INTRODUCTION

America on the Brink

For a week in February 1801, America teetered on the brink of disaster. The electoral college had deadlocked, and the job of picking the next president fell to the House of Representatives. Vote after vote was leading nowhere—after thirty-five ballots, still no president of the United States.

Inauguration Day was less than three weeks away. President John Adams’s term would end, and the Constitution did not specify what was to happen next if the impasse in the House continued. For ordinary Americans, it was clear enough what ought to happen: the Republican party and its presidential candidate, Thomas Jefferson, had won the election, and the House should recognize this fact. But the Federalist party was powerful in Congress, and many Federalists were trying to throw the presidency to Aaron Burr, a political chameleon who might well make great concessions to gain the prize. If this gambit failed, the Federalists might have pushed John Marshall, their newly appointed chief justice of the Supreme Court, into the president’s chair. While Marshall was the nation’s most popular Federalist politician, he was utterly unacceptable to the Republicans. Jefferson detested him, despite—because of?—the fact that they were cousins.

Danger signs were everywhere. The Republican governors of Pennsylvania and Virginia were preparing their state militias to march on Washington if the Federalists used a legal trick to steal the presidency. A mob surrounded the half-built Capitol in Washington, D.C., threatening death to any Federalist pretender to the office. Leading Federalist newspapers conjured up the prospect of “the militia of Massachusetts consisting of 60,000 (regulars let us call them) in arms” crushing the force of some “factions foreigners in Pennsylvania, or a few fighting bacchanals of Virginia.”

If hotheads had had their way, the 1787 Constitution would have disintegrated. American history would have moved in a Latin American
direction. We would have seen military clashes, ending, most probably, with another constitutional convention, this time with Thomas Jefferson in the chair. Rather than proving an enduring feature of the American order, written constitutions would have begun to seem ephemeral things—with the Constitution of 1802 replacing the Constitution of 1787, which had only recently replaced America’s first constitution: the Articles of Confederation of 1781.

Three constitutions in twenty years! How many more crises and constitutions were in store for an unruly infant republic on a vast continent? Would the United States ever reach any kind of equilibrium?

Thanks to some unsung heroes—including the deviously resourceful Thomas Jefferson, the surprisingly cool-headed John Adams, the much maligned Aaron Burr, and the otherwise forgotten James Bayard—the republic weathered its first great crisis. On the thirty-sixth ballot, the House of Representatives selected Thomas Jefferson and cut off the cycle of violence. Though John Adams refused to show up at the inaugural ceremony, Federalist Chief Justice Marshall swore Jefferson in as president of the United States.

This was no easy victory. If the nation survived the crisis, it wasn’t because the Constitution provided clear rules for the political game. The Framers of 1787 made an alarming number of technical mistakes that invited partisans to inflame an already explosive situation. I will be setting the constitutional stage so that you can appreciate the evolving choices confronting the protagonists in this great drama, as well as the complexities of their responses.

While they managed to save the republic, our heroes do not emerge with clean hands. Statesmanship turns out to be a tricky business, displaying incongruous combinations of self-restraint and self-interest, public concern and petty patronage. But in the end these complexities cast a flickering light on a fundamental question: How did Americans manage their first democratic transition without descending into a cycle of violence?

Given our inveterate tendency to read history backwards, we haven’t taken this question seriously. The entire crisis has been treated as if Jefferson’s victory was inevitable. Most contemporary historians go further and downplay the traditional focus on great events in Washington, choosing to emphasize social, not political, developments.
Constitutional lawyers have also trivialized the crisis. For them, the House election of Jefferson serves as prologue to a series of flare-ups in the electoral college that have struck the nation over the centuries. When yet another disaster hits, as in Bush v. Gore in the 2000 election, the profession dusts off the old precedents to see whether they contain some lessons. But during ordinary times, constitutional lawyers are happy to let sleeping dogs lie while turning their attention to the exciting goings-on at the Supreme Court.

This is a mistake. I will be viewing the crisis as symptomatic of a much deeper constitutional transformation in American history, and one that reverberates to the present day. February 1801 marks the birth-agony of the plebiscitarian presidency: for the first time in American history, a president ascended to the office on the basis of a mandate from the People for sweeping transformation. The great engine for change was the invention of recognizably democratic political parties—with Federalists and Republicans ferociously competing with each other for electoral supremacy. The presidency became the obvious institutional focus for this competition, making it plausible for the electoral winner to claim a popular mandate. Thomas Jefferson was the first president to make such a claim, and this assertion generated a series of shattering challenges to the rest of the system. Although America pulled back from the brink in 1801, the rise of the plebiscitarian presidency triggered institutional confrontations that transformed basic constitutional arrangements by the end of the decade, and in ways that remain relevant today.

I begin with the Philadelphia Convention of 1787 and its failure to foresee the development of democratic party competition. Following the teachings of classical republican thought, the Convention equated parties with factions and considered them unmitigated evils. Two-party competition is at the core of modern democracy, but the Convention had a very different aim. It sought to create a republic that transcended faction, not a democracy in which parties rotated in office. Its complex constitutional machine aimed to encourage the selection of political notables to govern in the public interest, and to disdain the arts of faction.

When they looked at the presidency, the Convention feared a demagogue, and it designed the electoral college to reduce the chances that a political opportunist could ascend to power. But the onset of party competition undermined its basic premises. In 1787 the Convention delegates
could reasonably suppose that their electoral college had been engineered to select a statesman who transcended petty factionalism as president; but in the course of a decade their clever design had disintegrated into a jumble of antiquated legalisms that threatened to frustrate the choice of the People. Through inspired statesmanship and plain good luck, the leaders of 1801 managed to avoid a disaster by picking Thomas Jefferson. In solving their immediate problem, however, they created a new challenge to the constitutional order.

With Jefferson at its head, the Republican party was not content with gaining the presidency. It aimed for nothing less than a sweeping repudiation of the Federalist past—both its governing philosophy and its governing personnel. There was one large obstacle to this “revolution of 1800”: the six Federalists sitting on the Supreme Court, led by John Marshall. For these men, the Jeffersonians’ claim of a mandate from the People was sheer demagoguery. The supreme act of popular sovereignty was the ratification of the Constitution of 1787, not the election of 1800, and the Court’s job was to put the Republicans in their place.

The result was a decade of grim institutional struggle between the men of 1800 and the men of 1787—between the president, whose mandate from the People was backed by Congress, and the Court, whose mandate was backed by a piece of paper. At the end of our story, neither side would gain total victory. They would instead pass on to the next generation a fragile synthesis of the constitutional meanings of both 1787 and 1800.

The Jeffersonians’ struggle with the Marshall Court inaugurated a complex institutional dance that can be seen as one of the great leitmotifs of American constitutional development. Over the next two centuries there would be many presidents who would claim a mandate from the People on the basis of their party’s victory at the polls; and there would be many Courts that would look upon these large claims with skepticism, seeking to put the president in his place even when his plebiscitary authority was backed by sweeping majorities in Congress. And these later struggles often ended in a manner similar to the first—with neither side achieving total victory, and both finding themselves enmeshed in an evolving synthesis of the plebiscitarian assertions of the present with the constitutional achievements of the past.

In the early years of the republic, the ongoing institutional struggle
displayed an inner logic, with one conflict setting the stage for the next. I will be presenting this drama in five acts. Part One of this book deals with Act I, exploring how democratic party competition smashed the old electoral college and transformed the nature of the presidency. Part Two shows how the triumph of the plebiscitarian presidency triggered a series of confrontations over the next decade between the revolutionaries of 1800 and the constitutionalists of 1787.

**Act II: The Assault on the Old Constitution.** The story continues with the entry of the newly elected Republican Congress onto the scene in December 1801. With the encouragement of the president, Congress begins its revolutionary work by repudiating one of the most vulnerable portions of the Federalist inheritance. During its lame-duck session earlier in the year, the Federalist Congress had used its final days of power to create a new and powerful set of circuit courts to dispense federal justice throughout the nation. Before handing over the presidency to Jefferson, Adams filled these new courts with dedicated Federalists eager to fulfill their nationalizing mission.

For the Jeffersonians, these “midnight judges” were an affront to the American people. When they created and filled these judgeships, the lame-duck president and Congress knew that the voters had repudiated the Federalist party. Nevertheless, they chose to appoint a host of Federalists to intrude upon the administration of justice in the states. The People had elected their new president and Congress to put an end to such incursions on state prerogatives. If the Republicans were to remain faithful to their mandate, they would at once repudiate this final Federalist assault on popular sovereignty.

Within weeks the new congressional majority was pushing through legislation that would destroy the new courts and purge the midnight judges from office. The Federalist minority responded by invoking the Constitution as a bar. In the Federalists’ view, the text of 1787 spoke for the People in a higher sense than did the Jeffersonians, and the Judiciary article of that great text protected the midnight judges from political interference. Unless and until the Jeffersonians managed to amend the Constitution, the judges’ appointments were sacrosanct.

The Republicans overwhelmed these Federalist objections by party-line votes in Congress, but the Supreme Court posed a very different problem. No party-line vote could help the Republicans there—all six...
justices were Federalists. How would these remaining representatives of the old regime respond to the Republican claims of a mandate from the People?

**Act III: The Court Retreats.** Enter John Marshall and his famous opinion in Marbury v. Madison, known throughout the world as an epoch-making statement vindicating the power of judges to lay down the law to politicians in the name of the Constitution. Modern constitution-builders have entirely lost sight of Marbury’s relationship to the crisis that gave it birth. Once we set the historical stage more fully, Marbury will take on a different appearance. Rather than a ringing vindication of judicial power, it was part of a large strategic retreat, rationalizing a stunning judicial concession to the Republicans’ proud claim to a mandate from the People.

To glimpse the bigger picture, consider William Marbury’s very distant relationship to the Republican assault on the old regime portrayed in Act II. He wasn’t one of the new circuit judges who were the Republicans’ main targets. He was merely seeking his commission for the inconsequential post of justice of the peace in the District of Columbia. Marbury got caught up in the larger controversy only because Adams awarded him his petty post at the last minute, and Jefferson took the broad view that Adams was wrong to give out any jobs, however small, once he had lost his bid for reelection. As a consequence, the new president ordered his secretary of state, James Madison, to refuse to hand Marbury his commission as JP. If he hoped to gain his commission, he would have to go to the courts for relief.

Before considering Marbury’s effort further, we should first consider the fate of the cadre of Federalist judges purged by the Republican Congress. In contrast to the hapless Marbury, Adams made sure that these distinguished gentlemen got their commissions before his presidential term came to an end. Indeed, the new judges were already holding court throughout the United States at the time the Republican Congress kicked them out of office. Their struggle to keep their jobs involved the constitutional independence of all future judges of the United States. Nothing similar was at stake in Marbury’s lawsuit.

The justices of the Supreme Court were well aware of this point. They seriously contemplated a judicial strike to protest the purge of their colleagues on the circuit courts—playing with legal arguments they later found persuasive in Marbury. Nonetheless, they finally decided to accept
the legitimacy of the Jeffersonian purge in a little-known opinion, Stuart v. Laird, handed down a week after Marbury in 1803. Despite Marshall’s strong conviction that the Jeffersonians were acting unconstitutionally, and despite the ready availability of techniques that would have allowed the justices to resist, the Supreme Court refused to follow up on Marbury by defending the circuit judges against the Jeffersonian purge. Instead, the Court allowed the Jeffersonians to claim a mandate from the People to deliver a powerful blow to the ideal of judicial independence. On this crucial matter, it was the presidentialist revolution of 1800, not the Founding of 1787, that served as the basis for future constitutional development.

If we look at what the Marshall Court did, and not merely what it said, it is wrong to treat Marbury as the main event and Stuart as an historical curiosity. Marbury is better viewed as a footnote to Stuart. As a first approximation, an integrated reading of the Stuart and Marbury decisions goes something like this: Stuart stands for the proposition that the Supreme Court should give way to the central claims made by a victorious president and his party in the name of the People. Marbury, in turn, holds out the prospect that on matters of less central concern to the People of the present day, earlier achievements of popular sovereignty may appropriately inform constitutional development.

Act IV: The Struggle for Judicial Independence. The justices’ decision to throw the circuit judges overboard failed to pacify the Jeffersonians, who embarked upon an escalating assault against the Federalists on the Supreme Court. Their constitutional weapon of choice was impeachment. Jefferson selected Justice Samuel Chase as his first target, and by 1804 the House went along with a bill of impeachment. The danger to the Court was so grave that, at one point, Marshall considered surrendering Marbury’s assertion of the power of judicial review. But when the moment of truth came at the Senate impeachment trial, enough Republican senators joined the Federalist minority to acquit Chase.

The Marshall Court’s strategic retreat in Stuart was beginning to pay off. A couple of years is an eternity in politics. If the justices had gone to the mat in defense of the Federalist circuit judges in 1802 or 1803, the Republicans would have reacted immediately with an impeachment campaign to clear out the obstructionists from the Court. By ceding constitutional ground to the Republicans on their central issue, the justices bought themselves time, and time is a precious commodity for life-ten-

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ured judges in their ongoing struggle with a mobilized political movement. Justices live on, but political movements can disintegrate, and by the time of Chase’s Senate trial in 1805, the president’s leadership of Congress had begun to weaken.

Despite the failure of impeachment, Jefferson continued to plot further assaults on the Court. But his capacity for presidential leadership diminished over time, and a new institutional equilibrium was emerging: president and party would count for a great deal in the constitutional order that the Founders had never imagined; but judicial independence would survive and perhaps the justices might make good on Marbury’s claim to power at some remote moment in the future.

Act V: Judicial Synthesis. Marshall did not live to see the day when the Court would follow up on Marbury and again strike down a federal statute. He watched with alarm, though, as his fellow Federalists began to resign from the bench, giving Jefferson a much easier way to change the course of constitutional law. Although a frontal assault on judicial independence was institutionally difficult and politically costly, there was nothing to stop the president from naming sympathetic Republicans to vacancies. Time might have been on the side of the Marshall Court in the short run, but the longer run was shifting in the presidentialist direction.

Both Jefferson and his successor, James Madison, occasionally faltered in their determination to name committed Republicans to the Court. But as the years passed, their strategy of transformative appointments began to make a real difference. During its early years the Marshall Court almost always spoke with a single voice, and that voice was almost always Marshall’s. Over time, though, more Republican voices began to be heard. And by the end of the decade power began to shift.

By 1812 only three of the Court’s seven justices were holding commissions signed by Federalist presidents. And once Marshall lost his solid Federalist majority, the Court’s jurisprudence took a Jeffersonian turn. In United States v. Hudson and Goodwin, its great decision of 1812, Marshall was no longer writing for the Court. His accustomed place had been occupied by William Johnson, Jefferson’s first appointee, who ordered a sweeping cutback in the power of the federal courts. Our story ends with the Court weaving a complex web of doctrine that promised a synthesis of Federalist and Republican principles.

This moment is missed in standard accounts, which emphasize a later
period in the long life of the Marshall Court. In this book I do not chronicle the doctrinal twists and turns of the Marshall Court over its long history. We have more than enough of these court-centered accounts. In focusing on the Court’s first decade, I want to locate the changing role of the judiciary as a response to an even more fundamental constitutional transformation—the rise of a democratic party system which enabled the president to claim a mandate from the People for constitutional change. Within this setting, my five-act drama elaborates a distinctive model of constitutional change that relies on judges both to refine presidential claims of a mandate and to integrate these new mandates into the fabric of constitutional law.

I want to contrast this form of interaction between president and Court with the forms of constitutional change developed earlier in the Founding period. In elaborating their own ideas about constitutional change, the delegates to the Philadelphia Convention did not seriously consider the executive branch as an appropriate bearer of a ringing mandate from the People. Within their Whiggish understanding of history, the chief executive, aka THE KING, was the great enemy of the People. If the People mobilized to assert their rights, they did so through representative assemblies. The paradigm was the Glorious Revolution of 1688, with its Westminster Convention demanding that future kings swear allegiance to a newly fashioned Bill of Rights.³

The Philadelphia Convention of 1787 saw itself as a proud successor of this Whig tradition, and when it looked to the future, it naturally supposed that assemblies would once again take the lead in speaking for the People. When drafting Article V dealing with constitutional amendments, the Philadelphiaan visionaries envisioned a process involving a dialogue between assemblies on the national and state levels—either a new constitutional convention or two-thirds of Congress was authorized to propose amendments, and three-fourths of state conventions or legislatures could ratify them. There was no suggestion that presidents might play a constructive role in higher lawmaking.

This was a perfectly sensible decision in 1787—nothing in the English-speaking tradition suggested that presidents might serve as bearers of popular mandates for fundamental constitutional change. But the ink on the Constitution was hardly dry before history played one of its many tricks: starting with the election of 1800, presidents would often claim
mandates, and the legitimacy of these claims would be adjudicated through a dialogue in which both the Supreme Court and the Congress would play fundamental roles. The electoral college crisis of 1801 inaugurated a model of presidential leadership that would coexist and compete with the Philadelphia Convention’s model of assembly leadership for the next two centuries.

To mark this point, I propose a new way of defining the Founding’s contribution to the American constitutional experience. To prepare the ground for redefinition, I propose a naive question: When precisely did “the Founding” occur?

The received wisdom begins with the Philadelphia Convention of 1787 but does not end there. Everybody recognizes that the proposal and ratification of the Bill of Rights were essential parts of the original deal—and so the common understanding of “the Founding” proceeds into the 1790s. At that point things become a little hazy, but one final event stands out: Marbury v. Madison is presented as the triumphant conclusion of the story. With the great chief justice announcing the ascendancy of judicial review, all the really important pieces of the constitutional puzzle are in place: the Constitution, the Bill of Rights, and the Supreme Court dedicated to their enforcement. Constitutional history leaves Jefferson’s administration with a sense of resolution—a conviction that, though the unknowable future would place immense strains on our early inheritance, the Founders built better than they knew (or we deserve).

“The Founding,” in short, is conventionally understood as if it were a (rather primitive) moving picture rather than a single epic painting. In editing our early history, however, we have left some essential scenes scattered on the cutting room floor.

I have no problem with the first two acts in the Founding drama: the Constitution and the Bill of Rights are indeed tributes to the capacity of assemblies—conventions in the first case, legislatures in the second—to gain mandates for constitutional change in the name of We the People. Only our preoccupation with Marbury v. Madison in the third act is misguided. The last phase of the Founding should begin in 1800, with Jefferson’s electoral victory marking a mandate for fundamental change. Though Marbury remains important, it is only one part of a complex dialogue between the Court and the political branches. Rather than celebrating a single decision, we should see Marbury as part of a decade-long ef-
fort by which the Supreme Court began to weave all three great acts of
popular sovereignty—the Constitution, the Bill of Rights, and the Repub-
lcan revolution of 1800—into a living doctrine of higher law.

My revision is less harmonious, emphasizing continuing institutional
crises and provides only a tenuous sense of resolution. But is it more re-
vealing?

For starters, it permits a deeper appreciation of some fundamental his-
torical truths. Considered in its largest outlines, the Founding was a great
debate between centralizers and decentralizers—with the centralizers win-
ning big in 1787, and their opponents regaining the initiative with the Bill
of Rights and the revolution of 1800. The conventional narrative reveals a
pro-Federalist bias because it focuses exclusively, in its triumphalist con-
clusion, on Marshall’s effort to put Jefferson in his place in Marbury v.
Madison. Although the Marshall Court did manage to sustain important
centralizing themes into the Jeffersonian era, it is wrong to ignore the de-
centralizing thrust of this last phase of Founding politics. Yet this is pre-
cisely the consequence of emphasizing Marbury at the expense of other
great events of the early 1800s.

Paradoxically, the conventional narrative also blinds us to the impor-
tance of nationalizing tendencies in our early history: most notably, to the
way the rise of national political parties generated a new understanding of
the president as the choice of the People. Once we eliminate the electoral
college crisis from our view of the Founding, we will have trouble recog-
nizing the powerful impact of plebiscitarian presidencies over the entire
course of American constitutional development. Of course, it would be
wrong to ignore this point when treating the particular cases of Jackson or
Lincoln or Roosevelt, but it is easy to treat these presidentialist initiatives
as special cases, not as examples of an ongoing dynamic emerging from the
Founding itself. And the same is true when it comes to legal discussions of
particular efforts by the Supreme Court to integrate presidentialist
mandates into the living doctrine of American constitutional law. In con-
trast, my revision of the Founding’s final act places these points at the very
center of our constitutional understanding.

There are large intellectual gains in making this turn, but it inevitably
raises bigger issues. For Americans at least, there is more at stake in revi-
sionist accounts of “the Founding.” So long as the republic lives, the
Founding is our fate. In our politics, in our law, in our deepest self-under-
standings as a nation, we are forever returning to consult its meaning. There is a Sisyphean character to the enterprise—but that will never deter the effort, nor should it. Americans are right to suppose that decisions made long ago by Enlightenment revolutionaries continue to shape the range of our present opportunities—if only through a complex process of historical mediation over two centuries. By cutting out crucial scenes from the Founding, the conventional narrative damages America’s capacity to understand itself.

And we need all the self-understanding we can get. History can’t serve as a cookbook, providing us with definitive recipes for solving twenty-first-century problems of statecraft. The early republic was a very different place from the hegemonic nation we call America. Nevertheless, our first constitutional encounter with the plebiscitarian presidency remains a relevant source of reflection on contemporary dilemmas. And apart from any particular insights, the story provides an antidote to a characteristic disease of intellectual life in an imperial republic: an all-too-pervasive tendency to treat the Founders as demigods, almost divinely inspired to discharge their task of steering the infant Republic on the path to future greatness.

This is not how the Founders appear here. There was no miracle at the Philadelphia Convention. In designing the presidency, the Framers made blunder after blunder—some excusable, others not. These mistakes set the stage for many awkward moments.

Item: The Framers designated the president of the Senate to preside over the counting of the presidential ballots, but the Senate president in 1801 turned out to be Thomas Jefferson himself—who used his power to eliminate his Federalist rivals from contention in the House runoff.

Item: The Framers mistakenly allowed the retiring president and Congress to control affairs for an extended lame-duck period after they lost an election. This gave the Federalists a chance to use their last days in power to push for a statute that would have authorized their new chief justice to displace Jefferson as president of the United States.

Item: As lame-duck secretary of state, Marshall blundered and forgot to give some of the president’s appointees their commissions for office. When the disappointed office-seekers went to the Supreme Court for relief, Marshall, in his new position, did not do the right thing and disqualify himself from the decision. Instead, he used the case as an opportunity to
berate the incoming administration for failing to correct his blunder. The case is Marbury v. Madison.

With the vice president counting his rivals out, and his rivals pushing the chief justice toward the presidential chair, with Marshall responding to Jefferson’s election by abusing his position as chief justice to rebuke the new administration—there is more than a whiff of the banana republic in our story. The protagonists do not take on the appearance of neo-classical demigods. They are human, all too human. And yet, for all their misadventures, they managed to pull their nation back from the brink and pass on to their successors a fragile sense of constitutional order that transcended their bitter partisan disagreements.

May the same be said of us.