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The Puzzling Persistence of Process-Based Federalism Theories

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Like bell-bottom jeans, the theory of the political safeguards of federalism periodically makes a brief comeback, before common sense returns it from whence it came. In the 1950's, Professor Herbert Wechsler famously coined the phrase in arguing that the national government's structure allowed the states to protect themselves from overreaching federal laws.¹ About a quarter-century later, Dean Jesse Choper gave more theoretical substance to the idea. Because states could take care of themselves, Choper argued, courts should not interfere in federalism cases but should instead use their institutional capital to defend individual rights.² Although *Garcia v. San Antonio Metropolitan Transit Authority*³ adopted elements of the theory, the Rehnquist Court has implicitly rejected it by rejuvenating the judicial protection of federalism.⁴

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1. See 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, 546 (1954).

2. See JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175 (1980); see also Jesse H. Choper, *The Scope of National Powers Vis-à-vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977).

3. 469 U.S. 528 (1985).

4. One of us has argued that the trend of these recent federalism decisions has essentially overruled *Garcia*. See John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997) [hereinafter Yoo,

Nonetheless, the political-safeguards theory has made something of a comeback. The first sign of its resurrection was an article by Professor Larry Kramer, which argued that political parties provide all the protections that the states may need.⁵ Second came Justice Breyer's dissent in *United States v. Morrison*, where the Court invalidated the civil suit provision of the Violence Against Women Act as beyond Congress's legislative power.⁶ According to Justice Breyer, "within the bounds of the rational, Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance."⁷ Justice Souter's dissent carried similar overtones.⁸ Professor Bradford Clark's new article in this Review represents a third, and we think the most rigorous, effort to defend the political-safeguards theory.⁹ Clark argues that a strict approach to the separation of powers will safeguard the states by making it more difficult to enact federal legislation.

We have little quarrel with Clark's adherence to formalism in separation of powers. Indeed, both of us have written separately that formalism is most closely consistent with the text and the original understanding of the Constitution's separation of powers.¹⁰ What we find mistaken, however, is Professor Clark's broader effort to prop up the deeply flawed political-safeguards theory. Despite his best efforts, we conclude that the theory of the political safeguards of federalism remains fundamentally mistaken and that

Judicial Safeguards].

5. See Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

6. *United States v. Morrison*, 529 U.S. 598 (2000).

7. *Id.* at 660 (Breyer, J., dissenting) (citations omitted).

8. *Id.* at 647 (Souter J., dissenting) ("The objection to reviving traditional state spheres of action as a consideration in commerce analysis, however, not only rests on the portent of incoherence, but is compounded by a further defect just as fundamental. The defect, in essence, is the majority's rejection of the Founders' considered judgment that politics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy.").

9. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEXAS L. REV. ____ (2001).

10. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of the War Power*, 84 CAL. L. REV. 167 (1996) [hereinafter "Yoo, War Powers"].

recent scholarly attempts to give it a firmer foundation have failed. Professor Clark's piece, insightful as it is, unfortunately is rather akin to reinforcing the walls of a sand castle as the tide returns.

At the outset, a clarification is necessary. When we refer to the political safeguards of federalism we mean the theory that posits that because the states are represented in the national political process, judicial review of federalism questions is either unnecessary or unwarranted. In other words, the political safeguards of federalism refers to the theory that the political safeguards are the *exclusive* means of safeguarding the states. Under this approach, federal courts are not to exercise review over questions that involve only the balance of power between the federal government and the states.

A look at the major political-safeguards theorists illustrates the theory's permutations. Professor Choper first made the case for the exclusive theory by arguing that courts should find federalism questions nonjusticiable. Professor Kramer is also probably best classified as an exclusivist; he believes that the Rehnquist Court's federalism cases of the last decade have been based on a "phony originalism" in which the Court is "heedlessly striking down federal laws in what amounts to a treacherous game of blind man's bluff with the Constitution and American government."¹¹ While Kramer occasionally seems to contemplate some judicial review of the scope of federal power his review would be so insubstantial as to result in no review at all. (Indeed at times he argues that judicial review as a whole is constitutionally unauthorized). By contrast, Professors Wechsler's and Clark's precise views on judicial review are more difficult to identify. Almost all of Wechsler's famous 1954 article was devoted to describing the political safeguards; at the end, he fleetingly suggested that judicial review of the scope of federal power might still remain appropriate, but only if done gingerly and reluctantly.¹² While Professor Clark's argument represents an effort to shore up the political-safeguards theory generally, he fails to explore its implications for judicial review. His argument could be read to suggest that if the Court adopts a formalist approach to the separation of powers, there would be little if any need for the judiciary to police the limits of federal power.

11. Kramer, *supra* note 5, at 291.

12. Wechsler, *supra* note 1, at 559 ("This is not to say that the Court can decline to measure national enactments by the Constitution when it is called upon to face the question in the course of ordinary litigation It is rather to say that the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress.").

We do not doubt that the political safeguards may, on occasion, safeguard the states' constitutional powers and prerogatives. The Constitution was crafted to ensure the states a significant role in the composition of the federal government, and the states' continuing constitutional roles serve to sometimes protect states' rights and to restrain Congress' attempts to overreach. We challenge, however, the conclusion of Justices Breyer and Souter and political-safeguards supporters that the political safeguards represent the only protections for federalism. In our view, the exclusive theory is simply inconsistent with the Constitution's text, structure, and original understanding. None of these sources allows the federal courts to exercise judicial review while simultaneously excluding entire subject matters from its protections—especially one as central to the structure of the Constitution as federalism. The political-safeguards theory treats judicial review as purely functional and almost discretionary, while we believe that the constitutional text, structure, and history impose judicial review as a mandatory duty on the courts. We should emphasize that we are not referring to judicial review of the sort that elevates the Supreme Court's opinions into the supreme, final word on constitutional interpretation. Rather, we only defend the limited and reasonable claim that the text and structure support a more modest version of judicial review, which derives from the judiciary's performance of its constitutional duty to decide cases or controversies involving federal law. This theory of coordinate branch construction acknowledges the right of the President and Congress to interpret the Constitution in the course of performing their own unique constitutional functions.

While the Constitution lacks an obvious judicial review clause, we believe that the Framers approached the issue in the same way they understood the separation of powers. Though the latter concept never was explicitly codified, few have any difficulty seeing its expression in various constitutional texts and structures. Similarly, various constitutional provisions, when considered in their historical context, reflect the original understanding that the courts would exercise judicial review. This review would apply to federal laws that infringed the powers reserved to the states, just as it would to any properly brought case arising under federal law. In other words, the Constitution contemplates judicial review generally and judicial review of federal legislation in particular, just as it contemplates that none of the three branches will exercise the powers of the others.

Part I of this Essay argues that the political-safeguards theory does not square with the constitutional text. It rejects the notion that judicial review is not authorized by the Constitution, and hence can be deployed according to our discretion. Rather, judicial review flows directly from the courts' function of deciding cases and controversies arising under federal law, the respect due to

a written Constitution, and the principle of a federal government of limited powers. The constitutional text nowhere excepts federalism cases from the general category of disputes susceptible to judicial review. Part II discusses the severe structural distortions created by the political-safeguards theory, and criticizes the provocative theory that the extra-constitutional role of the political parties can serve as a complete substitute for judicial review of federalism questions.

Part III demonstrates that the original understanding of the Constitution cannot support any theory that insists that the national political process is the exclusive safeguard for federalism. Four years ago, one of us published a preliminary review of the framing materials; it indicated that the Framers understood judicial review to extend to questions concerning the division of power between the federal government and the states.¹³ Responding to Professor Kramer's claim that the political safeguards are exclusive because the Framers did not believe that judicial review would exist at all,¹⁴ we have conducted a more thorough examination of the historical evidence. Our review suggests that Professor Kramer's claims are sorely mistaken. There is ample evidence that many Framers generally assumed that judicial review would exist, that it could limit federal power that exceeded constitutional limits, and that the mere existence of political process safeguards did not preclude judicial review of the scope of federal power. While the founders undoubtedly believed that the political process would serve as a significant safeguard of state interests, they did not understand those protections to be exclusive.

In the course of challenging the political-safeguards theory, we uncover substantial evidence, some not before examined by scholars, that supports the legitimacy of judicial review generally—a far broader debate than the one over the political safeguards of federalism.¹⁵ Although there were a handful

13. See generally, Yoo, *Judicial Safeguards*, *supra* note 4, at 1357-91.

14. Kramer, *supra* note 5, at 234-52.

15. An 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* (2000); SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* (1990); ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* (1989); J.M. SOSIN, *THE ARISTOCRACY OF THE LONG ROBE: THE ORIGINS OF JUDICIAL REVIEW IN AMERICA* (1989); LEONARD LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* (1988) (especially chapter 6); RAOUL BERGER, *CONGRESS V. THE SUPREME COURT* (1969); CHARLES A BEARD, *THE SUPREME COURT AND THE CONSTITUTION* (1962); WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE*

of founders who denied the propriety of judicial review, there was a surprisingly strong consensus amongst Federalists and Anti-federalists that the courts had to review the constitutionality of federal legislation. This agreement was consistent with broader historical and intellectual developments taking place at the time. Critics of the Court's two-century tradition of judicially reviewing the scope of federal legislation bear a heavy burden, for they must explain not only the conflict between their theories and the constitutional text and structure, but the original understanding as well.

II. The Constitutional Text and Judicial Review

Although it has undergone several transformations, the theory of the political safeguards of federalism remains fundamentally at odds with the Constitution's text. To be sure, as Wechsler conceived it, the political safeguards arise from the Constitution's structuring of the political branches. Article I's granting of two votes to each state in the Senate, the distribution of the seats in the House of Representatives by state, and the electoral college's emphasis on states, all give the states a "crucial role in the selection and the composition of the national authority."¹⁶ Because the constitutional text gave states ample means to defend their interests, Wechsler concluded, "federal intervention as against states is . . . primarily a matter for congressional determination in our system as it stands."¹⁷ Wechsler believed that states would use their influence in the national political process to pursue their interests, which would protect state sovereignty and thus preserve the balance between federal and state power.

Wechsler's argument, however, is essentially a political and functional argument, not a textual one. It does not base its acceptance of judicial review

UNITED STATES (1953); CHARLES GROVE HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* (1932); CHARLES WARREN, *CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT* (1925); EDWARD S. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* (1914). A similar list of articles includes: Kramer, *supra* note 5; 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 Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031 (1997); Yoo, *Judicial Safeguards*, *supra* note 4; Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom* 1993 SUP. CT. REV. 329.

16. Wechsler, *supra* note 1, at 546.

17. *Id.* at 559.

on the constitutional text, nor does link its exceptions to judicial authority to any constitutional provisions. Rather, Wechsler sought to explain why the federal courts could turn their attention away from protecting state sovereignty and instead focus on state attempts to frustrate federal powers.

Choper's version of the theory lacked a textual basis as well. Rather, Choper argued that the Court ought to withdraw judicial review of federalism so as to better protect individual rights.¹⁸ As a countermajoritarian institution without command of the sword or purse, the Court must rely upon its legitimacy to convince others to enforce its rulings. By withdrawing from federalism cases, Choper maintained, the Court could conserve its exhaustible institutional capital for the purpose of standing up to the majority in the defense of individual rights. Furthermore, Choper argued, the national political process could be trusted to protect state interests. Notice, however, that neither scholar relied upon any textual authorization for the withdrawal of judicial review. Rather, both Wechsler and Choper appealed to considerations of institutional function, constitutional culture, or the workings of national politics, in order to justify the conclusion that courts need not review federalism questions.

Wechsler and Choper were wise to sidestep the constitutional text because the text supplies little or no support for their arguments. Article III, which must provide the textual basis for judicial review, declares 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."¹⁹ This provision *nowhere* contains an exception from judicial review for cases involving federalism. To be sure, several barriers may preclude judicial review of constitutional (and other) questions. Standing, mootness, ripeness, and the political question doctrine may prevent parties from litigating issues that arise under federal law.²⁰ Yet these justiciability doctrines are not designed to keep specific subject matters out of the federal courts; rather each enforces Article III's case or controversy requirement. Once justiciability requirements are satisfied, Article III does not cordon off any subject matter as immune from judicial review.²¹

18. Choper, *supra* note 2.

19. U.S. CONST. art. III, § 2 (emphasis added).

20. See, e.g., *Nixon v. United States*, 506 U.S. 224 (1993).

21. One of us has argued that federal courts cannot play a role in deciding whether the President has the constitutional authority to initiate military hostilities without congressional approval. See Yoo, *War Powers*, *supra* note

Implicitly acknowledging this fact, the third scholar in the political-safeguards triumvirate, Larry Kramer, attempts to one-up Wechsler and Choper. The Constitution does not demand judicial review of federalism, Kramer argues, because the Constitution requires virtually no judicial review at all.²² According to Kramer, “[g]iven their understanding of judicial review, no one in the Founding generation would have imagined that courts could or should play a prominent role in defining the limits of federal power. And no one did.”²³ The Founders would have left the job of defining the Constitution’s meaning to “popular action,” such as voting, petitioning, mob action, or “revolutionary violence.”²⁴ “Permitting judges to resolve legitimate disagreements about the meaning of the Constitution,” Kramer concludes, “would have violated core principles of republicanism, which held that such questions could only be settled by the sovereign people.”²⁵ Ideas about judicial review, Kramer believes, rested only in the minds of a “small minority” at the Framing.²⁶

The most Kramer will concede is that perhaps some believed the courts might exercise review “where the legislature unambiguously violated an established principle of fundamental law.”²⁷ Yet he argues that courts should exercise a review of federal legislation that infringes on state sovereignty that is so deferential as to be virtually identical to a regime that that would utterly preclude judicial review. For Kramer, review might be rational basis in theory, but nonjusticiable in fact.

We believe that Kramer has misread the Founding materials, and we will explain in Part III why. For present purposes, however, it is important to recognize that Kramer, too, has avoided making a textual argument. Indeed, he—like Wechsler and Choper before him—neglects to examine the textual basis for judicial review.²⁸ In passing, for example, Kramer simply asserts

10, at 287-90. This is not due to any discrete subject matter exception to judicial review, however, but because such issues fall within the political question doctrine due to their textual commitment to the political branches of government.

22. Kramer, *supra* note 5, at 234-35.

23. *Id.* at 235.

24. *Id.* at 237.

25. *Id.*

26. *Id.* at 238.

27. *Id.* at 240.

28. A number of different scholars have argued about whether the constitutional text supports judicial review. Some of the more well-known examples are ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 5-6

that “the text says nothing about judicial review.”²⁹ This allows Kramer to quickly conclude that judicial review can be applied wherever he sees fit, just as it permitted Wechsler and Choper to deploy or withdraw judicial review according to their functional sensibilities.

B. Article III.

Wechsler, Choper, and Kramer make a basic error in ignoring the primary indicator of constitutional meaning: the text. The constitutional text provides a basis for judicial review, and it does so without regard to the subject matter at hand. As set forth by Chief Justice Marshall in *Marbury v. Madison*, the power of judicial review does not stem from the any special role for the Court in settling great social questions or in defending individual liberties.³⁰ Rather, judicial review arises from the nature of a written Constitution and the Court’s unique function in resolving cases or controversies. It is inevitable, Marshall observed, that cases brought before the federal courts will involve conflicts between statutory law and the Constitution. The judiciary’s constitutional duty to decide cases required it to choose between the two:

if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.³¹

In a conflict between the two different sources of federal law, Marshall concludes, the Constitution must take precedence. As a written document adopted through popular ratification, the Constitution expresses higher law that cannot be changed through legislative enactment.

In *Marbury*, then, judicial review reflects a sort of super-choice-of-law rule. There will always be cases in which a statute and the Constitution provide conflicting answers as to a legal question. To be sure, the Federal

(1962); CHARLES BLACK, *THE PEOPLE AND THE COURT* 23-25 (1960); LEARNED HAND, *THE BILL OF RIGHTS* 1-30 (1960); William Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). For an excellent recent effort, see John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333 (1998).

29. Kramer, *supra* note 5, at 287.

30. 5 U.S. (1 Cranch) 137, 173-80 (1803).

31. *Id.* at 178.

Export Duty, the Bill of Attainder, and the Ex Post Facto Clauses³², which Marshall initially cited as examples, may not pose direct contradictions because they may not provide substantive legal rules—rather, each could be understood as a guidepost or principle to be taken into account by the legislature. Marshall's last example, the Treason Clause, provides a better illustration. Because it is found in Article III, the Treason Clause appears to specifically instruct the courts that no one “shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.”³³ Here, the Constitution more clearly supplies a legal rule for the judiciary. If Congress were to pass a law allowing conviction of treason on the testimony of a single witness, a court would face a direct conflict between the Constitution and the federal statute over which rule to apply. In performing its constitutional function of deciding cases and controversies within its jurisdiction, the federal court must choose between two directly contradictory federal rules, one supplied by the Constitution and one by legislative enactment. At a minimum, judicial review must exist to provide a rule of decision based on the Constitution's supremacy.

Oddly enough, the political safeguards of federalism theory ignores the unique constitutional duty of the judiciary while elevating that of the other branches. Wechsler and Choper expect that both the President and Congress will perform their constitutional duties—enacting and enforcing federal law—in a manner that will respect the constitutional structure and, in particular, the rights of the states. Indeed, the limited theory of judicial review developed in *Marbury* leaves substantial room to the other branches to interpret the Constitution in the course of executing their particular constitutional functions.³⁴ A *Marbury* approach, based on the judiciary's function in deciding cases, recognizes that the other branches may use their own plenary constitutional powers to advance their own interpretation of the Constitution.³⁵ At the same time, however, defenders of the political safeguards conclude that the judiciary is not entitled to the same assumption. Rather, they believe that the judiciary ought *not* enforce the constitutional structure, even though in the course of performing its constitutional duties it will confront conflicts between ordinary federal law and superior constitutional law. None of the

32. U.S. CONST. art. I, § 9.

33. *Marbury*, 5 U.S. (1 Cranch) at 179 (quoting U.S. CONST. art III, § 3, cl. 1).

34. See John Yoo, *Choosing Justices: A Political Appointments Process and the Wages of Judicial Supremacy*, 98 MICH. L. REV. 1436, 1455 (2000).

35. See *id.* at 1455-56.

proponents of the political-safeguards theory explain why the judiciary should be exempt from the supreme obligation that applies to all federal officials to obey the Constitution in the course of performing their duties. Federal judges, after all, take the same oath to support the Constitution as do members of Congress and executive officials.³⁶

D. The Supremacy Clause

Kramer and those who would withdraw judicial review over the limits of federal power further fail to provide a satisfactory account of the Supremacy Clause. Article VI declares that the “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.”³⁷ Not only does this clause place the Constitution in the primary position in the hierarchy of federal law³⁸, it also anticipates that state judges would exercise some power of judicial review. The very next clause states that “the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”³⁹ Two things immediately become apparent upon examination of this second provision. First, Article VI makes clear that the Constitution itself is *Law* to be enforced—hence, it authorizes state judges to set aside state laws that conflict with it. The Constitution therefore is not, as Justice Gibson of the Pennsylvania Supreme Court famously argued in 1825, a document containing political rules that are to be enforced only by the Congress and President.⁴⁰ Courts clearly have a role in enforcing the Constitution.

Second, Article VI explicitly recognizes that state judges will engage in

36. See U.S. CONST. art. VI, cl. 3; *Marbury*, 5 U.S. (1 Cranch) at 180. But see *Eakin v. Raub*, 12 Serg. & Rawle 330, 352-53 (Pa. 1825) (Gibson, J., dissenting) (arguing that the Oath Clause places no duty on judges to refuse to enforce unconstitutional federal laws).

37. U.S. CONST. art. VI, cl. 2.

38. Though the Supremacy Clause does not unequivocally declare that the Constitution trumps a contrary federal law or treaty, the Supremacy Clause says as much. First by listing the Constitution first, the Clause implies the Constitution's absolute supremacy. Second, by only making laws made in “pursuance” of the Constitution supreme, the Clause suggests that other federal laws are not supreme.

39. U.S. CONST. art. VI, cl. 3.

40. *Eakin*, 12 Serg. & Rawle at 355 (Gibson, J., dissenting).

some type of judicial review, for they are commanded to set aside state law that comes into conflict with federal law. In the course of this task, state judges first must ask whether a federal statute, with which state law conflicts, itself is consistent with the Constitution. If a state law conflicts with a federal law but the federal law itself is unconstitutional, then the state court may be under no Article VI obligation to invalidate the state law. Indeed, in enacting the first Judiciary Act, Congress contemplated that state courts would exercise just this sort of judicial review. Section 25 of the 1789 Act gave the Supreme Court jurisdiction over the decisions of the highest state courts when “the validity of a treaty or statute of ‘the United States’ is drawn in question,” and then stated that the state court’s decision could be reversed or affirmed in the Supreme Court.⁴¹ The only way that a state court could draw “the validity” of a federal treaty or statute into “question” would be if it had refused to enforce a federal law because it violated the Constitution. Moreover, by recognizing that the Supreme Court could affirm a state court decision that invalidated a federal treaty or statute, Section 25 anticipates that the highest federal court also could exercise judicial review. Thus, Article VI’s vesting of judicial review in the state courts implies a parallel power on the part of the federal courts. As Wechsler himself asked rhetorically, albeit in a different context, “Are you satisfied . . . to view the supremacy clause in this way, as a grant of jurisdiction to state courts, implying a denial of the power and the duty to all others?”⁴² The answer is obviously no; if state courts enjoy the power to review the constitutionality of federal and state legislation, federal courts do as well. Binding state judges to the supreme Law of the Land just reflects a broader constitutional presumption in favor of judicial review.

F. Article V

One last textual provision, which Marshall mentions only in passing in *Marbury*, strongly suggests the propriety of judicial review. An absence of judicial review would transform our constitutional system into one of legislative supremacy, which contradicts the Constitution’s core principle of a national government of limited powers. Article V sets out a detailed, and difficult, process for amending the Constitution: two-thirds of both the Senate and the House or the state legislatures, and three-quarters of the state legislatures or state conventions, must agree before a change can be made to the

41. Judiciary Act of 1789, 1 Stat. 73, § 25.

42. Wechsler, *Neutral Principles*, *supra* note 28, at 3.

Constitution.⁴³ Skeptics of judicial review have suggested that the Constitution could be read to require either that only the political branches need observe the Constitution,⁴⁴ or that the courts need only ensure that federal laws follow the procedural requirements for the enactment of statutes set out in Article I, Section 7.⁴⁵ If such were the case, however, Article V would seem to be an awfully odd provision. The absence of judicial review would allow Congress to circumvent Article V and arguably “amend” the Constitution by simple legislation in any case in which the Constitution’s rule and a legislative enactment impose contradictory rules on a court. Congress and the President then would *possess* the power to alter the Constitution through normal legislation. This would allow Congress and the President to share the power to amend the Constitution with the more elaborate methods set out in Article V, a result forbidden by the exclusivity of Article V itself.⁴⁶ The Congress-plus-President method also would make some of Article V’s super-majority requirements largely superfluous because Congress could pass statutory “amendments” by bare majorities. We doubt that the Constitution permits *Congress* to effectively amend the Constitution outside Article V’s cumbersome procedure. Yet this would be the practical result in a world without judicial review.

A final, broader point may serve to crown the textual shortcomings of the political safeguards of federalism. All of these textual provisions—Article III, the Supremacy Clause, the Oath Clause, Article V—formed a part of the original Constitution as drafted by the Federal Convention and as ratified by the states. When the Constitution took effect in 1788, *there was no Bill of Rights*. In fact, the Federalists waged a rearguard action throughout the state ratifying debates to prove that a Bill of Rights was unnecessary in a

43. U.S. CONST. art. V.

44. *See, e.g., Eakin* 12 Serg. & Rawle at 352-53 (Gibson, J., dissenting).

45. *See, e.g., Van Alstyne, supra* note 28, at 20-22.

46. John Harrison articulates this point nicely. *See* Harrison, *supra* note 28, at 347-49. We are putting aside the provocative argument that the people acting directly through popular conventions could amend the Constitution by a pure majority. *See* Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside of Article V*, 94 COLUM. L. REV. 457 (1994); Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988). Professor Henry Monaghan has raised potentially crippling doubts about Professor Amar’s theory. *See* Henry P. Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996).

Constitution of enumerated legislative powers. If the supporters of the political safeguards of federalism concede that judicial review exists, but contend that the courts should use their powers primarily to defend individual rights, then they cannot explain exactly what the federal courts would have used this power for at the time of the Constitution's ratification. It was not until 1791 that the necessary number of states ratified the package of amendments that we now know as the Bill of Rights. Without those amendments, there were precious few individual rights provisions in the original Constitution for the federal courts to protect.⁴⁷ If judicial review does exist, and did exist at ratification, it must have extended to cases involving the limitations on the powers of the federal government, both through federalism and the separation of powers. There simply was little else over which the federal courts could exercise their powers of judicial review. Those who believe judicial review exists, but not over federalism questions, cannot explain the function of judicial review during the Republic's first years.

Those demanding a "smoking gun" which authorizes judicial review will be disappointed. We admit that no textual provision in the Constitution explicitly and directly mandates judicial review. But our claim is that at the time of the founding, judicial review would have been understood to follow naturally from the concept of a written Constitution of limited powers and from Article III's creation of an independent judiciary. Hence the tell-tale textual signs that the Constitution was not merely a series of hortatory declarations, but instead was supreme law that trumps contrary statutes and treaties. Notwithstanding the fact that the constitutional text seems silent on the question of the judicial review of federal legislation, both federal and state courts were empowered to refuse to enforce federal and state legislation contrary to the Constitution.

IV. Constitutional Structure

Theories defending the political safeguards of federalism run into serious problems not only with the Constitution's text, but with its structure as well. Wechsler and Choper would give priority to the judicial protection of individual rights. Although Kramer does not clearly spell out what constitutional questions he would leave to the courts, presumably he would agree with his predecessors that the judiciary should exercise judicial review in cases involving individual rights, or maybe the separation of powers.⁴⁸ Kramer even might be willing to allow *minimal* judicial review over federalism cases, but

47. See, e.g., U.S. CONST. art. I, § 9.

48. Kramer, *supra* note 5, at 288.

only if the standard of review were so slight that virtually all federal enactments would pass muster—in other words, a result that would be indistinguishable from no judicial review over federalism at all. Hence Kramer essentially joins Choper in concluding that the states do not really need judicial protection because of the actual workings of the federal government. This Part will discuss the errors of constitutional structure committed by the political-safeguards theorists, and focuses on the special problems that beset Kramer's effort to substitute political parties for judicial review of such questions.

B. Errors of Constitutional Structure

2. *Exclusivity.*—Most strikingly, Choper and Kramer assume that the political safeguards of federalism are *exclusive*. They are forced to argue that the Constitution itself rules out judicial review over federalism issues because the other branches have the sole responsibility for ensuring that federal power does not expand beyond its constitutional limits. We should give credit where credit is due. Supporters of the political safeguards of federalism theory deserve praise for reviving the understanding that the constitutional structure would safeguard federalism. Each component of the political branches—the Senate, the House, and the President—is indeed “dependent,” as James Madison argued in *The Federalist Papers*, on the state governments.⁴⁹ The Senate clearly can represent state interests,⁵⁰ the Electoral College chooses the President (as the nation was so vividly reminded during the Florida controversy in the 2000 elections), and the House is elected according to the districts drawn by the states and by voters qualified by the states. And, as Professor Clark reminds us, the Senate—and through it the states—plays an indispensable role in the enactment of all three species of federal legislation: statutes, treaties, and constitutional amendments.

None of these scholars, however, can show how or why the constitutional structure makes these safeguards exclusive. Simply because the Constitution establishes one mechanism for the protection of a certain value—here the states' participation in the national political process—it does

49. *THE FEDERALIST* No. 46, at 296 (James Madison) (Clinton Rossiter ed., 1961).

50. *See THE FEDERALIST* No. 62, at 377-78 (James Madison) (Clinton Rossiter ed., 1961) (“[T]he equal vote allowed to each State [in the Senate] is at once a constitutional recognition of the portion of sovereignty remaining in the individual States and an instrument for preserving that residuary sovereignty.”).

not follow that the Constitution makes that the only mechanism. The fallacy of this reasoning can be clearly seen when it is applied elsewhere. If the mere representation, for example, of an interest in a branch of the national government justified the withdrawal of judicial review in that area, there would be no need for judicial review at all. Individuals are fully represented in the national government through their direct election of the House of Representatives, their selection of Senators under the Seventeenth Amendment, and their choice of presidential electors. According to the logic of the political safeguards of federalism theory, the ability of individuals to use the national political process to protect their rights renders judicial review over individual rights unnecessary. Yet, as Justice Powell observed in dissent in *Garcia v. San Antonio Metropolitan Transit Authority*, “[o]ne can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process.”⁵¹ Likewise, nothing in the constitutional text or structure precludes the federal courts from supplementing the safeguards provided by the political branches, whether in the area of individual rights or federalism.⁵²

4. *Limited Federal Powers.*—Reading the Constitution in the manner proposed by Wechsler, Choper, Kramer, and Clark does violence to the basic structure of the Constitution’s grant of powers to the national government. The political safeguards of federalism theory makes Congress the only judge of the extent of its own powers; even if Congress oversteps the written limitations and restrictions on its own authority, Choper, Kramer et al. would not empower any other branch to block the implementation of such unconstitutional laws. In effect, the political-safeguards theory is tantamount to a theory of parliamentary supremacy, in which the legislature enjoys all governmental powers and knows no limitation aside from its own judgment. As Brutus, one of the most perceptive Anti-Federalists wrote during the ratification contest: “The inference is natural that the legislature will have an

51. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 565 n.8 (1985) (Powell, J., dissenting).

52. A defender of the political-safeguards theory might respond that while individuals are represented in the political process, that process could still be biased against minority groups. Indeed, this concern forms the basis of the process-based theories of *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938), and of Jesse Choper and John Hart Ely. But the same could be just as true with regard to the states. Larger states, for example, could consistently use the political process to exclude the interests of a minority of states.

authority to make all laws which they shall judge necessary for the common safety, and to promote the general welfare. This amounts to a power to make laws at discretion.”⁵³ Kramer seems to agree with Brutus, but for him unrestrained congressional discretion is a virtue, not a vice. “In a world of global markets and cultural, economic, and political interdependency, the proper reach of federal power is necessarily fluid, and it may well be that it is best defined through politics,” Kramer declares,⁵⁴ after criticizing the Court’s efforts to rein in congressional power in cases such as *United States v. Lopez*,⁵⁵ *New York v. United States*,⁵⁶ and *United States v. Printz*.⁵⁷

While such views might make sense if we were writing a new founding document from scratch, they run headlong into one of our Constitution’s most fundamental principles. The Constitution simply does not grant the federal government an unlimited legislative power. Rather, in contrast with Article II’s general grant of the executive power to the President, Article I vests Congress with “[a]ll legislative Powers herein granted.”⁵⁸ If we are to treat “herein granted” as meaningful, we must construe the phrase as limiting Congress’s legislative powers to the list enumerated in Article I, Section 8. This stands in sharp contrast with Articles II and III, which lack that specific language and, as Alexander Hamilton first argued, thus refer to inherent executive and judicial powers that have gone unenumerated elsewhere in the document.⁵⁹

Article I’s structure further illustrates the limited grant of authority to Congress. Article I, Section 8 contains a specific enumeration of the powers given to the legislature. To give Congress a general legislative power, checked only by its own judgment, would render the limited enumeration in Article I, Section 8 superfluous. If Congress can exercise a general federal

53. Brutus V, NEW YORK JOURNAL, Dec. 13, 1787, *reprinted in* 14 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 423 (John P. Kaminski *et al.* eds. 1983) [hereinafter DOCUMENTARY HISTORY]

54. Kramer, *supra* note 5, at 292; *see also id.* at 291 (“the political process is structured in a way that entitles Congress’s decision to a great deal of deference.”).

55. 514 U.S. 549 (1995).

56. 505 U.S. 144 (1992).

57. 521 U.S. 898 (1997).

58. U.S. CONST. art. I, § 1.

59. *See* Pacificus No. 1, June 29, 1793, *reprinted in* 15 PAPERS OF HAMILTON 39 (Harold C. Syrett ed., 1962); *see also* Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 570–71 (1994).

legislative power, unrestrained by judicial review, then there is no need to provide Congress with the power to regulate interstate commerce, enact bankruptcy laws, coin money and fix the standards of weights and measures, and to create rules of intellectual property. Indeed, the Necessary and Proper Clause itself would have served no useful purpose, as Congress would be the judge of any laws it believed useful to enact. Further, proponents of the political safeguards of federalism render meaningless Article I, Section 9, which contains explicit restrictions on Congress's powers. While some of these limitations, such as the bar on ex post facto laws, sound in individual rights, other provisions are only prohibitions on federal power, such as the export duty and port preference clauses.⁶⁰ Without judicial review of federalism questions, Congress's plenary federal legislative power would render most of Article I, Section 9 mere surplusage.

In short, Choper and Kramer would reverse the rule of interpretation set out in the Tenth Amendment. The Tenth Amendment declares that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."⁶¹ Even if one believes that the Tenth Amendment does not recognize a substantive area of state sovereign authority—a view that seems to be at odds with the Court's current case law⁶²—one must nevertheless agree that the Amendment at least serves as a rule of construction. The Tenth Amendment is a reminder that the Constitution is to be interpreted as vesting only limited, enumerated powers in the federal government. As Justice Story wrote, "[t]his amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred is withheld, and belongs to the state authorities"⁶³ While some would argue that this is a truism,⁶⁴ it becomes an axiom only if one accepts that the powers of Congress are limited by the enumeration of Article I, Section 8. Allowing Congress to sit as the sole judge of the extent of its own powers would upend this constitutional structure, by effectively vesting the government with all legislative powers subject to the Constitution's individual

60. See U.S. CONST. art. I, § 9.

61. U.S. CONST. amend. X.

62. FA.

63. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (Boston, Hilliard, Gray, & Co. 1833).

64. See *United States v. Darby*, 312 U.S. 100, 124 (1941) (asserting Tenth Amendment "states but a truism that all is retained which has not been surrendered").

rights constraints.⁶⁵

6. *The Purposes of Judicial Review*.—Defenders of the exclusivity of the political safeguards finally err in their effort to precisely segregate cases involving federalism from those involving the protection of the federal government or of individual rights. It seems that those who would preclude the federal courts from hearing cases involving state sovereignty would not do the same when the states allegedly infringe the rights of the federal government. In other words, political-safeguards theorists might not want judicial review in *New York v. United States*, for example, but they would want the federal courts to hear cases such as *McCulloch v. Maryland*, in which a state attempted to tax the operations of the Bank of the United States.⁶⁶ Justice Holmes once remarked: “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.”⁶⁷ Wechsler, Choper, and Kramer would take Holmes’ particular choice between two evils (the choice of no judicial review over the federal government) and make it the ironclad rule.

The difficulty with this view is that it cannot draw a true distinction between cases protecting the federal government, on the one hand, and cases protecting the states, on the other. In both types of cases, the Court is doing the same thing: identifying the boundary between the powers of the federal and state governments. Thus, for example, *McCulloch v. Maryland* did not call on the Court only to decide whether the Constitution’s Necessary and Proper Clause permitted the establishment of a national bank. It also required the Court to decide whether state sovereignty allowed Maryland to impose a tax on the operations of a federal instrumentality. In finding that the federal bank was immune from state taxation, Chief Justice Marshall declared that “[i]t is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate

65. We understand that a constitution could be written to preclude judicial review and pave the way for parliamentary or legislative supremacy. Our argument merely suggests that our Constitution seems like a poor candidate for legislative supremacy given the numerous restrictions (explicit and implicit) it imposes on federal power.

66. 17 U.S. (4 Wheat.) 316 (1819).

67. OLIVER WENDELL HOLMES, *Law and the Court*, reprinted in COLLECTED LEGAL PAPERS 291, 295-96 (1920).

governments, as to exempt its own operations from their . . . influence.”⁶⁸ *McCulloch* held both that the federal government could establish a national bank, and that the sovereignty of the states to tax had been “modified” so that they could not impede its operation.⁶⁹ Both questions required an examination of the scope of federal power.

In the modern era, the Court has continued to recognize the dual nature of the federalism inquiry. In *New York v. United States*, the Court observed that in some cases the Court has asked whether Congress has undertaken action consistent with its enumerated powers. In other cases, it has reviewed whether congressional legislation has invaded the reserved sovereignty of the states. “In [cases] like these,” the majority continued, “involving the division of authority between federal and state governments, the two inquiries are mirror images of each other.”⁷⁰ By mirror images, the Court meant that “[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.”⁷¹ In other words, every time the judiciary determines whether Congress has acted within its constitutional authority, it also has decided whether states enjoy exclusive sovereignty within that area—these questions are the flip sides of the same coin. Thus, excluding judicial review over questions of state sovereignty makes no sense if one still wants review over the federal government's right to override state laws.

Followers of the political-safeguards theory also fail to understand the larger purpose behind judicial review of federalism. They seek to establish a false dichotomy between the protection of individual rights and the protection of states rights. Yet they fail to grasp that both individual rights and federalism were designed with the same purpose in mind. Today we tend to think of individual rights and the structural elements of the Constitution as distinct fields, which are taught separately in law school and studied separately by scholars. The Framers did not understand the Constitution to embody this strict division; in fact, they believed that both served to limit the power of the federal government. Thus, the original Constitution contains rights-bearing provisions, such as the Ex Post Facto Clause and the Treason Clause, while the Bill of Rights limits the powers of the national government as much as it may secure individual liberties. Take, for example, the Free Speech Clause.

68. *McCulloch*, 17 U.S. (4 Wheat.) at 427.

69. *Id.* at 425, 436.

70. *New York v. United States*, 505 U.S. 144, 156 (1992).

71. *Id.*

While today we think of the Clause as granting individuals the right to express their views free from certain forms of government regulation, it is not written that way. Rather, the First Amendment declares that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”⁷² The Amendment does not codify an individual’s right to speech or religion; it only denies Congress the power to make laws respecting those subjects. Its primary purpose, as with much of the Bill of Rights, is to codify the implicit limits on the powers of the federal government, rather than simply to identify the rights of the individual.⁷³

Thus, the political-safeguards approach to judicial review undermines the complementary roles played by federalism and individual rights in our Constitution. Both were intended to limit the powers of the federal government, which the Framers worried could be subject to abuse. By eliminating judicial review over federalism, Choper and Kramer remove one of the Constitution’s structures for ensuring that the national government does not evade the restrictions on its authorities. Ironically, their theories also have the effect of crippling one of the primary safeguards for individual rights. As Publius wrote in *The Federalist* No. 26, “the State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens, against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers.”⁷⁴ Should the federal government exceed its powers, the states “will be ready enough,” Publius predicted, “to sound the alarm to the people and not only to be the VOICE, but, if necessary, the ARM of their discontent.”⁷⁵ Even Justice Brennan recognized that the states could play a creative role in protecting individual rights more broadly than the federal government.⁷⁶ By allowing the federal government to expand its powers unchecked at the expense of the states, those who would oust judicial review from this area

72. U.S. CONST. amend. I.

73. See Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1146-48 (1991); John Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967 (1993). The Establishment Clause similarly protected “individual rights” by prohibiting the federal government both from disturbing state-established churches and by prohibiting the establishment of a church where a state chooses to have none. *Id.* at 1157-61.

74. THE FEDERALIST No. 26, at 172 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

75. *Id.*

76. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

undercut institutions that perform a critical function in protecting individual liberties. By promoting an exclusive political safeguards of federalism, Choper and Kramer unwittingly undermine the political safeguards of rights.

8. *Federalism v. State Interests.*—While the disciples of the political-safeguards theory erroneously distinguish between individual rights and federalism, they also mistake the advancement of state interests for the protection of state sovereignty. Wechsler and Choper, and Clark to some extent, believe that the interests of states will find representation whenever the federal government makes law. For example, the Senate participates in enacting statutes, consents to treaties, and approves constitutional amendments. Allowing states to voice their views in the councils of the national government, however, does not compel the conclusion that the states will protect federalism. States often may have a temporary political interest in achieving a goal that may require them to sacrifice their rights as institutions. An analogy to individual rights may make this point clear. Just because individuals may make their views known through the election of the House and the President, and through the public opinion polls, does not mean that the people will never enact laws that violate individual rights. Indeed, the majority of people—acting through their national representatives—enact laws that violate someone's constitutional rights more often than we would like.⁷⁷ We cannot conclude that the representation of the interests of individuals will result in the protection of the rights of those individuals. Individuals seem altogether too willing, at times, to give up their rights in pursuit of what appears at the time to be some greater good.

If we are unwilling to conflate individual representation with the protection of individual rights, we similarly should not make the mistake of equating state representation with the protection of state sovereignty. To begin with, the link between the interests of states as institutions and their national representatives became detached as early as 1913, when the states ratified the Seventeenth Amendment transferring the power to select Senators from the state legislatures to popular election. Even if the connection between states and Senators were stronger, however, we still could not assume that the national political process would automatically protect federalism. Just as individuals are, at times, willing to infringe their individual rights to achieve a legislative goal, so too the states may be all too happy to sacrifice their sovereignty to achieve their temporary interests.

77. See, e.g., *United States v. Eichman*, 496 U.S. 310, 318 (1990) (invalidating the Flag Protection Act of 1989, which passed Congress by wide majorities, as a violation of Free Speech Clause).

United States v. Morrison may provide an instructive example in this regard.⁷⁸ In 1994, the Violence Against Women Act (VAWA) passed overwhelmingly in both Houses of Congress and was signed by the President. It received the support of 38 of the attorneys general of the 50 states, who claimed that “[o]ur experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds.”⁷⁹ Clearly, the states believed that their interests were served by the passage of VAWA, even though the law expanded federal power into the formerly state-regulated area of gender-motivated crime and exceeded Congress’s powers under the Commerce Clause. In VAWA, the states placed political expediency before constitutional principle.

The Constitution itself reflects the commonsense understanding that the states will not always act to protect state sovereignty. The Port Preference Clause⁸⁰, born of a fear that politically powerful state would attempt to commercially subjugate weaker states, prohibits Congress from enacting port preferences. The Clause serves as a reminder that states might pursue their own parochial interests at the expense of the other states and at the expense of the Constitution.

This distinction between the constitutional rights of states and their temporary political interests means that we cannot expect the states to always defend federalism. States, like individuals, will often be tempted by political circumstances to sacrifice their constitutional rights for some temporary advantage. As Alexander Hamilton observed more than two centuries before *Morrison*, the Federal Convention “certainly perceive[d] the distinction between the rights of a state and its interests.”⁸¹ As he put it, “[t]he rights of a state are defined by the Constitution, and cannot be invaded without a violation of it,” while “the interests of a state have no connection with the constitution, and may be in a thousand instances constitutionally sacrificed.”⁸² While the structure of the national government may be a political safeguard of federalism, it cannot be a *perfect* safeguard of federalism. As a result, the federal courts must play backup to Congress, to ensure that any unconstitutional legislation that emerges from the political process—albeit by

78. 529 U.S. 598 (2000).

79. *Id.* at 661 (Breyer, J., dissenting).

80. U.S. CONST. art. I, § 9, cl. 6.

81. Melancton Smith and Alexander Hamilton Debate Rotation in the Senate (June 25, 1788) in 2 DEBATE ON THE CONSTITUTION 813 (Bernard Bailyn ed., 1993).

82. *Id.*

a difficult route, as Professor Clark profitably reminds us—will not survive.

A final peril of the political-safeguards theory rests on its wholesale embrace of modern, functionalist theories of constitutional interpretation. Underlying the various strains of the political-safeguards theory is a functional claim that runs along the following lines: judicial review is unnecessary to protect federalism because other mechanisms (the Senate, bicameralism, political parties) will do the job; therefore, judicial review may be more profitably deployed over other areas, such as individual rights. Many of the political-safeguards theorists apparently believe in a strong version of this claim: judicial review will *never* be necessary because the other mechanisms will *always* safeguard the states. Political safeguard theorists never identify when or under what circumstances these mechanisms might fail, which conceivably would justify the resurrection of judicial review over federalism. At the same time, perhaps, there are a few political-safeguards theorists who silently recognize that such review would be appropriate if the political safeguards no longer worked.

In either case, however, the political-safeguards theory has serious shortcomings. If the political safeguards are exclusive even when the safeguards fail, then the political-safeguards theorists do not really seek to protect state sovereignty. After all, even when their mechanisms fail, these theorists would still refuse to acknowledge the propriety of judicial review. They do not really champion the political-safeguards theory as an adequate means of protecting the states, but instead use it as an excuse not to protect state sovereignty and not to enforce the limits on federal power. Yet, these scholars cannot provide a clear justification for elevating the constitutional values they believe should be the focus of judicial protection, such as individual rights, over the constitutional values they believe are less worthy (*i.e.*, federalism), without reference to an extra-constitutional normative claim that may not command broad support. While such functionalist theories place great importance on balancing different constitutional values, they provide little predictability or guidance as to how that analysis should be conducted.

D. The Pitfalls of an Extra-Constitutional Mechanism

Perhaps recognizing the frailty of the political-safeguards theory, recent prominent defenders of the thesis have re-oriented it in a new direction. According to Professor Kramer, we should not seek an explanation of the supposed success of the political safeguards of federalism in the constitutional structure. These formal constitutional devices, he admits, suffer from

“weakness” or even “immateriality.”⁸³ Rather, federalism receives sufficient protection, and hence judicial review proves unnecessary, because the *political parties* protect the states. The political safeguards of federalism work not because of formal constitutional structures, but because of “a politics that preserved the states’ voice in national councils by linking the political fortunes of state and federal officials through their mutual dependence on decentralized political parties.”⁸⁴ As was once said about Vietnam, Kramer had to destroy the theory in order to save it.

2. *Non-Governmental Organizations as Substitutes for Judicial Review.*—Kramer’s approach suffers from a number of fundamental structural flaws. The most obvious is that Kramer seeks to protect values enshrined in the Constitution exclusively through a variable and uncertain extra-constitutional mechanism. This creates numerous theoretical and practical difficulties. First, extra-constitutional conditions can fluctuate wildly, and hence Kramer must admit that the scope and intensity of judicial review can vary widely over time. Political parties very well may have protected federalism at some moments in our history, but at other times they may not have. For his political party safeguards of federalism theory to be of any consequence, Kramer has to believe that judicial review over federalism ought to disappear when the strength of political parties is high, but then re-emerge as political parties weaken. After all, if parties are not significant actors in the political process, they cannot do very much to safeguard federalism. In fact, Kramer’s thesis depends on far more than merely the relative strength of parties in our political system. Not only must they play a dominant role in our government, they must also actively use their power to protect state sovereignty. If parties are significant actors in the political process but do not actually safeguard federalism interests, then Kramer would be forced to acknowledge that judicial review must apply to cases like *Lopez*, *New York*, and *Morrison*.

As a result, Kramer’s approach is structurally unworkable because it places impossible burdens on the federal judiciary. He would have courts exercise jurisdiction over federalism cases only if political parties were weak or were failing to protect the states. Judges would face an impossible task in making such determinations—indeed, social scientists themselves encounter severe difficulties in attempting to measure the relative strength of parties throughout our history. Are judges supposed to conduct opinion polls, or examine the prevalence of split-ticket voting, or look at party fundraising

83. Kramer, *supra* note 5, at 223.

84. *Id.* at 219.

levels, or measure party discipline in Congress? Would judges have to consult political scientists or the latest election results every time they made a justiciability determination in a federalism case?

Kramer's theory is not only impractical, but also in tension with the notion of a written Constitution. By linking judicial review to the health and performance of extra-constitutional organizations like political parties, Kramer is forced to admit that judicial review itself is variable. Sometimes it is present, sometimes not, regardless of the facts of the case itself. Our written Constitution, however, does not permit judicial review only some of the time, depending on the activities of private actors not even mentioned in the Constitution.⁸⁵ If judicial review can be withdrawn over a certain class of subjects, then its exercise in those areas cannot be constitutional in the first place—judicial review would represent an infringement on the prerogatives of the political branches. If judicial review may legitimately be applied to specific subjects, then its subsequent withdrawal over those same subjects must be unconstitutional. To hold otherwise would amount to saying that the legislative veto could be constitutional in some circumstances, but not others, depending on how well represented aliens are in government,⁸⁶ or that the independent counsel law is sometimes constitutional but sometimes not, depending on the president's character.⁸⁷

The faults in Kramer's approach can be further highlighted by replacing individuals for states in his reformulation of the political-safeguards theory. Political parties can do a lot to protect individuals, through the passage of sweeping civil rights laws, the operation of entitlement programs, and the activities of the administrative agencies. Indeed, one might speculate that political parties have a greater interest in protecting individuals, upon whose votes they rely upon for control of the government, than in protecting the states. To be consistent, Kramer ought to seize hold of this fact to conclude that the courts should not exercise judicial review over cases involving individuals, because the political parties do a sufficiently good job of promoting their rights.⁸⁸ If, however, the political parties were to experience reductions

85. To be sure, we can imagine a written constitution that explicitly provided for variable judicial review of this sort. We only deny that our Constitution authorizes or requires that judicial review depend on the actions of private parties.

86. *See* *INS v. Chadha*, 462 U.S. 919 (1983).

87. *See* *Morrison v. Olson*, 487 U.S. 654 (1988).

88. For some legal academics today, in fact, the prospect of removing judicial review over individual rights does not cause as much heartache as one might have suspected. *See* MARK TUSHNET, *TAKING THE CONSTITUTION*

in their power (assuming that courts had available some way to accurately measure this), judicial review could return with full vigor. In fact, one could make the same argument in regard to the rights of the federal government versus the states. It might be the case that the political parties operate to ensure that the rights of the federal government are appropriately voiced in the councils of state governments—and why should they not, since in Kramer’s conception political parties ought to be two-way streets where federal and state officials interact. If that is true, then Kramer’s approach should find little need for the federal courts to exercise judicial review over state laws that potentially infringe on national power.

Yet, we suspect that Kramer would never consider seriously the withdrawal of judicial review from individual rights and federal power cases. Certainly his predecessors, Wechsler and Choper, never did; nor does Clark. We can only assume that Kramer has simply made a normative judgment that he favors judicial protection of some areas, but not over federalism. That choice, however, cannot truly be based on an objective factor, such as the workings of political parties in protecting federalism, because that mechanism works equally well (if not better) in areas over which Kramer would want judicial review to exist.

Kramer’s devotion to political parties further blinds him to the faults of relying upon non-governmental mechanisms as a substitute for judicial review. If the existence of political parties can justify a decision like *Garcia*, why not rely upon any other extra-constitutional device to oust judicial review over a certain subject? It is almost common wisdom now that interest groups often play a dominating role in the passage of legislation.⁸⁹ Suppose that certain interest groups, such as corporations, used their political power to support the location of regulatory decisions at the state level.⁹⁰ One might mimic Kramer’s analysis of political parties by hypothesizing that many corporations are organized along state lines and that many corporate officers at the national level first get their start at the regional or state level. Corporations allow those with national and regional interests to interact and share views, which are powerfully represented in the political process due to the role corporations

AWAY FROM THE COURTS 165-72 (1999).

89. For an overview of these theories, see DANIEL A. FARBER AND PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12-37 (1991).

90. This is possible under certain conditions. See Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 276-81 (1990).

play in lobbying and in financing campaigns. Judicial review, in Kramer's view, would be unnecessary because sufficiently powerful non-governmental organizations give voice to the interests of the states in the national political process. But if this is true of corporations, it should also be true of public interest groups. Groups such as the NAACP and the ACLU, among others, often exert a powerful voice on behalf of individual rights in the political process. But surely Kramer would not agree that the success of these groups would justify reduced judicial scrutiny of laws that affect individual rights. Yet, that is the natural conclusion one must reach if one agrees with him that non-governmental organizations can substitute for judicial review.

4. *The Problem with Parties.*—The pitfalls of relying upon non-governmental organizations to replace judicial review become even more obvious when we take a closer look at the role of political parties in government. Kramer sees political parties as the great saviors of federalism that stepped in to replace the faulty structural protections for the states provided by the Constitution. Yet Kramer's explanation of the function of political parties in constitutional government suffers from a number of problems. If even Kramer cannot accurately determine whether political parties are protecting federalism, then the courts cannot confidently make decisions about expanding or withdrawing judicial review based on the activities of these extra-constitutional actors.

Kramer's claims about the role of political parties can be briefly summarized. In the course of a lengthy exegesis on the emergence and growth of parties in American history, Kramer argues that national political parties in the United States arose in a decentralized fashion. The resulting framework "linked the fortunes of federal officeholders to state politicians and parties and in this way assured respect for state sovereignty."⁹¹ This happened because American political parties are organized at the state level and only loosely confederate at the national level, and they are the training grounds for future federal officials, they are more concerned with getting people elected than pursuing a coherent program.⁹² At first, Kramer says that the strength of political parties from Jefferson's time to the 1960s meant that federal officers needed local support to win elections; but then he argues that after the 1960s it has been the weakness of political parties that has protected state governments because parties cannot establish unified control over the government.⁹³ It seems that regardless of the strength of political parties, they

91. Kramer, *supra* note 5 at 276.

92. *Id.* at 278-79.

93. *Id.* at 278-82.

always end up protecting the states sufficiently to preclude judicial review.

This theory about the function of political parties is deeply flawed. First, it runs counter to the traditional account of the role of parties in constitutional government. Parties formed precisely to overcome the manner in which the Constitution divided governmental authority in the United States. Both the separation of powers and federalism threatened to make the rational exercise of government power impossible. Political parties arose in order to “organiz[e] the majorities necessary to fill offices and adopt policies.”⁹⁴ As Professor Sidney Milkis, perhaps the leading political scientist to study this issue has recently written, “[t]he two-party system has played a principal part in combining the separated institutions of constitutional government, thus centralizing government sufficiently for it to perform its essential duties.”⁹⁵ One of the primary purposes of federalism was to divide government power precisely to prevent its effective use—fresh from their experiences under the British, the Framers were concerned that an efficient government might threaten liberty.⁹⁶ By providing an extraconstitutional means for coordinating the operations of government, political parties actually help the national political process overcome constitutional structures like federalism. Kramer’s thesis simply cannot square with the prevailing interpretation of the general role of political parties in our constitutional system.

Second, Kramer confuses the agenda of political parties with their institutional function. There is no doubt that at some moments political parties have pursued, as their substantive program, the return of power to the states. The first political party in our history, for example, the Jeffersonian Democrats, arose in order to limit the centralization of national administrative power in the executive branch.⁹⁷ For the most part, Democrats remained committed to a decentralized government well into the early 20th Century. Limited federal powers, however, have not always set the substantive agenda of other political parties, such as the Federalist Party, to cite but one example. And in the 20th Century, political parties have successfully campaigned on the platform of transferring large amounts of power to the federal government—

94. Harvey C. Mansfield, Jr., *Political Parties and American Constitutionalism*, in AMERICAN POLITICAL PARTIES AND CONSTITUTIONAL POLITICS 3 (Peter W. Schramm and Bradford P. Wilson eds., 1993).

95. SIDNEY M. MILKIS, *POLITICAL PARTIES AND CONSTITUTIONAL GOVERNMENT: REMAKING AMERICAN DEMOCRACY* 2 (1999).

96. See John Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 43-44 (1998).

97. See MILKIS, *supra* note 95, at 20.

witness FDR's and LBJ's Democratic Party landslides and the corresponding expansion of federal regulatory power over the economy and society. Since the New Deal, political parties have facilitated the creation of a president-centered national administrative state that has resulted in the growth of federal power at the expense of the states, the Court's recent federalism cases notwithstanding.⁹⁸ Today, it is difficult to claim that the political parties play an institutional role in securing a proper balance between federal and state power.

Third, the political-safeguards theory fails to identify any reliable mechanism whereby a state's constitutional interests regularly receive protection. Kramer claims that parties serve this function because "the decentralized American party systems completely dominate[] the scene and protect[] the states by making national officials politically dependent upon state and local party organizations."⁹⁹ The organization of political parties along state lines, however, by itself proves nothing more than the states are already permanent features of the American governmental system. In other words, Kramer suffers from a chicken-and-egg problem. The fact that political parties organize at the state level does not demonstrate that they protect the states; rather, their geographic organization very well could be a product of the pre-existing sovereignty of the states. And mere reliance upon state and local political parties for election does not guarantee that federal officials will take federalism into account in their decisions. State and local parties themselves may not hold federalism near and dear to their hearts—they might, for example, be only too happy to transfer troublesome or expensive public policy issues to the federal government. Identifying the interests of state political parties with the states as institutions is to make the same error as equating the interests of state legislatures with the interests of federalism.¹⁰⁰ If there is an invisible hand that compels political parties to protect state sovereignty, Kramer has yet to reveal it.

Indeed, recent history suggests that the political parties cannot prove reliable as safeguards of federalism because their operations are so amorphous and given to change. At one time, it may have been true that political parties were weak, decentralized organizations that retarded the nationalization of government power. Today, however, political parties are no longer solely local entities through which federal officials must work to achieve election. Others have remarked upon the rise in the Democratic and Republican national committees as coordinators of uniform political messages,

98. *See id.* at 100-02.

99. Kramer, *supra* note 5, at 276.

100. *Cf. supra* note 81.

the increased importance of money in financing campaigns, and the role of consultants, television, and mail.¹⁰¹ This has tended to undermine the local character of the political parties and reorient partisan politics toward national agendas and issues. Indeed, these changes may suggest that political parties today have an interest in expanding the power of the federal government, so as to provide a more powerful tool for the achievement of party agendas. Political parties may well find it easier to promote tort reform, for example, by enacting one statute at the federal level, rather than a law in each state.¹⁰² The mutability of political parties and their institutional structure suggests that they cannot serve as durable, permanent guardians of state sovereignty, even if they might do so on a temporary basis.

The current state of the political parties raises even more doubts about Kramer's account. Even if the Democratic and Republican parties have an institutional interest in protecting federalism, their fortunes of late have been on the wane. While FDR turned the Democratic party into an advocate for the centralization of power in the presidency, he also sought in the long run to replace parties with the presidency as the national leader of government administration. During the latter half of the 20th Century, political scientists have observed that the power of political parties has fallen as the presidency, the administrative state, and the courts have grown into significant actors in the exercise of government power. As Professor Milkis concludes, the New Deal "began a process whereby democratic and decentralized institutions that facilitated public debate and choice were displaced by executive administration."¹⁰³ In the 1960s and 1970s, liberal reformers sought to tame executive power, not by strengthening parties, but by creating an "institutional partnership" between Congress, the courts, and public interest groups in the oversight of administration.¹⁰⁴ Thus, even if political parties had an institutional bias toward protecting the states, their decline in influence means that federalism is not receiving the protection it once may have.

Indeed, this conclusion is reflected in Kramer's treatment of the relationship between the decline in political parties in the latter half of the 20th Century and the protections for federalism. Kramer fails to demonstrate that the mere existence of political parties translates into a consistent historical

101. See, e.g., MILKIS, *supra* note 95, at 144-45.

102. The Republican party under President Reagan is a good example. Although Reagan campaigned to restore a new federalism and to engage in deregulation, in other areas the Republican Party sought to expand federal and executive power. See *id.* at 148.

103. *Id.* at ____.

104. *Id.*

pattern of protection for federalism. Kramer cannot point to a single example in recent years in which the existence of political parties has protected state sovereignty by intentionally blocking federal legislation deemed to exceed constitutional limitations on congressional power. If anything, the decline of parties in the wake of the New Deal has been accompanied by a striking expansion in the federal regulation of areas—such as crime, the environment, health and safety, education—that were once mostly within the control of the states. Establishment of middle-class entitlement programs, such as Social Security and Medicare, represents a massive tilt in the scales of power toward the federal government that neither party today can challenge.¹⁰⁵ During this period, it has been judicial review, rather than political parties or the formal constitutional safeguards, that has provided even the most minimal protections for the states from expansive federal legislation.¹⁰⁶

105. *Id.* at 166.

106. [NOTE TO AUTHORS-PLEASE DOUBLE CHECK THIS FN TO MAKE SURE CHANGES WERE ENTERED CORRECTLY]

Kramer admits that the influence of political parties probably has declined in recent years, but then turns around to claim that this very weakness is a political safeguard of federalism. Recognizing the shakiness of relying upon political parties, Kramer relies at the very end of his analysis on the administrative bureaucracy as a safeguard of federalism. Kramer, *supra* note 5, at 282. According to Kramer, because parties are weak, they cannot be used to centralize power in the federal government. This contradicts his earlier statements that the strength and organization of political parties constitute a safeguard of federalism, and even if true only goes so far as showing that parties are not a *threat* to federalism. The decline of partisanship, however, does not show that the parties can serve as *guardians* of federalism against the federal government.

In any event, Kramer speculates that the current weakness of parties is not such a threat because the federal administrative bureaucracy is a sufficient safeguard of the states. *Id.* at 283-85. This seems logically contradictory. To be sure, the bureaucracy may ameliorate the expansion of federal power by taking the views of state government into account when supervising federal programs, or even recognize flexible policymaking on the part of states within those programs. The bureaucracy, however, cannot return the balance of federal and state power to the original position struck before the expansion itself—they are the very products of the expansion.

Kramer also throws in the “intergovernmental lobby” and the role of states as recruiting and training grounds for federal officials as protectors of federalism. *Id.* at 284-85. He does not explain in any detail how they play

One last way of examining the validity of Kramer's thesis is to examine the role of the political parties in isolation. Would Kramer's political parties model of the safeguards of federalism have any purchase but for the presence of the structural protections for the states? In other words, would the political parties perform the function that Kramer attributes to them if there were no special mechanisms, such as the Senate, that gave the parties the formal constitutional means to promote federalism? Suppose, for example, that the Constitution had not created a Senate or an Electoral College, but instead that it had established a unicameral legislature and a President chosen by direct popular election. Could we expect the political parties to promote federalism in such an environment? It is hard to think so, given how the political parties have nationalized their organizational structures and operations, and have pursued broadly national agendas, even in the presence of formal constitutional mechanisms that protect state sovereignty. Political parties may once have promoted decentralized government, but not because of the nature of parties per se, but because our national ideology for much of our history favored decentralized government *and* because the existence of the states is simply a fact of American political life.

We want to be clear. Kramer's focus on political parties is not wholly without merit. Kramer has performed a valuable service in pointing out how the political parties, in some circumstances, have safeguarded federalism. But like Choper before him, Kramer has failed to show that these protections are *exclusive* or even adequate. Nothing he has said convincingly demonstrates that political parties have the institutional interest and organization to replace the formal constitutional protections for federalism. His work relies on an extraconstitutional structure of politics that is so admittedly mutable and uncertain that it only proves our point: more permanent mechanisms, such as judicial review, are necessary to safeguard federalism. Rather than serving as a political safeguard of federalism, parties are the political products of federalism.

VI. The Original Understanding of Judicial Review

In this part, we describe the original understanding of judicial review. The burden of proof must lie with those who defend the political safeguards by arguing that judicial review itself was not originally understood. We have shown that the constitutional text and structure militate strongly in favor of a

this role, whether they have played this role successfully, and why they should substitute for judicial review. In this article, we have chosen to put aside these speculations in favor of focusing on the heart of Kramer's argument.

judicial power to refuse to enforce unconstitutional laws. More than two centuries of judicial review also frame the debate. Critics of judicial review, such as Professors Kramer and Choper, who might appeal to the original understanding must show a strong and widely shared consensus among the Framers in order to overcome the apparent mandate of the constitutional text, structure, and history. We believe that any fair reading of the historical materials shows that such a conclusion would be unwarranted. Not only was judicial review consistent with broader historical developments taking place at the time of the Framing, but we believe that substantial evidence from both the Philadelphia and the state ratifying conventions lends strong support for the propriety of judicial review.

As we discuss below, the rise of judicial review began with the innovation of state courts in striking down unconstitutional state laws. By the time of the Federal Convention, judicial review had become sufficiently familiar to the delegates that many assumed that judges could refuse to enforce federal and state laws that violated the new Constitution. During the ratification struggle, participants on both sides, for and against the Constitution, assumed that the federal courts would enjoy the power of judicial review. Federalists relied upon judicial review to fend off charges that the new Constitution would result in a national, consolidated government. Anti-Federalists never denied that judicial review could keep Congress within its proper bounds. Instead, they either charged that judicial review would prove ineffective, or that it would prevent Congress from enacting needed legislation.

We also explain how our conclusion is consistent with the fact that the Constitution does not seem to expressly sanction judicial review. We believe that the founders probably understood various constitutional provisions (the “judicial power,” jurisdiction of cases “arising under the Constitution,” and a supermajority ratification and amendment process) as sanctioning, indeed requiring, judicial review. Although the founders’ reading of the Constitution might seem less than watertight today, their experience with state court judicial review suggests that they would have understood the federal Constitution to authorize the same practice. As an agent of the people, the judiciary could refuse to enforce the decisions of another servant of the people, the legislature, when it acted *ultra vires*. Put simply, judicial review was thought to flow from the nature of a limited Constitution and the existence of an independent judiciary. In this respect, the Framers’ treatment of judicial review bears a striking similarity to their approach to the separation of powers. Like judicial review, the separation of powers receives no clear definition in any single provision of the Constitution. Yet, in drafting and ratifying the Constitution, the Framers’ widespread assumption of its existence

is reflected in the Constitution's structure and textual provisions. Judicial review received similar acceptance; so assumed was its presence in the new constitutional order, the text and structure reflect more than mandate its existence.

B. The Road to Philadelphia

Law schools commonly teach judicial review as arising from Chief Justice Marshall's brilliant (or devious) opinion in *Marbury v. Madison*.¹⁰⁷ By striking down Section 13 of the Judiciary Act of 1789, which allegedly had vested the Supreme Court with an unconstitutional original jurisdiction over mandamus cases, the Court cleverly handed President Jefferson victory over William Marbury, while asserting for itself the power of judicial review. Some accounts portray judicial review as springing forth fully formed, like Athena from the head of Zeus.¹⁰⁸ Popular though it is, this view fails to take into account the history leading up to 1803, and, even more significantly for interpretive reasons, the history leading up to the 1787 to 1788 ratification period. Leading historians of the ratification period such as Jack Rakove and Gordon Wood conclude that the Framers came to accept judicial review during the period leading to ratification.¹⁰⁹ As Wood has recently written: "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."¹¹⁰ This section will discuss both those fundamental changes, and the precedents and statements in which they found their expression.

On the eve of the Revolution, the clear rule was that Parliament could alter the unwritten British constitution at will. As James Wilson explained, the "British constitution is just what the British Parliament pleases" and thus Parliament's legislative acts could never properly be deemed "unconstitutional." More generally, "[t]he idea of a constitution, limiting and superintending the operations of legislative authority, seems not to have been accurately understood in Britain. There are, at least, no traces of practice conformable to such a principle."¹¹¹ When the states began drafting their first constitutions, they largely followed the view that the legislative branch should

107. 5 U.S. (1 Cranch) 137 (1803).

108. See, e.g., BICKEL, *supra* note 28, at 1.

109. See Rakove, *supra* note 15; Wood, *supra* note 15.

110. Wood, *supra* note 15, at 793.

111. 2 DOCUMENTARY HISTORY, *supra* note 53, at 361.

dominate.¹¹² Though many affirmed the necessity of separating powers, none of them explicitly authorized judicial review of the validity of state legislation.¹¹³ As late as 1780, Thomas Jefferson lamented the Virginia legislature's tendency to usurp the powers of the other branches and to infringe the rights of individuals, but he concluded that little could be done under the existing constitution. No opposition from the other branches could be effectual because the legislature "may put their proceedings into the form of acts of Assembly, which will render them obligatory on the other branches."¹¹⁴

By the time of the Constitution's drafting seven years later, however, many in the framing generation understood that the courts could refuse to enforce laws that violated a constitution. Several historical developments created the necessary conditions for this transformation in thinking to occur. As Professor Rakove has argued, judicial review became an important response to widespread dissatisfaction with changes in the American governmental system. First, many of the delegates who met in Philadelphia shared the concern that the Articles of Confederation had failed to prevent the

112. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 127-255 (1969).

113. SOSIN, *supra* note 15, at 203. This is not to say that the state constitutions were given totally over to legislative supremacy, as some historians such as Gordon Wood have suggested. During the early national period, several states moved toward a stronger executive branch and a more modern notion of the separation of powers. *See, e.g.*, WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTION: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 256-75 (Rita & Robert Kimber trans., Univ. of N.C. Press 1980) (1973); MARC W. KRUMAN, *BETWEEN AUTHORITY & LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* 109-30 (1997); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 80-86 (1985). The importance of this more recent historical work is discussed in John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2231 n.47 (1999). To the extent this more recent work is accurate, it supports our thesis that events before the Constitution would have made the Framers familiar with the idea of judicial review.

114. THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA*, 120 (William Peden ed., W.W. Norton & Co. 1982) (1954), *quoted in* THE FEDERALIST NO. 48 at 311 (James Madison) (Clinton Rossiter ed., 1961).

states from ignoring or frustrating national enactments, particularly treaties.¹¹⁵ Congress lacked any formal method to sanction states for not complying with federal laws.¹¹⁶ Judicial review by national courts over state legislation arose as an institutional mechanism that would allow the national government to police the line between federal and state power.¹¹⁷ While judicial review arose in the context of protecting the national government from the states, this development still shows that the idea of courts invalidating legislation at odds with the Constitution was nowhere near as unfamiliar to the Framers as some might think.

Second, the eighteenth century witnessed an outpouring of statutes from assemblies, both British and American. Where before the legislature had performed the primary function of checking the executive, by the middle of the 1700's the central activity of legislatures became the enactment of positive legislation. In Britain, as David Lieberman argues, this burst of activity led to the perception that Parliament was passing laws too hastily and with too little consideration of their impact on the law.¹¹⁸ As they too won their own legislative supremacy during the Revolution,¹¹⁹ state assemblies embarked on

115. While we cannot survey the successes and failure of the Articles of Confederation, some useful sources include JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* (1979); FORREST McDONALD, *E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC 1776-1790* (1965); PETER S. ONUF, *THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES 1775-1787*, at 3-20 (1983); JACK P. GREENE, *PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788* (1986). On the problems with treaty enforcement, see John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2013-24 (1999).

116. See, e.g., JAMES MADISON, *Vices of the Political System of the United States*, in 9 PAPERS OF JAMES MADISON 345, 351 (Robert A. Rutland et al. eds., 1975).

117. See Rakove, *supra* note 15, at 1047 ("Undisputably, judicial review, conceived as a mechanism of federalism, was palpably and unequivocally a fundamental element of the original intention of the Constitution with the Supremacy Clause as its trumpet.").

118. DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN* 12-32, 52-64, 121-27 (1989).

119. Indeed, some view the Revolution as resulting primarily because of

a similar orgy of legislation that often benefited one interest at the expense of another.¹²⁰ This rapid transformation in the nature of the legislative power led many in the framing generation to view the legislature, rather than the executive, as the greatest threat to limited government.¹²¹ Judicial review became a mechanism to counter the powers unleashed by the new form of legislative politics.

Third, Americans' attitude toward their judiciaries underwent fundamental change during the period from 1776 to 1787. In the prerevolutionary period, the colonists often suspiciously viewed judges as an extension of the power of the British Crown.¹²² After independence, however, Americans began to view their judges as a professional corps of apolitical experts. As Wood argues, the intellectual origins of this change came from several sources. First, the growing belief that legislatures were no longer themselves sovereign, but instead were agents of the people, reconfigured the courts into representatives of the people as well.¹²³ Second, the Americans' unique effort to set out their fundamental laws in writing transformed the reality of a constitution from implicit moral inhibitions into explicit limitations on the legislature.¹²⁴ Third, and this in the 1790s and 1800s, the written Constitution became a source of law that could be applied during the usual course of judicial business.¹²⁵ Certainly by Marshall's time, if not before, judges became less a political arm of the government, and more "exclusively legal."¹²⁶

As with all such broad historical and intellectual accounts, exact dates are difficult to pin down. Many of these changes began before the Philadelphia Convention, some may have appeared with their fullest vigor

the colonists' desire to defend their customary authority, within the British imperial constitution, to legislate over most domestic matters. *See, e.g.*, 3 JOHN PHILIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO LEGISLATE* 63-86 (1991).

120. *See* Rakove, *supra* note 15, at 1055-56.

121. *See, e.g.*, THE FEDERALIST No. 51, at 290-91 (James Madison) (Clinton Rossiter ed., 1961).

122. *See, e.g.*, J.R. Pole, *Reflections on American Law and the American Revolution*, 50 WM. & MARY Q. 123-59 (1993); Rakove, *supra* note 15, at 1062; Wood, *supra* note 15, at 789-90.

123. *See* Wood, *supra* note 15, at 793; *see also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

124. Wood, *supra* note 15, at 795-96.

125. *Id.* at 799-800.

126. *Id.* at 804.

afterwards. Nonetheless, these developments are important because they show that the Framers' treatment of judicial review during the federal and state conventions, which we turn to below, was consistent with broader developments in their constitutional thinking. Further, this raises severe doubts about the claims of those who argue that judicial review at the framing was unforeseen or wholly obscure, as their stories run directly counter to the cycles of American constitutional and intellectual history. To the extent we have a story of early American constitutional development, therefore, a reading of the history that demonstrates an original understanding of judicial review ought to be preferred over one that does not.

Within this context of historical change, several more precise developments and understandings took shape that support the conclusion that the Framers understood that courts could refuse to enforce unconstitutional laws. At least two elements were necessary preconditions for this evolution of thought. First, the written nature of the state constitutions made it possible for those outside the legislature to judge whether it had transgressed a constitution's boundaries. By the time of the Convention, it was possible to speak of a law being unconstitutional, null, or void when it breached the fundamental charter. As James Wilson observed during the Pennsylvania ratifying convention, "[t]o control the power and conduct of the legislature, by an overruling constitution, was an improvement in the science and practice of government reserved to the American states."¹²⁷

But the written nature of these constitutions was not enough to establish judicial review. Other fundamental charters had been reduced to writing before and yet judicial review did not arise. State judiciaries had to seize on what was implicit in their constitutions to develop their potential role. The judiciaries took the step of acting upon their constitutional judgments, because even if one could label a law "unconstitutional," it did not necessarily follow that a judge could refuse to enforce such law. Because the judiciary was the last stage where law was applied to fact, the courts could breathe life into constitutional restrictions by ignoring unconstitutional laws.

In as many as eight cases prior to the Constitution's ratification, state judiciaries engaged in some form of judicial review.¹²⁸ When presented with

127. 2 DOCUMENTARY HISTORY, *supra* note 53, at 361.

128. Josiah Philips's Case (Va. 1778) *discussed in* 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES bk. I, pt. 1, app. at 293 (1803); Holmes v. Walton (N.J. 1780), *described in* Austin Scott, Holmes v. Walton: *The New Jersey Precedent*, 4 AM. HIST. REV. 456 (1899); Commonwealth v. Caton, 8 Va. (4 Call) 5 (1782); Rutgers v. Waddington (N.Y. City Mayor's Ct. 1784), *reprinted in* 1 JULIUS GOEBEL, JR., THE LAW PRACTICE OF

a case involving a statute deemed to transgress the fundamental charter, judges chose the fundamental charter over the formerly “obligatory” statute. Given that the state constitutions did not authorize this practice and that it seems to have been previously unknown, the state judiciaries were acting quite remarkably. This is hardly the place for an extended discussion of these cases. Indeed, we are quite sure that we will not be able to solve the long-standing controversy over the interpretation of these cases.¹²⁹ Nor do we claim to know what precisely impelled these state courts to seize the initiative by declaring unconstitutional statutes void. We mention these cases only to lay the predicate for our later arguments. Whatever these cases should have meant—whether they should have been construed to cover only cases involving judicial procedure or whether the cases legitimated a broader form of judicial review—is not the important question.

What matters is how the founding generation understood those early state cases. As we will explain, the founders seemed to believe that these cases established a general presumption that the judiciary must ignore unconstitutional statutes. Judicial review became understood as a necessary consequence of a written constitution and an important structural check on the legislative power. Just as the framers understood the state constitutions to allow judicial review—even though those texts did not expressly do so—so too would they understand the text and structure of the Constitution of 1787 as giving federal courts a similar role.

To be sure, we find few explicit references to the state cases in the drafting and ratification debates. Yet these cases must have become part of the Convention’s background assumptions because where formerly the legislature was supreme, delegates to the federal and state conventions now acknowledged that the Constitution would take precedence. Indeed, judicial review could hardly have been an obscure topic because at least two such cases were reported in the popular Philadelphia press during the Federal

ALEXANDER HAMILTON 393-419 (1964); *Symsbury Case*, 1 Kirby 444 (Conn. Super. Ct. 1785); *Trevett v. Weeden* (R.I. 1786), *described in* JAMES M. VARNUM, *THE CASE*, *Trevett v. Weeden* (1787); “Ten-Pound Act” Cases (N.H. 1786), *described in* 2 CROSSKEY, *supra* note 15, at 968-71 (1953); *Bayard v. Singleton*, 1 N.C. (Mart.) 48 (1787). On a ninth possible case, cited by Professor Crosskey, we follow William Treanor’s judgment that it probably never happened. See William M. Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491, 492 n. 1 (1994).

129. Robert Clinton lists the various scholars who have characterized some of these cases in wildly different fashions. ROBERT L. CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 54 (1989).

Convention.¹³⁰ More generally, we believe that the founders had accepted the notion that any “inferior” law must give way to a superior. For instance, Jefferson, who had assumed that the judiciary had to regard all laws as “obligatory,” seemed to have experienced a change in heart by 1787. Jefferson criticized the portion of the Virginia plan that would allow Congress to void state laws. “[W]ould not an appeal from the state judicatures to a federal court in all cases where the act of Confederation controlled the question, be as effectual a remedy, & exactly commensurate to the defect?”¹³¹ Jefferson clearly thought that the state judges, in appropriate circumstances, should allow federal law to trump contrary state law. If they were not up to the task, however, the federal court could intervene.

Similarly, James Iredell in a public pamphlet and in private correspondence vigorously defended judicial review. In *To the Public*, Iredell claimed that the North Carolina legislature was a “creature of the Constitution” and had only limited, circumscribed powers.¹³² Because the judges served the public rather than the legislature and because the Constitution was law, the judges were to choose the Constitution over contrary statutes.¹³³ In a letter to Richard Spaight, Iredell elaborated his argument that a law contrary to the Constitution is void and the judges should not carry out the contrary law.¹³⁴

In the next several parts we discuss the consensus in favor of judicial review at the founding. In the process, we expose the error in Professor Kramer’s claim that “no one in the Founding generation would have imagined that courts could or should play a prominent role in defining the limits of federal power.”¹³⁵ A review of that generation’s writings and speeches will reveal that such critical figures such as James Wilson, Patrick Henry, Alexander Hamilton, Oliver Ellsworth, Gouverneur Morris, and James Madison spoke up on behalf of or assumed such a judicial role. Indeed, we

130. *Id.* at 53.

131. Letter from Thomas Jefferson to James Madison (June 20, 1787) in 5 THE WORKS OF THOMAS JEFFERSON 283, 284-85 (Paul Leicester Ford ed., 1904). While we readily acknowledge that Jefferson himself was not technically a Framers, we think his views here are worth quoting because they are representative of more widely held views.

132. See 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 145-49 (Griffith J. McRee ed., 1857) (emphasis in original) [hereinafter IREDELL CORRESPONDENCE].

133. 2 *id.* at 145-49.

134. 2 *id.* at 172-75.

135. Kramer, *supra* note 5, at 235.

would so far as to say that in the face of this widespread support, no significant statesman denied that the courts could exercise judicial review.¹³⁶

136. Professor Kramer relies heavily upon Sylvia Snowiss's work, *Judicial Review and the Law of the Constitution*, to support his claim that none of the framers originally understood the Constitution to establish judicial review. Snowiss argues that during the period leading up to the ratification, judicial review was hotly disputed and that when it was practiced or discussed, it was understood as "a judicial substitute for a revolution." SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 1-2 (1990). During this period, Snowiss (and Kramer) claims, judicial review was understood to apply only to "concededly unconstitutional" cases where it was absolutely clear that the legislature had transgressed higher law. *Id.* at 34-37. It was only at the very end of the ratification (beginning with *Federalist* No. 78), she maintains, that leading Framers such as James Iredell, Alexander Hamilton, and James Wilson developed a coherent theory of judicial review. *Marbury* then transformed judicial review into regular, everyday judicial business, in which courts interpreted and applied the Constitution as they would other sources of law. Because the Constitution became ordinary supreme law, judicial review was no longer limited to concededly unconstitutional statutes.

We believe that Kramer's wholesale adoption of Snowiss' analysis has led him seriously astray. We agree with other scholars who view her classification of judicial review at the framing into different periods as excessively contrived and ultimately mistaken. *See* Alfange, Jr., *supra* note 15, at 344-45. Snowiss's classification of evidence is such that her chronological distinctions become largely meaningless. Important discussions and cases that seem to belong to one period, for example, are catalogued as belonging to another. For instance, Iredell's extensive defense of judicial review occurred before *Federalist* No. 78 was ever conceived, yet she classifies it as part of the later, post-ratification developments toward more aggressive judicial review. SNOWISS, *supra*, at _____. Likewise, Snowiss classifies cases that were decided after *Federalist* No. 78 as part of the pre-ratification approach that courts could only invalidate obviously unconstitutional legislative acts. *Id.* at _____.

We could provide more examples, but the point is straightforward. The historical evidence that Snowiss puts forth simply does not fit the neat lines she attempts to draw. Rather than adopting an "overly schematic and too precious" effort to classify events in a few decades into precise historical categories, *see* Wood, *supra* note 15, at 796 n. 41, we believe that the better approach is to broaden the lens to ask what historical trends were in motion during the critical and ratification periods, and then to see if these

We begin with the Philadelphia Convention. Though the debates were secret and merely proposed language rather than made supreme law, what the delegates said about judicial review reveals their shared understandings. If they regarded judicial review as following from the nature of a written constitution the creation of a judiciary, it is likely that their understanding would be reflected outside the convention. Indeed, many of the Framers went on to become Federalist leaders in the state conventions, where their views strongly influenced those who ratified the document.

D. The Philadelphia Convention: Assuming Judicial Review

Professor Kramer makes numerous claims about the Philadelphia Convention to prove that the doctrine of judicial review was relatively unimportant in late eighteenth century America. First he insists that judicial review generally was a “trivial aspect” of the delegates’ thinking.¹³⁷ Next he mentions that a “judicial check on Congress” in particular was only mentioned once, briefly and indirectly.¹³⁸ Third, he contends that given the sorry experience under the Articles of Confederation, “an overreaching Congress was the least of the Framers’ worries.”¹³⁹ Unfortunately, Kramer’s

developments led to the expression of views on judicial review during the Constitution’s framing. As we will demonstrate, many of the framing generation, both Federalist and Anti-Federalist, assumed that the federal courts would have the authority to refuse to enforce unconstitutional laws. We do not find in these discussions any broad agreement that the power could be used only in situations of obviously unconstitutional legislative acts. The Framers spoke of judicial review in so many contexts that it hardly seems possible that they could have understood that judicial review was limited to concededly unconstitutional acts. The clauses and principles they discussed were hardly crystal clear, yet they expected judicial review nonetheless. For instance, several ratifiers discussed judicial review of legislation passed pursuant to the necessary and proper clause. *See infra* section III(C)(2). As would have been obvious to everyone at the time (and as is obvious to modern scholars), this clause hardly established neat and defined limits on federal power. Hence the ratifiers who spoke of judicial review of supposedly necessary and proper acts simply could not have thought that judicial review was limited to concededly unconstitutional acts.

137. Kramer, *supra* note 5, at 246.

138. *Id.* at 244.

139. *Id.* at 246.

conclusions are based on an incomplete reading of the Federal Convention's proceedings. A more nuanced and thorough interpretation shows that judicial review played a significant role at Philadelphia.

The Convention discussed judicial review in at least five contexts: the revisionary council, the ratification procedure for the Constitution, the Ex Post Facto Clause, the congressional veto of state laws, and the inferior federal judiciary. In those debates less than a handful of the delegates specifically rejected judicial review, while the overwhelming majority who commented on judicial review endorsed it and assumed its legitimacy. In other words, most references to judicial review (and there are quite a few) assumed that the judiciary could refuse to enforce unconstitutional legislation.

The first rough draft of the Constitution, the Virginia plan, contained a revisionary council. Presumably modeled on a similar provision in the New York Constitution, the council was composed of executive and judicial officers who could jointly reject legislation passed by the national legislature.¹⁴⁰ When this portion of the Virginia plan first came up for discussion, it immediately ran into opposition on the grounds that the judiciary's participation was unnecessary because the judiciary already could declare laws unconstitutional. Elbridge Gerry doubted that the judiciary ought to have a share in the veto "as they 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."¹⁴¹ Rufus King concurred: the "Judicial ought not to join in the negative of a Law, because the Judges will have the expounding of those Laws when they come before them; and they will no doubt stop the operation of such as shall appear repugnant to the constitution."¹⁴² Gerry convinced the Committee of the Whole to postpone consideration of the revisionary council in favor of a purely executive veto.¹⁴³

James Wilson, however, would not let the concept die.¹⁴⁴ Much later, Wilson reintroduced a revisionary council amendment and attempted to respond to prior arguments opposed to the judiciary's share in the veto. He

140. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1966) [hereinafter FARRAND'S RECORDS]. More on the Virginia plan's proposal for invalidating state laws shortly.

141. 1 *id.* at 97.

142. 1 *id.* at 109 (William Pierce's notes).

143. 1 *id.* at 98.

144. Indeed, he unsuccessfully tried to revive the council almost immediately after it was postponed. See 1 *id.* at 138, 140.

remarked that “[I]t had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power” was insufficient. “Laws 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.”¹⁴⁵ Madison agreed with the motion and Wilson’s logic of a check beyond judicial review. The veto “would be useful to the Judiciary departmt. by giving it an *additional* opportunity of defending itself.”¹⁴⁶ Wilson and Madison sought to include judges on the council because they wanted to add to the judges’ power to refuse to enforce unconstitutional laws the additional authority to block unwise laws simply on policy grounds.

Luther Martin, for one, repeated the arguments voiced 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.”¹⁴⁷ George Mason observed that Martin had misunderstood Wilson’s point. In their “expository capacity of Judges,” they would have a negative “in one case only They could declare an unconstitutional law void.”¹⁴⁸ But with regard to laws unjust, oppressive, or pernicious, they could do nothing. So while the federal judiciary armed with a veto might have a double negative with respect to the constitutionality of legislation, absent a veto the federal judges would lose the capacity to strike down unwise but otherwise constitutional laws.

When Madison revived the concept of a judicial veto with a novel motion¹⁴⁹, two delegates spoke out against the propriety of judicial review. Though Hugh Mercer favored Madison’s motion, 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 uncontrollable.”¹⁵⁰ Though John Dickenson agreed with Mercer that judges should not be able to set aside laws, he also was at a loss as to what should be used as a substitute.¹⁵¹ Though the comments of Mercer and Dickenson were beside the point (the Convention was not then debating the propriety of judicial review), Gouverneur Morris

145. 2 *id.* at 73.

146. 2 *id.* at 74 (emphasis added).

147. 2 *id.* at 76.

148. 2 *id.* at 78.

149. 2 *id.* at 298.

150. 2 *id.* at 298.

151. 2 *id.* at 299.

immediately challenged their minority views: “[Morris] 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 the real danger would arise absent judicial review. Legislatures had a long track record of usurping authority. Therefore judicial review of unconstitutional laws served a valuable checking role.¹⁵²

While debating the wisdom of uniting the judiciary with the executive in the exercise of veto authority, seven delegates recognized that the federal judiciary would review the constitutionality of federal legislation. Three (Gerry, King, and Martin) believed that the judiciary’s recognized power to strike down unconstitutional laws made the judiciary’s participation in the veto unnecessary. Four (Wilson, Madison, Morris, and Mason) thought that an “additional” judicial check would serve to defend the judiciary, stiffen the executive’s resolve, and protect the public.¹⁵³ Though two delegates (Mercer and Dickenson) declared their opposition to the concept,¹⁵⁴ the weight of the recorded sentiment suggests that Gerry’s views represented those of the majority at the Convention. Judicial review did meet “with general approbation.”¹⁵⁵

A second discussion of judicial review revolved around, of all things, the means of ratifying the Constitution. The Virginia Plan had provided that the Constitution would be ratified after both Congress and popular conventions

152. *Id.*

153. 2 *id.* at 73-75.

154. There probably were a third and fourth. In a letter to James Iredell, Philadelphia Delegate Richard Spaight of North Carolina, denounced judicial review as a usurpation. Speaking of *Bayard v. Singleton*, 1 N.C. (Mart.) 48 (1787), Spaight claimed that there was no constitutional authority for judicial review in the North Carolina Constitution and that to read in such a power would grant the judicial an absolute negative on the legislature. See Letter from Richard Spaight to James Iredell in 2 IREDELL CORRESPONDENCE, *supra* note 132, at 168, 169.

Although discussing the council of revision concept rather than judicial review, Gunning Bedford of Delaware claimed that he opposed “every check on the Legislative He thought it would be sufficient to mark out in the Constitution the boundaries to the Legislative Authority, which would give all the requisite security to the rights of the other departments.” 1 FARRAND’S RECORDS, *supra* note 140, at 100-01.

155. 1 FARRAND’S RECORDS, *supra* note 140, at 97.

approved it.¹⁵⁶ When Oliver Ellsworth argued that the Constitution should be sent to the state legislatures for approval as the Confederation required,¹⁵⁷ Morris and Madison demurred, each citing judicial review as the reason. Morris wanted to amend this plank of the Virginia Plan to allow for a bare majority of the states to ratify the Constitution.¹⁵⁸ But he knew there would be a serious problem if Ellsworth secured a role for the state legislatures: if a bare majority of legislatures ratified the Constitution, judges in a subsequent judicial proceeding would require unanimous consent as the Confederation provided. “Legislative alterations not conformable to the federal compact, would clearly not be valid. The Judges would consider them as null & void.”¹⁵⁹ If, on the other hand, the people ratified the Constitution, the judges would accept it as law even if it evaded the Confederation’s unanimity rule.¹⁶⁰ Hence Morris feared that if the Constitution was adopted by state legislatures without the requisite unanimity, judicial review might be wielded to void the Constitution itself. Here is someone who knew (and feared) the power of judicial review.

Madison had a different perspective that also confirmed judicial review. If the legislatures ratified the new compact as the articles required, it would be in the nature of a league or treaty. If the people ratified, it would be a true Constitution. A treaty might be just as morally inviolable as a constitution, but in political operation, the latter was far preferable for a simple reason. A subsequent law violating a treaty might supercede the treaty; but a “law violating a constitution established by the people themselves, would be considered by the Judges as null & void.”¹⁶¹ In other words, Madison believed if the nation adopted a constitution, judicial review would follow to ensure that a constitution trumped contrary laws. The same clearly could not be said of a compact like the Confederation. Here is someone who clearly desired judicial review.¹⁶²

Judicial review also was discussed in the context of the ex post facto clause. When the federal ex post facto clause was discussed, Hugh

156. 1 *id.* at 22.

157. 2 *id.* at 88-93.

158. 2 *id.* at 92.

159. *Id.*

160. *Id.*

161. 2 *id.* at 93.

162. Madison's argument might be construed as limited to judicial review of state legislation only. We see no need to so confine it. Moreover, the logic of his argument applies regardless of the source of law. Laws violating a Constitution should always be deemed null and void, whatever their source.

Williamson of North Carolina declared that the clause might be useful “because the Judges can take hold of it.”¹⁶³ Presumably, judges would take hold of the prohibition and declare contrary laws unconstitutional. In a later debate about the contract clause, Madison made Williamson’s point more forcefully. Madison regarded the contract clause as duplicative of the ex post facto clause. Did not “the prohibition of ex post facto laws, which will oblige the Judges to declare such interferences null & void” render the contract clause superfluous?¹⁶⁴ Whatever the merits of his claim, Madison again assumed judicial review.¹⁶⁵ Though we have found judicial review discussed in the context of the ex post facto clauses, there is no textual, structural, or historical reason to believe that judicial review was understood as only protecting this particular individual right.

Another extended discussion of judicial review occurred in the context of the Virginia Plan’s proposal for a congressional veto of state laws. The Virginia Plan provided that the national legislature would be able to “negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union.”¹⁶⁶ Although the power was approved without debate or dissent in the Committee of the Whole,¹⁶⁷ it failed to pass on the Convention itself.¹⁶⁸ The reason: the congressional negative would “disgust” the states and would be unnecessary. The expected opposition from the states is easily understood. Few state legislatures would be eager to elevate the federal Congress into a watchdog over their legislation. Yet, the provision was also regarded as unnecessary because of a familiar concept: judicial review.

Roger Sherman of Connecticut deemed the congressional negative “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.”¹⁶⁹ Gouverneur Morris opposed it as well. The proposal would arouse the “disgust of all the States.” and, in any event, “[a] law that

163. 2 FARRAND’S RECORDS, *supra* note 140, at 376.

164. 2 *id.* at 440.

165. Although Madison was speaking of the state ex post facto clause, there is no reason to think that his comments about the judicial enforcement of the clause wouldn’t apply to the federal courts. After all, the clauses are virtually *in haec verba*.

166. 1 FARRAND’S RECORDS, *supra* note 140, at 21.

167. 1 *id.* at 54.

168. 2 *id.* at 28.

169. 2 *id.* at 27.

ought to be negated will be set aside in the Judiciary department.” and ¹⁷⁰ Madison, who supported the congressional negative, did not deny that the courts could ignore unconstitutional laws. Instead, he claimed that judicial review would be too little, too late. States would pass laws accomplishing their injurious ends before they could “be set aside by the National Tribunals.”¹⁷¹ Nor could confidence be placed in the State Tribunals to protect national authority. “In R. Island the Judges who refused to execute an unconstitutional law were displaced and others substituted.”¹⁷²

Although the Convention disagreed with Madison’s view, it unanimously approved a provision that assumed judicial review. Luther Martin proposed this predecessor to the Supremacy Clause whereby federal legislative acts “made by virtue & in pursuance” of the Constitution and all treaties would be the supreme law of the states and the “[j]udiciaries of the several States shall be bound thereby in their decisions.”¹⁷³ When Charles Pickney attempted to reintroduce the “legislative veto” in late August, Wilson reiterated Madison’s earlier argument that it would “be better to prevent the passage of an improper law, than to declare it void when passed.”¹⁷⁴ It was to no avail. The Convention rejected Pickney’s motion to recommit the idea to a committee.¹⁷⁵ Before the Convention finally rejected the legislative veto, Edmund Randolph framed a compromise. Recognizing that the states would fear congressional review of state legislation, Randolph considered allowing the states to challenge the constitutionality of congressional vetoes.¹⁷⁶ In other words, under Randolph’s view, the Congress would not have a complete right to veto any and all state legislation; rather, Congress could only invalidate legislation that was contrary to some constitutional provision. Then the states could call upon the judiciary to decide whether the states had acted unconstitutionally. In considering this idea, Randolph was hardly flirting with the notion of judicial review. Rather he embraced the concept. Indeed, in introducing the Virginia plan, Randolph argued that the national judiciary would be a check on the legislative and executive branches.¹⁷⁷ Randolph’s proposal, coupled with his arguments while Virginia Attorney General,¹⁷⁸ and his

170. 2 *id.* at 28.

171. 2 *id.* at 27.

172. *Id.*

173. 2 *id.* at 28-29.

174. 2 *id.* at 391.

175. *Id.*

176. 3 FARRAND’S RECORDS, *supra* note 140, at 56.

177. 1 *id.* at 28.

178. William Treanor recounts how Randolph, prior to Philadelphia, had

subsequent comments at the Virginia ratifying convention,¹⁷⁹ suggests that he understood the propriety of judicial review.

In discussing the wisdom of a federal legislative check on state legislation, five delegates (Sherman, Morris, Madison, Wilson, and Randolph) assumed the existence of judicial review. Indeed some spoke of judicial review even before the Supremacy Clause codified judicial review of state legislation, suggesting that like judicial review generally, judicial review of state legislation was simply understood to follow from the nature of a written Constitution of limited powers. In keeping with the general acceptance of judicial review, the Convention decided that judges, and not Congress, would decide whether the state legislators had violated supreme law. Indeed, many of the same delegates who spoke of judicial review in other contexts (Madison, Morris, and Wilson, for example) spoke of it here utilizing the same understandings and expectations. Judicial review of state legislation was not viewed as a different creature from the judicial review of federal legislation.

Furthermore, implicit in the discussion of judicial review of state legislation was the power to review contrary federal legislation. After all, in the course of judicial review, courts would have to judge whether federal laws were made “in pursuance of” the Constitution, for it could not be the case that those unwilling to grant Congress an express negative meant to cede one *sub silentio*. If all federal law were to be supreme, no matter how ultra vires, then there would be no meaningful difference between the two schemes. In either case, Congress would judge whether state laws were unconstitutional and the obedient, faithful judiciary promised by opponents of congressional review would rubber stamp congressional acts.¹⁸⁰ Accordingly, the

admitted the propriety of judicial review in his arguments in *Commonwealth v. Caton*, 8 Va. (4 Call.) 5 (1782). See Treanor, *supra* note 128, at 507-514.

179. See *infra* notes 192-193.

180. To be sure, there would be one crucial difference. Under the Supremacy Clause approach, Congress would have to rely upon the judiciary to enforce its necessarily supreme laws. If Congress could make the declaration, however, it would not need to rely upon others. Yet the proponents of judicial review of state legislation assumed judicial fidelity to the supreme law of the land. Indeed, the proponents of state judicial review of state legislation disagreed with Madison and Wilson when the latter two claimed that the judiciaries could not be relied upon. Hence, the proponents of the judicial review option must have regarded judicial review as an option *only* when the state laws in question violated the law of the land. In many cases, this could only occur after an interpretation of the Constitution regarding the power to pass the law in the first instance.

Supremacy Clause, by implicitly requiring judicial review of state statutes, necessarily meant that the judiciary (federal and state) would have to judge the meaning of the federal constitution and judge whether federal law was made in pursuance of it. In other words, judicial review of state constitutions and statutes almost necessarily requires an analysis and interpretation of the federal constitution and often requires judicial review of federal statutes and treaties. For in the absence of judicial review of the constitutionality of federal laws, Congress would, in effect, have the unchecked power to “veto” state legislation.

Finally, judicial review was implicit in the frequent debates over whether the Constitution should create inferior federal courts. When defenders of the state judiciaries attempted to fend off the creation of the lower federal courts, they implicitly represented that the state courts would review state constitutions and laws to determine if they were in conformity with the federal constitution, laws, and treaties.¹⁸¹ They also admitted that the Supreme Court could correct the errors of the state judiciaries.¹⁸² The proponents of inferior federal courts successfully secured a legislative power to create such courts because they convincingly argued that state courts might not consistently choose federal law over state law.¹⁸³ In other words, proponents of inferior federal courts never argued that the state courts were constitutionally incapable of judicial review of state legislation. Rather, proponents of inferior federal courts argued that the state courts might choose to ignore superior federal rules and adhere to their own state’s laws. As should be obvious, both sides assumed the propriety of judicial review; they merely differed as to who would best exercise that power in the first instance.

Given that both sides assumed that state courts could engage in judicial review of state legislation, it is hard to imagine why these same delegates would not similarly assume that the courts, federal and state, could judge the constitutionality of federal legislation. In the absence of some constitutional provision to the contrary, judicial review of federal legislation would be just as naturally part of a limited constitutional system as was judicial review of state legislation.

In light of this evidence, Professor Kramer’s claims about judicial review

181. See, e.g., 1 FARRAND’S RECORDS, *supra* note 140, at 119 (John Rutledge claiming that state courts could decide all cases in the first instance).

182. 1 *id.* at 124 (John Rutledge noting the Supreme Court could secure uniformity).

183. See, e.g., 1 *id.* at 122, 124 (comments of James Madison); 2 *id.* at 46 (comments of Edmund Randolph).

at the Convention are mistaken.¹⁸⁴ Far from being a “trivial aspect,” judicial review was explicitly mentioned at least a dozen times and it was clearly implicit in many contexts. In particular, judicial review of federal legislation was discussed almost a dozen times—far more than Professor Kramer’s claim that it was mentioned but once.¹⁸⁵ Finally, we believe that the evidence from the Convention suggests that some delegates were concerned that Congress might pose a threat to the states. In addition to the discussions of federal judicial review of congressional legislation, the framers debated the Constitution’s political safeguards of federalism, safeguards designed to protect the states from the vortex-like tendencies of Congress. There are simple and frank acknowledgements that Congress, like the state legislatures, probably would exceed its authority from time to time.¹⁸⁶ Though the Convention had been called to strengthen the federal government, that purpose alone does not prove that the delegates were unconcerned about the scope of federal power generally or about the scope of federal legislative power in particular. Given that the states would play a role in the ratification, delegates understood the need to limit and check the federal legislative vortex.

Out of this jumble of issues, a pattern emerges. Delegates discussed judicial review in various contexts—individual rights, separation of powers, federal and state legislation—without linking their claims to specific constitutional language. We believe that this pattern reflects the understanding that judicial review did not directly arise from any particular

184. In fairness to Professor Kramer, we believe that he was unaware of all these discussions of judicial review.

185. Kramer, *supra* note 5, at 244. Indeed, by Professor Kramer’s own count, it was mentioned at least thrice, for he also cites the remarks of Wilson, Martin, and Mason. *Id.* at 244-45. In truth, Kramer cites four instances, because he (curiously) cites Elbridge Gerry’s comments in a footnote. *Id.* at 244 n.121. We are not sure why Kramer treats his three (or four) citations to judicial review as if they were but one.

186. Though many delegates voiced fears that the states posed a bigger threat of usurpation than the federal government, *see, e.g.*, 1 FARRAND’S RECORDS, *supra* note 140, at 355-57 (Madison and Wilson arguing that danger of encroachment was more likely to come from states), many of these same delegates understood that federal head might infringe on the states prerogative. *See* 2 *id.* at 35, 74 (Madison decrying tendencies of legislative vortex); 2 *id.* at 76 (Morris saying real threat to liberty came from legislature); 1 *id.* at 155 (George Mason claiming that the states needed protection against federal encroachment); 1 *id.* at 492-93 (Rufus King claiming that fears of federal encroachment had not been satisfactorily resolved).

provision, but instead followed from the concept of a limited, written Constitution and the creation of an independent judiciary. Just by creating a “judicial power of the United States” that could decide cases “arising under the Constitution,” our limited Constitution authorized judicial review. And just by implicitly permitting concurrent state court jurisdiction over at least some constitutional cases, the Constitution necessarily allowed state court judges to engage in judicial review as well. Absent a provision barring judicial review by the state and federal courts, they would bear the constitutional responsibility to determine the constitutionality of legislation. Of course, our Constitution contains no such language and no one ever proposed including such a restriction. Hence, judged against the background understandings so evident during the Convention, the Philadelphia delegates assumed that the Constitution permitted courts to measure statutes against the Constitution, including the constitutional propriety of federal legislation.

F. Ratification: Confirming Judicial Review

The Constitutional Convention was hardly anomalous. When the debate shifted from the drafting stage to the state ratifying conventions, judicial review once again played a significant role. In several ratifying conventions, and in pamphlets and letters, individuals acknowledged that the Constitution authorized judicial review. Indeed, both opponents and proponents of the Constitution understood that judicial review would keep Congress within the Constitution’s four corners. To illustrate the breadth of the material, we have broken down the evidence into different categories: individual rights, enumerated powers, complaints about judicial review, general discussions of judicial review, and extended dialogues regarding judicial review. We also briefly comment on how the discussions of judicial review of state legislation revealed a broader consensus regarding the propriety of judicial review more generally. As at Philadelphia, judicial review was understood to be part of any limited constitutional scheme. Indeed, in the face of many statements that the courts would engage in judicial review, we know of no one during the ratification process who even hinted that judicial refusal to enforce unconstitutional federal legislation would itself violate the Constitution. As with the Philadelphia Convention, Kramer and others who insist that judicial review was not originally understood to be part of the Constitution have overstated their case and overlooked or downplayed significant evidence to the contrary.

2. *Safeguarding Individual Liberties.*—Throughout the ratification struggle, Anti-federalists criticized the Constitution because it would not prevent the federal government from violating individual rights. At the Philadelphia Convention, however, Madison and Hugh Williamson had cited

the judiciary as a bulwark for individual rights—in particular, the prohibition against ex post facto laws. During the ratification struggle, Federalists repeated the claim that the judiciary would safeguard individual rights. 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.¹⁸⁷ 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”¹⁸⁸ The State Soldier clearly recognized that judicial protection of property rights against legislative encroachment safeguarded property values. At the Virginia ratifying convention, opponents of the Constitution argued that the federal judiciary would shield vicious federal officers from suits.¹⁸⁹ A federal sheriff might “go into a poor man’s house, and beat him, or abuse his family, and the federal court will protect him.”¹⁹⁰ Future Chief Justice John Marshall denied the charge: “[t]o 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 authorize [such insults], it would be void.”¹⁹¹ Virginia Governor Edmund Randolph, our nation’s first Attorney General, made similar claims. Even if Congress enacted laws requiring excessive bail and fines and cruel and unusual punishments, “judges must judge contrary to justice”¹⁹² for these punishments to matter. Likewise, if general warrants were authorized, would not the federal judiciary “be independent enough to prevent such oppressive practices? If they will not do justice to persons injured, may not they go to our own State judiciaries and obtain it?”¹⁹³ Though opposed to the Constitution,

187. The State Soldier IV (Mar. 19, 1788), in 8 DOCUMENTARY HISTORY, *supra* note 53, at 509-511.

188. *Id.* at 511.

189. In light of today’s qualified immunity doctrines for federal officers, the Constitution’s opponents may have been prescient. For a discussion of official immunity, see RICHARD H. FALLON ET AL., HART & WESCHLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1155-84 (4th ed. 1996).

190. Debates (June 20, 1788) in 10 DOCUMENTARY HISTORY, *supra* note 53, at 1432.

191. 10 *id.* at 1432.

192. 10 *id.* at 1351.

193. 10 *id.* at 1351-52. See also 10 *id.* at 1427 (reporting that Edmund Pendelton declared that the judiciary would never accept and oppressive construction of the laws).

George Mason made similar claims about the judicial enforcement of the federal ex post facto clause.¹⁹⁴

At the Massachusetts ratifying convention, Theophilus Parsons denied that the absence of a bill of rights would matter. Because “no power was given to Congress to infringe on any one of the natural rights of the people . . . should they attempt it without constitutional authority, the act would be a nullity, and could not be enforced.”¹⁹⁵ Parsons was voicing the common view: if Congress lacked the power but asserted it nonetheless, the judiciary would ignore the statute.

Many understood that the judiciary would repudiate legislative attempts to violate individual rights. Sometimes the individual rights prohibitions were express, such as the Ex Post Facto Clauses. Other times, Federalists claimed that judicial review would safeguard unenumerated rights. Whatever the merits of their claims, however, each understood that the judiciary would play a crucial role safeguarding individual rights. As Marshall hyperbolically claimed, outside of the judiciary, there was no other body that could safeguard individual rights from legislative encroachment.

4. *Policing the Limits of Specific Congressional Powers.*—In addition to their criticism that the Constitution left individual rights vulnerable, Anti-federalists shared a second common and related concern: that the Constitution would not prevent Congress from overstepping the limits on its powers. Again, Federalists responded by relying in part upon judicial review. Regarding the Necessary and Proper Clause, James Madison, “Aristedes,” and George Nicholas argued that the courts would rebuff congressional laws that swept too far. If Congress misconstrued the Necessary and Proper Clause and exercised excessive power, Publius noted, the consequence would be the same “as if they should misconstrue or enlarge any other power vested in them . . . [or] if the State legislatures should violate their respective constitutional authorities. In the first instance, the success of the usurpation [would] depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts.”¹⁹⁶ If judicial review failed, an

194. See *infra* note 225 and accompanying text.

195. JONATHAN ELLIOT, 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 161-62 (1907) [hereinafter ELLIOT'S DEBATES].

196. THE FEDERALIST No. 44, at 285-86 (James Madison) (Clinton Rossiter ed., 1961). To speak of the usurpation as depending on the actions of the judiciary is to recognize that judiciary could thwart the usurpation.

appeal to the people would be the last resort.¹⁹⁷ “Aristides”—Alexander Contee Hanson—made a similar claim about the sweeping clause. Though Congress would first judge the extent of its authority, “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.”¹⁹⁸ At the Virginia ratifying convention, George Nicholas attempted to quell fears of the Sweeping Clause and the General Welfare Clause. “[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.”¹⁹⁹ John Steele, speaking at the North Carolina convention, denied 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.”²⁰⁰

John Marshall not only noted the propensity of judicial review to safeguard familiar individual rights, but he also observed that judicial review would preclude Congress from citing the Supremacy Clause as a justification for tinkering with subject matters left to the states such as the rights to contract and hold property. Though some feared that the Supremacy Clause meant that Congress would know no legislative limits, Marshall utterly rejected the fear:

Has the government of the United States power to make laws on every subject? . . . Can they make laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same state? Can they 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

197. *Id.* at 286.

198. Aristides: Remarks on the Proposed Plan, (Jan. 31, 1788) in 15 DOCUMENTARY HISTORY, *supra* note 53, at 531.

199. Debates, (June 16, 1788), in 10 DOCUMENTARY HISTORY, *supra* note 190, at 1327.

200. 4 ELLIOT’S DEBATES, *supra* note 195, at 71. Given that the North Carolina Supreme Court had recently engaged in judicial review, *see supra* note 128, it is likely that Steele’s point was widely shared at the North Carolina convention. Indeed, recall that North Carolina delegate to the Philadelphia Convention, Hugh Williamson, had noted that the judges could enforce the ex post facto clause’s prohibition.

Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void.²⁰¹

At the same Virginia convention, Edmund Pendleton made an analogous point regarding western land claims. Even if Congress passed laws regarding the validity of such claims, the courts would take no cognizance of them because Congress lacked legislative authority over such claims.²⁰²

Though each of these statesmen spoke of judicial review in a particular context, oftentimes responding to specific complaints, they spoke with a universality that went beyond the narrow issue at hand. Whatever the precise complaint, the same, familiar mechanism for controlling a legislature was put forth. Publius, Aristedes, Nicholas, Henry, and Pendleton each recognized that the courts could refuse to enforce an unconstitutional law.

6. *Generic Discussions of Judicial Review.*—Anti-Federalist complaints against the Constitution were of such ferocity and frequency that many partisans of the Constitution relied on judicial review as a general response to attacks on the Constitution. In this more general context one again witnesses the commonly shared support for judicial review.

Many of the Philadelphia delegates reiterated their understanding that judges could review the constitutionality of federal legislation. We have already noted how Madison confirmed judicial review in the context of the Ex Post Facto and Necessary and Proper Clauses. In another *Federalist*, Madison observed that the Supreme Court was the “tribunal” to “ultimately” decide in an impartial manner and according to the Constitution “the boundary between” the state and national governments.²⁰³ Luther Martin, who at

201. Debates, (June 20, 1788), in 10 DOCUMENTARY HISTORY, *supra* note 190, at 1431.

202. Debates, (June 12, 1788), in 10 *id.* at 1200-01.

203. THE FEDERALIST No. 39, at 245-46 (James Madison) (Clinton Rossiter ed., 1961). If Congress unilaterally determined the boundary between state and federal power and the judiciary lacked judicial review, then there would be no sense in which the Supreme Court would be the ultimate arbiter of the boundary. Because the Supreme Court is the ultimate arbiter (per Madison), the judiciary necessarily must have the power to declare that Congress has overstepped its limited legislative bounds.

Leonard Levy has argued that Madison was not truly a supporter of judicial review. See LEVY, *supra* note 15, at 104 (1988). Among other things, Levy cites Madison's Philadelphia claim that jurisdiction over cases arising under the Constitution should be limited to cases of a “Judiciary Nature.” *Id.*

Philadelphia had noted that judges could “negative” unconstitutional laws, protested that federal judges would wield this power in a partial manner. He supposed that whether federal laws are constitutional “rests *only* with the judges, who are appointed by Congress.”²⁰⁴ Nonetheless, this critic of the Constitution agreed with Madison that the federal courts would judge the constitutionality of federal statutes.

Others who apparently said nothing or even opposed judicial review during the Philadelphia Convention spoke in favor of the institution during the ratification process. At the Connecticut ratifying convention, future Senator and Supreme Court Chief Justice, Oliver Ellsworth, spoke out on the subject:

This Constitution defines the extent of the [federal] powers 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.²⁰⁵

It is hard to interpret Ellsworth’s comments as anything but a ringing endorsement of the Constitution’s authorization of judicial review.

John Dickenson, who at Philadelphia had expressed qualms about judicial

at _____. Levy also cites Madison’s concern that because the judiciary is the last branch to judge the constitutionality of a law that fact makes the judiciary “paramount to the Legislature, which was never intended and can never be proper.” *Id.* at _____. Neither claim by Madison (nor any of the others cited by Levy) casts doubt on Madison’s support for the judicial review of federal legislation. The first quote actually supports judicial review when it occurs in the context of cases properly in the federal courts. Madison probably wanted to ensure that the judiciary would not have a free-wheeling license to decide the meaning of the constitution whenever someone had a constitutional “dispute.” The second quote assumes the propriety of judicial review as well; the judiciary still must decide whether it will ratify or ignore the legislature’s usurpation. Madison’s quote only calls into question whether the judiciary’s determination must be followed by the other branches. Our point is that the judiciary, in the course of deciding cases or controversies, must choose to enforce or vindicate the Constitution over a contrary federal or state law. On this point, we believe that Madison was quite consistent.

204. Luther Martin, *Genuine Information X* (Feb. 1, 1788), in 16 DOCUMENTARY HISTORY, *supra* note 53, at 8.

205. The Connecticut Convention (Jan. 7, 1788), in 3 DOCUMENTARY HISTORY, *supra* note 53, at 553. Ellsworth also noted that the states would be subject to judicial review as well. *Id.*

review, seemed to have overcome them by the ratification struggle. Discussing the many checks on federal authority, he included the “federal independent *judges*, so much concerned in the execution of the laws, and in the determination of their constitutionality.”²⁰⁶ His comments are significant because they come from an earlier opponent of judicial review, and they reveal his understanding that judicial review would exist under the new Constitution. Dickenson cited no constitutional text; he did not have to because the founders believed that judicial review naturally resulted from a limited Constitution.

Theophilus Parsons, the author of the famous Essex Result, wrote of a different “judicial” review. He claimed that juries could review the constitutionality of federal legislation. “An act of [federal] usurpation is not obligatory; it is not law; and *any man* may be justified in his resistance.”²⁰⁷ Even if the federal government deemed a man a criminal “only his own fellow-citizens can convict him; they are his jury, and if they pronounce him innocent, not all the powers of Congress can hurt him; and innocent they certainly will pronounce him, if the supposed law he resisted was an act of usurpation.”²⁰⁸ Parsons clearly was not speaking of factual innocence. Nor was he speaking of jury nullification, whereby a jury prevents the application of a supposedly unjust though constitutional law. Instead, he claimed that anyone, including jurors,²⁰⁹ could resist unconstitutional laws. Parsons, who went on to become the Chief Justice of the Massachusetts Supreme Judicial Court, clearly believed that the judiciary—broadly understood—could ignore unconstitutional laws.

Also at the Massachusetts Convention, Samuel Adams clearly assumed that judges would judicially review federal legislation. Governor John Hancock had proposed that “all powers not expressly delegated to Congress are reserved to the several states, to be by them exercised.” Adams seized on the proposal as removing doubts and giving assurances that “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.”²¹⁰ In

206. Fabius IV, *PENNSYLVANIA MERCURY*, Apr. 19, 1788, in 17 DOCUMENTARY HISTORY, *supra* note 53, at 182.

207. 2 ELLIOT'S DEBATES, *supra* note 195, at 94.

208. 2 *id.* at 93-94 (emphasis added).

209. He was not the only one who believed that the jury could void unconstitutional laws. Recall that Aristedes had mentioned that others also held that belief.

210. 2 ELLIOT'S DEBATES, *supra* note 195, at 131 (comments of Samuel

other words, the proposal would underscore that federal power was limited and thus subject to judicial review.²¹¹ The Tenth Amendment codifies a variant of Hancock's proposal and makes explicit what was implicit in the original Constitution. All powers not granted to the federal government rest with the states or the people. As Adams observed, once one admits this elemental proposition, judicial review of federal legislation follows as a matter of course. The judiciary would declare void a legislature's attempt to usurp powers not granted.

8. *Complaints about Judicial Review.*—In response to Federalist promises about judicial review, the Anti-Federalists adopted two different strategies. First, they denied that judicial review could meaningfully check Congress. Either the Constitution granted plenary legislative power—in which case judicial review seemed beside the point—or biased judges would rubber stamp federal law. Either way, the game was stacked against the states. Second, they cleverly attempted to hoist their opponents on their own petards. Judicial review would work too well. It would handcuff Congress, preventing it from correcting perceived problems in the Constitution. Both sets of complaints, once again, underscored the propriety of judicial review. Indeed, we know of no adversary of the Constitution who ever denied that the Constitution authorized judicial review, despite the fact that such an argument would have been a useful weapon to wield against the Federalists who used judicial review to their advantage.

The Federal Farmer, one of the Constitution's most articulate opponents, 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 judges may decide the question on principles of equity as well as law.²¹²

The Federal Farmer confirmed several propositions. Absent an equitable

Adams).

211. Given that Massachusetts delegates Rufus King and Elbridge Gerry assumed the propriety of judicial review at Philadelphia, *see supra* notes 141-142, we can assume that Parsons and Adams's claims at the Massachusetts convention were not outside the mainstream of Massachusetts opinion.

212. *See* Letter XV from the Federal Farmer to the Republican (May 2, 1788) *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 53, at 341.

construction of the Constitution, Congress could not enact a federal law that prohibited state taxation of certain articles. Second, a suit challenging the federal tax preemption statute would be a case “arising under” the Constitution. Most important, his complaint regarding the equity power was premised on the notion that the judiciary ordinarily was under an obligation to engage in judicial review. After all, the Farmer did not need to invoke the judiciary’s equity powers if the courts were not under a duty to strike down unconstitutional federal law in the first place. Equity would give the biased federal judiciary the cover under which they could bypass their duty to strike down unconstitutional acts and instead enforce them.²¹³

In a letter to revolutionary hero Samuel Adams, Samuel Osgood made the exact same claim about equity. “[S]uppose then, any State should object to the exercise of Power by Congress as infringing the Constitution of the State.”²¹⁴ The remedy “is to try the Question before the supreme Judicial Court.”²¹⁵ Yet they 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.”²¹⁶ Like the Farmer, Osgood argued that the generally recognized route for challenging the constitutionality of legislation—the courts—would be of no avail. The biased federal courts would deploy their equitable powers to vindicate federal authority.

We have already seen that John Marshall, George Nicholas, and Edmund Pendleton defended judicial review at the Virginia convention. Another colloquy reveals that some accepted the propriety of judicial review but doubted its efficacy. Pendleton recalled how the Virginia legislature had unconstitutionally attainted an individual and noted that his “brethren in that department (the judicial) felt great uneasiness in their minds; to violate the Constitution by such a law. They have prevented the operation of some unconstitutional acts.”²¹⁷ Patrick Henry seized on Judge Pendleton’s claim

213. On the framing debate over the equity power of the federal courts, see John Choon Yoo, *Who Measures the Chancellor's Foot?: The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121 (1996).

214. Letter from Samuel Osgood to Samuel Adams (January 5, 1788), in 15 DOCUMENTARY HISTORY, *supra* note 53, at 263, 265.

215. 15 *id.* at 265.

216. *Id.*

217. The Virginia Convention (June 12, 1788) in 10 DOCUMENTARY HISTORY, *supra* note 53, at 1197. Pendleton also had sent a remonstrance to the state legislature that a law creating district courts was unconstitutional. 10 *id.* at 1227 n.17. Pendleton also probably had in mind *Commonwealth v.*

to criticize the federal judiciary. Far from questioning the propriety of judicial review, Patrick Henry extolled the institution.²¹⁸ Pendleton had honored Virginia's judiciary by

saying, that they had firmness to counteract the legislature in some cases We have this landmark to guide us.—They had fortitude to declare that they were the judiciary and would oppose unconstitutional acts. Are you sure that your Federal Judiciary will act thus? Is that Judiciary so well constructed, and so independent of the other branches, as our State Judiciary? Where are your land-marks in this Government? I will be bold to say you cannot find any in it. I take it as the highest encomium on this country, that the acts of the Legislature, if unconstitutional, are liable to be opposed by the Judiciary.²¹⁹

Henry's complaint assumed that the federal judiciary could engage in judicial review. He merely doubted whether they would be resolute enough to deserve the "highest encomium."²²⁰ No one directly took issue with Henry's prediction.

Like a good lawyer, Henry argued in the alternative. If the judges defied his prediction and chose the Constitution over the Congress, they would be forced to void beneficial laws. In other words, judicial review would work too well and prevent Congress from rectifying the Constitution's problems. He made this claim in the context of the federal judiciary's supposed power to review factual determinations made by juries. The Anti-federalists charged that federal judges would review findings of fact made by juries. Federalists responded that Anti-federalists had misread the Constitution and that Congress could pass "regulations" that would preclude appellate review of a

Caton, 4 Call (Va.) 5 (1782), where his Virginia Court of Appeals voided a pardon in which the Virginia Senate had not concurred.

218. This, despite the fact that Pendleton was subtly criticizing a bill of attainder passed at Henry's urging.

219. The Virginia Convention (June 12, 1788) in 10 DOCUMENTARY HISTORY, *supra* note 53, at 1219.

220. *Id.* Later, Henry reiterated his claim that the federal judiciary would not restrain Congress. Though we are assured that a federal "judiciary . . . will correct all," closer examination reveals a "judiciary oppressively constructed; your jury trial destroyed, and the judges dependent on Congress." 3 ELLIOT'S DEBATES, *supra* note 195, at 57. *See also* 3 *id.* at 58 (Henry observing that the convention had been told that Congress's laws would be "judged by righteous judges"). The jury trial was supposedly destroyed because the Constitution was construed as barring jury trials in civil cases. The judiciary was dependent on Congress because Congress could raise salaries and impeach judges.

jury's factual findings.²²¹ Henry took exception to such claims. Congress could not prohibit appeals as to fact because "the federal judges, if they spoke the sentiments of independent men, would declare their prohibition nugatory and void."²²² More generally, by virtue of the Necessary and Proper Clause, Congress could not "depart from the Constitution; and their laws in opposition to the Constitution would be void."²²³ George Mason claimed that an amendment would be necessary to prevent the Supreme Court from reviewing factual findings. Even if Congress passed a law declaring that appellate judges could not review facts, "will not the Court be still judges of the fact consistently with this Constitution?"²²⁴

Mason liked the argument about judicial review constraining Congress so much that he recycled it. According to Mason, Congress would have to pay off the Revolutionary War debt in full because any law that redeemed the debt below par would be *ex post facto*, this despite the fact that speculators had bought the debt on the cheap. Should Congress pass a law to 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.²²⁵

Conventional wisdom suggests that Mason was wrong about the *ex post facto* clause—it only covers criminal legislation.²²⁶ Yet Mason's claims about judicial review were of a piece with his acknowledgment at Philadelphia that the judiciary would decide the constitutionality of legislation.

One other incident involved an opponent of the Constitution wielding judicial review as a weapon at the Virginia convention. William Grayson complained that the Constitution abrogated state immunity against suit by

221. See, e.g., 3 *id.* at 534 (comments of Madison at Virginia ratifying convention).

222. 3 *id.* at 572.

223. 3 *id.* at 540-41.

224. The Virginia Convention (June 20, 1788) in 10 DOCUMENTARY HISTORY, *supra* note 190, at 1361-62.

225. Mason made clear that he believed that the *ex post facto* clauses barred all retrospective legislation. 10 *Id.* at 1362.

226. See *Calder v. Bull*, 3 U.S. 386 (1789) (holding that the *ex post facto* prohibitions are limited to criminal laws).

foreign governments but still required the foreign government's consent before a state could sue it. "It is fixed in the Constitution that they [states] shall become parties. This is not reciprocal. If the Congress cannot 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."²²⁷ Once again, we have no interest in the merits of sovereign immunity. We cite Grayson only to show that the Anti-Federalists assumed judicial review as readily as did the Federalists²²⁸

Anti-Federalists recognized the existence of judicial review. Yet they sought to deny that judicial review would effectively safeguard the states. One set claimed that judicial review would never work as promised because federal judges would be interested only in the expansion of federal power. Another set noted that judicial review of federal legislation might not benefit the states. Instead, judicial review might hamper some congressional attempts to address onerous constitutional prohibitions or disabilities on the states.

10. *Judicial Review of State Legislation.*—Scholars generally agree that the federal and state courts may measure state statutes against the Constitution. Given the consensus, we have little to add here. Yet the manner in which judicial review of state legislation was discussed confirms that the judiciary was understood as a bulwark of the entire Constitution and not just for the restrictions and prohibitions on the states. One example

227. 10 DOCUMENTARY HISTORY, *supra* note 53, at 1448.

228. Not all those who bemoaned the restraining effects of judicial review were using it as a clever means of attacking the Constitution. Months after Georgia ratified the Constitution, "A Planter" warned what the Constitution's impending ratification might mean for Georgia's paper money. A Planter, *The Aftermath of Ratification*, GAZETTE OF THE STATE OF GEORGIA, 3 July ____, 3 DOCUMENTARY HISTORY, *supra* note 53, at 304, 304-05. Under Article I, Section 10, Clause 1, no State shall "make any Thing but gold and silver Coin a Tender in Payment of Debts." U.S. CONST. art. 1, § 10, cl.1. A Planter warned that whatever the state's rules prior to the Constitution's ratification, paper money could no longer be used to satisfy debts. Moreover, the state could not pass installment laws giving debtors greater time to pay. Indeed, even if Congress wanted "to give relief against the operation of any article of the Constitution" it could not do so. Any attempt would be "set aside" because the Constitution was the supreme law of the land. A Planter, *supra*, at 305. Not even Congress could successfully relieve states of their Section 10 burdens and prohibitions because the judges would stay faithful to the Constitution.

suffices to illustrate the point. At the North Carolina Convention, William Davie noted that in every government, it was necessary that a judiciary exist to decide all questions “arising out of the constitution.”²²⁹ Indeed, “without a judiciary, the injunctions of the Constitution may be disobeyed, and the positive regulations neglected or contravened.”²³⁰ Davie then cited various prohibitions on the states. He ended his praise of the restrictions on the states by claiming that it is “absolutely necessary that the judiciary of the Union should have jurisdiction in all cases arising in law and equity under the Constitution. Surely there should be somewhere a constitutional authority for carrying into execution constitutional provisions: otherwise, as I have already said, they would be a dead letter.”²³¹

We believe that Davie expressed the common view. Experience had proven that legislatures would overreach and enact unconstitutional laws and that the people could not be consistently counted upon to restrain their representatives. (Indeed, the people were often the ones clamoring for the unconstitutional laws.) Instead, the judiciary would help ensure that the Constitution’s limitations and prohibitions were not “dead letters.” Although Davie was primarily speaking about judicial review of state legislation, we believe what he said also applied to federal legislation. Indeed, Davie cited the Port Preference Clause as a beneficial restriction.²³² The Clause would have been a “dead letter” absent judicial review of federal legislation. Similarly, the other restrictions on Congress found in Article I, Section 9 and the constraints on Congress derived from the enumeration of limited powers in Article I, Section 8 would have been viewed by many in the founding generation as meaningless absent the judiciary’s power to review the constitutionality of federal legislation.

12. *Extended Exchanges.*—Thus far, we have reviewed relatively discrete comments confirming the constitutionality of judicial review. We will now discuss examples of more prolonged exchanges about the nature and scope of judicial review. At the Pennsylvania ratifying convention, the Constitution’s opponents raised a series of concerns about judicial review. None of them doubted its existence. Instead they doubted its effectiveness. James Wilson began the discussion by listing judicial review as one of many checks on the federal government:

229. 4 ELLIOT’S DEBATES, *supra* note 195, at 156.

230. *Id.*

231. *Id.*

232. *Id.*

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 . . . 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.²³³

In making his point, Wilson was merely confirming what he had said in Philadelphia. By virtue of judicial review, the judiciary had a partial, constitutional negative on Congress's laws.

John Smilie, an articulate opponent of ratification, did not deny the propriety of judicial review. Notwithstanding their guaranteed salaries, judges would lack the courage and independence to stand up to Congress. "We have not every security from the judicial department. The judges, for disobeying a law, may be impeached by one house, and tried by the other."²³⁴ Likewise, Robert Whitehill, commenting on the Supremacy Clause, claimed that though laws might be made in "pursuance" of the Constitution, they still might not be agreeable to it, *i.e.*, they might be unconstitutional.²³⁵ In other words, "pursuance" might just require that the laws satisfy bicameralism and presentment. If so, judicial review was an empty promise insofar as limits on congressional authority were concerned.²³⁶

Wilson ably defended judicial review's effectiveness. He mocked Smilie's claim that the House and Senate would impeach a judge for declaring unconstitutional laws unconstitutional. "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 their duty?"²³⁷ Wilson also

233. The Pennsylvania Convention (Dec. 1, 1787) *in* 2 DOCUMENTARY HISTORY, *supra* note 53, at 449-50. Wilson's comments about judicial review are confirmed by William Wayne's notes. *See* 2 *id.* at 453. ("The legislature may be restrained by the judicial department").

234. The Pennsylvania Convention (Dec. 4, 1787) *in* 2 *id.* at 465.

235. The Pennsylvania Convention (Dec. 7, 1787) *in* 2 *id.* at 513.

236. Earlier, Wilson had claimed that Congress could not pass any laws restricting the press because they would not be in "pursuance" of the Constitution. The Pennsylvania Convention (Dec. 1, 1787) *in* 2 DOCUMENTARY HISTORY, *supra* note 233, at 455.

237. The Pennsylvania Convention (Dec. 4, 1787) *in* 2 DOCUMENTARY

denied Whitehill's narrow procedural construction of "pursuance." A law was pursuant to the Constitution only if the law was otherwise constitutional:

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.²³⁸

By denying that judges would be cowered into foregoing judicial review by threats of impeachment and by rejecting the claim that the Constitution surreptitiously sanctioned all federal legislation, Wilson confirmed that judicial review would not necessarily be a paper tiger. Properly wielded, judicial review had real bite.²³⁹

The most sustained attack on the consequences of judicial review took place in a series of newspaper essays written by "Brutus." Like the other opponents of the Constitution, Brutus did not dispute that the Constitution authorized judicial review of the constitutionality of legislation. Instead, he understood, better than most, the possible consequences of robust judicial review: the judiciary would eclipse Congress. Brutus began his assault on Article III in late January of 1788. He asserted that the judges would construe the Constitution free of any fixed or established rules and would use their equity power to expansively construe federal power. Because the legislature could not correct or set-aside the Supreme Court's erroneous judgements, they would "have the force of law." Notwithstanding his view that Congress had broad powers, he voiced the widespread view that the "legislature must be controuled by the constitution, and not the constitution by them."²⁴⁰

His next essay fleshed out the common conception of judicial review. If the legislature passed laws, "which, in the judgment of the court, they are not

HISTORY, *supra* note 233, at 492.

238. The Pennsylvania Convention (Dec. 7, 1787) in 2 DOCUMENTARY HISTORY, *supra* note 233, at 517.

239. An abridged account of Wilson's defense of judicial review was published in the *Pennsylvania Herald* and was subsequently republished (at least in part) at least eleven times throughout the United States. 2 *id.* at 524. Though Kramer refers to this as the "only apparent example of newspaper coverage of an exchange on judicial review, Kramer, *supra* note 5, at 250 n.139, he curiously fails to note that this coverage extended throughout the U.S.

240. Brutus No. XI, in 15 DOCUMENTARY HISTORY, *supra* note 214, at 512, 514.

authorised to do by the constitution, the court will not take notice of them.”²⁴¹ Why could the court ignore such unauthorized laws? Because the constitution would be “highest or supreme law” and the courts would enjoy a power to determine what the constitution means when cases present themselves. If judges were forced to prefer the unauthorized law to the Constitution, the inferior law would trump the superior. Accordingly, “the judgment of the judicial, on the Constitution, will become the rule to guide the legislature in their construction of their powers.”²⁴² Several essays later, Brutus declared that when the “legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void.”²⁴³

Brutus's essays on the judicial power were entirely consistent with what had been said by other Anti-federalists about judicial review. Instead of attacking Congress as wholly unconstrained, Brutus and other opponents accepted the propriety of the judicial constraint on congressional power. These aggressive opponents of the Constitution joined in the widespread understanding that the judiciary had a constitutional check that could restrain Congress. Indeed, many of the complaints voiced against the judiciary acknowledged judicial review. The courts could restrain Congress—but they were unlikely to do so. Instead, they would favor broad congressional authority because that would expand their jurisdiction. Or judges would employ their equitable powers to expansively construe congressional powers. Or, fearing impeachment, judges would be too timorous to constrain Congress.

Publius' extensive discussion of the federal judiciary in *Federalist No. 78* was, in large measure, a refutation of Brutus' predictions about the future judicial review of federal legislation. Regarding the supposed superiority of the judiciary, Hamilton denied it. In truth, neither the legislature nor the judiciary was supreme. Instead, their principal—the people—was supreme. Moreover, though judges could declare federal statutes void, they were by no means asserting their superiority over Congress. Instead, the judiciary was merely acting as an agent on behalf of their principal. When one agent pledged to defend the Constitution recognized that another was exceeding its constitutional powers, the former agent could ignore the latter's usurpation for nothing was clearer “than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.”²⁴⁴ Hence, under the limited Constitution “[n]o legislative act, therefore, contrary to the

241. Brutus No. XII, in 16 *id.* at ____.

242. Brutus No. XII, in 16 *id.* at 72, 73.

243. Brutus No. XV, in 16 *id.* at 431, 433.

244. THE FEDERALIST No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Constitution, can be valid”²⁴⁵ in court.

In order for judicial review to work, Hamilton argued, judges had to enjoy substantial institutional independence. If the judiciary “are to be considered as the bulwarks of a limited Constitution against legislative encroachments,” a permanent tenure will contribute “to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.”²⁴⁶ Independence would also prove necessary to guard against the momentary “ill humors” that might seize the people and propel them to demand that their representatives enact laws incompatible with the Constitution. Indeed, resisting the temporary passions of the people would “require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution.”²⁴⁷

Because independence would foster the proper judicial temper, every man should support independence: “That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.”²⁴⁸

But why should the Constitution be read as if the judiciary could declare that the legislature had overstepped its bounds? Why shouldn’t the Constitution instead be read as if the legislature could judge its own limits or perhaps definitely construe the Constitution for all three branches? Hamilton abjured text and relied upon convention. Neither could be “the natural presumption where it is not to be collected from any particular provisions in the Constitution 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.”²⁴⁹ Hence, Hamilton’s argument against legislative supremacy in the exposition of the Constitution was not based on dry logic. Instead, he relied on presumptions. Unless the Constitution provided otherwise, the judiciary could ignore unconstitutional laws.²⁵⁰

245. *Id.*

246. *Id.* at 469.

247. *Id.* at 470.

248. *Id.* at 470-71.

249. *Id.* at 467.

250. Regarding the dialogue between Brutus and Publius, Professor Kramer takes great pains to show that most Americans would have been unaware of their agreement on judicial review. *See* Kramer, *supra* note 5, at 247-49. In making this claim, Professor Kramer misses the significance of the dialogue. We cite this now famous dialogue not to claim that everyone in

In a later *Federalist*, Publius expanded on the presumption theme. He admitted that although unconstitutional laws “ought to give place to the Constitution” this doctrine was not deducible from the particular circumstances of the Constitution.²⁵¹ Instead, judicial review arose “from the general theory of a limited Constitution; and as far as it is true is equally applicable to most if not to all the State governments.”²⁵² Hence any complaints about judicial review at the federal level also would “serve to condemn every constitution that attempts to set bounds to the legislative discretion.”²⁵³ Publius was declaring, in effect, that a written, limited Constitution would necessarily produce judicial review and that each state constitution authorized judicial review as well.²⁵⁴

When pressed to explain and defend judicial review, Wilson and Hamilton had no difficulty in doing so. The federal judiciary was well-equipped to carry forward the tradition begun in the states of judges choosing superior law over inferior. Moreover, judicial review did not mean that the judges could exert their independent will or were superior; instead judges were to act as the people’s faithful agents in determining whether another agent of the

America was aware of that dialogue. Instead we cite the dialogue as just one more instance in which opponents and proponents of the Constitution agreed that the Constitution established judicial review over federal legislation. Regardless of how many read the various Publius and Brutus papers on judicial review, these papers merely reflect the broader consensus that the Constitution established judicial review. Taken individually, each of the numerous comments during the ratification process were probably seen or heard by a relatively small amount of people. Yet taken as a whole, these comments would have been heard by many and probably reflect the underlying consensus regarding judicial review. Indeed, given that we know of no one who seriously doubted the propriety of judicial review during the ratification struggle, the consensus seems all the more likely.

251. THE FEDERALIST No. 81, at 482 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

252. *Id.*

253. *Id.* at 483.

254. Hamilton’s support for the judicial review was not merely expressed under the cover of anonymity. At the New York Convention, Hamilton observed that the courts would “express the true meaning of the Constitution” by permitting concurrent taxation on the parts of the state and federal governments. 2 ELLIOT’S DEBATES, *supra* note 195, at 356. Hamilton’s comments suggest that he expected the courts to treat the Constitution as law in their proceedings and not as a document merely directed to the legislature.

people—the legislature—had violated the Constitution. We have attempted to consider the evidence supporting judicial review of the constitutionality of federal legislation thematically. In doing so, we may have obscured the consensus. It is worth reviewing the many contexts in which individuals confirmed the propriety of judicial review. Despite the incomplete documentary record, we know that judicial review was approvingly discussed in the following conventions: Virginia, Pennsylvania, Connecticut, Massachusetts, and North Carolina. Newspaper commentaries emanating from Georgia, Maryland, and New York also assumed the propriety of judicial review over federal legislation.

Moreover, we know that the Constitution's opponents and proponents agreed that judicial review was part of the constitutional scheme. The opponents included a who's who of Anti-federalists: Brutus, The Federal Farmer, George Mason, Luther Martin, Patrick Henry, and others. The proponents of the Constitution who assumed judicial review included even more luminaries: Edmund Randolph, Edmund Pendleton, James Madison, John Marshall, Alexander Hamilton, John Dickenson, Oliver Ellsworth, Theophilus Parsons, among others. Both partisans and adversaries of the Constitution understood that it authorized judicial review and used judicial review to either defend or criticize the Constitution.

Our review of the evidence suggests that scholars ought to reverse a commonly held presumption against judicial review. Many labor under the mistaken view that if they cannot clearly discern the textual authority for judicial review, it amounts to an unconstitutional usurpation. We think the rule at the founding was the exact opposite. Even in the absence of language clearly codifying judicial review, judicial review followed naturally from the nature of a limited, written Constitution and the creation of an independent judiciary. Indeed, in order to undermine this "natural presumption," as Hamilton characterized it, the handful of opponents to judicial review at the Philadelphia Convention would have had to affirmatively reject the power. Given that the constitutional text does not explicitly bar judicial review, we find it unremarkable that so many participants in the ratification assumed judicial review would exist.²⁵⁵ Many speakers and writers of the period understood that judicial review was simply woven into the constitutional fabric. As the

255. Indeed, given the state of the historical record, those that view judicial review of federal legislation as somehow illegitimate have much to answer for, for how was it that so many (both for and against the Constitution) assumed the propriety of judicial review even in the absence of some clear textual provision authorizing it? We think the answer dooms those who would deny the provenance of judicial review.

evidence indicates, judicial review was not something whose existence people generally contested; rather it was a largely accepted constitutional fact that was wielded as a sword or shield either for or against the Constitution.

VIII. Conclusion

This article has demonstrated that the theory that the political safeguards may substitute for judicial review cannot comport with the text, structure, or original understanding of the Constitution. While the Constitution does not contain an explicit provision that authorizes judicial review, the constitutional text and structure indicate its existence, just as they do in regard to the separation of powers and federalism. Once we understand that judicial review rests on firm textual and structural support, we can also see that neither admits of any subject matter exceptions to judicial review. Rather, allowing the national political process to wholly replace judicial review creates severe distortions in the constitutional system. Such an approach upends the concept of a federal government of limited powers, it misdirects the energies of judicial review, and it confuses state political interests for the maintenance of a balance between national and state powers. Efforts to salvage the political-safeguards theory by relying on the national political parties prove equally unconvincing. Our basic notions of constitutionalism conflict with the idea that the performance of a constitutional duty, such as judicial review, can ebb and flow based on the activities of actors exogenous to the Constitution itself.

Because the constitutional text, structure, and practice all lend their imprimatur to judicial review, those who seek to undermine it by appealing to the original understanding must carry the burden of proof and persuasion. Our review of the Framing period sources demonstrates that supporters of the political-safeguards theory have failed to meet this test. Rather than showing a widespread consensus that the federal courts could not refuse to enforce unconstitutional statutes, events at the Philadelphia and state ratifying conventions suggest the exact opposite: that both supporters and opponents of the Constitution assumed that judicial review would exist. While the Framers no doubt anticipated that the role of the states in the formation of the federal government would discourage unconstitutional statutes, they nowhere said these protections were to be exclusive. Judicial review flowed quite naturally from the idea that under a written Constitution, no branch could be allowed to exceed the scope of its delegated powers.

Some modern scholars have constructed distinctions between judicial review of state legislation on the one hand and judicial review of federal legislation on the other. Others have attempted to elevate judicial review over

individual rights, while suppressing judicial review over the limits on federal power. The Constitution's text and structure do not support such distinctions. As we have argued, sometimes deciding the constitutionality of state legislation that allegedly conflicts with federal legislation necessarily involves judicial review of both species of legislation. Moreover, the neat division between individual rights and federalism is impossible to draw in the Constitution because many "individual rights" provisions sound in federalism, while other seemingly "federalist" provisions have clear individual rights implications. No delegate to the Federal or state ratification conventions sharply distinguished judicial review of state legislation or individual rights from judicial review of federal legislation. Instead many delegates spoke favorably or assumed the existence of judicial review as an institution. Many Federalists and Anti-federalists voiced what was implicit in the Constitution: federal legislation of whatever sort would be measured against the Constitution and, if found wanting the legislation would not be enforced by the courts. Efforts to segregate different subject matters into separate categories of judicial review are largely a product of the modern era, where most scholars view federalism with suspicion.

Where does all of this leave us in the current debate over federalism? With both everything and nothing. On the one hand, our defense of judicial review approves of the current Court's rejection of the political safeguards of federalism and applauds its effort to police the boundaries between federal and state power. On the other hand, demonstrating that the federal courts must bear this responsibility sheds little light upon the substantive lines that should limit the national government's powers. Showing that the judicial power must include jurisdiction over federalism cases does not answer questions about the scope of state sovereign immunity or the limits of the Commerce Clause. But it does tell us that simply because federalism presents the courts with hard questions, this does not mean that the courts can refuse to answer them.