JUDICIAL REVIEW AND ITS ALTERNATIVES: AN AMERICAN TALE

*Daniel A. Farber**

It is not a logical or practical necessity that Parliament should have ultimate legal authority to decide what the law is. But it is a practical necessity that some *institution have ultimate authority to decide any legal question that may arise . . . .*[1]

I. INTRODUCTION

The tale of judicial review in America is a familiar one, opening with John Marshall's moment of glory in *Marbury v. Madison*.[2] This essay presents a somewhat different version of the traditional story of American judicial review. In this re-telling, the story of judicial power is something like the *Farmer in the Dell*—the children's song in which the farmer, his wife, and various farm animals are eliminated, until in the end, "the cheese stands alone."

A similar process of elimination took place in the course of American history. The idea of congressional supremacy was never really in the cards, given a written constitution dividing power among independent branches of government. No single organ of government could claim to be the constitutional voice of the people as a whole. *Marbury* began the development of administrative law and with it the cabining of executive power to interpret the Constitution. The Civil War terminated the possibility of states serving as constitutional guardians. As we will see, secession confirmed Madison's fear that polycentric constitutional interpretation, without some authoritative method of dispute

* Sho Sato Professor of Law, University of California at Berkeley, Boalt Hall School of Law, and McKnight Presidential Professor of Public Law, University of Minnesota Law School. Thanks to Jim Chen and Suzanna Sherry for helpful comments.

1. JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY 261 (1999).

2. 5 U.S. (1 Cranch) 137 (1803).

resolution, would wreak havoc. At the end of the game, only the Supreme Court was left standing as the authoritative judge of constitutional questions.

Today, just when judicial review has spread to many democracies around the world,[3] it has faced renewed challenge from some leading scholars.[4] Accordingly, the organizers of this symposium commemorating *Marbury* have asked us to contemplate the question: "Judicial review: blessing or curse?" Rather than addressing this question directly, this essay will return to an earlier debate over who should have authority to settle constitutional disputes. Understanding that debate will help us to comprehend just why judicial review has become so embedded in American law and why it is unlikely ever to be dislodged.

Before proceeding any farther, it would probably be useful to define what I mean by judicial review. Judicial review has two components: competence and potency. The competence prong means that courts are authorized to consider, in appropriate litigation, whether the actions of other government officials violate the Constitution. Thus, as used here, judicial review includes any constitutional review by courts of the acts of state and federal officials, whether legislative, judicial, or executive.[5]

The potency prong means that the court has the ability to order officials themselves to comply with its rulings, not just the authority to rule on constitutional issues that arise in private litigation. Without coercive power over officials, a court's view of a constitutional issue often would be nothing more than an advisory opinion, incapable of legally restraining the other branches of government. For instance, state officials might be able to block implementation of a federal decree. Judicial potency should be distinguished from judicial supremacy. It is one thing to say that, in a case properly before it, a court can forbid another official from acting contrary to its own view of the Constitution. It is another thing to say that officials must follow the courts' view of the Constitution when no case has yet been brought or in circumstances where no case could *ever* be brought. *Marbury* did not involve that form of judicial supremacy, but Marshall definitely did insist on his authority to require the executive to comply with *his* view of the

3. One possible impetus to the spread of judicial review is discussed in Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83 (2002).

4. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 129-76 (1999); JEREMY WALDRON, LAW AND DISAGREEMENT 285-94 (1999).

5. The Supreme Court's power to declare federal statutes unconstitutional has often been thought to be both the core and the most contested form of judicial review. One of my purposes is to debunk that assumption.

Constitution in an appropriately brought case.

Marbury was notable because Marshall claimed both competence and potency for the Court. When we return to the earliest battles over judicial review, we find that the competence holding was much less significant than the potency ruling. It was not the Court's claim of competence to interpret the Constitution, but rather its claim of being able to force its views on other officials, that was hotly controversial. Without such authority, however, the Court would be unable to serve its key function of constitutional dispute resolution.

The first real debate about the locus of authority to interpret the Constitution began a few years before *Marbury* and was not definitively resolved until Appomattox. The terms of engagement were strikingly different than today's scholarly debates. Discussions about judicial review today are primarily concerned with the separation of powers. The main alternative to judicial review is legislative supremacy, and the question is whether the courts have the power to overrule the decisions of elected legislators. Thus, today, opponents of judicial review call for the courts to give up the power to declare state or federal statutes unconstitutional.[6] But if we focus on this question, we misunderstand the early debates over the Court's role.

Unlike current scholars, the main early critics of the Supreme Court were not vitally concerned about the Court's intrusion on congressional prerogatives. In the era of the Marshall Court, judicial review was first and foremost a question about federalism rather than about separation of powers. The alternative to constitutional review by the Supreme Court was not congressional supremacy but states' rights. The main issue was not whether the Constitution was binding law, but whether it was a national charter or a multilateral compact.[7]

Today, we are oblivious to this earlier debate for several reasons. Our paradigm of judicial review by the Marshall Court is *Marbury*, which was actually unusual in pitting the Court against Congress. Furthermore, the idea of states as truly autonomous constitutional agents had little currency after the Civil War, was battered again during the Civil Rights Era, and has little support among scholars today. So the Marshall-era debate has little resonance for us. And finally, because of our fascination with the countermajoritarian difficulty, our own biggest worry about judicial review is that it can trump the majority will, not that it will stifle

6. *See* TUSHNET, *supra* note 4, at 154, 175-76.
7. *See* discussion *infra* Parts III, IV.A.

the states.[8]

Overcoming this lapse of historical memory and recalling the federalism-based debate over judicial review is valuable for three reasons. First, it should make us suspicious of the question whether judicial review is desirable. The question is always, "compared to what?" The alternative to judicial settlement of constitutional disputes may be parliamentary supremacy in some societies, polycentric negotiation in others, and political breakdown in others. Each of these alternatives might conceivably be worse than judicial review under some circumstances and better under others. Without knowing the relevant alternative and the social context, we cannot even frame the question, let alone answer it.

Second, the states' rights movement from the Virginia and Kentucky Resolutions through Nullification was the one really serious effort in American history to construct a viable form of constitutional control outside of the courts. Much of the debate was obviously bound to the specifics of that period in history. But we may have something to learn today from that earlier debate. Advocates of de-judicializing the interpretation of the Constitution may have something to learn from Madison's critique of polycentric interpretation.

Third, this snippet of history clarifies the place of judicial review in the American tradition. As noted earlier, the British alternative of parliamentary supremacy seems to have had essentially no appeal at all as applied to Congress. The major political actors agreed that some independent constitutional judgment about congressional power was warranted, whether from the courts, the president, or the states. The dispute was not over the need for extra-legislative review; it was over the locus of review. And it was less about democracy than about nationhood. The debate over the Supreme Court's role was tied to profoundly different ideas of the nature of the Union and the role of the federal government. Once those disputes about nationhood were settled by the Civil War, judicial review by the Supreme Court had no serious competitor. The nationalization of constitutional judgment by Supreme Court review became an axiom of political life.[9]

---

8. *See* DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 140-68 (2002).

9. In this regard, it is interesting to note that Mark Tushnet has sought to connect American constitutionalism with national identity. *See* Mark Tushnet, *Politics, National Identity, and the Thin Constitution*, 34 U. RICH. L. REV. 545, 562-66 (2000). Tushnet further suggests the possibility that a national council of revision might substitute for the nationalizing role of the Supreme Court. *See id.* at 556 n.45. As we will see *infra* Part III, the antebellum debate over

Our historical investigation begins in Part II by recalling the Marshall Court's campaign to establish its authority to review state and federal enactments on constitutional grounds. In tension with those claims of federal judicial authority, a competing approach gave state governments independent power to interpret the Constitution. The states' rights movement and its critics (notably including James Madison) are the subject of Part III. In its mature form in the hands of John Calhoun, states' rights theory was developed in conscious opposition to the Supreme Court's claims of interpretative authority. Part IV then assesses the relevance of this history to our understanding of the American version of judicial review today. In particular, we can see more clearly the close historic connection between judicial review and the American concept of divided government, in which no single organ of government has ever been trusted to act as the definitive representative of the people.

What this history shows is that American judicial review derives from two premises, which relate to stability and mistrust. The mistrust premise consists of the refusal to trust any single government body—particularly any single body of politicians—with complete control over individual rights. The stability premise is based on the inadvisability of diffusing the power of constitutional interpretation too greatly, because of the resulting potential for deadlock and constitutional crisis. Stability does not require a means to permanently entrench a particular interpretation of the Constitution, but it requires some mechanism for resolving specific clashes involving constitutional issues. Given these premises, the idea of using courts as a dispute resolution mechanism becomes natural, if not inevitable. In claiming the power to overrule both Congress and the President on constitutional grounds, Marshall's opinion in *Marbury* paved the way for judicial dispute resolution in constitutional cases.

Notably, these arguments for judicial review do not depend on the existence of any particular mode of judicial review, and they do not imply the desirability of any specific mode of judicial review. American judicial review exists because we wish both to check other officials and to minimize the likelihood of constitutional crises. We do not, however, need to call upon any faith in judicial infallibility; nor do we need to assume that judicial review will generally produce good rulings. Like other forms of dispute resolution, judicial review essentially rests simply on the idea that adjudication is preferable to combat as a way of settling arguments. How judges should go about deciding constitutional issues is pretty much unrelated to the

---

the role of the Supreme Court was in good part a debate over the meaning of nationhood.

question of whether they should decide them in the first place.

II. THE EMERGENCE OF JUDICIAL REVIEW

For the first half of the twentieth century, American liberals complained that judicial review was undemocratic, a complaint taken up by conservatives in their turn in the second half of the century. Believing this to be the central issue about judicial review, scholars naturally brought this preoccupation to bear when interpreting the formative period of judicial review. Thus, *Marbury* has loomed large as the Court's first foothold on deeply contested territory, whereas cases like *Martin v. Hunter's Lessee*[10] have been seen as minor footnotes. But, as a matter of history, this is backwards. The Court's authority to reject Congress's views of constitutional issues was far less contested—and much less important initially—than its authority to displace contrary interpretations by state government.

A. Marbury *and Judicial Review*

Marbury was a deft legal and political exercise, reaffirming judicial power while dodging any direct confrontation with the President at a time when the Court's political position was very shaky. The reasoning of the decision, with respect to judicial review, was very simple:

- The Constitution is a legal document which trumps ordinary legislation.
- It is the job of judges to interpret and apply legal documents.
- Ergo, judges must strike down legislation that violates the Constitution.

Marshall, of course, made the argument with somewhat more rhetorical panache:

> Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. . . .
>
> . . . .
>
> So if a law be in opposition to the constitution; 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

10. 14 U.S. (1 Wheat.) 304 (1816).

> which of these conflicting rules governs the case. This is of the very essence of judicial duty.[11]

As commentators have delighted in pointing out, Marshall's logic, both in this[12] and other parts[13] of the opinion, was hardly airtight. In my view, however, the critics exaggerate the significance of the holes in Marshall's argument for judicial review. The "arising under" clause and the Supremacy Clause fairly clearly established the key premise of Marshall's argument, that the Constitution is "law" of a kind that courts are authorized to interpret.[14] The only remaining gap involves the separation of powers—whether Congress has the power to determine *conclusively* the constitutionality of its own actions. The text of the Constitution does not unambiguously preclude this type of interpretative supremacy by Congress. But, as we will see later, the notion of congressional supremacy had remarkably little support at the time.[15]

Marshall's opinion was probably effective, not just because of its intrinsic merits, but because it resonated with emerging ideas about constitutionalism. While judicial review was a new and largely untested idea, Marshall clearly did not invent the idea out of whole cloth.[16] Rather, it had strong roots in the thinking of the time. Beginning in the 1780s, some American courts had begun to strike

---

11. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

12. *See* Christopher L. Eisgruber, *John Marshall's Judicial Rhetoric*, 1996 SUP. CT. REV. 439, 454 (1997); Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 7-13 (1983). *See generally* William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1 (1969).

13. *See generally* Akhil Reed Amar, Marbury, *Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989); Sanford Levinson, *Why I Do Not Teach* Marbury *(Except to Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553 (2003).

14. *See Marbury*, 5 U.S. at 179-80.

15. The Jeffersonians were less upset by judicial review than by the first hints of what we would now call judicial supremacy—the Supreme Court's view that the views stated in its own written opinions are binding on all other branches of government. For a review of the Jeffersonian challenge to the Marshall Court, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 371-81 (1998). A good discussion of "departmentalism," the main current alternative to judicial supremacy, can be found in SUSAN R. BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATES 1-27 (1992).

16. For good discussions of "[j]udicial [r]eview [b]efore *Marbury*," see CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 58-64 (1996); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1128-46 (1987).

down legislation as unconstitutional.[17] Not surprisingly, this development met with resistance from state legislatures.[18] Striking down a statute may have seemed "an extraordinary and solemn political action . . . something to be invoked only on the rare occasions of flagrant and unequivocal violations of the Constitution."[19] As a practical matter, judicial review may have been expected to be a less effective check on Congress than public opinion.[20] But some form of judicial review did have the support of leading constitutional thinkers.[21] At the Constitutional Convention, the debate over the Council of Revision indicated that the Framers endorsed judicial review. Their inclusion of the Supremacy Clause in the Constitution was apparently intended to force state courts to engage in review of state legislation.[22]

Notably, both Madison and Hamilton endorsed judicial review. In *Federalist No. 78*, Hamilton said:

> The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bill of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[23]

Hamilton went on to reject the "imagination" that judicial review would "imply a superiority of the judiciary to the legislative

17. 2 GEORGE HASKINS & HERBERT JOHNSON, THE OLIVER WENDELL HOLMES DEVISE HISTORY THE SUPREME COURT OF THE UNITED STATES, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, at 189-90 (1981).

18. 2 *id.* at 196.

19. 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, 798-99 (1999).

20. *See* Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 40-45, 72-73 (2001).

21. For this reason, Kramer's historical account seems to underestimate the strength of the historical roots of judicial review. *See generally* Larry D. Kramer, *But When Exactly Was Judicially-Enforced Federalism "Born" in the First Place?*, 22 HARV. J.L. & PUB. POL'Y 123 (1998).

22. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 173-76, 258 (1996).

23. DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 196 (1990) (quoting THE FEDERALIST NO. 78, at 403 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001)).

power"—rather, judicial review only implies that "the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former."[24]

When he introduced the Bill of Rights into the House, Madison had taken a similar position. In advocating the adoption of a Bill of Rights, Madison had referred to the role of the judiciary. He contended that, if rights guarantees are:

> incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.[25]

(Apparently, this remark was derived from an observation in a letter from Jefferson about the "legal check" which a bill of rights would allow the judiciary to exercise.)[26] Earlier, Madison had suggested that in "controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide" would be the Supreme Court.[27] Thus, the primary spokesmen for both the Federalists and their Jeffersonian opponents were already on record as supporting judicial review.

Perhaps because of its consistency with the zeitgeist, the judicial review portion of the *Marbury* opinion was mostly unchallenged.[28] True, the Republican press was sharply critical of *Marbury*. But the criticism focused on Marshall's claim that the executive was subject to mandamus, rather than on the Court's exercise of judicial review over the legislature.[29]

Although Jefferson himself remained silent about *Marbury* at

---

24. *Id.* (quoting THE FEDERALIST NO. 78, *supra* note 23, at 403-04).

25. *Id.* at 230.

26. *See* Jack N. Rakove, *Judicial Power in the Constitutional Theory of James Madison*, 43 WM. & MARY L. REV. 1513, 1531 (2002). Madison apparently did not have much faith in the fortitude of the courts and thought that popular opinion probably would, as a practical matter, prevail in the end. *See id.* at 1529-30.

27. *See id.* at 1527 (quoting THE FEDERALIST NO. 30, at 198 (James Madison) (George W. Carey & James McClellan eds., 2001)).

28. *See* Kramer, *supra* note 20, at 88 ("[I]t bears emphasizing that *Marbury* broke no new ground in the theory or practice of judicial review.").

29. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 233-34, 246-52 (1922).

the time,[30] he was later quite bitter about the decision. But his discontent did not relate to the portion of the opinion in which the Court held the Judiciary Act of 1789 unconstitutional and therefore found the case to be outside its jurisdiction. Rather, he seemed more upset about what he considered to be the Court's misapplication of the common law governing the delivery of legal instruments:

> Marbury . . . applied to the Supreme Court for a mandamus to the Secretary of State . . . . The court determined at once, that being an original process, they had no cognizance of it; and therefore the question before them was ended. But the Chief Justice went on to lay down what the law would be, had they jurisdiction of the case, to wit: that they should command the delivery. . . . Besides the impropriety of this gratuitous interference, could anything exceed the perversion of law? For if there is any principle of law never yet contradicted, it is that delivery is one of the essentials to the validity of the deed.[31]

Jefferson also remained convinced that the executive branch was immune from mandamus, "[t]he constitution controlling the common law in this particular."[32] But he seemingly did not object to the *Marbury* Court's holding that the Judiciary Act of 1789 had unconstitutionally expanded the Court's original jurisdiction.

Thus, *Marbury*'s assertion of judicial power to interpret the Constitution may have been bold, but it was not revolutionary. But judicial review emerged as a significant force in the constitutional system only during the later years of the Marshall Court.[33]

B. The Marshall Court's Attack on State Interpretative Autonomy

Marbury establishes an independent role for the federal courts in constitutional interpretation *vis a vis* the other two branches. But the Marshall Court was much more anxious to establish that its constitutional views trumped those of the states. In the decade between 1815 and 1825, the Court found itself embroiled in a series of disputes about whether state courts had independent authority to interpret the Constitution. These disputes are familiar to modern lawyers. What may be less familiar is the way in which these disputes fit into the general debate about states' rights.

Major constitutional thinkers like Madison and Calhoun

30. *See* HASKINS & JOHNSON, *supra* note 17, at 195.

31. Letter from Thomas Jefferson to Justice William Johnson (June 12, 1823), *in* THOMAS JEFFERSON, WRITINGS 1474 (Merrill D. Peterson ed., 1984).

32. Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), *in* JEFFERSON, *supra* note 31, at 1427 n.*.

33. *See* Wood, *supra* note 19, at 799-809.

perceived a tight connection between these assertions of federal jurisdiction and the more dramatic questions of secession and nullification. Today we tend to take for granted the Court's power over the states, while viewing its power over Congress as more debatable,[34] but this was not always the case. States' rights supporters, according to a leading constitutional historian, conceded that "[j]udicial review of the acts of other *federal* departments might have been anticipated in the constitutional design, but not judicial review of the sovereign acts of the states."[35]

The Virginia Supreme Court's 1814 decision in *Hunter v. Martin*[36] was the most notable challenge to federal judicial supremacy. In a previous stage of the same litigation, the U.S. Supreme Court had reversed the Virginia court, holding that certain Virginia laws violated the treaty of peace with Britain by confiscating a huge tract of property owned by Lord Fairfax.[37] The Supreme Court had vacated the Virginia court's previous decision in the case and remanded with the curt instruction to enter judgment in favor of the defendant.[38] On remand, however, the Virginia court held that the U.S. Supreme Court had no authority to review its decisions.[39] The Virginia court argued that it was exempt from the U.S. Supreme Court's appellate jurisdiction, and that Section 25 of the Judiciary Act of 1789, which purported to convey such jurisdiction, was unconstitutional.[40] (Note the readiness with which the leading Jeffersonian state court itself exercised judicial review of this congressional enactment.) Thus, it held, the U.S. Supreme Court had no authority to issue a writ of error to the Virginia court.[41]

---

34. *See* Keith E. Whittington, *Herbert Wechsler's Complaint and the Revival of Grand Constitutional Theory*, 34 U. RICH. L. REV. 509, 541 (2000).

35. G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE: 1815-1835, at 126 (abr. ed. Oxford Univ. Press 1991) (1988) (emphasis in original).

36. 18 Va. (4 Munf.) 1 (1814), *rev'd*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). The Reporter noted that this opinion, "being in all respects the most important and interesting case in the volume, is inserted first, although not first in order of time as to its decision." *Id.* at 1. The lasting significance of this provision of Section 25 of the Judiciary Act of 1789 is discussed in 1 WARREN, *supra* note 29, at 13-17.

37. *Hunter*, 18 Va. at 3-6.

38. *Id.* at 6.

39. *Id.* at 25.

40. *Id.*

41. *Id.* It is no coincidence that this case involved land titles. Representatives of Virginia and Kentucky had already voiced strong opposition to federal judicial supremacy, for fear that federal courts would be unsympathetic to property interests in those two states. *See* 1 WARREN, *supra* note 29, at 219.

The lead opinion in the Virginia court was written by Justice Cabell. He linked the jurisdictional question to a broad vision of the constitutional scheme. Cabell portrayed the state and federal governments as parallel and independent, though both were bound by the Constitution. As independent sovereigns, both governments must act through their own agents, including their own courts. True, state courts are bound by the Supremacy Clause. But this only requires them to apply the Constitution in accordance with their own judgment, not that of the Supreme Court. The Supreme Court could not have appellate jurisdiction over a state court because this would imply superiority over a separate sovereign.[42]

The concurring opinions in the Virginia court also drew upon broader constitutional themes. Judge Brooke relied on the Virginia Resolutions (discussed in Part III below) as authority for the proposition that the states are the main guardians of the people's rights. He also stressed that under the Articles of Confederation, Congress had to rely on the states to enforce federal law. The whole point of the Constitution was to avoid such commandeering of state government. "To have relied on the state authorities as the means of exercising its most essential powers, would have totally changed the character of the national government, and reduced it to a state of imbecility little short of that of the former confederation."[43] After all, the "great and radical vice"[44] of government under the Articles was its dependence on the cooperation of the states. (Modern readers may see a prefiguring of the Supreme Court's recent attacks on what it calls "federal commandeering.")[45] Judge Roane also relied on the Virginia Resolutions and Madison's subsequent report. He stressed that the Constitution adopted a new scheme by which "the general government acted directly upon the people."[46] In Judge Roane's view, there was no need for participation in federal affairs by the state governments except in electing the President and Senators. Indeed, he said, if state judges were considered to be arms of the federal judiciary, they could be forced to hear so many federal cases as to "actually drive them out of office!"[47]

---

42. *Hunter*, 18 Va. at 9.

43. *Id.* at 22 (Brooke, J., concurring).

44. *Id.*

45. *See* Printz v. United States, 521 U.S. 898, 919 (1997); New York v. United States, 505 U.S. 144, 163 (1992) (quoting THE FEDERALIST NO. 15, at 108 (Alexander Hamilton) (C. Rossiter ed., 1961)).

46. *Hunter*, 18 Va. at 35 (Roane, J., concurring).

47. *Id.* at 38. The third concurring judge thought it clear that the Constitution's reference to the Supreme Court's appellate jurisdiction must relate only to lower federal courts, not to appeals from state courts. *Id.* at 56-57 (Fleming, J., concurring).

Naturally, the Virginia court's views did not go down well with the Supreme Court. Justice Story's opinion for the Court in *Martin v. Hunter's Lessee*[48] confirmed the Court's jurisdiction over state courts.[49] Like the Virginia judges, Justice Story linked his analysis with a broader constitutional vision. He began by addressing the relationship between the state and federal governments. He portrayed the Constitution as deriving directly from "We, the People," and as establishing federal supremacy not only over individuals but over the states. After this nationalist prologue, Story argued that the Framers expected that cases within the federal judicial power might also arise in the state courts. When "the states are stripped of some of the highest attributes of sovereignty . . . it is certainly difficult to support the argument that the appellate power over the decisions of state courts is contrary to the genius of our institutions."[50] Since the federal courts clearly had the power to set aside unconstitutional actions of the state legislators and governors, why not those of the state courts?

Today, this seems an odd debate. The Virginia court's declaration of independence from the Supreme Court's governance violated what we now take to be a foundational legal principle. The idea of Supreme Court supervision of the state courts, as well as of the lower federal courts, is now axiomatic. Hence, the Virginia court's position seems outlandish to us, while Story's elaborate response seems like overkill. But the Virginia position was not outlandish at the time. The fact that the point was seriously contested tells us that the unquestioned legal axioms of the early Republic were quite different from our own. Indeed, Justice Story's opinion was not the end of the dispute.

Five years after *Martin v. Hunter's Lessee*, the Court was faced with another challenge to much of its appellate jurisdiction over state courts. *Cohens v. Virginia*[51] involved the application of a Virginia ban on lotteries to the sale of a ticket for a District of Columbia lottery.[52] The defendants appealed the state judgment to the U.S. Supreme Court.[53] The State of Virginia resisted on the

48. 14 U.S. (1 Wheat.) 304 (1816).

49. *Id.* at 323-62. For an extensive analysis of the opinion, see WHITE, *supra* note 35, at 494-503.

50. *Martin*, 14 U.S. at 343-44. For a closer analysis of Story's opinion, agreeing with the result (but not all of the reasoning) from a textualist/originalist perspective, see DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 91-96 (1985).

51. 19 U.S. (6 Wheat.) 264 (1821).

52. *Id.* at 268.

53. *Id.* at 264.

basis of sovereign immunity.[54] Issuing a writ of error would force the state, which of course had brought the criminal case initially, into federal court. The state challenged this exercise of federal jurisdiction under the Eleventh Amendment.[55]

Although the lottery law itself had no great importance, larger issues of federalism were in play. Virginians were already alarmed by the power of the federal courts, and this was the "case in which the Virginia lawyers expressed their defiance of *Martin*."[56] The federal courts seemed to be insidiously expanding federal powers at the expense of the states, to the dismay of important political figures.

Jefferson, for example, had lamented in 1820 that "[t]he steady tenor of the Courts of the United States . . . is to break down the constitutional barriers between the coordinate powers of the States and the Union."[57] In 1821, he had written to Judge Roane, author of one of the concurrences in *Martin*, saying that his greatest fear was of the federal judiciary.[58] The federal judiciary, Jefferson said, operated "like gravity, ever acting, with noiseless foot, and unalarming advance, gaining ground step by step, and holding what it gains," thus "[e]ngulfing insidiously" the states into the federal government.[59] His audience probably needed no convincing. Apart from Roane's anti-nationalist constitutional views, he had special reasons for unhappiness with Marshall. Jefferson had hoped to appoint Roane as Chief Justice but was thwarted by Adams's last-minute appointment of Marshall.[60]

As it turned out, it was Marshall himself who wrote the opinion of the Court in *Cohens*, rebuffing the renewed attack on its authority over the state courts. Like Story, he grounded his opinion in a nationalist vision of the Constitution. Without Supreme Court review of state criminal convictions, he argued, federal power could be frustrated by any hostile state government. Federal officials who were convicted of violating unconstitutional state laws would have no federal recourse. Nor was confidence in the integrity of the state

54. *Id.* at 380.

55. *Id.* at 305-07.

56. WHITE, *supra* note 35, at 504. Virginians may also have been concerned about the extraterritorial effect of Congress's broad powers over the District of Columbia, which might also have been used by Congress to permanently free any slave who entered the District.

57. 2 WARREN, *supra* note 29, at 6.

58. 2 *id.*

59. 2 *id.* at 6-7.

60. 2 HASKINS & JOHNSON, *supra* note 17, at 208. Roane was also the son-in-law of Patrick Henry, the great Anti-Federalist. Rakove, *supra* note 26, at 1533.

courts an adequate answer. Marshall admitted that state judges were generally entitled to public confidence, but collisions between state and federal government could sometimes take place. The Constitution had to be construed with bad times as well as good ones in mind. Hence, the federal government had to have the means of executing its own laws without the need for assistance from others, which might not be forthcoming in a crisis. State governments, said Marshall, had no right to interfere with the constitutional scheme. While the people made and could unmake the Constitution, "this supreme and irresistible power to make or to unmake, resides only in the whole body of the people; not in any sub-division of them."[61] Thus, any effort by a subdivision to interfere with the federal Constitution "is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it."[62] Consequently, he declined to read the Eleventh Amendment as preventing the appeal of a state criminal conviction to the Supreme Court merely because the state government was a party to the case.

Cohens also gave Marshall, who had not sat in *Martin* because of a conflict of interest, the opportunity to address the Court's general relationship with state courts. Again, Marshall took a strongly nationalistic stance. No one could deny that the United States was a single nation in terms of international relations and internal commerce. Rather than being independent sovereigns, Marshall said, the states were components of the Union with only limited aspects of sovereignty. Logically, then, the federal government's judicial organ should be supreme in interpreting federal law, particularly given the risk of inconsistent decisions in different states. Furthermore, he noted, the exercise of such appellate jurisdiction was explicitly condoned by the *Federalist* papers.[63] Finally, Marshall observed, this interpretation of Article III was endorsed by the first Congress when it passed the Judiciary Act of 1789, and had been accepted by all but one of the state courts

61. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 389 (1821).

62. *Id.*

63. According to Hamilton, an appeal would certainly lie from state courts to the Supreme Court on federal questions. Whenever a federal issue is involved in litigation, according to Hamilton, the issue can be appealed to the Supreme Court. Without such federal appellate jurisdiction, state courts could not safely have been given any authority to decide issues of federal law without imperiling the effectiveness of the national government. The Supreme Court was the ideal overseer for the state courts, being "destined to unite and assimilate the principles of national justice and the rules of national decisions." *See* THE FEDERALIST NO. 82, at 458-61 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

that had been reversed by the Supreme Court.[64]

As a recent historian observes, *Cohens* was anathema to states' rights advocates:

> A case could not have been better designed to alarm the zealous guardians of states' rights. That Virginia should be cited to appear at the bar of the Supreme Court to defend its right to enforce its own penal laws was regarded as a monstrous invasion of state sovereignty and independence.[65]

After the decision came down, Judge Roane appealed to James Madison to write a rebuttal of the Court's opinion.[66] To his frustration, Madison responded that the "sounder policy" was that federal decisions should prevail when in collision with state courts.[67] So Roane took on the task himself, calling the Court's ruling a "most monstrous and unexampled decision"[68] which could only be explained by the "love of power which all history informs us infects and corrupts all who possess it."[69] Jefferson also continued to bemoan the federal judiciary, calling it "[t]he engine of consolidation"[70] and advocating congressional action to reverse the *Cohens* decision.[71]

Roane may not have convinced Marshall of the error of his ways, but his arguments were applauded from Monticello. Having read Roane's attacks on *Cohens*, Jefferson remarked that:

> [T]hey appeared to me to pulverize every word which had been delivered by Judge Marshall, of the extra-judicial part of his opinion; all was extra-judicial, except the decision that the act of Congress has not purported to give to the corporation of Washington the authority claimed by their lottery law, of controlling the laws of the States within the States themselves.[72]

But, said Jefferson, Marshall:

> [W]ent on gratuitously to prove, that notwithstanding the eleventh amendment of the constitution, a State *could* be brought as a defendant, to the bar of his court; and again, that

64. *Cohens*, 19 U.S. at 417-18.
65. HOBSON, *supra* note 16, at 127.
66. 2 WARREN, *supra* note 29, at 14.
67. 2 *id.* at 15.
68. 2 *id.*
69. 2 *id.* at 16.
70. 2 *id.* at 17.
71. 2 *id.* at 17-18.
72. Letter from Thomas Jefferson to Justice William Johnson (June 12, 1823), *in* JEFFERSON, *supra* note 31, at 1473.

> Congress might authorize a corporation of its territory to exercise legislation within a State, and paramount to the laws of that State.[73]

Marshall's argument "was so completely refuted by Roane, that if he can be answered, I surrender human reason as a vain and useless faculty, given to bewilder, and not to guide us."[74] Jefferson was hardly a crackpot; he was the founder of the dominant national political party. But the Jeffersonians did not go unanswered, and the debate in the press over *Cohens* continued until the end of 1821.[75]

The Marshall Court again repudiated the idea of state interposition in another important case. *Osborn v. Bank of the United States*[76] was one round in the long struggle over the constitutionality of the bank. Ohio passed a law imposing a $50,000 tax on each of the bank's branches.[77] Pursuant to this law, the state auditor decided to seize the funds from the bank.[78] The bank obtained a federal injunction against collection of the tax, but state officials went ahead anyway.[79] After being refused payment of the tax, Osborn's assistant entered the bank's vault and took everything he could find, to the tune of $100,000.[80] The lower federal court issued an order directing the return of the funds to the bank.[81] Marshall admitted the obvious direct impact of the order on the state, but he rejected the state's sovereign immunity argument.[82] He stressed the possible impact of a contrary holding on federal supremacy. If immune from federal suit, state officials could bring the execution of federal law to a standstill. If a state administrator imposed a fine or penalty on a federal official, the official would be unable to obtain an injunction. The tax collector and the U.S.

---

73. *Id.*
74. *Id.*
75. *See* WHITE, *supra* note 35, at 521-24.
76. 22 U.S. (9 Wheat.) 738 (1824).
77. *Id.* at 740.
78. *Id.* at 740-41.
79. *Id.*
80. *Id.* at 741.
81. *Id.* at 743-44. During the litigation, the Ohio legislature passed legislation depriving the bank of any right to sue in the state courts and of any immunity from state officers. *See* 1 WARREN, *supra* note 29, at 535-37.
82. The defendants conceded that state officers might be liable for damages. *Osborn*, 22 U.S. at 858. Or, as Marshall put it, they "expressly waive the extravagant proposition, that a void act can afford protection to the person who executes it, and admits the liability of the defendants to the plaintiffs, to the extent of the injury sustained, in an action at law." *Id.* at 839. But an injunction, the defendants argued, would involve the state itself more directly. *Id.*

Marshall would be at risk of ruinous penalties like those assessed against the bank. In short, Marshall said, a state would be "capable, at its will, of attacking the nation, of arresting its progress at every step, of acting vigorously and effectually in the execution of its designs, while the nation stands naked, stripped of its defensive armour."[83]

These Marshall Court decisions were designed to undermine any effort to use state sovereignty as a shield against perceived federal excesses. Rather than being allowed to exercise independent judgment about constitutional issues, the state courts were subordinated to the Supreme Court. Their power to control the actions of federal officers was limited by Supreme Court oversight. If a state legislature tried to block what it considered an unconstitutional federal statute, state officials could be enjoined by a federal court from obeying the state law and would be liable for damages as well. But as we will see in the next section, there was a strong countercurrent in early American thought, calling for polycentric constitutional interpretation by the states.

III. THE STATES AS CONSTITUTIONAL INTERPRETERS

As noted earlier, today the obvious alternative to judicial review is congressional supremacy. But that was not at all the way things looked in the early years of the Republic.

A. The Virginia and Kentucky Resolutions

The Virginia and Kentucky Resolutions were drafted by Madison and Jefferson, who kept their authorship secret.[84] Today, the Virginia and Kentucky Resolutions, and their protests against the infamous Alien and Sedition Acts, are well-remembered but less often read. They provided an early challenge to the kind of nationalist vision that would later animate the Marshall Court. On their face, they did not quite claim a power of state governments to invalidate federal laws or state power to overrule the decisions of the federal courts, but they at least flirted with such claims.

---

83. *Id.* at 848. A suit for damages might be brought against the state official enforcing such a law, Marshall admitted, but this might be too little and too late to do any good. *See id. Osborn* partially anticipated the Court's best-known decision on injunctions against state officers, *Ex parte Young*, 209 U.S. 123 (1908). The Court in the latter case relied on *Osborn* in upholding the power of federal courts to enjoin constitutional violations by state officials. *Id.* at 150, 167. *Ex parte Young* did go further than *Osborn*, however, insofar as it upheld an injunction against a state attorney general bringing suit on the state's behalf in its own courts. *See id.* at 167.

84. STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 719 (1993).

The Kentucky Resolutions, based on a draft of Jefferson's, began with a strong affirmation of the compact theory. The states had created the general government for special purposes, reserving to each state all remaining power. The Resolutions maintained that the federal government, as a creature of the compact, was not the final judge of the extent of its own powers. Instead, each party to the contract had to judge for itself whether the terms of the agreement had been violated. But the Kentucky Resolutions stopped short of actual resistance to federal authority. Kentucky merely asked the other states to "concur in declaring these [acts] void and of no force" and in "requesting their repeal at the next session of Congress."[85]

The Virginia Resolutions drafted by Madison were somewhat tamer. Madison was more cautious than Jefferson about giving state legislatures any power to block federal legislation.[86] Like the Kentucky Resolutions, Virginia's spoke of the Constitution as a compact between the states. Rather than focusing on individual states, however, the Virginia Resolutions spoke of the states as a group. In the event of a "deliberate, palpable, and dangerous" violation of the Constitution by the federal government, "the states who are parties thereto have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them."[87]

But what such "interposition" might mean in practice was unclear. The Resolutions merely requested other states to:

> [C]oncur with this Commonwealth in declaring, as it does hereby declare, that the acts aforesaid are unconstitutional, and that the necessary and proper measures will be taken by each, for cooperating with this State in maintaining unimpaired the authorities, rights, and liberties, reserved to the States respectively, or to the people.[88]

---

85. Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, *reprinted in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 544 (Jonathan Elliott ed., 2d ed., Philadelphia, J.B. Lippincott & Co. 1881) (1836). On the difference between Jefferson and Madison regarding the precise nature of the federal compact, see H. Jefferson Powell, *The Principles of '98: An Essay In Historical Retrieval*, 80 VA. L. REV. 689, 717-18 (1994).

86. JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS 197-99 (1993).

87. JAMES MADISON, Virginia Resolutions Against the Alien and Sedition Acts (Dec. 21, 1798), *reprinted in* JAMES MADISON, WRITINGS 589 (Jack N. Rakove ed., 1999).

88. *Id.* at 591.

None of the other states supported the Resolutions, and several condemned them.[89] In response to criticism from other states, Madison authored the *Report on the Alien and Sedition Acts*.[90] According to Madison, the Constitution was a compact between the sovereign peoples of the individual states.[91] Consequently, "there can be no tribunal above their authority, to decide in the last resort, whether the compact made by them be violated"[92]—although the federal judiciary:

> is, in all questions submitted to it by the forms of the constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the authorities of the other departments of the government; not in relation to the rights of the parties to the constitutional compact, from which the judicial as well as the other departments hold their delegated trusts.[93]

But Madison backed away from any claim of state power to override the courts. The Resolutions did not imply a legislative power to annul the judgments of the courts, according to Madison. Such state declarations did not intrude on the judicial power, because they were merely "expressions of opinion, unaccompanied with any other effect, than what they may produce on opinion, by exciting reflection."[94] In contrast, judicial decrees "are carried into immediate effect by force."[95] How could there be anything wrong with one state legislature merely communicating its views to other legislatures? After all, Madison observed, the Constitution clearly allows legislatures to communicate with each other for other purposes: to call for a constitutional convention or to negotiate over interstate compacts.[96]

The Kentucky legislature also responded to its critics. Although the response used the term nullification, it also asserted that Kentucky would bow to the laws of the Union. Jefferson had flirted with the idea of secession as an ultimate remedy, but Madison objected.[97] At Madison's urging, Jefferson eliminated language reading: "But determined, were we to be disappointed in this [the

89. ELKINS & MCKITRICK, *supra* note 84, at 720.

90. JAMES MADISON, Report on the Alien and Sedition Acts (Jan. 7, 1800), *reprinted in* MADISON, *supra* note 87, at 608.

91. *Id.* at 610.

92. *Id.* at 611.

93. *Id.* at 613-14.

94. *Id.* at 659.

95. *Id.*

96. *Id.* at 660.

97. *See* SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828, at 241-43 (1999).

reaction of the American people], to sever ourselves from that union we so much value, rather than give up the rights of self government which we have reserved, & in which alone we see liberty, safety & happiness."[98]

It is worth noting that the prime movers behind the Resolutions had all expressed support for judicial review. We have already seen Madison and Jefferson's views at the time of the Bill of Rights.[99] George Nicholas, one of the major supporters of the Kentucky Resolution, had written that if the administration tried to enforce the Alien and Sedition Acts, "the Courts would declare them to be void."[100] Jefferson had also written that "upright Judges" would protect against "any exercise of power unauthorized by the Constitution of the United States."[101] (He had apparently begun to despair, however, of finding such "upright judges" in the federal judiciary!)

The Republicans were swept into power by the 1800 election, and the Federalists were effectively destroyed as a political party. But the Virginia and Kentucky Resolutions had a life that extended beyond the immediate occasion. They also exceeded, at least in Madison's case, the intention of the author. For much of the early nineteenth century, the political heirs of Jefferson and Madison revered the Virginia and Kentucky Resolutions as a courageous rescue of American democracy from the nefarious schemes of Federalists like Hamilton.[102] But they proceeded more in the spirit of Jefferson, at his most intemperate, than in Madison's moderated tones.

B. Nullification

States' rights received another major boost in the 1820s, resulting in sharp challenges to the Marshall Court's nationalist opinions. A number of amendments to the Constitution were unsuccessfully proposed to limit federal judicial power and make either the states or the Senate the final judge of constitutional issues.[103] Efforts were also made in Congress to repeal Section 25 of the Judiciary Act of 1789 in order to prevent Supreme Court review

98. ADRIENNE KOCH, JEFFERSON AND MADISON: THE GREAT COLLABORATION 197-98 (Oxford Univ. Press 1964) (1950).

99. *See supra* text accompanying notes 25-27.

100. 1 WARREN, *supra* note 29, at 259.

101. 1 *id.* at 259-60.

102. *See* ELKINS & MCKITRICK, *supra* note 84, at 719.

103. *See* Richard E. Ellis, *The Persistence of Antifederalism after 1789*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 307 (Richard Beeman et al. eds., 1987).

of state court decisions.[104]

Within a decade of *Osborn*, an alternative vision of constitutional interpretation was brilliantly articulated by John Calhoun. Relying on Madison's Virginia Resolutions, he proclaimed the right of each state to interpose itself against abuses of federal power. Because the Constitution divided power between the federal government and the states, the problem was to preserve the original balance of power, which had eroded over the years. The time-tested answer, in England and elsewhere, was to give each of the institutional players veto power. Deadlocks could be resolved through the amendment process. In the event of a constitutional dispute between it and one of the states, the federal government could appeal to the states collectively. Judgment would then be passed by three-quarters of the states, which could exercise the amending power and "whose decrees are the Constitution itself, and whose voice can silence all discontent."[105]

Like Marshall, Calhoun's views about constitutional interpretation were rooted in a broad constitutional vision. But those views were very different. For Calhoun, as for Justice Thomas in our own day,[106] the Constitution was a compact between the states, rather than the creation of a single national community. Thus, Calhoun said, the "States, in ratifying the constitution, did not lose the confederated character which they possessed when they ratified it . . . but, on the contrary, still retained it to the full."[107] But in the first Congress, Calhoun maintained, states' rights received a fatal blow. The Judiciary Act of 1789 "in effect, destroyed the relation of coequals and co-ordinates between the federal government and the governments of the individual States; without which, it is impossible to preserve its federal character."[108] By providing for appeals from state courts to the Supreme Court, the Judiciary Act of 1789 emasculated the state courts, and with them,

104. *Id.* at 307-08.

105. John Calhoun, Fort Hill Address (July 26, 1831), *reprinted in* CORRESPONDENCE OF JOHN C. CALHOUN 59-94 (J. Franklin Jameson ed., 1856). For a more detailed discussion of Calhoun's views and his role in the nullification crisis, see WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816-1836, at 2-3, 132-44, 154-59, 208, 290-92, 354-55 (1965).

106. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 846-49 (1995) (Thomas, J., dissenting).

107. JOHN C. CALHOUN, *A Discourse on the Constitution and Government, in* UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 92-96 (Ross M. Lence ed., 1992).

108. *Id.* at 223.

the rest of state government.[109]

Along with state judges, Calhoun said, state governors and legislators had also become subordinated to the federal government. They, too, could no longer implement their independent understandings of the Constitution. As Calhoun explained, laws can reach individuals only through the courts; thus, when state courts became subordinate to the federal courts, so did the other branches of state government.[110] Consequently, all of state government was dragged down when the Judiciary Act of 1789 subordinated the state court to the federal government, which then "cease[d] to stand . . . in the relation of coequal and co-ordinate departments with the federal judiciary."[111]

Calhoun viewed Section 25 of the Judiciary Act of 1789 as a fatal blow to the American constitutional scheme:

> I have now shown that the 25th section of the judiciary act is unauthorized by the constitution; and that it rests on an assumption which would give to Congress the right to enforce, through the judiciary department, whatever measures it might think proper to adopt; and to put down all resistance by force. The effect of this is to make the government of the United States the sole judge, in the last resort, as to the extent of its powers, and to place the States and their separate governments and institutions at its mercy.[112]

As Barry Friedman points out, Calhoun's critique of judicial review by the Supreme Court was not that it was anti-majoritarian, but on the contrary that it would destroy the rights of regional minorities.[113]

In his attack on South Carolina's effort to engage in nullification, Andrew Jackson sturdily defended the Supreme Court's authority to review state court interpretations of the Constitution.[114] But the most cogent response to Calhoun came from Madison. During the final six years of his life, we are told, "Madison could not get the nullifiers out of his mind."[115] If the nullifiers did not yield to reason, he thought, "the explanation will lie between an impenetrable stupidity and an incurable prejudice."[116]

Madison developed his arguments in a series of widely

109. *Id.* at 223-24.
110. *Id.* at 228.
111. *Id.* at 224.
112. *Id.* at 238.
113. *See* Friedman, *supra* note 15, at 412.
114. *See id.* at 403-04.
115. DREW R. MCCOY, THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY 151 (1989).
116. *Id.* at 152.

publicized letters. Like Calhoun's, his analysis derived from a larger vision of the nature of the Constitution. Madison agreed that the Constitution was formed "among the States in their highest sovereign capacity."[117] Being a compact among the states constituting "the people of *all the states* into 'one people for certain purposes,'"[118] however, it could not be annulled at the will of any individual state, unlike a state constitution.[119] In Madison's view, to leave questions of interpretation to each of the states would be fatal to the Union. It would undermine the vital principle of national uniformity in the application of federal law, and some federal laws such as the tariff simply could not be effectively enforced without this uniformity. If state and federal decisions had equal weight, "[s]cenes could not be avoided"[120] in which federal and state officers "would have rencounters [sic] in executing conflicting decrees, the result of which would depend on the comparative force of the local posse."[121]

According to Madison, the most effective checks against abuse of federal power are structural: the responsibility of members of Congress to their home state legislatures and electorates and the impeachment power vested in Congress. In an extreme case of usurpation, revolution would remain as an extra-constitutional right. But within the constitutional scheme, Madison said, the federal judicial power must be paramount:

> Those who have denied or doubted the supremacy of the judicial power of the U.S. & denounce at the same time nullifying power in a State, seem not to have sufficiently adverted to the utter inefficiency of a supremacy in a law of the land, without a supremacy in the exposition & execution of the law . . . .[122]

Turning Calhoun's reliance on the amendment procedure on its head, Madison observed that nullification would allow a single state to immunize itself from constitutional restrictions, thereby making at least a temporary de facto amendment in the Constitution without the consent of any other state, far less the three-fourths required by the amendment procedure.[123]

Madison particularly sought to rebut any reliance on his own

117. *Id.* at 135.

118. *Id.*

119. Letter from James Madison to Edward Everett (Aug. 28, 1830), *in* MADISON, *supra* note 87, at 842-45.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

Virginia Resolutions. He maintained that the Resolutions eschewed any right to forcible state resistance to the federal government. Instead, the Resolutions called for concurrent action by all the states to secure a change in federal law. Moreover, Madison argued, the state legislatures that criticized the Resolutions would surely have said so, if they had understood the Resolutions to authorize forcible resistance to the federal government.[124]

Madison explained his views more fully in a letter to Thomas Jefferson:

> We arrive at the agitated question whether the Judicial Authority of the U.S. be the constitutional resort for determining the line between the federal & State jurisdictions. Believing as I do that the General Convention regarded a provision within the Constitution for deciding in a peaceable & regular mode all cases arising in the course of its operation, as essential to an adequate System of Govt. that it intended the Authority vested in the Judicial Department as a final resort in relation to the states . . . ; and that this intention is expressed by the articles declaring that the federal Constitution & laws be the supreme law of the land, and that the Judicial Power of the U.S. shall extend to all cases arising under them: Believing moreover that this was the prevailing view of the subject when the Constitution was adopted & put into execution; . . . thus believe I have never yielded my original opinion indicated in the "Federalist" No. 39 . . . .[125]

Madison also believed that it would be too cumbersome to refer constitutional disagreements to new conventions and that allowing state courts to interpret the Constitution independently would "soon make the Constitution & laws different in different States, and thus destroy that equality & uniformity of rights & duties which form the essence of the Compact,"[126] to say nothing of leading to clashes of force between state and federal authorities.[127]

---

124. *Id.* at 288-89.

125. Letter from James Madison to Thomas Jefferson (June 27, 1823), *in* MADISON, *supra* note 87, at 801-02.

126. *Id.* at 800.

127. *Id.* at 801. Madison's correspondence with Roane and Jefferson is discussed in more detail in Rakove, *supra* note 26, at 1534-46. Rakove concludes:

> The weak allusion to the role of the federal judiciary in *The Federalist No. 39* had evolved into the recognition that it potentially embodied the most important constitutional mechanism to moderate the inherent ambiguities in the constitutional text. It was the one institution that was best qualified to pursue the steady course of "liquidating" the meaning of constitutional provisions, and thereby lay down the precedents and set the example that other institutions could hopefully be induced to follow and emulate.

C. *Secession and Beyond*

If a state could not express its constitutional views through nullification, more extreme action might be required. Calhoun may have intended nullification as a halfway house that would make secession unnecessary. His successors were not so shy.

Jefferson Davis explained the constitutional theory behind secession in a speech shortly after Sumter. He relied on the compact theory of the Constitution. From "a period as early as 1798," the nationwide majority party (the Democrats) had adopted the "creed that each State was, in the last resort, the sole judge as well of its wrong as of the mode and measure of redress."[128] As support for this view, Davis relied on the Kentucky and Virginia Resolutions and on Madison's report to the Virginia legislature in response to criticism from other state legislatures. Exercising this power of independent constitutional interpretation, the Southern state conventions had decided that the terms of the compact had been broken. The remedy was secession.

Of course, in the end, it was not Davis's view that would prevail. Lincoln presented his own views in his first inaugural address.[129] He conceded that if a majority deprived a minority "of any clearly written constitutional right, it might, in a moral point of view, justify revolution—certainly would, if such right were a vital one."[130] But no such claim could be made by the South. If minorities seceded whenever there was a disagreement about the meaning of the Constitution, democracy would be impossible. "Plainly," he said, "the central idea of secession, is the essence of anarchy."[131] The "only true sovereign of a free people" is a majority "held in restraint by constitutional checks, and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments."[132] This vision left no room for states as autonomous checks on the federal government.

In contrast, Lincoln did not challenge the Supreme Court's authority to engage in judicial review. He accepted its power to enforce its views in particular cases like *Dred Scott v. Sandford*,[133] however misguided he might have considered those views:

Id. at 1546.

128. Jefferson Davis, Special Message to the Confederate Congress (May 7, 1860).

129. Chapters four and five of DANIEL FARBER, LINCOLN'S CONSTITUTION (2003), discuss the constitutional aspects of the secession crisis in detail.

130. 2 ABRAHAM LINCOLN, First Inaugural Address, *in* SPEECHES AND WRITINGS 219 (Don E. Fehrenbacher ed., 1989).

131. 2 *Id.* at 220.

132. 2 *Id.*

133. 60 U.S. (19 How.) 393 (1856).

> I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration, in all parallel cases, by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice.[134]

Thus, despite *Dred Scott*, Lincoln did not challenge the authority of the courts to enforce the Constitution in cases before them.[135]

With the triumph of Lincoln's view of the Union on the battlefield, the Supreme Court's authority to engage in judicial review was freed from its greatest historical rival. It has remained largely unchallenged to this day.

IV. THE ROADS NOT TAKEN

In 1789, it was at least thinkable that American constitutional interpretation might take several turns. The people at large had no way of expressing their views except through some organ of government, state or federal. Interpretative authority might have reposed entirely in Congress, or at least with Congress having the final word on constitutional issues. In effect, any real enforcement of constitutional limitations would be entirely political. It is this possibility that some current scholars seek to resurrect. But in the antebellum era, this possibility lacked serious political support. A second possibility was that the states would be the primary check on Congress. But this possibility vanished along with the antebellum South where it had its strongest support. This left only the president and the Supreme Court as possible institutional checks on Congress. Although the president has retained some independent role in constitutional interpretation, particularly in foreign affairs, it was the Court that emerged as the primary locus for determining constitutionality. Thus, as discussed below, the Court acquired

134. 2 LINCOLN, *supra* note 130, at 220-21. Lincoln was discussing the constitutional power of Congress to prohibit slavery in the territories.

135. Lincoln's famous refusal to obey a writ of habeas corpus issued by Chief Justice Taney in the early days of the Civil War may appear to contradict this stand. For reasons that are too complex and peripheral to the current subject to discuss here, I believe that the contradiction is only superficial. *See* FARBER, *supra* note 129, ch. 9.

control of constitutional interpretation because none of the other possibilities proved historically viable.

A. *Congressional Supremacy in Constitutional Interpretation*

Strikingly, none of the major national figures in the early Republic believed that Congress was the sole judge of the constitutionality of its own actions. Even Jefferson believed that "each of the three departments has equally the right to decide for itself what is its duty under the constitution, without any regard to what the others may have decided for themselves under a similar question."[136]

The Civil War changed a great deal in American constitutional thinking, but it did not pave the way for congressional hegemony. Even the Reconstruction Congress, as aggressive as it was in flexing its muscles, was unwilling to place all of its hopes in the hands of its own successors. In particular, the ultimate form of the Fourteenth Amendment seems to reflect a distrust of future legislation. Representative John Bingham's original draft of the Fourteenth Amendment empowered Congress to protect various individual rights against the states (like the current Section 5 of the Amendment.) This draft was put on hold after the following comment by Representative Hotchkiss:

> Now, I desire that the very privileges for which the gentlemen [Bingham] is contending shall be secured to the citizens; but I want them secured by a constitutional amendment that legislation cannot override. Then if the gentleman wishes to go further, and provide by laws of Congress for the enforcement of these rights, I will go with him. . . .
>
> This amendment provides that Congress may pass laws to enforce these rights. Why not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens; and let that amendment stand as part of the organic law of the land, subject only to be defeated by another constitutional amendment. We may pass laws here to-day, and the next Congress may wipe them out.[137]

Bingham's next version of the Amendment followed this suggestion.[138] In his final attempt to explain the meaning of the Amendment, Bingham said that "protection by national law from

136. Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), *in* JEFFERSON, *supra* note 31, at 1427-28.

137. FARBER & SHERRY, *supra* note 23, at 309.

138. *Id.* at 310.

unconstitutional State enactments" is "supplied by the first section of the amendment."[139] Intriguingly, he pointed to the South Carolina nullification ordinance of three decades earlier as his illustration of why the federal government needed additional power to defend the rights of citizens.[140]

After the Civil War, the Court was faced again with threats to its independence. As in *Marbury*, the Court dodged the most dangerous threats by ducking dangerous cases on jurisdictional grounds.[141] Nevertheless, the Court remained actively engaged in judicial review.[142] If the Johnson impeachment had succeeded, and Congress had also remained irate at the Court, perhaps we might have veered toward legislative supremacy. But as it was, judicial review survived the nation's greatest constitutional crisis. It was to remain a fixture in the legal landscape.

The failure of congressional supremacy to thrive as a constitutional vision should not be surprising. Congressional supremacy would have faced an uphill battle, given the basic structure of American government. The use of a written constitution was not necessarily incompatible with congressional supremacy. Conceivably, Congress could have been considered the final judge of any ambiguities. But the existence of a written constitution, with specific procedures for amendment, did make it hard to maintain that Congress was the ultimate sovereign in the same sense that Parliament was sovereign in England.

Identifying Congress with popular sovereignty was also difficult because of the way the constitutional system divided power. Congress could not make a convincing claim to be the embodiment of "We, the People." With Senators allocated on the basis of states rather than population and selected by the state legislatures, it was hard to view the Senate as somehow incarnating the popular will. Moreover, because the framers eschewed a parliamentary system, the President had at least as good a claim to represent the American people as did Congress as a whole (or even just the House of Representatives).[143] Additionally, the state governments also had a collective claim to represent the people of the whole country. Thus,

---

139. *Id.* at 313.

140. *Id.* at 312-13.

141. *See, e.g.*, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869); Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866).

142. *See, e.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128 (1872); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

143. The President's claim to represent the people as a whole is discussed in Chief Justice Burger's opinion in *I.N.S. v. Chadha*, 462 U.S. 919, 948 (1983).

Congress could not claim any unique status as the embodiment of the people. Rather, it was just one of several institutions for representing the popular will. There was no logical inevitability to the argument that its views on constitutional issues should trump the others in cases of disagreement.

Other, more subtle barriers to congressional supremacy also exist. American political culture has always had a strong strain of populism (stronger at some times than others), but this has never been the exclusive theme. Madison himself believed that the majority was capable of posing a threat to liberty, and that the Constitution needed to guard against this threat. Antebellum Southerners believed that the Northern majority was a threat to their interests. At the end of the war, the Reconstruction Congress feared that white Southerners might unite with Northern Democrats to repeal the rights of blacks. As we have seen, Section 1 of the Fourteenth Amendment was a response to this threat. Today, of course, libertarians on the right, and supporters of civil rights and civil liberties on the left, all fear abuse by majority legislation.

Finally, congressional supremacy is undercut by the longtime American distrust of politicians. It is possible to imagine that American society might someday trust its legislators enough to make them the final legal judges of their own powers. But it would take a revolution in public attitudes for the American public to be willing to repose such powers in Congress. It should not be forgotten that members of Congress enjoy something quite a bit less than the reverence of the public. Who would trust them as the exclusive guardian of our liberties? Not the American people, anyway.[144]

B. Polycentric Constitutional Enforcement By States

An alternative to congressional supremacy might have been to divide authority over constitutional interpretation among multiple institutional actors. In the early years of the Republic, as we saw in Part III, supporters of this alternative relied on the state governments to enforce constitutional limitations. But this strategy was no longer viable after the Civil War. And given the great decline of state autonomy after the New Deal, it seems an even less plausible strategy today.

144. Even Mark Tushnet admits that, "For all practical purposes, the Westminster model [of parliamentary supremacy] has been withdrawn from sale." Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 814 (2003).

A skeptic might suggest that the tide is once again turning in favor of the states as autonomous constitutional actors. The Supreme Court's recent federalism decisions—and in particular, its enthusiasm for state sovereign immunity—might be seen as opening some space for independent constitutional interpretation by states. But it is a mistake to see these cases as a drastic retreat from the Court's historic commitment to ensuring the supremacy of national law (and of its own interpretations of that law). While stressing the need in *Alden v. Maine*[145] to respect the states as "joint participants in a federal system,"[146] Justice Kennedy spoke in the same breath, of the "ample means" available to enforce federal law.[147] In *Alden*, the Court lists no fewer than five mechanisms for enforcing federal law against states: grants of federal funds in return for waivers of immunity, suits by the federal government itself, individual suits under statutes implementing the Fourteenth Amendment, suits against state officers for injunctive relief, and individual damage suits against state officers.[148] Hence, the Court maintained: "[t]he principle of sovereign immunity as reflected in our jurisprudence strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States, . . . providing ample means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause."[149]

In sum, the federalism revival is far short of resurrecting the prospect of the states as independent interpreters of the Constitution. The current Court views the federal system as one where federal law is paramount within its sphere, but with implementation mechanisms that are tempered by an appreciation for the state role in the system. In *Alden* itself, the Court did not believe that the interest in enforcing federal law was seriously at stake. After all, Justice Kennedy said, the United States had not found the federal interest sufficiently important to "justify sending even a single attorney to Maine to prosecute this litigation."[150]

Justice Holmes once said, "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."[151] Having been wounded in action during the Civil War, it is no

145. 527 U.S. 706 (1999).
146. *Id.* at 758.
147. *Id.* at 757.
148. *Id.* at 754-57.
149. *Id.* at 757.
150. *Id.* at 759.
151. OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295-96 (1921).

wonder that Holmes so staunchly rejected the state-centered model of constitutional interpretation. But the Supreme Court today does not seem willing to relinquish this power any more than he was.

Indeed, the Court has gone beyond exerting appellate review over the state courts. It has actually supported their conscription by Congress as federal enforcement tools. In *Testa v. Katt*,[152] the Court held that state courts must entertain federal causes of action, at least whenever they have jurisdiction over analogous state causes of action.[153] (Note that this fulfills the worst fears of Judge Roane and his fellow Virginia judges.) Despite all of the Court's recent fulmination about "federal commandeering" of state executive and legislative officers, the Court has expressly reaffirmed the holding of *Testa*,[154] and has even extended it under narrow circumstances to state administrative agencies.[155] Far from offering a forum for states to express independent views of the Constitutions, state courts have now become a kind of "fifth column," representing the views of their federal judicial masters rather than those of their fellow state officials. In short, Judge Roane's worst fears have come true.

Admittedly, history has taken many unexpected turns. Perhaps the current American nation state will someday evolve toward a much weaker federation, and nullification will emerge as a realistic strategy. Yet, in the absence of such a radical transformation of our national identity, the states seem to be out of contention as possible guardians of the constitutional order. Madison offered strong arguments why a successful national government would require authoritative constitutional dispute resolution by the Supreme Court. Those arguments seem equally compelling today, unless we are willing to give up on our current conception of nationhood.

C. *The Presidentialist Alternative to Judicial Review*

Neither congressional constitutional hegemony nor polycentric state constitutionalism has proved a viable alternative to federal judicial review. If Congress is not to be trusted to be the sole judge of its own authority, and if the state governments are eliminated, that leaves only the President as an alternative to judicial review.[156]

---

152. 330 U.S. 386 (1947).

153. *Id.* at 394.

154. *See* Printz v. United States, 521 U.S. 898, 928-29 (1997); New York v. United States, 505 U.S. 144, 178 (1992).

155. *See* Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 771 (1982).

156. Neal Devins has suggested that the elimination of judicial review would result in executive supremacy. *See* Neal Devins, *Reanimator: Mark Tushnet and the Second Coming of the Imperial Presidency*, 34 U. RICH. L. REV. 359, 368-71 (2000).

Outside of foreign affairs, however, where the courts generally have not intruded, the President's ability to play an autonomous interpretative role is seemingly limited to his purely discretionary powers. These powers—primarily, the veto power, the pardon power, and control over prosecutions—are far from trivial. But in the domestic sphere, *Marbury* was only the beginning of the development of a complex system of administrative law, largely dedicated to bringing executive action under legal control. Modern administrative law makes it difficult for the President to pursue his own domestic legal agenda without judicial oversight.

It is not impossible to imagine a system of government in which the President would be the ultimate judge of all constitutional issues, subject only to impeachment as a check. Mike Paulsen has sketched the outlines of such a system.[157] But as Steve Calabresi points out, such a system would take us close to an "elective Caesarism,"[158] which seems impossible to square with our constitutional tradition. Our system of law has generally evolved in the opposite direction, so that subjecting the executive to legal controls is seen as fundamental to the rule of law. The President obviously retains significant avenues for implementing his own constitutional views, in making discretionary enforcement decisions, exercising the veto power, dispensing pardons, and engaging in foreign relations. But it is hard to envision presidentialism as actually displacing the core of judicial review in our system of government.

The trend of the past half-century has been strongly against presidentialism. In *Youngstown Sheet & Tube Co. v. Sawyer*,[159] the Court upheld an injunction against a cabinet officer acting under direct presidential orders.[160] In doing so, it also rebuffed the President's expansive view of his own constitutional authority. More recently, the Court held that cabinet officers, though not the President himself, are liable for damages for unconstitutional official acts, subject to a defense of good faith.[161] In *United States v.*

157. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 322 (1994).

158. Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421, 1433 (1999).

159. 343 U.S. 579 (1952).

160. *Id.* at 584-88.

161. *See* Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982) (holding President immune from damages for official acts); Butz v. Economou, 438 U.S. 478, 506-08 (1978) (finding cabinet officers have only qualified immunity); *see also* Clinton v. Jones, 520 U.S. 681, 705 (1997) (concluding that sitting President may be sued for damages based on nonofficial actions).

Nixon,[162] the Court upheld coercive relief against the President himself, overturning the President's view of the constitutional scope of executive privilege.[163] Quite apart from their specific holdings, these decisions all reinforce the Court's primacy in constitutional interpretation *vis a vis* the President. Notably, each of the Presidents involved felt compelled to comply with the Court's decision, in one case at the expense of his ability to continue in office. Thus, there is little reason to view pure presidentialism as a viable alternative in modern America.

A more plausible alternative to judicial review might be a hybrid system, in which constitutional judgment is undertaken by the President and by Congress jointly. This is something like the system that operates in the field of foreign affairs. But it is a troubling model, with defects that we probably tolerate in foreign affairs only because judicial review is impractical. It suffers from many of the vices that Madison attributed to nullification as a form of polycentrism. Because there is no neutral tribunal for resolving constitutional claims in foreign affairs, such claims serve at least as much to overheat rhetorical battles as to aid public deliberation.[164] As in foreign affairs, where true power has slipped into the hands of the President, such a dualistic system would have a tendency to degenerate into a unitary scheme, empowering whichever branch had the practical edge in implementing its views. Alternatively, we might end up with a patchwork: presidential sovereignty in some areas like federal criminal law enforcement, and congressional sovereignty in others such as creation of private causes of action. Moreover, such a system would have no good way of ensuring the application of constitutional law to state governments.

Finally, the system would suffer from a certain logical disconnect: if the other two branches can each block each other's actions on constitutional grounds, why not the courts? Indeed, one branch or the other might well try to recruit the judges as allies. If so, it's not hard to imagine the Court faced with a true logical conundrum. Congress might well pass a statute (over presidential veto) requiring the courts to review the constitutionality of executive action. If the Court followed the statute, it would have to engage in judicial review of the executive. To refuse to follow the statute would be to engage in judicial review of Congress. So, no matter how the court would rule in such a case, it would be back in the business of judicial review!

---

162. 418 U.S. 683 (1974).

163. *Id.* at 710-13.

164. *See* H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION xv-xvi, 6-7, 17-18 (2002).

Apparently, Americans are no more willing to trust the President to exercise unchecked power over private rights, than they are to trust Congress to exercise unchecked legislative power. So long as executive actions remain subject to judicial supervision, it will normally be the courts that will have the final word on constitutional disputes. A hybrid system would be superior to pure presidential or congressional sovereignty in containing some internal checks, but inferior in terms of the potential for disruption and constitutional crisis. Again, such a system would run into the American reluctance to give complete control over private rights to politicians.

V. CONCLUSION

This Essay offers a rather unromantic vision of the basis for judicial review. Essentially, judicial review is an attempt to solve a practical problem: how to keep politicians from violating individual rights or undermining the overall system of government for short-term gains. While it is not self-evident that this problem warrants a structural solution, the consensus in America and increasingly elsewhere is that it is serious, and that the solution involves adopting an enforceable constitution. But, who is to enforce the constitution?

This enforcement problem has three possible resolutions: (1) allow a single political body to enforce the constitution, counting only on the political process to restrain that body; (2) allow multiple political groups to enforce the constitution, counting on them to check each other; or (3) use arbitrators who are at least somewhat independent of the politicians. The first option has had little following in American and decreasingly little anywhere else currently; the second option has too much potential for chaos and instability; and so the third option looks like the best bet.

In short, judicial review thrives by default because none of the alternatives are palatable. By laying claim to the power to oversee the federal executive and the states, as well as Congress, the Marshall Court made possible the federal judiciary's control of constitutional arbitration. Thus, like the rest of the constitutional order, judicial review is a way of solving a practical problem of government. If this be pragmatism, make the most of it.

***