

# The Origins of Judicial Review

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This year marks the 200th anniversary of *Marbury v Madison*.<sup>1</sup> In that case, as it is often taught in law schools, the Supreme Court created its authority to declare federal statutes unconstitutional. Although seldom used in the Court's early years,<sup>2</sup> the power of judicial review over federal statutes has been used more frequently by the Rehnquist Court. In a series of cases, the Court has declared unconstitutional federal statutes that have gone beyond the limits of the Commerce Clause,<sup>3</sup> or Section 5 of the Fourteenth Amendment,<sup>4</sup> or that have invaded the sovereignty of the states as guaranteed by the Tenth<sup>5</sup> and Eleventh Amendments.<sup>6</sup> These cases have been much discussed, and mostly criticized, by legal academics.<sup>7</sup>

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<sup>1</sup> 5 US (1 Cranch) 137 (1803).

<sup>2</sup> After *Marbury*, the Supreme Court did not invalidate another federal law until *Dred Scott v Sandford*, 60 US (19 How) 393 (1857), in which it found the Missouri Compromise's effort to restrict the spread of slavery into the territories to be unconstitutional. See *id.* at 452.

<sup>3</sup> See *United States v Morrison*, 529 US 598, 619 (2000); *United States v Lopez*, 514 US 549, 552 (1995).

<sup>4</sup> See *Board of Trustees of University of Alabama v Garrett*, 531 US 356, 374 (2001); *Kimel v Florida Board of Regents*, 528 US 62, 67 (2000); *Florida Prepaid Postsecondary Education Expense Board v College Savings Bank*, 527 US 627, 630 (1999); *City of Boerne v Flores*, 521 US 507, 536 (1997).

<sup>5</sup> See *Printz v United States*, 521 US 898, 935 (1997); *New York v United States*, 505 US 144, 177 (1992).

<sup>6</sup> See *Kimel*, 528 US at 91; *Alden v Maine*, 527 US 706, 712 (1999); *College Savings Bank*, 527 US at 630; *Idaho v Coeur d'Alene Tribe of Idaho*, 521 US 261, 287–88 (1997); *Seminole Tribe of Florida v Florida*, 517 US 44, 76 (1996).

<sup>7</sup> See, for example, Philip P. Frickey and Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 Yale L J 1707 (2002) (criticizing as institutionally wrongheaded the Court's imposition of decisionmaking process requirements on Congress in federalism cases); Ruth Colker and James J. Brudney, *Dissing Congress*, 100 Mich L Rev 80 (2001) (criticizing the Rehnquist Court's federalism decisions as reflecting a growing disrespect for Congress); Robert C. Post and Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 Yale L J 441 (2000) (criticizing the Court's decisions on Section 5 of the Fourteenth Amendment); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 Notre Dame L Rev 953 (2000) (criticizing the expansion of state sovereign immunity); Frank B. Cross, *Realism about Federal-*

It should come as no surprise that when the Supreme Court has refused to enforce unconstitutional federal legislation, supporters of such legislation have questioned the legitimacy of judicial review. Such arguments typically have arisen during crucial moments in American political and constitutional history, such as the early national period,<sup>8</sup> the Civil War,<sup>9</sup> the New Deal,<sup>10</sup> and the Civil Rights movement.<sup>11</sup> It is fair to say that the recent federalism decisions have not yet wrought a revolution in the federal-state relationship,<sup>12</sup> and there has been nothing approaching the popular outcry and political attacks on the courts that characterized the true controversies over judicial review that occurred during the Civil War or the New Deal.

Nonetheless, academics from both ends of the political spectrum have criticized the Rehnquist Court's exercise of judicial review.<sup>13</sup> From the

*ism*, 74 NYU L Rev 1304 (1999) (arguing that a more expansive federalism is not actually protective of states' rights); Edward L. Rubin and Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L Rev 903 (1994) (criticizing the instrumentalist and normative arguments for federalism).

To be sure, some have defended the Court's jurisprudence. See, for example, Saikrishna B. Prakash and John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 Tex L Rev 1459 (2001) (arguing that judicial review is a valid safeguard for federalism); Lynn A. Baker and Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 Duke L J 75 (2001) (arguing that the Court should enforce the federalism provisions of the Constitution); Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 Mich L Rev 752 (1995) (defending the Court's enforcement of federalism guarantees).

<sup>8</sup> For example, see generally Letter from Thomas Jefferson to Abigail Adams (Sept 11, 1804), in Paul Leicester Ford, ed., 10 *The Works of Thomas Jefferson* 86 n 1, 89 n 1 (G.P. Putnam's Sons 1905) (asserting that, in the context of the Sedition Act, the judiciary and executive are "equally independent" in reviewing the constitutionality of laws); Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (Oxford 1971) (describing Jeffersonian attacks on the federal courts).

<sup>9</sup> See Abraham Lincoln, First Inaugural Address (Mar 4, 1861), in James D. Richardson, 6 *A Compilation of the Messages and Papers of the Presidents* 5, 9 (Bureau of Natl Literature and Art 1908) (questioning the scope of Supreme Court decisions); Don E. Fehrenbacher, *Slavery, Law and Politics: The Dred Scott Case in Historical Perspective* 240–43 (Oxford 1981) (discussing Republican and academic reaction to the Dred Scott decision).

<sup>10</sup> See G. Edward White, *The Constitution and the New Deal* 3–4 (Harvard 2000) (noting that the nature of judicial review changed with differing interpretations of the Constitution); Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* 12 (Oxford 1998) (discussing proposals to restrain judicial review in the wake of Court decisions striking down New Deal initiatives); Bruce Ackerman, 2 *We the People: Transformations* 312–44 (Harvard 1998) (discussing President Roosevelt's, and his opposition's, efforts to restrain judicial review).

<sup>11</sup> See, for example, Philip B. Kurland, *Politics, the Constitution, and the Warren Court* 113–17 (Chicago 1970) (discussing the Court's reaction to Arkansas's resistance against the implementation of *Brown v Board of Education*); Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 259–64 (Bobbs-Merrill 1962) (discussing historical resistance to Court decisions from President Jackson to the school desegregation cases).

<sup>12</sup> See, for example, Jesse H. Choper and John C. Yoo, *The Scope of the Commerce Clause after Morrison*, 25 Okla City U L Rev 843, 854–67 (2000) (describing alternative methods for enforcement of federal policies despite recent federalism decisions); Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 Harv L Rev 102, 122–32 (1996) (arguing that the rebirth of the sovereign immunity doctrine does not preclude accountability of states in federal court); Charles Fried, *Foreword: Revolutions?*, 109 Harv L Rev 13, 73 (1995) (doubting whether the Rehnquist Court's federalism jurisprudence can be construed as "revolutionary").

<sup>13</sup> Although we discuss the basis for federal and state court judicial review of state statutes, our main interest is in defending the textual, structural, and historical basis for federal and state court judi-

right, Judge Robert Bork attacks the Court's role in deciding issues such as abortion, and has called for a constitutional amendment that would allow Congress to override judicial decisions.<sup>14</sup> From the left, Professor Mark Tushnet criticizes the Court's views on affirmative action and federalism, and has proposed the elimination of judicial review.<sup>15</sup> Perhaps the most prominent recent critic, thanks to articles in the *Harvard* and *Columbia Law Reviews*, is Professor Larry Kramer.<sup>16</sup> Following in the well-known footsteps of Professors Herbert Wechsler<sup>17</sup> and Jesse Choper,<sup>18</sup> Professor Kramer argues that the Supreme Court's effort to police the boundaries of national power is both unwise and unwarranted. But whereas Wechsler's and Choper's arguments were purely functional in nature—that the Supreme Court was better equipped and more needed for the job of protecting individual liberties—Professor Kramer boldly claims that the Constitution itself never authorized *any* judicial review of federal statutes. In a lengthy historical review, Professor Kramer insists that the Founders<sup>19</sup> did not expect that the federal and state courts would be able to invalidate unconstitutional federal legislation. In 1787, Kramer claims, judicial review was too novel and controversial for it to be made part of our constitutional order without explicit and clear authorization. Because of the doctrine's novelty and controversiality, the Founders felt the need to explicitly sanction judicial review of state law in the Supremacy Clause. The Constitution's lack of a similarly clear and specific authorization for judicial review of federal legislation signals that such judicial review was never authorized.<sup>20</sup> The un-

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cial review of federal statutes. Whenever our usage of the phrase "judicial review" is less than precise, the reader should understand that we are referring to judicial review of federal statutes.

<sup>14</sup> See Robert H. Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline* 117, 321 (Regan Books 1996).

<sup>15</sup> See Mark Tushnet, *Taking the Constitution Away from the Courts* 99–102, 154 (Princeton 1999).

<sup>16</sup> See Larry D. Kramer, *Foreword: We the Court*, 115 *Harv L Rev* 4 (2001); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 *Colum L Rev* 215 (2000). Professor Kramer has proved something of a moving target. In his earlier work, Professor Kramer claimed that judicial review of federalism questions was unwarranted due to the operation of political parties, which he claimed provided sufficient protection for federalism. We criticized this argument as being at odds with the constitutional text, structure, and original understanding. See Prakash and Yoo, 79 *Tex L Rev* 1459 (cited in note 7). In his second article, Professor Kramer barely mentions political parties at all, shifting his arguments to the idea that the original understanding wholly precludes judicial review.

<sup>17</sup> See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum L Rev* 543 (1954).

<sup>18</sup> See generally Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Chicago 1980); Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 *Yale L J* 1552 (1977).

<sup>19</sup> By "Founders" we mean both those who drafted the Constitution (the "Framers") and those who ratified it as supreme law (the "Ratifiers").

<sup>20</sup> In fact, claims Professor Kramer, the Founders meant the Constitution to be a "political-legal" document. According to this view, the Constitution was not understood to be "ordinary law" to be interpreted and applied by the courts. Instead, the Constitution incorporated "popular constitutionalism": The people were to act as the sole check on congressional overreaching using popular mechanisms such as

authorized nature of judicial review not only undermines the Court's current federalism jurisprudence, it also renders *Marbury v Madison* without constitutional foundation.

The assault on judicial review is flawed on three levels. First, the recent attack on judicial review ignores the starting point for all constitutional interpretation: the constitutional text. Like Wechsler and Choper, the most recent round of academic criticism ignores the manner in which the constitutional text authorizes judicial review and fails to establish that the text prohibits it. Using Professor Alexander Bickel's quarter-century-old critique of the textual foundations of judicial review as a foil,<sup>21</sup> Part I of this Article lays out the various textual foundations of judicial review of federal and state legislation. Throughout Part I, we highlight the severe textual difficulties with the claim that the Constitution is not law for courts to interpret and apply.

Second, recent arguments also disregard the Constitution's structure. Much of the recent attack on judicial review is really an effort to undermine judicial supremacy. The two issues, however, are quite distinct. A careful examination shows that the constitutional text and structure allow—indeed require—the federal and state courts to refuse to enforce laws that violate the Constitution. Nowhere do the constitutional text and structure, however, generally compel the other branches of government to accept the judiciary's readings of the Constitution in the execution of their own functions. Rather, each branch must interpret the Constitution for itself in the course of performing its own constitutional duties. Thus, the federal courts must determine the constitutionality of the federal statutes that they interpret and apply in cases and controversies properly brought before them. Similarly, the President must gauge the constitutionality of federal statutes prior to taking care that they are “faithfully executed,” and both Congress and the President must determine the constitutionality of the bills that they consider before making them law. This approach to constitutional interpretation has been widely understood throughout our history, and continues to be well understood by at least some legal academics and historians today.<sup>22</sup> Part II

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voting, pamphleteering, and petitioning. If those measures failed to curb the legislature, the people might take more radical steps such as taking to the streets and engaging in mob violence. See Kramer, 115 Harv L Rev at 26–29 (cited in note 16).

<sup>21</sup> See Bickel, *Least Dangerous Branch* at 2–14 (cited in note 11).

<sup>22</sup> See, for example, Laurence H. Tribe, 1 *American Constitutional Law* 264–67 (Foundation 3d ed 2000); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Georgetown L J 217 (1994); Robert Lowry Clinton, *Marbury v. Madison and Judicial Review* (Kansas 1989); Edwin Meese III, *The Law of the Constitution*, 61 Tulane L Rev 979 (1987); Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* (Basic 1986); Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum L Rev 1, 7–9 (1983). Although some have recently argued that judicial supremacy presents the most functional model for constitutional interpretation, see Larry Alexander and Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv L Rev 1359, 1362 (1997) (“[W]e defend [*Cooper v Aaron*] and its assertion of judicial primacy without qualification.”), it appears that the weight of academic commentary in

of this Article develops these ideas by making two structural arguments. To begin with, the written nature of our Constitution helps establish judicial review. A written constitution creates a structure in which the individual branches of government may not change its provisions unless acting through the specific procedures, established in the document itself, for amendment. Judicial review also arises from an understanding of the separation of powers as creating three branches of government that bear independent obligations to interpret and enforce the Constitution within their respective spheres.

Third, there is a wealth of evidence that the Founders believed that the courts could exercise some form of judicial review over federal statutes. Dozens of delegates to the federal and state conventions understood that the proposed Constitution would authorize judicial review of federal legislation. Moreover, in pamphlets and in the popular press, commentators on the Constitution likewise wrote that such review would exist. Finally, in the early years of the new republic, both Congress and the courts understood that the latter could judge the constitutionality of the former's laws. In the face of this widespread consensus—which included both Federalists and Anti-Federalists—it is telling that no one from the founding era apparently ever denied that the Constitution authorized judicial review. Given the rather lopsided nature of the historical record, we believe that modern scholars who insist that the Founders never authorized judicial review of federal statutes are mistaken. In Part III of this Article, using primary<sup>23</sup> and secondary sources,<sup>24</sup> we present a comprehensive historical analysis of the original understanding of judicial review.

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the last few years has embraced the idea of coordinate branch review. See, for example, John C. Yoo, *Choosing Justices: A Political Appointments Process and the Wages of Judicial Supremacy*, 98 Mich L Rev 1436, 1454–67 (2000) (advocating coordinate branch review in order to ameliorate the politicized appointments process); Neal Devins and Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 Va L Rev 83 (1998) (arguing that coordinate review promotes stability); Gary Lawson and Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L Rev 1267, 1279–1329 (1996) (identifying textual sources of the presidential power of interpretation); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 Georgetown L J 347 (1994) (articulating a middle-ground theory between judicial supremacy and coordinate review called “comparative institutional competence”); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 Georgetown L J 373, 373–74 (1994) (endorsing coordinate branch review); David E. Engdahl, *John Marshall's “Jeffersonian” Concept of Judicial Review*, 42 Duke L J 279 (1992) (arguing that Justice Marshall endorsed a Jeffersonian or “concurrent review” theory of constitutional interpretation in *Marbury*).

<sup>23</sup> We chiefly rely upon the following primary sources from the founding era: Max Farrand, ed, *The Records of the Federal Convention of 1787* (Yale rev ed 1966); Jonathan Elliot, ed, 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (2d ed 1836); Merrill Jensen, et al, eds, *The Documentary History of the Ratification of the Constitution* (State Historical Society of Wisconsin 1976).

<sup>24</sup> A necessarily incomplete list of the books that have considered the original understanding of judicial review includes: William E. Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review* (Kansas 2000); Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (Yale 1990); Robert Lowry Clinton, *Marbury v. Madison and Judicial Review* (cited in note 22); J.M. Sosin, *The Ar-*

At the outset, it is important to underscore our limited thesis. We believe that the Constitution, as originally understood, authorized the federal and state judiciaries to ignore unconstitutional federal legislation. We do not address various theories about the best application of judicial review, whether they be efforts to interpret the Constitution in light of contemporary values,<sup>25</sup> to protect minorities,<sup>26</sup> to reinforce democratic representation and preserve space for democratic decisionmaking,<sup>27</sup> to interpret the Constitution along “common law” lines in order to promote the rule of law,<sup>28</sup> or to adhere solely to the Constitution’s original understanding.<sup>29</sup> Nor do we address how much deference the courts should show Congress regarding the constitutionality of federal statutes, or the proper scope of the political question doctrine.<sup>30</sup> Finally, we do not discuss how the other branches must

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*istocracy of the Long Robe: The Origins of Judicial Review in America* (Greenwood 1989); Leonard W. Levy, *Original Intent and the Framers’ Constitution* (Macmillan 1988); Raoul Berger, *Congress v. The Supreme Court* (Harvard 1969); Edward S. Corwin, *The Doctrine of Judicial Review: Its Legal and Historical Basis and Other Essays* (Peter Smith 1963); Charles A. Beard, *The Supreme Court and the Constitution* (Prentice-Hall 1962); William Winslow Crosskey, *Politics and the Constitution in the History of the United States* (Chicago 1953); Edward S. Corwin, *Court over Constitution: A Study of Judicial Review as an Instrument of Popular Government* (Peter Smith 1957); Charles Grove Haines, *The American Doctrine of Judicial Supremacy* (California 1932); Charles Warren, *Congress, the Constitution, and the Supreme Court* (Little, Brown 1925); William M. Meigs, *The Relation of the Judiciary to the Constitution* (Da Capo 1971) (reprint of Neale 1919); Brinton Coxe, *An Essay on Judicial Power and Unconstitutional Legislation* (Kay and Brother 1893). A list of articles includes: Kramer, 115 Harv L Rev 4 (cited in note 16); Kramer, 100 Colum L Rev 215 (cited in note 16); Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 Wash & Lee L Rev 787 (1999); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 Stan L Rev 1031 (1997); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S Cal L Rev 1311 (1997); Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 S Ct Rev 329; Henry M. Hart, Jr., Book Review, *Professor Crosskey and Judicial Review*, 67 Harv L Rev 1456 (1954); Frank E. Melvin, *The Judicial Bulwark of the Constitution*, 8 Am Polit Sci Rev 167 (1914); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv L Rev 129 (1893).

<sup>25</sup> See, for example, Ronald Dworkin, *Freedom’s Law* 2, 37 (Harvard 1996) (articulating the idea that judges should base judgments in part on public morality); Robert C. Post, *Constitutional Domains: Democracy, Community, Management* 36 (Harvard 1995) (asserting that constitutional interpretation must be based on a common commitment to national values); Laurence H. Tribe and Michael C. Dorf, *On Reading the Constitution* 8–13 (Harvard 1991) (arguing that each generation has a role in interpreting the Constitution).

<sup>26</sup> See, for example, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 87–88 (Harvard 1980) (articulating a representation-reinforcing theory of judicial review); Choper, *Judicial Review and the National Political Process* at 64–65 (cited in note 18) (stating that judicial review should protect minorities).

<sup>27</sup> See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* xiv (Harvard 1999) (arguing that minimal judicial decisions promote democratic deliberation).

<sup>28</sup> See, for example, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U Chi L Rev 877, 879 (1996); Harry H. Wellington, *Interpreting the Constitution: The Supreme Court and the Process of Adjudication* 78, 81–82 (Yale 1990).

<sup>29</sup> See, for example, Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 3 (Kansas 1999); Antonin Scalia, *A Matter of Interpretation* 38–41 (Princeton 1997); Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 143 (Free Press 1990).

<sup>30</sup> See, for example, John C. Yoo, *The Continuation of Politics by Other Means: The Original*

respond to a judicial judgment that a federal statute is unconstitutional. These theories are about the implementation and consequences of judicial review. Our goal here is to show that the necessary predicate for these theories—the Constitution’s authorization of judicial review—is on solid textual, structural, and historical grounds. In short, the original intent behind the Constitution (what the founders intended the Constitution to provide) and the Constitution’s original public meaning (what the Constitution would have meant to a single, informed, objective reader in 1787–1788) show that the Constitution authorized judicial review.

Many academics disparage the current Court’s efforts to restrict the scope of federal legislative power. Debating the legitimacy of any individual decision or doctrine, in terms of whether it correctly interprets the Constitution, is perfectly appropriate. Nonetheless, we do not believe that these decisions properly call into question the scope and legitimacy of judicial review. Judicial review may be a bad idea; it may be maddening at times; it may be countermajoritarian. But it is not some extraconstitutional or unconstitutional institution imposed upon the nation by *Marbury v Madison*, Chief Justice Marshall, or today’s imperial judiciary. Rather, judicial review finds its origins in the Constitution’s text and structure, as understood by those who drafted and ratified it.

## I. JUDICIAL REVIEW AND THE CONSTITUTIONAL TEXT

For two centuries, scholars and statesmen have debated the constitutionality of judicial review of federal statutes. Some scholars have argued that judicial review has weak textual foundations. While one could read the Constitution as permitting judicial review of federal statutes, these skeptics maintain that no constitutional provision specifically and unequivocally authorizes judicial review of federal statutes.

Nonetheless, we think that the Constitution’s text does authorize judicial review of federal statutes. In this Part, we explain why. We begin with a brief history of the episodic arguments against judicial review. We next discuss how Article III, Section 2 authorizes federal courts to review the constitutionality of federal and state law. We then show how the Supremacy Clause also authorizes judicial review of federal and state statutes.

### A. The Recurring Arguments against Judicial Review

The most recent attacks on judicial review are part of periodic and persistent criticisms of *Marbury* that usually have coincided with periods of

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*Understanding of War Powers*, 84 Cal L Rev 167, 287–90 (1996) (arguing that the dispute between President and Congress over authority to initiate hostilities is not justiciable due to the allocation of the declare war power to Congress); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum L Rev 237, 330–35 (2002) (calling for a reinvigorated political question doctrine).

acute constitutional and political conflict. The first significant scholarly criticism of the institution of judicial review occurred as a result of the Supreme Court's invalidation of laws promoted by the Populist and Progressive movements.<sup>31</sup> Critics of the Court articulated what has become familiar to us today as the "countermajoritarian problem"—judicial review frustrated the will of the majority and hence was anti-democratic.<sup>32</sup> During this period, for example, the first scholarly articles attacking judicial review appeared, with one of them declaring in 1883 that "the judiciary can no more annul an act of Congress on the ground of its unconstitutionality than Congress can set aside a decree of the courts without jurisdiction."<sup>33</sup> Others argued that judicial review posed a problem for democracy by allowing unelected judges to substitute the rules of an old Constitution over the preferences of the current majority. Perhaps the most well-known critiques from this era are those of James Bradley Thayer, who argued that the Court should not invalidate a federal statute except in cases of a clear constitutional violation,<sup>34</sup> and Edward Corwin, who initially argued that the Framers never expressly conferred upon federal judges the power to nullify acts of Congress and that originalist evidence revealed a "diversity of opinion" on this issue.<sup>35</sup> Once on the bench, Justices Oliver Wendell Holmes, Jr., Louis

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<sup>31</sup> Although defining exactly the Populist and Progressive movements is difficult, historians have provided several excellent studies. See generally William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937* (Princeton 1994); Lawrence Goodwyn, *Democratic Promise: The Populist Moment in America* (Oxford 1976) (describing Populism); Robert H. Wiebe, *The Search for Order, 1877–1920* (Hill and Wang 1967) (discussing Progressivism).

<sup>32</sup> Barry Friedman has conducted a useful intellectual history of the countermajoritarian problem. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 NYU L Rev 1383 (2001) (questioning both revisionist and traditional accounts of *Lochner*); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U Pa L Rev 971 (2000) (examining public reaction to Court rulings during the New Deal era); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 NYU L Rev 333 (1998) (covering the history of judicial review during the early- to mid-nineteenth century).

<sup>33</sup> Robert G. Street, *How Far Questions of Policy May Enter into Judicial Decisions*, 6 Reports of the American Bar Association 179, 185–86 (1883), quoted in Clinton, *Marbury v. Madison and Judicial Review* at 167 (cited in note 22).

<sup>34</sup> Thayer, 7 Harv L Rev at 144 (cited in note 24).

<sup>35</sup> Edward S. Corwin, *The Supreme Court and Unconstitutional Acts of Congress*, 4 Mich L Rev 616, 620, 624 (1906). It seems that Corwin's views on the matter often changed. Four years later Corwin declared that the "the idea of judicial review, within narrow limits, and particularly as a weapon of self defense on the part of the courts against legislative encroachment, had made considerable headway among the membership of the Constitutional Convention." Edward S. Corwin, *The Establishment of Judicial Review*, 9 Mich L Rev 102, 118 (1910). But a page later he also noted that there were "strong expressions of disapprobation of the idea of judicial review." *Id.* at 119.

Four years later still, Corwin had the following to say: "That the members of the Convention of 1787 thought the Constitution secured to courts in the United States the right to pass on the validity of acts of Congress under it *cannot be reasonably doubted*." Corwin, *The Doctrine of Judicial Review* at 10 (cited in note 24) (emphasis added). Finally, in 1938, Corwin modified his 1914 position by arguing that the "arising under" branch of jurisdiction only extended to cases involving prohibitions on Congress (such as the Bill of Rights) and not the implicit limitations arising out of the Constitution's limited enumeration of national powers. Corwin, *Court over Constitution* at 81 (cited in note 24). In making this

D. Brandeis, and others translated these ideas into the practice we know today as judicial restraint.

Criticisms of judicial review only intensified during the New Deal period. According to the traditional account, the Hughes Court imposed a cramped view of the Commerce Clause and an expansive notion of economic liberties to invalidate significant portions of New Deal legislation.<sup>36</sup> President Franklin Roosevelt responded by attempting to pack the Court with new Justices, but the “switch in time that saved Nine”—the Court’s decisions in 1937 approving New Deal legislation—forestalled the effort to fiddle with the Court’s size. Although there has been a rebirth in scholarly interest about the New Deal and its legitimacy, and about whether there was really a switch at all,<sup>37</sup> there remains little doubt that the controversy prompted academics and intellectuals to question the roots of judicial review. Such questions became intertwined with other arguments, such as the advancing age of the Justices and their lack of connection with modern economic conditions. Some resurrected the charges from the Populist and Progressive Eras that in *Marbury* Chief Justice Marshall had created judicial review where the Constitution did not,<sup>38</sup> and much thought went into proposals to limit the Court’s exercise of that power. Indeed, it was in this period that Attorney General and future-Justice Robert H. Jackson penned his book, *The Struggle for Judicial Supremacy*, which argued that the Court should focus judicial review on the protection of individual and minority rights.<sup>39</sup>

Jackson’s work presaged an important shift in the third round of academic criticism of judicial review. After the New Deal settlement, in which the Court effectively ceased patrolling the boundaries of national power vis-à-vis the states in favor of greater attention for individual rights, scholarly

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claim, Corwin abandoned his earlier insistence that the “arising under the Constitution” jurisdiction could possibly cover cases challenging the constitutionality of federal laws. See Corwin, 4 Mich L Rev at 618–19.

<sup>36</sup> See, for example, William E. Leuchtenburg, *The Supreme Court Reborn* 214–16 (Oxford 1995).

<sup>37</sup> See, for example, White, *Constitution and the New Deal* at 201–04 (cited in note 10); Cushman, *Rethinking the New Deal Court* at 30–33 (cited in note 10); Ackerman, 2 *We the People: Transformations* at 381–82 (cited in note 10).

<sup>38</sup> See, for example, Isidor Feinstein, *The Court Disposes* 56–57 (Covici Friede 1937) (characterizing judicial review as “usurpation”); Dean Alfange, *The Supreme Court and the National Will* 31 (Doubleday 1937) (describing judicial review as “masterly ingrafted upon our constitutional system” by Justice Marshall); Louis B. Boudin, 1 *Government by Judiciary* 220–24 (William Godwin 1932) (critiquing Marshall’s opinion and motives in handing down *Marbury* and questioning the constitutional basis of judicial review). See generally Robert E. Cushman, *The Supreme Court and the Constitution*, in Alfred Haines Cope and Fred Krinsky, eds, *Franklin D. Roosevelt and the Supreme Court* 60 (D.C. Heath and Co 1952).

<sup>39</sup> Robert H. Jackson, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics* 319 (Knopf 1941) (“[The popularly elected regime] should, of course, be so restrained where its program violates clear and explicit terms of the Constitution, such as the specific prohibitions in the Bill of Rights.”).

questioning of the legitimacy of judicial review gave way to works concerning its function and application. Rather than rejecting judicial review, legal academics sought instead to tame it, to reconcile the countermajoritarian difficulty with democracy. One burst of scholarly attention, apparently sparked by *Brown v Board of Education*, witnessed classic works such as Learned Hand's *Bill of Rights*, Alexander M. Bickel's *The Least Dangerous Branch*, Herbert Wechsler's *Toward Neutral Principles of Constitutional Law*, and Charles Black, Jr.'s *The People and the Court*. A second burst consisted of Jesse Choper's *Judicial Review and the National Political Process* and John Hart Ely's *Democracy and Distrust*, both efforts to solve the countermajoritarian difficulty by developing theories that harmonized judicial review with democracy. Although critical of the textual and structural foundations of judicial review, these latter works justified judicial review on functional grounds, such as Choper's defense of individual rights or Ely's claim that under-represented groups excluded from the political process ought to receive judicial protection.

Recent decisions by the Supreme Court, however, have provoked a return to outright rejection of judicial review. Prominent thinkers, both conservative and liberal, have once again assailed judicial review as inconsistent with democracy and called for its abolition. Critical of decisions on social and cultural issues, such as abortion and gay rights, Judge Robert H. Bork argues that courts have seized a final decisionmaking power over broad issues at odds with the wishes of the American people.<sup>40</sup> He proposes allowing majorities of the House and Senate to overrule any Court decision. Disapproving of decisions on free speech and race, Professor Mark Tushnet criticizes the Court for enforcing an increasingly conservative vision of constitutional law.<sup>41</sup> He would prefer to abolish judicial review altogether, leaving the Constitution's enforcement up to the other branches of government and, ultimately, the people.<sup>42</sup>

Like the others, Professor Kramer has joined the charge against the judiciary because of disagreement with certain decisions. He strongly disagrees with the Rehnquist Court's federalism jurisprudence. What gives Kramer a different flavor from Bork and Tushnet is his resurrection of the charge, last seriously heard during the Populist and Progressive Eras, that the Founders did not intend the courts to enjoy the power of judicial review. Notwithstanding this conclusion, Professor Kramer embraces judicial protection of individual rights and judicial review of state action, while simultaneously rejecting judicial review of the limits of federal power.<sup>43</sup>

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<sup>40</sup> Bork, *Slouching Towards Gomorrah* at 321 (cited in note 14) (calling the judiciary "an organ of power without legitimacy either in democratic theory or in the Constitution").

<sup>41</sup> See Tushnet, *Taking the Constitution Away from the Courts* (cited in note 15).

<sup>42</sup> For criticism of Tushnet's arguments, see Saikrishna B. Prakash, *America's Aristocracy*, 109 *Yale L.J.* 541, 562–68 (1999) (criticizing Tushnet's idea of a "thin" Constitution).

<sup>43</sup> See Kramer, 115 *Harv L.Rev.* at 166 (cited in note 16).

None of these recent criticisms do much to address the textual arguments for and against judicial review. Indeed, neither Judge Bork nor Professor Tushnet really makes claims about what the Constitution provides; instead they address what features the Constitution ought to have (or not have). Moreover, despite the fact that Professor Kramer makes claims about the Constitution's original understanding, he does not make much of a textual argument to support his conclusion that the Constitution does not authorize judicial review of federal statutes. The only textual claim that Professor Kramer offers is that because judicial review was apparently such a novel and controversial idea, the Supremacy Clause was necessary as an explicit establishment of such review over state law. The lack of a similarly clear textual authorization for judicial review of federal statutes indicates that the latter form of judicial review was never intended or desired.

To locate comprehensive critiques of the textual basis for judicial review, one must hearken back to Bickel's and William Van Alstyne's work in the 1960s.<sup>44</sup> Both scholars challenged Chief Justice John Marshall's opinion in *Marbury v. Madison*,<sup>45</sup> or at least modern interpretations of the breadth of the decision, as advancing weak textual and structural claims. In concluding that the judiciary should ignore unconstitutional federal statutes, Marshall famously relied upon several factors: the Constitution's written nature and the limited scope of federal power; that the judicial power extends to cases "arising under the Constitution" and hence presumably includes cases challenging the constitutionality of federal statutes; the Oaths Clause, which requires all judges, federal and state, to take an oath to support the Constitution;<sup>46</sup> and that the Supremacy Clause makes the Constitution the "supreme Law of the Land" and further provides that only federal laws "made in Pursuance" of the Constitution become part of that "supreme Law."<sup>47</sup> Because Marshall's reading of the Constitution supposedly falls short of absolutely proving that the Constitution authorizes judicial review, Bickel and Van Alstyne suggested that *Marbury v. Madison* was something of a coup d'état that allowed the judiciary to seize a policymaking and political role for itself.

Both Bickel and Van Alstyne also made much of the supposed absence of a constitutional provision that specifically authorizes judicial review of federal legislation. In contrast to constitutional provisions that specifically

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<sup>44</sup> See, for example, William Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L J 1, 16–29; Bickel, *Least Dangerous Branch* at 2–14 (cited in note 11).

<sup>45</sup> 5 US (1 Cranch) 137.

<sup>46</sup> US Const Art VI, cl 3. The Oaths Clause states:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

<sup>47</sup> See *Marbury*, 5 US (1 Cranch) at 173–80.

grant Congress legislative authority over commerce or that confer on the President pardon authority, there apparently is no provision that specifically sanctions or requires judicial review of federal legislation. Apparently, a central feature of our modern constitutional law—judicial review—lacks a solid textual foundation.

In the Parts that follow, we counter the textual assault on judicial review by showing how the Constitution authorizes judicial review of federal statutes.

### B. Article III and the “Arising Under” Jurisdiction

Section 1 of Article III states that the “judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>48</sup> Section 2 declares, *inter alia*, that the “judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”<sup>49</sup> In *Marbury*, Chief Justice Marshall insisted that it was “too extravagant to be maintained” that those who extended the judicial power to cases arising under the Constitution would not have expected the courts to interpret and apply the Constitution in the course of deciding such cases.<sup>50</sup>

Professor Bickel long ago criticized Marshall’s reasoning as too quickly assuming that Article III’s “judicial power” included the power to review acts of the federal legislature.<sup>51</sup> Article III “does not purport to tell the Court how to decide cases; it only specifies which kinds of cases the Court shall have jurisdiction to deal with at all.”<sup>52</sup> Bickel also observed that the extension of the judicial power to cases “arising under the Constitution” might give federal courts nothing more than the power to hear challenges to alleged constitutional violations by the executive or by the states. Cases challenging executive detentions and cases questioning the validity of state statutes under Article I, Section 10 might have made up the entire class of cases thought to arise under the Constitution.<sup>53</sup>

Responding to Bickel’s speculation about the meaning of “judicial power” requires an explanation of what that phrase was thought to encompass at the founding. In our view, at the founding, judges generally were understood to have the authority to engage in judicial review because constitutions were ordinary law that judges could apply in cases before them. We make the historical case for this claim in Part III. If we are right, by cre-

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<sup>48</sup> US Const Art III, § 1.

<sup>49</sup> US Const Art III, § 2.

<sup>50</sup> 5 US (1 Cranch) at 179.

<sup>51</sup> See Bickel, *Least Dangerous Branch* at 5 (cited in note 11).

<sup>52</sup> *Id.*

<sup>53</sup> See *id.* at 6 (noting that the branch of jurisdiction extending judicial power to cases arising under the Constitution need not mean that courts may review the constitutionality of federal legislation).

ating judges and vesting them with the “judicial power” (in other words, those powers typically understood to be vested with judges), the Constitution taps into a shared understanding at the time of the framing that judicial review was an appropriate judicial authority.<sup>54</sup>

The second set of criticisms of Marshall’s argument—that the “arising under” language might only refer to constitutional cases involving challenges to state law—runs into its own set of difficulties. In particular, there is no textual basis for reading the “arising under” language as excluding cases involving the constitutionality of federal statutes. Most commentators, including Bickel and Choper, admit that cases in which state laws conflict with the Constitution fall within Article III, Section 2’s grant of jurisdiction over cases “arising under this Constitution.” Indeed, this grant is absolutely necessary for the federal judiciary’s exercise of jurisdiction over cases in which state laws conflict with the Constitution. Cases in which parties challenge the constitutionality of federal legislation qualify as cases “arising under the Constitution” in exactly the same manner. Such cases require the federal courts to determine whether a law is consistent with the Constitution. What critics of judicial review cannot explain is how Article III’s “arising under” jurisdiction excludes cases challenging the constitutionality of federal statutes while simultaneously compelling review of state law.

To take an example, suppose that both the federal government and several states enacted identical legislation prohibiting the burning of the American flag. According to critics of federal judicial review, both the federal and state courts must set aside the state law if it is in conflict with the Constitution.<sup>55</sup> Thus, these critics believe that the operation of the “judicial power” and “arising under” jurisdiction cedes to federal courts the authority to invalidate the state law. Yet, these critics believe that federal courts would not have the same authority with regard to an identical federal statute.<sup>56</sup> Article III, Section 2, however, makes no textual distinction between the latter case and the former. Both situations involve “cases arising under the Constitution” because both involve challenges to laws in conflict with the Constitution. Either the “arising under” jurisdiction enables federal courts to review the constitutionality of state *and* federal laws or federal courts have no such power over either set of laws. We are of the view that

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<sup>54</sup> We do not claim that only judiciaries with formal grants of the “judicial power” could engage in judicial review. As we discuss in Part III.A, state judiciaries were generally viewed as endowed with the authority to engage in judicial review of the constitutionality of state statutes, whether or not their constitutions formally vested them with “judicial power” or “judicial authority.” As noted, the power of judicial review was simply regarded as a power associated with judges. If a judge had jurisdiction over constitutional cases, the judge could decide whether statutes were constitutional.

<sup>55</sup> See *Texas v Johnson*, 491 US 397, 399 (1989) (invalidating a Texas law that prohibited desecration of the American flag).

<sup>56</sup> But see *United States v Eichman*, 496 US 310, 312 (1990) (finding unconstitutional the Flag Protection Act of 1989).

the “arising under” jurisdiction empowers federal courts to judge the constitutionality of state and federal statutes alike.

The more general problem is that scholars such as Professors Bickel and Kramer seem to insist upon specific, narrowly drawn authority before they will concede that the Constitution’s text authorizes judicial review of federal statutes. But such standards are wholly unrealistic and cannot be applied to the Constitution, else we must conclude that the federal judiciary has absolutely no power because no judicial powers are precisely specified. For instance, nothing in the Constitution specifically grants the federal judiciary the power to issue judgments, issue contempt citations, or to make rules to govern their own proceedings. Yet no one doubts that the federal courts have such authorities as part of their Article III “judicial power.” Likewise, just because the Constitution nowhere contains a provision that specifically and only authorizes judicial review over federal statutes does not mean that the federal courts lack such authority.<sup>57</sup>

Although no constitutional provision specifically and only authorizes judicial review of federal statutes, there is express, general authority for such review in the form of “arising under the Constitution” language. Rather than separately listing “cases challenging the constitutionality of state laws,” “cases challenging the constitutionality of federal statutes and treaties,” and “cases contesting the constitutionality of federal and state executive action,” the Constitution more pithily declares that the federal judiciary has jurisdiction over all types of these “cases arising under the Constitution.” Indeed, numerous members of the founding generation understood that this language expressly authorized the federal courts to measure the constitutionality of federal statutes against the Constitution. Addressing the “arising under” language, George Mason noted that “an *express* power is given to the Federal Court, to take cognizance of such controversies” and thus the Supreme Court could declare all federal *ex post facto* laws void.<sup>58</sup> Likewise, James Wilson observed that it was up to the federal judiciary to declare unconstitutional federal statutes “null and void” because it had jurisdiction of cases “arising under the Constitution.”<sup>59</sup> This common sense

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<sup>57</sup> If one wished, one could raise doubts about the scope of other powers granted by the Constitution. For instance, the Constitution nowhere specifies that Congress may take private property. Yet even before the enactment of the Fifth Amendment (which implicitly confirmed that the federal government may take private property for public use), few would have doubted Congress’s ability to take property for purposes of establishing post roads or erecting military forts. The fact that the Constitution does not specifically list all the different applications of the postal or army-raising powers does not mean that the Congress lacks the authority to take property for such and other ends.

<sup>58</sup> John P. Kaminski and Gaspare J. Saladino, eds, 10 *The Documentary History of the Ratification of the Constitution* 1361–62 (State Historical Society of Wisconsin 1993) (emphasis added).

<sup>59</sup> Merrill Jensen, ed, 2 *The Documentary History of the Ratification of the Constitution* 517 (State Historical Society of Wisconsin 1976). See also Brutus XI, in John P. Kaminski and Gaspare J. Saladino, eds, 15 *The Documentary History of the Ratification of the Constitution* 513 (State Historical Society of Wisconsin 1984) (noting that “arising under” language “must include such [cases], as bring into question [the Constitution’s] meaning, and will require an explanation of the nature and extent of

understanding of that jurisdictional language prevailed during the first Congress as well. In the Judiciary Act of 1789, Congress acknowledged the Supreme Court's appellate jurisdiction over decisions of the highest court of a state in which "the validity of a treaty or statute of the United States is drawn in question."<sup>60</sup> By admitting that the Court could affirm state court decisions that declared federal statutes and treaties to be unconstitutional, the first Congress understood that the Supreme Court's appellate jurisdiction over cases "arising under the Constitution" included the power to hold federal laws unconstitutional. Hence there is express authority confirming that the federal courts may engage in judicial review of federal statutes. It is just not so narrowly drawn that it operates to establish only that form of judicial review.

Apart from the grant of the judicial power and the grant of jurisdiction over cases "arising under the Constitution," Article III contains another provision that supports judicial review of federal statutes. Article III, Section 3 limits the manner in which treason may be defined: "Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort."<sup>61</sup> More important, it also establishes the procedures by which a court may convict a defendant of treason: "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."<sup>62</sup> The latter provision, by speaking of treason convictions, "is addressed especially to the courts,"<sup>63</sup> federal and state, because only courts can convict for violations of federal law. If the Constitution does not otherwise authorize or contemplate judicial review of federal statutes, this latter provision makes no sense because it lays out a rule obligatory on the courts in a system in which the courts must enforce any federal statute, even those contrary to the Constitution. We know of no critic of judicial review who has explained why this provision exists if the courts must nonetheless convict people of treason on the testimony of one witness, if Congress so provided. In our view, the Treason Clause is not the only constitutional provision that the courts must enforce against contrary federal legislation. Instead, we think it clear that the Treason Clause was adopted against the backdrop of a general understanding that the courts were empowered to enforce the Constitution by ignoring unconstitutional federal statutes. When the federal courts were granted jurisdiction of cases "arising under the Constitution," they were granted the authority to judge the constitutionality of

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the powers of the different departments under it. . . . [The courts] are authorised to determine all questions that may arise upon the meaning of the constitution in law").

<sup>60</sup> Judiciary Act of 1789 § 25, 1 Stat 73, 85.

<sup>61</sup> US Const Art III, § 3, cl 1.

<sup>62</sup> *Id.*

<sup>63</sup> *Marbury*, 5 US (1 Cranch) at 179.

both state law and federal statutes, including federal statutes that might violate the Treason Clause.

### C. The Supremacy Clause

In concluding that the Constitution authorized judicial review of federal statutes, *Marbury* also relied upon the Supremacy Clause for the proposition that the Constitution must trump unconstitutional federal statutes. The Clause provides that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>64</sup>

By limiting supreme law status to those federal statutes made in Pursuance of the Constitution, the Supremacy Clause establishes that the Constitution is superior to unconstitutional federal statutes. A second feature of the clause is that it vests a limited power of judicial review in state judges. When there is a conflict between the supreme law and state constitutions or laws, state judges are to enforce the supreme federal law.<sup>65</sup>

Reliance on the Supremacy Clause has troubled critics of judicial review. For example, the requirement that federal laws be “made in Pursuance” of the Constitution might only impose the procedural requirement that for a statute to really qualify as supreme law, it must undergo bicameralism and presentment.<sup>66</sup> Once a law meets those criteria, the argument goes, the Supremacy Clause might require that state courts enforce the law without questioning its constitutionality.<sup>67</sup> Moreover, even if unconstitutional federal laws are not to be accorded supremacy because they are not made “in Pursuance” of the Constitution, the Clause does not explicitly identify *who* decides whether a federal law is consistent with the Constitution. The Constitution’s supremacy does not necessarily establish judicial review any more than it authorizes executive review or popular review of the constitutionality of federal statutes.

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<sup>64</sup> US Const Art VI, cl 2.

<sup>65</sup> Some of our claims about the Supremacy Clause parallel those independently made by Brad Clark in a recent article. See Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 Geo Wash L Rev 91 (2003).

<sup>66</sup> See Van Alstyne, 1969 Duke L J at 20–22 (cited in note 44).

<sup>67</sup> See Bickel, *Least Dangerous Branch* at 9–10 (cited in note 11).

### 1. The Constitution as enforceable Law of the Land.

Despite these concerns, we believe that the text of the Supremacy Clause supports the idea that the courts must refuse to enforce federal legislation that is at odds with the Constitution. Three important points are worth making here. First, and most important, the Clause makes clear that the Constitution itself is law that may be interpreted and enforced by courts. Modern critics, such as Sylvia Snowiss, Robert Clinton, and now Larry Kramer, claim that at the time of the Framing, constitutions were considered superior law whose enforcement was left to the political process or direct popular action, rather than the courts.<sup>68</sup> “Constitutional or fundamental law subsisted as an independent modality, distinct from both politics and from the ordinary law interpreted and enforced by courts. It was a special category of law,” claims Professor Kramer.<sup>69</sup> He relies on John Philip Reid’s claim that constitutions of that era were neither ordinary law cognizable by the courts nor merely hortatory admonitions. Our Constitution (along with other constitutions of the eighteenth century) was instead a “political-legal” document—a law binding all, but unenforceable by the courts.<sup>70</sup>

Whatever might have been true for constitutions drafted in the middle of the eighteenth century, critics of judicial review misunderstand the text of the 1787 Constitution. In numerous ways, the Supremacy Clause indicates that the Constitution is law capable of enforcement by courts.<sup>71</sup> To begin with, Article VI lists the Constitution together with other forms of law, each of which clearly can be interpreted by courts in appropriate cases. If the “political-legal” view of the Constitution is correct, the Framers must have lumped these laws together as supreme law in Article VI, while at the same time implicitly intending to segregate the Constitution and deprive it of judicial enforcement. In our view, the text of the Supremacy Clause does not bear a reading that some parts of the supreme Law of the Land are cognizable in the courts while another part—the most important, the Constitution—is not.

Not surprisingly, even those who insist that the Constitution was a “political-legal” document not cognizable in the courts refuse to follow the

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<sup>68</sup> See, for example, Kramer, 115 Harv L Rev at 24 (cited in note 16).

<sup>69</sup> Id at 26.

<sup>70</sup> John Phillip Reid, 3 *Constitutional History of the American Revolution: The Authority to Legislate* 28–29 (Wisconsin 1991).

<sup>71</sup> We believe that, as a historical matter, Americans of the founding era came to understand constitutions as ordinary (though supreme) law cognizable by the courts prior to the Constitution’s drafting and ratification. There is no other way of explaining the dozens of statements from the founding era making clear that the courts, state and federal, would enforce the Constitution against legislatures that enacted statutes that transgressed the Constitution. However one might characterize constitutions in the late 1780s—as ordinary law, as fundamental law, as a political-legal document—does not matter to us as long as it is recognized that our Constitution was to be interpreted and applied by the courts. We recount this historical evidence in Part III.

logical implications of their claim. This is most clearly seen when one considers the obligation imposed by the Supremacy Clause on state judges to enforce federal law over state law. When confronted by a provision of a state constitution or statute that conflicts with the federal Constitution, all agree that a state judge is “bound” to enforce the Constitution and not the state law. In the process of fulfilling this duty, courts necessarily must interpret the federal Constitution and judge whether it is truly at odds with the challenged state law. Suppose, for example, California were to enact a tax on all imports of fruit, allegedly to pay for inspection costs, and brought an action against an importer for refusing to pay the tax. If the defendant refused to pay on the ground that the state had violated Article I, Section 10’s ban on state duties on imports, a state court would have to determine the scope of Article I, Section 10 in the course of applying it to the case. In this way, the Constitution contains law to be applied by courts in the course of deciding cases, and is not some abstract “political-legal” document incapable of judicial interpretation and enforcement.

Because states can act in tension with constitutional provisions outside Article I, Section 10, one cannot limit the judicial interpretation of the Constitution vis-à-vis the states to that Section alone. Courts also must decide whether states have usurped or interfered with other federal powers. For instance, a court cannot properly implement the dormant aspect of the Commerce Clause without first interpreting the scope of the power granted to Congress by the Constitution.<sup>72</sup> More generally, whenever a state statute is said to conflict with any provision of the Constitution, judges must decide the meaning of the constitutional provision prior to deciding whether the state law is in conflict. If courts are to fulfill their duty to treat the Constitution as the supreme Law of the Land vis-à-vis the constitutions and laws of the states, they cannot hermetically seal off the Constitution and deem it non-judicially-cognizable law. To vindicate the Constitution against the states, the courts must be able to interpret the entire Constitution.

By admitting that the Supremacy Clause requires federal and state courts to enforce federal law (including the Constitution) against conflicting state law, critics of judicial review wholly undermine their claim that the Constitution is a non-judicially-cognizable political-legal document.<sup>73</sup> One cannot adhere to that latter position while simultaneously conceding (indeed insisting) that courts must interpret the Constitution and enforce it against the states. Perhaps the judicial review skeptics somehow regard the

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<sup>72</sup> This assumes, of course, that the dormant aspect of the Commerce Clause was part of the original Constitution. See, for example, Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich L Rev 1091 (1986). Consider Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L J 425 (1982) (arguing that the Court should cease enforcement of the Dormant Commerce Clause).

<sup>73</sup> See, for example, Kramer, 115 Harv L Rev at 62–63 (cited in note 16) (observing that the Supremacy Clause requires judges to prefer federal law over state law).

Constitution as enjoying a schizophrenic personality—sometimes constitutional provisions are law cognizable by courts and other times the very same provisions are political-legal provisions beyond the purview of the courts. Such a theory seems improbable for it contemplates a bizarre and inconsistent Constitution without any sound textual basis for doing so.

We are of the view that, save for specific circumstances,<sup>74</sup> the entire Constitution is a judicially cognizable document to be interpreted and applied by courts in cases where they have jurisdiction. As such, the Constitution is hardly singular. The Founders clearly understood that state courts could interpret *state constitutions*. The last part of the Supremacy Clause, by making clear that state constitutions must give way to the supreme Law of the Land, indicates that the Founders contemplated state court interpretation of the state constitutions. Article VI's direction to state courts to enforce federal law in conflict with state constitutions would be meaningful only if the state courts already could interpret their state constitutions. If state courts could take no notice of the state constitutions—if these constitutions were understood to be purely non-justiciable political-legal documents—there would have been no need to instruct the state courts to ignore the state constitutions when presented with contrary federal law.<sup>75</sup> Because the Constitution indicates that state constitutions were not political-legal documents beyond the purview of the state courts, and because of the textual indications that the Constitution was law to be enforced by the courts, we think that the Constitution was judicially enforceable law. Consistent with this claim, nothing in the text comes close to negating the implications of the Supremacy Clause or more generally renders the Constitution a species of law incapable of judicial enforcement.

## 2. The status of federal statutes not “made in Pursuance” of the Constitution.

By referring to federal statutes “made in Pursuance” of the Constitution, the Supremacy Clause supports judicial review of federal statutes in a second way. By virtue of this limitation, only those federal statutes “made in Pursuance” of the Constitution are entitled to supremacy. Federal statutes not “made in Pursuance” of the Constitution are not part of the supreme Law of the Land and cannot trump contrary state law. For federal statutes to

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<sup>74</sup> For one important exception, see Yoo, 84 Cal L Rev at 287–90 (cited in note 30) (arguing that the dispute between the President and Congress over authority to initiate hostilities is not justiciable due to allocation of the declare war power to Congress). Others, however, have recently called for a broader reinvigoration of the political question doctrine as consistent with *Marbury v Madison*. See generally Barkow, 102 Colum L Rev 237 (cited in note 30).

<sup>75</sup> As we discuss later, state courts themselves were of the view that they could interpret and enforce the state constitutions. See Part III.A. Moreover, we think that the Founders were generally of the view that the state judges were correct in enforcing their state constitutions over contrary state statutes. See Part III.B.

be made in Pursuance of the Constitution they must not merely satisfy bicameralism and presentment, they must be authorized by a grant of legislative power and also not run afoul of restrictions on federal power (such as the Bill of Rights). In other words, federal statutes inconsistent with the Constitution (those otherwise unconstitutional) are not statutes “made in Pursuance” of it, and such federal statutes are not part of the supreme Law of the Land.<sup>76</sup>

Although some have claimed that the “made in Pursuance” language might mean no more than that only those federal laws that are enacted by bicameralism and presentment are supreme,<sup>77</sup> this claim fails on several levels. First, nothing in the text suggests that “made in Pursuance” is limited only to constitutional provisions that define process, rather than substance. Indeed “made in Pursuance” calls to mind the entire Constitution rather than just the requirements of Article I, Section 7. For instance, a law that went through bicameralism and presentment and that abrogated the right to jury trial hardly seems to have been “made in Pursuance” of the Constitution. Instead, such a statute would be “made in opposition” to the Constitution.

Second, it seems unlikely that “made in Pursuance” performs a separation-of-powers function that *limits* the ability of the other branches of government to review the actions of Congress. The Supremacy Clause, which comes toward the end of the original Constitution, is designed to define the relationship between federal law and state law. In the process, it makes clear that unconstitutional statutes are not part of the Law of the Land. The Clause does not perform the very different separation-of-powers function of restricting which branches of government have the authority to interpret the Constitution, which one would expect to be addressed, if at all, in Articles I, II, or III. Indeed, as we explain in Part II.B, no constitutional provision vests the sole authority to interpret the Constitution in any one branch. Instead, the constitutional structure requires that each branch interpret and enforce the Constitution itself.

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<sup>76</sup> This clearly was the understanding at the Founding. During the ratification, various Federalists urged that “in pursuance” of the Constitution meant not just conformity with bicameralism and presentment, but otherwise consistent with the entire Constitution. Only such latter statutes were entitled to be treated as supreme over contrary state law. See, for example, Jensen, ed, 2 *Documentary History of the Ratification* at 517 (cited in note 59) (James Wilson commenting that “in pursuance” meant that a law was otherwise constitutional). Earlier, Wilson had claimed that Congress could not pass any laws restricting the press because such laws would not be in “pursuance” of the Constitution. *Id.* at 455. See also Jonathan Elliot, ed, 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 188 (2d ed 1836) (Governor Johnston of North Carolina commenting that every law consistent with the Constitution is “made in Pursuance” of it; those laws inconsistent are not made in Pursuance of it); *id.* at 182 (William Davie commenting to the same effect); *id.* at 28, 178–79 (James Iredell commenting to the same effect); Federalist 33 (Hamilton), in *The Federalist* 203, 207 (Wesleyan 1961) (Jacob E. Cooke, ed) (claiming that laws that are not pursuant to the Constitution, but instead invade state power, are acts of usurpation).

<sup>77</sup> See, for example, Bickel, *Least Dangerous Branch* at 9 (cited in note 11).

Third, reading “made in Pursuance” to limit review of federal statutes only to procedural defects creates a strange anomaly. The counterintuitive reading accords the status of supreme federal law to unconstitutional statutes. Any federal statute, no matter how unconstitutional, would be part of the supreme Law of the Land so long as that statute went through bicameralism and presentment. Consider an analogy. Would we consider the presidential seizure of domestic steel mills to be constitutional simply because President Truman had issued an executive order in the correct form—in other words, “made in Pursuance” of his claimed Article II powers?<sup>78</sup> Most would agree, we presume, that reading “made in Pursuance” in such a manner improperly creates an extremely odd category—unconstitutional, yet supreme federal statutes. Indeed, we wonder how a given federal statute could be considered “unconstitutional” in the conventional sense of that term when that same statute is said to be part of the supreme Law of the Land merely because it went through bicameralism and presentment.

Finally, even if the “made in Pursuance” language only referred to process, it still would support a limited form of judicial review. In determining whether a law actually met the requirements of bicameralism and presentment, a court would have to interpret the Constitution and treat it as ordinary law. *INS v Chadha*,<sup>79</sup> in which the Supreme Court examined the constitutionality of the legislative veto, is a case in point.<sup>80</sup> In determining whether congressional action under the legislative veto could have the force of law, the Court had to determine what exactly constituted bicameralism, what constituted presentment to the President, and ultimately what constituted a federal law. If the constitutional text allows courts to adjudicate such significant questions about which laws are part of the supreme Law of the Land, it should hardly be read to limit judicial review only to bicameralism and presentment. Nothing in the constitutional text (or history) suggests that “made in Pursuance” was understood to have this effect.

Once one concludes that the “made in Pursuance” language means that unconstitutional federal statutes are not part of the supreme Law of the Land, certain important conclusions follow. In particular, when faced with a conflict between a state law and a federal statute, a court cannot automatically favor the federal statute. Instead, the court must first determine if the federal statute is entitled to be treated as part of the supreme Law of the Land. If the federal statute is unconstitutional, it cannot benefit from the Supremacy Clause and it cannot trump the state law. In this way, the Supremacy Clause also indicates that state courts must engage in a limited but significant judicial review of federal statutes.<sup>82</sup>

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<sup>78</sup> See *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579 (1952).

<sup>79</sup> 462 US 919 (1983).

<sup>80</sup> See *id.* at 956–58.

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<sup>82</sup> Those generally skeptical of the textual foundations of judicial review may have an additional

Judge Learned Hand observed many years ago that the vesting of this form of judicial review of federal statutes in the state courts implied that federal courts could not test the constitutionality of a federal statute when it conflicted with state law.<sup>83</sup> We tend to agree, however, with Herbert Wechsler, who responded that it would be strange to think that this authorization of judicial review by state courts also amounted, simultaneously, to an implicit bar on the exercise of the same power by federal courts.<sup>84</sup> When confronted with a conflict between state law and a federal statute, both the state and the federal courts must determine whether the federal statute is entitled to supreme law status. If the federal statute is unconstitutional, it is not part of the Law of the Land and cannot trump the conflicting state law.

### 3. Judicial review of state law.

Finally, the widespread support for judicial review of state law also suggests the existence of review of federal statutes. Perhaps sharing Justice Holmes's belief that the Union would be jeopardized if federal courts could not nullify state laws<sup>85</sup> and given the overwhelming consensus in favor of this type of action, skeptics of judicial review (and academics more generally)<sup>86</sup> often spend little time and effort explaining the textual basis for judicial review of state law. After all, one of the notorious problems under the Articles of Confederation had been that states (and their courts) sometimes refused to recognize the superiority of properly enacted treaties and congressional resolves above state laws. Regardless of their precise views on judicial review of federal legislation, critics generally agree that review

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reason to be doubtful about reading the Constitution as if state judges must allow unconstitutional federal statutes to trump contrary state law. Nothing in the federal Constitution specifically directs state court judges to enforce unconstitutional federal statutes. Accordingly, if a state court followed the logic of those who demand specific textual authority for judicial review before acknowledging its legitimacy, it would have to ignore the unconstitutional federal statute because it would lack the authority (or the obligation) to enforce such a federal statute over state law. In this scenario, some sort of judicial review is inevitable because either the state law will be struck down (even though there is no textual authority for state courts to void state law based on an unconstitutional federal statute) or the federal statute will be ignored (even though there supposedly is no authority for state courts to void federal statutes).

<sup>83</sup> See Learned Hand, *The Bill of Rights* 28 (Harvard 1958).

<sup>84</sup> See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv L Rev 1, 3–5 (1959).

<sup>85</sup> See Oliver Wendell Holmes, *Collected Legal Papers* 295–96 (Harcourt 1920) (“I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.”).

<sup>86</sup> One influential casebook includes only one very short paragraph on the question of federal judicial review of state law. See Geoffrey R. Stone, et al, *Constitutional Law* 50 (Aspen 4th ed 2001). (We do note, however, that the authors do spend a good deal of time on the related question on the basis for Supreme Court review of state court decisions.) Another casebook appears not to speak directly to the issue of judicial review of state law at all, content to treat the issue in the broader context of the constitutionality of judicial review more generally. See William Cohen and Jonathan D. Varat, *Constitutional Law* 33–36 (Foundation 10th ed 2001).

over state legislation must exist in order to vindicate the national uniformity and supremacy of federal law.

If pressed for a textual basis of judicial review over state law, many would no doubt cite the State Judges Clause. It provides that the “Judges in every State shall be bound [to the supreme Law of the Land], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>87</sup> Indeed, Professor Kramer relies upon the State Judges Clause as the needed textual basis for such review. The Clause “‘bound’ state judges to give federal law priority” and thereby “removed all doubts” about the availability of judicial review of state law by making “explicit the authority to do something that might or might not have been implicit without it.” It also eliminated “the leading objection to judicial review, which was that judges had not been authorized by the people to make such decisions.”<sup>88</sup> Thus, the State Judges Clause apparently authorizes judicial review of state law by federal and state courts. By negative implication the Clause further suggests that federal and state judges have no analogous power over federal legislation because there is no specific textual authority providing for it.

Such efforts to defend judicial review over state law, while simultaneously rejecting it with regard to federal statutory law, demonstrate the weakness of the textual argument against judicial review. If one were to apply the *expressio unius* argument consistently, there is no sound textual basis for *federal* courts to engage in judicial review of state law. The language referencing the “Judges in every State” only authorizes *state* courts to invalidate state laws that contravene the Constitution; federal judges go without mention in the Supremacy Clause.<sup>89</sup> Indeed, the subsequent reference to state constitutions and laws confirms that the phrase “Judges in every State” refers to state judges and not federal ones.<sup>90</sup>

The drafting and ratification history of the Supremacy and State Judges Clauses further supports this reading of the State Judges Clause. The New Jersey Plan, presented to the delegates at the Philadelphia Convention, contemplated that the state courts would exercise exclusive original jurisdiction over federal cases. To guarantee adherence to federal law, the New Jersey Plan provided that “the Judiciary of the several States shall be bound [to the supreme law] in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding.”<sup>91</sup> After the Convention rejected a congressional power to veto state laws, Luther Martin moved

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<sup>87</sup> US Const Art VI, cl 2.

<sup>88</sup> Kramer, 115 Harv L Rev at 63 (cited in note 16).

<sup>89</sup> See Bickel, *Least Dangerous Branch* at 8–9, 12–13 (cited in note 11). See also Hand, *Bill of Rights* at 5–6 (cited in note 83).

<sup>90</sup> Even if one were tempted to read “Judges in every State” as applying to any judge, federal or state, that functioned in a state, the Supremacy Clause still would not apply to judges located in federal territory, such as the District of Columbia. In other words, the Clause would still not cover Supreme Court justices and hence would not authorize its review of the constitutionality of state laws.

<sup>91</sup> Max Farrand, ed, 1 *The Records of the Federal Convention of 1787* 245 (Yale rev ed 1966).

that the Convention accept the New Jersey Plan's version of the Supremacy and State Judges Clauses. His motion was unanimously approved.<sup>92</sup> With some important changes not relevant here,<sup>93</sup> the Constitution became the supreme Law of the Land and the State Judges Clause bound state judges to enforce that law even when it conflicted with state constitutions and laws. During the ratification fight, numerous Anti-Federalists,<sup>94</sup> including Martin himself, understood the State Judges Clause as applying to state judges only. It originally had been intended to assure that lower federal courts would be unnecessary because *state* judges stood ready to vindicate supreme federal law in the first instance.<sup>95</sup>

If the State Judges Clause is only addressed to state court judges, it cannot serve as the textual foundation for the federal judiciary's power to strike down state laws that violate the Constitution. Moreover, no other constitutional provision specifically vests this power in the federal courts. Although we believe the "arising under" language of Article III authorizes judicial review of the constitutionality of federal and state statutes, critics of judicial review (such as Professors Kramer and Snowiss) have to regard this language as wholly inadequate. If that language fails to specifically authorize judicial review of federal statutes it likewise fails to specifically authorize judicial review of state statutes by federal courts. Yet none of the critics who demand specific authority for judicial review of federal statutes would concede that federal courts cannot review the constitutionality of state laws. Indeed, the uniform consensus is that such review is critical to the functioning of the federal system.

Ironically, in order to defend federal court judicial review over state law, critics of judicial review must rely on the very textual and structural arguments we make here in defense of judicial review of federal law. Professor Kramer illustrates this dilemma nicely. Although he seems to ac-

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<sup>92</sup> See Max Farrand, ed, 2 *The Records of the Federal Convention of 1787* 28–29 (Yale rev ed 1966) (giving history of votes).

<sup>93</sup> After the Convention approved the Supremacy and State Judges Clauses, they were sent (along with other provisions) to the Committee of Detail. The Committee made two modifications. It altered the phrase "Judicatures of the several States" to "judges in the several States" and provided that federal law would preempt state constitutions as well as state laws in state courts. On August 23, 1787, the Convention unanimously agreed to make the Constitution, as well as federal law, the supreme Law of the Land. For a more complete discussion of the Supremacy Clause's drafting history, see Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 *Va L Rev* 1957, 2020–21 (1993).

<sup>94</sup> See *id* at 2024–27.

<sup>95</sup> See Luther Martin's Reply to the Landholder, in Max Farrand, ed, 3 *The Records of the Federal Convention of 1787* 286–87 (Yale rev ed 1966) (describing how he had proposed the provisions after the rejection of the congressional veto over state laws and before the Convention agreed to vest Congress with authority to create inferior federal courts). Unfortunately for Martin, his gambit backfired as the Convention, over Martin's objections, voted to authorize Congress to create inferior federal courts and simultaneously left in place the precursors of the Supremacy and the State Judges Clauses. When Martin made his proposal, he may not have known that the Committee of the Whole had already agreed to grant Congress the power to create inferior federal courts.

knowledge that the State Judges Clause only binds state judges,<sup>96</sup> he inexplicably declares that the Constitution's supremacy over state law "could be enforced by state and national courts."<sup>97</sup> In concluding that federal judges may engage in judicial review of state law even in the absence of specific textual authorization, Professor Kramer abandons his insistence that any form of judicial review must be specifically authorized. After all, under Professor Kramer's reading of the Constitution, no other provision of the Constitution (other than the Supremacy Clause) even speaks to judicial review, which means that no other provision could possibly sanction judicial review of state law by federal courts. Perhaps Professor Kramer believes that the drafting and ratification history of the Supremacy and State Judges Clauses somehow authorizes judicial review of state law (but not federal law) by federal courts. But if that were the foundation for his theory, Professor Kramer would have to abandon his insistence that there must be a specific textual basis for every form of judicial review.

If it were understood that the federal courts would engage in judicial review of both federal statutes and state law, why did not a similar understanding with respect to the state judicial power make the State Judges Clause unnecessary? As we will discuss in greater detail later, at the time of the framing state judges were generally understood to enjoy the power of judicial review. Nonetheless, the Clause was necessary to relieve judges of their obligation of exclusive loyalty to their state constitutions and laws. If state judges were to enforce federal law even at the expense of state law (a role they alone might play if Congress chose not to create inferior federal courts), it was thought necessary that state judges receive a special, explicit admonition that they should abandon their exclusive allegiance to state law. As Edward Corwin remarked long ago, because state court judges were judges of a different jurisdiction and because they had not always chosen federal law over state law in the past, it was thought necessary to enact a special, unmistakable command directed at state judges.<sup>98</sup> Likewise, as Henry Hart noted, a special clause was necessary because of a perceived "special problem, peculiar to state judges"—their dogged loyalty to state authority.<sup>99</sup> By supplanting their formerly exclusive obligation to state constitutions and laws, the State Judges Clause allows a preexisting power—judicial review—to be used in the service of the new supreme Law of the Land. Put a different way, the State Judges Clause acts as a choice of law provision addressed particularly (although not exclusively) to state judges who were thought to already enjoy the power of judicial review and who

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<sup>96</sup> See Kramer, 115 Harv L Rev at 63 (cited in note 16).

<sup>97</sup> Id at 62. See also id at 63 (speaking of an "express command for judges to prefer federal to state law"). Indeed, Kramer continuously speaks of the category of judicial review of state laws, not concerning himself with who undertakes such review. See id at 60–67.

<sup>98</sup> See Corwin, *The Doctrine of Judicial Review* at 13–14 (cited in note 24).

<sup>99</sup> Hart, 67 Harv L Rev at 1470 (cited in note 24).

must henceforth exercise that power in favor of the “supreme Law of the Land.” The presence of the State Judges Clause and its particular admonition to the state courts does not detract from the other textual indications that the federal courts may judge the constitutionality of state law and federal statutes alike.

## II. JUDICIAL REVIEW AND THE CONSTITUTIONAL STRUCTURE

Two aspects of the constitutional structure further support our conclusion that the constitutional text is best read as authorizing judicial review over federal legislation. First, as Chief Justice Marshall himself explained almost two centuries ago, the written nature of our Constitution establishes judicial review. A written constitution creates a structure in which the individual branches of government may not change its provisions unless acting through the specific procedures, established in the document itself, for amendment or alteration. This was Chief Justice Marshall’s fundamental insight two centuries ago, and it remains equally true and important today. Second, judicial review naturally flows from an understanding of the separation of powers as creating three branches of government that bear independent obligations to interpret and enforce the Constitution within their respective spheres. Within this scheme, the Article III judiciary must refuse to enforce legislation that violates the Constitution. Just as nothing in the Constitution compels the judiciary to accept the constitutional judgments of the other branches, nothing requires the President or Congress to accept the Court’s interpretations of the Constitution.

### A. The Nature of a Written Constitution

#### 1. Popular sovereignty.

We can see the structural foundation for judicial review in the nature of the Constitution and its relationship with the officers of the federal government. According to the theory of popular sovereignty prevalent at the time of ratification, the Constitution is a creation of the people of the several states.<sup>100</sup> This understanding of government power represented a rejection of the notion that sovereignty itself lodged in the government or monarch. Necessarily, the government exercises power only because it serves as the agent of the people’s will. As James Madison wrote in Federalist 46, “[t]he Federal and State Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes.”<sup>101</sup> Madison reminded critics of the proposed constitu-

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<sup>100</sup> *U.S. Term Limits, Inc v Thornton*, 514 US 779, 846 (1995) (Thomas dissenting) (noting that the Constitution was ratified by the consent of the people of individual states and not by the consent of “the people” as a whole).

<sup>101</sup> Federalist 46 (Madison), in *The Federalist* 315, 315 (cited in note 76).

tion that “the ultimate authority, wherever the derivative may be found, resides in the people alone.”<sup>102</sup>

It follows from this that the government can exercise only that power which the people have delegated to it. A written constitution serves to codify these powers. Any exercise of authority beyond the grant of power in the written Constitution therefore is illegal, because it goes beyond the delegation from the people and undermines popular sovereignty. As Alexander Hamilton expressed it in Federalist 78, “every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.”<sup>103</sup> If this understanding did not hold sway, then a written constitution would prove inconsequential because the agents could simply exercise the powers that they saw fit, regardless of the will of the people. As *Marbury* declared, “[t]he distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.”<sup>104</sup> Without the basic proposition that the agents could not act beyond the power granted in the Constitution, the government would be sovereign rather than the people. Or, as Hamilton wrote, it “would be to affirm that the deputy is greater than his principal; . . . that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid.”<sup>105</sup> To preserve the basic nature of a written constitution of limited, enumerated powers, the Constitution must be “superior, paramount law” to any actions of the government it creates.<sup>106</sup>

Therefore, any government action—whether executive, legislative, or judicial—that conflicts with the Constitution must be a nullity. In order for the Constitution to successfully establish written limitations on the powers of the branches of government, it must establish a rule of decision that places it above the actions of the organs it creates. Otherwise, the branches of the government could surpass those limits with impunity. As *Marbury* explained, “an act of the legislature, repugnant to the constitution, is void.”<sup>107</sup> “This theory,” according to Marshall, “is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society.”<sup>108</sup> If the Constitution were not given precedence over legislation, a written constitution would represent only an “absurd attempt[], on the part of the people, to limit a power, in its own nature illimitable.”<sup>109</sup>

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<sup>102</sup> *Id.*

<sup>103</sup> Federalist 78 (Hamilton), in *The Federalist* 521, 524 (cited in note 76).

<sup>104</sup> 5 US (1 Cranch) at 176–77.

<sup>105</sup> Federalist 78 (Hamilton) at 524 (cited in note 103).

<sup>106</sup> *Marbury*, 5 US (1 Cranch) at 177.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

Nothing in the Constitution directs judges to treat nullities—unconstitutional statutes—as if they were valid laws. Hence vindicating the people’s choice of a limited Constitution requires judges to refuse to enforce unconstitutional statutes.

## 2. The Oaths Clause.

Neither *The Federalist* nor *Marbury* makes the claim, however, that it is solely the function of the judiciary to decide whether the acts of the other branches of government are unconstitutional, and hence ought not be obeyed. Rather, popular sovereignty theory suggests that each branch has an obligation to refuse to obey government actions that go beyond the Constitution. Otherwise, these agents of the people’s delegated power would be complicit in allowing “the deputy” to become “greater than his principal.” Indeed, the Oaths Clause suggests as much. It declares that “[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.”<sup>110</sup> The Oaths Clause makes clear that all officials of both the federal and state governments have a basic obligation not to violate the Constitution. *Marbury* suggested that the Clause might go further by requiring oath-takers to disregard governmental actions of other institutions that conflict with the Constitution.<sup>111</sup>

Critics of judicial review have sometimes suggested that though federal and state judges must take an oath to support the Constitution, it does not necessarily follow that they can choose to nullify or ignore federal statutes that they deem unconstitutional. Swearing an oath to the Constitution does not necessarily mean that one enjoys interpretational independence—in other words, that one can decide for oneself what the Constitution means and then act upon that reading. Indeed the Constitution might otherwise provide (or be based on the understanding) that the Congress may judge conclusively for all three branches whether its own laws are constitutional. If this were true, the Oaths Clause might well require the federal and state courts (along with state legislatures and federal and state executives) to defer to congressional judgments about the constitutionality of federal laws.

This reading, however, strikes us as erroneous. Nothing in the Constitution establishes that any one branch should interpret the document definitively. Nor does anything in the Constitution demand that any branch defer to the interpretations of the other. Indeed, if one were to believe that judicial review is unconstitutional because it infringes on Congress’s power to interpret the limits of its own powers definitively, one must also believe that the President cannot veto a bill or refuse to enforce a law on the grounds

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<sup>110</sup> US Const Art VI, cl 3.

<sup>111</sup> See 5 US (1 Cranch) at 180.

that the bill or law is unconstitutional. If Congress's authority to interpret the Constitution is final vis-à-vis the courts, it should carry the same weight in regard to the executive branch as well. We know of no one who claims that the President cannot veto legislation on the grounds that it is unconstitutional (indeed, early in our history the veto was used almost exclusively on constitutional grounds),<sup>112</sup> which only highlights the structural illogic of such an outcome.<sup>113</sup>

Chief Justice Marshall not only cited the Oaths Clause in concluding that judges could not enforce unconstitutional statutes, he also cited the particular oath that the first Congress imposed upon federal judges. Federal judges were to swear to "faithfully and impartially discharge and perform all the duties incumbent on me as [Judge or Justice], according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States."<sup>114</sup> When you compare this specific oath to the generic one required by the Congress in the first federal statute ("I, A.B., do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States"),<sup>115</sup> it very well suggests that the federal judges were understood to have the authority to interpret and enforce the Constitution of the United States. Because federal judges apparently had to take both oaths, the more specific judicial oath indicated the congressional view that federal judges were to decide cases agreeably to (consistent with) the Constitution while discharging their duties. In our view, the first Congress clearly thought that the Constitution was law for the federal judges to apply.

In truth, judicial review is nothing special. It is merely the manner in which federal judges implement their obligation, while performing their unique function of deciding Article III cases or controversies, to obey the written limits on the delegation of power to the government by the people. Similarly, other branches of the government must obey the same obligation to enforce the Constitution while performing their unique responsibilities, whether it is a congressman who votes against legislation that she believes to be unconstitutional, or a president who vetoes unconstitutional legislation.<sup>116</sup> President Andrew Jackson described the obligation while vetoing

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<sup>112</sup> See, for example, Charles L. Black, Jr., *Some Thoughts on the Veto*, 40 L & Contemp Probs 87, 89–92 (Spring 1976) (listing exercises of the veto power by the President from George Washington through John Tyler and explaining the justification for each use).

<sup>113</sup> There is wide disagreement, however, about whether the President can refuse to enforce an unconstitutional law. Compare Meese, 61 Tulane L Rev at 985–6 (cited in note 22), with Tribe, 1 *American Constitutional Law* at 729–30 (cited in note 22).

<sup>114</sup> Judiciary Act of 1789 § 8, 1 Stat at 76.

<sup>115</sup> An Act to regulate the Time and Manner of administering certain Oaths § 1, 1 Stat 23, 23 (1789).

<sup>116</sup> See Paulsen, 83 Georgetown L J at 343 (cited in note 22) ("The President may exercise a power of legal review . . . over acts of Congress and refuse to give them effect insofar as his constitutional authority is concerned."); Frank H. Easterbrook, *Presidential Review*, 40 Case W Res L Rev 905, 906–09 (1990) (discussing the presidential practice of vetoing legislation on constitutional grounds). See also Symposium, *Executive Branch Interpretation of the Law*, 15 Cardozo L Rev 21 (1993) (addressing the

legislation to re-charter the Bank of the United States (which the Supreme Court had upheld as constitutional in *McCulloch v Maryland*<sup>117</sup>):

It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision.<sup>118</sup>

### 3. Article V.

Article V buttresses this understanding of the written Constitution. Article V establishes a difficult process for amending the Constitution, one that requires either two-thirds of both the Senate and the House or the state legislatures to propose an amendment, followed by three-quarters of either the state legislatures or state conventions to approve it.<sup>119</sup> Article V's supermajority requirements indicate that the Framers did not intend that the Constitution be easy to amend; it also makes clear that they did not intend for the normal processes of government to suffice for amending the Constitution. Without judicial review (or executive or legislative review, for that matter), the federal government would be able to circumvent Article V by exercising authority that exceeded the Constitution's written limits on the powers delegated by the people. This would allow the government to effectively amend the Constitution without undergoing Article V's difficult super-majoritarian process.<sup>120</sup> Judicial review, therefore, safeguards the Constitution's restrictions on its own amendment, and in so doing preserves the written limitations on the government's powers.

### 4. Political processes.

Critics have argued that the constitutional structure permits withdrawal of judicial review from federalism and separation of powers cases due to the presence of the Senate or the self-interest of the branches or the action of extraconstitutional actors, such as political parties. Professor Wechsler, for example, first famously argued that judicial review over federalism questions might not be necessary because the Senate, as the representative of state interests, could adequately safeguard federalism.<sup>121</sup> Professor Choper further observed that the self-interest of the President and Congress

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relationship between the Supreme Court and the President).

<sup>117</sup> 17 US (4 Wheat) 316, 424 (1819).

<sup>118</sup> Andrew Jackson, Veto Message (July 10, 1832), in James D. Richardson, ed, *2 A Compilation of the Messages and Papers of the Presidents 1789–1897* 576, 582 (GPO 1896).

<sup>119</sup> US Const Art V.

<sup>120</sup> See John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 Va L Rev 333, 347–49 (1998).

<sup>121</sup> See Wechsler, 54 Colum L Rev at 559 (cited in note 17).

would protect the institutional interests of their branches in separation-of-powers disputes, and hence that no judicial intervention would be necessary.<sup>122</sup> Professor Kramer has even claimed that, because political parties are organized along state lines and advance state interests, the Court can dispense with judicial review of federalism.<sup>123</sup> These critiques have emboldened the opponents of judicial review on the Court, such as Justices Souter and Breyer, who believe that judicial review of the scope of federal legislative power is unconstitutional or unjustified.<sup>124</sup>

Modern critics of judicial review are mistaken, however, to the extent they erroneously assume that the political process must serve as the exclusive safeguard of federalism or the separation of powers. As should be obvious, the presence of some institutions that protect federalism or the separation of powers does not indicate there are no other additional safeguards. Similar logic, for example, would preclude judicial review over individual rights, for the people select presidential electors, Senators, and Representatives, and one equally could expect these institutions to therefore vigorously protect the rights of individuals.<sup>125</sup> Yet few critics of judicial review insist that judicial review of individual rights is unnecessary because people elect members of Congress and indirectly select the President.

These critics also err in believing that the Constitution can be read as permitting judicial review to protect individual rights but somehow as precluding judicial review of the limits of federal power. Justices Souter and Breyer, for example, favor vigorous judicial intervention in cases where federal legislation threatens individual rights. Professor Kramer (somewhat inexplicably given his general claim) likewise seeks to preserve judicial review to safeguard individual rights.<sup>126</sup> Indeed, Professor Choper argues that judicial review must be eliminated in federalism and separation-of-powers cases in order to allow the courts to better stand up to the popular will in striking down legislation that violates individual rights.<sup>127</sup>

Nothing in the constitutional text or structure, however, makes a distinction between federalism and separation-of-powers issues on the one hand, and individual-rights questions on the other. If judicial review is to exist over individual-rights cases, it must extend to these other constitutional questions as well.<sup>128</sup> Indeed, if judicial review is acknowledged to be

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<sup>122</sup> See Choper, *Judicial Review and the National Political Process* at 377 (cited in note 18).

<sup>123</sup> See Kramer, 100 Colum L Rev at 219 (cited in note 16).

<sup>124</sup> See, for example, *United States v Morrison*, 529 US 598, 660 (2000) (Breyer dissenting); id at 647 (Souter dissenting).

<sup>125</sup> See, for example, *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528, 565 n 8 (1985) (Powell dissenting).

<sup>126</sup> Kramer, 115 Harv L Rev at 126–27 (cited in note 16).

<sup>127</sup> See Choper, *Judicial Review and the National Political Process* at 169 (cited in note 18).

<sup>128</sup> One of us has argued, however, that in the limited area of war powers the federal courts have no role in adjudicating disputes between the President and Congress. See John C. Yoo, *War and the Constitutional Text*, 69 U Chi L Rev 1639, 1682–83 (2002) (arguing that judicial review of war deci-

part of the original constitutional scheme, it could not have been limited only to the individual-rights provisions of the Constitution, because for the first two years of the republic the Bill of Rights did not even exist. Aside from the narrow restrictions on federal power in Article I, Section 9, judicial review in those early years could only have extended to limits on the powers of the national government, either through separation-of-powers or federalism questions. Once critics admit that judicial review must extend to a specific selection of constitutional issues such as the protection of individual rights, the text and structure demand that judicial review should extend to other constitutional issues such as the enforcement of limits on federal power.

None of this denies that the political safeguards theorists have a powerful point: The Framers designed the Senate, and to a lesser degree the President (through the Electoral College) and the House of Representatives (through the ability to decide how to elect representatives), to represent state interests,<sup>129</sup> and they thus expected the structure of the federal government to limit federal power.<sup>130</sup> We only deny that this fact necessarily means that the political safeguards are the exclusive safeguards of federalism. The text and structure do not permit an exclusive political safeguards theory and the original understanding (discussed later) wholly refutes it.

##### 5. Judicial review of federal law by state courts.

In our view, the Constitution's written nature and the Supremacy Clause's designation of the Constitution as enforceable law explains why state courts generally may judge the constitutionality of federal statutes and treaties.<sup>131</sup> Because of the Constitution's many indications that it was judicially cognizable law, there was no need for it explicitly to confer upon the state courts the power to review the constitutionality of federal statutes.<sup>132</sup>

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sions would undermine the President's flexibility and invite defiance of the federal courts); Yoo, 84 Cal L Rev at 287–90 (1996) (cited in note 30) (assessing the Framers' intended role for the courts in addressing war controversies). War powers, however, are not excluded from judicial review because of any broad exception on a par with that claimed for federalism or separation-of-powers cases. Rather, the area of war powers would not be subject to adjudication due to the political question doctrine and the vesting in Congress of the juridical power to determine whether the nation is at war in the Declare War Clause. In other words, when the courts refrain from addressing war powers disputes, it is because they admit that they lack the constitutional competence to do so.

<sup>129</sup> See Federalist 46 (Madison) at 317–18 (cited in note 101) (arguing that national representatives will possess a “local spirit,” thereby protecting state governments from the federal government).

<sup>130</sup> On this point, we are in agreement with Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex L Rev 1321, 1358 (2001) (discussing the Founders' expectation that the Senate would represent states' interests).

<sup>131</sup> In this brief discussion, we refer to a generic power to judge the constitutionality of federal statutes, whether or not a federal statute is said to conflict with a state law. Hence we discuss a state court power broader than the one that arises from the implications of the Supremacy Clause. See Part I.C.2.

<sup>132</sup> The Supremacy Clause's specific admonition to state courts to enforce the supreme Law of the Land in no way detracts from our argument. Given the loyalty (or partiality) shown to state law by state

Indeed, we think that this understanding of state courts is the only way to explain why the Judiciary Act of 1789 assumed that state courts could refuse to enforce unconstitutional federal statutes. Though the Constitution nowhere specifically authorized judicial review of federal statutes by state courts, Congress understood that the state courts enjoyed such power nonetheless. Courts of that era were simply understood to enjoy the power of judicial review over written constitutions. And, just as important, the Constitution was made supreme over unconstitutional federal statutes.<sup>133</sup>

### B. Coordinate Branches and Constitutional Obligations

Consideration of the constitutional structure shows that judicial review naturally flows from the manner in which the Constitution allocates and separates power among the three branches of government. Judicial review arises from both the separation of powers and the principle that each branch of government is coordinate and independent and responsible for interpreting and enforcing the Constitution while fulfilling its unique constitutional function. Federal judges must engage in judicial review because of their basic duty to obey the Constitution while performing their job, defined in Article III, to decide cases or controversies. While the federal judiciary enjoys no constitutional authority to force the other branches to adopt its interpretations of the Constitution in the performance of their unique functions, neither can the other branches dictate constitutional meaning to the judiciary when it decides cases or controversies. By its nature, the Constitution's separation of powers creates judicial review.

We can see this by examining the manner in which the separation of powers dictates the interaction of the executive, legislative, and judicial branches. Without entering the debate over formalism and functionalism,<sup>134</sup>

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courts, it was thought necessary to place special emphasis on the duties of state judges vis-à-vis supreme federal law in the form of the State Judges Clause. This Clause requires state judges to use a preexisting authority—judicial review—to vindicate federal law over contrary state law. For obvious reasons, it was wholly unnecessary to underscore the state judges' ability to choose the Constitution over contrary *federal* statutes. Though they might be reluctant to prefer federal law to state law, there was no reason to suppose that state judges would be reluctant to declare federal statutes unconstitutional.

<sup>133</sup> For an extended discussion of the Judiciary Act of 1789, see Part III.D.

<sup>134</sup> Compare Steven G. Calabresi and Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L J 541 (1994) (arguing that the Framers intended to create a unitary executive), with Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L J 1725 (1996) (advocating a functional approach to separation-of-powers questions); Lawrence Lessig and Cass R. Sunstein, *The President and the Administration*, 94 Colum L Rev 1, 2 (1994) (challenging the historical basis of the unitary executive as "just plain myth"). This division in the literature between formalism and functionalism is mirrored in the case law. Compare *Morrison v Olson*, 487 US 654, 689–93 (1988) (adopting a functional approach in upholding the constitutionality of a "good cause" standard for the President's removal of the independent counsel), with *Chadha*, 462 US at 945–51, 958–59 (adopting a formal approach—and rejecting a functional approach—in holding unconstitutional the legislative veto); *Bowsher v Synar*, 478 US 714, 726 (1986) (holding that Congress cannot reserve for itself the right of removal of an executive officer). Although it may be futile to predict these matters, formalism seems to be on the rebound, as demonstrated in *Clinton v New York*, 524 US 417, 447–49 (1998) (holding the Line Item Veto Act un-

we think a few basic principles can be agreed upon. The Constitution makes clear that the three branches are coordinate, in the sense that they are equal to each other. As James Madison wrote in Federalist 49, “[t]he several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.”<sup>135</sup> This means that each branch is equal because each exercises grants of authority received directly from the people through the Constitution, and that none is subordinate to the others. That said, the Constitution clearly does not establish a pure separation of powers in which each branch of government is separate and distinct from the others. Rather, the Constitution explicitly deviates from such a system by granting the President a conditional veto over legislation and creating a role for the Senate in the approval of treaties and the appointment of executive officers.

Despite the mixture of powers in certain areas, the branches clearly execute certain core functions that belong to them alone. Only Congress can enact legislation within the sphere granted to the federal government by Article I, Section 8 and the Reconstruction Amendments, only the President may execute federal laws, and only the Judiciary may decide Article III cases or controversies. And these constitutional functions do not dictate a three-way balance of power: The Framers originally believed that the legislature would tend to dominate while the federal courts would be the least dangerous branch,<sup>136</sup> while today some are concerned about the powers of the presidency since the New Deal<sup>137</sup> and others about the imperial judiciary.<sup>138</sup> Nonetheless, the guiding principle of the separation of powers is that each branch performs a unique constitutional function and that no one branch may usurp or interfere with another branch’s performance of this function. As Madison said in Federalist 48:

It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and compleatly administered

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constitutional because a veto under the Act would not satisfy the Constitution’s bicameralism and presentment requirements); *Plaut v Spendthrift Farm, Inc.*, 514 US 211, 239–40 (1995) (stating—in holding a law unconstitutional based on separation-of-powers concerns—that “the doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified”); and *Metropolitan Washington Airports Authority v Citizens for the Abatement of Airport Noise, Inc.*, 501 US 252, 276–77 (1991) (rejecting a functionalist argument in holding a provision of a congressional act transferring control of two airports from federal to regional authority unconstitutional based on separation-of-powers concerns).

<sup>135</sup> Federalist 49 (Madison), in *The Federalist* 338, 339 (cited in note 76).

<sup>136</sup> See, for example, Federalist 51 (Madison), in *The Federalist* 347, 350 (cited in note 76) (addressing the dominance of the legislature in a republican government); Federalist 78 (Hamilton) at 523 (cited in note 103) (stating that the federal courts would be the weakest of the three branches).

<sup>137</sup> See, for example, Arthur M. Schlesinger, Jr., *The Imperial Presidency* vii–x (Houghton Mifflin 1973) (assessing the presidency’s growing infringement upon the other branches’ powers).

<sup>138</sup> See generally Bork, *Slouching Towards Gomorrah* at 321 (cited in note 14); Kramer, 115 Harv L Rev at 128–30 (cited in note 16).

by either of the other departments. It is equally evident, that neither of them ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers.<sup>139</sup>

This separation of powers prevents the “tyrannical concentration of all the powers of government in the same hands.”<sup>140</sup>

This independence of the branches prevents the federal government from concentrating power in a tyrannical fashion. Each branch must have the ability to resist the encroachments of the other branches. As Madison wrote in Federalist 51, “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others.”<sup>141</sup> Once so armed, the incentives for each branch would be to prevent domination by the others. “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”<sup>142</sup> Thus, the separation of powers functions not merely by creating separate and distinct branches of government with their own distinct responsibilities, but by ensuring that each branch has the constitutional power to frustrate attempts by the other branches to expand their authority in an unwarranted manner.

From this structure, judicial review emerges. The Constitution vests the federal courts with the core function of deciding Article III cases or controversies. As we have seen, in the course of performing its constitutional responsibility the judiciary must give primacy to the Constitution over any other actions of the federal or state governments. This requires federal judges to interpret the Constitution in the course of resolving conflicts that arise between federal or state law and the Constitution. As Alexander Hamilton wrote in Federalist 78:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred.<sup>143</sup>

It is in the course of deciding cases that judges construe the Constitution, and hence Chief Justice Marshall later observed, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>144</sup>

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<sup>139</sup> Federalist 48 (Madison), in *The Federalist* 332, 332 (cited in note 76).

<sup>140</sup> *Id.* at 338.

<sup>141</sup> Federalist 51 (Madison) at 349 (cited in note 136).

<sup>142</sup> *Id.*

<sup>143</sup> Federalist 78 (Hamilton) at 525 (cited in note 103).

<sup>144</sup> *Marbury*, 5 US (1 Cranch) at 177.

This is not to say that the judiciary's ability to interpret the Constitution is supreme or exclusive. As we have stated, the power to interpret the Constitution is common to all three branches. In performing his duty to execute faithfully the laws, the President must be able to determine whether a federal statute is a valid one; in other words, whether it conforms to the paramount law of the Constitution. In deciding whether to enact a law, Congress must determine whether the legislation rests within its Article I, Section 8 powers and whether the legislation violates constitutional prohibitions. Judicial review represents the same manifestation of the duty of all federal government officials to place the Constitution first as the supreme law in the course of performing their unique constitutional responsibilities. In this respect, we agree with Professor Michael Paulsen and Judge Frank Easterbrook that the same constitutional reasoning that supports judicial review also militates in favor of a form of executive branch review in the course of executing the laws or exercising the veto.<sup>145</sup>

A critic might respond, however, that one branch ought to accept the constitutional judgments of another in the course of reviewing the conduct of the other branch. Indeed, Thayer's argument that courts should not invalidate legislation unless Congress has made a "clear mistake" amounts to an admonition that the federal judiciary generally should accept legislative judgments about the constitutionality of legislation. As we have seen, however, such a presumption would undermine the purposes behind the separation of powers. First, it would force one branch to be dependent on the will of another, when there is no such command in the Constitution itself. As Hamilton argued in *Federalist 78*:

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution.<sup>146</sup>

Second, if the federal judiciary were to accept the judgment of the other branches as to the constitutionality of their actions, the courts would no longer have the independence and constitutional abilities predicted by Madison in *Federalist 51*. Absolute deference would remove the judiciary's ability to resist the unconstitutional encroachments of the other branches, and thereby undermine the proper functioning of the separation of powers. Third, if the judges could not review the constitutionality of legislation, they would no longer be performing their constitutional duty, because they would be forced to decide cases and controversies in a manner that placed

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<sup>145</sup> See Paulsen, 83 *Georgetown L J* 217 (cited in note 22); Easterbrook, 40 *Case W Res L Rev* 905 (cited in note 116).

<sup>146</sup> *Federalist 78* (Hamilton) at 524–25 (cited in note 103).

the will of the elected representatives above the will of the People as expressed in the higher law of the Constitution. As Hamilton put it:

It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.<sup>147</sup>

By now, it should be clear that we regard judicial supremacy—the notion that the other branches (indeed the rest of society) must adhere to the judiciary’s interpretations of the Constitution—as fundamentally inconsistent with the separation of powers. In our view, the constitutional text and structure merely permit the federal courts a power of judicial review in the same way that they should be understood to grant the other branches the power of interpreting the Constitution while performing their own duties. Indeed, it is important to understand that the authority of the federal courts in this regard is, by design, far weaker than that of the other two branches. To be sure, the judiciary enjoys sufficient independence—due to life tenure and irreducible salary—to exercise their constitutional authority to check the other branches without fear of direct reprisal. On the other hand, however, the federal judiciary has no way to actually enforce its constitutional views. The judiciary has, as Hamilton explained, “no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment.”<sup>148</sup> Even to enforce its judgments, he observed, the judiciary “must ultimately depend upon the aid of the executive arm.”<sup>149</sup> In other words, the courts only may refuse to approve the unconstitutional actions of the other branches in the course of deciding cases or controversies, but still must rely on the agreement of the other branches to give those decisions force. That the Constitution nowhere establishes judicial supremacy does not mean that the Constitution somehow prohibits (or fails to establish) judicial review.

It is on this last point that we believe that the most recent critics of judicial review have been shooting at the wrong target. Whether it has been Judge Bork’s criticisms of the Rehnquist Court’s decisions on abortion rights and free speech, or Professor Kramer’s and others’ critiques of the Court’s federalism decisions, the actual target has been the idea of judicial supremacy. We agree that the Constitution does not support this vision of the judicial role. Nevertheless, the same elements of the Constitution that deny judicial supremacy also help establish judicial review. The Constitu-

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<sup>147</sup> *Id.* at 525.

<sup>148</sup> *Id.* at 523.

<sup>149</sup> *Id.*

tion makes each branch equal and independent in the performance of its unique constitutional functions, while at the same time requiring that all members of the federal government respect the Constitution as supreme, paramount law. Judicial review springs from these two basic structural principles. In deciding Article III cases or controversies, judges sometimes must resolve conflicts between the Constitution and federal and state law, and in doing so they must give effect to the higher law of the Constitution.<sup>150</sup>

These two structural considerations—the Constitution’s written, limited nature and its separation of powers—explain why *Marbury v Madison* confidently ended by noting that the “particular phraseology of the constitution of the United States confirms and strengthens the principle” that the judges must ignore unconstitutional statutes.<sup>151</sup> Consistent with *Marbury*, numerous state courts had exercised (or were viewed as exercising) judicial review over state law notwithstanding the lack of explicit authorization for such judicial review in their state constitutions. Though these cases might have been somewhat controversial at first, over time judicial review came to be generally viewed as a presumed function of the judiciary under a written constitution with the separation of powers such that no specific textual authorization for judicial review was necessary. Accordingly, *Marbury* could conclude that had the Constitution merely invested the federal courts with the judicial power and granted them general jurisdiction, the Constitution would have been understood to authorize judicial review of federal statutes and state law just as the state courts had so construed the state constitutions under similar circumstances.

### III. JUDICIAL REVIEW AND THE ORIGINAL UNDERSTANDING

The Constitution’s original understanding confirms our reading that its text and structure establish judicial review of federal legislation. Fairly read, the historical evidence indicates that at the time of the Constitution’s drafting and ratification, Americans generally regarded judicial review as an inevitable product of a limited, written constitution with a separation of powers. The evidence also refutes the claims of scholars who have asserted that the Founders did not regard the Constitution as authorizing judicial review of federal statutes.

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<sup>150</sup> We need not take a position here on what the executive and legislative branches must do in response to a judgment issued by a court in a proper case. We only reject the judicial supremacist notion that the judiciary’s interpretations of the Constitution must guide the executive and legislative branch as they go about interpreting the Constitution. In our view, the Constitution does not require that the executive and legislative branches approach questions of constitutional interpretation in the manner in which the judiciary would. Because the political branches are equal and coordinate, they can reach conclusions about the meaning of the Constitution contrary to those reached by the judiciary.

<sup>151</sup> 5 US (1 Cranch) at 180.

In this Part, we first discuss why and how judicial review generally came to be accepted in the pre-ratification period. Beginning in the early 1780s state courts began to treat the state constitutions as law to be applied over contrary state law. Notwithstanding the absence of any specific textual authorization in the state constitutions, judicial review was typically understood as a check on the legislature that arose from the nature of a written constitution and the separation of powers. What is striking about this period is not that there was some opposition to judicial review but that this resistance was so scattered and weak. By the time of the Philadelphia Convention and the ratification fight, tepid resistance had given way to a general acceptance of judicial review.

Records from the Philadelphia Convention reveal that no fewer than a dozen delegates in almost two dozen instances discussed judicial review of federal legislation. Indeed, the understanding that judicial review would exist under the proposed Constitution proved critical to several decisions. The availability of judicial review convinced delegates to reject the judiciary's participation in a council of revision that could veto federal legislation. It also led delegates to discard a proposed congressional veto over state laws. Other delegates cited judicial review as a reason for adopting certain provisions. Only two delegates questioned judicial review, but neither proposed prohibiting it. Indeed, even those two delegates agreed, during the ratification struggle, that the Constitution would authorize judicial review of federal statutes. Finally, during the ratification fight, none of the Philadelphia delegates denied that the final version of the Constitution authorized judicial review of federal legislation. In fact, every delegate who spoke of judicial review affirmed that it was a feature of the new Constitution.

The records of the state ratification conventions and the contemporaneous public debate provide the most convincing evidence that the Constitution established judicial review. Delegates to the state conventions discussed judicial review in no fewer than seven of the ratification conventions in almost thirty instances. Outside the conventions, Americans confirmed that the Constitution authorized judicial review in pamphlets and in newspapers across twelve states. Federalists and Anti-Federalists alike understood that courts would be able to ignore unconstitutional federal statutes. Just as significant, no scholar has been able to cite *any* Federalist or Anti-Federalist who declared that the Constitution did not permit judicial review of federal legislation. Though people disagreed on much else about the Constitution, all those who addressed judicial review agreed that the Constitution authorized the judiciary to ignore unconstitutional federal statutes.

We conclude with a brief examination of the early years of the federal government under the new Constitution. One might have expected that, for purely institutional reasons, Congress would have denied that the courts could ignore unconstitutional federal statutes. Instead, in the first Congress

(and in subsequent Congresses), congressmen understood that courts could determine the constitutionality of federal legislation. Indeed, the famous Judiciary Act of 1789 codified the congressional consensus that the Constitution authorizes judicial review of federal statutes. Not surprisingly, the judiciary had similar views about its own authority vis-à-vis federal legislation.

#### A. The Creation of Judicial Review in the States

Written in the aftermath of the Revolution, the first state constitutions did not explicitly establish judicial review. As Willi Paul Adams notes, when the early state constitutions were drafted the “judiciary was not yet seen as guardian of the constitutional order.”<sup>152</sup> Nonetheless, the state assemblies were not to be omnipotent. Some state constitutions expressly incorporated Montesquieu’s famous maxim that the executive, legislative, and judicial powers ought to be kept separate.<sup>153</sup> Other constitutions created institutions devised to check the legislature. Pennsylvania and Vermont, for example, each had a Council of Censors, designed to determine “whether the legislative and executive branches of government have . . . exercised other or greater powers than they are intitled [sic] to by the constitution.”<sup>154</sup> New York’s Constitution created a council of revision (which consisted of the Governor, the Chancellor, and the judges of the supreme court) to exercise a veto over legislation,<sup>155</sup> while Massachusetts vested veto authority in the Governor alone.<sup>156</sup>

At some point, however, these declarations and institutions came to be viewed as insufficient. While we do not seek to pinpoint when judicial review came to be generally “accepted,” we think that as the instances where the state courts engaged in judicial review (or were perceived as having done so) accumulated and as fundamental changes occurred in American

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<sup>152</sup> Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 269 (North Carolina 1980) (Rita and Robert Kimber, trans) (discussing the role of the state judiciaries in the context of separation of powers and suggesting that the early constitutions relied not on the judiciary to annul unconstitutional laws, but upon veto and councils of revision).

<sup>153</sup> See, for example, Va Const of 1776 (superseded 1829), reprinted in William F. Swindler, ed, 10 *Sources and Documents of United States Constitutions* 51, 52 (Oceana 1979) (“The legislative, executive, and judiciary department, shall be separate and distinct.”); Mass Const of 1780 Pt I, Art XXX, reprinted in William F. Swindler, ed, 5 *Sources and Documents of United States Constitutions* 92, 96 (Oceana 1979) (separating the three branches of government “to the end it may be a government of laws, and not of men”).

<sup>154</sup> Penn Const of 1776 § 47 (superseded 1790), reprinted in William F. Swindler, ed, 8 *Sources and Documents of United States Constitutions* 277, 285 (Oceana 1979). For a nearly identical provision, see Vt Const of 1777 ch 2, § 44 (superseded in 1786), reprinted in William F. Swindler, ed, 9 *Sources and Documents of United States Constitutions* 487, 495 (Oceana 1979).

<sup>155</sup> See NY Const of 1777 Art III (superseded 1822), reprinted in William F. Swindler, ed, 7 *Sources and Documents of United States Constitutions* 168, 172 (Oceana 1979).

<sup>156</sup> See Mass Const of 1780 Ch 1, § 1, Art II, reprinted in Swindler, ed, 5 *Sources and Documents of United States Constitutions* at 96 (cited in note 153).

ideas of government and law,<sup>157</sup> judicial review came to be generally understood as an important check on the legislature under a written, limited constitution with a separation of powers.

Before delving into the details of cases, conventions, and speeches, some preliminary comments about the development of judicial review seem appropriate. Judicial review responded to, and was consistent with, several historical trends, circumstances, and problems in American constitutional and political thought of this period. First was the generic problem of a newly hyperactive legislative power. As Professors Gordon Wood and Jack Rakove have explained, the eighteenth century saw a deluge of statutes. Whereas in the past the British Parliament and state legislatures principally had checked their respective executives, by the middle of the century their chief activity became the enactment of positive legislation. This burst of activity led to the perception that Parliament was passing laws too hastily and without sufficient deliberation.<sup>158</sup> State legislatures were similarly frenetic, enacting what we today would think of as “special-interest” legislation.<sup>159</sup> This transformation in the nature of the legislative power led many Founders to view the legislature as the greatest threat to limited government.<sup>160</sup> As James Madison complained, “[t]he short period of independence has filled as many pages [of the law books] as the century which preceded it. Every year, almost every session adds a new volume.”<sup>161</sup> Some came to believe that another institution was necessary to check the legislative vortex.

Second, there was a need to prevent states from ignoring or frustrating national enactments, particularly treaties.<sup>162</sup> The Continental Congress

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<sup>157</sup> As Professor Wood has observed: “The sources of something as significant and forbidding as judicial review never could lie in the accumulation of a few sporadic judicial precedents, or even in the decision of *Marbury v. Madison*, but had to flow from fundamental changes taking place in the Americans’ ideas of government and law.” Wood, 56 Wash & Lee L Rev at 793 (cited in note 24).

<sup>158</sup> See David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* 12–28, 56–64, 121–27 (Cambridge 1989) (providing empirical data demonstrating the increase in lawmaking activity and corresponding concerns about the “incapacity and inattention” of legislators and suggesting that Blackstone’s *Commentaries* were one response to these perceived deficiencies and deviations from common law).

<sup>159</sup> See Rakove, 49 Stan L Rev at 1055–56 (cited in note 24).

<sup>160</sup> See, for example, Federalist 51 (Madison) at 350 (cited in note 136) (describing the central role of the legislative branch in republics and methods for keeping its power in check).

<sup>161</sup> James Madison, Vices of the Political System of the United States (Apr 1787), in Robert A. Rutland, et al, eds, 9 *The Papers of James Madison* 345, 353 (Chicago 1975).

<sup>162</sup> Sources on the difficulties that the Continental Congress experienced include: Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607–1788* 181–97 (Georgia 1986) (discussing the growing awareness among American leaders in the 1780s that the Continental Congress lacked requisite authority over the states to govern effectively); Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775–1787* 3–20 (Pennsylvania 1983) (describing the difficulties in adjudicating interstate territorial disputes); Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* 337–54 (Knopf 1979) (discussing difficulties in securing state acceptance of revenue and foreign policy decisions); Forrest McDonald, *E Pluribus Unum: The Formation of the*

lacked any formal method to enforce state compliance with the Articles of Confederation, federal resolves, and treaties. Judicial review by state courts over state legislation arose as an institutional mechanism that would check the legislature. Indeed, in early 1787 the Continental Congress had urged the states to adopt laws making clear that any acts contrary to the 1783 peace treaty with Great Britain were repealed and to direct the state courts to decide cases involving the treaties according to the treaties themselves, notwithstanding state law.<sup>163</sup> In this way, Congress envisioned that state courts would help vindicate the treaty-making power granted to Congress by the Articles of Confederation.

Third, the concept of the separation of powers grew in importance during the Critical Period. As Professor Gordon Wood has observed, by 1787 the separation of powers had become “for many Americans an ‘essential precaution in favor of liberty.’”<sup>164</sup> Professor Wood has argued that Americans during this period initially understood the separation of powers as a means to insulate the judiciary and the legislature from the executive branch. Only as the Framers became dissatisfied with the state assemblies did the concept of the separation of powers as a limitation on the legislative branch coalesce.<sup>165</sup> More recent historical work, however, has emphasized that the concept of the separation of powers as a restriction on *any* single branch from accumulating unlimited power emerged as early as the first state constitutions.<sup>166</sup> The separation of powers was not simply a check on the executive, but a guard against arbitrary, centralized government power and a protection of liberty. To the extent that this more robust concept of the separation of powers took hold earlier in the American political conscious-

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*American Republic, 1776–1790* 133–54 (Houghton Mifflin 1965) (describing the crises confronting the Continental Congress in the years preceding the Federal convention). On the problems of treaty enforcement in particular, see John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Colum L Rev 2013–24 (1999) (discussing the weaknesses of the Continental Congress’s treaty power and how these weaknesses affected treaty agreements formed during this period).

<sup>163</sup> See Letter to Governors from the President of Congress (Apr 13, 1787), in Roscoe R. Hill, ed., *32 Journals of the Continental Congress, 1774–1789* 177–84 (GPO 1936). See also Yoo, 99 Colum L Rev at 2019–20 (cited in note 162) (arguing that the fact that Congress had to urge the states to repeal laws conflicting with the treaty demonstrates its weakness).

<sup>164</sup> Gordon S. Wood, *The Creation of the American Republic 1776–1787* 549 (Norton 1972) (reprint of North Carolina 1969).

<sup>165</sup> See *id.* at 446–53 (relating criticisms of state constitutions in the revolutionary period by Jefferson, Madison, and other reformers for placing excessive power in the legislative branch).

<sup>166</sup> See Adams, *The First American Constitutions* at 256–75 (cited in note 152) (“All the state constitutions reflected the principles of the separation of powers and of checks and balances. None proclaimed or applied Paine’s principle of simplicity.”). See also Marc W. Kruman, *Between Authority and Liberty: State Constitution Making in Revolutionary America* 109–30 (North Carolina 1997) (arguing that separation of powers concerns received a great deal of attention during state constitutional conventions in the Revolutionary period); Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 80–87 (Kansas 1985) (describing limits placed on each branch in early state constitutions).

ness, it is more likely that the Founders would have understood judicial review as a product of the separation of powers.

As Professor Wood points out, the primary beneficiary of the embrace of the separation of powers was the judiciary. Americans' attitude toward their judiciaries underwent a fundamental change in the period from 1776 to 1787. During the revolutionary period, the colonists had associated judges (and executives) with the excesses of the British Crown.<sup>167</sup> Hence state constitutions created weak executives and judiciaries. With the passage of time, however, the guilt-by-association wore off and the people began to view the courts as agents acting on behalf of the people.<sup>168</sup> As state courts in the 1780s exercised the authority to judge the constitutionality of statutes, people came to accept the idea that one set of their agents could serve as a check on another on behalf of a constitution controlling both.

Finally, one cannot overestimate the significance of the written nature of the state constitutions. Before written constitutions were adopted, it might have been difficult to determine whether a legislature was acting unconstitutionally—after all, there was no baseline text; with a written constitution, however, all could compare a statute with the actual constitutional text. What James Iredell said of the North Carolina Constitution in 1787 was true of every state with a written constitution: The Constitution is not “a mere imaginary thing, about which ten thousand different opinions may be formed, but a written document to which all may have recourse.”<sup>169</sup> A written constitution created a focal point in pondering constitutional meaning and helped make possible judicial review.<sup>170</sup>

These historical developments found expression in the examples of state judicial review in the pre-constitutional period. In as many as eight cases<sup>171</sup> across seven states,<sup>172</sup> state courts deemed a state statute to violate a

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<sup>167</sup> See, for example, Wood, 56 Wash & Lee L Rev at 789–90 (cited in note 24) (“Colonial America considered judges dangerous because they regarded judges essentially as appendages or extensions of royal authority embodied in the governors, or chief magistrates.”); Rakove, 49 Stan L Rev at 1062 (cited in note 24) (arguing that royal control of judicial appointments made the colonists distrustful of the judiciary). See generally J.R. Pole, *Reflections on American Law and the American Revolution*, 50 Wm & Mary Q 123 (1993).

<sup>168</sup> See Wood, 56 Wash & Lee L Rev at 792–94 (cited in note 24) (describing the development of the idea that “judges, though not elected, resembled the legislators and executives in being agents or servants of the people with a responsibility equal to that of the other two branches of government”). See also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L J 1425, 1443 (1987) (describing the Federalists’ identification of the executive and judiciary as “agents of the People” in curbing legislative power).

<sup>169</sup> Letter from James Iredell to Richard Spaight (Aug 26, 1787), in Griffith J. McRee, ed, *2 Life and Correspondence of James Iredell, One of the Associate Justices of the Supreme Court of the United States* 172, 174 (Appleton 1858).

<sup>170</sup> On the importance of a written constitution in establishing judicial review, see Whittington, *Constitutional Interpretation* at 54–59 (cited in note 29). Whittington notes, “It is the fixity of the written Constitution that empowers the judiciary to determine that a statutory law may be repugnant to it.” *Id.* at 57.

<sup>171</sup> *Josiah Philips’s Case* (Va 1778), discussed in St. George Tucker, 1 *Blackstone’s Commentar-*

fundamental charter (or other species of higher law). A number of these state courts treated their constitutions as normal law to be interpreted and applied by judges. Just as importantly, they did so without clear textual authority. No state constitution specifically authorized state judges to apply the state constitution as law and to use it to measure the validity of the legislature's acts.<sup>173</sup> Instead, courts appeared to derive their power of review from the nature of a written, limited constitution with a separation of powers.

Given the lack of proper legal reporting at the time, academics have debated the nature and scope of these early state cases. Did these state courts actually exercise a form of judicial review? Or did they instead rely

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*ies: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* appendix at 293 (Lawbook Exchange 1996) (reprint of Birch and Small 1803) (refusing to enforce a bill of attainder prohibited by the state constitution); *Holmes v Walton* (NJ 1780), described in Austin Scott, *Holmes vs. Walton: The New Jersey Precedent: A Chapter in the History of Judicial Power and Unconstitutional Legislation*, 4 *Am Hist Rev* 456, 456–60 (1899) (holding that a law allowing trial by a jury of six individuals violated the state constitution); *Commonwealth v Caton*, 8 Va (4 Call) 5, 20 (1782) (holding invalid a pardon passed by one house of the state legislature and rejected by the other); *Rutgers v Waddington* (NY City Mayor's Ct 1784), reprinted in Julius Goebel, Jr., et al, eds, 1 *The Law Practice of Alexander Hamilton: Documents and Commentary* 392, 414–19 (Columbia 1964) (interpreting the Trespass Act to avoid conflict with the law of nations and the peace treaty between the United States and Great Britain); *Symsbury Case*, 1 Kirby 444 (Conn Super Ct 1785) (holding that the legislature could not alter a land grant without the grantees' consent); *Trevett v Weeden* (RI 1786), described in James M. Varnum, *The Case, Trevett against Weeden: On Information and Complaint, for Refusing Paper Bills in Payment for Butcher's Meat, in Market, at Par with Specie* (John Carter 1787) (refusing jurisdiction where law required action to be tried by a judge in the face of fundamental law guaranteeing trial by jury); "*Ten-Pound Act*" Cases (NH 1786), described in Crosskey, 2 *Politics and the Constitution in the History of the United States* at 968–71 (cited in note 24) (holding statute that required small debt claims to be tried by a justice of the peace violated the state constitution's guarantee of trial by jury); *Bayard v Singleton*, 1 NC (Mart) 42, 45 (1787) (holding that a statute directing courts to dismiss on a party's motion actions brought to recover lands sold under another act violated the state constitution's guarantee of trial by jury).

<sup>172</sup> The states are Connecticut, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, and Virginia.

<sup>173</sup> In at least two cases, state courts struck down legislation even when the state lacked a written constitution. Neither Connecticut nor Rhode Island adopted new constitutions in the early days of the Revolution. Instead, they continued under their colonial charters. In *Symsbury*, the judiciary refused to apply a statute that took property from the proprietors of the town of Symsbury, Connecticut on the grounds that the statute could "not legally operate" to curtail the original allotment to the Symsbury proprietors. 1 Kirby at 477. See also Meigs, *The Relation of the Judiciary to the Constitution* at 68–70 (cited in note 24) (describing the circumstances surrounding the case). In *Trevett v Weeden*, the Rhode Island judges refused to accept jurisdiction in a case where John Weeden had been indicted by an Act of Assembly under which persons were to be tried without a jury. Though the judges did not formally declare the Act unconstitutional, refusing jurisdiction was tantamount to declaring the statute void as unconstitutional. Indeed, the State Assembly instituted an inquiry into the action of the judges based on the notion that the court had "declared and adjudged an act of the supreme legislature of this state to be unconstitutional, and so absolutely void." See Haines, *The American Doctrine of Judicial Supremacy* at 109 (cited in note 24) (quoting the joint resolution of the Rhode Island legislature requiring the justices to give account for their refusal to exercise jurisdiction). Here again, the judges engaged in judicial review even in the absence of a constitution and even in the absence of anything directly on point in the colonial charter. See *id.* at 112 (stating that Varnum, the defense attorney, based his argument for invalidation of the statute on natural law and "Coke's theory of ancient fundamental enactments").

upon statutory interpretation or other mechanisms to vindicate state constitutions and other superior laws?<sup>174</sup> Were these cases primarily about protecting the judiciary from legislative overreaching?<sup>175</sup> Or did they embrace a claimed authority to interpret and defend their respective constitutions more generally? Our aim is not to resolve these controversies one way or another.<sup>176</sup>

What matters is how the Founders understood those early state cases. We believe that the Founders regarded these cases as having established the general proposition that constitutions were law for judges to interpret and apply. During the Constitution's drafting and ratification, numerous individuals favorably referred to judicial review by state courts. At Philadelphia, James Madison praised the Rhode Island "[j]udges who refused to execute an unconstitutional law" and condemned the legislature for replacing them with more pliable sorts.<sup>177</sup> Elbridge Gerry likewise noted that state judges "had [actually] set aside laws as being agst. the Constitution" and had done so with "general approbation."<sup>178</sup> In *The Federalist*, Alexander Hamilton twice alluded to these state court decisions.<sup>179</sup> In Virginia, both Patrick Henry and Edmund Pendleton praised the Virginia judiciary's willingness to stand up to the legislature.<sup>180</sup> These comments reflect an understanding that the state judiciaries had asserted, and were properly endowed with, the power to refuse to enforce unconstitutional statutes.

Judges were not alone in asserting that courts could ignore unconstitutional statutes and thereby check the legislatures. In November 1783, for example, a committee of the Pennsylvania Council of Censors issued a report about possible amendments to the state constitution. Criticizing the current system, the committee observed that "if the assembly should pass an unconstitutional law and the judges have the virtue to disobey it, the same could instantly remove them."<sup>181</sup> By lamenting the lack of protection for

<sup>174</sup> See, for example, Clinton, *Judicial Review* at 23 (cited in note 22) ("Most, if not all, of the cases in the colonial, revolutionary, Founding, and Marshall eras (and most in the Taney era as well), in which courts refused application of legislation, are best explained in accordance with the 'statutory construction' approach.")

<sup>175</sup> See, for example, Wolfe, *Judicial Review* at 74–75 (cited in note 22) (discussing judicial review in the context of Hamilton's concern about judicial independence).

<sup>176</sup> We generally follow William Treanor's excellent account of the pre-constitutional cases on judicial review. See William M. Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U Pa L Rev 491 (1994).

<sup>177</sup> Farrand, ed, 2 *Records of the Federal Convention* at 28 (cited in note 92).

<sup>178</sup> Farrand, ed, 1 *Records of the Federal Convention* at 97 (cited in note 91).

<sup>179</sup> See Federalist 78 (Hamilton) at 528 (cited in note 103) (stating that some states had already experienced the "benefits of the integrity and moderation of the judiciary"); Federalist 81 (Hamilton), in *The Federalist* 541, 543 (cited in note 76) (noting that any criticism of judicial review at the federal level is equally applicable to the states).

<sup>180</sup> See Jonathan Elliot, ed, 3 *Debates on the Adoption* at 299 (cited in note 23) (comments of Edmund Pendleton); id at 324–25 (comments of Patrick Henry).

<sup>181</sup> Corwin, *Doctrine of Judicial Review* at 40–41 n 62 (cited in note 24) (quoting the committee's report to the Council of Censors).

state judges who ignored unconstitutional state statutes, the committee clearly assumed the existence of judicial review.<sup>182</sup> In North Carolina, James Iredell vigorously defended judicial review. In his letter “To the Public,” Iredell claimed that the North Carolina Constitution was law, that the legislature was a “creature of the Constitution,” that it possessed limited, circumscribed powers, and thus that judges were to choose the constitution over contrary statutes.<sup>183</sup> His subsequent letter to Richard Spaight provides a more elaborate explanation of why judges should ignore unconstitutional statutes.<sup>184</sup>

Even those in the hinterlands of the republic apparently were familiar with judicial review. Consider the revealing proceedings of the Danville, Kentucky “Political Club.” After first concluding that “an Act of Assembly must be in accordance with the Constitution of the State,” the Society turned its attention to the following question: “If an Act of Assembly should be contrary to the Constitution, which ought to govern a judge in his decision?” The answer, not surprisingly, was the state constitution.<sup>185</sup>

Acceptance of judicial review spread thanks to the reports of newspapers and pamphlets. *Holmes v Walton*, the New Jersey case,<sup>186</sup> might have inspired James Varnum’s argument before the Rhode Island Supreme Court in *Trevett v Weeden*.<sup>187</sup> In turn, at least five newspapers carried reports on *Trevett*.<sup>188</sup> *Rutgers v Waddington*, in which Alexander Hamilton argued that a New York law violated the peace treaty with Great Britain, was reported

<sup>182</sup> We shall see later that one of the reasons for judicial independence was the view that this would encourage a salutary judicial review. See Part III.C.1 for a detailed treatment of the role that the argument for judicial independence played in the ratification debates.

<sup>183</sup> See Letter to the Public (1786), in McRee, ed, 2 *Iredell Correspondence* 145, 146–49 (cited in note 169) (rejecting both forms of popular constitutionalism—petition and revolution—as impracticable responses to legislative overreaching and suggesting judicial review as a viable alternative).

<sup>184</sup> See Letter to Richard Spaight at 172 (cited in note 169) (arguing from the Constitution’s status as “fundamental law”). As one of his state’s leading legal figures, Iredell led the ratification fight in North Carolina and was appointed to the Supreme Court by President Washington.

<sup>185</sup> See Meigs, *The Relation of the Judiciary to the Constitution* at 78 (cited in note 24) (describing the debates on this issue in the Political Club in April and May 1787). Meigs also cites an instance in which the Pennsylvania Assembly asked judges to decide whether a state law barring the transport of goods for British prisoners, and a magistrate’s seizure and condemnation of such goods, should be allowed to stand in the face of a passport issued by General Washington. Following the recommendation of the state judges, the legislature repealed their statute and declared it void ab initio. See *id.* at 65–66.

<sup>186</sup> See note 171. It seems very clear that the *Holmes* case was reported in the newspapers (or at least well known). Writing an open letter to the “Primitive Whig” in 1786, “Probus” observed that the New Jersey legislature was omnipotent, save for the state judiciary’s ability to declare unconstitutional acts “null and void.” Probus did note, however, that when the New Jersey courts had nullified an act, the legislature had gone into “high dudgeon” as a result. See Letter to the Primitive Whig in *The New Jersey Gazette*, reprinted in the *Pennsylvania Gazette*, February 8, 1786 found at <http://www.accessible.com/accessible/text/gaz4/00000724/00072495.htm> (visited Apr 20, 2003). That Probus quickly assumed the availability and propriety of judicial review suggests that it was fairly well-known and established in New Jersey.

<sup>187</sup> See Meigs, *The Relation of the Judiciary to the Constitution* at 72 (cited in note 24).

<sup>188</sup> See Cox, *Judicial Power* at 247 (cited in note 24) (stating that “five newspaper accounts” of the case have been discovered).

in a pamphlet and widely covered by the newspapers.<sup>189</sup> *Bayard v Singleton*, the North Carolina case, apparently had much of North Carolina “by the ears.”<sup>190</sup> It was discussed in the legislature and in newspapers, especially because General William Davie was threatened with criminal prosecution for his argument.<sup>191</sup> Finally, the Ten-Pound Act cases out of New Hampshire received attention in the Philadelphia papers at the time of the Philadelphia Convention.<sup>192</sup>

We do not deny that these cases sometimes generated controversy. It should not be surprising that some, particularly those in the legislature, resisted the decisions. Attempts to retaliate against state judges, however, were generally unsuccessful. Richard Dobbs Spaight of North Carolina may have claimed that judicial review was “insufferable” and “absurd and contrary to the practice of all the world,” but the North Carolina legislature chose not to punish its judges. By a margin of two to one, North Carolina legislators rejected a proposal that required statutes and the state constitution to be on an equal footing.<sup>193</sup> Though a committee charged the judges with “disregarding or suspending” the legislature’s acts, a subsequent committee concluded that these judges had not done anything wrong.<sup>194</sup> Likewise, after the Ten-Pound Act cases in New Hampshire, the state legislature initially insisted that its act was constitutional. Yet the state judges continued to refuse to execute the law. Apparently experiencing a change of heart, the assembly declared (by a margin of nearly two to one) that the judges were not impeachable “as their conduct [was] justified by the constitution” and voted to repeal the unconstitutional statute.<sup>195</sup> State legislatures seemed to agree that their judges were authorized to treat their state constitutions as supreme law over contrary state statutes.

The Rhode Island legislature appears to have been the only one that came close to retaliating against the judiciary. After *Trevett v Weeden*, the legislature called upon the judges to answer for their actions. After first refusing to respond, the judges stated that though

they disclaim and totally disavow any the least power or authority, or the appearance thereof, to contravene or controul the constitutional laws of the State . . . they conceive that the entire power of construing and judging of the same, in the last resort, is vested solely in the Supreme Judiciary of the State.<sup>196</sup>

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<sup>189</sup> See Crosskey, 2 *Politics and the Constitution* at 963–65 (cited in note 24). See also note 171.

<sup>190</sup> See Meigs, *The Relation of the Judiciary to the Constitution* at 119 (cited in note 24).

<sup>191</sup> See *id.* at 118–19.

<sup>192</sup> See Crosskey, 2 *Politics and the Constitution* at 970–71 (cited in note 24).

<sup>193</sup> See *id.* at 971–73.

<sup>194</sup> See *id.* at 971–72.

<sup>195</sup> *Id.* at 970.

<sup>196</sup> Varnum, ed, *The Case* at 45 (cited in note 171) (quoting a statement of the judges).

In other words, though they asserted no power to control *constitutional* laws, they had the authority to ignore *unconstitutional* laws. In response, the legislature determined that it could remove judges for criminal offenses only and that refusing to enforce allegedly unconstitutional laws did not qualify.<sup>197</sup> When the judges' single-year terms expired, however, the legislature reappointed only one of the judges.<sup>198</sup>

Critics of judicial review have cited the Rhode Island legislature's actions as representative of the reaction to judicial review in the 1780s.<sup>199</sup> Its relatively weak retaliation, however, was singular. Though elsewhere some criticized the state judges who enforced constitutional limits on legislative power, in no other instance was action actually taken against the judges. Even in the case of Rhode Island, the judges were not dismissed, fined, or imprisoned. Instead the legislature, without explanation, exercised its constitutional authority to refuse reappointment to all but one of the judges. Even this mild rebuke—if that is what it was—was condemned. During the Federal Convention, Madison criticized Rhode Island for replacing the judges with others “who would be willing instruments of the wicked & arbitrary plans of their masters.”<sup>200</sup> Despite the fact that the Rhode Island Charter nowhere specifically authorized judicial review, no one defended the Rhode Island legislature.<sup>201</sup>

Experience under the first state constitutions revealed that popular constitutionalism could not fully check the unconstitutional actions of the legislature. Indeed, it was popular support for legislatures willing to transgress state constitutions that created the problem in the first place. Judicial review as a necessary check on the legislature arose as an additional defense of a limited constitution with a separation of powers. While popular

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<sup>197</sup> See Haines, *The American Doctrine of Judicial Supremacy* at 110–11 (cited in note 24).

<sup>198</sup> *Id.* at 111.

<sup>199</sup> See, for example, Kramer, 115 Harv L Rev at 58 (cited in note 16) (“Similar reactions [to that in Rhode Island] were recorded throughout the 1780s whenever and wherever a court considered exercising review, with the exception of Virginia.”).

<sup>200</sup> See Farrand, ed, 2 *Records of the Federal Convention* at 28 (cited in note 92).

<sup>201</sup> It is worth noting that Professor Kramer's recounting of the Rhode Island legislative reaction to the opinion neglects important facts. First, Kramer contends that the “judges' courage gave way completely, and they meekly submitted a written memorial” disavowing the right to ignore the legislature's laws. 115 Harv L Rev at 58 (cited in note 16). But Kramer's quotation of that letter is incomplete and, unfortunately, misleading. The judges never denied the power of judicial review. They only denied any power to control the “constitutional laws” of the legislature. See text accompanying note 196. This claim is entirely consistent with a continued belief in judicial review. In our view, Professor Kramer discovers a concession where none was made. Moreover, Professor Kramer fails to reveal that the legislature subsequently repealed the statute in question, thereby suggesting that the legislature might have agreed with the court about its unconstitutionality. See Haines, *The American Doctrine of Judicial Supremacy* at 111 (cited in note 24) (“Before the new judges took their seats, however, the obnoxious law was repealed and the courts had gained a partial victory.”). Finally, we know of no actual evidence indicating that the judges' decision was either a decisive or motivating factor in the legislature's decision not to reappoint the majority of the judges. The fact that one judge was reappointed might cut against reading too much into the legislature's failure to reappoint the others.

constitutionalism remained an important safeguard, it was supplemented by a more institutionalized means of protecting limited constitutions. As James Iredell noted, the people could not be expected to successfully thwart every unconstitutional statute. “A thousand injuries may be suffered” before the people might take action.<sup>202</sup> Judicial review, on the other hand, could safeguard a constitution in the ordinary operation of government without the need for popular revolt.<sup>203</sup>

In this way, historical trends and events leading up to the Constitution’s drafting shaped the role of courts, under a limited, written constitution with a system of separated powers. Several important developments, such as the concern over legislative power, state infringement of national enactments, and the increase in popular support for the judiciary, created the fertile soil in which judicial review would take root. Decisions by state courts, and the growing acceptance of these decisions, demonstrated that courts, obeying a limited constitution and defending the separation of powers, had a duty to ignore unconstitutional statutes. Just as the Framers understood the state constitutions to allow judicial review, they also would understand the new Constitution’s text and structure to establish a similar role for the federal and state courts.

The rest of this Part will reconstruct the consensus in favor of judicial review at the Founding. Our review shows that critical figures such as James Wilson, Patrick Henry, Alexander Hamilton, Oliver Ellsworth, Gouverneur Morris, and James Madison defended or assumed such a judicial role. Indeed, in the face of such claims, no one of that era denied that under the Constitution the courts could engage in judicial review. That the Constitution’s supporters *and* opponents understood it to authorize judicial review provides compelling evidence that a consensus had developed by 1787–1788 that judicial review was regarded as a natural product of a written constitution with a separation of powers.

## B. The Framing of Judicial Review

The state court cases and the doctrine of judicial review were undoubtedly on the minds of the delegates as they drafted the Constitution in Philadelphia during the Summer of 1787. At least three of the state cases were reported in the Philadelphia press or described in pamphlets during the Federal Convention.<sup>204</sup> Moreover, several of the delegates had been involved in the cases themselves: Alexander Hamilton as advocate in *Rutgers v Wad-*

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<sup>202</sup> Iredell, Letter to the Public at 147 (cited in note 183) (arguing that revolution was a “dreadful expedient” for resolving constitutional disputes).

<sup>203</sup> See *id.* at 147–49.

<sup>204</sup> See Warren, *Congress, the Constitution, and the Supreme Court* at 44–46 (cited in note 24) (stating that the *Trevett*, *Bayard*, and “*Ten Pound Act*” cases were reported in Philadelphia newspapers during the Convention and that several members of the New Jersey delegation had played important roles in the *Holmes* case).

*dington*,<sup>205</sup> Edmund Randolph as counsel and George Wythe and John Blair as judges in *Commonwealth v Caton*,<sup>206</sup> William Davie and Richard Dobbs Spaight as counsel in *Bayard v Singleton*,<sup>207</sup> and David Brearly as judge in *Holmes v Walton*.<sup>208</sup> Other delegates were familiar with these cases.<sup>209</sup>

In addition to their direct experience with and knowledge of these cases, delegates revealed their understanding of judicial review during the proceedings themselves. More than a dozen Philadelphia delegates discussed judicial review in almost two dozen different instances. Such was the widespread understanding of judicial review that delegates referred to it in several different contexts: judicial participation in the veto of federal legislation, creation of inferior federal courts, protection of individual rights, constitutional ratification, and congressional invalidation of state laws.<sup>210</sup>

Throughout the Convention, delegates assumed that judicial review would flow naturally from the role of the judiciary under a written constitution with a separation of powers. Moreover, delegates assumed the existence of judicial review even before the Convention approved any language (such as the Supremacy Clause or the Article III “arising under” jurisdiction) that could be read to authorize judicial review. Such was their confidence that the Constitution would authorize judicial review that the delegates rejected proposals such as the Council of Revision and the congressional negative over state laws, in part because they understood judicial review would perform similar functions. Other delegates cited judicial review as a reason to adopt particular constitutional provisions. If we may indulge in a metaphor, judicial review was like a dark star, which although not observable in the visible spectrum, was such a substantial element of the uni-

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<sup>205</sup> See Berger, *Congress v. The Supreme Court* at 90–91 (cited in note 24) (disputing Crosskey’s assertion that Hamilton’s decision not to appeal in *Rutgers* reflects Hamilton’s personal belief that New York’s constitution did not provide for judicial review).

<sup>206</sup> See *Commonwealth v Caton*, 8 Va (4 Call) 5, 5–6 (Va App 1782) (noting judges who tried case and attorneys who argued it).

<sup>207</sup> See Warren, *Congress, the Constitution, and the Supreme Court* at 45–46 (cited in note 24).

<sup>208</sup> *Id.* at 44–45. Delegates William Livingston and William Paterson likely knew of *Holmes* as well because the former was the Governor and Paterson was Attorney General at the time of the decision. *Id.* at 45.

<sup>209</sup> Gouverneur Morris discussed *Holmes* in a 1785 pamphlet. *Id.* Though he did not support judicial review himself, John Francis Mercer must have known of *Commonwealth v Caton* because his brother there had endorsed judicial review. See Kramer, 115 Harv L Rev at 60–61 (cited in note 16). James Madison mentioned *Trevett v Weeden* during the proceedings. See Farrand, ed, 2 *Records of the Federal Convention* at 28 (cited in note 92) (statement of Madison referring to Rhode Island judges as setting aside laws as against the state charter). Elbridge Gerry likewise referenced the many cases in which courts had declared laws unconstitutional. Farrand, ed, 1 *Records of the Federal Convention* at 97–98 (cited in 91).

<sup>210</sup> We have previously discussed the Philadelphia Convention’s treatment of judicial review thematically. See Prakash and Yoo, 79 Tex L Rev at 1497–1505 (cited in note 7). We have adopted a different approach here by focusing on the material chronologically. We also reveal more instances in which delegates discussed judicial review.

verse's structure that it exerted a gravitational pull that altered the course of the stars and planets nearby.

### 1. Judicial review of federal legislation.

As noted, even before the Federal Convention had adopted explicit language confirming its existence, delegates assumed that judicial review of federal legislation would arise from the nature of a written, limited constitution with a separation of powers. The delegates first discussed judicial review in the context of the Virginia Plan. In introducing a draft constitution, Edmund Randolph of Virginia cited the federal judiciary as a "check" on the legislative and executive powers.<sup>211</sup> In light of the widespread acceptance of judicial review in Virginia and Randolph's support for it as counsel in *Commonwealth v Caton*,<sup>212</sup> he no doubt meant, and was understood to mean, that the judiciary would engage in judicial review of acts of the federal legislature in cases that arose before them. Because the Virginia Plan did not specifically authorize judicial review,<sup>213</sup> Randolph apparently relied upon a shared understanding that the judiciary could ignore legislative acts that were contrary to the Constitution.

In debating the Virginia Plan, numerous delegates likewise understood it to authorize judicial review of federal statutes. One of the Virginia Plan's most interesting features was the Council of Revision, composed of the President and federal judges, which could veto federal legislation. When the Committee of the Whole<sup>214</sup> first addressed the Council, Elbridge Gerry of Massachusetts and Rufus King of New York immediately questioned why the judiciary needed two shields, a share in the veto power and judicial review. According to Gerry, the federal judges "will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality. In some States the Judges had <actually> set aside laws as being agst. the Constitution. This was done too with general approbation."<sup>215</sup> King similarly remarked that federal judges should not have a share in the veto be-

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<sup>211</sup> Farrand, ed, 1 *Records of the Federal Convention* at 28 (cited in note 91) (notes of William Paterson).

<sup>212</sup> In *Commonwealth v Caton*, Randolph had argued that "every law against the constitution may be declared void" by the judiciary. Treanor, 143 U Pa L Rev at 512 (cited in note 176). He must have asserted this as a necessary attribute of the judicial power under a written constitution with a separation of powers because the Virginia Constitution itself nowhere specifically authorized judicial review. At the time he proposed the Virginia Plan, Randolph was governor of Virginia, arguably the most politically important state in the Union, and would become the nation's first Attorney General.

<sup>213</sup> See Farrand, ed, 1 *Records of the Federal Convention* at 20–23, especially Resolution 9 at 21–22 (cited in note 91) (describing the functions of branches of government, including "one or more supreme tribunals," but making no reference to judicial review).

<sup>214</sup> The Committee of the Whole was a means for the delegates to conduct business in a less formal manner. It functioned for about a third of the entire Convention.

<sup>215</sup> Farrand, ed, 1 *Records of the Federal Convention* at 97 (cited in note 91).

cause “they will no doubt stop the operation of such as shall appear repugnant to the constitution.”<sup>216</sup> Gerry and King were apparently persuasive because the Committee of the Whole subsequently decided to consider a purely executive veto in place of the Council.<sup>217</sup> Their arguments, however, would have made no sense unless they (and others) understood the Virginia Plan as already establishing judicial review. In other words, like Randolph before them, Gerry and King understood that federal judges would be endowed with authority to ignore constitutional laws.

In later discussions, none of the Council’s proponents denied that the federal judges would exercise judicial review. Instead they argued that the power did not go far enough because it did not extend to laws that were unwise as a matter of policy. James Wilson acknowledged that there was “weight” in the “observation” that “the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights.” But this authority was not enough, because “[l]aws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect.”<sup>218</sup> James Madison agreed. A share in the veto “would be useful to the Judiciary departmt. by giving it an additional opportunity of defending itself.” It would also “be useful to the Community at large as an additional check agst. a pursuit of those unwise & unjust measures which constituted so great a portion of our calamities.”<sup>219</sup> By speaking of an “additional opportunity” and an “additional check,” Madison indicated that he too perceived the need for something beyond judicial review. Hence both Wilson and Madison shared the view that the federal judiciary could engage in judicial review of federal law.

Criticizing the Council proposal, Luther Martin of Maryland repeated the arguments made earlier by Gerry and King. “[A]s to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative.”<sup>220</sup> George Mason of Virginia echoed Wilson’s and Madison’s arguments. While it was true that the judges already would have a “negative” in their “expository capacity,” this negative “could impede in one case only, the op-

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<sup>216</sup> Id at 109 (William Pierce’s notes).

<sup>217</sup> See id at 98.

<sup>218</sup> Farrand, ed, 2 *Records of the Federal Convention* at 73 (cited in note 92). Wilson later restated his point about the insufficiency of judicial review. Speaking of the Council of Revision and responding to the opposition of those who complained that the judiciary would wield a “double negative,” see text accompanying note 220, Wilson noted that “[t]he firmness of Judges is not of itself sufficient[.] Something further is requisite—It will be better to prevent the passage of an improper law, than to declare it void when passed.” Id at 391.

<sup>219</sup> Id at 74.

<sup>220</sup> Id at 76.

eration of laws. They could declare an unconstitutional law void.”<sup>221</sup> Because the federal judiciary would have to enforce unjust or pernicious laws, however, judicial participation in the veto was needed. Once again, both critics and supporters of the Council assumed the federal courts could judge the constitutionality of federal statutes. Their disagreement concerned whether the judiciary should enjoy a double negative—a share of the veto as well as judicial review.

One final Council-related colloquy reveals the common understanding that judicial review would exist under the new Constitution. After James Madison proposed a modified Council of Revision, John Francis Mercer of Maryland noted his disapproval of “the Doctrine that the Judges as expositors of the Constitution should have the authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontrollable.”<sup>222</sup> John Dickinson of Delaware “was strongly impressed with the remark of Mr. Mercer as to the power of the Judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute.”<sup>223</sup> Some scholars cite these comments as evidence that the delegates regarded judicial review as an unfamiliar and unpopular doctrine.

Though Mercer and Dickinson hardly embraced judicial review, their comments might actually advance the case for judicial review of federal legislation. For Mercer to speak of the “Doctrine” of judicial review suggests that it was well understood and hardly obscure and unknown.<sup>224</sup> Moreover, Mercer’s comments intimate that he recognized that this “Doctrine” was incorporated into the draft constitution. Even though Mercer was not present for the earlier discussions about judicial review (he arrived late to the Convention) and although no one apparently spoke in favor of judicial review immediately prior to his comments, Mercer felt the need to criticize judicial review, suggesting that he (like many others) read the draft constitution as authorizing it. This reading of Mercer’s comments is consistent with his comments during the ratification fight where Mercer seemed to admit that the federal courts could engage in judicial review of federal legislation.<sup>225</sup> Likewise, Dickinson’s comments presuppose the existence of judicial review. He never asserted that judicial review of federal legislation was not part of the draft constitution. Instead he argued that “no such power ought to exist,” which could be fairly read as suggesting that he recognized that judicial review did, in fact, exist. Moreover, while Mercer

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<sup>221</sup> *Id.* at 78.

<sup>222</sup> *Id.* at 298.

<sup>223</sup> *Id.* at 299.

<sup>224</sup> Samuel Johnson’s Dictionary defined “doctrine” as the “principles or positions of any sect or master; that which is taught.” Samuel Johnson, 1 *A Dictionary of the English Language* (Strahan 1755). Johnson’s definition suggests an idea or viewpoint that is accepted by a group of people.

<sup>225</sup> See text accompanying notes 339–343. [dan error]

was opposed to judicial review, Dickinson's views were more ambiguous. Given that he was unaware of an effective alternative, he actually might have grudgingly supported judicial review. This was most likely his view, for, as we will see, during the ratification struggle Dickinson actually praised judicial review as a check on the Congress.<sup>226</sup>

Perhaps the most telling sign of widespread support for judicial review in the Convention is the fact that Mercer and Dickinson do not seem to have swayed any of the delegates. Gouverneur Morris of Pennsylvania quickly rose to defend judicial review:

He could not agree that the Judiciary which was part of the Executive, should be bound to say that a direct violation of the Constitution was law. A controul over the legislature might have its inconveniences. But view the danger on the other side . . . Encroachments of the popular branch of the Government ought to be guarded agst.<sup>227</sup>

Indeed, no one made a motion to deny the federal judges judicial review. Rather, judicial review continued to be understood as a useful check on the unconstitutional encroachments of the popular branch.

Importantly, all of these comments assumed that judicial review would derive directly from the nature of a written, limited Constitution with a separation of powers. They were made *prior* to the adoption of any specific provision that authorized judicial review of federal statutes.<sup>228</sup> Yet the Convention perhaps believed some language was necessary because the federal judiciary was to have limited jurisdiction. Without a grant of jurisdiction over constitutional cases, federal judges might not have even had authority to hear such cases. On August 27th, Doctor William Johnson of Connecticut proposed language that cured this potential problem. The Convention unanimously agreed that the Supreme Court would have jurisdiction over cases arising under "this Constitution" in addition to cases arising under federal statutes.<sup>229</sup> When James Madison questioned whether the resulting

<sup>226</sup> See text accompanying notes 337–338. [dan error]

<sup>227</sup> Farrand, ed, 2 *Records of the Federal Convention* at 299 (cited in note 92).

<sup>228</sup> Delegates hinted at the availability of judicial review of federal legislation in several other contexts as well. For example, arguing in favor of property requirements for federal officers and legislators, Charles Pinckney of South Carolina noted that the federal judiciary would act as "the Umpires between the U. States and individual States." *Id.* at 248. To regard the federal judiciary as umpires in disputes between federal and state authority implies that the umpires may favor state law over unconstitutional federal statutes. Otherwise, Pinckney likely would have referred to the federal judges as discretionless "Enforcers" rather than "Umpires." John Rutledge of Virginia made a similar point. He opposed making judges removable upon the executive's application to the Congress because he seemed to expect that the federal judges would engage in judicial review. According to Rutledge, "If the supreme Court is to judge between the U. S. and particular States, this alone is an insuperable objection." *Id.* at 428. Once again, if the Supreme Court were constitutionally bound to enforce all federal statutes and could not interpret and enforce the Constitution, there would be very little need for the Court to "judge" between the U.S. and the states. Indeed, by legislatively directing the judiciary, Congress could ensure that the federal government always would prevail.

<sup>229</sup> *Id.* at 430. Given the subsequent interpretation of this language by Wilson, Mason, and others,

“right of expounding the Constitution” went too far, delegates generally agreed that the federal judiciary’s “right of expounding” extended only to those cases of “a Judiciary nature.”<sup>230</sup> Judicial review was understood not to be some freewheeling authority to decide the constitutionality of federal laws, but only to extend to those questions that arose within the confines of a proper case. More to the point, Madison’s comments show that the Framers generally regarded the Constitution as law to be applied by the courts, rather than a non-judicially-cognizable “political-legal” document. Under a written constitution with a separation of powers, the courts would have the “right of expounding the Constitution.”

Events at the Federal Convention also suggest that delegates understood that the state courts likewise could examine the constitutionality of federal legislation (subject, of course, to Supreme Court review). Consider the debate about whether to grant Congress a veto over state laws that violated the Constitution or treaties. Opponents of the measure exclaimed that the states would not abide it.<sup>231</sup> But because some means of controlling unconstitutional state laws was thought necessary, opponents cited the ready availability of state courts to vindicate federal law.<sup>232</sup> Immediately after the Convention defeated this congressional negative, Luther Martin successfully reintroduced a precursor of the Supremacy Clause taken from the New Jersey Plan:

[T]he Legislative acts of the U. S. made by virtue & in pursuance of the articles of Union, and all treaties made & ratified under the authority of the U. S. shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or their Citizens and inhabitants.<sup>233</sup>

Implicit in the claims of those opposed to the congressional veto was the understanding that state courts could review the constitutionality of federal legislation. After all, opponents of the congressional veto could not possibly have thought that they were replacing an express congressional veto with an implicit one. If the state courts had to enforce *every* federal statute, no matter how unconstitutional, Congress effectively would enjoy the very authority deemed totally unacceptable to the states. Congress could pass statutes voiding state laws at will and the state courts would be the ready enforcers of the very evil sought to be avoided.

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see text accompanying notes 58–60, we classify Johnson as someone who supported judicial review of federal statutes by federal courts.

<sup>230</sup> Farrand, ed, 2 *Records of the Federal Convention* at 430 (cited in note 92).

<sup>231</sup> See *id.* at 27–29 (discussing the Congressional veto with Morris stating that the proposal would “disgust all the States”).

<sup>232</sup> See *id.* at 27.

<sup>233</sup> *Id.* at 28–29.

Safe to say, neither Luther Martin nor any other defenders of state prerogatives proposed any such thing. Given the shared understanding of the judicial role in expanding the Constitution, these delegates fully expected that the state courts would not have to enforce unconstitutional federal statutes and would not thereby be forced to nullify every state law that Congress might designate. Indeed, the language of the Supremacy Clause itself suggests the limited state court undertaking. Only federal statutes made “in pursuance of” the Constitution are part of the supreme Law of the Land and hence, only federal statutes consistent with the Constitution actually trump contrary state law. Any other interpretation of the Supremacy Clause and the events leading up to it would mean that those unwilling to grant Congress an express negative would have unwittingly ceded one sub silentio.

Apart from these instances when judicial review was evident in the actions or decisions of the delegates, the delegates at other times made generic references to judicial review. For instance, when Oliver Ellsworth of Connecticut argued that the Constitution should be sent to the state legislatures for approval,<sup>234</sup> Gouverneur Morris and James Madison cited judicial review as the reason to ignore the Articles of Confederation’s amendment procedure. Morris wished to have the Constitution ratified by a majority of the states and then too by the people of the states, rather than by unanimous vote of the state legislatures as required by the Articles. He understood that if only a bare majority of legislatures ratified the changes, however, judges might void the Constitution as failing to follow the amendment process specified in the Articles. “Legislative alterations not conformable to the federal compact, would clearly not be valid. The Judges would consider them as null & void.”<sup>235</sup> If the people of the states ratified the Constitution, however, the judges would accept it as law. Judicial review was understood to be such a potent mechanism that judges might nullify the proposed Constitution itself for its failure to conform to the Articles’ amendment process.<sup>236</sup>

In discussing the ratification process for the new Constitution, Madison likewise confirmed the existence of judicial review. If the state legislatures ratified the new Constitution, it would have the same legal status as a treaty. If the people ratified the Constitution, however, it would be a true Constitution that the judges could enforce as supreme law. A treaty might be just as morally inviolable as a constitution, but in political operation, the latter was far preferable because of the resulting availability of judicial review. A subsequent law violating a treaty might supersede the treaty, but

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<sup>234</sup> *Id.* at 88–93.

<sup>235</sup> *Id.* at 92.

<sup>236</sup> The Articles of Confederation did not specifically authorize judicial review either of congressional resolutions or of proposed amendments. That Morris understood that judicial review would serve to safeguard the Articles suggests that judicial review was an established institution.

“[a] law violating a constitution established by the people themselves, would be considered by the Judges as null & void.”<sup>237</sup> In other words, Madison believed that if the people adopted a constitution, judicial review necessarily followed to ensure that the constitution trumped contrary laws.<sup>238</sup>

Finally, Hugh Williamson’s discussion of the federal Ex Post Facto Clause also demonstrated the common acceptance of judicial review. A delegate from North Carolina, Williamson declared himself in favor of the federal Ex Post Facto Clause because far from being futile (as Daniel Carroll and James Wilson had suggested), this clause would be useful because “the Judges could take hold of it,” in other words, use it to declare federal ex post facto laws unconstitutional.<sup>239</sup>

Morris, Madison, and Williamson stated principles of general applicability. The courts would not enforce laws inconsistent with a constitution’s provisions and would not enforce constitutional amendments adopted in contravention of the procedure for amendments. Morris insisted that in order to avoid judicial review of radical constitutional changes, one had to secure the people’s consent for such change. Madison argued that recourse to the people also ensured that the new Constitution itself would benefit from judicial review.<sup>240</sup> Williamson noted that protections for individual rights gave judges a solid basis for striking down unconstitutional acts. The point not to be lost is that each thought that judges generally could refuse to enforce laws contrary to the existing constitutional order.

## 2. Judicial review of state law.

Exchanges regarding judicial review of state laws also reveal the general support for judicial review. Once again, these discussions reveal that delegates assumed the existence of judicial review even before the Convention adopted language codifying it. First, delegates understood that the limited, written constitution would authorize judicial review of state law by the state and federal courts just as they believed it would sanction judicial review of federal statutes. Specific textual authorization for such review was unnecessary. Second, no delegate ever claimed to have been unfamiliar with

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<sup>237</sup> Farrand, ed, 2 *Records of the Federal Convention* at 93 (cited in note 92).

<sup>238</sup> One might be tempted to construe Madison’s claim as limited to judicial review of state legislation only. We see no need to so confine it. First, the logic of his argument applies regardless of the source of law. Second, Madison elsewhere acknowledged judicial review of federal statutes. We think Madison was making a general point about how to treat unconstitutional legislation enacted against the backdrop of a popular constitution.

<sup>239</sup> *Id.* at 376.

<sup>240</sup> In truth, the two positions were a bit inconsistent. Morris thought that judicial review was available to vindicate the Articles of Confederation even though they were adopted by the state legislatures. Madison, however, claimed that such treaty-like agreements would not benefit from judicial review. Only popularly enacted constitutions could benefit from judicial review. If Madison were right, the courts would not heed the Articles when confronted with a contrary state statute.

the concept of judicial review as a means of enforcing the federal Constitution. Third, the arguments and rationales that were relied upon in invoking judicial review of state law applied equally to judicial review of federal statutes.

When discussing the proposal to grant Congress an absolute veto of state laws, delegates cited judicial review as the appropriate means of vindicating the constitution. To Roger Sherman of Connecticut, the congressional veto was “unnecessary, as the Courts of the States would not consider as valid any law contravening the Authority of the Union, and which the legislature would wish to be negated.”<sup>241</sup> Gouverneur Morris opposed the congressional negative for the same reason. The proposal would not only arouse the “disgust [of] all the States,” it was also unnecessary because “[a] law that ought to be negated will be set aside in the Judiciary department.”<sup>242</sup>

Madison, the author of the congressional negative, never denied that the courts could ignore unconstitutional state laws. Rather he doubted the efficacy of judicial review as a means of vindicating federal law. Judicial review occurred too late in the process. States could accomplish their harmful objectives before their unconstitutional laws could “be set aside by the National Tribunals.”<sup>243</sup> Nor could one be confident that state judges would defend the Constitution in the face of possible retaliation by the state legislatures. After all, “[i]n R. Island the Judges who refused to execute an unconstitutional law were displaced, and others substituted.”<sup>244</sup> While Madison admitted that judicial review could restrain the states, he did not regard it as a perfect substitute for a congressional veto that could immediately check unconstitutional state laws.<sup>245</sup> When Sherman, Morris, and Madison made their comments about judicial review, the Convention had not yet approved either the Supremacy Clause or Article III. Each of these delegates spoke of an institution that would exist even in the absence of express constitutional authorization. Like the state court judges, delegates concluded that under a written constitution with a separation of powers, the judiciary (both state and federal) would choose superior over inferior law in the course of deciding cases.

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<sup>241</sup> Farrand, ed, 2 *Records of the Federal Convention* at 27 (cited in note 92).

<sup>242</sup> *Id.* at 28.

<sup>243</sup> *Id.* at 27.

<sup>244</sup> *Id.* at 28.

<sup>245</sup> Such was the pervasiveness of the “Doctrine” that Edmund Randolph actually urged judicial review as a check on the proposed congressional veto. Recognizing that the states justly would fear unfettered congressional review of state legislation, Randolph proposed allowing the states to challenge the constitutionality of congressional vetoes before the federal courts. See Farrand, ed, 3 *Records of the Federal Convention* at 56 (cited in note 95). One might view Randolph’s proposal as indicating that judicial review was not assumed to be a natural judicial function. Judicial review of *legislation*, however, was the norm. To extend judicial review over exercises of veto authority would have been unprecedented. Granting the courts the power to review the constitutionality of such vetoes would have required clear textual authorization because it would have reached well beyond the existing consensus in favor of judicial review of statutes.

The Convention disagreed with Madison's misgivings about the efficacy of judicial review. It unanimously approved the predecessors of the Supremacy and State Judges Clauses that were premised on the notion that the state courts could engage in judicial review of the constitutionality of state law. Why were these provisions adopted when so many delegates had assumed the existence of judicial review even in the absence of any authorizing constitutional language?<sup>246</sup> As noted earlier, we believe that these provisions were adopted to overcome the existing allegiance of state judges to their state constitutions and laws. Some delegates, such as Roger Sherman and Gouverneur Morris, believed that adoption of the new Constitution would bind state judges to enforce the Constitution's supremacy. Others took a different view. Edmund Randolph, for example, asserted that "[n]o judge will say that the *confederation* is paramount to a State constitution."<sup>247</sup> Thus, rather than "authorizing" judicial review of state law, the Supremacy and State Judges Clauses merely create the conditions thought necessary for state judges to exercise judicial review to enforce the new supreme Law of the Land. The clauses instruct state judges to abandon any exclusive loyalty to their individual state constitutions and laws. Instead, the state judges were to enforce the Constitution and (constitutional) federal statutes over conflicting state law.

Judicial review of state law also was clearly implicit when delegates discussed whether to create inferior federal courts. When defenders of the state judiciaries attempted to fend off the idea, they implied that the state courts would refuse to enforce state constitutions and laws that violated federal law.<sup>248</sup> They also admitted that the Supreme Court could correct the errors of the state judiciaries, especially in those situations where the federal law ought to trump the state law.<sup>249</sup> The proponents of state courts lost the argument because their opponents convincingly argued that state courts might not consistently choose federal law over state law. Notwithstanding the Supremacy and State Judges Clauses, state courts might remain partial

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<sup>246</sup> Professor Kramer claims that the delegates adopted the Supremacy and State Judges Clauses because these clauses were necessary to answer the "leading objection to judicial review": that it was unauthorized. Kramer, 115 *Harv L Rev* at 63 (cited in note 16). Professor Kramer's claim about the delegates' objection to judicial review is crucial because it allows him to distinguish judicial review of state law from judicial review of federal statutes, which he argues never received the same specific textual authorization. The Philadelphia debates, however, provide no real basis for believing that the principle objection to judicial review was that it was unauthorized. The only clear opponent of judicial review, John Francis Mercer, did not object that it was unauthorized. Instead, he simply disapproved of the doctrine's substance. Since no one else unequivocally objected to judicial review, the leading objection was Mercer's—that judicial review was a bad idea.

<sup>247</sup> Farrand, ed, 1 *Records of the Federal Convention* at 26 (cited in note 91) (notes of James McHenry). Madison agreed that "judges of the state must give the state laws their operation, although the law abridges the rights of the national government." *Id* at 169 (notes of Robert Yates).

<sup>248</sup> See, for example, *id* at 119 (John Rutledge claiming that state courts could decide "all cases in the first instance").

<sup>249</sup> See *id* at 124 (John Rutledge noting that the Supreme Court could secure uniformity).

to their state's laws.<sup>250</sup> Given the fear of legislative retribution, state judges might choose to ignore superior federal rules. Supporters of inferior federal courts, however, never argued that the state courts were constitutionally or institutionally incapable of judicial review of state legislation. Nor did anyone argue that judicial review of state law was inconsistent with American constitutional law. Instead, both sides in the debate assumed that there would be judicial review of state law. They merely differed as to which judiciary would best exercise that power in the first instance.<sup>251</sup>

Consider finally Madison's claim about the prohibition on state ex post facto laws. Madison regarded the Contract Clause as unnecessary because "the prohibition of ex post facto laws, which will oblige the Judges to declare such interferences null & void" effectively rendered the Contract Clause superfluous.<sup>252</sup> Whatever the merits of his interpretive claim, Madison again assumed the existence of judicial review.<sup>253</sup> Even though his statement was made in the context of the state ex post facto clause, there is no reason to believe that Madison somehow thought that the courts were unable to enforce the federal Ex Post Facto Clause. As we have seen, throughout the Federal Convention Madison spoke in support of judicial review of federal statutes. Hence, Madison's observations about the state ex post facto clause seem equally apt for its federal counterpart: Judges would be "oblige[d]" to "void" federal ex post facto statutes.

Today, most everybody agrees that the Constitution authorizes judicial review of state law by federal and state courts. But few have revealed how the Philadelphia delegates treated this issue. We have shown that the delegates generally assumed that the state courts already enjoyed the power to ignore unconstitutional state laws. We also have revealed that no delegate ever claimed ignorance of how judicial review would function to vindicate supreme federal law. Finally, the arguments for judicial review of state law paralleled the arguments for judicial review of federal statutes.

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<sup>250</sup> See, for example, *id.* at 122, 124 (James Madison observing that uncertainty would result from committing the resolution of conflicts between state and federal laws to state courts); Farrand, ed, 2 *Records of the Federal Convention* at 46 (cited in note 92) (Edmund Randolph arguing that "the Courts of the States can not be trusted with the administration of the National laws").

<sup>251</sup> Given the understanding that the judicial function encompassed judicial review, there was no need for precise textual authorization with regard to review of state law by the federal judiciary. Indeed it is telling that apparently no delegate cited the "arising under" language as legitimating judicial review by federal courts of state laws. We do not think the lack of such a discussion suggests that the language did not authorize federal court review of state law. Rather, we think that delegates presumed the existence of judicial review by state and federal courts and hence there was no reason to highlight the textual authority for federal courts to engage in judicial review of state law.

<sup>252</sup> Farrand, ed, 2 *Records of the Federal Convention* at 440 (cited in note 92).

<sup>253</sup> It seems likely that he was referencing *all* judges, federal and state. We have already highlighted that the Constitution nowhere specifically authorizes judicial review of state law by federal courts (even though the Constitution did specifically sanction such review by the state courts). See Part III.C. Hence it seems to be the case that Madison understood that courts were in the business of judicial review and read the "arising under" jurisdiction as encompassing both judicial review of federal statutes and of state law.

### 3. Consensus regarding the judicial role.

What emerges from this comprehensive account of the Philadelphia Convention is the sense that, despite the claims of recent scholarship,<sup>254</sup> judicial review was anything but unknown or uncertain. Apparently no delegate questioned the repeated references to the power of the judiciary to ignore unconstitutional laws. Indeed, many of the references to judicial review were concise, suggesting that the concept was familiar rather than obscure or unknown. Moreover, it appears that no one was surprised by the repeated references to judicial review—precisely the opposite reaction one would expect if judicial review had not yet been generally embraced. Indeed, neither the lone delegate who objected to judicial review nor the delegate who voiced mild misgivings ever claimed that judicial review was unfamiliar or unclear.

Even more relevant, the number of delegates who spoke favorably of judicial review indicates that it largely had become an accepted product of a written constitution with a separation of powers. Fifteen delegates from nine of the twelve states that sent delegates spoke about judicial review of federal legislation in almost two dozen different instances.<sup>255</sup>

Some have claimed that we should not take the views of a dozen delegates as representative of the understanding of the whole Convention. But these delegates were leaders in the Convention and the most active and engaged debaters. While it would be speculative to assume that those who spoke necessarily reflected the views of the silent delegates, it probably is the case that those who spoke about judicial review were the most influential.<sup>256</sup>

Furthermore, if we examine the views of all the delegates by scrutinizing what they said or wrote before, during, and after the Convention, the

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<sup>254</sup> See, for example, Kramer, 115 Harv L Rev at 59 (cited in note 16).

<sup>255</sup> Some have attempted to minimize the significance of what these delegates said in the Convention by suggesting that they amounted to a small minority. See, for example, *id.* at 60–61 (cited in note 16). Given that many delegates said virtually nothing during the proceedings and given that there were so many issues before the Convention, we think it difficult to deny the import of what fifteen delegates said about judicial review in almost two dozen instances.

The delegates are William Samuel Johnson (Connecticut); John Dickinson (Delaware); Luther Martin and John Francis Mercer (Maryland); Elbridge Gerry and Nathaniel Gorham (Massachusetts); Rufus King (New York); Hugh Williamson (North Carolina); James Wilson and Gouverneur Morris (Pennsylvania); Charles Pinckney (South Carolina); James Madison, George Mason, Edmund Randolph, and John Rutledge (Virginia).

We rely on Jack Rakove's research in classifying Nathaniel Gorham as a delegate who opposed the Council of Revision on the grounds that judges could protect themselves by determining the constitutionality of federal laws. See Rakove, 49 Stan L Rev at 1058 (cited in note 24). Thus even though we do not discuss his views in the text, we count him among those discussing judicial review.

<sup>256</sup> Using a slightly expanded list of delegates, Corwin notes that the delegates favoring judicial review account for twice as many columns in Farrand's Index than did the delegates who were apparently silent regarding judicial review. See Corwin, *The Doctrine of Judicial Review* at 11–12 (cited in note 24). This suggests that those who actively participated in the Convention's proceedings were more likely to discuss judicial review just like they were more likely to discuss other constitutional issues.

historical evidence provides even more support for our claims. Raoul Berger, for example, estimated that the delegates at the Federal Convention favored judicial review by twenty-six to six (out of a total of fifty-five delegates).<sup>257</sup> Charles Beard claimed that the tally was twenty-five to three.<sup>258</sup> As we expand the scope of our inquiry in order to discern the views of delegates who apparently said nothing about the matter at Philadelphia, the evidence in favor of judicial review only becomes more lopsided.

It is also worth emphasizing that delegates assumed that judicial review of federal statutes and state law would exist prior to any language that could be thought to specifically authorize any form of judicial review. Following the example of state judges who had read the limited state constitutions to authorize judicial review, delegates understood that the limited federal constitution likewise would authorize judicial review of federal statutes. Indeed, though judicial review of all sorts was discussed throughout the convention, no one ever remarked that the proposed constitution's text somehow failed to sanction judicial review of federal legislation. Had there been a general hostility to judicial review, surely at least one delegate would have objected when judicial review of federal statutes was cited as a reason against particular proposals and as a reason in favor of others.<sup>259</sup>

Although scholarly work typically differentiates judicial review of state laws from judicial review of federal statutes, the Convention records supply no reason for drawing this artificial distinction. First, no delegate ever spoke in favor of such asymmetric judicial review. Second, no delegate ever claimed that one form of judicial review was on a firmer textual footing than the other. Third, no delegate even drew a distinction between the two forms of judicial review. This is hardly surprising. In light of the concerns about granting the federal government too much power, few would have argued in favor of subjecting state legislatures to judicial review, while simultaneously seeking to set Congress free of the same mechanism. Although delegates might have spoken particularly about the need to keep the states or Congress within the bounds of the Constitution, these individuals

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<sup>257</sup> See Berger, *Congress v. The Supreme Court* at 104 (cited in note 24) (noting the names of supporters and detractors of judicial review at the Convention).

<sup>258</sup> See Beard, *The Supreme Court and the Constitution* at 69 (cited in note 24).

<sup>259</sup> It is significant that apparently no one denounced judicial review of state legislation. Why were those who supposedly favored an exclusive resort to popular constitutionalism utterly silent while the Convention specifically incorporated judicial review of state law by state courts? Moreover, if judicial review was a novel, revolutionary, and largely unknown concept in 1787, why did no proponent of state power ever denounce the innovation of allowing courts to second-guess the state legislatures? As to the first question, we think that those in favor of popular constitutionalism understood that judicial review was not a threat. A judicial obligation to enforce only constitutional statutes in no way preempts the people from reaching their own independent judgments of the constitutionality of legislation. This also explains why so few objected to judicial review of federal statutes. Regarding the second question, we think that defenders of state prerogatives never made such objections because judicial review was an accepted means of checking legislatures and because they understood that judicial review would apply to federal statutes as well.

were merely discussing two different applications of the same basic principle.

Numerous delegates—James Wilson, James Madison, Edmund Randolph, Elbridge Gerry, George Mason, Luther Martin, Gouverneur Morris—foresaw that judicial review would arise from a written, limited constitution with a separation of powers. These delegates were not speaking on the assumption that judicial review would be adopted later in the Convention’s proceedings. Instead, these delegates made their statements against the backdrop of a shared understanding about judicial review. Even if judicial review had been a “barely audible note” prior to the Convention, as one scholar has argued,<sup>260</sup> judicial review became a full-throated roar during the Convention’s proceedings. That roar reached its crescendo during the ratification struggle, when people inside and outside the ratification conventions repeatedly confirmed that the Constitution sanctioned judicial review of federal legislation.

### C. The Ratification of Judicial Review

Carefully examined, the Federal Convention records demonstrate that judicial review was well understood to result from the nature of a written, limited Constitution with a separation of powers. However, those records provide us only with a sense of the intentions of those who drafted the Constitution. It was ratification by the state conventions that gave the Constitution its legal status as the nation’s fundamental law. Hence it is appropriate to examine the records of the ratification debates and the interpretations of the Constitution put forward by its original readers, including citizens, polemicists, and delegates.<sup>261</sup>

The ratification materials provide even more support than the Philadelphia debates for the conclusion that the Founders understood the Con-

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<sup>260</sup> See Kramer, 115 Harv L Rev at 60 (cited in note 16).

<sup>261</sup> Several historians have distinguished between the original intent of the drafters of the Constitution at the Federal Convention, and the original intent of those who ratified the document. See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 8–9 (Vintage 1996) (insisting that this distinction is critical if originalism intends to provide an authoritative interpretation of the constitutional text because only the intention of the Ratifiers can suffice); Levy, *Original Intent* at 2 (cited in note 24) (“What mattered to [the Framers] was not the understanding of the Convention but] the text of the Constitution, construed in the light of conventional rules of interpretation, the ratification debates, and other contemporary expositions.”); Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 Const Comm 77, 111–13 (1988) (arguing that because they understood that the Constitution could withstand charges of usurpation only by virtue of ratification, the Framers rejected appeals to framer intent in interpreting the text). A third originalist approach would be to seek out the Constitution’s objective public meaning and not exclusively focus on the Framers or the Ratifiers.

Many leading Federalists took the position that it is the evidence from the ratification that should matter most. See, for example, Jensen, ed, 2 *Documentary History of the Ratification* at 483–84 (cited in note 59) (statement by James Wilson before the Pennsylvania ratifying convention to the effect that only through ratification would the Constitution have value and authority); Federalist 40 (Madison), in *The Federalist* 258, 263–64 (cited in note 76) (describing the work of the federal Convention as “advisory and recommendatory,” requiring imprimatur of approval from state conventions).

stitution to authorize judicial review of federal legislation. Throughout the United States, dozens of speakers and writers made clear that judges, federal and state, could refuse to enforce legislation that transgressed the Constitution. Participants confirmed that the Constitution established judicial review of federal legislation in no fewer than seven ratifying conventions.<sup>262</sup> In addition, pamphlets and newspaper essays were published in all but one state observing that the Constitution would authorize judicial review of federal legislation. Far from ignoring judicial review or criticizing its supposed absence, both Federalists and Anti-Federalists affirmed that the Constitution would authorize judicial review of federal statutes.

In fact, judicial review played a critical role in the Federalist defense of the Constitution. Judicial review was discussed in several different contexts: protection of individual rights; enforcing limits on congressional power; limiting state power; and the jurisdiction of the courts.<sup>263</sup> In general, judicial review arose in these debates as a response to the common Anti-Federalist argument that the Constitution established a consolidated national government that would absorb the states and violate individual liberties.<sup>264</sup> After Federalist claims that the federal government was a government of only enumerated powers did not quiet the controversy, the debate shifted to the institutional mechanisms that would enforce the Constitution's written limits. Federalists observed that the judiciary could enforce the limits on congressional power by refusing to enforce unconstitutional laws.<sup>265</sup>

No Anti-Federalist denied that the Constitution sanctioned judicial review of federal statutes. In fact, they agreed that the Constitution authorized such review, complaining that judicial review would prevent Congress from fixing the Constitution's flaws. Far from calling judicial review into doubt, such criticisms yield further evidence that the Constitution was understood as codifying judicial review.

#### 1. Judicial review in the state ratifying conventions.

In at least seven state ratifying conventions, leading delegates openly declared that the Constitution authorized judicial review of federal legislation. In none of these conventions did anyone deny that the courts could refuse to enforce unconstitutional federal statutes. Nor did anyone ever admit

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<sup>262</sup> These were Connecticut, Massachusetts, New York, North Carolina, Pennsylvania, South Carolina, and Virginia. See Part III.C.1.

<sup>263</sup> We have previously discussed the treatment of judicial review during the ratification struggle. See Prakash and Yoo, 79 *Tex L Rev* at 1505–21 (cited in note 7). Our treatment here differs in two respects. First, we lay out far more evidence that supports the understanding that the Constitution authorized judicial review. Second, we approach the materials chronologically, rather than thematically.

<sup>264</sup> See Yoo, 70 *S Cal L Rev* at 1375 (cited in note 24) (arguing that federalism and individual rights concerns were intertwined in the ratification debates and both were addressed by judicial review).

<sup>265</sup> The course of the debate along these lines is reviewed in *id.* at 1374–91.

that they were unfamiliar with or unaware of judicial review. We recount these discussions in the order in which the states ratified the Constitution.

a) *Pennsylvania*. In the Pennsylvania convention, opponents of the Constitution did not doubt that the Constitution would authorize judicial review of federal statutes. Instead, opponents like John Smilie and Robert Whitehill questioned the efficacy of judicial review as a check on Congress. James Wilson triggered the debate by listing judicial review as one of many checks on the federal government:

I say, under this Constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department . . . [I]t is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual *mode*, notwithstanding that transgression; but when it comes to be discussed before the judges—when they consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void. And judges, independent and not obliged to look to every session for a continuance of their salaries, will behave with intrepidity and refuse to the act the sanction of judicial authority.<sup>266</sup>

In unequivocally embracing judicial review, Wilson merely confirmed his earlier comments in the Federal Convention.

Neither Smilie nor Whitehill contested Wilson's claim that judicial review could keep Congress in check. Instead they sought to show how weak the institution would be. Smilie argued that federal judges would lack the courage to stand up to Congress because they might be impeached for "disobeying a law," in other words, declaring a law unconstitutional.<sup>267</sup> Commenting on the Supremacy Clause, Whitehill claimed that any law would be made "in *pursuance*" of the Constitution if it went through bicameralism and presentment. That is, unconstitutional laws would still be treated as part of the supreme Law of the Land,<sup>268</sup> and judicial review would prove an empty promise.<sup>269</sup>

Wilson demolished their claims. He mocked Smilie's assertion that Congress could impeach judges for engaging in judicial review. "The judges are to be impeached because they decide an act null and void that was made in defiance of the Constitution! What House of Representatives would dare to impeach, or Senate to commit judges for the performance of

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<sup>266</sup> Jensen, ed, 2 *Documentary History of the Ratification* at 450–51 (cited in note 59). Wilson's comments about judicial review are confirmed by William Wayne's notes. See id at 453 ("The legislature may be restrained by the judicial department.").

<sup>267</sup> Id at 466.

<sup>268</sup> Id at 513.

<sup>269</sup> Wilson previously had claimed that Congress could not pass any laws restricting the press because such laws would not be in "pursuance" of the Constitution. See id at 454–55.

their duty?”<sup>270</sup> He also refuted Whitehill’s narrow construction of “pursuance.” Only constitutional laws could be described as “made in Pursuance” of the Constitution:

If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void. For the power of the Constitution predominates. Anything, therefore, that shall be enacted by Congress contrary thereto will not have the force of law.<sup>271</sup>

One can hardly overestimate the significance of Wilson’s comments. He was one of the most learned lawyers of his day and second only to Madison in his influence on the Constitution’s drafting.<sup>272</sup> His first point suggests how accepted judicial review had become. Whereas impeachment was initially considered an option for judges thought to have engaged in judicial review in *Trevett v Weeden*, Wilson spoke as if such retribution was unthinkable. His second point confirms that “made in Pursuance” in the Supremacy Clause did not confer supremacy on all federal statutes that went through bicameralism and presentment. Only otherwise constitutional federal statutes can be described as “made in Pursuance” of the Constitution.

Wilson, Smilie, and Whitehill were not the only delegates at the Pennsylvania Convention to note the availability of judicial review. The Chief Justice of the Pennsylvania Supreme Court, Thomas McKean, listed judicial review as one of three checks on federal legislative authority. McKean observed that “[i]n order to secure Liberty and the Constitution, it is absolutely necessary that the Legislature should be restrained.” While mentioning popular constitutional methods—elections and revolutions—the first method he cited was “[b]y the Judges deciding agst. the Legislature in Favor of the Constn.”<sup>273</sup> Pennsylvania’s brightest legal lights confirmed that judicial review would be a central element of the new constitutional order.<sup>274</sup>

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<sup>270</sup> *Id.* at 492.

<sup>271</sup> Jensen, ed, 2 *Documentary History of the Ratification* at 517 (cited in note 59).

<sup>272</sup> See Robert Green McCloskey, *Introduction*, in Robert Green McCloskey, ed, 1 *The Works of James Wilson* 1, 2 (Harvard 1967) (noting Wilson’s accomplishments in the founding era). Wilson’s understanding of the Constitution was valued throughout the country. As we recount later, his confirmation of judicial review was published in newspapers throughout the states.

This is not to say that we are of the opinion that Wilson’s views on the Constitution were always correct. Our conclusions are based on the totality of the evidence and not on what one or two “influential” founders might have believed. Wilson was right in his beliefs about judicial review because so many others agreed with him.

<sup>273</sup> John Bach McMaster and Frederick D. Stone, eds, *Pennsylvania and the Federal Constitution, 1787–1788* 766 (Historical Society of Pennsylvania 1888).

<sup>274</sup> Though we are unaware of any cases in which the Pennsylvania judiciary had engaged in judicial review of state statutes prior to the state’s ratification of the Constitution, it is clear that judicial review was a known institution in Pennsylvania. As mentioned earlier, the Pennsylvania Council of Censors had criticized the Pennsylvania Constitution because it did not prevent the removal of judges when

b) *Connecticut*. Speaking at the Connecticut convention, future Chief Justice of the U.S. Supreme Court Oliver Ellsworth likewise cited judicial review as an essential check on federal legislative power:

This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality are to be made independent, will declare it to be void.<sup>275</sup>

Ellsworth also noted that state legislatures would be subject to judicial review.<sup>276</sup> He confirmed the general understanding that *all* legislatures were subject to judicial review and undermined any notion that judicial review of federal statutes differed from judicial review of state law. Given that Ellsworth had attended the Philadelphia Convention and was a judge on the highest Connecticut court, his understanding of the Constitution likely carried weight before the Connecticut convention. As a Connecticut Senator, Ellsworth would serve as the principal drafter of the Judiciary Act of 1789, which assumed that the Constitution authorized judicial review of federal statutes by state and federal courts.<sup>277</sup>

c) *Massachusetts*. Samuel Adams, addressing the Massachusetts convention, noted that judges would void unconstitutional federal legislation. The Massachusetts Governor, John Hancock, had proposed an amendment that would have affirmed that “all powers not expressly delegated to Congress, are reserved to the several states to be by them exercised.” Adams praised the proposal because “if any law made by the federal government shall be extended beyond the power granted by the proposed Constitution, and inconsistent with the Constitution of this State, it will be an error, and adjudged by the courts of law to be void.”<sup>278</sup> Clearly the proposal itself did not codify judicial review. Instead, it provided an additional (arguably superfluous) basis for courts to judge the constitutionality of federal legislation. In making his point, Adams relied upon a preexisting understanding that the Constitution authorized courts to engage in judicial review.

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judges ruled state statutes unconstitutional. See note 181 and accompanying text.

<sup>275</sup> Merrill Jenson, ed, 3 *The Documentary History of the Ratification of the Constitution* 553 (State Historical Society of Wisconsin 1978) (speech at the Connecticut convention on Jan 7, 1788).

<sup>276</sup> See *id* (“On the other hand, if the states go beyond their limits . . . the law is void; and upright, independent judges will declare it to be so.”).

<sup>277</sup> See Part III.D.

<sup>278</sup> John P. Kaminski and Gaspare J. Saladino, eds, 6 *The Documentary History of the Ratification of the Constitution* 1395 (State Historical Society of Wisconsin 2000) (speech at Massachusetts Convention on Feb 1, 1788).

Theophilus Parsons, author of the famous Essex Result,<sup>279</sup> likewise confirmed the availability of judicial review, but did so along popular constitutional lines. He first mentioned that all state officers, including state judges, would have to take an oath to the Constitution and that they would thereby be obliged to vigorously oppose federal usurpations. Presumably, state judges could engage in vigorous opposition by engaging in judicial review of federal statutes. Parsons went on to note that “any man” could resist an act of federal usurpation, thereby indicating that everyone, including state and federal judges, would be able to resist unconstitutional federal legislation.<sup>280</sup>

d) *South Carolina*. In South Carolina, Charles Pinckney, a delegate to the Philadelphia Convention, confirmed that judicial review would exist under the new Constitution. The judiciary was “the keystone of the arch . . . whose duty it would be not only to decide all national questions which should arise within the Union,” but also to keep the state judiciaries in check.<sup>281</sup> This echoed his observation at the Federal Convention that the federal courts would act as “umpires” between the federal and state governments.<sup>282</sup> Pinckney also noted that the judiciary and the executive would check and correct the “licentiousness” of Congress, thus emphasizing that the federal courts could curb legislative usurpations.<sup>283</sup>

e) *Virginia*. Many delegates discussed judicial review of federal legislation at the Virginia convention. Federalists included Governor Edmund Randolph; Edmund Pendleton, President of the Court of Appeals; future Virginia Attorney General George Nicholas; John Marshall; and James Madison. Anti-Federalists, such as former Governor Patrick Henry, George Mason, and William Grayson, agreed that the Constitution authorized judicial review.

Presaging the conclusions that he would reach in *Marbury v Madison*, John Marshall cited judicial review as an effective check on Congress:

Can [Congress] go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the Judges as an infringement of the Constitution

<sup>279</sup> The Essex Result was one town’s response to the proposed Massachusetts Constitution of 1778 and “the first clear formulation of the [separation of powers] theory which was to become the basis of the Federal Constitution.” M.J.C. Vile, *Constitutionalism and Separation of Powers* 165 (Liberty Fund 2d ed 1998)

<sup>280</sup> Jonathan Elliot, ed, 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 93–94 (2d ed 1836) (“An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance.”). The future Massachusetts Supreme Court Justice could not have meant that state and federal judges could resist unconstitutional laws in their private capacity but would have to enforce such laws in their public characters.

<sup>281</sup> Elliot, ed, 4 *Debates on the Adoption* at 257–58 (cited in note 76) (describing the judiciary as the “most important and intricate part of the [Constitutional] system”).

<sup>282</sup> See note 228.

<sup>283</sup> See Elliot, ed, 4 *Debates on the Adoption* at 330 (cited in note 76).

which they are to guard:—They would not consider such a law as coming under their jurisdiction.—They would declare it void.<sup>284</sup>

Responding to the claim that the federal judiciary would shield federal officers from liability, Marshall claimed that the federal judiciary would vindicate the Constitution:

To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the Judiciary? There is no other body that can afford such a protection. . . . Were a law made to authorise [official trespass against private property or persons], it would be void.<sup>285</sup>

Marshall's unequivocal remarks powerfully support the claim that the Constitution originally authorized judicial review.

Edmund Pendleton discussed judicial review in the context of western land claims. Should Congress pass laws regarding the validity of such claims, the federal and state courts would take no cognizance of them because Congress lacked legislative authority over such claims.<sup>286</sup> Both sets of courts would decide “in strict conformity to justice” and protect preexisting property interests.<sup>287</sup> Edmund Randolph made similar claims about criminal law and procedure. Should Congress require excessive bail and fines or enact cruel and unusual punishments, “Judges must judge contrary to justice” before these punishments can be inflicted.<sup>288</sup> Likewise, if general warrants were authorized, “[c]an it be believed that the Federal Judiciary would not be independent enough to prevent such oppressive practices? If they will not do justice to persons injured, may they not go to our own State Judiciaries and obtain it?”<sup>289</sup> Randolph not only confirmed that judicial review would be an element of the Constitution; he also believed that state judges could exercise this power.

Consistent with his earlier affirmation of judicial review at Philadelphia, Madison confirmed that the Constitution authorized judicial review in the Virginia convention. Observing that the power of judicial review flowed from the federal judiciary's “arising under” jurisdiction, he argued that the Constitution recognized “a new policy” of submitting the “explication of [federal] authority” to the “judiciary of the United States.”<sup>290</sup> Madison could not have meant that federal courts were relegated merely to rubber-stamping assertions of federal authority. If that were the case, there might

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<sup>284</sup> Kaminski and Saladino, eds, 10 *Documentary History of the Ratification* at 1431 (cited in note 58).

<sup>285</sup> *Id.* at 1432.

<sup>286</sup> See *id.* at 1200–01.

<sup>287</sup> *Id.* at 1200. See also *id.* at 1427 (Edmund Pendleton stating that the judiciary would never accept an “oppressive construction” of the laws).

<sup>288</sup> *Id.* at 1351.

<sup>289</sup> *Id.* at 1351–52.

<sup>290</sup> Elliot, ed, 3 *Debates on the Adoption* at 532 (cited in note 180).

be no judicial explication of the Constitution. Rather, the “new” policy was to allow the federal courts to interpret and apply the Constitution in the course of deciding cases. According to Madison, this was the meaning of Article III’s “arising under” jurisdiction.<sup>291</sup>

Encapsulating the complementary relationship between judicial review and popular constitutionalism, George Nicholas characterized the judiciary as the first line of defense and the people as the ultimate defense. In explaining the Sweeping and General Welfare Clauses, Nicholas asked: “[W]ho is to determine the extent of such powers? I say, the same power which in all well regulated communities determines the extent of Legislative powers—If they exceed these powers, the Judiciary will declare it void.”<sup>292</sup> But if the judiciary failed in its duty, “the people will have a right to declare it void.”<sup>293</sup> Nicholas’s comments reveal that judicial review was not meant to supplant popular methods of enforcing the Constitution. Rather, judicial review was an initial defense of a limited constitution.

Virginia Anti-Federalists never denied the existence of judicial review of federal legislation. Instead, they pursued two arguments. First they denied the efficacy of judicial review. Patrick Henry argued that the federal judiciary lacked the “fortitude” to ignore unconstitutional acts because they were not sufficiently independent of Congress.<sup>294</sup> Congress might impeach judges or raise their salaries to make them pliable. This weakness contrasted sharply with the fortitude of the state judiciary. “I take it as the highest encomium on this country [Virginia], that the acts of the Legislature, if unconstitutional, are liable to be opposed by the Judiciary.”<sup>295</sup> Far from denying that federal judges could engage in judicial review, Henry questioned whether the judiciary would have the resolve to oppose unconstitutional acts.

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<sup>291</sup> Admittedly, Madison cited the restrictions on the states as an example of the restrictions the judiciary was meant to enforce. See *id.* Yet there is no reason to doubt that this citation was illustrative rather than a complete description of cases arising under the Constitution. Indeed, he had just spoken of the “new policy” that the judiciary would explicate the Constitution in general terms. Moreover, it is worth noting that Madison makes clear that the Constitution is law cognizable by the courts.

In a recent article on Madison’s view of judicial review, Jack Rakove indicates that Madison in 1787–1788 expected the courts to “police the boundaries of federalism separating the legislative jurisdictions of the Union and the states.” Jack N. Rakove, *Judicial Power in the Constitutional Theory of James Madison*, 43 *Wm & Mary L Rev* 1513, 1528 (2002) (commenting on Federalist 39).

<sup>292</sup> Kaminski and Saladino, eds, 10 *Documentary History of the Ratification* at 1327 (cited in note 58).

<sup>293</sup> *Id.*

<sup>294</sup> See *id.* at 1219. Earlier, Henry had mocked those who claimed that the “judiciary . . . will correct all” possible congressional infractions on the Constitution because he once again claimed that the federal judges were made dependent upon Congress. John P. Kaminski and Gaspare J. Saladino, eds, 9 *The Documentary History of the Ratification of the Constitution* 962 (State Historical Society of Wisconsin 1990).

<sup>295</sup> Kaminski and Saladino, eds, 10 *Documentary History of the Ratification* at 1219 (cited in note 58).

The Anti-Federalists' second and more frequent course of attack was to argue that judicial review would prevent the enforcement of beneficial, albeit unconstitutional, federal laws. For instance, when Anti-Federalists charged that federal judges would review findings of fact made by juries, Federalists responded that Congress could pass "regulations" that would preclude such appellate review. In turn, Anti-Federalists claimed that judicial review made a legislative fix impossible. George Mason asserted that a constitutional amendment would be necessary to prevent the Supreme Court from reviewing factual findings. Even if Congress passed a law preventing appellate judges from reviewing facts, "will not the Court be still judges of the fact consistently with this Constitution?"<sup>296</sup> Henry made the same claim. Congress could not prohibit review of factual findings because "the Federal Judges, if they spoke the sentiments of independent men, would declare [the legislative] prohibition nugatory and void."<sup>297</sup> This conclusion followed from the more general rule that Congress could not "depart from the Constitution; and their laws in opposition to the Constitution, would be void."<sup>298</sup>

Mason repeated this general argument in the context of the Revolutionary War debt. He insisted that Congress would have to pay off the debt in full because any law that redeemed the debt below par would be *ex post facto*. Should Congress pay less than the nominal amount, the federal judiciary

must determine according to this Constitution. It says expressly, that they shall not make *ex post facto* laws . . . . Will it not be the duty of the Federal Court to say, that such laws are prohibited?—This goes to the destruction and annihilation of all the citizens of the United States, to enrich a few. . . . As an express power is given to the Federal Court, to take cognizance of such controversies, and to declare null all *ex post facto* laws, I think Gentlemen must see there is danger, and that it ought to be guarded against.<sup>299</sup>

Mason's claims about judicial review were of a piece with his acknowledgment at the Federal Convention that the federal judiciary would decide the constitutionality of federal legislation. He also confirmed that "arising under" jurisdiction was understood as an express authorization of judicial review of federal legislation.

William Grayson, another Anti-Federalist, employed this argument in the context of state sovereign immunity. Grayson complained that the Constitution abrogated state immunity against suit by foreign governments and that Congress could not statutorily restore immunity. "If the Congress can-

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<sup>296</sup> Id at 1407.

<sup>297</sup> Id at 1420–21.

<sup>298</sup> Id at 1420.

<sup>299</sup> Id at 1361–62.

not make a law against the Constitution, I apprehend they cannot make a law to abridge it. The Judges are to defend it. They can neither abridge nor extend it.”<sup>300</sup> Whatever the merits of Grayson’s point about sovereign immunity, he believed that judges were charged with defending the Constitution, even when faced with unconstitutional statutes that might mitigate or eliminate serious problems with the Constitution.

Virginia Anti-Federalists did not criticize the Constitution for its creation of judicial review. Indeed, Patrick Henry had conspicuously praised the institution. Rather, they criticized particular problems with the Constitution, and pointed out that Congress could not correct them because the courts would ignore unconstitutional legislation. Everyone who discussed judicial review at the Virginia convention not only confirmed the existence of judicial review of federal legislation, they also appeared to favor it.

*f) New York.* In the New York ratifying convention, Alexander Hamilton affirmed the claims he had made outside the convention regarding the availability of judicial review. At one point during the proceedings, he argued that both the federal and state governments had a concurrent power of taxation. Should the question come before the federal courts, “they will express the true meaning of the Constitution and the laws” and permit collection of the state taxes. Indeed, the federal judges would “be bound . . . to declare that both the taxes shall have equal operation . . . . If they transgress their duty, we are to hope that they will be punished.”<sup>301</sup> The next day in the convention, Hamilton noted that because the laws of the United States were supreme only with respect to authorized powers, when Congress “depart[s] from this sphere, [its laws] are no longer supreme or binding.”<sup>302</sup>

*g) North Carolina.* With *Bayard v Singleton* fresh in their minds, North Carolina delegates read the Constitution as authorizing judicial review. John Steele rejected the notion that Congress could lengthen congressional tenure pursuant to its power over the time, place, and manner of congressional elections. “The judicial power of that government is so well constructed as to be a check . . . . If the Congress make laws inconsistent with the Constitution, independent judges will not uphold them, nor will the people obey them.”<sup>303</sup> Likewise, William Davie observed that in every government, it was necessary that a judiciary exist to decide all questions “arising out of the Constitution.” Absent a judiciary, “the injunctions of the Constitution may be disobeyed, and the positive regulations neglected or contravened.”<sup>304</sup> Indeed, Davie went so far as to say that constitutional pro-

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<sup>300</sup> Id at 1448.

<sup>301</sup> Elliot, ed, 2 *Debates on the Adoption* at 356 (cited in note 280).

<sup>302</sup> Id at 362. Hamilton had earlier noted that with a bicameral legislature, a divided executive, and an “independent” judiciary, “it is next to impossible that an impolitic or wicked measure should pass the scrutiny with success.” Id at 348.

<sup>303</sup> Elliot, ed, 4 *Debates on the Adoption* at 71 (cited in note 76).

<sup>304</sup> Id at 156.

visions would be “dead letter[s]” absent judicial enforcement.<sup>305</sup> Though Davie made these comments primarily in the context of discussing restrictions on state power, he also cited the Port Preference Clause, a clause that limits only congressional power.<sup>306</sup> More generally, the logic of his argument indicates that all of the Constitution’s federal limitations and prohibitions would have been viewed as “dead letter[s]” had the judiciary not been vested with the authority to refuse to enforce efforts to violate these rules.

Before we move to an examination of what was said outside the conventions, several points are worth emphasizing. First, delegates discussed the existence of judicial review in no fewer than seven conventions.<sup>307</sup> Second, almost two dozen delegates discussed judicial review of federal legislation in the state ratifying conventions. Third, because some individuals mentioned judicial review multiple times, the subject was discussed almost three dozen different times. Fourth, in the face of these comments, no one denied that the judiciary would enforce the Constitution’s limitations on federal power. Opponents of the Constitution only doubted whether the federal judiciary would be resolute enough to stand up to Congress. Anti-Federalists even claimed that judicial review would preclude the enforcement of laws that would ameliorate the Constitution’s flaws. Fifth, support for judicial review did not come from unknown quarters. Almost all the leading lights of the founding spoke in favor of it: James Wilson, Alexander Hamilton, Edmund Randolph, James Madison, Patrick Henry, George Mason, Oliver Ellsworth, John Marshall, and many others. If there were those who thought that the Constitution did not authorize judicial review of federal legislation, they kept strangely silent.

## 2. Judicial review outside the conventions.

Commentaries in the pamphlets and newspapers that circulated during the ratification period provide an important source of the Constitution’s original public meaning. In these essays, we can see several important developments. First, the number and quality of the references demonstrate that the understanding of judicial review was widespread. Second, these writings demonstrate that judicial review became an important element in the Federalist defense of the Constitution against claims that the federal government would burst the limits on its enumerated powers. And third, the

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<sup>305</sup> *Id.* at 158.

<sup>306</sup> See *id.* at 156–57.

<sup>307</sup> What of the other state ratifying conventions (Delaware, Georgia, Maryland, New Hampshire, New Jersey, and Rhode Island)? Because of the paucity of material from these other conventions, we cannot draw any firm conclusions one way or the other. Still, there is no reason to think that the conventions for which we have records were outliers when it came to judicial review of federal legislation. As noted in the next Part, judicial review of federal legislation was discussed in newspapers and pamphlets in twelve of the thirteen states.

written debate between Federalists and Anti-Federalists demonstrates that both groups assumed that the Constitution would authorize judicial review.

To begin with, the press reprinted convention speeches that confirmed that judicial review would be a central constitutional feature. An account of James Wilson's speech supporting judicial review, for example, was published in the *Pennsylvania Herald* and was subsequently republished eleven times, from Vermont to South Carolina.<sup>308</sup> Oliver Ellsworth's similar defense of judicial review at the Connecticut ratifying convention was published in fourteen newspapers in the four months after his speech.<sup>309</sup>

Many other individuals wrote anonymous or pseudonymous essays and pamphlets specifically designed to influence the public. Writing as "Aristides," Federalist Alexander Contee Hanson confirmed the availability of judicial review. Hanson, a judge on the Maryland General Court, sought to calm fears about the Necessary and Proper Clause observing that "every judge in the union, whether of federal or state appointment, (and some persons would say every jury) will have a right to reject any act, handed to him as a law, which he may conceive repugnant to the constitution."<sup>310</sup> The well-received forty-two page pamphlet, which was circulated in Maryland, Pennsylvania, Virginia, and New York,<sup>311</sup> confirmed that both federal and state judges would decide the constitutionality of federal statutes.

Responding to Edmund Randolph's published objections to the Constitution, John Stevens, Jr., likewise confirmed the existence of judicial review. As "Americanus," Stevens noted that the

Constitution itself is a *supreme law of the land*, unrepealable by any *subsequent law*: every law that is not made in conformity to *that*, is in itself nugatory, and the Judges, who by their oath, are bound to support the Constitution as the *supreme law of the land* must determine accordingly.<sup>312</sup>

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<sup>308</sup> See *Newspaper Report of Proceedings and Debates*, Pa Herald (Dec 8, 1787), reprinted in Jensen, ed, 2 *Documentary History of the Ratification* at 524 (cited in note 59); id at 525 n 1 (editorial note).

<sup>309</sup> See James Wadsworth and Oliver Ellsworth, *Speeches in the Connecticut Convention*, Conn Courant (Jan 14, 1788), reprinted in Kaminski and Saladino, eds, 15 *Documentary History of the Ratification* at 273, 278–79 (cited in note 59) (Ellsworth's comments on judicial review); id at 279 n 1 (editorial note relating that by April 22, 1788, Ellsworth's speech was reprinted in six newspapers in Connecticut, one in New York, five in Pennsylvania, one in Maryland, and one in South Carolina).

<sup>310</sup> See Aristides (Alexander Contee Hansen), *Remarks on the Proposed Plan of a Federal Government*, reprinted in Kaminski and Saladino, eds, 15 *Documentary History of the Ratification* at 517, 531 (cited in note 59) (discussing the role of the judiciary in relation to limitations on the power of Congress).

<sup>311</sup> Id at 518 (editorial note).

<sup>312</sup> See Americanus VII (John Stevens, Jr.), *A Refutation of Governor Edmund Randolph's Objections*, Daily Advertiser (NY) (Jan 21, 1788), reprinted in Bernard Bailyn, ed, 2 *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle over Ratification* 58, 60 (Library of America 1993).

Stevens indicated that the Constitution's status as supreme law superior to statutes, in combination with the judicial duty to enforce the Constitution, authorized judicial review.<sup>313</sup>

*The Federalist*, the most famous public explication and defense of the Constitution, is replete with references to judicial review. Madison twice mentioned judicial review serving as a check on legislation that might exceed the Constitution's enumerated limits. In Federalist 39, Madison noted that the Supreme Court was the "tribunal" to "ultimately" decide in an impartial manner "the boundary between" the state and national authority. Recognizing that the federal judiciary was not bound to enforce all congressional statutes, Madison claimed that these decisions were to be made "according to the rules of the Constitution."<sup>314</sup> In Federalist 44, Madison reaffirmed this federal judicial role. If Congress misconstrued the Necessary and Proper Clause or any other provision and "exercise[d] powers not warranted" by the Constitution, "[i]n the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts."<sup>315</sup> If the federal judiciary were always obliged to enforce congressional laws—if they could not engage in judicial review—they would have no real say as to "the success of the usurpation" other than to facilitate it.

Alexander Hamilton expanded upon these passing references.<sup>316</sup> As is well known, Federalists 78 and 81 defend judicial review and judicial independence as important elements of the new constitutional order. Federalists had initially argued that the federal government would not exceed the limits on its powers because of the political safeguards of federalism: The states would have such a hand in the selection of the Senate, House, and Presi-

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<sup>313</sup> Writing in a Virginia newspaper, "The State Soldier" denied that Congress or the states could pass ex post facto laws or deprive people of their property:

Under this government neither the Congress nor state legislature could, by direct laws, deprive us of any property we might hold under the general law of the land, or punish us for any offence committed previous to the passage of such laws, since they are prohibited from passing ex post facto laws.

See *The State Soldier* IV, Va Indep Chron (Mar 19, 1788), reprinted in John P. Kaminski and Gaspare J. Saladino, eds, 8 *The Documentary History of the Ratification of the Constitution* 509, 510–11 (State Historical Society of Wisconsin 1988). Nor could they "destroy the equality of right, or injure the value of property in a particular state, or belonging to any individual by a partial administration of justice, since the same doors of one general tribunal would be opened to all—which would on the contrary enhance the value of all property." *Id.* at 511. The *State Soldier* understood that judicial review safeguarded property values.

<sup>314</sup> Federalist 39 (Madison), in *The Federalist* 250, 256 (cited in note 76).

<sup>315</sup> Federalist 44 (Madison), in *The Federalist* 299, 305 (cited in note 76).

<sup>316</sup> He first mentioned judicial review in Federalist 16, noting its ability to keep the states in check. Suppose a state legislature sought to oppose the execution of federal laws. "If the Judges were not embarked in a conspiracy with the Legislature they would pronounce the resolutions of such a majority to be contrary to the supreme Law of the Land, unconstitutional and void." Federalist 16 (Hamilton), in *The Federalist* 99, 104 (cited in note 76). Though the immediate issue was state statutes, the thought clearly had wider application.

dency that they could prevent the enactment of unconstitutional laws.<sup>317</sup> In response, Anti-Federalists argued that Congress could not be trusted to be the judge of its own powers, and that ambition would drive federal officials to expand federal powers.<sup>318</sup> Hamilton's argument in Federalists 78 and 81 amounted to a reply brief.

Hamilton maintained that even if the political safeguards failed, the courts could still refuse to enforce legislation that infringed the Constitution in cases before them:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.<sup>319</sup>

Because of the nature of the Constitution as the supreme expression of the people's will, Hamilton wrote, judges were duty bound to enforce its provisions above any statute. "[W]here 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."<sup>320</sup>

Hamilton also made other points that confirmed the availability of judicial review of federal statutes. First, he argued that judicial independence was necessary for judges to resist unconstitutional legislation. Perhaps thinking of the controversy in Rhode Island, he explained that life tenure was needed to insulate judges from any retaliation for their exercise of judicial review.<sup>321</sup> Second, Hamilton defended judicial review on the basis that the "natural presumption" was that legislators were not the "constitutional judges" of their own powers. Instead, "[i]t is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter

<sup>317</sup> See, for example, Federalist 45 (Madison), in *The Federalist* 308, 311 (cited in note 76) ("Thus each of the principal branches of the federal Government will owe its existence more or less to the favor of the State Governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious, than too overbearing towards them.")

<sup>318</sup> See, for example, Brutus I, NY J (Oct 18, 1787), reprinted in John P. Kaminski and Gaspare J. Saladino, eds, 13 *The Documentary History of the Ratification of the Constitution* 411, 416 (State Historical Society of Wisconsin 1981) ("[E]very body of men, invested with power, are ever disposed to increase it. . . . This disposition, which is implanted in human nature, will operate in the federal legislature to lessen and ultimately to subvert the state authority."); Brutus VI, NY J (Dec 27, 1787), reprinted in Kaminski and Saladino, eds, 15 *Documentary History of the Ratification* 110, 115 (cited in note 59) (arguing that the General Welfare Clause was so broad as to constitute a "matter of opinion . . . and the Congress will be the only judges in the matter").

<sup>319</sup> Federalist 78 (Hamilton) at 525 (cited in note 103) (explaining how the courts stand between the people and the legislature).

<sup>320</sup> *Id.*

<sup>321</sup> See *id.* at 526–27 (stating that the courts' function as a barrier to legislative overreaching "afford[s] a strong argument for the permanent tenure of judicial offices").

within the limits assigned to their authority.”<sup>322</sup> Indeed, Hamilton would later claim that judicial review was “not deducible” from anything in the Constitution, but instead flowed from “the general theory of a limited constitution.”<sup>323</sup>

Finally, Hamilton noted that any critique of judicial review by federal courts would equally apply to the state constitutions, which also authorized judicial review.<sup>324</sup> While we disagree with his claim that judicial review was “not deducible” from the Constitution’s text, Hamilton confirmed that the Constitution was written and ratified against a background presumption about how judges ought to decide cases when a statute conflicted with a constitution. Even in the absence of the Constitution’s “peculiar expressions” (to quote Chief Justice Marshall),<sup>325</sup> the operation of the separation of powers within a written, limited constitution would have given rise to judicial review nonetheless.

Consistent with the claims of their counterparts in the state ratifying conventions, Anti-Federalists in the public arena never denied that the Constitution permitted judicial review. Brutus, whose claims about judicial review provoked Hamilton’s Federalists 78 and 81, discussed judicial review extensively in three separate papers.<sup>326</sup> Brutus had initially argued that the federal government would eventually invade state sovereignty because Congress could not be trusted to be the judge of its own powers. When Federalists argued that judicial review would provide a secondary check, Brutus agreed that courts would have that authority. In addressing Article III, Section 2, Brutus observed that the courts “are authorised to determine all questions that may arise upon the meaning of the constitution in law. This article vests the courts with authority to give the constitution a legal construction, or to explain it according to the rules laid down for construing

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<sup>322</sup> *Id.* at 524–25.

<sup>323</sup> Federalist 81 at 543 (cited in note 179):

[W]herever there is an evident opposition, the laws ought to give place to the constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention; but from the general theory of a limited constitution; and as far as it is true, is equally applicable to most, if not all the state governments.

<sup>324</sup> See *id.*

<sup>325</sup> *Marbury*, 5 US (1 Cranch) at 178.

<sup>326</sup> See Brutus XV, NY J (Mar 20, 1788), reprinted in John P. Kaminski and Gaspare J. Saladino, eds, 16 *The Documentary History of the Ratification of the Constitution* 431, 434–35 (State Historical Society of Wisconsin 1986) (acknowledging that the Constitution committed the “constitutional mode of deciding upon the validity of the law” to the Supreme Court, and arguing that this power, largely unfettered by other constraints, would work to the detriment of state power). See also Brutus XI, NY J (Jan 31, 1788), reprinted in Kaminski and Saladino, eds, 15 *Documentary History of the Ratification* 512, 512–17 (cited in note 59) (describing the Constitution’s provisions for the federal judiciary and arguing that they do not guarantee that the judiciary will work for the common good); Brutus XII, NY J (Feb 7 and 14, 1788), reprinted in Kaminski and Saladino, eds, 16 *Documentary History of the Ratification* 72, 72–75, 120–22 (arguing that the power of judicial review possessed by the federal judiciary would enable it to destroy the states).

a law.”<sup>327</sup> It was the nature of the Constitution as supreme law, its application in court as law, and the function of the federal judiciary to decide cases or controversies, that produced judicial review. Brutus wrote:

[T]he courts are vested with the supreme and uncontrollable power, to determine, in all cases that come before them, what the constitution means; they cannot, therefore, execute a law, which, in their judgment, opposes the constitution, unless we can suppose they can make a superior law give way to an inferior.<sup>328</sup>

As one of the most incisive Anti-Federalist writers, Brutus acknowledged the existence of judicial review, and indeed he agreed with Federalists on its basic origins and function. Because he criticized the Constitution as enshrining judicial supremacy, one might view him as a critic of judicial review. Properly understood, however, Brutus did not actually object to judicial review. Instead, he objected to the judicial supremacy that might result from judicial review. In any event, whatever his exact views on the desirability of judicial review of federal statutes, Brutus unequivocally confirmed that the Constitution would establish such judicial review.

In his famous report to the Maryland House of Assembly on the proceedings of the Federal Convention, Anti-Federalist Luther Martin protested that federal judges would wield judicial review in a partial manner. He insisted that whether federal laws are constitutional “rests *only* with the judges, who are *appointed* by Congress.”<sup>329</sup> Martin erroneously charged that the Constitution required Congress to create inferior federal courts and accord them exclusive jurisdiction over cases “arising under the Constitution.”<sup>330</sup> Far from denying judicial review, however, Martin merely objected that federal judges were not sufficiently independent of Congress.

Other Anti-Federalists complained that the federal judiciary would employ their equitable powers to avoid their judicial duty. The Federal Farmer claimed that the judiciary’s equity powers would enable the courts to uphold otherwise unconstitutional federal tax laws:

Suppose a case arising under the constitution—suppose the question judicially moved, whether, by the constitution, congress can suppress a state tax laid on polls, lands, or as an excise duty, which may be supposed to interfere with a federal tax. By the letter of the constitution, congress will appear to have no power to do it: but then the

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<sup>327</sup> Brutus XI at 513 (cited in note 326).

<sup>328</sup> Brutus XII at 73 (cited in note 326).

<sup>329</sup> Luther Martin, *Genuine Information X*, Balt Md Gazette (Feb 1, 1788), reprinted in Kaminski and Saladino, eds, 16 *Documentary History of the Ratification* 8, 8 (cited in note 326). Martin was refighting a battle he had lost in Philadelphia. Martin had proposed the Supremacy and State Judges Clauses to preclude the creation of lower federal courts. The Convention, however, both adopted these clauses and authorized Congress to create an inferior federal judicial system.

<sup>330</sup> *Id.*

judges may decide the question on principles of equity as well as law.<sup>331</sup>

Though denying the efficacy of judicial review, the Federal Farmer clearly assumed that judges could void constitutional laws. A suit challenging the constitutionality of a federal statute would be a case “arising under” the Constitution. In a letter to Samuel Adams, Samuel Osgood likewise criticized the equity power as allowing the federal judiciary to avoid its obligation to enforce the Constitution. “[S]uppose then, any State should object to the exercise of Power by Congress as infringing the Constitution of the State, the legal Remedy is to try the Question before the supreme Judicial Court.” Yet the Supreme Court could go beyond “the Letter of the general or State Constitutions, to consider & determine upon it, in Equity—This is in Fact leaving the Matter to the Judges of the supreme Judicial Court.”<sup>332</sup> Both Osgood and the Federal Farmer complained that the equity power would allow courts to ignore their duty to engage in judicial review of federal legislation. Had they not believed that judicial review was a check on Congress, they would never have had occasion to criticize the equity power in the first instance.<sup>333</sup>

Anti-Federalists outside the conventions also employed the same tactic used by Henry, Mason, and Grayson at the Virginia ratifying convention. They claimed that judicial review would prevent the enforcement of laws designed to correct perceived constitutional defects. “Centinel” insisted that even if the Congress wanted to

violate the fundamental articles of the constitution for the sake of public justice [to ensure payment of debts owed the Confederation] . . . still it would be of no avail, as there is a further barrier interposed . . . , namely, the supreme court of the union, whose province it would be to determine the constitutionality of any law that may be controverted. . . . [I]t would be [the judges’] sworn duty to refuse their sanction to laws made in the face [of] and contrary to the letter and spirit of the constitution.<sup>334</sup>

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<sup>331</sup> Letter XV from the Federal Farmer to the Republican (Jan 18, 1788), in John P. Kaminski and Gaspare J. Saladino, eds, 17 *The Documentary History of the Ratification of the Constitution* 333, 341–42 (State Historical Society of Wisconsin 1995) (arguing that the grant of equity power to federal judges will allow them to appeal to the “spirit and true meaning of the constitution” in deciding cases).

<sup>332</sup> Letter from Samuel Osgood to Samuel Adams (Jan 5, 1788), in Kaminski and Saladino, eds, 15 *Documentary History of the Ratification* 263, 265 (cited in note 59).

<sup>333</sup> For an examination of the concern over the courts’ equity jurisdiction during the Framing, see John C. Yoo, *Who Measures the Chancellor’s Foot?: The Inherent Remedial Authority of the Federal Courts*, 84 Cal L Rev 1121, 1153–61 (1996) (arguing that the Federalists responded to the Anti-Federalist critique by denying that the federal judiciary would have broad equity powers).

<sup>334</sup> Centinel XVI, *Indep Gazetteer, or the Chronicle of Freedom* (Feb 26, 1788), reprinted in McMaster and Stone, eds, *Pennsylvania and the Federal Constitution* 657, 659 (cited in note 273).

“A Planter” in Georgia more generally argued that Congress could not “give relief against the operation of any article of the Constitution” because judges would treat such federal statutes as void.<sup>335</sup> Anti-Federalists almost took a perverse pleasure in pointing out that there could be no legislative solution for the Constitution’s perceived faults.<sup>336</sup>

Finally, it is worth taking special note of the evolving views of those two Philadelphia delegates that had doubted the wisdom of judicial review. Recall that at Philadelphia John Dickinson expressed reservations about judicial review, while at the same time doubting that any more effective device would serve the same purpose. During the ratification fight, however, he actually praised judicial review. Writing as “Fabius,” Dickinson observed that one significant check on federal authority would be the “federal independent *judges*, so much concerned in the execution of the laws, and in the determination of their constitutionality.”<sup>337</sup> In his illustrious career, Dickinson had served as Governor of Delaware and President of the Pennsylvania Executive Council and had been a primary drafter of the Articles of Confederation. His observation on judicial review was published in seven newspapers from New Hampshire to Virginia.<sup>338</sup>

John Francis Mercer had more emphatically disapproved of judicial review at Philadelphia.<sup>339</sup> Yet during the ratification fight he seemed to have believed that the Constitution authorized judicial review. Writing as “A Farmer,”<sup>340</sup> Mercer belittled Aristides’s claims about concurrent federal and

<sup>335</sup> “A Planter” warned that after the Constitution’s ratification, paper money could no longer be used to satisfy debts. Moreover, the state could not grant debtors greater time to pay. Even if Congress wanted “to give relief against the operation of any article of the Constitution,” it could not do so. Any congressional attempt would be “set aside” because the Constitution was the supreme Law of the Land. See “A Planter,” excerpt from *Ga State Gazette* (July 3, 1788), reprinted in Jensen, ed, 3 *Documentary History of the Ratification* 304, 304–05 (cited in note 275). “A Planter” was not seeking to influence ratification in Georgia because his comments came months after Georgia voted to ratify the Constitution.

<sup>336</sup> Such was the pervasive recognition of judicial review that even a New York correspondent of a London newspaper noted that there would be judicial review of federal acts. “The judicial power is established for the benefit of foreigners, and will be a check on any encroachment for the State or the United States on the Constitution. They have the power of declaring void any law infringing it.” *London Public Advertiser* (Oct 8, 1789), quoted in Warren, *Congress, the Constitution, and the Supreme Court* at 66 (cited in note 24). Though this statement was made in 1789, we find it telling that even correspondents for foreign newspapers understood that judicial review would prevent the enforcement of unconstitutional federal and state legislation. Warren also cites two other statements from 1789, one from a New York newspaper and one from a North Carolina newspaper. See *id.* at 66 & n 2.

<sup>337</sup> Fabius IV (John Dickinson), *Pa Mercury* (Apr 19, 1788), reprinted in Kaminski and Saladino, eds, 17 *Documentary History of the Ratification* 180, 182 (cited in note 331).

<sup>338</sup> *Id.* at 180 (editorial note).

<sup>339</sup> See Farrand, ed, 2 *Records of the Federal Convention* at 298 (cited in note 92) (stating that he “disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontroulable”).

<sup>340</sup> Herbert Storing notes that “A Farmer” was likely John Francis Mercer. See Herbert J. Storing, ed, 5 *The Complete Anti-Federalist* 5 & n 1 (Chicago 1981) (editorial note setting forth evidence supporting that conclusion). See also Kaminski and Saladino, eds, 15 *Documentary History of Ratification*

state court jurisdiction.<sup>341</sup> In particular he remarked: “Is it not absurd to suppose that the *national* government intended that the *State* courts should have jurisdiction to decide on the LAWS of the *United States*, whether consonant or repugnant to the *national constitution . . . ?*”<sup>342</sup> “A Farmer” went on in this vein, repeatedly mocking the notion that petty state judges might declare federal statutes unconstitutional.

Of all the comments about judicial review during the ratification struggle, Mercer’s attack on Aristides comes the *closest* to denying that the Constitution authorized judicial review. But in denying only that the state courts could engage in judicial review of federal statutes, Mercer implied that the Constitution authorized such judicial review by federal courts. Aristides had claimed that *both* the state and federal courts could engage in judicial review. While attacking Aristides for his amateurish interpretation of the proposed Constitution, Mercer never contested Aristides’s point that the federal courts could engage in judicial review. Instead, Mercer merely asserted that the state courts were deprived of jurisdiction over all those branches of jurisdiction mentioned in Article III, Section 2.<sup>343</sup> Mercer apparently conceded that *only* the federal courts could hear challenges to the constitutionality of federal statutes. In any event, Mercer clearly was wrong in supposing that the grant of authority to the federal courts to engage in judicial review of federal statutes was somehow exclusive. As we discuss in the next Part, the Judiciary Act of 1789 makes clear that both the state and federal courts may judge whether federal statutes are “consonant or repugnant to the Constitution.”

Outside the convention halls, more than a dozen individuals, writing in newspapers or pamphlets that appeared in twelve of the thirteen states, agreed that the Constitution authorized such review. Once again, these individuals who affirmed judicial review—Wilson, Ellsworth, Madison, Hamilton, Dickinson, Martin, Yates—were among the most influential and respected legal minds of the era. Both proponents and opponents of ratification shared the belief that the Constitution authorized judges to engage in judicial review of federal acts. Finally, two Philadelphia delegates who had questioned the wisdom of judicial review conceded during the ratification struggle that federal courts, at least, could engage in judicial review of federal statutes.

Fairly read, the ratification materials indicate that the Constitution was originally read and understood to authorize judicial review of federal stat-

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at 519 (cited in note 59) (editors noting A Farmer “perhaps” was Mercer).

<sup>341</sup> See notes 310–311 and accompanying text. [dan error]

<sup>342</sup> A Farmer VI (Apr 1, 1788), in Storing, ed, 5 *The Complete Anti-Federalist* 51, 54 (cited in note 340).

<sup>343</sup> See *id.* at 53 (stating that Article III jurisdiction “is expressly given to the inferior federal courts,” and that it was clear that the Article “was intended to keep the federal and State jurisdictions entirely separate”).

utes. Table 1 tallies up the number of speakers in the convention and the number of separate publications (or re-publications) of essays and pamphlets confirming that the Constitution would authorize judicial review of federal statutes. The Table illustrates that judicial review was discussed throughout the nation during the ratification fight. It also demonstrates that four of the most important states—Massachusetts, New York, Pennsylvania, and Virginia—saw multiple confirmations of judicial review of federal statutes. We don't wish to make too much of these figures, interesting as they are. But they do seem impressive once one realizes that no scholar to date has identified even *one* participant in the ratification fight who argued that the Constitution did not authorize judicial review of federal statutes. This silence in the face of the numerous comments on the other side is revealing and hard to ignore.

**Table 1**  
**Ratification Period References Confirming**  
**Constitutionality of Judicial Review of Federal Statutes**

States	Discussions of Judicial Review of Federal Legislation at State Ratifying Conventions <sup>344</sup>	Published Pamphlets and Essays Discussing Judicial Review of Federal Legislation <sup>345</sup>	Totals for Individual States
Connecticut	1	8	9
Delaware	- <sup>346</sup>	1	1
Georgia	-	2	2
Maryland	-	3	3
Massachusetts	2	7	9
New Hampshire	-	2	2
New Jersey	-	-	-

<sup>344</sup> The figures in this column represent the number of *times* that judicial review of federal legislation was discussed in each of the state ratifying conventions and not the number of separate *statements* made by those speakers in each state convention.

<sup>345</sup> The figures in this column represent the total number of original publications and re-publications of pamphlets and essays discussing judicial review of federal legislation during the ratification period. For example, some pamphlets or essays were published in only one newspaper in a given state whereas other pamphlets or essays were published in multiple newspapers and states. These figures were compiled from sources such as the volumes of the *Documentary History of the Ratification of the Constitution*, *The Friends of the Constitution*, and *The Complete Anti-Federalist*, each of which provide publication information for pamphlets and essays. *The Documentary History* is particularly useful because it provides precise publication records in the Appendix of each volume. See, for example, 15 *Documentary History of the Ratification* at Appendix 2 (cited in note 59).

<sup>346</sup> Sometimes, the lack of convention records precludes drawing conclusions one way or another. Indeed, states where no figures are given are precisely those states where we have the fewest records of what transpired at the ratifying conventions. As a general matter, we know very little about what was said at these conventions.

New York	1	29	30
North Carolina	2	1	3
Pennsylvania	6	15	17
Rhode Island	-	2	2
South Carolina	2	2	3
Virginia	11	2	10
<b>All States</b>	25	74	109 <sup>347</sup>

#### D. Judicial Review in the Early Years

Whatever one might say about judicial review prior to the Constitution's ratification, the record during the first years of the republic is clear. Scholars agree that by the first Congress, the nation's political leaders recognized that judicial review of federal statutes would be an element of the new constitutional order. The historical record reveals a smooth transition from the ratification struggle to the early days of the new republic, an unsurprising conclusion if one accepts that judicial review was part of the broader historical trends of the period. From our perspective, the evidence from this period reveals a general acceptance that the Constitution authorized judicial review.

It should come as no surprise that judicial review continued to take root in the courts in the early years. Over a sixteen-year period, there were some twenty state court cases in which at least one judge held a statute unconstitutional.<sup>348</sup> Professor William Treanor contends that the sheer volume of cases from this period indicates that judicial review was not that extraordinary.<sup>349</sup>

One of the most fulsome discussions of judicial review from the era is found in *Vanhorne's Lessee v Dorrance*,<sup>350</sup> a federal circuit court case in which Supreme Court justices struck down a state law. Justice William Patterson, explaining why he struck down the state law, observed:

[I]f a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that, in such case, it will be the duty of the Court to adhere to the Constitution, and to declare the act null and void. The Constitution is the basis of legislative authority; it

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<sup>347</sup> The total for "All States" is ten speakers/publications higher than the sum of the totals in the two preceding columns because the relevant source confirms that an account of James Wilson's affirmation of judicial review was published a total of twelve times but only identifies two of the states in which it was published. See note 308 and accompanying text. As a result, we have included the ten additional publications in the "All States" total but have not attributed them to any particular states.

<sup>348</sup> See William Michael Treanor, *Judicial Review before Marbury: Policing Boundaries* (unpublished manuscript on file with U Chi L Rev).

<sup>349</sup> See *id.* at 5.

<sup>350</sup> 2 US (2 Dall) 304 (CCC Pa 1795).

lies at the foundation of all law, and is a rule and commission by which both legislators and judges are to proceed.<sup>351</sup>

Appealing to American exceptionalism, Patterson declared, “Whatever may be the case in other countries, yet, in this, there can be no doubt, that every act of the legislature, repugnant to the constitution, is absolutely void.”<sup>352</sup> Patterson’s opinion, though uttered in the context of a case involving state law, clearly was a general exposition about the nature of American constitutions. Indeed, his opinion likely formed the basis of Marshall’s in *Marbury*.<sup>353</sup>

More generally, in almost two dozen instances, federal judges asserted the power to declare statutes unconstitutional.<sup>354</sup> Cases in which Supreme Court justices asserted that judges had the power to void unconstitutional federal laws are well known: *Hayburn’s Case*,<sup>355</sup> *Cooper v Telfair*,<sup>356</sup> and *Hylton v United States*.<sup>357</sup> In *Hayburn’s Case*, a mere four years after the Constitution’s ratification, five Supreme Court justices and three district judges concluded that a federal statute imposing non-judicial duties on federal judges was unconstitutional.<sup>358</sup> Likewise, in *Hylton*, decided in 1796, three justices assumed that they had the authority to judge the constitutionality of a federal tax on carriages.<sup>359</sup> Hence it was hardly surprising when Justice Samuel Chase observed in *Cooper* that “it is indeed, a general opinion, it is expressly admitted by all this bar, and some of the Judges have, individually, in the circuits, decided, that the supreme court can declare an act of congress to be unconstitutional, and, therefore, invalid.”<sup>360</sup> The courts of this era clearly considered themselves in the business of judging the constitutionality of federal and state statutes.

Members of the first Congress likewise believed that the courts would judge the constitutionality of federal legislation. According to Professor David Currie, whose multi-volume work, *The Constitution in Congress*, is the most thorough survey of congressional constitutional interpretation, “Repeatedly and without contradiction, members of the First Congress ac-

<sup>351</sup> Id at 309.

<sup>352</sup> Id at 308.

<sup>353</sup> See Treanor, *Judicial Review before Marbury* at 76 (cited in note 348).

<sup>354</sup> See Maeve Marcus, *Judicial Review in the Early Republic*, in Ronald Hoffman and Peter J. Albert, eds, *Launching the “Extended Republic”: The Federalist Era* 25, 28, 35–48 (Virginia 1996).

<sup>355</sup> 2 US (2 Dall) 409 (1792)

<sup>356</sup> 4 US (4 Dall) 14 (1800).

<sup>357</sup> 3 US (3 Dall) 171 (1796).

<sup>358</sup> See 2 US (2 Dall) at 409–14 n (a).

<sup>359</sup> See 3 US (3 Dall) at 176 (Paterson), 183 (Iredell), 184 (Wilson).

<sup>360</sup> 4 US (4 Dall) at 18 (making the observation, but not having to so hold to settle the case at bar). In *Cooper*, the Supreme Court read the Georgia Constitution of 1777 to permit judges to determine the state constitutionality of state statutes. See id at 17–20 (seriatim opinions).

knowledged that the constitutionality of their actions would be subject to judicial review.”<sup>361</sup>

Reflecting the congressional consensus, James Madison cited judicial review in June of 1789 as a reason for adopting a bill of rights. If rights were annexed to the Constitution vis-à-vis Congress, “independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights.”<sup>362</sup> Madison made this argument presumably at the urging of Thomas Jefferson, who had earlier observed in a letter to Madison that a bill of rights puts “a legal check” in the judiciary’s hands.<sup>363</sup>

Members of the first Congress were hardly alone in their assessment. Throughout the first decade of the republic, members of Congress continued to assume that the judiciary would review the constitutionality of Congress’s handiwork in the course of deciding cases. Judicial review was discussed in the debates over the President’s removal power, the Bill of Rights, slavery, the Bank bill, the Post Office, and numerous other matters.<sup>364</sup> Moreover, as Professor Currie has observed, “there is no indication in the Annals [of Congress] that any member of Congress publicly challenged” the judicial nullification of the portions of the Invalid Pension Act in *Hayburn’s Case*.<sup>365</sup> In fact, we know of no member of Congress from the first decade who doubted or denied that the judiciary could judge the constitutionality of federal statutes.<sup>366</sup>

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<sup>361</sup> David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801* 120 (Chicago 1997).

<sup>362</sup> 1 *Annals of Congress* 457 (Gales and Seaton 1834); James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), reprinted in Robert A. Rutland, et al, eds, 12 *The Papers of James Madison* 197, 207 (Chicago 1977).

<sup>363</sup> Letter from Thomas Jefferson to James Madison (Mar 15, 1789), in Merrill D. Peterson, ed, *Thomas Jefferson: Writings* 942, 943 (Library of America 1984).

<sup>364</sup> See Kramer, 115 Harv L Rev at 78 (cited in note 16) (stating that during these debates, “most of the speakers accepted or assumed [judicial review’s] existence”).

<sup>365</sup> Currie, *The Constitution in Congress* at 155 (cited in note 361). See also *Hayburn’s Case*, 2 US (2 Dall) at 409–14, n (a) (refusing to carry out non-judicial duties required by statute); Act of Mar 23, 1792 (Invalid Pension Act) § 2, 1 Stat 243, 244 (requiring district courts to sit as commissions to examine pension claims).

<sup>366</sup> To the contrary, there is evidence that some members of Congress thought that Congress could not or should not even attempt to codify its views on the Constitution because to do so would be to usurp judicial functions. The original version of the bill creating the Department of Foreign Affairs would have declared that the Secretary was to “be removable from office by the President of the United States.” 1 *Annals of Congress* at 473 (cited in note 362). William Smith objected not only to the substance but also to the attempt to express Congress’s views on the Constitution:

Gentlemen have said that it is proper to give a legislative construction of the Constitution. I differ with them on this point. I think it an infringement of the powers of the Judiciary. . . . A great deal of mischief has arisen in the several States, by the Legislatures undertaking to decide Constitutional questions.

Id at 488–89. Smith was not alone in thinking that the Congress ought not express its views about presidential removal authority. Alexander White of Virginia noted that he “would rather the Judiciary should decide the point, because it is more properly within their department.” Id at 485. In other words, a few members thought Congress should not express its views on the Constitution’s meaning because to do so would tread upon the judiciary’s authority.

Undoubtedly, the most momentous statute relating to judicial review was the Judiciary Act of 1789.<sup>367</sup> Passed by the first Congress, the Act convincingly confirms the general approval of judicial review. First, Section 25 gave the Supreme Court authority to affirm or reverse the decisions of the highest state courts when “the validity of a treaty or statute of, or an authority exercised under the United States [is questioned], and the decision is against their validity.”<sup>368</sup> By giving the Supreme Court jurisdiction over state court decisions that were “against the[] validity” of federal statutes and treaties, Congress understood that the state courts could judge federal statutes and treaties to be unconstitutional. After all, if state courts could not decide cases against the validity of federal statutes or treaties, this Section would have been pure surplusage.<sup>369</sup> Second, Section 25 also contemplated Supreme Court appellate jurisdiction whenever a state court decided in favor of the validity of state law in the face of an alleged conflict with federal law (including the Constitution).<sup>370</sup> This part of Section 25 likely was written based on the understanding that state courts would uphold the validity of state law if they concluded that conflicting federal statutes and/or treaties

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We cite these claims from the first Congress not to suggest that Congress cannot interpret the Constitution. Congress must consider the constitutionality of its legislation and not merely leave constitutional questions for the judiciary to decide. Nonetheless, these statements are significant because they reveal the broad support for judicial review in the first Congress. Such extreme statements are not made at the cusp of a political transformation; they are made after the widespread acceptance of an idea.

<sup>367</sup> Judiciary Act of 1789 § 25, 1 Stat 73.

<sup>368</sup> *Id.* at 85. Because we refer to the Section at length, it is worth quoting in full:

That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption, specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

*Id.* at 85–87.

<sup>369</sup> This first category of cases did not involve alleged conflicts between state and federal law because there was a separate category devoted to such alleged conflicts. See language quoted in note 368.

<sup>370</sup> See 1 Stat at 85.

were unconstitutional.<sup>371</sup> Third, Congress acknowledged that the highest federal court could exercise judicial review of federal legislation when it granted the Supreme Court the authority to “affirm” state court decisions that had invalidated a federal statute. To “affirm” a decision of a state court that decided “against the[] validity” of a federal statute or treaty is to engage in judicial review of a federal statute.

Our reading of the Judiciary Act is hardly idiosyncratic. Elbridge Gerry’s comments made during discussion of the Judiciary Act most likely reflected the general sentiments of the first Congress: “The constitution will undoubtedly be [the courts’] first rule; and so far as your laws conform to that, they will attend to them, but no further.”<sup>372</sup>

It is hard to overstate the Judiciary Act’s significance. In this Act, a majority of Congress, by acknowledging the constitutionality of judicial review, made a constitutional admission against its interest. First of all, Congress assumed that *state* courts could judge the constitutionality of federal statutes. Congress could have granted the lower federal courts concurrent or exclusive jurisdiction over cases challenging the constitutionality of state law and federal statutes. Instead, notwithstanding that the Constitution nowhere directly authorizes general state court review of federal statutes and treaties, Congress recognized that the state courts already enjoyed the power to engage in such review.<sup>373</sup> Moreover, Congress admitted that the Supreme Court could likewise engage in judicial review on appeal. Presumably the Supreme Court could do the same in the context of cases in its original jurisdiction.

Those who believe that the Constitution never sanctioned judicial review of federal statutes must think that the first Congress, when it passed the Judiciary Act, massively misconstrued the Constitution. Indeed, in their eyes the first Congress must have veered sharply away from the understanding of the Constitution held by those who drafted and ratified it. However, there is no evidence that the first Congress sought to reject, rather than

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<sup>371</sup> If we are correct in our reading of this portion of Section 25, it dovetails well with our earlier assertion that by requiring state court judges to prefer federal statutes made in Pursuance of the Constitution over contrary state law, the Supremacy Clause necessarily grants authority to the state courts to judge whether federal statutes are constitutional in the first instance.

<sup>372</sup> 1 *Annals of Congress* at 861 (cited in note 362). In addition to the constitutional interpretation crucial to resolving the cases mentioned above, Section 25 also granted the Supreme Court jurisdiction over any cases questioning “the construction of any clause of the constitution . . . and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution . . . .” 1 Stat at 85–86. Once again, not only were state courts understood to be able to interpret the federal Constitution, but also the Supreme Court could “affirm” a state court’s interpretation denying alleged constitutional rights and privileges. In this regard, recall our earlier point that the oath marked out for federal judges by Section 8 required them to perform their duties “agreeably to the constitution and laws” to their best “abilities and understanding.” See *id* at 76. In *Marbury*, Chief Justice Marshall concluded that this language required federal judges to prefer the Constitution (and its meaning) in the course of deciding cases. See notes 45–47 and accompanying text.

<sup>373</sup> Section 25 did not authorize judicial review of federal statutes by state courts so much as it assumed that state courts already had the generic authority to engage in such review.

implement, the original understanding concerning the role of the courts. In fact, five of the Senators on the committee that drafted the Judiciary Act of 1789 were delegates at the Philadelphia Convention. Two other Senators were delegates as well.<sup>374</sup> We doubt that they were all wrong about the constitutionality of judicial review.

When it comes to the prevailing attitudes towards judicial review immediately before, during, and immediately after the Constitution's ratification, we believe that James Wilson spoke for most Americans of the era. In his *Lectures on the Law* (written shortly after ratification), Wilson noted that "it is the right and it is the duty of a court of justice, under the constitution of the United States, to decide" whether a statute is unconstitutional and therefore void. The Constitution had provided an "effectual and permanent provision" that "every transgression of those [constitutional] bounds shall be adjudged and rendered vain and fruitless. What a noble guard against legislative despotism!"<sup>375</sup>

#### CONCLUSION

Some academics have criticized judicial review of federal statutes as unsupported by the original understanding of the Constitution, and instead have characterized it as the invention of Chief Justice Marshall, *Marbury v. Madison*, or an imperial judiciary. In this Article, we have provided judicial review with a firmer textual, structural, and historical basis. First, we have argued that the constitutional text, particularly the Supremacy Clause and the grant of "arising under" jurisdiction in Article III, Section 2, make the Constitution ordinary law to be interpreted and applied in federal and state courts. Second, we have asserted that the constitutional structure, with its establishment of a government of limited powers, further supports judicial review. In addition, the Constitution's creation of three coordinate, equal departments of government means each of the branches must interpret and enforce the Constitution in performing its own unique constitutional functions.

Third, our review of the original understanding demonstrates that those who drafted and ratified the Constitution understood that the courts would exercise judicial review over federal statutes. Before the drafting of the Constitution, court cases throughout the states gave rise to the understanding that judges acting under limited, written constitutions must determine the constitutionality of statutes that they are called on to enforce. During the Philadelphia Convention, several leading Framers, including James Madison, Gouverneur Morris, and James Wilson, spoke in favor of

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<sup>374</sup> See Corwin, *Doctrine of Judicial Review* at 49 n 74 (cited in note 24).

<sup>375</sup> James Wilson, *Comparison of the Constitution of the United States, with that of Great Britain*, Lectures on Law XI (1790–1791), in McCloskey, ed, 1 *Works of James Wilson* 309, 330 (cited in note 270).

judicial review or assumed that it would exist. In fact, the assumption of its existence led the Framers to discard other proposed checks on legislative power. Furthermore, during the ratification debates, famous proponents and opponents of the Constitution alike understood that federal and state courts could review the constitutionality of federal statutes. Finally, during the early years of the new republic, both members of the judiciary and Congress understood the Constitution to authorize judicial review by federal and state courts.

In light of this evidence, we wonder why criticism of the legitimacy of judicial review has been so vehement of late. As we have discussed, earlier intellectual attacks on judicial review have coincided with periods of acute political and constitutional conflict, such as the Early Republic, the Civil War, the New Deal, and the Civil Rights movement. In other words, sustained criticism of the legitimacy of judicial review usually occurs when the Court has opposed significant political movements that seek to use federal power to address a pressing social problem, whether it be slavery, the nationalization of the economy and society, or economic depression. What strikes us as odd about the most recent round of academic criticism is that it is untethered to any great political or popular frustration with the Court. The Court's recent federalism decisions have yet to place any serious roadblocks before the modern regulatory state. Not only are the academic critics of judicial review mistaken on the constitutional text, structure, and history, they have launched their scholarly broadsides without the broader political support that would allow their critiques to be taken seriously by the body politic.