilton’s and Iredell’s arguments, adding little or nothing that was new.

For Wilson, as for these earlier writers, judicial review was not a consciously crafted
feature of the Constitution so much as an accidental, if fortunate, byproduct of its status as
supreme law. Courts were not specially charged with interpreting or enforcing the Constitution,
but neither could they ignore it. “The business and the design of the judicial power is, to
administer justice according to the law of the land,” and the law of the land necessarily included
the Constitution: “that supreme law” to which “every other power must be inferiour and

41 See Introduction to 1 The Works of James Wilson 37-40 (Robert Green McCloskey ed., 1967); Page Smith,
Courts became involved in constitutional interpretation and enforcement not because the Constitution was ordinary law within their special province, but because judges were no less obligated to respect the Constitution’s commands than any other institution or citizen.

Like Hamilton, Wilson made his point by analogy to a conflict of laws, though where Hamilton posited a choice between an earlier and a later law, Wilson used two contradictory laws. “According to two contradictory rules,” he observed, “justice, in the nature of things, cannot possibly be administered.” It followed that if both rules were to “come regularly before the court, for its decision on their operation and validity,” one of them “must, of necessity, give place to the other.” And if the two rules were the Constitution and a statute “manifestly repugnant to some part of [it],” it was obvious which rule this had to be:

The supreme power of the United States has given one rule: a subordinate power in the United States has given a contradictory rule: the former is the law of the land: as a necessary consequence the latter is void, and has no operation. In this manner it is the right and it is the duty of a court of justice, under the constitution of the United States, to decide.

Like Iredell, Wilson emphasized that judges could not do otherwise without acting illegally themselves. “If that constitution be infringed by one [department],” he urged, “it is no reason that the infringement should be abetted, though it is strong reason that it should be discountenanced and declared void by the other.” Reflecting the same pragmatism as Iredell,

42 1 Works of Wilson, supra note 41, at 329.
43 Id.
44 Id. at 329-30.
45 Id. at 330.
46 Id.
Wilson celebrated “[t]he effects of this salutary regulation,” a fortuitous means to secure the “bounds of the legislative power” by rendering congressional transgressions “vain and fruitless.”

Wilson’s is one of a handful of extrajudicial treatments of judicial review in the 1790s. Yet if scholarly analysis was rare, a surprising number of judges (surprising, at least, by comparison to the 1780s) chose to address judicial review in written opinions. Of these, the opinions in *Kamper v. Hawkins* were by far the best known and most influential in the years before *Marbury v. Madison*. Kamper was part of a prolonged farce over court reform that played itself out in Virginia during the 1780s and 90s. Having botched its response to the judges’ “Respectful Remonstrance” of 1788, the Virginia legislature kept searching for cheap ways to staff and run a new district court. In 1789, as part of a comprehensive package of reforms, it enacted legislation giving district court judges “the same power of granting injunctions . . . as is now had and exercised by the judge of the high court of chancery.” The validity of this grant of power came before the General Court in 1793, which ruled unanimously that the legislature had acted improperly. In a sign of the changing times, on this iteration the court expressed its views in the context of a case—through judicial review—rather than seeking relief by appealing directly to the public, as it had done five years earlier.

Writing seriatim, four of the five judges rested their decisions on constitutional grounds, holding that the legislature could not assign the same person functions of more than one judicial

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47 See Charles Grove Haines, The American Doctrine of Judicial Supremacy 104 (1914). This influence was due in no small measure to the fact that the opinions in *Kamper* were quickly published in pamphlet form and thus more accessible than other opinions in an age before official reports were common. Id.; Margaret V. Nelson, The Cases of the Judges: Fact or Fiction?, 31 Va. L. Rev. 243, 251 (1945).

office. Judge James Henry disagreed with his brethren in this respect, finding that “the legislature were fully authorized by the form of government, to appoint the district judges to exercise a chancery jurisdiction,” but that the appointments had not been made according to the proper procedure. Id. at 52-53.

It is “the first law of the land,” and “a rule to all the departments of the government, to the judiciary as well as to the legislature.” As the first law of the land, moreover, “whatsoever is contradictory thereto, is not the law of the land.” It is void, not law at all—a fact every department is duty-bound to acknowledge in the course of doing business, judges no less than anyone else:

Now since it is the province of the legislature to make, and of the executive to enforce obedience to the laws, the duty of expounding must be exclusively vested in the judiciary. But how can any just exposition be made, if that which is the supreme law of the land be withheld from their view?

Spencer Roane’s opinion laid out the pragmatic basis for acting, namely, to provide a peaceful means of securing the supreme authority of the people. Roane agreed with Tucker that it was illogical to say that judges must blind themselves to constitutional considerations. “In expounding laws,” he observed, “the judiciary considers every law which relates to the subject: would you have them to shut their eyes against that law which is of the highest authority of any,

49 Judge James Henry disagreed with his brethren in this respect, finding that “the legislature were fully authorized by the form of government, to appoint the district judges to exercise a chancery jurisdiction,” but that the appointments had not been made according to the proper procedure. Id. at 52-53.

50 Id. at 71.

51 Id. at 78, 79 (emphasis added).

52 Id. at 81.

53 Id. at 79.
or against a part of that law, which either by its words or by its spirit, denies to any but the people the power to change it?” More than just illogical, the proposition was foolish, for it would remove the institution most capable of supplying an orderly resolution to conflicts between the people and their governors. Reiterating an argument made by the North Carolina court in *Bayard v. Singleton*, Roane insisted that the judges are “not only the proper, but a perfectly disinterested tribunal” who “do actually decide on behalf of the people” in resolving what “is in fact a controversy between the legislature and the people.”

John Tyler was of a like mind, though he emphasized the need for judicial review if judges were not to act illegally themselves. The constitution is “the great contract of the people,” and it binds all three branches equally to ensure that it is “faithfully and rightly executed.” The legislature acts illegally when it enacts laws that violate the constitution, and judges who enforce such laws become party to the same illegal act: “To be made an agent, therefore, for the purpose of violating the constitution, I cannot consent to.—As a citizen I should complain of it; as a public servant, filling an office in one of the great departments, I should be a traitor to my country to do it.” Tyler returned to the point in the conclusion of his opinion, this time setting it on more personal grounds as the act not of a judge, but of a citizen who believed in the importance of the constitution:

> To conclude, I do declare that I will not hold an office, which I believe to be unconstitutional; that I will not be made a fit agent, to assist the legislature in a

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54 Id. at 38-39.
55 Id. at 39.
56 Id. at 59.
57 Id. at 61.
violation of this sacred letter; that I form this opinion from the conviction I feel that I am free to think, speak, and act, as other men do upon so great a question.58

At the same time, Tyler cautioned, judges must be careful in taking it upon themselves to disparage what the legislature had done. “[T]he violation must be plain and clear, or there might be danger of the judiciary preventing the operation of laws which might be productive of much public good.”59

Kamper provided the single most elaborate discussion of judicial review in the 1790s, but the opinions of other courts were similar in both tone and reasoning. If there was any respect in which Kamper was unrepresentative, it was that other judges took even greater pains to emphasize the importance of limiting judicial intervention to laws whose unconstitutionality was clear (an argument made in Kamper only by Judge Tyler).60 The federal courts were particularly insistent on this point, though state courts routinely noted it as well.61 James Iredell recorded Justice Wilson and Judge Peters agreeing on circuit in United States v. Ravara that “tho an Act of Congress plainly contrary to the Constitution was void, yet no such construction should be given in a doubtful case.”62 Justice Chase similarly announced in Calder v. Bull that “if I ever exercise the jurisdiction [to review legislation,] I will not decide any law to be void, but in a very

58 Id. at 65-66.
59 Id. at 61.
60 See Casto, supra note 10, at 222-30; Sylvia Snowiss, Judicial Review and the Law of the Constitution 59-63 (1990); Haines, supra note 47, at 176-78.
61 See, e.g., Respublica v. Duquet, 2 Yeates 493, 498 (Pa. 1799) (“we must be satisfied beyond doubt, before we can declare a law void”).
62 Recollections of James Iredell, quoted in Casto, supra note 10, at 223; Ravara is found at 2 U.S. (2 Dall.) 297 (C.C.D. Pa. 1793).
clear case,”\textsuperscript{63} reiterating a point he had made previously in \textit{Hylton v. United States}.\textsuperscript{64} Bushrod Washington said much the same thing in \textit{Cooper v. Telfair}, noting that “the presumption, indeed, must always be in favour of the validity of laws, if the contrary is not clearly demonstrated.”\textsuperscript{65} William Paterson concurred, observing that “to authorise this Court to pronounce any law void, it must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative application.”\textsuperscript{66} The Supreme Court was as good as its word, too, reaching to uphold a federal tax law in \textit{Hylton v. United States}\textsuperscript{67} and generally showing great reluctance to find even state laws unconstitutional.\textsuperscript{68}

\textit{Hylton} is particularly interesting in this respect, inasmuch as the Washington Administration trumped up the case for the sole purpose of obtaining a judicial decree that a federal statute was constitutional.\textsuperscript{69} Worried about growing opposition to a tax on carriages, federal officials contrived with Daniel Hylton to create a litigation vehicle for the Supreme Court to express its opinion—hoping that word from the Court might dampen a spreading popular movement to refuse payment on constitutional grounds. “I consider the question as the greatest one that ever came before [the Supreme] Court,” Attorney General William Bradford wrote in

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\item \textsuperscript{63} 3 U.S. (3 Dall.) 386, 395 (1798).
\item \textsuperscript{64} 3 U.S. (3 Dall.) 171, 173, 175 (1796).
\item \textsuperscript{65} 4 U.S. (4 Dall.) 14, 18 (1800).
\item \textsuperscript{66} Id. at 19.
\item \textsuperscript{67} 3 U.S. (3 Dall.) 171 (1796).
\item \textsuperscript{68} The only case in which the Court held a state law unconstitutional was Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796), and it stretched pretty far to avoid doing so in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).
\item \textsuperscript{69} The story of this case is recounted in detail in 4 The Law Practice of Alexander Hamilton 297-340 (J. Goebel & J. Smith eds., 1980) and Robert P. Frankel, Jr., Before Marbury: Hylton v. United States and the Origins of Judicial Review, 28 J. Sup. Ct. Hist. 1 (2003); Casto, supra note 10, at 101-05.
\end{itemize}
urging recently-retired Treasury Secretary Alexander Hamilton to argue the case for the government. “[I]t is of the last importance not only that the act should be supported, but supported by the unanimous opinion of the Judges and on grounds that will bear the public inspection.”\textsuperscript{70} The obliging Justices overlooked an astonishing number of procedural obstacles\textsuperscript{71} and dutifully issued opinions supporting the government’s authority—stretching as necessary to uphold the law by emphasizing policy over constitutional text and structure.\textsuperscript{72} Contrary to the usual practice, which called for a Justice who decided a case on circuit to sit out, even Justice Wilson joined the effort, adding a brief statement to let everyone know that his “sentiments, in favor of the constitutionality of the tax in question, ha[d] not been changed.”\textsuperscript{73}

The “doubtful case” rule also explains why judges invariably illustrated their understanding of judicial review with blatantly unconstitutional laws, the most common example

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\textsuperscript{71} First, Hylton stipulated that he had failed to pay taxes on 125 carriages, when in fact he owned only one. This was necessary to satisfy the amount in controversy required for the Supreme Court to exercise appellate jurisdiction, though Hylton went along only after the government agreed that any judgment against him could be discharged for $16—the tax and penalty on a single carriage. Second, even this phony pleading made the amount in controversy exactly $2000 (125 carriages at $16 per carriage), whereas the Judiciary Act conferred jurisdiction only if “the matter in dispute exceeds the sum or value of two thousand dollars.” Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84 (emphasis added). Third, the court below had been evenly divided and so had not decided the case, meaning there was no “final judgment” to review—a problem the parties sought to avoid by having the defendant “confess[] judgment.” 3 U.S. (3 Dall.) at 172. Fourth, even if Hylton’s confession were treated as creating a reviewable judgment, a party cannot ordinarily appeal from a judgment to which it consented. Fifth, the government paid Hylton’s attorney’s fees and costs, presumably destroying the necessary adversarial relationship. Not only did the Court reach the merits despite these impediments—in striking contrast to its behavior in, for example, Hayburn’s Case, 2 U.S. (2 Dall.) 409 (1792)—but none of the Justices bothered even to mention them. See Currie, supra note 10, at 32.

\textsuperscript{72} See Currie, supra note 10, at 33-37; Casto, supra note 10, at 104-05. For a defense of the decision, see Bruce Ackerman, Taxation and the Constitution, 99 Colum. L. Rev. 1, 20-24 (1999).

\textsuperscript{73} 3 U.S. (3 Dall.) at 183-84.
\end{footnotesize}
being a law denying the right to trial by jury altogether.\textsuperscript{74} The point was not rhetorical. These were, literally, the only kinds of laws they could imagine declaring void. Recall that legislation contradicting explicit constitutional provisions had been a significant problem in the 1780s, so this apparently limited power of review would not have seemed insignificant or unimportant to judges of the period.

Apart from failing to emphasize the need for a law to be clearly unconstitutional, the opinions in \textit{Kamper} accurately reflected the theory of judicial review that gained acceptance in the 1790s. Rather than claiming to exercise review because constitutional interpretation is a uniquely judicial task, courts emphasized the fact that unconstitutional laws were void and insisted that courts were no less obligated than anyone else to attend to this fact. The constitution applied to the judiciary “as well as” to the other branches, and judges could not permit themselves to be made “fit agents” in abetting legislative illegality, but should instead uphold constitutional values “on behalf of the people.” In charging a Georgia grand jury, now-Justice James Iredell affirmed his earlier essay, explaining that when laws violated the Constitution, “the courts of justice, in any such instance coming under their cognizance, are bound to resist them, they having no authority to carry into execution any acts but such as the constitution warrants.”\textsuperscript{75} Justice Paterson stressed the same theme in his charge to the grand jury in \textit{Vanhorne’s Lessee v. Dorrance}:


\textsuperscript{75} James Iredell’s Charge to the Grand Jury of the circuit court for the district of Georgia, Oct. 17, 1791, in 2 DHSC, supra note 16, at 219.
I take it to be a clear position; that if a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that, in such case, it will be the duty of the Court to adhere to the Constitution, and to declare the act null and void. The Constitution is the basis of legislative authority; it lies at the foundation of all law, and is a rule and commission by which both Legislators and Judges are to proceed. It is an important principle, which, in the discussion of questions of the present kind, ought never to be lost sight of, that the Judiciary in this country is not a subordinate, but co-ordinate, branch of the government.\textsuperscript{76}

Note the structure of Paterson’s argument. A law that “oppugns” the Constitution must give way and be rejected. By whom? The statement precedes and is independent of any reference to courts or judges, because such laws (which are not laws) should be rejected by everyone.\textsuperscript{77} But everyone includes courts and judges. Hence, it is “equally clear and sound” that judges have a duty to declare such laws void. Paterson’s chief concern was to establish that courts too could engage in constitutional enforcement, that the judiciary was a coordinate and not a subordinate branch. It would take a few years more before any judge would go farther than this and claim that the legal nature of the Constitution made courts uniquely responsible for interpreting and enforcing it. Bear in mind, too, as the actions of the Justices in \textit{Hayburn’s Case} illustrate, that judicial review had not yet fully displaced extrajudicial forms of protest even among judges, much less among the people at large.

Remember that any statement describing what judicial review “was” should be treated with caution because a range of views existed as to both its propriety and its nature. Very conservative Federalists had already begun to articulate a theory recognizable today as judicial

\textsuperscript{76} 2 U.S. (2 Dall.) 304, 308-09 (1795).

\textsuperscript{77} Cf. James Wilson, Lectures on Law, in 1 Works of Wilson, supra note 41, at 186 (explaining that “whoever would be obliged to obey a constitutional law, is justified in refusing to obey an unconstitutional” one and that “everyone who is called to act, has a right to judge”).

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supremacy, while there were still people—including some more moderate Federalists—who rejected judicial review altogether. “[T]ho very popular and very prevalent,” wrote Connecticut’s Zephaniah Swift in 1795, the idea of judicial review “requires some consideration.” It was indeed likely, he conceded, that a legislature would sometimes pass laws that violated the Constitution, but “it is as probable that the judiciary will declare laws unconstitutional which are not, as it is, that the legislature will exceed their constitutional authority.” The people being ultimate judge in all events, there was no warrant for courts to pass on the constitutionality of laws:

The legislature are not under the controll or superintendence of the judiciary—if they pass laws which are unconstitutional, they are responsible to the people—who may in the course of elections dismiss them from office, and appoint such persons as will repeal such unconstitutional acts. On this power of the people over the legislature, depends their security against all encroachments, and not on the vigilance of the judiciary department.

That there was this range of views is not surprising. As Swift notes, however, by the mid-1790s, acceptance of judicial review was becoming “very popular and very prevalent.” And while beliefs about its specific content were not completely uniform, mainstream opinion embraced a modest doctrine in which, consistent with popular constitutionalism, courts acted as

78 See chapter five at pp. X-X.


80 Id. at 52-53.

81 See also Donald F. Melhorn, A Moot Court Exercise: Debating Judicial Review Prior to Marbury v. Madison, 12 Const. Comm. 327, 346-52 (1995), describing a moot court held at the Litchfield Law School in 1797 in which an array of arguments are presented for and against judicial review. The moot court voted 2-1 that courts should have no such power.
the people’s agents to supplement and enhance popular control over the interpretation and implementation of constitutional law.

_Popular Constitutionalism, circa 1800._

The emergence of judicial review, even in this limited and restrained form, still needed to be fit into a theory of the Constitution. The argument for review was ultimately straightforward—to wit, that judges, no less than other citizens or government officials, were bound to take notice of the Constitution if and when it became relevant in the ordinary course of business. Yet however innocuous the proposition might sound stated abstractly, its application in practice raised an embarrassing theoretical problem. James Madison pointed to the difficulty in his 1788 observations on Jefferson’s draft constitution for Virginia: “[A]s the Courts are generally the last in making their decisions,” he explained, “it results to them by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Department paramount in fact to the Legislature, which was never intended and can never be proper.”

William Blackstone had addressed a similar dilemma in the portion of his _Commentaries_ which tried to make sense of _Dr. Bonham’s Case_. For even as a rule of statutory interpretation, Coke’s opinion could be read to give courts a leeway over statutes inconsistent with Blackstone’s principle claim of unconditional legislative supremacy. Constrained by this latter commitment, the only solution Blackstone could come up with was to restrict judicial authority,

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so he interpreted *Bonham’s Case* to affirm only a limited equitable power in courts to disregard collateral consequences of a statute that were not clearly spelled out.83

Working within a system based on popular sovereignty created new theoretical possibilities for Americans, whose solution to their version of the dilemma is known today as the “departmental” or “concurrent” or “coordinate” theory.84 Madison himself was among its earliest and strongest proponents. During the 1789 debate over the President’s removal power, and notwithstanding the misgivings he had communicated to Jefferson the previous year, Madison conceded the basic argument for judicial review. “I acknowledge, in the ordinary course of government, that the exposition of the laws and constitution devolves upon the judicial,” he said. It did not follow, however, that judicial decisions should therefore acquire any special stature or status:

But, I beg to know, upon what principle it can be contended that any one department draws from the constitution greater powers than another, in marking out the limits of the powers of the several departments. The constitution is the charter of the people to the government; it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the constitutional boundary of either be brought into question, I do not see that any one of these independent departments has more right than another to declare their sentiments on that point.85

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85 Speech by James Madison to the House of Representatives on the Removal Power of the President (June 17, 1789), in 12 Papers of Madison, supra note 5, at 232, 238. See also James Madison, “Helvidius” Number 2 (August 31, 1793), in 15 Papers of Madison, id. at 80, 83.
Thomas Jefferson, who embraced this theory throughout his political life, expressed the idea succinctly: “[E]ach of the three departments has equally the right to decide for itself what is its duty under the constitution, without regard to what the others may have decided for themselves under a similar question.”

Modern commentators find this theory puzzling, seeing in it a formula for chaos and anarchy. Many openly concede to finding the argument confusing, or confused. Others assume that proponents of the departmental theory must have recognized its incompleteness and continued to search for an alternative “effective method of resolving differences over constitutional interpretation.” One historian pejoratively labels the theory “arbitrary review” because, he says, it provides no “principled functional limits” for resolving constitutional conflicts. Even modern scholars who purport to endorse departmentalism seem to find Madison’s and Jefferson’s version of it unintelligible. They typically propose to assign different

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86 See David N. Mayer, The Constitutional Thought of Thomas Jefferson 257-94 (1994). As Mayer explains, Jefferson’s emphasis shifted over time—from an early confidence in the reliability of courts to a late-life belief that federal judges were an irresponsible “corps of sappers and miners” working to undermine the Constitution’s careful balancing act. Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), in 10 The Writings of Thomas Jefferson 169-70 (Paul Leicester Ford ed., 1898). But these were changes in tone that occurred within the same departmentalist framework, a framework Jefferson restated on numerous occasions over the course of three decades. See Letter from Thomas Jefferson to Mrs. Adams (Sept. 11, 1804), in 4 Memoirs, Correspondence and Miscellanies from the Papers of Thomas Jefferson 26, 27 (Thomas Jefferson Randolph ed., 1829); Letter from Thomas Jefferson to George Hay (June 2, 1807), in id. at 75, 75; Letter from Thomas Jefferson to W.H. Torrance (June 11, 1815), in 9 The Writings of Thomas Jefferson, supra, at 516, 517-18; Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), in 10 id. at 140, 141-42; Letter from Thomas Jefferson to William Jarvis Short (Sept. 28, 1820), in id. at 160, 160-61.

87 Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), in 10 The Writings of Jefferson, supra note 84, at 140, 142.

88 Snowiss, supra note 60, at 98; see also Louis Fisher, Constitutional Dialogues: Interpretation as Political Process 238-39 (1988)(“The problem with Jefferson’s doctrine is that he neglects to identify those questions [as to which each branch is to be final].”)

89 Clinton, supra note 83, at 25.
branches different degrees of authority for different sorts of questions, though always and ultimately, it seems, subject to a judicial veto.90

This generic confusion is revealing of the extent to which we have lost touch with the idea of popular constitutionalism. For what underlies the commentators’ uncertainty is the assumption not just that someone must have final authority to resolve routine constitutional conflicts, but that this someone must be a governmental agency. From such a perspective, any theory that purports to leave decision making power in all three branches equally obviously appears nonsensical, an invitation to endless conflict.

The assumption that final interpretive authority must rest with some branch of the government belongs to the culture of ordinary law, not to the culture of popular constitutionalism. In a world of popular constitutionalism, government officials are the regulated, not the regulators, and final interpretive authority rests with the people themselves. Hence, Madison, Jefferson, and their supporters had no difficulty whatever explaining how constitutional conflicts would finally be resolved: they would be decided by the people. As Virginia Senator Stevens Thomas Mason explained:

Though . . . each department ought to discharge its proper duties free from the fear of the others, yet I have never believed that they ought to be independent of the nation itself. . . . All the departments of a popular Government must depend, in some degree, on popular opinion. None can exist without the affections of the

people, and if either be placed in such a situation as to be independent of the nation, it will soon lose that affection which is essential to its durable existence.  

Ideally, of course, disputing branches of government would achieve an accommodation on their own, though Jefferson once observed that “[w]e have . . . in more than one instance, seen the opinions of different departments in opposition to each other, & no ill ensue.”  

Accommodation among the branches, after all, was what all that checking and balancing in separation of powers theory was supposed to be about.  But if no compromise was forthcoming and a final resolution was needed, it was obvious who would decide. The issue would be answered, in Madison’s words, by “the will of the community, to be collected in some mode to be provided by the constitution, or one dictated by the necessity of the case.”  

Jefferson, too, urged that “[w]hen the legislative or executive functionaries act unconstitutionally, they are responsible to the people in their elective capacity”:

The exemption of the judges from that is quite dangerous enough. I know of no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their

91 Speech by Stevens Thomas Mason, in 11 Annals of Congress, supra note 37, at 59.  

92 Mayer, supra note 85, at 270. The quoted passage is from Jefferson’s notes for his First Inaugural Address. He deleted the passage because, in context, it pertained to his plans to pardon those convicted under the Sedition Act, and this was a politically controversial step that Jefferson wanted to downplay in the interest of striking a conciliatory tone. See id. at 269. See also Letter from Thomas Jefferson to W.H. Torrance (June 11, 1815), in 9 The Writings of Thomas Jefferson, supra note 85, at 518.  

93 The locus classicus of this principle is, of course, Madison’s Federalist 51. James Wilson makes the point equally well, however, in his “Lectures on Law.” See Works of Wilson, supra note 41, at 300.  

94 Speech to the House of Representatives on the President’s Removal Power, in 12 Papers of Madison, supra note 5, at 238.
discretion by education. This is the true corrective of abuses of constitutional power.95

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

[Y]et I contend that such a law is not the less obligatory because the organ through which it is to be executed has refused its aid. A pertinacious adherence of both departments to their opinions, would soon bring the question to issue, in whom the sovereign power of legislation resided, and whose construction of the law-making power should prevail.96

By “bring the question to issue,” Breckinridge meant, of course, that “pertinacious adherence” by different branches to conflicting views would force the public to decide.

Looking back on statements like these from a distance of two centuries, modern commentators sometimes read them as sounding in natural law and reserved for a dissolution of the Lockean contract.97 From the perspective of the 1790s, however, an idea of “the people” as a collective body capable of acting independently from within the political system was more serviceable. Obviously it would be best to resolve disputes without popular intervention, just as we prefer seeing ordinary law disputes settled without litigation. But if a dispute could not be settled and needed authoritative resolution, politics was the proper forum, the people were the proper agent, and “political-legal” devices were the proper means.

95 Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in 10 Writings of Jefferson, supra note 85, at 160, 162.


97 See Stimson, supra note 83, at 100.
The plausibility of this understanding was, if anything, enhanced by social and political developments in the 1790s, which vastly enlarged the role and importance of an emerging democratic public sphere. As republican government steadied itself, the numbers of citizens engaged in politics swelled, as did their demands to control the course of government. This was reflected in much more than expanded suffrage and higher voter turnouts, though these were certainly important. It appeared as well in the emergence of new organizations, new forms of communication and political expression, and new public rites and rituals. Juries, mobs, and other traditional local institutions remained important, but now so too were the budding political parties, the Democratic-Republican societies, and the new partisan press. Americans organized and voiced opinions as never before. They mounted petition campaigns and called conventions; they paraded in the streets, planted liberty poles, and burned effigies; they held feasts and delivered public toasts. The popular voice changed and grew more insistent as these new institutions and practices became the means by which that voice was defined, and refined.


Americans—including even women and free blacks—learned “to fight over the legacy of their national Revolution and to protest their exclusion from that Revolution’s fruits.”\textsuperscript{102}

Anxious Federalists scrambled to squelch the rising populist tide, to preserve the patrician-led revolution they thought they had won in 1788.\textsuperscript{103} Instead they found themselves dragged, unwittingly and unwillingly, into the same public sphere, forced to imitate their opponents’ practices and copy their opponents’ organizational strategies.\textsuperscript{104} And as this happened, “common folk affirmed that they were far more than simple subjects of power,” demanding that political authority be “exercised in the negotiations between rulers and ruled that took place in public places and print as much as in congressional and state assembly chambers.”\textsuperscript{105}

Within this new political culture, the departmental theory made perfect sense. Each branch could express its views as issues came before it in the ordinary course of business: the Legislature by enacting laws, the Executive by vetoing them, the Judiciary by reviewing them. But none of the branches’ views were final or authoritative. They were the actions of regulated entities striving to follow the law that governed them, subject to ongoing supervision by their common superior, the people themselves. The achievement of judicial review in this early

\textsuperscript{102} Waldstreicher, supra note 99, at 3. The often subtle and sometimes not so subtle ways in which women, blacks, and poor whites found a voice, albeit one that usually remained subordinate, is a theme in both Waldstreicher’s and Newman’s books. See also Susan G. Davis, Parades and Power: Street Theater in the Nineteenth Century (1986); William Pencak, Matthew Dennis & Simon P. Newman, Riot and Revelry in Early America 12-13 (2002) and especially the essays by Thomas J. Humphrey at pp. 107-19, and by Susan Branson and Simon P. Newman at 229-48.


\textsuperscript{104} David J. Siemers, Ratifying the Republic: Antifederalists and Federalists in Constitutional Time 135-63 (2002).

\textsuperscript{105} Newman, supra note 99, at 7.
period was thus a successful bid by judges to an *equal* place in the scheme—to status as members of a coordinate branch, capable of making and acting upon independent judgments about the meaning of the Constitution.

The departmental theory was thus a self-conscious adjustment by the governing elite to new social, political, and cultural conditions: an adaptation that had appeal because it reflected and responded to how popular constitutionalism had changed since the Revolution, but did so in a way that maintained the theoretic preeminence of active popular control without at the same time inviting incoherence or anarchy. The biggest change, of course, was the repudiation of the monarchical political and social order, which generated new possibilities for conceptualizing the relationship of the people to their governors. Where eighteenth-century constitutionalism had imagined a wholly independent people checking the government from without, republicanism made it easier to think of the people acting in and through the government, with the different branches responding differently to popular pressure depending on their structure and their relationship to the polity. Madison’s and Jefferson’s references to resolving conflicts by finding an accommodation among the branches, for example, rested crucially on this idea.

Emphasizing a republican people’s ability to act through the government (rather than against it) put pressure on certain traditional *forms* of popular constitutionalism, particularly those associated with the use of violence. As early as 1784, we find Samuel Adams criticizing mob activity in western Massachusetts, what would subsequently become known as Shays’s Rebellion. “County Conventions & popular Committees servd an excellent Purpose when they were first in Practice,” Adams wrote to Noah Webster—hardly surprising given how Adams had

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used these very instruments in the 1760s and 70s to torment poor Governor Thomas Hutchinson.\textsuperscript{107} “No one therefore needs to regret the Share he may have had in them.” But, Adams continued, “I candidly owe it is my Opinion . . . 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.”

By no means did mobbing disappear. Even the Shaysites evoked mixed reactions.\textsuperscript{108} 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 and much of the opposition to the Jay Treaty and Alien and Sedition Acts to the Baltimore Riots of 1812.\textsuperscript{109} But for many, including many Republicans, this sort of behavior had started to become less acceptable. Popular constitutionalism itself was unaffected, and it continued to be simply assumed by most people. But there was a marked shift (especially among elites) toward

\textsuperscript{107} 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).

\textsuperscript{108} Siemers, supra note 104, at 13; Michael Lienesch, Reinterpreting Rebellion: The Influence of Shay’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). It was in this connection, for instance, that Jefferson made his famous remark about how “a little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical.” Letter from Thomas Jefferson to James Madison (Jan. 30, 1787), in 11 Papers of Jefferson, supra note 82, at 93.

elections, petitions, and non-violent forms of political protest as the proper means by which to express and measure public opinion.

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 by counseling caution and patience. “[W]e fear that the ill 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.¹¹⁰

Jefferson’s concerns about violent protest were echoed by others, both Federalist and Republican, elite and plebeian.¹¹¹ For present purposes, however, what matters is to note that this reflected a change in means, not ends. Preserving the people’s active control of their government and their Constitution remained paramount. But new devices were emerging to secure that control without violence, particularly as political parties formed and introduced novel

¹¹⁰ Letter from Thomas Jefferson to Edmund Pendleton (Feb. 14, 1799), in 7 Writings of Jefferson, supra note 86, at 356.

practices to make the people’s voice effective. Jefferson’s and Madison’s departmental theory had considerable appeal in this context.

Popular constitutionalism was changing in more subtle ways as well. Before the Revolution, it had depended on a cluster of social practices that historians typically lump together under the broad label of “deference.” These practices served to mediate and guide popular action by enabling a “well born” elite to gauge when resistance was appropriate and, even if not always fully in control, to ensure that opposition to government did not go too far or grow too violent. By 1800, the emerging democratic culture had begun to change the way such political relations were conceived and practiced. The idea of deference did not wholly disappear—that process would take several more generations to complete. But relationships between ordinary citizens and their political leaders and social betters were nevertheless changing, a change manifested among political leaders attuned to the insistent democratic pressures in a newfound respect for “public opinion.”

“Public opinion,” wrote Madison in an essay of that title which he published in December 1791, “sets bounds to every government, and is the real sovereign in every free one.” This was more than a paraphrase of Hume’s point about ultimate authority resting with

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113 James Madison, For the National Gazette: Public Opinion (Dec. 19, 1791), in 14 Papers of Madison, supra note 5, at 170.
the people because “FORCE is always on the[ir] side.” It was a normative and not just descriptive claim. Public opinion should be sovereign, because republicanism meant, first and foremost, that “after establishing a government [the people] should watch over it as well as obey it.”

In affirming the authority of public opinion, Madison was not preaching simple majoritarianism. The opinion that he believed should hold sway was more than the fleeting preferences of the moment, more than the unrefined passions of a majority of citizens. As Colleen Sheehan explains, those who championed popular supervision of government “did not simply equate public opinion with the will of the majority. Public opinion [was] not the sum of ephemeral passions and narrow interests; it [was] not an aggregate of uninformed minds and wills. Rather, public opinion require[d] the refinement and transformation of the views, sentiments, and interests of the citizens into a public mind guided by the precepts of reason, resulting in ‘the reason . . . of the public’ or ‘the reason of the society.’” This was Jefferson’s point when he urged in his first inaugural address that Americans “bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable.”

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114 “[A]s FORCE is always on the side of the governed,” Hume wrote, “the governors have nothing to support them but opinion. It is therefore, on opinion only that government is founded; and this maxim extends to the most despotic and most military governments, as well as to the most free and most popular.” David Hume, Of the First Principles of Government, in Essays: Moral, Political and Literary (Eugene F. Miller ed., rev. ed. 1985).


116 Sheehan , supra note 115, at 948.

117 Thomas Jefferson, First Inaugural Address (March 4, 1801), in 1 A Compilation of the Messages and Papers of the Presidents 321, 322-23 (J. Richardson ed. 1897).
Ensuring that the will of the majority was reasonable was a responsibility of leadership. Those whose situation in life had afforded them the opportunity to elevate their minds had a concomitant obligation to elevate those of their fellow citizens, particularly on matters of politics and government. “The class of the literati,” Madison wrote in notes to himself, “are the cultivators of the human mind—the manufacturers of useful knowledge—the agents of the commerce of ideas—the censors of public manners—the teachers of the arts of life and the means of happiness.”

It was the task of this elite to educate and edify, to foster a process of deliberation that refined and enlightened public sentiment in a fashion sufficient for the demands of self-government. This responsibility lay particularly heavily on elected officials. Just as public opinion must be obeyed once it had settled, Madison observed, “where not . . . fixed, it may be influenced by the government.” Among the most important devices for securing the sovereignty of public opinion, he added further, matched only by “a circulation of newspapers through the entire body of the people,” was “Representatives going from, and returning among every part of them.”

The political process imagined by such comments was different from the deferential politics of colonial America. “Symbolically,” explains historian Christopher Grasso, “the ‘public’ came to be seen, not as a body ruled by a sovereign head, but as a mind that ruled itself.” This did not mean the flattening or elimination of all distinctions, but it did embody a profound, if subtle, shift in the nature of politics. At the risk of oversimplifying, one can

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119 For the National Gazette: Public Opinion, in 14 Papers of Madison, supra note 5, at 170.

120 Grasso, supra note 96, at 282, 448-51.
describe the general direction of change as follows: Where the earlier system emphasized the power and patronage of a wealthy gentry, the new theory of republican politics was better characterized as a conversation—a conversation in which the elite now led by persuasion an electorate actively engaged in making its own judgments and decisions. As described by one historian of this idea of public opinion:

Representatives traveling to and from the nation’s capital provide links of communication and act as agents for the exchange of political ideas among the citizenry. As elected officials whose task was to deliberate on issues of national import, they both attend to the views of their constituents and convey back to them the concerns and interests of the nation at large. . . . The process of forming and fixing public opinion over an extensive federal republic is a slow and gradual one. The sentiments and views of the people are acted on and modified by enlightened members of society, by national representatives, and by their own experiences in local self-government. This process of refining and enlightening the public’s views results in a common and settled opinion among the national public. Once settled, public opinion is an authoritative source that influences government and presides over its decisions.121

Not everyone would have embraced this description of politics. Federalists were still holding out (with diminishing success) for an older idea of passive deference, while increasing numbers of ordinary citizens probably resented the emphasis on elite leaders enlightening the ignorant masses. Then, as now, politics was messier, more contested, than any single theory or theorist could capture. This was, nevertheless the dominant public ideology that emerged over the course of the 1790s, an ideology most Americans seem either to have embraced or grudgingly accept.

Two critical features of this ideology need to be emphasized if we are to understand how popular constitutionalism had evolved and how its essence was preserved by the departmental theory. On the one hand, the citizenry had become “an operationally active” sovereign as well as an authoritative one.\textsuperscript{122} It was the people themselves who decided, and only their opinion ultimately mattered. Madison stressed the need for an active citizenry in his essay on “Government”:

\begin{quote}
A republic involves the idea of popular rights. A representative republic \emph{chuses} the wisdom, of which hereditary aristocracy has the \emph{chance}; whilst it excludes the oppression of that form. . . . To secure all the advantages of such a system, every good citizen will be at once a centinel over the rights of the people; over the authorities of the confederal government; and over both the rights and the authorities of the intermediate governments.\textsuperscript{123}
\end{quote}

On the other hand, public opinion would work to secure rather than undermine republican government only if and for so long as the public was guided by reason. Among the principle benefits of federalism and separation of powers (not to mention the extensive size of the republic) were thought to be that these complicated and slowed politics long enough for reason to prevail. And though courts had not originally or conventionally been considered part of this process, by the 1790s judicial review was being included among these complicating devices—adding another voice capable of forcing further public deliberation when it came to constitutional matters. But judges were no more authoritative on these matters than any other public official, and their judgments about the meaning of the Constitution, like those of everyone else, were still subject to oversight and ultimate resolution by the people themselves.

\textsuperscript{122} Sheehan, supra note 115, at 948.

\textsuperscript{123} For the National Gazette: Government (Dec. 31, 1791), in 14 Papers of Madison, supra note 5, at 179.
Marbury v. Madison.

This, in fact, is all that Marbury v. Madison actually says or does. It has recently become quite fashionable to dismiss Marbury as an altogether trivial case—a predictable reaction, perhaps, to the previous generation’s hyperventilated celebration of it. Most of us were taught that Marbury was, as Robert McCloskey gushed, a “masterwork of indirection, a brilliant example of Marshall’s capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another.”124 More fawning still is Alexander Bickel’s breathless introduction in The Least Dangerous Branch:

[T]he institution of the judiciary needed to be summoned up out of the constitutional vapors, shaped and maintained; and the Great Chief Justice, John Marshall,—not singlehanded, but first and foremost—was there to do it and did. If any social process can be said to have been “done” at a given time and by a given act, it is Marshall’s achievement. The time was 1803; the act the decision in the case of Marbury v. Madison.125

Eventually, this sort of fulsome reverence was bound to incite rebellion, and Marbury revisionism is now all the rage.126 Michael Klarman derides Marshall’s ruling for having “offered no arguments that would have persuaded anyone who still questioned the legitimacy of [judicial review] in 1803,” and doing “nothing to facilitate the Court’s acquisition of the political stature necessary to make judicial review practically as well as theoretically significant.”127


125 Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 1 (1962).

126 In addition to the sources discussed below, significant works rethinking the importance of Marbury include Christopher Wolfe, The Rise of Modern Judicial Review (rev. ed. 1994); J.M. Sosin, The Aristocracy of the Long Robe (1989); Clinton, supra note 83. Paul Kahn’s The Reign of Law: Marbury v. Madison and the Construction of America (1997), is an exception to this general trend.

127 Klarman, supra note 74, at 1126.
James O’Fallon dismisses *Marbury* as already obsolete when it was decided, a testament to the way in which ideas can persist long after they have lost their utility.128 Mark Graber jeers that *Marbury* “merely established the judicial power to utter such declaratory sentences as ‘it is emphatically the province and duty of the judicial department to say what the law is,’ a power possessed by anyone with a minimal knowledge of English.”129 The author of one of the leading constitutional law casebooks has disclosed in conversation that he even considered leaving *Marbury* out of the book altogether, as a signal to students of its true unimportance.

Yet care must be taken, lest the reaction against *Marbury* match its predecessor for excessiveness. To be sure, *Marbury* did not stake out new territory in the theory of judicial review. That most people thought the power existed, even as to federal laws, was already clear from the debates in Congress as well as from cases like *Hylton v. United States* and *Hayburn’s Case*. Justice Chase could thus observe three years before *Marbury*, in *Cooper v. Telfair*, that “[i]t is, indeed, a general opinion, it is expressly admitted by all this bar, and some of the Justices have, individually, in the Circuits, decided, that the Supreme Court can declare an act of Congress to be unconstitutional, and, therefore, invalid.”130 But, he quickly added, “there is no adjudication of the Supreme Court itself upon the point.”131 *Marbury* was the first, and important for that alone. Yet there is more, for the circumstances in which *Marbury* was decided


130 4 U.S. (4 Dall.) at 19.

131 Id.
add to the significance of the case and make its reputation, if not quite up to hero-worship of the past, at least more deserved than is currently fashionable.

The case of *Marbury v. Madison* played a supporting role in a bigger drama about the place of the judiciary in American government, and while only a minor player, its part turned out to be important in unexpected ways. The stage was set by the election of 1800, in which Jefferson and the Republicans trounced the divided and demoralized Federalists. Jefferson’s and Burr’s margin over Adams in the Electoral College was only 73-65, but peculiarities in the way electors were chosen obscure from us (though not from contemporaries) the actual strength of the Republican showing.\(^{132}\) The elections for Congress more clearly evinced just how sweeping a victory Jefferson’s party had won. Going into the election, Federalists held sixty-three seats in the House of Representatives to the Republicans’ forty-three. The vote in 1800 more than reversed these numbers, leaving the Republicans with a 65-41 edge and a clear mandate to change the government’s direction.\(^{133}\)

Faced with the loss of the executive and legislative branches, the lame duck Federalist Congress acted quickly to secure its adherents a sanctuary in the judiciary. Federalists had talked about court reform for years: Attorney General Edmund Randolph had recommended steps as early as 1790; the Supreme Court had repeatedly petitioned for relief; and President

\(^{132}\) For example, although Republicans had a large majority among voters statewide in Pennsylvania, a legislative deadlock over the enactment of rules for selecting electors led to a last minute compromise whereby the vote was split 8-7 (in favor of Jefferson). See Harry Marlin Tinckom, *The Republicans and Federalists in Pennsylvania, 1790-1801*, at 245-53 (1950).

\(^{133}\) See Dauer, supra note 9, at 326, 331 tbls. 21 & 22. We should note, however, that these numbers are skewed in Jefferson’s favor by the 3/5 clause, which gave the Southern states where Jefferson was strongest a disproportionate number of seats relative to their actual voting population. (I thank Akhil Amar for drawing this point to my attention.)
Adams had urged Congress to take some sort of action as recently as December, 1799. But nothing came of these efforts until the embarrassment of Jefferson’s election finally spurred the Federalists to act. Gouverneur Morris justified their deeds in a letter to Robert Livingston:

“[T]he leaders of the federal party... are about to experience a heavy gale of adverse wind; can they be blamed for casting many anchors to hold their ship through the storm?”

These anchors were to consist chiefly of new judgeships in a substantially restructured third branch. The main feature of the Judiciary Act of 1801 was thus to relieve 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, said reduction to take effect when the next vacancy occurred. By this none-too-subtle means, the Federalists rewarded themselves with numerous appointments to the inferior courts—not just the judges, but also marshals, clerks, federal attorneys, and all the 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.

But time was short. The Judiciary Act became law on February 13, 1801. The new administration was scheduled to take over at 12:01 am on March 4. This meant the outgoing

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137 See Judiciary Act of 1801, ch. 4, §§ 6-7, 2 Stat. 90.
Federalists had less than three weeks to select, nominate, and confirm all the new judges and support staff.\footnote{138} Nor was the bonanza of last minute appointments limited to circuit courts created in the Judiciary Act. For on February 27, just four days before Jefferson’s inauguration, Congress rushed through yet another law creating yet another circuit court, this one for the District of Columbia; the President was authorized to nominate three more judges and also to appoint “such number of discreet persons to be justices of the peace, as the President of the United States shall from time to time think expedient, to continue in office five years.”\footnote{139} President Adams immediately nominated the allotted circuit judges, and the Senate hurriedly confirmed his choices. In addition, Adams selected forty-two justices of the peace, most stout Federalists. The outgoing President thus spent his last days in office signing commissions prepared for him by his overworked Secretary of State, John Marshall, who was also already serving as Chief Justice of the Supreme Court.

Once the commissions were signed, it was Marshall’s responsibility to make them official by affixing the seal of the United States and arranging to have them delivered. Commissions for the circuit judges went out before Adams’s term expired, but some justices of the peace were still waiting when time ran out—including one William Marbury. Legend has it that Marshall was frantically scribbling away when Jefferson’s Attorney General Levi Lincoln interrupted him carrying a watch whose hands showed midnight, March 3, 1801.\footnote{140}

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\footnote{138} The story of how these appointments were made is recounted in Kathryn Turner, The Midnight Judges, 109 U. Pa. L. Rev. 494 (1961).

\footnote{139} Act of Feb. 27, 1801, § 3, 2 Stat. 103, 104.

\footnote{140} See Turner, supra note 138, at 522. Albert Beveridge calls this “an absurd tale.” 2 Albert J. Beveridge, The Life of John Marshall 561 n. 2 (1916). While Beveridge’s account of Marshall’s life veers more toward hagiography than biography, he is probably right about this one.
Republicans were plenty angry about the federal courts even before these last minute shenanigans. They had not forgiven the exuberance with which Federalist judges tried to muzzle Republicans under the Sedition Act; nor had they forgotten the judges’ frequently outrageous conduct of the trials and aggressive use of the bench to campaign for Federalist candidates and policies.141 There were other issues, too, like the claim that common law was available to federal courts, which Jefferson called an “audacious, barefaced, and sweeping pretension” in comparison to which other Federalist doctrines were “unconsequential, timid things.”142

Yet despite all this, Jefferson and most Republicans were prepared to live and let live. Jefferson was furious at Adams for his last minute appointments—he later singled them out as the only “personally unkind” act Adams had ever committed against him143—but Jefferson was also willing to forgo a purge if the newly appointed officeholders would act honorably and responsibly. The new President 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. For example, Jefferson reduced the number of justices of the peace in the District of Columbia from forty two to thirty, but he included twenty five of Adams’s original appointees in this group.144


142 Letter from Thomas Jefferson to Edmund Randolph (Aug. 18, 1799), in 7 Writings of Jefferson, supra note 86, at 383, 384.

143 See Letter from Thomas Jefferson to Abigail Adams (June 13, 1804), in 8 id. at 307.

Jefferson’s correspondence in the months between March and December 1801, when the new Congress finally convened, indicates that he continued to brood about the judiciary. Yet Jefferson barely alluded to the matter in his December 8 opening address to Congress, and he recommended no specific action. “The Judiciary system of the United States, and especially that portion of it recently erected will, of course, present itself to the contemplation of Congress,” was all that he said, adding a hint in the guise of some hastily compiled (and not very accurate) caseload statistics. While a number of historians interpret this as evidence that Jefferson was already intent on repealing the Judiciary Act of 1801, most now believe he had not yet committed to such a policy. Strong elements within Jefferson’s party were pushing for action—influriated by, among other things, continued diatribes in the Federalist press and the audacity of Federalist judges in the new D.C. circuit who, despite the election results, instituted a common law libel prosecution against the editor of the Republican National Intelligencer. But moderates in the party had doubts about the propriety of repeal and were not anxious to begin their turn at the helm by plunging into what promised to be a bitter partisan affair, and Jefferson probably felt the same way. So he equivocated, neither advocating nor ignoring the possibility of repeal.


146 First Annual Message (Dec. 8, 1801), in 8 Writings of Jefferson, supra note 86, at 108, 123.

147 See, e.g., Haskins & Johnson, supra note 129, at 152; 3 Beveridge, supra note 134, at 18-22.

148 See, e.g., 1 Charles Warren, The Supreme Court in United States History 204 (1922); Malone, supra note 144, at 115-16; Ellis, supra note 37, at 34-35, 41-43; Alfange, supra note 135, at 355-56.

149 See 1 Warren, supra note 148, at 194-98; Ellis, supra note 37, at 40. 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.
Then, on December 16, Secretary of State James Madison was served with notice that a motion would be made in the Supreme Court the following day 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, Dennis Ramsay, Robert R. Hooe, and William Harper.\(^\text{150}\) Madison ignored the summons and Chief Justice Marshall granted the motion to show cause; argument about whether the petitioners were entitled to a writ was scheduled for the beginning of the next term. Richard Ellis hypothesizes that Federalists deliberately chose this moment to challenge Jefferson, believing “a show of determination would deter the Republicans on the court issue before they could unite themselves.”\(^\text{151}\) If so, the strategy backfired, for filing *Marbury v. Madison* turned out to be the crucial act that united Republicans behind the repeal effort.\(^\text{152}\) Interpreting the Court’s show cause order as confirmation of Federalist plans to use the judiciary to obstruct Jefferson’s administration, angry Republicans—including now, most importantly, the President himself\(^\text{153}\)—decided to strike first. “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.”\(^\text{154}\)

\(^\text{150}\) National Intelligencer, Dec. 21, 1801.

\(^\text{151}\) Ellis, supra note 37, at 44.

\(^\text{152}\) Id.; O’Fallon, supra note 128, at 238, 242; Alfange, supra note 135, at 354-, 358.

\(^\text{153}\) Federalists “have retired into the Judiciary as a stronghold,” an incensed Jefferson wrote to John Dickinson the day after Marshall issued his order, “and from that battery all the works of Republicanism are to be beaten down and erased.” Letter from Thomas Jefferson to John Dickinson (Dec. 18, 1801), in 10 The Writings of Thomas Jefferson 302 (Andrew A. Lipscomb ed., 1904).

\(^\text{154}\) Letter from Stevens Thomas Mason to James Madison (Dec. 21, 1801), quoted in Ellis, supra note 37, at 44.
The repeal debate proved to be every bit as ugly and contentious as moderate Republicans had feared. Overwrought Federalists ranted about the demise of an independent judiciary and hysterically charged Republicans with bringing the nation to “the brink of that revolutionary torrent, which deluged in blood one of the fairest countries in Europe.” Republicans shrieked back that repeal was justified to counter a Federalist abuse of power and preserve a proper constitutional balance as well as to protect the public fisc. The pending *Marbury* case was referred to by both sides—Republicans offering it as evidence of judicial overreaching, Federalists citing it as an example of why an independent judiciary was necessary. Numerous arguments both for and against judicial review were heard, including some Republican denunciations of the practice in any and all forms. In the end, which came on March 3, 1802, the Act was of course repealed.

A small coterie of ultra-Federalists would not accept defeat and embarked on a campaign to sabotage the Republicans’ victory. They asked the Supreme Court Justices to refuse to resume circuit-riding duties on constitutional grounds, but were rebuffed; Justice Chase was prepared to confront the president by this means, but he acquiesced in the unanimous views of his brethren to hold the circuit courts as scheduled. Unwilling to let matters rest, the same

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155 Speech by James A. Bayard, 11 Annals of Congress, supra note 37, at 650.

156 See, e.g., speech by James A. Bayard, in id. at 614-15; speech by John Randolph, in id. at 661; speech by Samuel W. Dana, in id. at 903-06.

157 See, e.g., speech by Stevens Thomas Mason, in id. at 59; speech by John Breckinridge, in id. at 178-80; speech by John Randolph, in id. at 661; speech by Nathaniel Macon, in id. at 710, 717-20.

158 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.

159 Ellis, supra note 37, at 60-62.
group of Federalists—Jefferson called them “the bitterest cup of the remains of Federalism rendered desperate and furious by despair”—formulated a new, 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. Finally, a number of test cases were brought challenging the repeal act in the restored federal circuit courts.

Nothing came of these efforts. The public relations campaign failed, due partly to the ham-fisted and insulting manner in which the Federalists presented their case, but even more because repeal was genuinely popular. 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. Adding injury to insult, Congress also voted to deny a petition by Marbury and friends for a transcript showing the exact dates of their nominations and confirmations.

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160 Letter from Thomas Jefferson to Joel Barlow (May 3, 1802), in 8 Writings of Jefferson, supra note 86, at 148, 149.


162 On the popularity of repeal, see Haskins & Johnson, supra note 134, at 156-63.
(necessary because the hapless petitioners were finding it difficult to prove that they had actually been appointed).\footnote{O’Fallon, supra note 128, at 240-41; Ellis, supra note 37, at 64. The petitioners managed to establish the existence of their commissions at trial only with great difficulty. After unsuccessfully examining clerks in the State Department and Attorney General Levi, they offered an affidavit from James Marshall, the Chief Justice’s brother, who had been helping to deliver commissions and who testified that he saw the commissions in the office of the Secretary of State. See Jean Edward Smith, John Marshall: Definer of a Nation 315-18 (1996). An even better witness was present in court, of course, but Marbury’s lawyer was understandably reluctant to call the Chief Justice himself.}

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.\footnote{Ellis, supra note 37, at 58-59.} An incidental effect of this legislation was to put off the hearing in \textit{Marbury v. Madison}, which otherwise would have been heard in June.

Undeterred, some of the removed Federalist judges 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. 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.

Incredibly, though four of six Supreme Court Justices had now indicated their unwillingness to rule against the administration, the pigheaded Federalists pressed on by appealing Chief Justice Marshall’s ruling to the full Court. The argument and decision in the case, 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, though 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 think proper.” 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.”

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

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165 See id. at 62-63; Smith, supra note 163, at 310-11.

166 Id. (The quote is from a letter by Levi Lincoln to Jefferson.)


168 Id.
for any reasons other than misbehavior in office. But that argument was no longer essential to 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 vitiate 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. 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 those citizens left problems of governing to their social and intellectual betters. Gouverneur Morris perfectly expressed 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.” A week later, Morris took umbrage at the suggestion that he had sought popular approval by one of his arguments. “[S]ure I am that I uttered nothing in the style of an *appeal to the people,*” he

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170 11 Annals of Congress, supra note 37, at 41.
sneered. “I hope no member of this House has so poor a sense of its dignity as to make such an appeal.” 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. There was, as a result, a new “overhanging threat” to unsettle the Justices as they sat down to decide *Stuart* and *Marbury*.

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

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171 Id. at 76.

172 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 *Annals of Congress*, 7th Cong., 2d Sess. c 460 (1803); Malone, supra note 144, at 147-48.

principal constitutional issue presented by the case. The Court refused to consider the 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.\textsuperscript{174}

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 \textit{Stuart}, \textit{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 \textit{Stuart}. Secretary of State Madison had simply ignored the initial motion to show cause, and he displayed equal 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 \textit{some} kind of statement: to send a message that the Court \textit{had} views and \textit{might} step in at some point. Marshall therefore prefaced his jurisdictional ruling with a lengthy dissertation explaining why the administration had acted unlawfully by withholding the petitioners’

\textsuperscript{174} Id. at 363-64.
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.\(^\text{175}\)

It was a risky strategy. Marshall’s lecture infuriated Jefferson, who perceived it as a politically-motivated attack on his presidency.\(^\text{176}\) 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).\(^\text{177}\) Marshall nevertheless decided to gamble. Richard Ellis explains:

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\text{[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.}\(^\text{178}\)
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\(^{175}\) Smith, supra note 163, at 319.

\(^{176}\) Although no contemporaneous commentary by Jefferson has been found, that the case rankled him is clear from a letter he wrote to George Hay in 1807, in connection with Burr’s trial for treason. “I observe that the case of Marbury v. Madison has been cited,” Jefferson complained, “and I think it material to stop at the threshold the citing that case as authority, and to have it denied to be law.” Urging that Marshall’s opinion was both “extrajudicial, and as such of no authority” and “against law,” Jefferson closed: “I have long wished for a proper occasion to have the gratuitous opinion in Marbury v. Madison brought before the public, and denounced as not law: and I think the present a fortunate one, because it occupies such a place in the public attention.” Letter from Thomas Jefferson to George Hay (June 2, 1807), in 4 Miscellanies from the Papers of Jefferson, supra note 86, at 75, 76.

\(^{177}\) 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, 82d Cong., 2d Sess. 454 (Edward S. Corwin ed., 1953)(Jefferson’s “is probably the correct doctrine”); Malone, supra note 144, 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”).

\(^{178}\) Ellis, supra note 37, at 67.
Marshall’s gamble paid off, and he succeeded in rebuking Jefferson without triggering a Republican backlash or even strong criticism in the press.179

And what about judicial review? Marshall definitely went out of his way (quite a bit out of his way, in fact) to address the issue. It would have been perfectly easy to have reached the same result in the case—that the Supreme Court lacked original jurisdiction to entertain Marbury’s petition—without striking anything down. Section 13 of the Judiciary Act of 1789 did not read like a grant of jurisdiction, and the better interpretation was that it authorized writs of mandamus only in cases where the Court otherwise had jurisdiction.180 Indeed, this would have been a stronger legal position than the one Marshall actually took, for (as countless scholars have argued) Marshall’s conclusion that Article III prohibited Congress from enlarging the Supreme Court’s original jurisdiction was anything but obvious.181 As it was, Marshall had to stretch very far to reach the result he did through an exercise of judicial review.

Why did he do it? Why force a potentially controversial question that no one had raised or even hinted at, particularly one wholly unnecessary to accomplish the Court’s main objective? And why do so at this highly charged moment, when the Court’s position was so precarious? The answer may be that the very precariousness of the Court’s position is what led Marshall to conclude that he needed to do something about judicial review. The federal courts had been under attack for five years, beginning with Republican denunciations of their role in enforcing the Sedition Act. This assault had become a full-fledged siege after Republicans took office and

179 See Malone, supra note 144, at 151; Smith, supra note 163, at 325.

180 See Currie, supra note 10, at 67-68.

assumed the offensive by repealing the Judiciary Act of 1801. In the course of debating repeal, the Supreme Court’s authority had been questioned and condemned, and the concept of judicial review had come under challenges of a type and temper not heard since before the Constitution was adopted. Suddenly, a practice that had seemed so uncontroversial throughout the 1790s no longer seemed immune to attack.

At the same time, outright rejection of judicial review was not yet a position embraced officially by Republicans, most of whom shared Jefferson’s more moderate departmental theory and were willing to live with review on his theory’s limited terms. This was the moment to make a statement, Marshall apparently decided, before more extreme sentiments against judicial review spread or grew into something more threatening. Yet such a statement would be effective only if the Court could make it in a way that dampened rather than inflamed further hostility. Marshall’s goal was, in effect, to get judicial review into the record—not to establish its existence, but to deflect an incipient movement to delegitimate it. Dean Alfange captured the likely drift of Marshall’s thinking thus:

[I]t was important to invoke the power of judicial review in order to establish a precedent for its later use and to include in the Reports of the Supreme Court a statement of the reasoning by which the power could be shown to be absolutely necessary. Thus, since judicial review could not safely have been used to invalidate a law that the Republicans cared about, it was necessary to find a law that the Republicans did not care about. And what more perfect law could have been found for this purpose than § 13 of the Judiciary Act of 1789?¹⁸³

¹⁸² See Newmyer, supra note 181, at 167; Ellis, supra note 36, at 58; 1 Warren, supra note 148, at 215-16.

¹⁸³ Alfange, supra note 135, at 367-68; see also Malone, supra note 144, at 147.
Robert McCloskey, it turns out, may have been right after all in praising Marbury as an example of Marshall’s “brilliant” capacity to sidestep danger. 184

It is tempting, and perhaps too easy, to assume that since Marshall was daring in finding a way to introduce judicial review into the case, he must have been equally bold and imaginative in developing the doctrine. If anything, the opposite was true. The circumstances of Marbury led Marshall to write cautiously and to formulate the Court’s authority to nullify legislation conservatively.

Many Federalists had, by the time of Marbury, begun to espouse a theory of judicial review broader and more ambitious than anything we have seen so far—a theory recognizable today as judicial supremacy, or the notion that judges have the last word when it comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone. 185 A few had pushed this theory aggressively during the debates over the repeal act, 186 in turn prompting the most forceful Republican denunciations of judicial review. But judges were generally more circumspect than politicians in declaring the scope of their authority, and Marshall was doubly inclined to be cautious in Marbury. His opinion thus carefully and self-consciously avoided the language and arguments of his Federalist allies. Instead, it offered a straightforward application of principles that were widely accepted, even by most Republicans (including, significantly, President Jefferson), and fully consistent with the premises of popular constitutionalism. Marshall himself acknowledged as much, for he was being neither ironic nor

184 McCloskey, supra note 124, at 40.

185 See chapter five at pages X-X.

186 See, e.g., speech by Gouverneur Morris, 11 Annals of Congress, supra note 37, at 82-83, 90, 180-81; speech by John Rutledge, in id. at 739-43, 754-55, 760; speech by Samuel W. Dana, in id. at 920-33.
misleading when he introduced the topic by observing that it was “not of an intricacy proportioned to its interest” and could be decided by “certain principles, supposed to have been long and well established.”

Like every other writer of the period, Marshall began with the principle that the Constitution is “a superior, paramount law,” and that, therefore, “an act of the legislature, repugnant to the constitution, is void.” He then asked, again like every other writer of the period, “does [such a law], notwithstanding its invalidity, bind the courts, and oblige them to give it effect?” Though this would seem, “at first view, an absurdity too gross to be insisted on,” Marshall proposed nevertheless to say more and explain why. Then, the famous line: “It is emphatically the province and duty of the judicial department to say what the law is.”

Read in context, this sentence did not say what, to modern eyes, it seems to say when read in isolation. That is, it did not say “it is the job of courts, alone, to say what the Constitution means.” Nor did it say, “it is the job of courts, more so than others, to say what the Constitution means.” What it said was “courts, too, can say what the Constitution means.”

Marshall thus followed his celebrated sentence with exactly the same point as that made by Tucker and Roane in Kamper:

Those who apply the rule to particular cases, must of necessity expound and interpret that rule. . . . Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the

\[187\] 5 U.S. (1 Cranch) 137, 176 (1803).

\[188\] Id. at 176-77 (quotes at p. 177).

\[189\] Id.

\[190\] Id.

\[191\] Id.
necessity of maintaining that courts must close their eyes on the constitution, and see only the law.\textsuperscript{192}

Marshall added a textual argument. Federal judicial power extends to cases “arising under” the Constitution.\textsuperscript{193} “Could it be,” he asked incredulously, “[t]hat a case arising under the constitution should be decided without examining the instrument under which it arises?”\textsuperscript{194} To anyone still unpersuaded of the “extravaganc[ee]” of such a supposition, Marshall offered a list of blatantly unconstitutional laws that would have to be enforced by courts if they ignored questions of constitutionality.\textsuperscript{195} “From these, and many other selections which might be made,” he concluded, “it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, \textit{as well as of the legislature.}\textsuperscript{196} Piling on with the point that the judges’ oath of office—which required administering justice “agreeably to \textit{the constitution}\textsuperscript{—would be “worse than solemn mockery” and “a crime” were judges required to ignore the Constitution, Marshall closed: a law repugnant to the Constitution is void, and “courts, \textit{as well as other departments, are bound by that instrument.}\textsuperscript{197}

The consistency between Marshall’s reasoning and that of every other judge and commentator we have studied is apparent and requires no elaboration. There are some differences: Marshall’s emphasis on text was unique—as it was unique to his constitutional

\begin{footnotes}
\item Id. at 177-178.
\item U.S. Const., Art. III, § 2.
\item 5 U.S. (1 Cranch) at 179.
\item Id.
\item Id. at 179-80 (emphasis added).
\item Id. at 180 (emphasis added).
\end{footnotes}
More interesting, while Marshall referred to the superior authority of the people and to the Court’s role acting on their behalf, the point was made *sotto voce*—though he did acknowledge (along the lines first articulated by James Iredell back in 1786) that the people “can seldom act” because an exercise of their “original right” requires “a very great exertion.” Whether Marshall was intentionally downplaying this argument because, in the depths of his heart, he was already secretly plotting to eliminate the people’s role cannot be known for sure, though this seems unlikely. Marshall was a Federalist and so not much interested in celebrating the people’s active role in constitutional politics—particularly not in 1803, with his party and his institution reeling from the anticourt, propopulist Republican onslaught. In any event, to readers of the time, unaware of what judicial review would become a century or more later, such an omission would not have been visible because the point would have been implicit in the opinion’s whole structure and analysis. To contemporary readers, Marshall was simply insisting—like practically every other judge and writer of the era—that courts had the same duty and the same obligation to enforce the Constitution as everyone else, both in and out of government.

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Did Marshall achieve his various objectives in *Marbury*? He managed to reprimand Jefferson for what amounted to dereliction of duty without bringing the wrath of Republicans down on the Court, thus weaving his way through the most politically treacherous territory. The Court may not have blocked the Administration’s measures, but neither did it prostrate itself.

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198 See Snowiss, supra note 60, at 125, 139.

199 5 U.S. (1 Cranch) at 176.
With respect to judicial review, judgment is more complicated. Conventional wisdom long held that Marshall succeeded magnificently, almost singlehandedly creating judicial review “out of the constitutional vapors.” More recent commentators have disparaged this sort of remark as nonsense. Not only did Marshall not invent judicial review, they say, but *Marbury* had little or nothing to do with its subsequent emergence as a formidable constitutional weapon, which happened decades later.

   In fact, neither position seems quite right. *Marbury* was an important statement at the time and under the circumstances in which it was made. Whether or how judicial review would have developed without it is a question we will never be able to answer. Maybe Marshall’s fears were overstated. Maybe judicial review would have continued to evolve as it did without a push from the Court. At the very least, however, asserting and exercising the power of judicial review at just this moment and in just this way helped to preserve a practice that might otherwise have been forced down a dead end road.

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200 See Bickel, supra note 125, at 1.