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That Elusive Consensus: The Historiographic Significance of William E. Nelson's Works on Judicial Review

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THAT ELUSIVE CONSENSUS: THE HISTORIOGRAPHIC SIGNIFICANCE OF WILLIAM E. NELSON'S WORKS ON JUDICIAL REVIEW*

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I. INTRODUCTION

As we recognize the influences of William E. Nelson's work upon succeeding scholars, it is perhaps also fitting to appreciate someone who contributed to the development of Nelson's academic perspectives. Nelson earned his Ph.D. in history from Harvard in 1971, having studied there under Bernard Bailyn. At that time, Bailyn was a leader in the historiographical movement that began in the late 1960s to reconsider the importance of ideology as a system of beliefs motivating historical actors from the Revolutionary Era through the Early Republic. Nelson's work on the legal history of this period, particularly his publications on the Marshall Court and judicial review, evince his acceptance of ideas as determinants of John Marshall's jurisprudence. Nelson's histories of law in the new nation, written during the last quarter of the twentieth century, put legal actors into the intellectual context in which they lived; we can read them as both expanding the growing field of intellectual history to include a history of law and as contributing to a developing body of legal history rebutting the old instrumentalist historiography that dominated much of the 1900s. Nelson has been in the vanguard of the use of intellectual history to understand law, specifically in defense of the Court's role in protecting individual rights.

* In no way is this brief essay an attempt to document or analyze the full historiography on judicial review. Such a work would require a very long book. The intent herein is to conceptualize and analyze Nelson's work on the topic in the context of some of the major movements and writings of his time. I am grateful to Felice Batlan and R. B. Bernstein for organizing this tribute to Bill and including me in it. I also appreciate the expert guidance and superb editing that Richard provided.

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Two schools of thought dominated scholarship in legal history from the 1940s to the late 1960s—instrumentalism and consensus. Instrumentalism grew out of the "progressive school," and was most significantly developed by Charles A. Beard and Carl L. Becker in the early twentieth century. Progressive history casts a long shadow over the field, influencing generations of students to see historical actors as largely influenced by economic or other self-interested motives. Historians of this school perceive a historical actor's beliefs merely as rationalizations or justifications for his or her desired behavior.[1] Early instrumentalists were generally legal practitioners who used history to make presentist claims about law in pursuit of political ends. The growth of legal positivism, arising out of the pragmatic school of thought at the turn of the century, and embraced by New Deal politicians, legal scholars, and ultimately the Supreme Court, recognized the ability, perhaps even the duty, of judges to consider the policy implications of their decisions and to adjudicate cases to foster, rather than frustrate, the public good. By the 1950s, James Willard Hurst integrated this pragmatic understanding of law with an understanding of history rooted in Beardian progressivism to espouse a new doctrine of legal history.[2] By showing that law had always functioned as a tool to enhance certain social interests, scholars of Hurst's Wisconsin Institute of Legal History challenged the ideals of legal neutrality, "a nation of law, not men," and objective judicial decision-making. From the instrumentalist perspective, legal positivism did not repudiate long-accepted judicial practices but instead recognized what law had always been and done; it merely substituted a different social interest or good for that which had existed earlier. When Nelson began writing in the 1970s, Hurst's disciples in instrumental-

1. Most significant works in this genre are CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913), and CARL L. BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS (1958). Beard's work retained its influence despite the contributions of ROBERT E. BROWN, CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF "AN ECONOMIC INTERPRETATION OF THE CONSTITUTION" (1956), which disproved many of Beard's factual representations. The school of thought is hardly dead. Recent neo-Beardian works include: WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION (2007), and TERRY BOUTON, TAMING DEMOCRACY: "THE PEOPLE," THE FOUNDERS, AND THE TROUBLED ENDING OF THE AMERICAN REVOLUTION (2007). *See also* Symposium, *Charles Beard's Economic Interpretation*, 2 AM. POL. THOUGHT 259 (2013), and the classic study by RICHARD HOFSTADTER, THE PROGRESSIVE HISTORIANS (1968).

2. JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956); James W. Hurst, *The Growth of American Law: The Lawmakers*, 26 IND. L.J. 118 (1950). *See also* MORTON G. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (2d ed. 1952).

ist thought, such as Lawrence M. Friedman and Morton J. Horwitz, led the study of legal history.[3]

The "Consensus School" arose in the decades after World War II in two forms. The first developed in reaction to the pernicious results of political cultures embracing and enforcing a particular ideology such as Communism or Fascism. It asserted that Americans were a pragmatic people who eschewed ideology for systems of governance in law, politics, and economics that "worked."[4] The second, less popular form, countered that an American ideology has existed since the Founding Period that endorsed individual rights and freedoms and human equality, ideals manifested in a constitutional democracy and free-enterprise capitalism.[5] Both scholarly threads of the consensus school received criticism for undervaluing the complexities and nuances of political thought and the divisions they caused. This criticism and the success of the instrumentalists combined to minimize ideology as a historical determinant and to marginalize intellectual history in scholarly legal history. The increasing emphasis on social factors such as race, gender, and class during the 1960s and 1970s, and its predilection for statistical methodologies, only added to that marginalization.

However, in the late 1960s and early 1970s, people like Bailyn and Gordon Wood constructed a new school of intellectual history that arguably built upon the limited second form of consensus historiography.[6] Rely-

3. Major works of these authors include: LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (Simon & Schuster, Inc., 3d ed. 2005); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977).

4. Perhaps the leading exponent of this school of thought is Daniel J. Boorstin, among whose many publications are THE LOST WORLD OF THOMAS JEFFERSON (Univ. of Chi. Press ed. 1948), THE GENIUS OF AMERICAN POLITICS (1952), and the three volume THE AMERICANS: THE COLONIAL EXPERIENCE (1958).

5. Perhaps the leading early publications in this historiographic school are RICHARD B. MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA (1946) and the works of Douglass G. Adair, including the posthumous publication of his dissertation as THE INTELLECTUAL ORIGINS OF JEFFERSONIAN DEMOCRACY: REPUBLICANISM, THE CLASS STRUGGLE, AND THE VIRTUOUS FARMER (2000), and the collection of his essays, FAME AND THE FOUNDING FATHERS: ESSAYS BY DOUGLASS ADAIR (Trevor Colbourn ed., 1974). *See also* CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC (1953). A late example of Consensus School thinking that evinces its compatibility with the new intellectual history is ROBERT H. WIEBE, THE OPENING OF AMERICAN SOCIETY: FROM THE ADOPTION OF THE CONSTITUTION TO THE EVE OF DISUNION xiii (1984):

> I find no basic ideological conflict separating Hamilton and his Federalist associates from Jefferson and his Republican colleagues: no aristocracy versus democracy, no mercantilism versus laissez-faire, no Court versus Country value systems . . . [T]heir agreement on the broad requirements of an independent republic, their commitment to a common brand of gentry governance, and their more or less inter-changeable condemnations of one another compressed those differences into a struggle over the interior design of the same ideological house.

6. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (expanded ed. 1992); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1969).

ing on primary documents in the forms of pamphlets, newspapers, letters, diaries, and sermons, this new intellectual history formed what came to be known as the "Republican Synthesis," recognizing shared beliefs and values within the political culture of the American people during the founding era.[7] Nelson's work in the 1970s offered a substantial departure from prevailing works in legal history as it built upon this new intellectual history to reconsider the possibility of ideological consensus in the early development of the nation's laws.

Nelson's initial foray into the history of the Marshall Court confronted a large body of instrumentalist literature on the topic. Although a few scholars found Marshall to use law in support of economic interests,[8] most scholars asserted that the Court served the political goals of the Federalist Party.[9] While in the view of these scholars, those Federalist goals included the protection of property from popular democracy, they focused more on building the power of the national government. A smaller number of authors, arguing more from a Consensus School perspective, contended that the Court applied politically neutral legal concepts. But, these authors were vague on the principles, ideologies, or values that supported these concepts.[10] In 1978, Nelson published *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence* in the *Michigan Law Review*. Writing to rebut the instrumentalist literature, but also to develop and clarify the idea of a politically-neutral jurisprudence, he sought to articulate a "new thesis" about the roots of Marshall's constitutionalism,[11] proposing that:

7. Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 WM. & MARY Q. 49, 49 (1972).

8. BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW (1942); Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1 (1977–1978).

9. *See generally* ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL (vols. 1-4, 1916–1919); EDWARD S. CORWIN, COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT (1938); RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC (1971); ROBERT K. FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL (1968); FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE (1937); CHARLES GROVE HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789-1835 (1944).

10. *See generally* RAOUL BERGER, CONGRESS V. THE SUPREME COURT 5-6 (1969); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 199-200 (1975); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (5th ed. 1883); WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953); HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).

11. William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 894 (1978).

> [E]ven though there were no specific, pre-existing legal principles from which Marshall could have deduced his major constitutional decisions, his jurisprudence nonetheless had important roots of a nonpolitical sort.[12]

Nelson recognized that the existing literature did not "fully explain" the reasoning of the Court and the resolution of the cases before it.[13] In writing this article in 1978, he was most interested in *Marbury v. Madison* and its assertion and deployment of the Court's power of judicial review.[14]

II. CASE HISTORY OF *MARBURY V. MADISON*

The historical context of the *Marbury* decision provides strong support for those who argue that Marshall's definition of judicial review had political motivations. The election of 1800 not only produced the first change in the partisan identification of the president and his administration, amounting to what some people at the time perceived as tantamount to a second revolution, but also awarded control of both houses of Congress to the Republicans.[15] The Federalists perceived the federal courts as their only defense against the democratic radicalism of the ascendant Jeffersonian Republicans. By contrast, the Republicans believed that the federal judiciary threatened the political voice of the people and was poised to deny them their civil rights. Heightening, if not creating, this Republican fear was the federal judiciary's role in enforcing the Alien and Sedition Acts from their enactment in 1798 to early 1801. Enacted during a period of exaggerated fears of internal dissent, precipitated by popular support for one side or the other in the war between France and Britain, these laws allowed the deportation of foreigners deemed dangerous to the country and criminalized "false, scandalous, and malicious" statements made about the country or any of its leaders.[16] The federal courts applied a very low standard of proof to convict defendants under the Sedition Act, sending dozens of newspaper editors and outspoken citizens to prison. James Madison and Thomas Jefferson argued that the federal statutes violated the constitutional protections of free speech and the freedom of the press. Yet, the federal courts never found the acts unconstitutional, leading Republican Party

12. *Id.*

13. *Id.*

14. Marbury v. Madison, 5 U.S. 137 (1803).

15. *See* R. B. BERNSTEIN, THOMAS JEFFERSON 133, 137 (2003); JOANNE B. FREEMAN, AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC 199-265 (2001).

16. Leonard Levy contends that these laws conformed to popular conceptions of seditious libel before the acceptance of Jeffersonian libertarian thought that expressed more absolute protections of expressive freedoms following 1800. LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985).

leaders to assert that the states could act to declare the laws null and void to protect the rights of their citizens.

The outgoing Federalist Congress passed the Judiciary Act of 1801 between the November 1800 election and the swearing-in of the Seventh Congress; President Adams signed the bill into law on February 13, 1801. The legislation reduced the number of justices on the Supreme Court from six to five in an attempt to deny President Jefferson the opportunity to replace the aged and frail Justice William Cushing, expected to leave the bench very soon. The Act also created new appellate circuit courts, intended to hear appeals from the district courts, and removed the obligation of Supreme Court justices to "ride circuit," which required them to serve as trial judges in the old federal circuit courts (sitting with the local U.S. district judge) in the circuits assigned to them. A companion bill, The Act Concerning the District of Columbia, became law on February 27, 1801, creating new judgeships, including justices of the peace. Together, these two laws allowed the outgoing President Adams to appoint dozens of new federal judges to serve in the District and the new appellate courts.

President Adams made the judicial appointments afforded him in the last days of his administration; yet, a few of the judicial commissions symbolizing the appointments were not delivered. The undelivered commissions were found only after Jefferson assumed office. The incoming President, despite criticism from many in his party, recognized the newly appointed judges who had received their commissions. However, he argued that judges who had not received their commissions were not entitled to them. A lawyer himself, Jefferson contended "delivery is one of the essentials to the validity of the deed. Although signed and sealed, yet as long as it remains in the hands of the party himself, it is *in fieri* [not complete], it is not a deed and can be made so only by its delivery."[17] Jefferson forbade Madison, his Secretary of State, from delivering the appointments to the "midnight judges" who had not received their commissions. One of these commissions belonged to William Marbury.[18]

Marshall's opinion for the Court, deciding the case on February 24, 1803, only added to the perception, then and thereafter, of the Court's political motivation. The Court framed three issues: (1) whether Marbury and

17. Letter from Thomas Jefferson to Justice William Samuel Johnson (June 17, 1823), *in* THOMAS JEFFERSON: WRITINGS 1469, 1469-1477 (Merrill D. Peterson ed., 1984) (quotation at 1474).

18. CLIFF SLOAN & DAVID MCKEAN, THE GREAT DECISION: JEFFERSON, ADAMS, MARSHALL AND THE BATTLE FOR THE SUPREME COURT (2009) (serving as a significant sources for the foregoing summary and the best factual account of the political context for the decision); *see also* R. KENT NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 21-22, 28-33 (2d ed. 2006); George L. Haskins, *Law Versus Politics in the Early Years of the Marshall Court*, 130 U. PA. L. REV. 1 (1981).

similarly situated appointees had a right to their commissions; (2) if so, whether a remedy existed; and (3) if a right is found to exist and a remedy is available, can the Supreme Court provide that remedy? Marshall found that the conferral of a judicial commission is complete upon approval by the Senate of the President's nominee, its subsequent signature by the President, and the affixing to it of the Great Seal by the Secretary of State. Delivery, contrary to Jefferson's argument, is not required to complete the conferral of the commission. As Marshall noted, the power to appoint rests solely with the President; once an appointment is made, his subordinates in the executive branch of government have a legal duty to deliver the commission as its symbol, without room for discretion, and their dereliction of duty cannot eviscerate a right already conferred. In making this assertion, Marshall articulated the Court's power to censure the executive branch for its failure to perform its legal duties. Neither Jefferson nor Madison was explicitly found culpable, but they had ultimate responsibility for the delivery of the commissions, and the implication spoke for itself. Significantly, Marshall saw himself as protecting the property rights of Marbury and the other judges—a role that few, if any, argued the Court did not have the right to perform. The conferral of a commission promised a position and a salary, property that could not be taken by the government outside the appropriate legal processes.

Having found a right to property to exist and to be protected by law, Marshall then considered the appropriateness of the requested writ of mandamus as a remedy for the administration's failure to deliver the commissions. This question involved sensitive considerations, raising the possibility of the Court ordering the executive to issue the commissions. Marshall found that no court could compel the executive to perform any discretionary political function properly within the constitutional scope of executive authority. However, as law has as its primary aim the protection of individual rights, as much from public or governmental interference as from threats arising from other private individuals, no government official in any branch or level of government can be immune from the force of law whenever that official attempts to use his public authority to deny or diminish another's protected rights.[19] The Court found a writ of mandamus to be the appropriate means for effectuating the law, providing the proper remedy for Marbury and his co-complainants. In doing so, it furthered the au-

19. Marshall's language on this point is: "where a specific duty is assigned [to a public official] by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured [by the non-performance of the assigned legal duty], has a right to resort to the laws of his country for a remedy." *Marbury*, 5 U.S. at 166.

thority of the judiciary to intervene in the business of the executive branch of government by using writs of mandamus, but limited its power to do so to legal matters, defined as concerning the protection of rights, as distinct from all other "political" matters, which entailed executive-branch officials' discretion.

The final issue before the Court concerned its own authority to issue the requested writ. To resolve this issue, Marshall turned to the Judiciary Act of 1789 and the United States Constitution. Section 13 of the Act empowered the Supreme Court, as a trial court, to "issue writs of mandamus . . . [to] persons holding office under the authority of the United States."[20] However, the Constitution provided that the Supreme Court was to act as an appellate court in all instances except those "affecting Ambassadors, other public Ministers and Consuls" and those in which a state shall be a party.[21] Only in that limited category of cases could the Court hear lawsuits in its original jurisdiction. The Court needed to consider whether Congress, as an ordinary legislative body, could pass legislation that expanded the Court's original jurisdiction beyond that defined in and limited by the Constitution. As Article V of the Constitution provided clear direction for the means of its own amendment, the answer was easy. Marshall explained that the issue truly was, "whether an act, repugnant to the constitution, can become the law of the land."[22] The Constitution embodied an "original and supreme will [that] organizes the government and assigns, to different departments, their respective powers."[23] That will of the people formed "the fundamental and paramount law of the nation, and consequently . . . an act of the legislature repugnant to the constitution is void."[24] Marshall added: "It is emphatically the province and duty of the judicial department to say what the law is;" and "[t]he judicial power of the United States is extended to all cases arising under the constitution."[25] At once, Marshall endorsed the concept of judicial review and the Supreme Court's power to exercise it while simultaneously denying Marbury his relief, thereby recognizing limits on the Court's power.

20. Judiciary Act 1789, ch. 20, § 6, 1 Stat. 81 (1789) (codified as amended at 28 U.S.C. § 1257).
21. U.S. CONST. art. III, § 2, cl. 1.
22. *Marbury*, 5 U.S. at 176.
23. *Id.*
24. *Id.* at 177.
25. *Id.* at 177-78.

III. HISTORIOGRAPHIC REACTION

Left unresolved, at least at that time, was the related question of judicial supremacy. Was the Court the only, or perhaps the final, authority on the meaning of the Constitution? How valid were Republicans' assertions that each branch of government held an equal authority to determine constitutionality and that state governments could declare legislation void if it contravened individual rights? These questions have provided fodder for scholars to this day, especially in the last thirty-five years.

The Supreme Court's issuance of a writ of mandamus to Secretary of State Madison likely would have exacerbated concern about the stability of the government just after a transfer of power, further polarizing Americans in the debate concerning judicial, and even federal, authority, and inflaming passions between Federalists and Republicans. By imposing a remedy with significant political ramifications, issuing the writ likely would have undermined any decision that Marshall rendered, articulating the powers of the judiciary to protect individual rights from executive misfeasance and subjecting legislation to constitutional scrutiny with the possibility of rendering it null and void. For these reasons, many have seen Marshall's opinion for the Court in *Marbury* as an artfully constructed piece of political manipulation. By deciding *Marbury* as he did, Marshall gained judicial power that could be used to rein in Republican legislative actions, but did so while giving Jefferson and the Republicans a Pyrrhic victory. Yet, as Nelson suggests, we perhaps best understand *Marbury* as an example of how law was becoming the supreme power in the new republic, exercising an authority that even the most powerful men in the country could not use for their own political or personal advantages. The full extent of that power in the hands of the Supreme Court remains a contentious issue.

Much of that debate is rooted in what it means to "say what the law is" when that law expresses the will of the people in a social contract regarded as "fundamental and permanent." The Constitution expresses at once the principles on which Americans demanded independence in constructing their new society and the form that the government of that new society would take. Though constitutions can define matters of governmental form in painstaking detail, the articulation of principles in ideas, concepts, and values is always a bit more vague. This distinction between principles and forms was fully appreciated at the time of the founding. Contemplating, in 1777, the building of a new society after the Revolution for example, Dr. Benjamin Rush wrote:

> It is one thing to understand the principles, and another to understand the forms of government. . . . There is the same difference between princi-

> ples and forms in all other sciences. Who understood the principles of mechanics and optics better than Sir Isaac Newton? and yet Sir Isaac could not for his life have made a watch or a microscope. Mr. Locke is an oracle as to the *principles*, Harrington and Montesquieu are oracles as to the *forms* of government.[26]

To what extent must judicial review rest on the forms of government, the structures, rules, and procedures outlined in the text of the Constitution; and to what degree can it consider principles? Those distrustful of judicial activism have long sought to restrict the Supreme Court to textual readings of the Constitution or to temper its authority by asserting a departmental approach to constitutional interpretation, placing the Court on equal ground with the legislative or executive branches. In asserting these limitations, they rely on the form of the United States government as expressed in the Constitution, in which they can find no real support for the idea of judicial supremacy and only a narrowly constructed idea of judicial review is acknowledged in the accompanying record, including *The Federalist No. 78*. Conversely, those who perceive the Court as an ultimate force for protecting rights, in a political environment often hostile to those rights, may argue from the principles articulated during the Revolutionary and Constitutional eras to justify a broad conception of judicial review and even to recognize judicial supremacy.[27]

Debates concerning the scope of judicial review have been most heated during periods when the thinking of the American people has changed rapidly, expressing itself in legislation promising either a defense of an old ideology and the social system consistent with it (the 1793 and 1850 Fugitive Slave Acts, for example) or in legislation reflecting new ideas and the hopes they engender for social change (the Civil Rights Act of 1964, for example). In particular, instances of tremendous ideological change prompting legislative action occurred in the 1930s, the 1960s, and after the 1980s. In each instance, the old Jeffersonian claim that judicial review, by limiting the voice of the majority expressed in legislation, is essentially undemocratic has resurfaced.

Supporters of the New Deal who chafed at the Supreme Court's use of the Contract Clause to void progressive legislation also essentially made

26. BENJAMIN RUSH, OBSERVATIONS UPON THE PRESENT GOVERNMENT OF PENNSYLVANIA IN FOUR LETTERS TO THE PEOPLE OF PENNSYLVANIA, Letter III (Phila., Styner & Cist 1777).

27. James Madison seemed to have endorsed the idea of judicial supremacy during the U.S. House of Representatives debates on amendments to the Constitution on June 8, 1789, when he contended that judges would "consider themselves in a peculiar manner the guardians of those rights" and constitute an "impenetrable bulwark" against their violation. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), *in* JAMES MADISON: WRITINGS 437, 437-452 (Jack N. Rakove ed., 1999) (quotation at 449).

this claim. The Court's seeming reversal in 1937 following awareness of the "Court packing scheme," however, brought an outcry from conservatives who feared that a self-interested majority in control of legislation would, if not checked, abandon the Constitution and its protection of property rights.[28] Conservatives expressed similar concern during the 1950s and 1960s when the Warren Court articulated a growing popular acceptance of a broad conception of rights that was not shared in the white South or among conservative white evangelical Christians. These groups complained about judicial activism in expanding civil rights at the expense of property rights, which built upon the *Carolene Products* rule to foster social change in race relations and matters of conscience. The defiance of the Court's decision in *Brown v. Board of Education* by people and politicians in Little Rock, Arkansas in 1958, prompted the Court to assert in *Cooper v. Aaron* that *Marbury* in fact "declared the basic principles that the federal judiciary is supreme in the exposition of the law of the Constitution."[29] By the end of the century, however, it was liberals who decried the Court's positive action in pursuit of a "new originalism."[30] The Rehnquist Court, between 1986 and 2005, "struck down an unprecedented number of congressional laws."[31]

IV. NELSON CHANGES THE HISTORIOGRAPHIC DEBATE

By the 1960s, the historical basis for judicial review was a less significant academic concern than was the scope of the Court's power. Legal realists argued that a politically-inclined Court could serve the public good regardless of the history of judicial review.[32] Yet, the relevance of history to our understandings and use of judicial review re-asserted itself in the 1970s, largely through works of Morton J. Horwitz and Richard E. Ellis, whose writings served as the leading authorities on the topic when Nelson approached it in the late 1970s.[33] Nelson's works on the subject can be read as finely crafted briefs, arguing, first, for the legitimacy of Marshall's use

28. *See generally* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000).

29. Cooper v. Aaron, 358 U.S. 1, 17-18 (1958). *See also* United States v. Morrison, 529 U.S. 598, 617 n.7 (2000).

30. *See generally* Keith E. Whittington, *The New Originalism*, ASS'N OF AM. LAW SCHS. & AM. POL. SCI. ASS'N (June 8, 2002), *available at* http://www.aals.org/profdev/constitutional/whittington.pdf.

31. BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 323 (2009).

32. *See* EUGENE V. ROSTOW, THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW (1962).

33. *See* ELLIS, *supra* note 9; HORWITZ, *supra* note 3.

of judicial review from the Founders' intents and respected precedent, and, second, if that first argument is unpersuasive, for the existence of strong philosophical legal and policy reasons for the original adoption and continued reliance upon the practice.

In considering Marshall in the intellectual context of his times, Nelson argues that the Chief Justice accepted the Enlightenment idea that natural rights existed before society. Men could only express these rights in law, thereby giving them vitality and protection.[34] Implicitly, Nelson asserts that the principles at the core of the movements toward Revolution and nation building were at least as important as the form of the new government. Ideas would serve as the "roots" of Marshall's jurisprudence, and Nelson devotes a substantial portion of his 1978 essay to developing them. In doing so, he writes intellectual history, building on the work of his former mentor, while also establishing the basis for the legal principles upon which Marshall's jurisprudence rested. Furthermore, the articulation of a verifiable basis for a principled jurisprudence argued against the prevailing view, in 1978, that political considerations above all else influenced all judicial decisions.

Certainly, Nelson was not the first person to use intellectual history as a basis for reconsidering Marshall's jurisprudence and the concept of judicial review. Gordon S. Wood, in his 1969 *The Creation of the American Republic*,[35] asserted that, by the time of the Revolution, Americans had come to see constitutions as "fundamental law" distinct from statutory law. Yet, during the 1770s and 1780s, various state legislatures acted somewhat like the English Parliament that had incurred the Americans' wrath and acted to interpret, and even to alter, state constitutions to serve perceived policy needs. The People, Wood argued, sought to prevent such errors in the federal government and crafted the U.S. Constitution so as to be alterable only by the People themselves or their "legally authorized" delegates.[36] In response, they adopted a Lockean idea of the social contract "as a fundamental law designed by the people to be separate from and controlling of all the institutions of government."[37] However, Wood also notes, "The concept of the constitution as fundamental law was not by itself a sufficient

34. Nelson, *supra* note 11, at 932 (supporting his reasoning by quoting Marshall's decision in Ogden v. Saunders, 25 U.S. 213, 345 (1827), in which Marshall writes, "the right to contract and the obligations created by contract . . . exist anterior to, and independent of society[:] . . . [they] are, like many other natural rights, brought with man into society; and, although they may be controlled, are not given by human legislation.").

35. WOOD, *supra* note 6, at 273-82.

36. *Id.* at 274-77.

37. *Id.* at 283.

check on legislative will unless it possessed some other sanction than the people's right of resistance."[38] This issue required "a revolutionary clarification in Americans' understanding of law and politics."[39] In a brief description of the development of the idea of judicial review, he found:

> The decisive assumption in the development of this judicial agency and authority was the real and ultimate sovereignty of the people. Judicial review did not "by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people, declared in the constitution, the judges . . . ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."[40]

Nelson too considered the social contract theory that dominated the thinking of Americans from the late 1760s through the early 1800s as the basis for a revolutionary ideology and the drafting of constitutions. One of Bailyn's major contributions was his argument that Americans transformed themselves from Whigs to republican theorists by creating the idea of popular sovereignty. Both Wood and Nelson attached great significance to this idea. During the 1760s, the colonists argued for recognition of their rights as Englishmen; but, as they came to understand the nature of parliamentary sovereignty that arose in the eighteenth century, they came to reject the English Constitution as the source of their rights, instead understanding rights to be intrinsic to the nature of man. Each person possessed equal and absolute rights protected only if the people retained sovereignty even after the creation of the polis. The American idea of a constitution adhered to the social contract ideal of Locke and Rousseau – a written instrument limiting the scope and authority of government to protect individual rights while also encouraging the development of a society in furtherance of the public good. The Constitution expressed the will of the people. As the supreme law, it served as the check on legislative, executive or judicial authority; in doing so, it secured popular sovereignty.[41] Nelson invokes this argument in forming an understanding of an American political philosophy in his 1978 article. Yet, unlike some of the preceding Consensus School historians, he recognized the tensions that arose in implementing generally accepted political ideas.

Nelson noted that a "communitarian social order" reinforced by shared values and "standards of right and justice" across a series of parochial lo-

38. *Id.* at 304.
39. *Id.* at 291.
40. *Id.* at 462 (citing THE FEDERALIST NO. 78 (Alexander Hamilton)).
41. *See generally* BAILYN, supra note 6.

cales formed the basis for colonial American society.[42] This communitarian parochialism had largely "broken down" by the late 1700s, but it left a residual acceptance, perhaps even expectation, of political consensus as the basis for governing. Americans' acceptance of the idea of popular sovereignty rested at least as much on their confidence in "an original, underived and incommunicable authority and supremacy in the collective body of the people" as on an appreciation of the need to vest the social contract with ultimate authority for the protection of man's rights.[43] Yet, the Revolution also ushered in a growing cosmopolitanism that accepted law as an abstraction that embodied fundamental truths and natural rights and applied them dispassionately, neutrally, and objectively in furtherance not only of justice but also of republican ideals.[44] Americans integrated their confidence in the popular will with their cosmopolitan acceptance of law embodying universal verities until the 1790s, at which time the previously integrated ideological threads unraveled and diverged. By 1800, according to Nelson, the Federalist Party "viewed law as a reflection of fixed and transcendent principles" and the Republican Party "considered it the embodiment of popular will."[45]

From Nelson's perspective in 1978, the Federalists expressed the more sophisticated and progressive legal understanding, though they voiced conservative fears of liberal changes in economic, political, and personal values infiltrating their society. He recognizes that many Federalists feared that the Republicans' more libertarian-minded policies "would subvert morality and lead to violence and anarchy."[46] These fears led them to endorse communitarianism as a means by which a new elite could impose values to preserve a virtuous republic. By the 1790s, the Republicans championed individual freedoms and opportunities derivative from natural rights to a greater degree than did the communitarian Federalists. Sophistication, concerning the nature and function of law, did not correspond to a progressive social agenda.

As Nelson presents it, Marshall's jurisprudence is rooted in the tension-filled amalgamation of these disparate ideologies. Personally committed to the idea that law expressed fundamental principles essential to republican society, Marshall also accepted the need for popular acceptance of those principles to provide confidence in law and public institutions.

42. Nelson, *supra* note 11, at 923.

43. *Id.* at 925 (quoting [Hartford] Connecticut Courant & Weekly Intelligence, Aug. 12, 1783, at 2, col. 3).

44. *Id*. at 923-26.

45. *Id.* at 928-29.

46. *Id*. at 930.

Marshall's use of judicial review to render legislation, as the expression of the majority's will, subject to constitutional imperatives, had to be consistent with prevailing notions of what was right and proper.

Nelson contends that Marshall accomplished his task by distinguishing between legal and political issues. The Chief Justice accepted the idea that values and rights had to be rooted in consensus – the idea that dominated American thinking about law, politics and society for most of the eighteenth century. This consensus expressed itself in the Constitution and served as the basis for constitutional limitations on legislative action. Nelson notes that Marshall endorsed his "generation's assumption that the people, exercising their power to create government [as developed in social contract theory], had incorporated basic and generally agreed upon principles of right with their Constitution."[47] Distinguishing between law and politics allowed Marshall to reconcile older ideas on the importance of government shaped by consensus with Revolutionary-era ideas on the legitimacy of public policies formed by majority will, the former ideas being expressed in law, the latter in politics.[48] The Constitution, as an expression of consensus forming the supreme law, acted to set limits on radical change within society. The consensus regarding rights and values, as contrasted with the majority will, would have to change before the majority position could be determinative of legal issues.

For Nelson, Marshall's distinction between law and politics is at the crux of *Marbury*. Once the Court understood that Marbury had a right to his office, the issue became legal, not political. Law, as the protection of individual rights, governed the resolution of the case. Just six days after the Court announced its decision in *Marbury*, the Court issued another decision (in an opinion written by Justice William Patterson) that, for Nelson, verifies his analysis of the Court's thought process in *Marbury*. In *Stuart v. Laird*, the Court was asked to decide the legitimacy of the Republicans' Judiciary Act of 1802, which repealed the Judiciary Act passed by the Federalist Congress in 1801. The repeal deprived federal appellate judges of property rights by eliminating their offices, while it also required Supreme Court justices to sit once again as trial judges in circuit courts, arguably creating a new role for them as judges in courts with some original jurisdiction. Many contemporaries saw these issues as identical to those resolved in *Marbury*. The Court did not. The plaintiff, Stuart, was not a judge who lost his office through the 1802 legislation; therefore, he lacked standing to bring the suit. As Nelson notes: "His complaint raised no issue of funda-

47. *Id.* at 937.
48. *Id*. at 933-36.

mental private rights, only issues of Congress's political power to organize the lower federal courts."[49] Moreover, the legislation in question did not expand, contrary to the Constitution, the jurisdiction of the Supreme Court. It only increased the job duties of federal employees, clearly a prerogative of the legislature, and specifically within the power of Congress to shape and reshape the federal courts, particularly as the 1802 Act restored the judiciary's structure to what it had been under the original statute of 1789 (of which Paterson had been an author). The Court upheld the Republican legislation.

Nelson sees the holdings in *Marbury* and *Laird* as consistent. Both decisions rested on the Court's deferral to Congress on political issues and its protection of fundamental individual rights through its use of law. Subsequent "contract clause" cases only clarified this role for the Court. By using Article I, Section 10 of the Constitution, the Court ruled various state laws that denied people their rights to property as unconstitutional, "invoking widely shared beliefs about individual rights in a republican state."[50] Nelson's analysis of these cases introduced a new argument into the historiography of judicial review: Marshall's delineation of political and legal issues represented an ideological perspective rooted in his integration of the consensus thinking of the early eighteenth century with ideas of popular sovereignty arising during the Revolutionary Era. Nelson then showed Marshall's jurisprudence to be based not on political self-interest but rather on the ideas that percolated in the early republic and served as the basis for American law. Nelson concludes that the Marshall Court limited its constitutional jurisprudence to cases in which the Court's action protected individual rights and conformed to popular perceptions of legitimacy. In doing so, it restricted the relevance of the old colonial idea of consensus to matters of rights, simultaneously sanctioning the majority's ability to make policy on all other matters.

Nelson developed his argument on Marshall's use of consensus as a basis of judicial authority at about the same time that Morton J. Horwitz asserted that state court judges in the early republic legitimized their role in remaking the common law in reliance upon consensus. Post-revolutionary Americans believed their constitutions to embody the will of the people and expected all laws to conform to them. Both the common law and the judges who hoped to amend existing law had to respect this imperative.[51] Horwitz cites Justice James Wilson's, *Lectures on Law*, delivered in 1791, for the

49. Nelson, *supra* note 11, at 941.
50. *Id.* at 943.
51. HORWITZ, *supra* note 3, at 17, 22.

judicial understanding that "the origin of [the] obligatory force of the common law rested on nothing else, but free and voluntary consent."[52] Horwitz added: "The emphasis in post-revolutionary legal thought on the consensual foundation of the common law was thus designed to demonstrate that common law judges actually constituted the 'trustees' or 'agents' of the sovereign people."[53] Although Nelson rejects the instrumentalist theory at the core of Horwitz's writings, he agrees that the judicial reliance on consensus expressed evolving ideas on popular sovereignty and judicial authority.

Nelson contends that judicial review is the means by which the Constitution expresses and protects popular sovereignty. Furthermore, his reliance on consensus allows us to see judicial review as an embodiment of democracy rather than a means of controlling it. Though some leading Republicans at the time of *Marbury* challenged the Court's assumption of power, Nelson notes that Marshall's jurisprudence generally, and his use of judicial review in particular, won endorsement from most Republicans, a position Nelson develops in later writings.[54] Consistent with his argument that neutral legal principles drove Marshall's jurisprudence far more than politics did, Nelson minimizes the differences between the parties, especially between "moderate" Federalists like Marshall and his counterparts among the Republicans. Nelson's 1978 essay identifies and develops ideological divisions far more than political ones. Judicial review was defined and expounded in *The Federalist No. 78* and had been applied by many state court judges, Federalist and Republican alike, in the late 1700s; staunch Republican judges, St. George Tucker and Spencer Roane of Virginia, used reasoning in issuing decisions overturning legislation nearly identical to Marshall's reasoning in *Marbury*.[55]

Nelson's argument is rooted strongly in reliance on the principles rather than the form of the Constitution. The idea that legislation must respect constitutional principles derived from social contract theory held nearly universal endorsement in 1803.[56] Jefferson himself included as his final paragraph of his Bill for Religious Freedom the following recognition of the inadequacy of legislation, relative to constitutional provisions, to protect the people's rights:

52. *Id.* at 20.

53. *Id.* at 18-20.

54. *See* Nelson, *supra* note 11, at 955. *See also* WILLIAM E. NELSON, *MARBURY V. MADISON*: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 72-75, 84 (2000).

55. *See* Nelson, *supra* note 11, at 937, 949-50.

56. *See* Haskins, *supra* note 18, at 8; *see also* BERGER, *supra* note 10, at 25-27.

> And though we well know that this Assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding Assemblies, constituted with powers equal to our own, and that therefore to declare this act irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right.[57]

Jefferson's language makes clear that a constitution, unlike legislation, can "restrain the acts of succeeding assemblies," in effect establishing parameters for legislative authority. Moreover, as the idea of parliamentary sovereignty was perhaps the major issue in the constitutional debates between the colonists and the British government before and during the Revolution, most Americans who had lived through those days understood that legislative bodies in the early republic performing "ordinary purposes of legislation" were unable to revise the Constitution. If the Constitution were to restrain the legislature, which did not have sole authority to determine the parameters imposed by the Constitution, the only issue regarding judicial review was the power of the Court, relative to Congress, to decide the constitutionality of legislation. Nelson suggests that, although radicals within the Republican Party may have wanted a limited role for the courts in this realm, the far more numerous moderates accepted judicial review.

Nelson published his essay in the *Michigan Law Review* just before a significant new movement in the writing of legal history began percolating. The "relative autonomy" school of thought promulgated by such scholars as G. Edward White, Michael Grossberg, Christopher L. Tomlins, and Holly Brewer, contends that in the Early Republic, law embodied certain republican and capitalistic principles that governed judicial decision-making, especially in private law cases tried in state courts. Law, rather than being a tool, or instrument, in the service of elite interests, functioned relatively autonomously to construct a polity respecting individual rights and freedoms, especially in economic and business realms, but also in family law.[58] Ultimately, law touched every aspect of human life, transforming a communitarian colonial society into an individualistic one by 1820.[59] Though

57. Thomas Jefferson, *A Bill for Establishing Religious Freedom*, *in* THE PORTABLE THOMAS JEFFERSON 251-253 (Merrill D. Peterson ed., 1975) (Virginia Assembly, 1777).

58. *See* Michael Grossberg, *Legal History and Social Science: Friedman's* History of American Law*, the Second Time Around*, 13 LAW & SOC. INQUIRY 359, 372 (1988); *see generally* Christopher L. Tomlins, *A Mirror Crack'd: The Rule of Law in American History*, 32 WM. & MARY L. REV. 353 (1991). For an earlier reflection on legal autonomy from an unexpected quarter, see E. P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 258-69 (1975).

59. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH-CENTURY AMERICA (1985); CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC (1993).

Nelson's work on judicial review dealt with public law and the Supreme Court and the new historiography addressed private law and state courts, his work shares two major characteristics with that of the burgeoning "relative autonomy" school of thought. Both bodies of literature suggest that ideology is the basis for the formation of legal principles that drove judicial decision-making, and both use their findings in strong rebuttal of the instrumentalist arguments that exercised almost hegemonic influence over the field through the 1970s.[60] Nelson's 1978 essay is pathfinding in these regards.

A reassertion of ideology as a factor in early American jurisprudence soon followed Nelson's 1978 publication. Three years later, University of Pennsylvania Law School Professor, George L. Haskins, restated Nelson's primary thesis that the Marshall Court perceived law as expressing neutral nonpolitical principles and separated law from politics.[61] Haskins cites Nelson's article and, like Nelson, focuses on ideology; relies on *Stuart v. Laird* as consistent with and explanatory of Marshall's decision in *Marbury*; finds that judges "throughout this period" were trying to "draw some kind of line . . . that would more clearly differentiate the political from legal questions;" and asserts that despite major ideological differences on certain issues, Republican and Federalist judges found common ground on their roles in enforcing the Constitution.[62] Moreover, he asserts the Court's protection of rights, as Nelson described, as being the key to understanding *Marbury*, writing, "[T]he Court, as watchdog of the rules of law embodied in the Constitution, has the dual function of protecting individual rights and of guaranteeing that no department of government – executive, or legislative, or judicial – shall overstep the bounds of another."[63] Marshall asserted the "vitality of the rule of law" and explained its role in protecting both individual rights and the separation of powers.[64]

60. In his 1978 law review article, Nelson states:

> [T]his essay argues that legal, not political, principles underlay Marshall's jurisprudence, but it attempts to understand those principles in a manner consistent with the unavoidable twentieth-century assumption that law is a body of flexible rules responsive to social reality rather than a series of immutable, unambiguous doctrines derived from a non-human source.

Nelson, *supra* note 11, at 902. This passage seems to reject the "relative autonomous" historiography that would develop in the 1980s and 1990s, but must be placed in context. Nelson is critical of the reductionist literature of consensus school historians who argued that legal principles formed ironclad doctrines that were only sketchily explained or developed. *Id.*

61. Haskins, *supra* note 18, at 5.

62. *Id.* at 9-10, 19. Haskins writes, "[o]ne must look beyond personalities to the clash of ideologies between Federalists and Republicans and to the roots of political allegiance as more important, and more basic, to understanding the principles that began to guide the Court through perilous and treacherous waters." *Id.* at 5.

63. *Id.* at 9.

64. *Id.*

Haskins published a similar argument in *Foundations of Power: John Marshall, 1801–1815*, written with Herbert A. Johnson, as part of the multivolume *History of the Supreme Court of the United States*; the appearance of this volume gave Nelson an opportunity to comment in a book review in 1982, the year after its publication.[65] Nelson notes that the authors found that "John Marshall's great accomplishment as Chief Justice was to establish the rule of law as the basis of the Supreme Court's jurisprudence," in the process "'extricat[ing] the Court from partisan politics' and enabl[ing] it 'to settle down to its judicial business as a recognized independent segment of the government.'"[66] Haskins and Johnson largely reiterate Nelson's own argument, and it is not surprising that the reviewer finds the book "persuasive."[67] However, in 1982, Nelson was looking increasingly to the present and the future, and wondering how Marshall's jurisprudence might serve as a guide for contemporary judges. He poses three questions considering whether the Court in the late 1900s could emulate the Marshall Court: (1) "why should the modern Court act as a nonpolitical body that merely applies and elaborates the rule of law?"; (2) "how could it carve out for itself a legal function distinct from more political functions which it might and which other institutions do perform?"; and (3) "what obstacles exist to today's Court assuming a nonpolitical role similar to that of the Marshall Court?"[68]

Nelson deals with the first issue easily, relying in part on Ronald Dworkin's conception of rights as bulwarks against political power or the means of protecting individuals from the political will of the majority acting contrary to the "principles fundamental to [the] society."[69] Rights, according to Dworkin, function as trump cards "'held by individuals' for use 'when . . . a collective good is not sufficient reason for denying them what they wish, as individuals, to have or to do.'"[70] As rights stand apart from, and superior to, the political realm, a nonpolitical entity must be vested with sufficient authority to counter the political power of the majority. By this reasoning, the Court must remain nonpolitical.[71]

65. 2 George Lee Haskins & Herbert A. Johnson, *Foundations of Power: John Marshall, 1801–1815*, *in* HISTORY OF THE SUPREME COURT OF THE UNITED STATES 126-204 (1981).

66. William E. Nelson, *Emulating the Marshall Court: The Applicability of the Rule of Law to Contemporary Constitutional Adjudication*, 131 U. PA. L. REV. 489, 490 (1982).

67. *Id.* at 491, 515.

68. *Id.* at 491-92.

69. *Id.* at 493.

70. *Id.*

71. *Id.*

Haskins and Johnson assert that the Marshall Court held rights to derive from natural law and therefore to be antecedent to government and the Constitution. However, Nelson argues that although natural law theories still have some currency, contemporary Americans generally recognize other sources of rights. The idea that rights are rooted in a broad social consensus regarding fundamental values and principles describes Americans' adherence to them regardless of their source. A widely shared consensus in any era can serve as a basis for law protecting individual rights. The Court's job is to find and articulate that consensus over "the values that law protects."[72] Nelson adds that, in 1982, several justices on the Burger Court were disinclined to perform that function, being more concerned with politics than with law.[73] As a result, the Court often eschewed hearing cases in which existing law rooted in consensus needed clarification or a minor extension in preference for cases in which the applicable law is uncertain and public opinion is sharply divided.[74] This practice, Nelson asserts, was "squarely opposite to the practice of the Marshall Court" which left socially divisive issues to the legislature.[75] Adding to the Court's problems in 1982, according to Nelson, was its disregard for precedent. Judicial reliance on precedent ensures law's conformity with consensual values, which change incrementally over time. Politically-minded judges who disregard precedent foster suspicions of the Court, and even of the law, as a political instrument rather than a nonpolitical protector of rights, transforming "a government of laws into a government of men."[76] The Justices, Nelson concludes, must follow Marshall's lead in subordinating their "personal views to an overarching institutional stance maintained by the Court as an entity," that is to respect the law as an expression of consensual principles.[77] Despite a change in the political climate since his last writing, Nelson adhered to the same historical findings that he had asserted earlier and encouraged judges to abide by the lessons that those findings taught.[78]

72. *Id*. at 507.

73. Nelson, *supra* note 66, at 508.

74. SAMUEL ESTREICHER & JOHN SEXTON, REDEFINING THE SUPREME COURT'S ROLE (1986) (criticizing this practice in a book that Nelson consulted).

75. Nelson, *supra* note 66, at 511.

76. *Id.* at 514.

77. *Id.*

78. In perhaps the final defense of judicial review as a means of preserving the jurisprudence of the Warren Court, John Hart Ely published a book asserting that the work of that Court was to reinforce rather than challenge representative democracy; 1980 was truly the end of an era. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1-9 (1980).

Nelson continued to express his perspective on contemporary debates in an essay written in 1987.[79] The debates about legal positivism and judicial review had arisen anew in arguments over "original intent." In his 1987 essay, Nelson seeks to justify the *Carolene Products* decision of 1938 and its famous Footnote Four, which bifurcated rights into personal and economic forms and offered greater protection to personal rights while also identifying, for the first time, the idea that rights belonged to groups of people as well as to individuals.[80] Nelson recognized that by the 1980s, "the theory of interest-group pluralism . . . no longer provid[ed] a useful justification" for the Court's holding.[81] Instead, he turns to history, particularly his understanding that law, at the time of the nation's founding, could only express moral norms when "the community had arrived at a substantial consensus about [their] rightness." Law, therefore, "illuminat[es] the deep-seated political structures and values that continue to underlie American constitutionalism."[82]

As in his 1978 essay, Nelson discussed the need for consensus before any significant political or legal change could occur in colonial America. Revolutionary-era Americans took comfort in the requirement of consensus as a basis for change, seeing the requirement as an embodiment of democratic ideals. Liberty came to mean the protection of people "from the arbitrary commands of others," even when those others held political power.[83] In this context, an individual's right to his own moral judgment deserved far greater protection than even his right to property. Property could be taxed, taken to serve the public good in times of crisis, or have its use restricted or limited. But, moral judgment, as a matter of personal conscience, could not be compelled. Moral choice was personal, private, and largely relative. Accordingly, law dealt very cautiously in considering morality, and could do so only based on a consensus approaching unanimity.[84]

Nelson argued in 1987 that the dichotomy expressed in the eighteenth century constitutes a historical precedent for the bifurcation used by the Court in 1938. The Court, he contended, "should abide by the expectations of the founding generation that moral and distributional decisions would be made in different fashions." It should "give legislatures free reign to dis-

79. William E. Nelson, *The Eighteenth-Century Constitution as a Basis for Protecting Personal Liberty*, *in* WILLIAM E. NELSON & ROBERT C. PALMER, LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 15 (1987).

80. United States v. Carolene Products Co., 304 U.S. 144, 151 n.4 (1938).

81. Nelson, *supra* note 79, at 17-18.

82. *Id.* at 18.

83. *Id.* at 42.

84. *Id.* at 44.

tribute economic goods . . . while denying them power to enact moral regulations favored only by a segment of society.[85] Footnote Four, according to Nelson, "reaffirmed" the idea of "limited government," rather than expanding government power.[86] To the extent that the Court's rationale, for its understanding that minority rights need to be free from majority dictates in certain areas, must be clarified, history offers that clarification.

Nelson used the same rationale in his defense of *Carolene Products*, and implicitly of the rights-oriented jurisprudence of the Warren Court that he applauded Marshall for using in *Marbury*. Both arguments rest on the historical reliance on consensus as a basis for law addressing fundamental principles and widely-shared values and morals while recognizing the limits upon judicial decision-making that such a requirement imposes. Yet, Nelson's writings in the 1980s evince a desire to move from the founding era to a contemporary one and to use his understanding of history to aid in the development of today's law.

Further development on the use of consensus by the Marshall Court came from G. Edward White, a historian specializing in history of constitutional and legal ideas and a longtime Professor of Law at the University of Virginia. In 1984, White wrote that the Court believed that its role was to "discover" and apply a "universal or fundamental principle" of law that helped to form a "consensual political theory, which in the early period of the Marshall Court was republicanism."[87] Adopting Nelson's argument that the Marshall Court relied upon fundamental legal principles and that a successful application of law depended upon its shared features with political consensus, White continued the growing historiographic trends to reinvigorate the role of ideas in the nation's founding and to attack instrumentalist thinkers. Yet, White challenged Nelson, as well as Haskins and Johnson, on more particular historical issues. He argued that republican political theory was so rooted in law that any separation of law and politics was impossible. According to White, Nelson and others confused "politics" with "partisanship."[88] The Marshall Court acted politically; but its jurisprudence did not originate in partisanship.[89] Even more significantly, White disagreed with Nelson's assertion that "there were no specific, pre-existing, legal principles" to be discovered.[90] Nelson saw the Court deriving these principles

85. *Id.* at 47.

86. *Id.* at 50.

87. G. Edward White, *The Working Life of the Marshall Court, 1815–1835*, 70 VA. L. REV. 1, 47-50 (1984).

88. *Id.* at 48.

89. *Id.*

90. *See* Nelson, *supra* note 11, at 894.

from a political consensus expressed in the Constitution; White saw these principles as expressions of ideology expressed in the Revolution and nation building that influenced political and legal thought.

In 1986, Christopher Wolfe reiterated Nelson's earlier arguments that the adoption of judicial review was rooted in pervasive cultural understandings of the significance of the Constitution and the functions of the judiciary.[91] He also shared Nelson's concerns about the use of the doctrine by the Burger Court, expressing the Court's practices as exercises of judicial "will," or impositions of the judges' values and perspectives, rather than legal "judgment" such as that used by the Marshall Court.[92] Judges, he claimed, ceased to express what Nelson termed consensual values, as their own values came to differ greatly from those of the public.

Three years later, Robert Lowry Clinton reconsidered the history of judicial review in light of what he perceived to be the errors of the Burger Court. A legal realist himself, he castigated his academic brethren for their tacit approval of these errors:

> The truth is, any theory of constitutional review which vests final authority to interpret that instrument in the hands of a single branch of the government will induce that branch invariably to self-aggrandizement. That insight is both the genius and genesis of the separation of powers. It is surprising that so many of those who contend that judges make law, that there is no fundamental distinction between law and politics, that judicial objectivity is unattainable, that constitutions are political documents, and so on, *also* assert that finality in constitutional interpretation must reside somewhere, and that somewhere is the Supreme Court![93]

For Clinton, legal realism should result in greater limitations on judicial discretion, not acceptance of judicial legislation. He found that Marshall's decision in *Marbury* "was not a political decision but was based on sound constitutional doctrine and existing legal precedent" and produced a limited doctrine of judicial review "that federal courts are entitled to invalidate acts of coordinate branches of government only when to allow such acts to stand would violate constitutional restrictions on judicial power, not on legislative or executive power."[94] Only in the late 1800s, according to Clinton, did critics of the doctrine expand upon Marshall's use of it, interpreting their "enemy" as far more powerful than it was, and in the process creating room for the Court to exercise greater power. Clinton considered "judicial review" as currently understood to be a myth that only history can

91. *See generally* CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW (1986).

92. *Id.* at 3-4, 73-79.

93. ROBERT LOWRY CLINTON, *MARBURY V. MADISON* AND JUDICIAL REVIEW 233 (1989).

94. *Id.* at 1, 79.

correct. Clinton cited Nelson's earlier analysis with approval in that the popular consensus that Nelson describes could well have been the basis for both the American people and legal actors to believe the myth as long as they did. Clinton wrote that law served as "the institutional locus of a shared system of values which contained, at its heart, incipient notions of individualism and democracy. The history of the American concepts of judicial function is largely the history of a long-standing effort to resolve the inescapable tension between these two ideas."[95] Clinton called for an adoption of departmental review confining judicial power to the revocation of laws that are of a "judicial nature," recognizing that such a policy "implies a derivative discretion in Congress—and to an extent, in the president—to disregard judicial decisions which set aside laws on the basis of constitutional provisions not addressed by the courts."[96] In sum, during the 1980s, Nelson's writing was shaping much of the academic dialogue, as scholars worked from, developed, and offered amendments to argument of his 1978 essay, and mirrored his use of history to challenge contemporary uses of judicial review inconsistent with Marshall's.

Yet, several writers, while usually expressing familiarity with his work, ignored Nelson's central arguments while perpetuating the idea of Marshall's political motivations. In 1986, for example, Susan Low Bloch and Maeva Marcus argued that the Chief Justice intentionally misconstrued history to reach his decision in *Marbury*, aggrandizing the power of the Supreme Court and "rendering the judiciary an independent and equal branch of the federal government."[97] The authors noted the highly-charged political atmosphere of the early 1800s and that, after the Republican victory at the polls in 1800, all of the Federalists' hopes rested with the judiciary.[98] They suggested that the only American precedent cited by Marshall, two pension cases described in one line apiece in the Court's minutes from 1794, was "conflated" by Marshall "to support his first conclusion that a writ of mandamus could issue to order a cabinet officer to do his duty, but disregarded . . . when they conflicted with his second conclusion that the Supreme Court could not issue such a writ in the exercise of its original jurisdiction."[99] Bloch and Marcus further contended that the question

95. *Id.* at 55.

96. *Id.* at 226-27 (noting the effect such a rule would have on existing precedent as of 1989 and stating, "[s]ince all invalidations of federal law by the Roosevelt Court, and most by the Warren Court, were handed down in cases of a judiciary nature, those most influenced by this analysis are the twenty-odd decisions of the Burger Court discussed earlier in this chapter.").

97. Susan Low Bloch & Maeva Marcus, *John Marshall's Selective Use of History in* Marbury v. Madison, 1986 WIS. L. REV. 301, 301 (1986).

98. *Id.* at 335-36.

99. *Id.* at 303, 307-08.

whether the Court could void legislation conflicting with the Constitution "was not an issue of the first impression despite Marshall's indications to the contrary."[100] They argued that "the most likely reason Marshall ignored . . . [contrary] precedents in *Marbury* was . . . that he believed they could not be dismissed or distinguished easily."[101] In reliance upon these legal inconsistencies, they concluded, "[I]t seems beyond dispute that politics played a significant part in the outcome of *Marbury*."[102] Bloch and Marcus found Marshall duplicitous in positing and Nelson gullible in recognizing the distinction between law and politics: "in purporting to separate law and politics in *Marbury* and clearly enunciating the doctrine of judicial review, Marshall sought to capture for the Court a special role in interpreting the Constitution." According to Bloch and Marcus, he succeeded, for "[a]lthough Marshall claimed to be eliminating political questions from review by the Court, in reality he assumed for the Court the critical power to determine which issues were political and which were law."[103] Bloch and Marcus sought to rebut the argument at the crux of Nelson's writing, but did so obliquely, failing, other than in an early footnote listing "numerous books and articles" discussing *Marbury*, to cite the essay or address its analysis.

Four years later, in her intellectually stimulating but somewhat unsatisfying book, *Judicial Review and the Law of the Constitution*,[104] Sylvia Snowiss used a reading of the intellectual history addressing constitutionalism to challenge the argument that judicial review is justifiable from the founders' intentions or the precedent that existed in 1803 and to criticize its expansive use in the twentieth century. Nonetheless, she stated that she shared "the prevailing view that judicial authority over legislation has by now generated sufficient support to be unaffected by assessments of original intent."[105] Snowiss found that ideas of the colonial era influenced the views of constitutions and judicial decision-making well into the 1800s. She built upon Wood's argument that constitutions expressed fundamental law, but argued conversely from him that in doing so they were converted from political to legal documents. This change, she contended, did not serve as the real basis for judicial review and judicial supremacy until the middle of the nineteenth century, when the Court assumed the power to

100. *Id.* at 324.
101. *Id.* at 326.
102. *Id.* at 333
103. *Id.* at 336.
104. SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION vii-viii (1990).
105. *Id.* at viii.

"expound" as well as to "enforce" fundamental law.[106] Seeing the Constitution as a political document as much as a legal one before that time, Snowiss contended, allows the development of judicial review to be seen as a political-legal action. Snowiss also borrowed from the late nineteenth-century Harvard constitutional scholar, James Bradley Thayer, who noted that early courts, using Hamilton's argument from *The Federalist No. 78*, voided legislation only when "there was no doubt about its unconstitutionality;" and in a "doubtful case," she maintained, the courts deferred to the legislatures.[107] In this way, they followed ancient practice in the use of judicial review, a practice little modified by the Revolution or by the drafting of constitutions. Perhaps most intriguing to students of Nelson is Snowiss's assertion that fundamental law lacked consensus and was completely distinct from widely shared values[108]—a proposition that, if true, challenges not only Nelson's work but much of our thinking on the Enlightenment influences on the Revolution and nation building as well.

By 2000, Nelson's desire to integrate history and contemporary social commentary found new expression in response to two relatively new legal voices, one from the left and the other from the right, on the contemporary political spectrum. Critical Legal Studies emerged from legal realism in the 1970s, fueled by disillusion with the relative failures of reform movements in the 1960s. Scholars of this persuasion minimize the importance of legal texts, such as statutes and court decisions, in determining legal outcomes in cases, contending instead that law and politics intertwine to such an extent that law is politics.[109] Rules of law, they maintain, derive from the collective intellectual constructs of many diverse actors and express considerable internal contradictions allowing judges great discretion. Accordingly, building a popular consensus regarding fundamental principles to be expressed in law is both impossible and irrelevant. Alternatively, an aggressive conservative reaction to the perceived radical changes in America, spawned in the social revolution of the late 1960s and early 1970s, and, fueled by the growth of an evangelical Christian movement that came to dominate the Republican Party as the "religious right," sought to restrain judicial activism by asserting that the Court had to rely upon the original intent of the founders.[110] In *Marbury v. Madison: The Origins and Legacy*

106. *Id.* at 1, 4, 8, 184-88.

107. *Id.* at 60 (relying upon James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893)).

108. *Id.* at 6, 215-20.

109. *See* Symposium, *Critical Legal Studies*, 36 STAN. L. REV. 1, 57-71 (1984).

110. *See, e.g.*, ROBERT H. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW 8 (1984); HARRY JAFFA ET AL., ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED

of Judicial Review, Nelson explains that Marshall's distillation of judicial review obviates the need for reliance upon original intent.[111] In making this argument, he relies to a great extent on his earlier explanation of the role of consensus, both in Marshall's jurisprudence and in maintaining judicial legitimacy.

In 1978, Nelson stated that Marshall's jurisprudence formed law as "a body of flexible rules in response to social reality," but he did little to develop the contemporary significance of this idea.[112] In 2000, he undertook that enterprise of development by putting *Marbury* into a legal continuum, offering a new insight into the meaning of judicial review. Nelson argued that law changes in response to an evolving consensus on the proper role of law in addressing social needs. Marshall understood and allowed for this flexibility:

> One possible argument is that the law—the body of doctrine derived from precedent or enacted by the sovereign—justifies the desired decision. Chief Justice John Marshall recognized and legitimated such arguments in *Marbury v. Madison*. A second possible argument is that the publicly proclaimed values on which the community agrees, as articulated by juries in the eighteenth century or by societal leaders and the media today, constitute a second form of law on which it is equally appropriate for a court to rely in reading decisions. Marshall also recognized and legitimated arguments of this sort in *Marbury*.[113]

The Depression of the 1930s brought about a huge change in Americans' understanding of the appropriateness of governmental action in support of economic growth, the elimination of suffering, and the positive securing of economic opportunities. As Marshall is understood in his explanation of judicial review, to have given the Court the authority to "enforce . . . values widely shared by the people as a whole," the change in American values in the 1930s permitted a corresponding change in American law.[114] Judicial review, therefore, depends not on original intent, understood as the consensus existing in 1789, but rather on the consensus that exists at any point in time in history. The decisions of the Court in the 1960s and 1970s were largely rooted in the shared values of Americans, derived from the crisis in the 1930s and the cultural aversion to Jim Crow and discrimination after World War II, to have law protect fundamental freedoms and secure basic standards of living. However, decisions since

QUESTION (1994); GARY MCDOWELL, THE LANGUAGE OF LAW AND THE FOUNDATIONS OF AMERICAN CAPITALISM 5-8 (2010).

111. *See generally* NELSON, *supra* note 54.

112. Nelson, *supra* note 11, at 903.

113. NELSON, *supra* note 54, at 122.

114. *Id.*

the 1970s have attempted to resolve political disputes involving certain minority group interests relative to those of a more powerful majority. These appear to Nelson as clearly political, not legal, issues.

Nelson reiterated in 2000 his view of *Stuart v. Laird* as clarifying and confirming both Marshall's separation of law and politics and his narrow understanding of judicial review as concerned only with individual rights, principles that, Nelson argued, remain vital in the twenty-first century. Though Nelson wrote his study of *Marbury* before the Court's decision in *Bush v. Gore*, it had great relevance to the debates that were soon to unfold. In providing another summary of the general acceptance of judicial review decades before *Marbury*, Nelson issued a restatement required less for its historical significance than for its political relevance. Opponents of judicial activism continued to challenge the appropriateness of judicial review by claiming that Marshall created the concept for political reasons, raising the possibility of restraining the Court in 2000 and after.

Yet, Nelson's development of his understanding of an evolving consensus is not the only aspect of his 2000 book that is new. Nelson also developed his argument on the importance of popular sovereignty in greater detail than he provided in 1978. Bailyn saw the significance of the idea of popular sovereignty as providing the legal or constitutional justification for the colonists' separation from Britain in the 1770s. Yet, as Nelson noted in 1978, two schools of thought existed as to the influence that the will of the people might have relative to fixed legal principles. In 2000, he showed how the idea of popular sovereignty came to fruition in the Constitution and was given full expression by Marshall in harmonizing the two schools of thought that contested in the early republic. He wrote:

> [T]he principles that [Marshall] 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 happiness.' In so ruling, the Marshall court evoked the revolutionary generation's assumption that the people, acting as a unitary body rather than as disparate individuals, had incorporated basic and generally–accepted principles of right into their constitution.[115]

Nelson looked to *The Federalist No.78* to assert that the Constitution served as a "fundamental law" that the people wrote to define the limits of legislative authority. The courts, according to Hamilton, were "designed to be an intermediate body between the people and the legislature" to interpret the fundamental law to keep legislative enactments within their proper

115. *Id.* at 63-64.

bounds.[116] Hamilton then defined the idea of popular sovereignty that Marshall used in his articulation of judicial review in *Marbury*:

> Nor does this conclusion by any means suppose of superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.[117]

From this perspective, popular sovereignty expresses a consensus—a general agreement among the populace as to the fundamental principles and values that are to guide society reminiscent of Rousseau's "General Will." Nelson used this idea of popular sovereignty, the articulated basis for judicial review, as part of his argument for the legitimacy of an evolving consensus as the basis for law as expressed by the Court. He built upon his initial thesis to respond to new scholarly works, contemporary ideas about judicial authority, and the conservative actions of the Rehnquist Court. Nelson provided a historical basis for continuing and restraining judicial review rooted not in original intent but in the jurisprudence of John Marshall, which recognized an evolving consensus as to fundamental principles as a source of law. Conceived in this way, the use of consensus as a constitutional consideration allows for the growth or change of legal doctrine, while simultaneously restraining the Court to matters, necessarily legal, on which a consensus can be found.

V. THE POLITICIZATION OF THE HISTORIOGRAPHY

As courts in the early twenty-first century have become focal points in political debates, from the contested 2000 presidential election to the outrage among some conservatives about the Court's upholding of the Patient Protection and Affordable Care Act of 2010, many scholars have attempted, like Nelson, to encourage the Court to eschew political decision-making to preserve respect for judicial review and the Court. In this context, the issue of what branch of government is best able to define and protect rights has taken on new significance.

Much of the recent scholarship accepts some form of judicial review but seeks to understand the practice's origins and development either to justify it or to restrain it in the hands of the contemporary Court. Perhaps the biggest issue in this debate is whether judicial review necessarily con-

116. *Id.* at 65 (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).
117. *Id*. at 66 (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

notes judicial supremacy. To a large extent, this issue restates the concern over judicial restraint in the exercise of judicial review explored by Nelson, Snowiss, and others in the 1970s and 1980s. Yet, the context has changed. The Roberts Court is overturning less legislation than its predecessors, but is addressing more political issues. Twenty-first century concerns focus less on an activist judiciary, and more on the political nature of a few key Court decisions, raising the issue of which branch of government is the proper vehicle for ensuring that the people are heard. Is the Court, as Nelson asserts, the best protector and enunciator of popular sovereignty?

Conservatives who recently bemoaned the Court's overturning statutes limiting abortion rights, or requiring school prayers or the teaching of creationism, have repeatedly demanded that the Court overturn the Patient Protection and Affordable Care Act that they derisively call "Obamacare."[118] At the same time, the Court has angered liberals by its tendency to perceive rights-related cases as political and to try to balance interests in these cases rather than make legal rulings. A primary example is the Court's accommodationist doctrine that sees Christians as a "protected group" to limit the separation of church and state.[119] This renewed interest in the scope of judicial review on left and right alike coincided with the bicentennial of *Marbury* in 2003. Several forums resulted in scholarly publications addressing the current debates on judicial authority, as scholars from left and right seem interested in limiting the use of judicial review, if only in the minds of some to preserve its legitimacy.

A conference held in 2003 at Wake Forest Law School questioned the advisability of judicial review because of its threats to democracy. Calls for a more populist Constitution expressed concerns over the countermajoritarian effects of the doctrine. In his introduction to the conference papers published in the *Wake Forest Law Review*, Michael Kent Curtis claims that critics of the doctrine confuse legislative action with the voice of the people.[120] For Curtis, any lack of democracy may be more attributable to problems within the political processes than to judicial review.[121] He recites a long history of criticism levied against the Court from at least the Progressive reaction to *Lochner* and subsequent rejection of New Deal legislation through conservative dissatisfaction with the Warren Court.

118. NFIB v. Sibelius, 132 S. Ct. 2566 (2012).

119. Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 334 (1987); Sherbert v. Verner, 374 U.S. 398, 399, 412-13, 416 (1963); MARK V. TUSHNET, THE RIGHTS REVOLUTION IN THE TWENTIETH CENTURY 23-24, 31 (2009).

120. Michael Kent Curtis, *Introduction to Judicial Review and Populism*, 38 WAKE FOREST L. REV. 314, 314-15 (2003).

121. *Id.* at 315.

Political dissatisfaction with the Court is cyclical, with one or the other party claiming that the Court is counter-majoritarian. He asserts that in the early twenty-first century, Americans find themselves in a 30-year period of cultural and political conservatism that has expressed itself in appointments to and decisions by the Court, with liberals responding by expressing the need for more popular constitutionalism.[122] Yet, for Curtis, the greatest threat to democracy at the turn of this century may be the same one existing at the turn of the last—the expansion of corporate power, manifested more in elections and the legislative process than in judicial action. Curtis argues that the courts must be the savior of democracy in their protection of the people's voices as distinct from corporate voices; however, to do so, the Constitution must express a degree of populism more consistent with the ideal of popular sovereignty.[123]

Davison Douglas, a former Golieb Fellow under Nelson, also traces a long history of dissatisfaction with judicial review, focusing on Progressive and populist reaction to the Court's 1895 declaration in the *Pollock* decision that held the federal income tax unconstitutional.[124] He asserts that, in the 1890s and early 1900s, conservatives encouraged a more expansive reading of *Marbury* to give the Court latitude to reject legislation intended "to ameliorate the efforts of industrialization, corral power of concentrated wealth, and protect the interests of labor."[125] They turned judicial review into a major component of the American constitutional system and rendered *Marbury* a "great" decision in the process. Douglas finds that the Court has distorted Marshall's jurisprudence, particularly in its assertions of judicial supremacy in *Cooper v. Aaron* in 1958. However, as that decision upholding desegregation shows, the concept once advanced by conservatives has been used to advantage in a wide range of cases concerning individual rights. The controversial concept, according to Douglas, has been the basis for individuals to assert their rights when political measures have failed to protect them.[126]

Writing in the same volume, Thomas C. Grey reaches a similar conclusion to that of Douglas, that judicial review has served a pragmatic function in the last fifty years that has benefitted democracy at least as much as it has harmed it. Grey contends that the Court's use of judicial review during the *Lochner* era seemed to reformers to be legal formalism, the defense

122. *Id.* at 316-21.

123. *Id.* at 370-74.

124. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1985).

125. Davison M. Douglas, *The Rhetorical Uses of* Marbury v. Madison*: The Emergence of a "Great Case"*, 38 WAKE FOREST L. REV. 375-77 (2003).

126. *Id.* at 409-13.

of legal doctrines and their logical derivatives at the expense of justice and social progress. As a result, generations of lawyers and scholars taught by more liberal-minded professors in law schools, rejected formalism in favor of the brand of legal pragmatism known as Legal Realism. In the hands of judges applying this school of thought, judicial review has become a necessary tool if the judiciary is to fill the role that Madison intended for it as an "impenetrable bulwark" against intrusions on people's rights.[127]

Writing from the legal realist perspective, Sanford Levinson restated Nelson's assertion that "one cannot possibly understand *Marbury* without placing it in the context of *Laird*."[128] But, thereafter, Levinson deviated from Nelson's reading of *Marbury*, finding Marshall to be so politically motivated that his jurisprudence constituted an especially "vulgar" form of legal realism, and implied acceptance of judicial supremacy as early as the early 1800s. He and Frank Michelman, another contributor to the symposium, agree generally on the desirability of eliminating not only judicial review but any constitution as a social contract as undemocratic limitations on popular will.[129]

Robert F. Nagel groups Nelson and Wolfe as "Revisionists" who see the *Marbury* decision as historically justified but inconsistent with prevailing practices rooted in judicial supremacy. Yet, he contends, the Revisionists share much with the Realists who perceive the Court to be acting politically and want to temper its abuse of authority.[130]

In 2005, Mark Tushnet edited a collection of short essays reconsidering the meaning of Marshall's definition of judicial review in a contemporary setting. In his introduction, Tushnet provides several propositions, by then well-established, derived from Nelson's earlier work. Tushnet asserted: "The Constitution's framers assumed that the national courts would have the power to overturn laws that the judges found were inconsistent with the limitations the Constitution placed on government power."[131] He added that the assertion that the federal courts "had the power to declare acts of Congress unconstitutional . . . [was] not, in itself, a controversial proposition."[132] Tushnet also cited *Laird* as "confirm[ing] that the judges

127. *See* Madison, *supra* note 27 and accompanying text; *see also* Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473 (2003).

128. Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553, 557 (2003).

129. Frank Michelman, *Living with Judicial Supremacy*, 38 WAKE FOREST L. REV. 579 (2003).

130. Robert F. Nagel, Marbury v. Madison *and Modern Judicial Review*, 38 WAKE FOREST L. REV. 613 (2003).

131. ARGUING *MARBURY V. MADISON* 1 (Mark V. Tushnet ed., 2005).

132. *Id.* at 5.

were likely to be prudent in exercising [the] power" of judicial review.[133] The essays in the book pit a limited "departmentalist" interpretation against a broader "judicial supremacy" reading of the meaning of judicial review. Giving great weight to the factual context of *Marbury*, departmentalists assert that judicial review recognizes the power of the courts "to declare unconstitutional those statutes that interfered with their [own] proper functioning," allowing for the possibility that each branch of government might render "its own independent judgment of what the Constitution means."[134] Their opponents derive their argument less from the setting of the case and more from an understanding of Marshall's opinion in a broader context of ideas and judicial practice. In doing so, advocates of judicial supremacy largely reiterate Nelson's arguments that we must understand judicial review through Marshall's articulation of law as an expansion of consensual understandings of the need to protect rights and that judicial review retains validity so long as it is used consistently with evolving consensual understandings. According to Tushnet, judicial supremacy is acceptable to the American people because it produces greater social and legal stability than the departmentalist interpretation, which leads inevitably to recurrent crises of constitutional interpretation. Judicial review, by contrast, becomes controversial only when it "invalidates statutes with broad congressional and popular support."[135]

Perhaps the most interesting essay in Tushnet's edited volume is that by Stephen Griffin, which proposes to develop "a theory of judicial review that is responsive to our democratic values and political circumstances."[136] Griffin sets out, in a clear and organized manner, the differences between judicial review as used by Marshall and the use of the doctrine by contemporary courts. Throughout this discussion, he relies heavily on Nelson's analysis of Marshall's distinction between law and politics. This distinction gains significance when government itself is divided. Griffin points out that since 1969, "[T]he President's party has controlled Congress for only eight and a half years."[137] He then explains the significance of this fact and its consequences for judicial review:

> Divided government has arguably increased the Court's power by making it more difficult for an aggrieved political party to strike back. But it has also deprived government of the political consensus that was as-

133. *Id.* at 6.

134. *Id.* at 6-7.

135. *Id.* at 9.

136. Stephen M. Griffin, *The Age of Marbury: Judicial Review in a Democracy of Rights*, *in* ARGUING *MARBURY V. MADISON* 106 (Mark V. Tushnet ed., 2005).

137. *Id.* at 123.

> sumed by modern theories of judicial review such as Bickel's. In a period of divided government, there is no "dominant national alliance" and no persistent lawmaking majority. By the logic of these theories, the risk that the Court could make countermajoritarian decisions (by striking down laws passed under unified government) without fear of being checked by the elected branches has increased significantly.[138]

Divided government has further led to a desire by each party to gain political advantage in the Court, with the appointment of Supreme Court justices becoming ever more political.[139] Distinguishing between law and politics in this realm is not as easy as it once was, and judicial independence thus appears chimerical.

Griffin does not assert, however, that recourse be made to the Constitution as written in 1787 to restrain today's judges. Considering original intent both reactionary and undemocratic, Griffin focuses on evolving conceptions of rights and of democracy as shapers of judicial review. The Court must enforce and protect rights from intrusive legislation but defer to legislation, as a democratic expression of the popular will, when it creates or defines rights that implement the values expressed in the Constitution. Although using different terms, Griffin largely reiterates Nelson's idea of an evolving consensus as a means of both justifying and limiting contemporary use of judicial review.

The popular constitutionalism that served as the focus of academic discussion at the Wake Forest symposium received its fullest expression to date in 2004 with Larry Kramer's publication of *The People Themselves*. Kramer shares Nelson's significant interest in popular sovereignty and the extent to which the Constitution and law protect it. At the heart of Kramer's work is the assumption that if the people are indeed sovereign and that sovereignty is recognized in the Constitution, then the people must have the power to assert what the law is and should be. He looks at judicial review from that perspective, finding that the founders intended the courts to exercise judicial review as consistent with a departmentalist view of constitutional interpretation, in which the other branches of government as well as the people themselves have the power to interpret the Constitution. He asserts that Marshall expressed this view and that it held sway until the middle of the twentieth century when the Court asserted a new doctrine, inconsistent with the founders' intentions, of judicial supremacy.

Although sharing Nelson's interest in popular sovereignty, Kramer contends that the doctrine arose, contrary to Bailyn, Wood, and Nelson, after the Revolution in support of an agency theory of separation of pow-

138. *Id.*
139. *Id.* at 125-26.

ers; although we can read Kramer's theory of popular constitutionalism as incorporating Nelson's theory of consensus as a necessary factor in constitutional interpretation, his arguments diverge from Nelson's. Kramer expresses dismay with the distinction that Nelson celebrates: the separation of law from politics. By contrast, he accepts the political aspects of constitutional law, even finding them advantageous. Kramer desires the people to play a greater role, one supported by history, in interpreting law, in the process minimizing greatly the monopoly of lawyers and judges.[140] He sees the Constitution as a far less formal and restrictive document than that conceived by social contract theory.[141] Yet, Kramer's book, despite its extensive historical references, fails to distinguish adequately between history and prescription. Its normative assertion that law responds to popular opinion in shaping Constitutional interpretations often appears as an imposition upon the past. Kramer's advocacy of popular constitutionalism seems limited after 1830 to expressions made through political parties, a convenient but unsatisfying means of blinding oneself to populist movements expressed in McCarthyism, the Ku Klux Klan, and the Tea Party. In 2006, Kramer's widely celebrated book was the focus of a conference at Chicago-Kent Law School; some of the papers presented there merit mention as relevant to the developing historiography on judicial review, and Nelson's place in it.

Morton J. Horwitz argues for placing Kramer's book in the context of a broad migration of liberals from endorsing judicial review to opposing it after the Court's decision in *Bush v. Gore*, a movement second only to that occurring after the *Lochner* decision.[142] Gerald Leonard notes Kramer's continuation of an error (perhaps first promulgated by Snowiss) that judicial review originated in the United States as a "political-legal" theory to serve as a substitute for revolution in the people's protection of their rights rather than as a judicial practice concerned with law.[143] By contrast, Mark Tushnet endorses Kramer's assertion that the Constitution forms a distinctive form of "political law." He contends that, although legal analysis encourages legal actors to look backward to precedent or texts explicating statutory intent, politics considers "what would be best for society in the

140. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7-8 (2004) (Kramer calls this participation "constitutional politics" and sees it as a means of revising constitutional law rather than interpreting and enforcing it).

141. *Id.* at 42.

142. Morton J. Horwitz, *A Historiography of the People Themselves and Popular Constitutionalism*, 81 CHI.-KENT L. REV. 813 (2006).

143. Gerald Leonard, *Iredell Reclaimed: Farewell to Snowiss's History of Judicial Reivew*, 81 CHI.-KENT L. REV. 867 (2006).

future."[144] As the Constitution expresses fundamental ideas about who the American people are when constituted as a nation, it is as much concerned with the present and future as with the past. Popular voices, therefore, are not only appropriately considered in, but also absolutely essential to exploring, constitutional meanings.

In perhaps the best essay in the collection, Christopher Tomlins encouraged readers to accept Kramer's book "not as a substantive position" on judicial review so much as "a lens" – a perspective from which to see the pitfalls and problems with the doctrine as popularly understood.[145] Kramer's widely read and highly controversial work restructures debate on the topic into a discussion of the normative goals of constitutional interpretation and the role of judicial review – an apt focus after more than 200 years of history with that doctrine.

Liberals have not been the only ones seeking such reconsiderations; several scholars holding conservative political views have renewed the argument that the concept of judicial review, as articulated by Marshall, was politically motivated and therefore must be used with greater restraint. Asserting the need to return to "original intent" in defining the scope of judicial authority, Lawrence Goldstone argues that *Marbury* "seems to meet every test of an originalist's view of bad law" and is "as corrupt as *Roe v. Wade*."[146] Philip Hamburger finds political motivation more in the subsequent use of the doctrine than in its articulation in *Marbury*. Referencing old common law ideals concerning judicial decision-making, he deems the concept to be part of a long-standing "legal duty" to "decide [cases] in accord with the law of the land."[147] Unlike the English, Americans expressed their "law of the land" in written constitutions superior to legislation, allowing judges to resolve conflicts in law by reference to a clearly preferred text but still in conformity with those old concepts of duty. Yet, Hamburger contends, historians and judges have misconstrued the history of judicial review to aggrandize the scope and power of judges to sit in review of legislation.[148]

Scholars such as Hamburger and Snowiss accept the relevance of intellectual history to law and explore older intellectual and legal contexts to

144. Mark V. Tushnet, *Popular Constitutionalism as Popular Law*, 81 CHI.-KENT L. REV. 991, 992-93 (2006).

145. Christopher Tomlins, *Politics, Police, Past and Present: Larry Kramer's* The People Themselves, 81 CHI.-KENT L. REV. 1007, 1009 (2006).

146. LAWRENCE GOLDSTONE, THE ACTIVIST: JOHN MARSHALL, *MARBURY V. MADISON*, AND THE MYTH OF JUDICIAL REVIEW 233 (2008).

147. PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 17, 101 (2008).

148. *Id.* at 617.

identify the roots of judicial review. In doing so, however, they may underestimate the transformative influences of the Revolution and of the process of drafting constitutions. Although early concepts of constitutional theory and judicial authority may have historical relevance, the Revolution represented an end to much of the colonial worldview and jettisoned much of the old common law. We can hardly judge Marshall's actions in 1803 from the perspective of the political theory and jurisprudence of the mid-eighteenth century as expressed in doctrines, rules and practices. When Snowiss and Hamburger judge Marshall in this way, they seem to argue that the Revolution itself was either a mistake or of little consequence. We therefore must distinguish their use of colonial history from what we find in the work of William E. Nelson. Nelson identifies the persistence of a communal thread of thought retaining an emotional and intellectual significance well into the 1800s. Far from constituting a practice, rule, or doctrine, it infused Americans with an attitude that influenced their judgments on governmental and judicial legitimacy. Marshall both shared and played to that communal thread in his reliance upon consensus.

Recent historiography has shown a tendency among scholars to contort history, legal concepts, and political theory, either to justify an activist judiciary or to promote one governed by restraint. Readers cannot help but conclude that politics play as large a role in the writing of this history as do historical data and legal reasoning. Set within this historiographical and normative context, Nelson's work appears even more objective and scholarly, the work of a man devoted to his craft and insisting on viewing the past, as much as possible, without the influences of contemporary normative pressures. It is notable that Nelson's findings, analysis, and conclusions regarding the history and use of judicial review have changed little over more than forty years, despite tremendous political, social, and legal changes during this period – a consistency suggesting that his work is still valuable and fruitful.

Two recent works, which stand apart from the highly politicized books and essays of the last 15 years, confront Nelson's analysis and conclusions directly. Each is written by a person who is not only an excellent historian, but also an able and astute analyst of legal ideas and doctrines. Both books, Charles Hobson's, *The Great Chief Justice*, and R. Kent Newmyer's, *John Marshall and the Heroic Age of the Supreme Court*, have become landmarks not just in the scholarship on John Marshall but in the historiography of the U.S. Constitution and American law.[149] Hobson asserts that, in fram-

149. CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW (1996); R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT (2001).

ing his jurisprudence, Marshall relied on principles of republicanism from which he deduced rules of law, a legal orientation that he shared with Jefferson.[150] It is this perspective, Hobson maintains, that encouraged Marshall to separate law from politics.[151] Marshall's articulation of the doctrine of judicial review protected the independence of the judiciary, federal authority, and private individual rights, all essential cornerstones of the American republic.[152] Perhaps most significant, Hobson contends that popular sovereignty was expressed in the Constitution, as the supreme will of the people. Far from being an encroachment on popular democracy, judicial review "offered a practical means of preserving and enforcing the permanent will of the people."[153] Yet, Hobson sees that the scope of judicial review has changed over time: Judicial review never implied judicial supremacy.[154]

Like Hobson, Newmyer finds popular sovereignty to be the basis of Marshall's jurisprudence and the doctrine of judicial review. He recognizes, however, that Marshall combined a commitment to this ideal with a complementary and equal commitment to capitalism and its values.[155] Even so, commitment to these ideals was not the only motivation for Marshall, Newmyer asserts, as he was willing to use law to win political battles. Marshall's political concerns were not personal or self-aggrandizing, however, but rather were rooted in a principled belief that national power must temper state authority. In developing a judicial doctrine on federalism, Marshall established the Court as the protector of individual liberties from interference from the state as well as from Congress.[156]

Nelson, Hobson, and Newmyer all agree that Marshall prudently exercised his authority by narrowing his decisions, especially in *Marbury*. They also find significant ideological bases for his jurisprudence, rebutting the old instrumentalists as well as the opportunistic realists of later years. All of these authors also contextualize *Marbury* in a broad consideration of other Marshall Court decisions and the intellectual climates of the times, with particular attention to Bailyn's arguments concerning the significance of popular sovereignty. The combination of intellectual and legal history

150. HOBSON, *supra* note 149, at 26-34, 37-38, 43-45.

151. *Id.* at 42-43, 53.

152. *Id.* at 69.

153. *Id.* at 58.

154. *Id.* at 70. A position shared by Nelson, Newmyer, and another leading biographer of Marshall, Jean Smith. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 326 (1996).

155. NEWMYER, *supra* note 149, at 210-66.

156. *Id.* at 167, 169.

that Nelson offered in 1978, and restated and developed in 2000, has found some of its brightest progeny in the works of Hobson and Newmyer.