

3-1-1971

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### Recommended Citation

F. R. Strong, *Rx for a Nagging Constitutional Headache*, 8 SAN DIEGO L. REV. 246 (1971).

Available at: <https://digital.sandiego.edu/sdlr/vol8/iss2/3>

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# Rx for a Nagging Constitutional Headache

F. R. STRONG\*

DIAGNOSIS: CONTINUING APPREHENSION OVER SEEMING CONGRESSIONAL POWER TO CURTAIL CONSTITUTIONAL REVIEW THROUGH CONTROL OF THE SUPREME COURT'S APPELLATE JURISDICTION

Appearance of the Raoul Berger volume on Congress and the Court<sup>1</sup> highlights continuing concern among commentators over Congress' apparent power to strip the Supreme Court, even completely, of its power to resolve constitutional issues, whether raised below in federal or state courts. The threatening constitutional provision is the second sentence of the second paragraph of section 2 of article III. Since *Marbury v. Madison*<sup>2</sup> the Court's original jurisdiction is free of either Congressional contraction or extension. But "in all other cases" within the Federal judicial power as defined in the first paragraph of section 2, "the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as Congress shall make."<sup>3</sup> While the question has been at issue for a hundred years, follow-

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1. R. BERGER, *CONGRESS V. THE SUPREME COURT* (1969). [hereinafter cited as BERGER].

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

3. U.S. CONST., art. III, § 2, cl. 2.

ing the Court's ruling in *Ex parte McCordle*,<sup>4</sup> major recent apprehension is a matter of the period since World War II. Speaking before the Association of the Bar of the City of New York in late 1948, former Justice Roberts cited several Achilles' heels in the Constitution, the most serious of which he deemed to be Congressional power to set aside the Court's appellate jurisdiction.<sup>5</sup> Shortly thereafter, Harrison Tweed, a noted member of the association before which the former Justice had spoken, devoted lectures at Boston University to "Provisions of the Constitution Concerning the Supreme Court of the United States," including the exceptions-regulations clause.<sup>6</sup> Then came Professor Henry Hart's celebrated article,<sup>7</sup> to be followed shortly by a study at the hands of Professor Lenoir.<sup>8</sup> Professor Lenard Ratner took a turn with the question just a decade ago;<sup>9</sup> and two years thereafter Professor Merry, a political scientist, examined the matter.<sup>10</sup> In the mid-1960's Professor Herbert Wechsler gave the issue his attention,<sup>11</sup> and during 1968 it was extensively ventilated in the Hearings before the Subcommittee on Separation of Powers of the Senate Judiciary Committee.<sup>12</sup> Now has come the detailed Berger study.<sup>13</sup>

Roberts and Tweed were both of opinion that Congress clearly

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4. 74 U.S. (1 Wall.) 506 (1869).

5. Roberts, *Now Is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A.J. 1 (1949) [hereinafter cited as Roberts], reprinted in *Hearings*, *infra* note 12, at 654-58.

6. Tweed, *Provisions of the Constitution Concerning the Supreme Court of the United States*, 31 BOSTON U.L. REV. 1 (1951) [hereinafter cited as Tweed].

7. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts; An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) [hereinafter cited as Hart].

8. Lenoir, *Congressional Control Over the Appellate Jurisdiction of the Supreme Court*, 5 U. KANS. L. REV. 16 (1956).

9. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960) [hereinafter cited as Ratner].

10. Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962) [hereinafter cited as Merry].

11. Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965) [hereinafter cited as Wechsler].

12. *Hearings Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm.*, 90th Cong., 2d Sess. (June 11-14, 1968) [hereinafter cited as *Hearings*].

13. Since appearance of the Berger volume, Professor Forkosch has written on the topic. Forkosch, *Exceptions and Regulations Clause of Article III*, 72 W. VA. L. REV. 238 (1970).

possesses the power at least to a degree to control the course of constitutional adjudication. As the latter put it,<sup>14</sup>

Most people, including many lawyers, would think that there is not much to discuss and that the Constitution clearly gives the Supreme Court absolute jurisdiction to invalidate an act of Congress or of a state legislature as unconstitutional. There are comparatively few who recognize that under the express words of the Constitution and a flat decision of the Supreme Court [citing *McCordle*] Congress can largely, if not entirely, deprive the Court of this jurisdiction.

Roberts urged the adoption of a curative amendment to protect the Court,<sup>15</sup> and in this had the support not only of the Association of the Bar but also of the New York State and the American Bar Associations. Mr. Tweed must have been sympathetic to the proposal for amendment, although "in the free intellectual air" in which he spoke at Boston University, he but summarized the arguments for and against it without "attempting to persuade or even express an opinion one way or the other." The Lenoir analysis found full Congressional power, without particular reference to the much mooted proviso for exceptions and regulations. Sufficient for him was the Court-approved view that, despite the seeming thrust of the Constitutional wording and the contentions of Mr. Justice Story, federal jurisdiction derives from Congressional action within the framework of the Constitution and not from the Constitution alone.

On the other hand, Professors Hart, Merry, and Ratner, together with several witnesses at the 1968 Hearings,<sup>16</sup> do not concede to Congress anything like full power to withhold appellate jurisdiction for constitutional review. The well-known dialogue in the Hart "exercise in dialectic" commences with consideration of *McCordle's* reach, which the questioner reads as holding "that the appellate jurisdiction of the Supreme Court is entirely within Congressional control." The response is that it is preposterous to "treat the Constitution, then, as authorizing exceptions which engulf the rule, even to the point of eliminating the appellate jurisdiction altogether." But to the Questioner,

it is so impossible to lay down any measure of a necessary reservation that it seems to me the language of the Constitution must be taken as vesting plenary control in Congress. A. It's not impossible for me to lay down a measure. The measure is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the Constitutional plan. *McCordle*, you will remember, meets that test. The circuit courts of the United States

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14. Tweed, *supra* note 6, at 1.

15. Roberts, *supra* note 5, at 3.

16. *E.g.*, *Hearings*, *supra* note 12, at 19.

were still open in *habeas corpus*. And the Supreme Court itself could still entertain petitions for the writ which were filed with it in the first instance.<sup>17</sup>

Citing this last passage from the Hart-Wechsler Casebook, into which meantime it had been incorporated,<sup>18</sup> Professor Ratner contended in like vein. "It is not reasonable to conclude that the Convention gave Congress the power to destroy [the Court's essential] role. Reasonably interpreted the clause means 'With such exceptions and under such regulations as Congress may make, not inconsistent with the essential function of the Supreme Court under this Constitution'."<sup>19</sup> To this argumentation he added a quite technical one based upon dictionary meanings of the key words.

. . . in legal context an exception cannot destroy the essential characteristics of the subject to which it applies.

Regulations usually specify conditions for engaging in certain conduct and sometimes forbid a particular act, but authority to prescribe them does not ordinarily include the power to prohibit the entire sphere of activity that is subject to regulation.<sup>20</sup>

The Ratner thesis was rejected outright by Professor Wechsler:

I see no basis for this view and think it antithetical to the plan of the Convention for the courts—which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by the Constitution as "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."<sup>21</sup>

To Professor Wechsler it follows from the seemingly unambiguous wording of the Constitutional paragraph in question,

that Congress has the power by enactment of a statute to strike at what it deems judicial excess by delimitations of the jurisdiction of the lower courts and of the Supreme Court's appellate jurisdiction. Under the *McCardle* case even a pending case may be excepted from appellate jurisdiction.<sup>22</sup>

At the subsequent Hearings of the Senate subcommittee, Senator

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17. Hart, *supra* note 7, at 1364-65.

18. H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 312 (1953).

19. Ratner, *supra* note 9, at 172.

20. *Id.* at 170, 171.

21. Wechsler, *supra* note 11, at 1005-06.

22. *Id.* at 1005.

Ervin, the chairman, was vigorous in espousal of the position taken by Professor Wechsler:

I have no doubt in my own mind that the Congress has complete control over the appellate jurisdiction of the Supreme Court of the United States. Some take the *Klein* case to argue to the contrary. But the *Klein* case itself recognizes expressly that the appellate jurisdiction of the Supreme Court is dependent upon an act of Congress.<sup>23</sup>

Moreover, the Senator likes it this way; one of the reasons for insertion of the exceptions-regulations clause was "as a check and balance which Congress can exercise to restrain the Court whenever the Court needs restraining."<sup>24</sup>

Among those witnesses at the Hearings in disagreement with this view, Professor William Van Alstyne spelled out, by far the most thoroughly, the case against Congressional power. Although recognizing that "the extent of that control is uncertain,"

On balance, however, I believe that there are a series of arguments, at least three of which are very substantial, to suggest that there are very substantial limitations on the power of Congress to collapse the appellate jurisdiction of the Supreme Court in the settling of cases and controversies which seek to resolve constitutional issues.<sup>25</sup>

From the subsequent detailed presentation it seems that the three limitations of major substantiality are those growing out of plausible interpretations of the exceptions and regulations clause alternative to "the one which is conventionally preferred." The essence of each of these three follows:

The first observation is this. That the phrase "with such exceptions" follows the provision which grants the Court authority to review findings of fact as well as conclusions of law. It may be reasonable to read the phrase in context as merely permitting Congress to restrict the Supreme Court from making original findings of fact, and from substituting its findings of fact for those determined by a jury below.<sup>26</sup>

There is a second interpretation that is feasible as well. The phrase "with such exceptions and under such regulations as the Congress shall make" may be read conjunctively, that is to say exceptions and regulations conjunctively, to express the thought that Congress may determine the manner in which cases arising under the Constitution may reach the Supreme Court, without suggesting, however, that Congress could wholly forbid such cases from reaching the Court at all.<sup>27</sup>

Finally . . . still another interpretation of the exceptions and regulations clause [is that] it may also refer back to earlier portions

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23. *Hearings, supra* note 12, at 23. See also *id.* at 22, 131-33.

24. *Id.* at 24.

25. *Id.* at 167.

26. *Id.* at 168.

27. *Id.*

of sections 1 and 2 of article III, portions which provide first, and without qualification, that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. . . . This reading does make considerable sense to me. The Court then preserves the clearer statement in section 1 that the whole judicial power of the United States shall be [v]ested as Justice Story indicated in *Martin v. Hunter's Lessee*, leaving the Congress to determine whether the power shall be exercised in particular cases as a matter of original jurisdiction or as a matter of appellate jurisdiction and as a matter of right by way of appeal or as a matter of judicial discretion as a matter of certiorari.<sup>28</sup>

Attorney Berger returns to Professor Hart for guidance, in keeping with his dedication of the volume "To the Memory of Professor Henry M. Hart, Jr. Who Lit the Way."

Professor Hart justly suggests that a literal reading of the "exceptions" clause would serve to "destroy the essential role of the Supreme Court in the constitutional plan." So far as can be gathered from the records, that was not the purpose of the "exceptions" clause.<sup>29</sup>

In search of the true purpose, Mr. Berger turns to debates in the ratifying conventions. "No aspect of Article III was as intensively debated in the Ratification Conventions as the 'exceptions' clause." Yet "[t]here is not the faintest intimation in the several convention records, nor in the contemporary prints, that the 'exceptions' clause was designed to enable Congress to withdraw jurisdiction to declare an Act of Congress void."<sup>30</sup> Rather, the prolonged debate "turned not at all on a curb on judicial 'excess,' but was solely concerned with review of matters of 'fact'" because of great fear that the provision would enable Congress to withhold jury trial in civil cases.<sup>31</sup> According to Mr. Berger's researches, so vigorous was the attack on the grant to the Supreme Court of appellate jurisdiction on facts as well as law that supporters of ratification turned to the immediately following exceptions-regulations clause for defense against "the imperious demand." Quoting John Marshall himself in the Virginia Convention, the clause would "go to the cure of the mischief apprehended."<sup>32</sup>

To adapt a familiar Holmesian phrase, to count upon Congress to

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28. *Id.* at 169.

29. BERGER, *supra* note 1, at 286.

30. *Id.* at 289.

31. *Id.* at 286-87.

32. *Id.* at 288, citing 3 J. ELLIOT, DEBATES 520, 560 (1896).

prevent the Court from denying civil trial by jury would be to rely upon a slender reed. Moreover, a great weakness in this line of reasoning is that the clause for which meaning is sought appeared in article XI of the draft constitution presented by the Committee of Detail on August 6, 1787,<sup>33</sup> whereas the insertion of "as to both law and fact," after the words "appellate jurisdiction", occurred on August 27 when the Judiciary Article underwent consideration and amendment in several particulars.<sup>34</sup> This sequence raises a presumption that the exception-regulations clause was originally included, and continued, for a purpose quite different from that of limiting the Supreme Court's appellate jurisdiction in fact as well as law. Professor Merry had sought to rebut this presumption by demonstrating that "While the provision reported by the Committee of Detail did not expressly say that Congress was to have power to make exceptions and regulations both as to law and fact, substantial grounds exist for concluding that the Committee did struggle with the problem of fact issues."<sup>35</sup> Yet he conceded that "much of the evidence is indirect", and his two instances of "direct support", that is, the rapidity with which the law-fact addition was made on August 27 and the inclusion of a guaranty of jury trial in criminal cases in proposed article XI as submitted on August 6,<sup>36</sup> involve non-sequiturs. Grant that each of these are historical facts but it does not follow that either demonstrates a meaningful connection between itself and the intended function of the exceptions-regulations clause. Apparently Mr. Berger was not impressed, for he makes no reference to either the Merry article or such a contention.

It might be contended that support for the Berger argument can be found in rejection on September 15 (during consideration of the Report of the Committee of Style) of a motion to add to paragraph three of section 2 of article III the preservation of trial by jury "as usual in civil cases."<sup>37</sup> Analysis of the objections, however, which were few in number and briefly considered, carries no hint whatsoever of any thought among the delegates that the addition to the third paragraph was necessary because the exceptions-regulations clause provided protection against Supreme Court review of jury-determined facts. The motion failed for the reason that in and

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33. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. Doc. No. 398, 69th Cong., 1st Sess. 479 (1927) [hereinafter cited as DOCUMENTS].

34. *Id.* at 625.

35. Merry, *supra* note 10, at 58.

36. *Id.* at 58-59.

37. DOCUMENTS, *supra* note 33, at 733-34.



among the States there were such variations in jury usage as to make it impossible by constitutional provision to preserve the civil jury "as usual."<sup>38</sup> Mr. Berger recognizes that realization of this complication lay at the heart of extensive debate in the ratifying conventions. "The difficulty, in a nutshell, was the greatly varied practice in the States respecting review of facts, not alone in jury trials but in admiralty and equity as well."<sup>39</sup> The effort of supporters of the proposed Constitution to allay the fears of opponents by falling back upon the exceptions-regulations clause was, as the surrounding circumstances clearly demonstrate, a makeweight contention that could not by any reasonable interpretation of the document drain that clause of other meaning.

It is significant that Berger buttresses his attempt to explain away the disturbing clause by return to the Hart reliance upon "the purpose and structure of the Constitution" taken as a whole.<sup>40</sup> Brilliant man that he was, Professor Hart sensed there was something about such a grant of power to Congress that did not jibe with the instrument fashioned by the Framers, and that reconciliation lay in macroscopic rather than microscopic inquiry. There he left the matter, not so much in the belief he had found a satisfactory cure for the nagging headache as in the hope that he had identified the direction in which further research might profitably go forward. "The purpose of the discussion is not to proffer final answers but to ventilate the questions . . ."

Meantime, the modern Court's one excursion into the issue has done nothing to alleviate the headache. In the course of his opinion for himself and Justices Brennan and Stewart, in *Glidden v. Zdanok*,<sup>41</sup> Mr. Justice Harlan asserted that Congressional authority to withdraw the Court's jurisdiction, as it did in *McCardle*,

. . . is not, of course, unlimited. In 1870, Congress purported to withdraw jurisdiction from the Court of Claims and from this Court on appeal over cases seeking indemnification for property captured during the Civil War, so far as eligibility therefor might be predicated upon an amnesty awarded by the President, as both courts had previously held that it might. Despite *Ex parte McCardle*, *supra*, the Court refused to apply the statute to a case in which the claimant had already been adjudged entitled to recover by the Court of Claims, calling it an unconstitutional at-

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38. *Id.*

39. BERGER, *supra* note 1, at 287.

40. Hart, *supra* note 7, at 293-96.

41. 370 U.S. 530 (1962).

tempt to invade the judicial province by prescribing a rule of decision in a pending case. *United States v. Klein*, 13 Wall. 128.<sup>42</sup>

By the Justice's own analysis of *Klein* it sets no limit on Congressional power under the exceptions-regulations clause but only differentiates between withdrawal of jurisdiction by the Congress and Congressional effort, in the guise of regulating the Court's appellate jurisdiction, to "prescribe rules of decision to the Judicial Department of the Government in cases pending before it." A clearer instance of legislative encroachment upon the central province of a coordinate branch of government could not be found. *Klein* and *McCardle* have nothing substantial in common; they treat of entirely different matters. In consequence, *Klein* identifies no limits to Congressional power over jurisdiction. Mr. Justice Harlan in the quoted paragraph was just not up to his usual legal acumen.

Mr. Justice Douglas, in a dissent to *Glidden* joined by Mr. Justice Black, does no better. The distinction between the two cases, attempted by Mr. Justice Harlan, is, he says, one between a claim to personal liberty and a property claim. But today "the distinction between liberty and property (which emanates from this portion of my Brother Harlan's opinion) has no vitality even in terms of the Due Process Clause."<sup>43</sup> The distinction thus failing, it would appear that the supposedly stronger case for delimitation of Congressional authority (*Klein*) is now of no precedential weight and *McCardle* rules the constitutional roost! But no, we are assured that "there is a serious question whether the *McCardle* case could command a majority view today."<sup>44</sup> One is reminded of Mr. Justice Jackson's complaint that the more a certain matter was explained to him the less he understood it. A jurisprudence oriented to result is not likely to alleviate any kind of constitutional headache, as Mr. Justice Black has been realizing in recent years.

#### RECOMMENDED TREATMENT: HEAVY DOSAGES OF DIFFERENTIATION BETWEEN CONSTITUTIONAL REVIEW AND JUDICIAL REVIEW

The term "judicial review" aptly describes the traditional functions of the third branch of Government. Principal among these are statutory or common-law interpretation, and canalization of executive discretion. Legislative promulgation or common-law precedent is reviewed to determine the thrust of statute or judge-made law, while executive implementation is reviewed for indica-

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42. *Id.* at 568.

43. *Id.* at 605, n.11.

44. *Id.*

tion of abuse in the inevitable discretion involved in application of general policy to concrete situation. Uninvolved is any judicial determination of constitutionality, that is, "constitutional review;" although it was the genius of Coke and Montesquieu to appreciate the contribution to delimitation of governmental power that could be made by a strong, co-ordinate judiciary. The exercise of each of these two differentiated types of review may be on the horizontal or on the vertical.<sup>45</sup>

The Judiciary Article as it was reported by the Committee of Detail, article XI, bestowed upon the Supreme Court both original and appellate jurisdiction.<sup>46</sup> The former was in scope essentially that carried into article III of the Constitution, save for original jurisdiction over impeachments. The Court's appellate jurisdiction, "with such exceptions and under such regulations as the Legislature shall make," ran to categories of case or controversy familiar in the subsequent Constitutional grant except for four later additions, of which one was all cases arising under "this Constitution." There is no indication that the the Committee of Detail had in mind for the Supreme Court, whether in appellate or original jurisdiction, anything but the exercise of judicial review in instances deemed to be of federal dimension. Stated otherwise, that Committee was creating the third branch of the new government,<sup>47</sup> understandably investing the new Court with a range of power in judicial review reflecting judgment as to the proper line of demarcation between federal and state judicial authority.

When, three weeks later, the Convention delegates finally reached consideration of article XI, a number of actions were rather quickly taken. Already remarked was the express designation that the Court's appellate jurisdiction was to be "both as to law and

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45. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1 [hereinafter cited as Van Alstyne], is helpful to an appreciation of the several respects in which courts may function as participants in delimitation of governmental power.

46. DOCUMENTS, *supra* note 33, at 479.

47. The Notes of both James Madison and Robert Yates record that on May 30 there was consideration and approval (though not with unanimity) of the Randolph resolve "that a *national* Government ought to be established consisting of a *supreme* Legislative, Executive & Judiciary." *Id.*, at 120-22, 740. On June 13 the Committee of the Whole in its report to the Convention made this its first Resolution, *id.* at 201, and the great influence of Montesquieu carried this view through the entire subsequent deliberations.

fact.” Among several additions to the Federal “Judicial power,” substituted for “The Jurisdiction of the Supreme Court” in the section setting forth the categories of case or controversy assigned to the judicial branch of the new government, was insertion of that respecting constitutional cases. On this addition, as on all other actions that day of August 27, recorded debate was very brief.

Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution and whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given that Department.

The motion of Doc. Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature.<sup>48</sup>

In searching Madison’s notes for a reasonable explanation of Doctor Johnson’s motion, and the condition on which agreement was reached, one is struck by the parallel between the evolution of what became article III and that of the Supremacy Clause. Article VIII as reported by the Committee of Detail reads as follows:

The Acts of the Legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States, shall be the supreme law of the several States, and of their citizens and inhabitants; and the judges in the several States shall be bound thereby in their decisions; anything in the Constitution or laws of the several States to the contrary notwithstanding.<sup>49</sup>

Consideration of article VIII preceded by four days that of article XI. On the 23d of August Mr. Rutledge moved an amendment “which was agreed to nem: contrad:” The amendment altered the great portion of article VIII only in capitalization and punctuation, but the article was now to open “This Constitution and the laws of the U.S. made in pursuance thereof. . . .”<sup>50</sup> Thus the extension to judicial power under article XI of all cases arising under the Constitution as well as under the laws and treaties of the United States followed shortly upon an identical alteration in the scope of the Supremacy Clause. From this sequence it is more than reasonable to conclude that Doctor Johnson’s amendment to article XI was for the single purpose of conferring upon the Supreme Court of the United States power to exercise vertical constitutional review with respect to State court dispositions of cases involving issues under the new Constitution of the United States.

The Committee of Style, reporting on September 12, proposed no

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48. *Id.* at 625.

49. *Id.* at 476.

50. *Id.* at 603. The citation is to Madison’s Notes. Compare the recordation of this action by Dr. James McHenry, *id.* at 942.

substantive alterations in article XI, now renumbered III; for the Supremacy Clause, now incorporated into new article VI, the only change was to declare the Constitution, laws and treaties of the United States to be "the supreme law of the land" rather than of "the several States, their citizens and inhabitants."<sup>51</sup> Debate on article III produced only rejection of the move to add right of jury trial in civil cases;<sup>52</sup> further consideration of article VI was lost in the pressure to terminate the Convention with a report to the Continental Congress.<sup>53</sup> However, in debate on the Export-Import Clause, as it came from the Committee of Style, there developed considerable concern over the reach of the prohibition on State taxes on exports. Several favored a proviso that would afford some relaxation from the prohibition. At this point.<sup>54</sup>

Mr. Gorham and Mr. Langdon, thought there would be no security if the proviso should be agreed to, for the States exporting through other States, against the oppressions of the latter. How was redress to be obtained in case duties should be laid beyond the purpose expressed?

Mr. Madison. There will be the same security as in other cases. The jurisdiction of the Supreme Court must be the source of redress. So far only had provision been made against injurious acts of the States. His own opinion was, that this was insufficient. A negative on the State laws alone could meet all the shapes which these could assume. But this had been overruled.

Out of the debate came the ultimate wording that "No State shall, without the consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . ." Significant for present purposes is the clear tie that Madison makes back to the action taken on August 27; constitutional review had been introduced into the Court's appellate jurisdiction for the limited function of control of State action inconsistent with prohibitions contained in the Federal Constitution. Later, when Hamilton came, in Number 80 of the Federalist Papers, to examine the scope of the judicial power under article III, the context in which he considered "cases arising under the Constitution" was that of vertical review of the validity of State legislative acts. The passages are most enlightening in

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51. *Id.* at 712.

52. *Id.* at 733-34.

53. According to Madison's Notes review of the report of the Committee of Style ended with article V. See, *id.* at 736.

54. *Id.* at 717.

view of the Convention action of August 27, and of Madison's understanding of it as disclosed on September 12.

As to "the proper extent of the federal judicature," Hamilton's "first point" is

that there ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the State legislatures without some constitutional mode of enforcing the observance of them? [Citing prohibitions on the States contained in the Constitution of the United States]. No man of sense will believe that such prohibitions would be scrupulously regarded without some effectual power in the government to restrain or correct infractions of them. This power must either be a direct negative on the State laws or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former, and, I presume, will be most agreeable to the States.<sup>55</sup>

Hamilton's "second point" is the "mere necessity of uniformity in the interpretation of the national laws. . . ."<sup>56</sup> Corresponding "with the first two classes of causes" is the extension of the Federal judicial power "To all cases in law and equity, *arising under the Constitution and the laws of the United States.*"<sup>57</sup> Distinguishing between the two, Hamilton asserts that

[a]ll the restrictions upon the authority of the State Legislatures furnish examples of it. They are not, for instance, to emit paper money; but the interdiction results from the Constitution, and will have no connection with any law of the United States. Should paper money, notwithstanding, be emitted, the controversies concerning it would be cases arising under the Constitution and not the laws of the United States, in the ordinary signification of the terms. This may serve as an example of the whole.<sup>58</sup>

Perhaps in these passages Hamilton does not mean to limit constitutional review wholly to the vertical dimension, although their significance cannot be denied for their indication of the type of constitutional review he believed the Constitution clearly warranted. A satisfactory judgment on his views is difficult to make with respect to the role to be played by the Supreme Court and possible lower Federal courts in effecting limitations on governmental power; some commentators have even thought they found inconsistency among the various Numbers of the Federalist in which Hamilton treated the Judiciary.<sup>59</sup> There is the paragraph in

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55. THE FEDERALIST, No. 80, at 236 (Fairfield 2d ed. 1966) (A. Hamilton) [hereinafter cited as THE FEDERALIST].

56. *Id.* at 237.

57. *Id.* at 239.

58. *Id.* at 240.

59. Number 81 has been troublesome. Thus Louis Boudin interpreted

Number 78 which has always been taken as proof that he fully embraced horizontal constitutional review:

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 bills 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 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.<sup>60</sup>

Yet the paragraph immediately preceding sounds in terms of wholly defensive use of constitutional review of the horizontal dimension.

This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legisla-

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it as entirely contradictory to assertions in Number 78. 1 L. BOUDIN, GOVERNMENT BY JUDICIARY 111-13 (1932) [hereinafter cited as BOUDIN]. Difficulty has centered on the meaning of Hamilton's denial "that the Parliament of Great Britain or the legislatures of the particular States, can rectify the exceptionable decisions of their respective courts in any other sense than might be done by a future legislature of the United States. The theory neither of the British, nor the State constitutions, authorizes the reversal of a judicial sentence by a legislative act." THE FEDERALIST, *supra* note 55, at 244-45. Differentiation between constitutional and judicial review quickly dissipates the confusion. Hamilton was in the early portion of Number 81 responding to criticism of "the particular organization of the Supreme Court in its being composed of a distinct body of magistrates, instead of being one of the branches of the legislature, as in the government of Great Britain and that of the State [of New York]." *Id.* at 243. The passage so puzzling to Mr. Boudin was but asserting that finality of decision was a hallmark of judicial review in all three judicial systems, despite differences in judicial organization. "A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases." *Id.* at 254. This is a necessary principle of judicial status under a separation-of-powers doctrine that posits the independence of a third, the judicial, branch. A largely disregarded paragraph in a later portion of Number 78 demonstrates that Hamilton grasped the vital difference between constitutional and judicial review. *Id.* 231-32.

60. THE FEDERALIST, *supra* note 55, at 228.

ture and the executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers."<sup>61</sup>

A limited conception of horizontal constitutional review on Hamilton's part would not be surprising; the actual exercises of it by State courts between Independence and Ratification were mostly defensive in nature. *Holmes v. Walton*<sup>62</sup> in 1780 and *Trevett v. Weedon*,<sup>63</sup> 1786, invalidated legislation restrictive of trial by jury. The decision usually regarded as the most significant precedent by Convention time was *Bayard v. Singleton*<sup>64</sup> in which the North Carolina court declared unconstitutional a statute of that State that sought in a class of litigation to deny to North Carolina courts the authority to engage in judicial review. Only *Commonwealth v. Caton*,<sup>65</sup> decided in 1782, involved judicial experimentation with invalidation of legislative action not directed at the judicial department, and there are features of it which sharply curtail its relevance. Louis Boudin challenged the authenticity of the case.<sup>66</sup> Assuming its authenticity it technically concerned formal, not substantive, constitutional review;<sup>67</sup> and the major legislative-judicial clash in Virginia, the remonstrance of the Court of Appeals to the General Assembly, concerned a refusal of the State judges to act under certain legislation of the Assembly because that legislation was asserted to interfere with the independence of the judicial branch under the Virginia constitution.<sup>68</sup>

Similar ambivalence marks the Convention debates, despite Mr. Berger's irritation with those who press the point. To him the doubts of Boudin-Crosskey-Corwin as to whether the intent of the Framers went beyond judicial self-defense are unjustified, yet the ghost will not down. Thus

Professor Hart's crushing refutation should have given "self-defense" its *coup de grace*, notwithstanding which Professor Westin has since referred to the *problem* whether "the Court could go beyond defense of its own prerogatives."<sup>69</sup>

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61. *Id.* at 227. The remainder of the paragraph is omitted.

62. Reported in C. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 92 (1932).

63. 2 CHANDLER CRIM. TRIALS 269 (1844).

64. 1 N.C. 5 (1787).

65. 4 Call. (Va.) 5 (1782).

66. BOUDIN, *supra* note 59, Appendix C.

67. Formal constitutional review, ordinarily referred to as formal judicial review, is concerned with legislative adherence to constitutional requirements for the enactment of legislation. It is defined in Corwin, *Judicial Review*, 8 ENCYC. SOC. SCI. 475, 463 (1932), and further considered in F. STRONG, *AMERICAN CONSTITUTIONAL LAW* 385-86, 1015-19 (1950) [hereinafter cited as STRONG].

68. 1 Va. Cases 98 (1788).

69. BERGER, *supra* note 1, at 155.



It is familiar history that on May 29 Governor Randolph proposed to the Convention fifteen Resolutions, of which the eighth was

Resolved that the Executive and a convenient number of the National Judiciary, ought to compose a Council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by \_\_\_\_\_ of the members of each branch.<sup>70</sup>

On June 4 this Resolution came before the Convention, sitting "In Committee of the Whole." Both Madison and Yates took notes on debate with respect to the first half of the Resolution. The notes vary, Madison's being the fuller, but there is no disagreement between them as to views expressed or actions taken. From Yates:

Mr. Gerry objects to the clause—moves its postponement in order to let in a motion—that the right of revision should be in the executive only.

Mr. Wilson contends that the executive and judicial ought to have a joint and full negative—they cannot otherwise preserve their importance against the legislature.

Mr. King was against the interference of the judicial—they may be biased in the interpretation—He is therefore to give the executive a complete *negative*.

Carried to be postponed, 6 States against 4—New York for it.<sup>71</sup>

The Madison notes expand on Mr. Gerry's views as follows:

Mr. Gerry doubts whether the Judiciary ought to form a part of it, as they will have a sufficient check against 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 against the Constitution. This was done too with general approbation. It was quite foreign from the nature of y.e office to make them judges of the policy of public measures. He moves to postpone the clause in order to propose "that the National Executive shall have a right to negative any Legislative act which shall not be afterwards passed by \_\_\_\_\_ parts of each branch of the national Legislature."<sup>72</sup>

The notes of Rufus King for June 4 take up with the ensuing motion of Mr. Gerry "to postpone the article for a Council of Revision, and to vest a qualified Negative in the Executive." King

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70. DOCUMENTS, *supra* note 33, at 118.

71. *Id.* at 752.

72. *Id.* at 147.

records that upon adoption of the motion, "by all States except Cont. & Maryland," several delegates spoke in opposition to a motion by Hamilton and Wilson that the Negative be complete, after which the latter went down to defeat with only the movers, and King, in support. Then, according to the King notes, Madison delivered himself as follows:

The judiciary ought to be introduced in the business of Legislation—they will protect their department, and united with the Executive make its negatives more strong. There is weight in the objections to this measure—but a check on the Legislature is necessary . . . . We must therefore introduce in our system Provisions against the measures of an interested majority—a check is not only necessary to protect the Executive power, but the minority in the Legislature. The independence of the Executive, having the Eyes of all upon him will make him an impartial judge—add the Judiciary, and you greatly increase his respectability.<sup>73</sup>

From the above it is quite apparent that the extended consideration of the merits of a Council of Revision began with the view that any judicial participation in it would be for the purpose of protecting the Judiciary against encroachments by the National Legislature, exactly in line with judicial development of the period. A re-combing of subsequent debates will not be undertaken here; the Berger review is inadequate in itself but footnotes to numerous more comprehensive searches including that of his idol, Professor Hart.<sup>74</sup> It suffices to observe that in subsequent consideration some delegates did appear to carry the concept of horizontal constitutional review beyond the defensive to embrace all manner of acts of Congress. However the evidence of abandonment of the original view of the limited function of that type of review does not compel the crucial contention of Berger and others that in passing without debate Doctor Johnson's motion of August 27, adding "all cases arising under this constitution," the delegates intended to legitimate the full range of horizontal constitutional review. Indeed, it is not at all clear that the motion was intended to provide for any degree of constitutional review of the horizontal type. As has been demonstrated,<sup>75</sup> the convincing evidence is that the Framers were there making provision only for Supreme Court exercise of vertical constitutional review.

There is no indication whatsoever that in adding the vertical segment of constitutional reviewing power to the Supreme Court's appellate jurisdiction, the Convention delegates sensed any conflict between such an extension and Congressional power over that jurisdic-

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73. *Id.* at 848.

74. BERGER, *supra* note 1, at 154-65.

75. See text accompanying note 47, *supra*.

tion. They had, by another action on August 27, seen a conflict between legislative authority with respect to judicial jurisdiction and legislative authority over the judicial function. Seemingly anticipating the problem of *Klein*, "The following motion was disagreed to, to wit to insert 'In all the other cases before mentioned the Judicial power shall be exercised in such manner as the Legislature shall direct.'"<sup>76</sup> But with respect to the categories of case or controversy originally included within the Court's appellate jurisdiction for purposes of judicial review, it was of the essence of good sense to leave to the legislative branch authority to make exceptions to, as well as regulations for, that jurisdictional bulk. There was double good sense for such a provision in light of the provision, in the draft of the Committee of Detail, authorizing the federal legislature to create inferior federal courts should it see fit to do so.

To leave to the legislative branch the power to undercut effective implementation of the Supremacy Clause is of a wholly different dimension. It is conceivable that the delegates saw no conflict because they could not conceive that a department of the new federal government would ever be disposed to take such action. It is far more likely, however, that tired from three weeks of intensive consideration of the complete draft for a Constitution submitted by the Committee of Detail, and attempting in one day to review and resolve six proposed alterations in the Judiciary Article, the delegates did not realize they were by Doctor Johnson's amendment giving the left hand power to take away that which they had given with the right hand in the interest of federal supremacy. In the clarity afforded by this narrow focus, there is presented an issue of internal inconsistency of a nature justifying preference for an interpretation of the constitutional paragraph guaranteeing judicial power vertically to review for constitutionality over the interpretation granting legislative power to withhold such appellate jurisdiction. Reliance could properly be placed on Professor Hart's thesis that the exceptions-regulations clause cannot rightly be permitted to destroy the Court's essential role in the constitutional plan because that thesis is now domesticated in a specific context that removes much of its self-serving, "must have been" generalization with respect to Framers intent in the face of unexplained constitutional language to the contrary.

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76. DOCUMENTS, *supra* note 33, at 625.

Near-contemporaneous action by the First Congress, in which sat many of the former Convention delegates, may offer the most satisfactory resolution of the issue of more precise limits under this general proposition. The celebrated section 25 did not exhaust the total reach of the Constitutional grant to the Supreme Court of its appellate jurisdiction over State courts. Familiar is the final sentence of section 25:<sup>77</sup>

But no other error shall be assigned or regarded as ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commission, or authorities in dispute.

Congress here restricted vertical constitutional *and* judicial review to federal questions, whereas article III extends the Court's appellate jurisdiction to "all cases . . . arising under this Constitution, the Laws of the United States, and Treaties made. . . ." By the Act of 1867 Congress omitted this last sentence, presumably in line with its general determination to extend Federal authority over the States. By a Herculean act of statutory misinterpretation, rivaling his earlier performance at the level of constitutional interpretation in the *Slaughter-House Cases*,<sup>78</sup> Mr. Justice Miller managed the conclusion that no change in the scope of the Court's appellate jurisdiction vis-à-vis State courts had been intended.<sup>79</sup> But the Congressional power was there, as the majority did not deny,<sup>80</sup> as Mr. Justice Bradley asserted in dissent,<sup>81</sup> as Justices Clifford and Swayne assumed in their dissent,<sup>82</sup> and as ex-Justice Curtis convincingly contended in his brief *amicus curiae*.<sup>83</sup>

There continues to this day this Congressional exception to the full reach of the Court's appellate jurisdiction over State courts *in re* constitutional review, as given by the Constitution.<sup>84</sup> Com-

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77. 1 Stat. 73, 85-87 (1789).

78. 83 U.S. (16 Wall.) 36 (1873).

79. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).

80. *Id.* at 638.

81. *Id.* at 641-42.

82. *Id.* at 638-39.

83. B. CURTIS, *JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES* 59-63 (2d ed. 1896).

84. 28 U.S.C. § 1257, restricting Supreme Court review to those situations where, in "the highest court of a State in which a decision could be had," there is "drawn in question" the validity of a treaty or statute of the United States, or the validity of a State statute, or "where any title, right, privilege or immunity is specially set up or claimed under Federal Constitution, statute, treaty, commission or authority." Section 2 of article III of course extends to "all cases" arising under the Constitution, laws and treaties of the United States. Cf. *Tracy v. Ginsberg*, 205 U.S. 170 (1907), assuming reviewing authority under diversity of citizenship.

ing down to us as it does from 1789, it can with much justification be taken as the intended guide to the extent of Congressional authority under the substantive portion of the exceptions-regulations clause. At the Subcommittee Hearings Professor Gunther put the point well by way of further illustration:<sup>85</sup>

For a good many years in our history, lots of cases arising in the State courts, for example, involving Federal issues could not be brought to the Supreme Court. They cannot all be brought to the Supreme Court now.

For example, the restriction involved in the old section 25 of the Judiciary Act in 1789 meant that, until the 20th century, cases in which the Federal right was denied in the State court did not go to the Supreme Court. These were after all restrictions of a substantive nature.

They were not simply procedural matters as to when you file a case or how you prepare a case or how you raise the issues. I think they were of great substantive significance in the sense that a very large bulk of potential Supreme Court material did not get to the Supreme Court because of the congressional failure to vest the whole jurisdiction.

I don't think it follows from that, that any kind of congressional control of appellate jurisdiction therefore must be permissible.

So far as the Framers were concerned, then, provision for constitutional review was incorporated into the Supreme Court's appellate jurisdiction for the single explicit purpose of providing an effective deterrent against State enactments, legislative or constituent, inconsistent with the new Constitution of the *United States* yet bearing the imprimatur of a State's Judges. But until ratified the document was only "a scrap of paper" and what the Ratifiers understood in making it an operative instrument of governance is another matter. From his exhaustive study Berger is convinced that ratification was achieved on the understanding that horizontal constitutional review of Acts of Congress was assured by article III's extension of judicial power to all cases arising under the Constitution. Debates in and accompanying the ratifying conventions, he asserts, reveal both great demand for Court invalidation of Congressional acts violative of the Constitution and assumption that the document provided that power; "A restrictive reading of the 'arising under' clause can not be extracted from textual compulsions";<sup>86</sup> therefore, Q. E. D.

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85. *Hearings*, *supra* note 12, at 17.

86. BERGER, *supra* note 1, at 217.

Accepting the accuracy of the Berger findings with respect to the great debates on ratification and granting that on its face alone, without contextual setting, the phrase in question can carry the broader meaning, nevertheless the Berger contention experiences three major difficulties. First, if article III embraces horizontal constitutional review—and concededly there is no other provision on which such judicial power can be rested—it immediately becomes subject, save as capable of exercise through the Court's original jurisdiction, to Congressional authority to make exceptions thereto. All effort, whether by Mr. Berger, Professor Van Alstyne, or others, to be rid of the irritant exceptions-regulations clause by contending that it was designed to take the sting from the law-and-fact clause is unconvincing, as has been shown. Article III is a veritable trap for those who understandably feel better if they can persuade themselves that the Constitution did indeed incorporate horizontal as well as vertical constitutional review.

Secondly, while the debates over ratification may be taken as indicating the appeal of extension to the horizontal level of the judicial power to rule with finality on issues of constitutionality, the evidence presented by Mr. Berger<sup>87</sup> does not convincingly demonstrate that the Constitution as ratified *must* be read as itself textually incorporating such a broadened conception of the part that the third branch of the new Government was to play under that Instrument. There is a serious variance between pleading and proof. The same criticism is to be made of Berger evidence that the growing acceptance of constitutional review of acts of Congress can be traced in the First Congress.<sup>88</sup>

A final difficulty in the Berger-type thesis lies in the irreconcilability of the asserted clarity of documentary inclusion of horizontal constitutional review with the travail involved in full establishment of Supreme Court authority to review Acts of Congress for consistency with the Constitution. On its facts *Marbury v. Madison*<sup>89</sup> established only that the Court had the power to declare unconstitutional Congressional action allegedly encroaching on the Court's own bailiwick as the third branch of the new Government. In a word, the exercise of constitutional review was defensive, strikingly like the North Carolina court's holding in *Bayard v. Singleton*,<sup>90</sup> to which Louis Boudin, in his monumental attempt to disprove the legitimacy of constitutional review, took no exception.<sup>91</sup>

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87. *Id.* ch. 4.

88. *Id.* ch. 5.

89. 5 U.S. (1 Cranch.) 137 (1803).

90. Cited *supra* note 64.

91. BOUDIN, *supra* note 59, at 66.

Professor Van Alstyne is quite correct that Chief Justice Marshall was by dictum after much bigger game.<sup>92</sup> But convincing demonstration of textual basis for the exercise of affirmative constitutional review of Acts of Congress was more than a match for even Marshall's great talents, and acceptance of this power in the Supreme Court has had to come more by faith than by proof.

Careful differentiation between constitutional review and judicial review lays basis for understanding why the Marshall dictum in *Marbury* has experienced such difficulty in its metamorphosis into unquestioned doctrine. In his brilliant although unappreciated dissent in *Eakin v. Raub*,<sup>93</sup> Mr. Justice Gibson had no difficulty at all with the vertical constitutional review involved in testing State legislative action against the norms of the Federal Constitution.

By becoming parties to the federal constitution, the states have agreed to several limitations of their individual sovereignty, to enforce which, it was thought absolutely necessary to prevent them from giving effect to laws in violation of those limitations, through the instrumentality of their own judges.<sup>94</sup>

Then quoting in full the Supremacy Clause, Gibson continued

This is an express grant of a political power and it is conclusive to show that no law of inferior obligation, as every state law must necessarily be, can be executed at the expense of the constitution, laws, or treaties of the United States.<sup>95</sup>

It followed that even the Pennsylvania Judges must exercise this "political power" of constitutional review to the extent of determining the consistency of any Pennsylvania legislative act with the Federal Constitution. But this "is not all," for by article III thereof, implemented by Act of Congress, the Supreme Court has appellate jurisdiction over State court determinations to the extent of their involvement of federal questions.

This is another guard against infraction of the limitations imposed on state sovereignty, and one which is extremely efficient in practice; for reversals of decisions in favour of the constitutionality of acts of assembly, have been frequent on writs of error to the Supreme Court of the United States.<sup>96</sup>

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92. Van Alstyne, *supra* note 45, at 34-36.

93. 12 Serg. & R. (Pa.) 330, 343, 358 (1825).

94. *Id.* at 355-56.

95. *Id.* at 356.

96. *Id.* Gibson could have had in mind *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.)

But to Mr. Justice Gibson the claim by a judiciary, whether State or Federal, of power to exercise horizontal constitutional review was quite another matter. Extensive quotation is essential to full understanding of the Gibson reasoning.<sup>97</sup>

It seems to me, . . . there is a plain difference, hitherto unnoticed, between acts that are repugnant to the constitution of the particular state, and acts that are repugnant to the constitution of the United States; my opinion being, that the judiciary is bound to execute the former, but not the latter. I shall hereafter attempt to explain this difference, by pointing out the particular provisions in the constitution of the United States, on which it depends. I am aware, that a right to declare all unconstitutional acts void, without distinction as to either constitution, is generally held as a professional dogma; but, I apprehend, rather as a matter of faith than of reason. I admit, that I once embraced the same doctrine, but without examination, and I shall, therefore, state the arguments that impelled me to abandon it, with great respect for those by whom it is still maintained. But I may premise, that it is not a little remarkable, that although the right in question has all along been claimed by the judiciary, no judge has ventured to discuss it, except Chief Justice Marshall, (in *Marbury v. Madison*, 1 Cranch, 176); and if the argument of a jurist so distinguished for the strength of his ratiocinative powers be found inconclusive, it may fairly be set down to the weakness of the position which he attempts to defend. . . . The constitution is a collection of fundamental laws, not to be departed from in practice, nor altered by judicial decision, and in the construction of it, nothing would be so alarming as the doctrine of *communis error*, which affords a ready justification for every usurpation that has not been resisted *in limine*. Instead, therefore, of resting on the fact, that the right in question has universally been assumed by the American courts, the judge who asserts it ought to be prepared to maintain it on the principles of the constitution.

I begin, then, by observing, that in this country, the powers of the judiciary are divisible into those that are POLITICAL, and those that are purely CIVIL. Every power by which one organ of the government is enabled to control another, or to exert an influence over its acts, is a political power. The political powers of the judiciary are *extraordinary* and *adventitious*; such, for instance, as are derived from certain peculiar provisions in the constitution of the United States, of which hereafter; and they are derived, by direct grant, from the common fountain of all political power. On the other hand, its civil, are its *ordinary* and *appropriate* powers; being part of its essence, and existing independently of any supposed grant in the constitution. But where the government exists by virtue of a *written* constitution, the judiciary does not necessarily derive from that circumstance, any other than its ordinary and appropriate powers. Our judiciary is constructed on the principles of the common law, which enters so essentially into the

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518 (1819); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In these and other decisions of his time on the Court, Marshall was, after *Marbury*, concerned with vertical constitutional review of State action challenged as violative of the commerce or contract clauses of the Constitution of the United States.

97. The following passages appear *id.* at 344-51.



composition of our social institutions as to be inseparable from them, and to be, in fact, the basis of the whole scheme of our civil and political liberty. In adopting any organ or instrument of the common law, we take it with just such powers and capacities as were incident to it at the common law, except where these are expressly, or by necessary implication, abridged or enlarged in the act of adoption; and that such act is a written instrument, cannot vary its consequences or construction. . . . Now, what are the powers of the judiciary at the common law? They are those that necessarily arise out of its immediate business; and they are, therefore, commensurate only with the judicial execution of the municipal law, or, in other words, with the administration of distributive justice, without extending to any thing of a political cast whatever. . . . With us, although the legislature be the depository of only so much of the sovereignty as the people have thought fit to impart, it is, nevertheless, sovereign within the limit of its powers, and may relatively claim the same pre-eminence here that it may claim elsewhere. It will be conceded, then, that the ordinary and essential powers of the judiciary do not extend to the annulling of an act of the legislature. Nor can the inference [to] be drawn from this, be evaded by saying that in England the constitution, resting in principles consecrated by time, and not in an actual written compact, and being subject to alteration by the very act of the legislature, there is consequently no separate and distinct criterion by which the question of constitutionality may be determined; for it does not follow, that because we have such a criterion, the application of it belongs to the judiciary. I take it, therefore, that the power in question does not necessarily arise from the judiciary being established by a written constitution, but that this organ can claim, on account of that circumstance, no powers that do not belong to it at the common law; and that, whatever may have been the cause of the limitation of its jurisdiction originally, it can exercise no power of supervision over the legislature, without producing a direct authority for it in the constitution, either in terms or by irresistible implication from the nature of the government: without which, the power must be considered as reserved, along with the other ungranted portions of the sovereignty, for the immediate use of the people.

Having demonstrated the basic distinction, in nature and source of the power, between judicial review and constitutional review, Mr. Justice Gibson continued:

The constitution of Pennsylvania contains no express grant of political powers to the judiciary. But, to establish a grant by implication, the constitution is said to be a law of superior obligation; and, consequently, that if it were to come into collision with an act of the legislature, the latter would have to give way; this is conceded. But it is a fallacy, to suppose that they can come into collision *before the judiciary*. . . .

Now, as the judiciary is not expressly constituted for that purpose, it must derive whatever authority of the sort it may possess,

from the reasonableness and fitness of the thing. But, in theory, all the organs of the government are of equal capacity; or, if not equal, each must be supposed to have superior capacity only for those things which peculiarly belong to it; and as legislation peculiarly involves the consideration of those limitations which are put on the law-making power, and the interpretation of the laws when made, involves only the construction of the laws themselves, it follows, that the construction of the constitution, in this particular, belongs to the legislature, which ought, therefore, to be taken to have superior capacity to judge of the constitutionality of its own acts. But suppose all to be of equal capacity, in every respect, why should one exercise a controlling power over the rest? That the judiciary is of superior rank, has never been pretended, although it has been said to be coordinate. It is not easy, however, to comprehend how the power which gives law to all the rest, can be of no more than equal rank with one which receives it, and is answerable to the former for the observance of its statutes. Legislation is essentially an act of sovereign power; but the execution of the laws by instruments that are governed by prescribed rules, and exercise no power of volition, is essentially otherwise.

Later, as Chief Justice of the Pennsylvania Supreme Court, Gibson presumably abandoned his position in *Eakin*, partly because of general acceptance of "the pretensions of the courts" and partly "from experience of the necessity of the case."<sup>98</sup> The two given reasons would appear to point in the same direction:

The fault line in the logic of the "dissent" . . . lies in this—that the presence in American constitutions of separation-of-power provisions looking to continuance of judicial [review] does not, as Justice Gibson then supposed, necessarily negative intendment that the judiciary also assume the entirely new and different role of constitutional interpreter and adjudicator.<sup>99</sup>

There is no basis for the assertion that the new judicial role was the consequence of judicial usurpation; the evidence to the contrary is convincing. But the evidence is equally convincing that clear differentiation of the new role from the old was slow in coming and that once achieved, a basis for constitutional review must be "read back" into a document predicated primarily upon conception of the judicial role as that of the exercise of judicial review.

Further testimony to the continuing difficulty of clear differentiation is furnished by Professor Edward S. Corwin, the political scientist whose views on constitutional matters were in his time more influential than those of most constitutional lawyers. Invited to prepare the topic of "Judicial Review" for the original Encyclopedia of the Social Sciences, Professor Corwin wrote that while the "official theory" of judicial review (that is, constitutional review)

accounts sufficiently for the power of the court to decide cases by

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98. *Norris v. Clymer*, 2 Pa. 277, 281 (1845).

99. STRONG, *supra* note 67, at 116.

rules drawn directly from the constitution, it does not account for the fact that such rules are generally regarded as binding the legislature in the shaping of future legislation. To explain this, the essential feature of judicial review, one must fall back upon a somewhat mystical notion of the relation of judges to law.<sup>100</sup>

The necessity in 1932 of reliance upon "a mystical notion" to explain "the essential feature" of at least horizontal constitutional review constitutes a telling indication of the difficulty of accommodating the Court's new role with traditional views of the judicial function. Only in the new, contemporary International Encyclopedia of the Social Sciences does differentiation of function begin to emerge.<sup>101</sup>

So with the Supreme Court itself, the emancipation of constitutional review has been slow and tortuous. One need but recall the final paragraph of *Massachusetts v. Mellon*,<sup>102</sup> to which even Mr. Justice Brandeis noted no exception:

The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. *Gaines v. Thompson*, 7 Wall. 347. We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be uncon-

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100. Corwin, *supra* note 67, at 457.

101. Tanenhaus, *Judicial Review*, 8 INT'L ENCYC. SOC. SCI. 303 (1968).

102. 262 U.S. 447 (1920).

stitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.<sup>103</sup>

It is a far cry from such a view of the Court's position in the governmental system to that twice expressed by the Warren Court. Although *Cooper v. Aaron*<sup>104</sup> was the Court's response to renewed assertions of the outworn doctrine of interposition, the opinion of the Court by the nine individual Justices reached beyond reaffirmation of their authority in vertical constitutional review.

Article VI of the Constitution makes the Constitution the "supreme law of the land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that "it is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.<sup>105</sup>

In three sentences not only is Marshall's trial-balloon dictum at long last enshrined as "basic principle" but the Court makes bold to claim that there has never been any question about it! The step from the defensive, almost apologetic explanation of *Mellon* to the assertive, historically inaccurate declaration of *Cooper* is truly Bunyanesque. A baker's dozen of years since, in litigation involving the exercise of horizontal constitutional review, Chief Justice Warren, in *Powell v. McCormack*,<sup>106</sup> makes the whole travail seem to have been so unnecessary.

Respondents' alternate contention is that the case presents a political question because judicial resolution of petitioners' claim would produce a "potentially embarrassing confrontation between coordinate branches" of the Federal Government. But, as our interpretation of Art. I, § 5, discloses, a determination of Petitioner Powell's right to sit would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a "lack of respect due [a] co-ordinate branch of government," nor does it involve an "initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr* . . . Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.<sup>107</sup>

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103. *Id.* at 488-89.

104. 358 U.S. 1 (1958).

105. *Id.* at 18.

106. *Powell v. McCormack*, 395 U.S. 486 (1969).

107. *Id.* at 548-49.

But simplistically obvious as judicial authority for constitutional review was to the Warren Court, it required one century and most of a second to achieve its domestication in the American constitutional framework. It was far from easy to come by, given the emphasis in the late eighteenth century on the political theory of separation of powers and the essentiality of its incorporation into American constitutions through provision for the broad exercise of judicial review. Domestic hindsight is treacherous here as in any interpretational context; so are deductions from the ease and rapidity with which other nations borrowing from us have grasped the distinction between the two types of review, even to the extent of establishing separate courts for the exercise of judicial and of constitutional adjudication. The only adequate explanation for the ultimate in constitutional review, the horizontal, is that as with Topsy it "just grew" until it forced a fulsome recognition of its own unique character and justification. To this functional view Learned Hand gave the adherence of his impressive intellectual strength. Although necessarily ineffective in his criticism of this view, Mr. Berger does accurately summarize it:<sup>108</sup>

In his 1958 Lectures, Judge Hand, though "unwilling to rest on the historical evidence," was prepared to "interpolate" a power of judicial [i.e. constitutional] review in order to "keep the States, Congress, and the President within their prescribed powers." Otherwise Congress would have been "substantially omnipotent" and the government "would almost certainly have foundered." This, he stated, is "not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation."

#### PROGNOSIS: RELIEF FROM THE NAGGING HEADACHE

Embrasure of the interpolative justification of horizontal constitutional review will bring quick and lasting relief. For under this approach there is no technical reliance upon the "arising under" clause and therefore no problem of conflict with the exceptions-and-regulations clause. Rather, horizontal constitutional review is understood as an evolutionary aspect of a constitutional plan understandably still incomplete in total construct at the time of drafting and ratifying the fundamental law of the new Nation.

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108. BERGER, *supra* note 1, at 219, quoting from L. HAND, *THE BILL OF RIGHTS* 14-15 (1958). It is to be noted that Judge Hand did not find in the historical document basis for even vertical constitutional review.

Consistent with the mature vision of Henry Hart as to "the essential role of the Supreme Court" in that constitutional plan, lodgement for the horizontal aspect of constitutional review can be found in the interstices of the Constitution as an instrument conceived in the womb of time for the realization of human liberty through the fashioning of effective limitations on the power of Government. Such intangible lodgement, although unsatisfactory to those literalists who feel insecure in the absence of explicit chapter and verse, constitutes the best guarantee of full judicial power in the Supreme Court to determine the constitutionality of behavior by all organs of the Federal Government free of headache over the existence of seeming constitutional basis for its partial or complete destruction by Congressional decree. Together with limitations on Congressional power to circumscribe vertical constitutional review that are deducible from historical events of 1787-1789, this view would restrict Congressional intervention to constructive legislative measures, akin to those now resident in 28 U. S. C., deemed necessary and proper to the most satisfactory effectuation of constitutional, as well as judicial, review.