My topic is Marbury v. Madison, the 1803 Supreme Court case that we understand to be the progenitor of judicial review—the doctrine allowing courts to hold acts of Congress unconstitutional. My claim is that Marbury was actually about something larger. It was about maintaining a balance between two concepts, democracy—the idea expressed by Lincoln in the Gettysburg Address of government of the people, by the people, and for the people; and the rule of law—the idea expressed by John Adams in the Massachusetts Constitution of 1780 that ours is a government of laws and not of men.

Virtually all Americans believe in both concepts—one, that the people make the law, and two, that law somehow transcends mere human will and incorporates ultimate principles of right. So defined, however, the two concepts are potentially in tension with each other. My claim this evening will be that for nearly two centuries, Marbury v. Madison provided a set of distinctions that enabled Americans to keep both the concept of democracy and the concept of the rule of law at the base of their constitutional theory.

This claim, in turn, has three components. First, we need to understand that John Marshall, by deciding Marbury, did not direct how we today should resolve the tensions we face between democracy and the rule of law. He couldn’t possibly have done that because he, like us, could not predict what would happen two centuries in the future. All he could know—all we can know—is what has happened in the past; all he could do—all we can do—is use knowledge of the past to try to control events in the present. The future, for Marshall like us, was beyond both knowledge and control.

Thus, if we want to appreciate the insight that Marshall’s opinion in Marbury v. Madison can provide us, we need to proceed to the second component of my claim—we need to understand what Marbury meant to Marshall. Only then can we turn to the third compo-
nent—understanding in broad outline how change that has occurred since Marbury has partially transformed its meaning, leaving it both different and the same as the case decided by John Marshall.

It is to the second component—what Marbury meant in its time—that I now want to turn. Understanding what Marshall decided in Marbury requires, in turn, that we begin with the government, law, and society of eighteenth-century Virginia—where Marshall was born and raised and from which he derived his ideas and values. We need to appreciate that eighteenth-century Virginia, unlike America today, was not governed by a ubiquitous bureaucracy with clear chains of command reaching upward to central political authorities. There were no police, state or local, no department of motor vehicles, no highway department, no state education bureaucracy. There was no colonial equivalent, on any level of government, of the Internal Revenue Service or the Social Security Administration.5

Because there was no modern bureaucracy, the judiciary and the officials like sheriffs responsible to it were the primary link between a colony’s central government and its outlying localities. The judiciary alone could coerce individuals by punishing crimes and imposing money judgments. Courts also apportioned and collected taxes, supervised the construction and maintenance of highways, issued licenses, regulated licensees’ businesses, and administered the Poor Law.6 As one member of Congress observed in an end-of-the-century recapitulation, “[o]ther departments of the Government” may have been “more splendid,” but only the “courts of justice [came] home to every man’s habitation.”7

But even though courts possessed vast jurisdiction, no one believed that judges possessed policy-making prerogatives of the sort that we assume Congress and the President possess today. It was a commonplace, as Josiah Quincy of Massachusetts argued in 1770, that courts merely dispensed justice according to law, which was thought to be “founded in principles, that are permanent, uniform and universal.”8 John Adams similarly believed that “every possible Case” ought to be “settled in a Precedent leav[ing] nothing, or but little to the arbitrary Will or uninformed Reason of Prince or Judge.”9 James Otis, Jr., another Massachusetts revolutionary, even argued during the 1760s that legislation “contrary to eternal truth, equity, and justice” would be void, since “the supreme power in a state . . . [was] jus dicere only, . . . [while] jus dare, strictly speaking, belong[ed] only to GOD.”10 Thus, even before the late eighteenth-century adoption of written constitutions, arguments were being made, in the words of a 1775 New York pamphlet, that “something must exist in a free state, which no part of it can be authorised to alter or destroy.”11

Prior to the American Revolution, few colonials imagined that social change was possible and nearly everyone assumed that life would go on essentially as it had for decades. Society was seen as a stable organism that grew and maintained itself of its own accord. It followed from this view of society that no one in government needed to make choices about the direction that law, government, and the society ought to take. Of course, bad people might threaten the health and stability of the organism: foreign monarchs often threatened its destruction by war, and criminals and other evil people posed menaces to its peace and stability at home. The king had the duty to make the decisions needed to protect the realm from foreign threats, and his courts performed the task of doing justice to malefactors at home. But doing justice did not entail policy choice; it necessitated only the enforcement of traditional, customary values, such as property, stability, community, and morality, which were embedded deeply within existing common law.12

It is also essential to emphasize that in doing justice, courts did not coerce the good people of a community; on the contrary, they worked harmoniously with those people to
protect and defend the embedded values that most people of the community took for granted. The judges who directed county- and colony-wide courts were prominent local and colonial leaders, but they were leaders who had power only to guide, not to command. For juries rather than judges spoke the last word on law enforcement in nearly all, if not all, of the eighteenth-century American colonies. Colonial judges could not enter a judgment or impose any but the most trivial of penalties without a jury verdict. And, in the cases in which they sat, eighteenth-century American juries, unlike juries today, usually possessed the power to find both law and fact.13

In American courts of today, judges give juries charges or instructions on the law, and if a jury fails to follow its instructions, its verdict, except for a verdict acquitting a defendant charged with a crime, will be set aside. Eighteenth-century American judges, in contrast, often did not give clear instructions. Lawyers assumed, as did John Adams, that “[t]he general Rules of Law and common Regulations of Society, under which ordinary Transactions arrange[d] themselves . . . [were] well enough known to ordinary Jurors,”14 and thus juries were directed that, as to many matters, they “need[ed] no Explanation [since] your Good Sence & understanding will Direct ye as to them”15 and that they should “do justice between the parties not by any quirks of the law . . . but by common sense as between man and man.”16 In Virginia, in particular, one commentator who reviewed eighteenth-century practice observed that there were “numerous cases” in which the jury “retired without a word said by the court upon the subject” of the case.17

Instructions were also ineffective because they were often contradictory. One potential source of contradiction was counsel, who on summation could argue the law as well as the facts. Most confusing of all was the court’s charge. Nearly every court in eighteenth-century America sat with more than one judge on the bench, and it appears to have been the general rule for every judge who was sitting to deliver a charge if he wished to do so. Sometimes judges were not unanimous.18

Of course, whenever jurors received conflicting instructions, they were left with power to determine which judge’s interpretation of the law and the facts was correct. Even when the court’s instructions were unanimous, however, juries could not be compelled to adhere to them. Once jurors had received evidence on several factual issues and on the parties’ possibly conflicting interpretations of the law, a court could compel them to decide in accordance with its view of the case only by setting aside any verdict contrary either to its statement of the law or to the evidence. By the 1750s English courts, upon motion of the losing party, would set aside such a verdict and order a new trial, but eighteenth-century American jurisdictions did not follow English practice.19

It accordingly seems safe to conclude that juries normally had the power to determine law as well as fact in both civil and criminal cases. Statements by three of the most eminent lawyers in late eighteenth-century America—John Adams, Thomas Jefferson, and John Jay—buttress this conclusion. In the early 1770s, Adams observed in his diary that it was “not only... [every juror’s] right but his Duty... to find the Verdict according to his own best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court.”20 In 1771–1782, Thomas Jefferson painted an equally broad picture of the power of juries over the law in his Notes on Virginia. “It is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges,” Jefferson wrote. “But this division of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact.”21 And, as late as 1793, John Jay, sitting as Chief Justice of the United States, informed a civil jury that it had “a right to take upon yourselves
to judge of both, and to determine the law as well as the fact in controversy.” “[B]oth objects,” Jay concluded, “are lawfully, within your power of decision.”

The power of juries to determine law as well as fact reveals a great deal about government and society in eighteenth-century America. In particular, the power of juries reveals that government officials simply lacked effective power to coerce people to obey the law. If an official failed by himself to coerce a recalcitrant person, he could not call for the aid of a substantial body of force other than fellow members of the community, organized as the militia; if the militia was on the side of the recalcitrant person, it would not, of course, aid the official. Thus, the only way for officials to ensure enforcement of the law was to obtain local community support for the law, and the best way to obtain that support was to permit local communities to determine the substance of the law through legal institutions such as the jury. In hindsight, this power of local communities to determine the substance of the law appears quite democratic.

However, the second reality that the law-making power of juries reveals is the fixed and certain nature of the law. If law had been uncertain and individual jurors had manifested differing opinions about its substance, it would have been impossible for jurors to have decided cases after receiving rudimentary or conflicting instructions, or even no instructions at all. The law-finding power of juries suggests ineluctably that jurors came to court with shared preconceptions about the substance of the law. This point was explicitly made in the 1788 Connecticut case of Pettis v. Warren. In a black slave’s suit for freedom, one juror was challenged for having a pre-existing opinion “‘that no negro, by the laws of this state, could be holden a slave.’” Affirming the trial court’s overruling of the challenge, the Connecticut supreme court held that “[a]n opinion formed and declared upon a general principle of law, does not disqualify a juror to sit in a cause in which that principle applies.” Indeed, the court observed that the jurors in every case could “all be challenged on one side or the other, if having an opinion of the law in the case is ground of challenge.” Jurors, the Connecticut court believed, were “supposed to have opinions of what the law is,” since they sat as “judges of law as well as fact.”

One might infer further that jurors came to the court with similar preconceptions about the law, at least as it applied to disputes that frequently came before them. Indeed, one cannot escape this inference without abandoning all efforts to understand how eighteenth-century government functioned. If jurors came to court with different and possibly conflicting opinions about substantive law, one would expect to find, first, that juries had difficulty reaching unanimous verdicts and that mistrials due to hung juries were correspondingly frequent, and second, that different juries at different times would reach different, perhaps inconsistent verdicts, thereby making the law so uncertain and unpredictable that people could not plan their affairs.

In fact, no such evidence exists. On the contrary, the available evidence suggests that juries had so little difficulty reaching verdicts that they often heard and decided several cases a day. No one in the mid-eighteenth century complained about the inconsistency of jury verdicts, and as soon as such complaints were heard in the century’s last decade, the system of jury law-finding began to disintegrate.

One final inference must be drawn. We know that eighteenth-century juries mirrored the white, male, landholding, and taxpaying population. It follows that, if jurors shared similar ideas about the substance of the law, then a body of shared ideas about law must have permeated a large segment of the population of every territory over which a court that sat with a jury had jurisdiction. Colonial government may have been able to derive policies from and otherwise function on the basis of those shared values.

Colonial communities, in short, were si-
multaneously democratic and governed by fixed laws. A word must be said about how such a system of governance was possible. Those who have lived amidst the twentieth-century cacophony of conflicting interests may find it difficult to imagine how a government could act only on the basis of shared values. The eighteenth-century Anglo-American world, however, was sufficiently different from our own so that government in that era might have so functioned.

The key difference was that colonial politics existed within an established constitutional structure that colonials could not control. Parliament, in which colonials had no direct voice, alone possessed the power to decide many fundamental social and economic issues, and for the first sixty years of the eighteenth century it was willing to abide by decisions reached in the preceding century that were often favorable to the colonies. Thus, much of the grist for genuine political conflict was removed from the realm of imperial politics; absent a radical restructuring of the Anglo-American system, there was simply no point in building a political organization around the issue of whether, for example, Anglicans would be tolerated in Massachusetts or whether Americans would be free to trade with French Canada without restriction.

Provincial politics were not radically different. Colonial legislatures were under American control, but they could not effectively enact legislation that significantly altered the structure of colonial society, since such legislation would almost always be vetoed by a colonial governor or by London. As a result, colonial legislation usually consisted of mere administration: raising and appropriating small amounts of tax money, distributing the even smaller amounts of government largess, and legislating as necessary to keep the few governmental institutions functioning. Even when provincial political conflict occurred, it rarely involved important social issues.

The coming of independence, however, significantly reshaped American politics. Independence introduced a new political style in stark contrast to the mid-eighteenth-century style of government by consensus. Over the course of the next several years, the Continental Congress had to raise and support an army, appoint commanding generals, negotiate with foreign powers, and govern the vast territories in the trans-Appalachian West that the United States acquired from Great Britain in the 1783 peace treaty acknowledging American independence. In performing these tasks, Congress and other national officials had to make choices among possible policies that were in conflict with each other—choices that favored some American interests over others and thus could not be made on the basis of principles or values with which nearly everyone agreed.

These national issues impacted local politics. Most significant of all were the divisions in local communities resulting from the Revolutionary struggle itself, as citizens who identified themselves as Patriots came into conflict with Loyalists, those who remained committed to the cause of Parliament and the Crown. These conflicts sundered communities and often resulted in the exile of Loyalists and the confiscation of their properties.

Little changed with the coming of peace. In order to obtain independence and secure British evacuation of all outposts in the newly recognized American territories, Congress had agreed in the 1783 treaty that individual British creditors would suffer no impediments to the collection of debts owed to them by Americans. But several states refused to honor this provision in the treaty and placed various impediments in the path of British creditors. Prospective lenders in Great Britain, knowing they would face future impediments as creditors, responded by tightening credit, while the British government reacted by refusing to evacuate outposts in the western portions of the new United States that the 1783 treaty had obliged it to surrender. As a result, Americans seeking to borrow money found it more difficult and expensive to do so, and those seeking to settle or otherwise exploit the West...
found the British army and its Indian allies in their path.34

These actions by several American states, by British lenders, and by the British government created political divisions in local American communities that would endure into the early nineteenth century. On the one side were debtors who did not want Congress to interfere with state policies that made debt collection more difficult. Pitted against them were pioneers who found the British blocking their westward movement and business entrepreneurs seeking to borrow funds to expand their operations; they wanted a stronger national Congress that could compel the states to obey the peace treaty.35

Above all, independence destroyed the constitutional order that had existed for a century in the British North American world. No longer were fundamental questions such as the distribution of power among various levels of government, the continuance of religious establishments, and the freedom of American merchants to trade abroad resolved by an imperial law that the colonies had little direct power to control. Independence compelled Americans to resolve such questions anew, often on a national rather than a local basis. Independence meant that newly independent Americans, unlike their colonial ancestors, would routinely need to make choices among competing policies and, as a result of those choices, structure the world in which they wanted to live. The post-Revolutionary generation’s grappling with these questions portended social discord in both state and national politics and, during the last two decades of the eighteenth century, provoked some of the most vituperative conflict that has ever occurred in American political history.36

This transformation occurred, however, in a society unprepared to abandon the pre-Revolutionary ideal that human law must conform to fundamental principles of divine or natural law. The older ideal persisted throughout the late 1770s and the 1780s. Post-Revolutionary Americans continued, in the words of Alexander Hamilton, to believe in “eternal principles of social justice” and to object to legislation “founded not upon the principles of Justice, but upon the Right of the Sword” and for which “no other Reason [could] be given . . . than because the Legislature had the Power and Will to enact such a Law.”41

The revolutionary struggle and the attainment of independence also transformed American society and politics ideologically. In discarding British rule and reconstituting their governments, Americans proclaimed that all law springs from popular will as codified in legislation. If the people could remake their government, it followed, the Maryland Journal declared in 1787, that the law-making power of the people must be “original, inherent, and unlimited by human authority,”37 while the Connecticut Courant wrote that there was “an original, underived and incommunicable authority and supremacy in the collective body of the people to whom all delegated power must submit and from whom there is no appeal.”38

This concept of legislation as the creation of new law by the people or their representatives proved practically significant after independence because groups such as religious dissenters and westward expansionists used it to promote their interests. Before the Revolution, policies imposed by London had tended to restrict westward expansion and to require that dissenters support established churches. Once independent Americans could formulate their own policies, however, both religious dissenters and westward expansionists campaigned to revise established policies. Legislatures frequently responded by changing inherited rules and practices, and in the process changed themselves as well. By enacting new law, legislatures reinforced the ideology of popular lawmaking power and forged an active, creative legislative process in lieu of one that had depended on the derivation of rules from preexisting shared principles.39

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Thinkers like James Madison, arguing at the time of the Constitutional Convention for a congressional
power to negate state legislation, noted in a letter to George Washington that America needed “some disinterested & dispassionate umpire” to control “disputes between different passions & interests in the State[s].”

The conflict between advocates of the people’s transcendent power to make law and adherents of older notions of the inherent rightness and immutability of law emerged with sharp clarity in a series of state-court cases during the 1780s and 1790s establishing the doctrine of judicial review. In a New York case, *Rutgers v. Waddington*, for example, the “supremacy of the Legislature . . . positively to enact a law” was pitted against “the rights of human nature” and the “law of nature.” Similarly, in *Trevett v. Weeden*, a Rhode Island act that penalized without jury trial anyone who refused to accept the state’s paper currency was challenged as “contrary to the laws of nature” and violative of the “fundamental right” of “trial by jury.”

But, as late as the early 1790s, the line between believers in popular sovereignty and believers in supreme fixed principles was rarely so plainly drawn. One could still believe simultaneously in the people’s power to make law and in the immutability of the principles underlying law. Although it appreciated and accepted popular lawmaking, the Revolutionary generation did not abandon older notions that law made by the people must not violate rights that Americans had proclaimed immutably theirs in the struggle with England. New and old ideas coexisted as the Revolutionary generation, believing in the people’s inherent goodness, simply assumed that all laws made by the people would be consistent with fundamental rights.

As the 1790s progressed, however, this ambivalent legal ideology proved merely transitory and diverged into two clearer, more coherent points of view. One sought to resolve all issues according to the will of the people, while the other sought to resolve them according to fixed principles of law. The appearance of these competing ideologies was closely related to the division in American politics in the 1790s between the Federalists, who generally viewed law as a reflection of fixed and transcendent principles, and the Republicans, who considered it the embodiment of popular will.

Historians generally agree that the first truly national political organizations arose in the mid-1790s in response to the French Revolution and the signing of Jay’s Treaty with Great Britain. These two events forced Americans to choose sides in the worldwide struggle between Britain and France that began in 1793, and for many the choice posed difficult ideological issues. Some Americans found themselves horrified by the excesses of the French Revolution during the early 1790s and by its culmination in the politically driven executions of the Reign of Terror; others, while not approving of the death and violence, remained convinced that the French republican movement would ultimately warrant American sympathy. Similarly, some thought that John Jay paid too high a price for British withdrawal from the Northwest Territory when he agreed in his treaty to have the federal government, in return, pay Revolutionary-era debts still owed to British creditors.

The political divisions of the mid-1790s reflected ideological concerns as well. For example, the Federalists saw in Jefferson and the Republicans many of the threats to religion, to life, and to property that they found so horrifying in French revolutionaries. The election of 1800, according to one Federalist campaign tract, would require voters to select either “GOD—AND A RELIGIOUS PRESIDENT; or impiously declare for JEFFERSON—AND NO GOD!!”

This widespread Federalist concern over Jefferson’s lack of traditional religious belief gained credence from the efforts of prominent elements in the Jeffersonian coalition in states such as Massachusetts and Virginia to pull down the state-supported churches that those colonies had erected at the time of their earliest settlements. For people who lived in an
age that had had little experience with societies that had maintained their stability without the assistance of such established churches, it was plausible to fear, as did a Federalist preacher in one 1800 election sermon, that if “the restraints of religion [were] once broken down, as they infallibly would be, by leaving the subject of public worship to the humors of the multitude, . . . we might well defy all human wisdom and power to support and preserve order and government in the State[s].”52

If the Federalists were convinced that conferral of power upon Republicans would subvert morality and lead to violence and anarchy, the Republicans were equally convinced that, if allowed to retain power, the Federalists would subvert republican liberties and rule autocratically. These fears of a Federalist conspiracy to pervert American liberties came to a climax during the administration of President John Adams, who held office from 1797 to 1801. It was during his term that Congress for the first time in American history imposed a direct tax, voted to establish a standing army and navy, and adopted the Alien and Sedition acts, pursuant to which Jeffersonian editors were sent to jail for criticizing government policies.53

In short, clear-cut party divisions had emerged by the second half of the 1790s. On one side stood the Republicans, avowing, in the words of James Madison, “the doctrine that mankind are capable of governing themselves”54 and accused by their opponents of scheming “to introduce a new order of things as it respects morals and politics, social and civil duties.”55 Opposite them stood the Federalists, claiming, in the words of the New England Palladium, to preserve “that virtue [which] is the only permanent basis of a Republic”56 and accused of attempting to restore monarchical government.57

These two competing political theories were deeply rooted in still-fresh American political experiences; they responded to ardently felt political needs. Republicans in 1800 could look back upon a quarter-century of fervid political activity during which a majority of the people had transformed the American constitutional landscape. In light of this, Republicans could plausibly hold that the popular majority would secure revolutionary improvements in government through continued exertion.58

Federalists, on the other hand, looked back on a different governmental tradition. They focused upon the workings of local government, which, even after twenty-five years of revolutionary transformation, continued to function without falling under the arbitrary control of those in positions of power. Federalists recognized a tradition, that is, of government by customary norms whose validity all right-thinking people accepted. That such traditional government seemed under attack in 1800 and unable to resolve every political issue was not startling; eighteenth-century government-by-consensus had always been somewhat unstable and unequipped to resolve all problems. Nevertheless, it had succeeded in many matters, and even its partial success offered hope to those in 1800 who dreaded government solely by majority will.59

Marbury v. Madison60 came before the Supreme Court immediately after the conflict between these two approaches to politics had come to a head in the election of 1800, in which Thomas Jefferson defeated John Adams’s reelection bid. The election unfortunately did not put an end to partisanship. Within a few months, partisan Federalist leaders of the lame-duck Congress that met in December 1800 promptly enacted the Judiciary Act of 1801, which revamped the lower federal judiciary.61

It is essential to appreciate how the Judiciary Act of 1801 upset a series of compromises, made at the Constitutional Convention and in the First Congress, between those who had wanted no federal courts and those who wanted an extensive judicial system. Specifically, the act gave federal courts jurisdiction to hear all cases involving questions of federal law, and, in addition, lowered from...
$500 to $100 the minimum amount of money that a plaintiff had to claim in order to bring a federal suit.

As a result of these changes, many more Americans could have been summoned into federal courts. Moreover, the 1801 act made those courts more efficient. In particular, it created sixteen new circuit judges, who collectively would have had a substantially greater capacity to determine lawsuits than the six Supreme Court judges who had been riding circuit under the 1789 act.62

The Judiciary Act of 1801 became law on February 13—less than three weeks before John Adams’s term as President expired. Undaunted, Adams managed to appoint and obtain Senate confirmation for the sixteen new circuit judges, all of them Federalists, as well as for several judges of courts, newly created by an act of February 27, 1801, in the District of Columbia. Unfortunately, Secretary of State Marshall was unable to deliver the commission for one of the new justices of the peace for the District, a certain William Marbury, before the end of President Adams’s term, and James Madison, the new Secretary of State, refused to make the uncompleted delivery. Upon his refusal, Marbury brought a suit for a writ of mandamus63 against Madison in the Supreme Court, and thus the case of Marbury v. Madison began.64

But before the Court could hear the case, Congress, now under the control of the Jeffersonian Republicans, intervened and passed the Judiciary Act of 1802, which repealed the Judiciary Act of 1801. Cases pending in the new circuit courts established under the 1801 act were transferred by the 1802 legislation back to the old circuit courts that had existed under the 1789 act. Congress also postponed the next Term of the Supreme Court until 1803 so that the Court could not rule on the constitutionality of the 1802 act before the act went into effect.65

Nonetheless, in one case so transferred, Stuart v. Laird,66 the defendant argued that the 1802 repeal act, and hence the transfer of his case, was unconstitutional. When his argument was rejected in the lower court, he appealed to the Supreme Court. Decided only six days after Marbury, Stuart became, in effect, a companion case in determining the legitimacy of the judicial policies of both Federalists and Republicans during the transition from the Adams to the Jefferson administration.67

Marbury v. Madison and Stuart v. Laird, both decided in 1803, thus created the possibility of a direct confrontation between the Federalist judiciary left over from the Adams administration and the new Jeffersonian Congress. In such a confrontation, Congress would have been very much on the offensive. As one Republican newspaper, the Boston Independent Chronicle, warned in 1803, any attempt “of federalism to exalt the Judiciary over the Executive and Legislature, and to give that favorite department a political character & influence” would “terminate in the degradation and disgrace of the judiciary.”68 However, Chief Justice Marshall, by nature a compromiser, was not inclined to take up this Republican challenge and generate a clash with President Jefferson and his Republican Congress.69

John Marshall had no propensity to turn Marbury and Stuart into instances of judicial review of the sort that the Jeffersonians feared. Although Chief Justice Marshall was prepared, as he wrote, to “disregard” the pressures of partisan politics when they were “put in competition with . . . his duty” to uphold the law, and always kept in mind the desirability of adjudicating at least some matters by a nonmajoritarian standard, he and his fellow Federalist Justices, with the possible exception of Justice Samuel Chase, were not elitist antidemocrats. They appreciated the need to steer clear of partisan controversy and not to challenge unnecessarily legislation enacted by democratic majorities. As Marshall’s private correspondence with his colleagues in the opening years of the 1800s indicates, the Chief Justice and his colleagues were fully aware of “[t]he consequences of refusing to
carry . . . into effect” a law enacted by a popular majority.70

Marshall and the other Justices, in short, strove to reconcile popular will and legal principle, not to make one either superior or subservient to the other. They had no intention of behaving as the Supreme Court ultimately would in Cooper v. Aaron,71 where the Court for the first time in its history explicitly announced that it possessed exclusive power to interpret the Constitution. Unlike the Justices in Cooper, Marshall and his colleagues did not declare themselves to be the ultimate arbiters of the nation’s constitutional policy choices, with power to bind coordinate branches of government to their judgments of constitutionality and thereby invalidate popularly supported legislative politics inconsistent with the constitutional values they favored. Marbury v. Madison and Stuart v. Laird were much narrower decisions.72

John Marshall and the other Federalist Justices achieved their narrow goals in Marbury and Stuart by distinguishing between the domain of law and the domain of politics. Indeed, the foundation of Marshall’s constitutional jurisprudence is the distinction between political matters, to be resolved by the legislative and executive branches in the new democratic, majoritarian style, and legal matters, to be resolved by the judiciary in the government-by-consensus style that had prevailed in most eighteenth-century American courts. Marshall, of course, invented neither style, nor did he first apply the latter to the adjudicatory process. His creative act was to use the distinction between law and politics to circumscribe, however imperfectly, the extent to which the political, majoritarian style could engulf all government, as it was threatening in 1800 to do.73

Merely announcing a line between law and politics does not, of course, fully differentiate the legal from the political. It is also necessary to put content into the line by articulating consistent and precise criteria for identifying matters appropriately decided by the legal method. We need to examine both Marbury v. Madison and Stuart v. Laird in considerable detail to appreciate how John Marshall and his fellow Justices accomplished this difficult task.74

Marshall began the Marbury opinion with a narrow and technical ruling—that President Adams’s signature on Marbury’s commission completed Marbury’s appointment to the office of justice of the peace and entitled him to the delivery of his commission. This ruling was especially important, however, because for lawyers of Marshall’s generation a right to an office was analogous to a right to land or other property. It meant that Marbury possessed a vested legal right to his commission, and it led the Chief Justice to the second issue in his opinion—whether Marbury had a remedy for the deprivation of the right.75

Marshall recognized the difficulty of this question, for he acknowledged, as he had once told his constituents, that the people, and hence their agents in the political branches of government, must sometimes be free to act unbound by fixed legal principles. Accordingly, his central task in Marbury was to specify when law bound the political branches and when it did not. To do so, he and the Court distinguished between political matters, such as foreign policy, as to which the legislature and executive were accountable only to the electorate, and matters of individual rights, which the courts would protect by adhering to fixed principles.76 In Marshall’s own words, “political” subjects “respect[ed] the nation, not individual rights” and were governed by a political branch whose decisions were “never . . . examinable by the courts” but “only politically examinable.”77

In contrast, there were cases where “a specific duty [was] assigned by law, and individual rights depend[ed] upon the performance of that duty.” In such cases involving “the rights of individuals,” every officer of government was “amenable to the laws for his conduct; and [could not] at his discretion sport away . . . vested rights . . . ,” and a person such
as Marbury who possessed a vested right was entitled to a remedy. In Marshall’s own words, “The very essence of civil liberty certainly consist[ed] in the right of every individual to claim the protection of the laws, whenever he receives an injury.”78

Thus, William Marbury was entitled to some remedy for deprivation of his right to office. But was he entitled to the particular remedy he had sought—a writ of mandamus issued by the Supreme Court of the United States in a suit commenced before it? The Judiciary Act of 1789 authorized the Court to issue writs of mandamus, but the judiciary article of the Constitution presented a problem, in that it limited the original jurisdiction of the Supreme Court to specified categories of cases, of which mandamus was not one. In order for the Court to issue the writ, it thus would have to reach one of two conclusions: either that Congress had power to grant original jurisdiction to the Supreme Court in cases in which the Constitution denied it, or that an action for mandamus in the Supreme Court was not the commencement of an original proceeding but a form of appeal from the official against whom the writ was being sought.79

It is noteworthy that Marbury’s counsel did not press the argument that by granting mandamus in a suit commenced before it, the Supreme Court exercised its original jurisdiction over original matters not specified in the Constitution. Instead, he mainly argued that the Court exercised appellate jurisdiction when issuing mandamus in a proceeding commenced before it. According to the thrust of his argument, which flowed from an accurate reading of Federalist No. 81, “the word ‘appellate’ [was] not to be taken in its technical sense, . . . but in its broadest sense, in which it denotes nothing more than the power of one tribunal” to have “by reason of its supremacy . . . the superintendence of . . . inferior tribunals and officers, whether judicial or ministerial.”80 In 1803, when the concept of appeal had not yet assumed its relatively narrow and precise modern meaning, that argument was plausible, and a court anxious to grant Marbury relief could easily have accepted it.81

However, accepting the argument would have contradicted Marshall’s distinction between matters of political discretion and matters of legal right, for it would have frequently led the Court to “revis[e] and correct the proceedings in a cause already instituted”82 in the executive branch and might thereby have brought before the Court all the issues, both of law and of fact, that the executive branch had previously considered. Such review might have continually presented the Court with political questions of executive motive. To avoid this danger and to ensure that the court serve as the purely legal institution he envisioned, Marshall had to consider a mandamus against officials, as distinguished from a mandamus against lower-court judges, as an original action in which the court granting the writ could confine the action’s scope to properly legal rather than political matters. Thus, he had to reject the claim that mandamus was a direct appeal from the executive to the Supreme Court.83

That brought Chief Justice Marshall to the issue of whether Congress could grant the Supreme Court jurisdiction that the Constitution denied it. Marshall’s answer, of course, was that Congress could not, and he accordingly declared unconstitutional Congress’s grant of jurisdiction to the Court, in the Judiciary Act of 1789, to issue original writs of mandamus.84

This recourse to judicial review will strike many listeners as perhaps even more political than granting the writ to Marbury would have been. But Marshall did not understand judicial review as we do today. For Marshall and his colleagues on the Supreme Court, judicial review neither required nor permitted judges to exercise policy discretion. At no point in the opinion did Marshall invoke the language of natural rights, nor did he rely on precedent or other prior judicial authority. In fact, he cited only one case in his entire opinion. In short, Marshall never relied upon principles that ei-
ther were made by or required interpretation by judges. On the contrary, the principles that he found fundamental acquired their authority from the “original right” of the people “to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness.” For Marshall and his colleagues, judicial review merely required comparison of fundamental principles incorporated by the people into the written text of the Constitution, which in the case of Marbury conferred original jurisdiction on the Supreme Court only in specified categories of cases and declared its jurisdiction to be appellate in all other cases, with the text of legislation, which gave the Court original jurisdiction over a category not within the Constitution’s specifications.

Of course, the propriety of exercising the power of judicial review was not without doubt prior to Marbury v. Madison. Still, whatever ambiguity may have existed, the Marshall Court’s assumption of the power of judicial review was hardly unprecedented. No one, of course, wanted the Court to assume policy-making powers. But the Chief Justice gave adequate reassurance that it would not when he announced that the Court would consider only legal and not political issues and then struggled, in those portions of the Marbury opinion that we now tend to ignore, to articulate a standard that would minimize the Court’s political involvement.

In sum, the distinction between legal and political decisionmaking runs throughout the Marbury opinion and is essential to our understanding of the case. It explains, for example, how Marshall could plausibly believe that judicial review involved, not an exercise of political discretion by the Court, but merely a juxtaposing of statute with Constitution to see if they conflicted. When the Court could resolve a case according to seemingly fixed principles, rather than transient policies, Marshall believed judicial review fell on the law side of the distinction and involved merely the judiciary’s judicial protection of immutable, individual rights. In contrast, a case that required the Court to choose among transient policies or otherwise to exercise political discretion was not, in Marshall’s estimation, an appropriate case for judicial review.

The distinction between law and politics outlined in Marbury gained force six days later from the Court’s disposition of the other case pending before the Court that questioned the constitutionality of an act of Congress. Stuart v. Laird passed upon the Republicans’ Judiciary Act of 1802, which repealed the Federalists’ Judiciary Act of 1801.

Federalists had contended in Congress that the 1802 Act was unconstitutional because it deprived judges appointed under the 1801 Act of the lifetime tenure guaranteed by Article III, Section 1 of the Constitution. The 1802 Act was also said to be unconstitutional because it required Supreme Court Justices to sit as trial judges in circuit courts, thereby conferring an original jurisdiction that, the argument contended, only the Constitution could confer. Marbury, we ought to recall, had been decided on an almost identical ground. Nonetheless, the Marshall Court sustained the 1802 Act. The apparent inconsistency between Marbury and Stuart, however, masks a deeper consistency in the Court’s approach. Significantly, the Court in Stuart never faced the contention that would have most troubled it: that the 1802 Act unconstitutionally deprived judges of a right to hold office. That contention would have involved issues of legally enforceable private rights, but it was not even raised, for Stuart was not one of the judges deprived of office; he was merely a litigant objecting to the transfer of his case from a court constituted under the 1801 Act to a court constituted under the 1802 Act. His complaint raised no issue of fundamental private rights, only issues of Congress’s political power to organize the lower federal courts.

There were two such issues. First, could Congress require a litigant to pursue his remedies in one court rather than another? As Marshall would suggest twenty-four years later in
Ogden v. Saunders, the legislature clearly could control remedies. Second, could Congress require Supreme Court Justices to ride circuit and thereby exercise an original jurisdiction not enumerated in the Constitution? Marbury had decided, of course, that Congress could not expand the Supreme Court’s original jurisdiction, but Stuart could be distinguished from Marbury, in that the 1802 Judiciary Act required individual Justices, not the full Court, to exercise original jurisdiction. Further, as Justice Paterson explained for the unanimous Court, the 1802 Act merely confirmed “practice and acquiescence” by Supreme Court Justices “commencing with the organization of the judicial system.” Such practice and acquiescence “afford[ed] an irresistible answer” to the claim of unconstitutionality; it was a “practical exposition...too strong and obstinate to be shaken or controlled,” and “indeed fixed the construction” of the Constitution. The fact that the Justices had performed the circuit duties imposed under the 1789 Judiciary Act put “the question...at rest.” In Marbury, on the other hand, no strong public sentiment, precedent, or established practice stood in the way of holding that the Constitution’s language prohibited the issuance of mandamus as a matter of original jurisdiction.

But a more fundamental fact distinguished Marbury from Stuart. By invalidating the Republican-sponsored Judiciary Act of 1802, the Marshall Court would have embroiled itself in a political contest with Congress and the President that it might not have survived. If the Court was to withdraw from politics, as Marshall had said in Marbury it would, it had to capitulate to legislative judgments upon such politically controversial issues as the constitutionality of the 1802 Act. Accordingly, the Court sustained the act. By contrast, the only way to avoid the politics behind Marbury had been to construe the Constitution in a way to which few would object and thereby invalidate section 13 of the 1789 Judiciary Act. To have issued a writ of mandamus to James Madison as Secretary of State would have thrust the Court into a political crisis. The Court’s only other option—to hold on substantive grounds that Marbury had no right to the mandamus—would have denied some individuals access to the courts to enforce their legal rights. In short, to maintain Marshall’s compromise—that courts would protect legal rights but refrain from adjudicating political questions—the Court had to decide both Marbury and Stuart as it did.

Thus, in two of the earliest cases decided by the Supreme Court following the 1800 election, Chief Justice John Marshall and the other Federalist Justices on the Court publicly addressed the task of reconciling popular will, which had provided the basis for the Jeffersonian-Republican victory in the election, and immutable principles, in which they, as well as many fellow citizens, continued to place their faith. As such, Marbury and Stuart were central to the process of differentiating law from politics and declaring that the Supreme Court would abstain from the exercise of political judgment.

Although many historians will disagree, I remain convinced that judicial review took root in early nineteenth-century America only because Marshall and his contemporaries believed, at some level, that the principles underlying constitutional government were nonpolitical—that is, that those principles existed independently of the will of the judges who applied them as well as the will of the political actors who flouted them. Of course, their belief was largely unarticulated, since they found its articulation as difficult as we find it to spell out our comparable beliefs. But, at the same time that the principles underlying Marbury were largely unarticulated, they also were unproblematic, because political elites, the only people who discussed such issues, accepted the Justices’ views. When elements of the elite did not agree with the Marshall Court’s views, as, for instance, on issues of the scope of federal and state powers, the Court refused to act in an independent political fashion and to impose its
own views but merely enforced the legislation that had been adopted by the majority of the Congress.98

It is essential to emphasize, however, that by eschewing independent political decision-making, the Court did not entirely remove itself from the political process. Cases as politically controversial as Marbury and Stuart still continued to find their way onto the Supreme Court’s docket, and the Court continued to decide them. The Justices also continued to behave strategically, as Marshall had in Marbury, where in dictum he proclaimed the Court’s authority to enforce the law and lectured the President for violating it and then turned to the less controversial doctrine of judicial review as the foundation for a judgment acceptable both to the President and to Congress. But until it invalidated the Missouri Compromise in Scott v. Sandford99 some fifty-four years after Marbury, the Court never struck down a legislative policy judgment for which a substantial nationwide political majority had voted and to which many voters in the polity still adhered. In that sense, the Marshall Court in Marbury v. Madison took itself out of politics.100

As soon as the Supreme Court had handed down its decisions in Marbury v. Madison and Stuart v. Laird, most political observers recognized the importance of the two cases. Both Federalist and Republican newspapers took note of the decisions and apprised readers of their significance. On the whole, they also approved of Marshall’s efforts. Although President Jefferson in later years would privately criticize the Marbury decision, he did not criticize it at the time the decision came down. Likewise, there was no criticism from Congress, which happened to be in session at the time of the decision. Similarly the Republican press, while giving extensive coverage to the decision, refrained from attacking it, while the Federalist press was, of course, supportive. Although the Marshall Court would later decide contentious issues and become engulfed in controversy, there was a general consensus that the Court had correctly decided both Marbury v. Madison and Stuart v. Laird. Only the political fringes of the Jeffersonian and Federalist parties had any doubts about the two decisions.101

Why, we need to ask, did Marbury and Stuart seem so important and at the same time generate so little controversy? Several explanations come to the surface, such as the Court’s announced withdrawal from politics and the widespread acceptability of a nonpolitical doctrine of judicial review. But the main reason for Marbury’s widespread acceptability, in my view, was the idea implicit in the opinion that courts should use law to protect private property. Such protection of property—an ideal at the core of John Marshall’s jurisprudence—appealed to politically active Americans, most of whom either owned private property or expected to own it at some point in their lives. No organized or identifiable groups or parties had yet formed to urge redistribution of wealth, and thus, when judges struck down statutes that took or regulated property without providing compensation, their decisions seemed nonpolitical. The scope of state power over private property was not yet a politically divisive one in the early nineteenth century, but one for which judges could find answers by reference to broadly shared beliefs about the nature of republican government.102

As one surveys the cases between about 1790 and 1820 involving claims that state statutes violated state constitutions or that federal statutes violated the Federal Constitution, a persistent pattern emerges. The pattern discloses that by 1820 the courts had begun to hold legislation unconstitutional with some frequency, but that their working understanding of the scope of their constitutional activity was sufficiently different from ours that, although we term their activity judicial review, we must not lose sight of the difference.103

Early nineteenth-century courts, unlike our own, still sought to leave—and in fact succeeded in leaving—to legislatures the resolu-
tion of conflicts between organized social interest groups. Once a legislature had resolved a conflict in a manner having widespread public support, judges would in practice view the resolution as that of the people at large, even though one or more organized groups continued to oppose it, and would give it conclusive effect, at least as long as a finding of inconsistency with the Constitution was not plain and unavoidable. Judges of the early nineteenth century, such as John Marshall, unlike judges of today, did not see judicial review as a mechanism for protecting minority rights against majoritarian infringement. Early judicial review rested instead upon a perception that, as to some issues, “the people” were a politically homogeneous and cohesive body possessing common rights, such as property, that courts had a legal obligation to protect.104

But the consensus underlying the early nineteenth-century practice of judicial review could not endure. As the circle of politically active Americans expanded during the course of the century, constitutional principles, especially principles about the sanctity of private property, became the subject of political debate. Farmers and urban laborers began to demand that the property of the wealthy be regulated and even redistributed. With this demand, Marshall’s line between law and politics became blurred, and some new foundation for judicial review was needed.105 That foundation was laid in the late 1930s when the Court ceased giving real scrutiny to congressional legislation regulating the economy but began strictly scrutinizing invasions of personal rights. As I have shown in a recent book entitled The Legalist Reformation, the concept elaborated in footnote 4 of Carolene Products—that the rights of discrete and insular minorities merit special judicial protection—was not politically controversial when Justice Stone announced it; indeed, the principle of protecting minorities appeared to be precisely what distinguished America from Nazi Germany. Accordingly, it served as a legal basis for judicial review at the very time that judicial protection of property rights, which once had seemed apolitical, had become politicized.106

It is now time to conclude. The main point I have tried to make is that the power of the Supreme Court to review the constitutionality of legislation has always rested on a perception that the Court is engaged in legal, as distinguished from political, decisionmaking. In the Marshall era, protecting property was the Court’s quintessentially legal task; in more recent times, it has been the protection of minority rights. In all times, the power of the Court has rested on the differentiation of law from politics.

It is a differentiation, however, that is now being challenged. At least since Robert Bork’s classic 1971 article on the First Amendment,107 critics from the right have questioned whether the Court’s rights-protective jurisprudence is truly apolitical; meanwhile, critical legal studies scholars on the left have argued that all law is merely politics.108 Thus, the foundational principle of American constitutionalism—the differentiation of law from politics—may be crumbling. I leave it to others to decide whether to shore up this foundation or to construct something new in its place. I ask only that we honor John Marshall for elaborating the bedrock principle on which we have grounded American constitutionalism for the past two centuries and on which his successors, perhaps, will continue to ground it for centuries to come.

ENDNOTES


6See id.

7*Annals of Congress*, 18 (1802), 110 (remarks of Senator Hillhouse).


17*Commonwealth v. Garth*, 3 Leigh 761, 30 Va. 825, 838 (General Ct. 1831) (Leigh’s amicus curiae brief).


19See ibid., 913–16.


24See ibid., 21.

25Kirby 426 (Conn. Sup. Ct. 1788).

26Ibid., 427.


28See ibid., 22.

29See ibid., 22–23.


31See ibid., 922–23.


33See ibid., 30.

34See ibid., 30–31.

35See ibid., 31.

36See ibid., 31–32.


41Petition of Salem, October 12, 1784, quoted in Wood, *Creation of the American Republic*, 406 n.22.


43[N.Y. Mayor’s Ct. 1784], in American Historical Asso-
A writ of mandamus (which obtains its name from the Latin verb, “mandamus,” which in translation means, “we order”) is a document issued by a court which orders a defendant, in this case Secretary of State Madison, to perform a specified act, in this case to deliver a commission, on behalf of a specified plaintiff, in this case William Marbury.

See Nelson, Marbury v. Madison, 57.

See ibid., 58.

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

See Nelson, Marbury v. Madison, 58.

[Boston] Independent Chronicle, March 10, 1803.

See Nelson, Marbury v. Madison, 58.


See ibid.

See ibid., 60.

See ibid.

See ibid., 60–61.

75 U.S. (1 Cranch) at 166.

Ibid.

See Nelson, Marbury v. Madison, 61.

85 U.S. (1 Cranch) at 147–48.


85 U.S. (1 Cranch) at 175.

See Nelson, Marbury v. Madison, 62.

See ibid., 62–63.

See ibid., 63.

85 U.S. (1 Cranch) at 176.

See Nelson, Marbury v. Madison, 64–67

See ibid., 67.

See ibid., 67–68.

See ibid., 68.

See ibid.

925 U.S. (12 Wheat.) 213, 353 (1827) (dissenting opinion).

See Nelson, Marbury v. Madison, 68.

95 U.S. (1 Cranch) at 309.


See ibid.

97 See ibid., 69–70.

See ibid., 70.


Ibid., 72.

See ibid., 72–76.

See ibid., 76–82.

See ibid., 82–83.

See ibid., 83.

