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# Using History to Reshape the Discussion of Judicial Review

## I. INTRODUCTION

On September 26, 1957, a memorable image dominated the front page of *The New York Times*: nine African-American children mounted the front steps of Little Rock Central High School, guarded by U.S. soldiers bearing rifles with fixed bayonets.<sup>1</sup> Behind this image lay a century-long struggle of African-Americans to wrest from their neighbors the political and legal equality guaranteed by the Thirteenth, Fourteenth, and Fifteenth Amendments.<sup>2</sup> In many respects, the struggle to desegregate Central High was political, as well as moral and constitutional. It pitted blacks against whites, the North against the South, and the government of the United States against the government of Arkansas. Despite its deeply political character, however, the dispute was submitted for resolution to the United States Supreme Court.<sup>3</sup>

Alexis de Tocqueville observed the American transformation of political conflicts into legal cases more than a century ago: "There is hardly a political question in the United States which does not sooner or later turn into a judicial one."<sup>4</sup> This transformation gives American judges "immense political power,"<sup>5</sup> which they exercise perhaps most significantly in the form of judicial review.<sup>6</sup> An American judge wields tremendous

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1. N.Y. TIMES, Sept. 26, 1957, at A1.

2. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (*Brown I*), supplemented by *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (*Brown II*); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Strauder v. West Virginia*, 100 U.S. 303 (1879); *In re Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* (1988); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976); MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987); J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978* (1979).

3. See *Cooper v. Aaron*, 358 U.S. 1 (1958).

4. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J.P. Mayer ed. & George Lawrence trans., Doubleday & Co. 1969) (1966).

5. *Id.* at 100.

6. See *id.* at 100-01. Judicial review has been called "the most distinctive American contribution to the entire history of Western constitutionalism," although

political power when he reviews a statute and finds it unconstitutional. The controversies sparked by the exercise of that power have generated a large and lively body of scholarship.<sup>7</sup>

Much of the scholarship on judicial review focuses on a single question: "Was the judicial review authority asserted in *Marbury v. Madison* a usurpation [of legislative or executive authority]?"<sup>8</sup> That question has several facets, including closely related inquiries into the historical<sup>9</sup> and democratic<sup>10</sup> legitimacy of judicial review. An inquiry into the historical legitimacy of judicial review focuses on *Marbury v. Madison*<sup>11</sup> because in that case the Supreme Court first announced its authority to review congressional statutes on the basis of their constitutionality.<sup>12</sup> A conventional interpretation of *Marbury* is that the Supreme Court, under the leadership of Chief Justice Marshall, invented judicial review without supporting precedent or signif-

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at least one author traces its theoretical roots to eighteenth-century French physiocrats. MICHAEL KAMMEN, SOVEREIGNTY AND LIBERTY 103 (1988); J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 279-80 (1992). Leaving aside the question of its origins, the American variety of judicial review has wielded remarkable international influence, especially on the postwar development of strong supreme courts in India and Japan and, to a lesser extent, on the establishment of constitutional courts in Western Europe. See Donald P. Kommers, *Judicial Review: Its Influence Abroad*, 428 ANNALS AM. ACAD. POL. & SOC. SCI. 52, 59 (1976).

7. See, e.g., 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); ROBERT H. BORK, THE TEMPTING OF AMERICA (1990); LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY (1932); WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953); JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); LEARNED HAND, THE BILL OF RIGHTS (1958); SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? (1994) [hereinafter PERRY, THE CONSTITUTION IN THE COURTS]; MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY (1982); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Edward S. Corwin, *Marbury v. Madison and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538 (1914); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

8. GERALD GUNTHER, CONSTITUTIONAL LAW 13 (12th ed. 1991) (italics added).

9. See *id.*

10. See *id.* at 19.

11. 5 U.S. (1 Cranch) 137 (1803).

12. *Id.* at 177-78.

icant historical antecedent.<sup>13</sup> A statement by Professor William Crosskey epitomizes this interpretation: “[J]udicial review of Congressional acts was not intended, or provided, in the Constitution.”<sup>14</sup> If true, this conventional interpretation of *Marbury* makes judicial review the most significant *ipse dixit* in American law.

This Comment, which questions that conventional interpretation of *Marbury*, focuses on three questions. First, what did the men who wrote, debated, and ratified the Constitution say about judicial review?<sup>15</sup> Second, what do those statements reveal about the role they thought judicial review would play in the American constitutional system? Third, what conclusions can be drawn from this historical inquiry for today’s discussion of judicial review?

This Comment demonstrates that many of those who wrote and ratified the Constitution made trenchant and suggestive remarks about judicial review and the role that they anticipated it would play in the new constitutional order. Despite other disagreements, even over the wisdom of ratifying the Constitution, the overwhelming majority of the Founders who said anything about judicial review agreed on a particular theory of it. Based on such historical evidence, this Comment offers two modest proposals intended to reshape the contemporary discussion of judicial review. First, it proposes to use the theory of

13. See, e.g., 1 BOUDIN, *supra* note 7, at 223-24; ROBERT L. CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 5-6 (1989); 2 CROSSKEY, *supra* note 7, at 1000; HAND, *supra* note 7, at 6-11.

14. 2 CROSSKEY, *supra* note 7, at 1000.

15. James Hutson, the editor of the most recent supplement to THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS], has cast some doubt on the integrity of the most important records of the Founding, including James Madison’s NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (James Madison rep., W.W. Norton & Co. 1987) (1966), and Jonathan Elliot’s THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 (Jonathan Elliot coll. & rev., reprint ed., Ayer Co. 1987) (2d ed. 1888). “[I]n all cases the resulting documents are not full, reliable records of the debates at the Constitutional and ratifying conventions.” James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 38 (1986). Hutson’s basic point is that “the mere fact that a record is in print does not make it reliable.” *Id.* at 39. As Hutson reminds us, human record keeping is imperfect. But learning all we can from the records of the Founders remains nonetheless indispensable if we are to understand the Constitution they wrote. Imperfect as the records may be, we have no other guide to the thinking of those constitutional architects whose framework of national political life has sheltered our nation for more than two centuries.

judicial review shared by many Founders as the appropriate reference point for a well-formed discussion of judicial review. Second, it proposes to truncate the current form of the discussion of judicial review by lopping off two extreme positions: legislative deference and policymaking discretion. To explain and defend these proposals, this Comment will first revisit the Hand-Wechsler debate, one of the landmark episodes in the development of constitutional theory since 1945. As part of taking up that debate, it will describe how two extreme positions in today's discussion of judicial review depend on the same interpretation of *Marbury*. Next, it will undermine that interpretation by presenting and discussing several remarks made in the Constitutional Convention, in the popular press during the ratification process, and in some of the state ratifying conventions. Finally, after articulating the theory of judicial review that these statements reveal, this Comment will argue that this early theory should be treated as the appropriate reference point for any serious contemporary discussion of judicial review. It will suggest further that today's discussion of judicial review should be reshaped by abandoning the extreme positions of legislative deference and policymaking discretion, given their common foundation on false history.

Judicial review is so often discussed that a brief explanation of some preliminary matters may forestall potential misunderstandings.

First, judicial review is customarily associated with history under the heading of "Originalism."<sup>16</sup> This Comment makes no attempt to describe "the original theory of judicial review," whatever that might be. Nor does it pass judgment on Originalism as a method of constitutional interpretation. The difference between my use of history in this Comment and the use to which history is generally put in the service of Originalism turns on the distinction between making use of history to enlighten the discussion of judicial review and conceiving of judicial review in terms of history.<sup>17</sup> Nor, finally, does this Comment address in more general terms the proper

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16. See generally INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (Jack N. Rakove ed., 1990) (collecting several well-known essays on Originalism).

17. Cf. Michael Oakeshott, *The Concept of a Philosophical Jurisprudence*, 3 POLITICA 203, 208 (1938) (distinguishing between a jurisprudence that makes use of history and one that conceives of jurisprudence in terms of history).

use of history by the Supreme Court when it adjudicates cases under the Constitution.<sup>18</sup> Instead this Comment proposes to use history to reshape the scholarly discussion of judicial review as it is mainly, although not exclusively, carried on among constitutional theorists.

Second, this Comment proceeds with two assumptions about history: historical evidence can prove or disprove historical opinions, and history is relevant to a serious discussion of judicial review. Some commentators, such as Michael Perry, have cast doubt on the relevance of history to the discussion of judicial review.

The debate about whether the Constitution establishes judicial review has limited relevance today. The practice of judicial review, including the modern practice of judicial review of federal acts, has indisputably become a definite feature of American government—indeed, a feature we unreservedly hold out as a model to the world. Any argument that judicial review was not established by the Constitution and is, in that sense, “unconstitutional,” however plausible the argument may be as an historical matter, is, at this point in the development of American political institutions and practices, antiquarian. In the sense that judicial review is now a definitive feature of American government—a *constitutive* feature—judicial review is constitutional.<sup>19</sup>

To some extent Perry is right, but he misses an important point. Significant positions in the discussion of the proper scope and exercise of judicial review rely on historical interpretations that can be supported or undermined through historical inquiry. Unlike Perry's straw man, this Comment will not make a two-step move from “Judicial review has (or lacks) historical support” to the conclusion “Judicial review should be exercised (or abandoned).” Instead it will make three moves: from “the Supreme Court's articulation of judicial review in *Marbury v. Madison* has strong historical support” to “rhetorical positions inconsistent with the previous claim must be rejected” to the conclusion, “the discussion of judicial review should be reshaped to reflect the rejection of such positions.” In short, an inquiry into the historical antecedents of *Marbury* is no mere

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18. See generally Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (criticizing the Court's use of history in constitutional adjudication).

19. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 7, at 26.

academic exercise. Once the practice of judicial review is taken for granted, the proper scope of the exercise of judicial review remains debatable. And it is that debate that the historical inquiry contained in this Comment is intended to reshape.

Third, this Comment travels over historical ground that other writers have also surveyed at length.<sup>20</sup> But repeated presentation of historical evidence showing that the Founders anticipated the Supreme Court's exercise of judicial review in *Marbury* has been so far unable to stifle what Hart and Wechsler called "the curiously persisting myth of usurpation."<sup>21</sup> Another presentation of similar historical evidence may not persuade every reader that the Supreme Court did not usurp the power of judicial review, but it may persuade some readers to reconsider how they discuss judicial review. If so, it will have served a worthwhile purpose. Besides, a summary of the historical evidence would provide an insufficient foundation for the theoretical proposals at the heart of this Comment.

Finally, while other writers have moved from history to theory<sup>22</sup> in a manner resembling the move made in this Com-

20. See, e.g., CHARLES A. BEARD, *THE SUPREME COURT AND THE CONSTITUTION* 15-72 (1938); RAUL BERGER, *CONGRESS V. THE SUPREME COURT* (1969); CLINTON, *supra* note 13, at 56-71; SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 38-44, 78-83 (1990); CHARLES WARREN, *CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT* 49-70 (new rev. & enlarged ed. 1935). I began researching this Comment by delving into the primary sources to learn what the Founders said and wrote about judicial review. My study of secondary materials deliberately came later. Only when my research and writing based on primary sources was all but completed did I discover, not surprisingly, that other scholars have addressed similar historical questions. However, the historical conclusions of this Comment were first reached independently. That I interpreted the historical evidence like other scholars before knowing of their work tends to strengthen my conclusions. As the Apostle Paul wrote, "In the mouth of two or three witnesses shall every word be established." 2 *Corinthians* 13:1 (King James).

21. PAUL M. BATOR ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 8 (3d ed. 1988).

22. When the historical research for this Comment was nearly finished, I happened to find two recently-published books whose arguments move from history to theory, a move which generally resembles the one that I propose to make: CLINTON, *supra* note 13, and SNOWISS, *supra* note 20. Both authors review similar, often identical, historical evidence. Yet they reach opposite conclusions. Clinton argues that the modern interpretation of *Marbury* as the fountainhead of judicial innovation is historically incorrect and that it has led to an unduly broad conception of judicial review. See CLINTON, *supra* note 13, at 223-33. Snowiss contends, however, that *Marbury* represents a genuine innovation by the Marshall Court, SNOWISS, *supra* note 20, at vii-viii, and that the most appropriate modern conception of judicial review combines "the judicial defense of fundamental values . . . with some form of restraint." *Id.* at 216.

ment, no other writer has employed that move to reach the same conclusions.

## II. THE DEBATE OVER HISTORICAL LEGITIMACY AND ITS CONNECTION WITH TWO EXTREME CONCEPTIONS OF JUDICIAL REVIEW

The significance of the legitimacy debate was highlighted during one of the most controversial moments in twentieth-century constitutional history: the Supreme Court's decision in *Brown v. Board of Education*.<sup>23</sup> *Brown* generated extraordinary theoretical debate over the historical legitimacy of judicial review.<sup>24</sup>

One of the best-known debates over the historical legitimacy of judicial review occurred a few years after *Brown* was decided.<sup>25</sup> Judge Learned Hand delivered the Oliver Wendell Holmes Lectures at Harvard Law School in 1958;<sup>26</sup> Professor Herbert Wechsler responded in the Holmes Lectures the following year.<sup>27</sup>

Hand's main historical claim was that the Constitutional Convention probably would not have enacted an express grant of judicial review "if the issue had been put to it that courts should have power to invalidate acts of Congress."<sup>28</sup> Based on this historical claim, as well as on textual arguments, Judge Hand magisterially denied the legitimacy of judicial review.

This Comment does not try to settle the difference of opinion between Clinton and Snowiss. Although it concludes that the historical evidence supports Clinton's opinion, it addresses a slightly different question than the one Snowiss addresses: Did Justice Marshall's opinion in *Marbury* change the theory of judicial review previously expressed by the Founders? This Comment focuses instead on whether those who wrote and ratified the Constitution said enough about judicial review to provide reasonably clear evidence of (1) their intention that federal courts should exercise judicial review and (2) their theory of judicial review. Therefore, my research provides no basis to evaluate Snowiss's thesis.

23. 347 U.S. 483 (1954) (*Brown I*), supplemented by *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (*Brown II*).

24. For an interesting treatment of the relationship between *Brown v. Board of Education* and the debates over the legitimacy of judicial review, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, at 258-68 (1992).

25. Horwitz and Gunther both treat the Hand-Wechsler debate as a key episode in the history of questioning the legitimacy of judicial review. *Id.*; GUNTHER, *supra* note 8, at 18-19.

26. The text of Judge Hand's lectures can be found at HAND, *supra* note 7.

27. The text of Professor Wechsler's lectures can be found at Wechsler, *supra* note 7.

28. HAND, *supra* note 7, at 7.



There was nothing in the United States Constitution that gave courts any authority to review the decisions of Congress; and it was a plausible—indeed to my mind an unanswerable—argument that it invaded the “Separation of Powers” which, as so many then believed, was the condition of all free government.<sup>29</sup>

Professor Wechsler responded a year later in his Holmes Lectures by noting that the historical evidence he and Henry Hart had gathered pointed towards the opposite conclusion.<sup>30</sup> “The grant of judicial power was to include the power, where necessary in the decision of cases, to disregard state or federal statutes found to be unconstitutional. Despite the curiously persisting myth of usurpation, the Convention’s understanding on this point emerges from its records with singular clarity.”<sup>31</sup> Wechsler also cited a book review<sup>32</sup> by Hart in which Hart wrote a devastating critique of Crosskey’s argument that the Founders had not intended to grant federal courts the power of judicial review.<sup>33</sup> From this historical evidence Wechsler concluded, “I have not the slightest doubt respecting the legitimacy of judicial review, whether the action called in question in a case which otherwise is proper for adjudication is legislative or executive, federal or state.”<sup>34</sup>

Despite appearances, the legitimacy debate carries more than academic interest. As Gerald Gunther has observed, “evaluations of the content as well as the timing of contemporary court decisions may evolve from discussions beginning with concern over legitimacy.”<sup>35</sup> A hotly contested aspect of the discussion of judicial review focuses on the scope of its exercise.

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29. *Id.* at 10-11.

30. Wechsler, *supra* note 7, at 5 n.13.

31. HENRY HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 14 (1st ed. 1953).

32. Wechsler, *supra* note 7, at 5 n.13 (citing Henry M. Hart, Jr., *Professor Crosskey and Judicial Review*, 67 HARV. L. REV. 1456 (1954) (reviewing 2 CROSSKEY, *supra* note 7)).

33. *See supra* text accompanying note 14. Crosskey’s arguments and Hart’s response may be taken as a less famous, though no less interesting, episode in the history of the legitimacy debate. Both were published less than five years before Judge Hand delivered his Holmes Lectures. They therefore form a useful and unduly neglected companion to the more famous Hand-Wechsler debate.

34. Wechsler, *supra* note 7, at 2.

35. GUNTHER, *supra* note 8, at 18.

At one extreme stands the Supreme Court's statement of its judicial supremacy in *Cooper v. Aaron*.<sup>36</sup> There the Court wrote, "This decision [*Marbury*] 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>37</sup> By labeling the *Cooper* Court's statement of judicial supremacy "extreme," I condone neither the unlawful actions of Governor Faubus nor the racism that gave those actions their perverse force. I merely use the label to indicate a common reading of *Cooper* as an overly ambitious statement of the Court's place in the constitutional system.<sup>38</sup>

At the other extreme stands the Supreme Court's statement in *Williamson v. Lee Optical*:

The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . "For protection against abuses by legislatures the people must resort to the polls, not to the courts."<sup>39</sup>

This passage denotes the Court's rejection of substantive due process as applied to legislation regulating economic conduct. But it also connotes a more general point: an approach to judicial review founded on legislative deference.

Both extremes<sup>40</sup> depend on the premise that the Court lacked an historical basis for its opinion in *Marbury*. The *Williamson* position—courts should defer to the legislature when exercising judicial review—corresponds to Judge Hand's argu-

36. 358 U.S. 1 (1958).

37. *Id.* at 18.

38. See, e.g., Sanford Levinson, *Conversing About Justice*, 100 YALE L.J. 1855, 1872 n.110 (1991) (reviewing JAMES B. WHITE, *JUSTICE AS TRANSLATION* (1990)) (rejecting the *Cooper* Court's claim to interpretive supremacy as "papalist").

39. 348 U.S. 483, 488 (1955) (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)) (citations omitted).

40. Incidentally, it is probably no accident that *Cooper*, a civil rights case, is the high-water mark of judicial supremacy and *Williamson*, a property rights case, is the low-water mark. See *id.* at 485-90; *Cooper*, 358 U.S. at 16-17. The modern Supreme Court has distinguished between personal and property rights, scrutinizing legislation in the former category and barely reviewing legislation in the latter. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

ment, which explicitly followed from the claim that *Marbury* lacked historical legitimacy.<sup>41</sup> And the *Cooper* Court relied on an interpretation of *Marbury* that at least one commentator calls "ahistorical" in its over-expansive conception of judicial authority.<sup>42</sup> The same commentator associates the broad reading of *Marbury* expressed by *Cooper* with the claim that *Marbury* lacked historical legitimacy.<sup>43</sup> "According to this construction [of *Marbury*], since judicial review originated from a coup d'etat, engineered for political purposes, *Marbury* is the primary antecedent for judicial policymaking in the modern era. . . . *Marbury* has become shorthand for judicial supremacy, as well."<sup>44</sup> If historical inquiry demonstrated that the Founders anticipated that federal courts would exercise judicial review, these extreme conceptions of judicial review could be dismissed as equally unsound. Contemporary discussion of the proper scope and exercise of judicial review could then proceed along less polemical, more useful paths.

### III. THE CONSTITUTIONAL CONVENTION

#### A. *Historical Origins*

The convention that produced the Constitution originated in 1785 when the legislatures of Maryland and Virginia tried to regulate navigation on the Potomac and Pocomoke Rivers, as well as on Chesapeake Bay.<sup>45</sup> Commissioners representing Maryland and Virginia met and soon realized that they could not intelligently regulate interstate navigation without the authority to establish a navy or impose tariffs.<sup>46</sup> On the advice of its commissioners, the Virginia legislature passed a resolution in January 1786 that appointed representatives to meet with representatives of the other states to devise "a uniform

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41. See *Williamson*, 348 U.S. at 488; HAND, *supra* note 7, at 6-7, 10-11. However, Wechsler's conception of judicial review bears no resemblance to the Court's statement of its power in *Cooper*. On the contrary, Wechsler saw judicial review in very different terms indeed. "The duty, to be sure, is not that of policing or advising legislatures or executives . . . . It is the duty to decide the litigated case and to decide it in accordance with the law . . . ." Wechsler, *supra* note 7, at 6.

42. CLINTON, *supra* note 13, at 15.

43. See *id.* at 192; *id.* at 14-15.

44. *Id.* at 219-20.

45. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 105 (Carolina Academic Press 1987) (abr. ed. 1833).

46. *Id.*

system in their commercial relations."<sup>47</sup> Virginia's resolution was sent to the other states, but only four states responded. Delaware, New Jersey, New York, and Pennsylvania met with Virginia to discuss common trade problems.<sup>48</sup>

After meeting at Annapolis, Maryland, representatives of these five states determined that they could not resolve their trade problems by themselves because they lacked the necessary powers and because not every state was represented.<sup>49</sup> Therefore, they submitted a report to all the states and to Congress recommending the appointment of commissioners to consider the "state of the union" under the Articles of Confederation.<sup>50</sup>

Virginia immediately appointed delegates to meet accordingly.<sup>51</sup> But the resolution was delivered to an inert Congress and languished until New York presented a motion in Congress requiring that all states meet to revise and propose amendments to the Articles of Confederation.<sup>52</sup> On February 21, 1787, Congress finally passed a resolution authorizing what has come to be called the Constitutional or Philadelphia Convention.

*Resolved* that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several States be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the States render the federal Constitution adequate to the exigencies of Government and the preservation of the Union.<sup>53</sup>

The Convention first met at Philadelphia in the State House on May 14th.<sup>54</sup> But eleven days passed before the quorum of seven states<sup>55</sup> had gathered so that the Convention

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47. *Id.*

48. *Id.* at 106.

49. *Id.*

50. *Id.*

51. *See id.*

52. *Id.* at 106-07.

53. Resolution of Feb. 21, 1787, 32 J. CONTINENTAL CONG. 1774-1789, at 74 (Roscoe R. Hill ed., reprint ed. 1968) (footnotes omitted).

54. *See* 1 RECORDS, *supra* note 15, at 1.

55. *See* 1 *id.* at 3.

could proceed with its business. Once it began in earnest, the Convention regularly met between May 25th and September 17th, debating what form of government would best suit the American states.<sup>56</sup>

On May 29, 1787, barely two weeks into the proceedings, Virginia's Governor, Edmund Randolph, introduced fifteen resolutions, known collectively as the Virginia Plan.<sup>57</sup> A day later the delegates confronted the scope of their own authority in deciding whether the Articles of Confederation could be satisfactorily amended. Congress had authorized the delegates to meet "for the sole and express purpose of revising the Articles of Confederation,"<sup>58</sup> yet some doubted whether this authorization could or should be adhered to. Charles Cotesworth Pinkney of South Carolina reminded the delegates that the Convention had not been authorized to discuss the construction of a government "founded on different principles from the federal Constitution"<sup>59</sup> (by which he evidently meant the Articles of Confederation). George Mason of Virginia disagreed. He argued that the Confederation lacked the essential power to compel "delinquent States"<sup>60</sup> to obey the Articles and that it would continue to lack that power until a national government could "directly operate on individuals"<sup>61</sup> rather than on states, as the Articles of Confederation then authorized.<sup>62</sup> In the end, the delegates decided to exceed the express terms of their congressional mandate, resolving "that a national Governnt. ought to be established consisting of a supreme Legislative Executive & Judiciary."<sup>63</sup>

### B. *Judicial Review and the Council of Revision*

In the records of the Constitutional Convention, the concept of judicial review appears most often in debates about the Council of Revision. The Council originated with the eighth resolution of the Virginia Plan, which proposed the creation of

56. See 1 *id.* at 1; 2 *id.* at 649.

57. See 1 *id.* at 22-23.

58. Resolution of Feb. 21, 1787, *supra* note 53, at 74.

59. 1 RECORDS, *supra* note 15, at 34.

60. 1 *id.*

61. 1 *id.*

62. ARTS. OF CONFEDERATION of 1781, arts. II, III, *reprinted in* 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL & LEGAL HISTORY 69, 70 (Melvin I. Urofsky ed., 1989).

63. 1 RECORDS, *supra* note 15, at 35.

a "council of revision"<sup>64</sup> composed of "the Executive and a convenient number of the National Judiciary."<sup>65</sup> It would be given the authority to review every act of Congress, whether previously passed or vetoed.<sup>66</sup> If an act was previously passed, the Council could veto it and Congress could then revive the act only by passing it again.<sup>67</sup> If previously vetoed, the Council could reenact the legislation, unless it was vetoed again by a certain percentage (presumably to be worked out at the Convention) of each branch of Congress.<sup>68</sup> This resolution soon attracted heated debate.

On June 4th, while meeting as a Committee of the Whole, the Convention considered the proposed Council of Revision.<sup>69</sup> According to Madison's record, Elbridge Gerry of Massachusetts spoke first.<sup>70</sup> Gerry expressed doubt whether the Council ought to include federal judges, reasoning that they would have enough power to repel "encroachments" on their authority "by their exposition of the laws, which involved a power of deciding on their Constitutionality."<sup>71</sup> He further noted that some state courts had already exercised similar power, a suggestion that received "general approbation."<sup>72</sup> Rufus King, also of Massachusetts, agreed. He thought that judges should not have a veto because they would be already empowered to "stop the operation of such [laws] as shall appear repugnant to the constitution."<sup>73</sup>

The next time the idea of judicial review arose in the context of the debates on the Council of Revision was on July 21st.<sup>74</sup> James Wilson of Pennsylvania again proposed that fed-

64. 1 *id.* at 21.

65. 1 *id.* When the Convention met, New York had a Council of Revision for determining questions of constitutionality. It was composed of members of the Executive and Judiciary and may have been the model for the Virginia Plan's proposal. See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 85 (1985).

66. 1 RECORDS, *supra* note 15, at 21.

67. 1 *id.*

68. 1 *id.*

69. 1 *id.* at 97 (emphasis omitted).

70. 1 *id.*

71. 1 *id.*

72. 1 *id.* *But see* Thayer, *supra* note 7, at 132-34 (discussing the surprise and opposition that greeted the doctrine of judicial review during the late eighteenth century in Rhode Island, New York, Vermont, and Connecticut).

73. 1 RECORDS, *supra* note 15, at 109.

74. 2 *id.* at 73.

eral judges sit on the Council,<sup>75</sup> despite the Convention's earlier rejection of the same proposal.<sup>76</sup> He returned to Mr. Gerry's argument<sup>77</sup> (without expressly citing it) that federal judges would have enough power to protect their institutional integrity through their authority "as expositors of the Laws."<sup>78</sup> Wilson admitted that this argument had some weight.<sup>79</sup> However, he contended that the power of judges to declare a law unconstitutional "did not go far enough."<sup>80</sup> He worried that laws could be "unwise," "dangerous," or "destructive," without being "so unconstitutional as to justify the Judges in refusing to give them effect."<sup>81</sup>

Wilson did not disagree with Gerry about whether the federal judiciary would exercise judicial review; the more pressing question for Wilson was whether judicial review provided a sufficient check on legislative excesses. He concluded, contrary to Gerry, that it did not.

In response to Wilson, Luther Martin of Maryland "considered the association of the Judges with the Executive as a dangerous innovation."<sup>82</sup> Martin argued that federal judges would address "the Constitutionality of laws"<sup>83</sup> as part of their ordinary judicial function and that they would exercise "a negative on the laws"<sup>84</sup> as a matter of course. Placing judges on the Council of Revision would give them "a double negative":<sup>85</sup> federal judges would exercise the power of judicial review as part of their ordinary jurisdiction and hold veto power by virtue of their place on the Council of Revision.<sup>86</sup>

75. 2 *id.*

76. 1 *id.* at 140 (recording the June 6th vote against the proposal that federal judges sit on the Council of Revision).

77. 1 *id.* at 97.

78. 2 *id.* at 73.

79. 2 *id.*

80. 2 *id.*

81. 2 *id.*; see also Thayer, *supra* note 7, at 155-56 (arguing that the Constitution does not effectively restrain Congress and state legislatures from doing "harm and evil" and that the remedy lies with the people, not the courts.)

82. 2 RECORDS, *supra* note 15, at 76.

83. 2 *id.*

84. 2 *id.*

85. 2 *id.*

86. While equal in power, these two forms of legislative veto were not equal in fact. A place on the Council of Revision would have given federal judges an opportunity to veto statutes before they were enacted. Judicial review, if exercised at all, would be exercised only after enactment. A place on the Council would have therefore conferred a "first in time" advantage in comparison to judicial review.

James Madison thought that Martin's discomfort with the blending of judicial and executive power failed to take into account the need for each department to mount "effectual barriers"<sup>87</sup> to maintain their original separation. George Mason of Virginia then argued, contrary to Luther Martin, that giving judges a place on the Council of Revision would lead to better legislation.<sup>88</sup> Without that place on the Council, judges could affect legislation in only a few instances. "They could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course."<sup>89</sup>

Almost a month later the concept of judicial review arose again during debates on the Council of Revision. On August 15th, John Francis Mercer, a newly-arrived<sup>90</sup> delegate from Maryland, "disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void."<sup>91</sup> Instead he thought that laws ought to be carefully drafted "and then to be uncontroulable."<sup>92</sup> John Dickinson of Delaware agreed—to a point. "He thought no such power [as judicial review] ought to exist."<sup>93</sup> Unlike Mr. Mercer, however, Dickinson could suggest no alternative to judicial review,<sup>94</sup> implying that he found Mercer's alternative of unreviewable laws unsatisfactory.

Gouverneur Morris of Pennsylvania immediately replied that "[h]e could not agree that the Judiciary which was part of the Executive, should be bound to say that a direct violation of the Constitution was law."<sup>95</sup> The first half of Morris's statement is somewhat unclear, though he probably meant that judges wield executive power.<sup>96</sup> The second half is fairly plain,

87. 2 RECORDS, *supra* note 15., at 77.

88. 2 *id.* at 78.

89. 2 *id.*

90. 2 *id.* at 176. Mercer first attended the Convention proceedings on August 6th. 2 *id.*

91. 2 *id.* at 298.

92. 2 *id.*

93. 2 *id.* at 299.

94. 2 *id.*

95. 2 *id.*

96. While this is a fair interpretation of Morris's statement, a well-known contemporaneous writer disputed the notion that judicial power is a subset of executive power. JAMES WILSON, *Of Government*, in THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. (1804), reprinted in 1 THE WORKS OF JAMES WILSON 284, 296 (Robert G. McCloskey ed., 1967).



however. Morris thought it objectionable to force judges to validate unconstitutional laws. By this he may have meant that judicial review was essential, even if federal judges were permitted to sit on the Council.<sup>97</sup>

The delegates' positions can be characterized in terms of the following categories. Gerry, King, and Martin thought that the grant of judicial power to the federal judiciary brought with it the power of judicial review. They thought that including judges on the Council of Revision was unnecessary or dangerous, the danger being a perceived violation of the principle of the separation of powers.<sup>98</sup> Wilson and Mason thought that judicial review did not go far enough, because it would not prevent Congress from passing unwise laws. They preferred judges to exercise judicial review *and* a legislative veto on the Council of Revision.

The other positions are unique to individuals. Morris thought judicial review essential, even if judges sat on the Council. His acceptance of judicial review puts him in agreement with most other delegates who spoke about judicial review, but his opinion about the Council of Revision is ambiguous. The records contain insufficient information to fairly conclude whether Morris favored or opposed judicial membership on the Council. But on the issue of judicial review, six delegates were agreed: the grant of judicial authority entailed the power of judicial review. Of the delegates whose statements I have discussed, only Dickinson and Mercer expressed any doubt about the desirability of letting judges exercise judicial review. At the same time, however, Dickinson admitted the absence of satisfactory alternatives to the exercise of judicial review. Of all the delegates, only Mercer completely opposed the concept of judicial review.

An interesting question remains, however. Why did Madison and Wilson repeatedly propose the Council of Revision in the face of persistent opposition? Madison may have wanted to include judges on the Council of Revision to avoid having to directly raise the issue of judicial review. In a letter to James Monroe, Madison wrote, "Such a Controul, restricted to Constitutional points, besides giving greater stability & system to the rules of expounding the Instrument, would have precluded the

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97. I owe this interpretive point to Professor David A. Thomas, whose course on Anglo-American History provided the occasion to write this Comment.

98. See, e.g., 2 RECORDS, *supra* note 15, at 75-77.

question of a Judiciary annulment of Legislative Acts."<sup>99</sup> One can only guess why Madison thought it desirable to "preclude" the issue of judicial review. Perhaps he thought judicial review desirable notwithstanding its potential divisiveness.<sup>100</sup>

### C. *Judicial Review in Other Contexts*

On July 17th, two months into the Convention proceedings, the delegates considered whether to give the national legislature the power to directly veto state laws.<sup>101</sup> Roger Sherman of Massachusetts thought the proposal unnecessary because "the Courts of the States would not consider as valid any law contravening the Authority of the Union, and which the legislature would wish to be negatived."<sup>102</sup> By this Sherman apparently meant that the state courts would exercise judicial review and strike down unconstitutional state laws. Gouverneur Morris was also opposed to the congressional veto. "A law that ought to be negatived will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a Nationl. law."<sup>103</sup> Here Morris laid out two alternatives that he found preferable to a congressional veto on state laws: the exercise of judicial review by federal courts and the exercise of national legislative power by Congress.

99. Letter from James Madison to James Monroe (December 27, 1817), in 3 RECORDS, *supra* note 15, at 424.

100. I raise the possibility that Madison may have thought judicial review potentially divisive based on the work of Forrest McDonald. He wrote of political theory in the 1780s, "the notion that the judges should be so independent as to have power to overrule juries or to pass upon the constitutionality of laws enacted by legislative bodies was alien to American theory and practice." MCDONALD, *supra* note 65, at 85. However, judicial review turned out to be less controversial than Madison thought: it was repeatedly mentioned during Convention debates without attracting more than a single instance of outright opposition. See *supra* text accompanying note 91. In fact, Gordon Wood has chronicled how questioning the idea of legislative supremacy led Americans of the 1780s toward the concept of judicial review. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 455-63 (1969). More recently, Professor Wood has suggested that the idea of an independent judiciary was alien in the 1780s because its development was "[t]he most dramatic institutional transformation in the early Republic." GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 323 (1992).

101. 2 RECORDS, *supra* note 15, at 27. The entire text of the proposal reads, "To negative all laws passed by the several States <contravening in the opinion of the Nat: Legislature the articles of Union, or any treaties subsisting under the authority of ye Union.>" 2 *id.* (footnote omitted).

102. 2 *id.*

103. 2 *id.* at 28.

The topic of judicial review also arose during debates on the proper mode of ratifying the Constitution.<sup>104</sup> In its resolution authorizing the Convention, Congress had specified that any amendments to the Articles of Confederation would be approved by the states.<sup>105</sup> But on July 23rd, the delegates took up the question anyway, considering whether state legislatures or specially-chosen ratifying conventions ought to have authority to ratify the Constitution.<sup>106</sup> James Madison said that the choice embraced a fundamental political difference between kinds of political systems. "He considered the difference between a system founded on the Legislatures only, and one founded on the people, to be the true difference between a *league or treaty*, and a *Constitution*."<sup>107</sup>

Madison perceived two advantages in terms of "*political operation*"<sup>108</sup> that recommended the choice of ratifying conventions over state legislatures. First, if considered a treaty, the union of American states would be subject to international law, which provides that a violation of any article of the treaty by any party frees all other parties from their obligations under the treaty.<sup>109</sup> This would perennially expose the union to dissolution. However, if considered a constitution, the union's laws would not be open to that interpretation, and the union would be less vulnerable. Second, if considered a treaty the Constitution would not force judges to invalidate laws that ran against it.<sup>110</sup> On the contrary, "A law violating a constitution established by the people themselves, would be considered by the Judges as null & void."<sup>111</sup>

Madison's argument is especially interesting and significant in terms of locating the historical antecedents of *Marbury v. Madison*. Not only did Madison unambiguously state the doctrine of judicial review, but he did so as a strong reason in favor of conferring the ratifying authority on special conventions rather than on state legislatures. At a deeper level, this argument means that Madison favored placing sovereignty squarely with "the people" rather than with the states. His

104. See 2 *id.* at 88-93.

105. *Supra* text accompanying note 53.

106. See 2 RECORDS, *supra* note 15, at 88.

107. 2 *id.* at 93.

108. 2 *id.*

109. 2 *id.*

110. 2 *id.*

111. 2 *id.*

tacit assumption seems to have been that whoever holds the authority to ratify a constitution holds constitutive power itself, because ratification is simply the means of exercising that power. Few arguments could more persuasively give judicial review a critical place in the constitutional universe than the argument that judicial review is a necessary corollary of a constitution founded on popular sovereignty. Madison implicitly makes that argument here.

One month later, on August 22nd, the delegates considered whether to include in the Constitution express prohibitions against bills of attainder and ex post facto laws.<sup>112</sup> Hugh Williamson, a delegate from North Carolina, explained that the North Carolina Constitution included a prohibition on ex post facto laws and that, "tho it has been violated, it has done good there & may do good here, because the Judges can take hold of it."<sup>113</sup> This reference to judicial review is veiled, but Williamson probably meant that including a constitutional prohibition on ex post facto laws would give judges authority to strike down such laws through the practice of judicial review.

Five days later the idea of judicial review again arose, this time in the course of a debate over the proper scope of the Supreme Court's jurisdiction.<sup>114</sup> The subject of debate was article XI, section 3 of "the Report of the Committee of detail,"<sup>115</sup> the direct antecedent of the first paragraph of the current version of Article III, section 2.<sup>116</sup> The original language had read,

The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers and Consuls; to the trial of impeachments of Officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and Citizens of another State, between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or subjects.<sup>117</sup>

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112. 2 *id.* at 375-76.

113. 2 *id.* at 376.

114. 2 *id.* at 430-32.

115. 2 *id.* at 177, 186-87, 430.

116. See U.S. CONST. art. III; 2 RECORDS, *supra* note 15, at 186-87, 575-76.

117. 2 RECORDS, *supra* note 15, at 186.

James Madison and Gouverneur Morris moved to amend the last clause of this passage to read, "to controversies [*to which the U—S— shall be a party*], between two or more States."<sup>118</sup> The Convention accepted this amendment without objection.<sup>119</sup>

Doctor William Samuel Johnson of Connecticut next proposed to amend the first clause to read, "The Jurisdiction of the Supreme Court shall extend to all cases arising under [*this Constitution and the*] laws passed by the legislature of the United States."<sup>120</sup> But, Madison objected to Johnson's proposal. He thought it probably extended the Court's jurisdiction too far by potentially allowing the Court to hear cases not "of a Judiciary Nature,"<sup>121</sup> or what we today would call nonjusticiable issues. Moreover, he argued, "The right of expounding the Constitution in cases not of this [judicial] nature ought not to be given to that Department."<sup>122</sup> By this argument Madison lodged two independent objections to Johnson's proposed amendment. First, he understood the proposal to allow the Supreme Court to hear nonjusticiable issues; he thought that such issues ought not come within the Court's jurisdiction. Second, he seems to have understood that the Court would have "the right of expounding the Constitution"<sup>123</sup> in every case over which it had jurisdiction, thus accepting judicial review only over justiciable cases. Put simply, Madison thought that Johnson's proposed amendment extended the Court's jurisdiction too far in general and the reach of judicial review too far in particular. Despite Madison's misgivings, the Convention adopted Johnson's amendment, "it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature."<sup>124</sup>

Thus many delegates made statements of varying clarity and length about judicial review and the role they thought it would play in the new constitutional order. Taken together these statements suggest that judicial review was widely con-

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118. See 2 *id.* at 186-87, 430 (emphasis added to highlight the proposed amendment).

119. 2 *id.* at 430.

120. See 2 *id.* at 186, 430 (emphasis added to highlight the proposed amendment).

121. 2 *id.* at 430.

122. 2 *id.*

123. 2 *id.*

124. 2 *id.*

sidered a necessary consequence of the grant of federal judicial authority. Only two delegates, Mercer and Dickinson, made statements unfavorable to judicial review. From this evidence one should be persuaded that judicial review was neither strange nor tremendously controversial—despite Madison's fears.<sup>125</sup> Several delegates referred to judicial review, sometimes at length and sometimes in passing, without raising more than a breath of opposition. What is more, those who made such references came from New England (Massachusetts), the Middle Atlantic state of Pennsylvania, and the South (Virginia), thus excluding sectional biases as a motivation. And the group of delegates who spoke favorably of judicial review included both Federalists and Antifederalists.<sup>126</sup> As other commentators have observed, "[t]he early Americans who were opposed to the power of judicial review were not among the national leaders, and were too few in number to constitute a majority."<sup>127</sup>

Judicial review appears to have been uncontroversially accepted by nearly all the members of the Constitutional Convention. Why, then, did they not explicitly vest federal courts with the power of judicial review?<sup>128</sup> One reply is that the

125. See *supra* text accompanying note 99.

126. Forrest McDonald characterized the Convention delegates who spoke about judicial review as having "widely divergent political views." MCDONALD, *supra* note 65, at 254.

127. P. Allan Dionisopoulos & Paul Peterson, *Rediscovering the American Origins of Judicial Review*, 18 J. MARSHALL L. REV. 49, 56 (1984).

128. Had they wished to design an express bar against unconstitutional laws, the Convention delegates could have looked for precedent and guidance to an interesting episode in English history. While imprisoned at the Tower of London, John Lilburne and his Leveller colleagues, political radicals during the mid-seventeenth-century struggles over English sovereignty, wrote *An Agreement of the Free People of England*. This summary of their constitutional principles anticipated several rights later included in the American Bill of Rights. Compare, e.g., JOHN LILBURNE ET AL., AN AGREEMENT OF THE FREE PEOPLE OF ENGLAND (1649), reprinted in THE LEVELLERS IN THE ENGLISH REVOLUTION 165 (G.E. Aylmer ed., 1975) (forbidding officials to punish persons "for refusing to answer to questions against themselves in Criminall causes") with U.S. CONST. amend. V (proclaiming that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself"). Toward the end of the same pamphlet the Levellers declared, "And all Laws made, or that shall be made contrary to any part of this Agreement, are hereby made null and void." LILBURNE ET AL., *supra*, at 168. This phraseology tantalizingly recalls the Supremacy Clause of Article VI. See U.S. CONST. art. VI. Much ink and energy might have been saved if the delegates had included in Article VI a clause clearly pronouncing unconstitutional laws "null and void" and specifying which branch of government would determine the constitutionality of laws under which conditions. For reasons that remain unknown, they did not.

Framers considered the authority to disregard unconstitutional legislation "a natural part of the total judicial power."<sup>129</sup> Given the historical evidence, this conclusion is more persuasive than the contrary opinion that the Convention did not explicitly grant the power of judicial review because it had barely considered the concept.<sup>130</sup>

With these statements by the Constitutional Convention in view, the next section will compare Federalist arguments made by Publius in *The Federalist Papers* with Antifederalist arguments made by Brutus.

#### IV. COMPARING BRUTUS AND PUBLIUS

On the topic of judicial review, the most significant newspaper exchange to occur between the end of the Constitutional Convention and the ratification of the Constitution occurred between Brutus and Publius. Brutus was the pseudonym of Robert Yates of New York, an Antifederalist; Publius was the pseudonym of the authors of the *Federalist Papers*: Alexander Hamilton, James Madison, and John Jay.<sup>131</sup> The ensuing debate, waged in the New York press, aimed to decide whether New York would join the Union.<sup>132</sup>

Brutus argued that federal courts would have the power of judicial review.

[I]f the legislature [Congress] pass laws, which, in the judgment of the [Supreme] court, they are not authorised to do by

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129. Dionisopoulos & Peterson, *supra* note 127, at 62.

Discussion of judicial review at the Constitutional Convention was slight. Some commentators have emphasized that both the relative silence of the members of the Convention on the subject of judicial review, and the silence of the Constitution, is evidence that we cannot know what the framers intended with regard to this power. It is altogether reasonable to reach another conclusion: to the extent that judicial review was discussed, the power was assumed and referred to with approval. At least some members of the Convention regarded judicial review as a natural part of the judicial power within the constitutional system.

*Id.* at 57-58 (footnotes omitted).

130. "A second fundamental principle on which the delegates were in general agreement was that, despite the shakiness of the precedents for the doctrine, the courts would by the very nature of their function have the power to strike down legislative acts if they were in violation of the Constitution." MCDONALD, *supra* note 65, at 254.

131. Martin Diamond, *The Federalist*, in *HISTORY OF POLITICAL PHILOSOPHY* 659, 659-60 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987).

132. *Id.* at 659.

the constitution, the court will not take notice of them; for it will not be denied, that the constitution is the highest or supreme law. And the courts are vested with the supreme and uncontrollable power, to determine, in all cases that come before them, what the constitution means; they cannot, therefore, execute a law, which, in their judgment, opposes the constitution, unless we can suppose they can make a superior law give way to an inferior. The legislature, therefore, will not go over the limits by which the courts may adjudge they are confined.<sup>133</sup>

This explanation of judicial review bears a striking resemblance to the explanation provided by Publius<sup>134</sup> in *Federalist* 78, as will be evident shortly. If nothing else, this statement alone shows that the pre-*Marbury* concept of judicial review was not the exclusive property of Alexander Hamilton, the author of *Federalist* 78.

Brutus also argued that the Supreme Court was dangerous because its opinion was final and its members independent. "No errors they may commit can be corrected by any power above them, if any such power there be, nor can they be removed from office for making ever so many erroneous adjudications."<sup>135</sup> At a superficial level, Brutus's first objection is easy to dismiss. If a legal system is to have any finality, there must be a court from whose decision there is no appeal. It is difficult to imagine what legal system Brutus would have advocated in its place. Any constitutional "errors" committed by the Supreme Court are technically correctable through amendment.<sup>136</sup> However, as Brutus may have foreseen, constitutional amendment is a remedy that corrects erroneous constitutional interpretations by the Supreme Court only at great cost. Other branches of government, Congress and the President, are not equipped to correct the Supreme Court's errors of constitutional interpretation. Such errors are most easily corrected by later Court cases—meaning that they are not easily corrected at all.

133. "Brutus" XII, N.Y.J., Feb. 7 & 14, 1788, reprinted in 2 THE DEBATE ON THE CONSTITUTION 171, 172 (Bernard Bailyn ed., 1993) [hereinafter DEBATE].

134. In referring to the author of the *Federalist* as "Publius" I follow the late Professor Diamond who argued that the pseudonym should be taken seriously, especially as regarding the contributions of Alexander Hamilton. Diamond, *supra* note 131, at 660.

135. "Brutus" XI, N.Y.J., Jan. 31, 1788, reprinted in 2 DEBATE, *supra* note 133, at 129, 129.

136. See U.S. CONST. art. V.



As for Brutus's objection to the independence of federal judges, Publius made an extended response, which will be discussed shortly.

Brutus reasoned that judicial review would give the Supreme Court power to expand federal jurisdiction at the expense of the states. He argued that the grant of judicial power "in Law and Equity"<sup>137</sup> meant that the Supreme Court would have the power to decide cases "according to what appears to them, the reason and spirit of the constitution."<sup>138</sup> From the power of judicial review and the power of construing the Constitution in equitable terms,<sup>139</sup> Brutus concluded that "[t]he judicial power will operate to effect . . . an entire subversion of the legislative, executive and judicial powers of the individual states."<sup>140</sup>

Those who favored ratification found their lasting voice in *The Federalist*. Partly because it is so familiar as a text, a word of introduction describing its historical context may be helpful. *The Federalist* was written to persuade the citizens of New York, especially those citizens likely to influence the outcome of the state ratifying convention, to vote for the Constitution.<sup>141</sup> However, it was something more, even to the authors themselves.

It seems clear that its authors also looked beyond the immediate struggle and wrote with a view to influencing later generations by making their work the authoritative commentary on the meaning of the Constitution. While *The Federalist* was the most immediate kind of political work, a piece of campaign propaganda, it spoke also to thoughtful men then and now, with a view to the permanence of its argument.<sup>142</sup>

Publius's explanation of judicial review in *Federalist 78* may be so well known as to be thought trite. However, it represents the most significant pre-*Marbury* explanation of judicial review.<sup>143</sup> It tells much about how judicial review was regarded by the Founders. In rehearsing Publius's argument it is appropriate to pay special attention to premises and logical con-

137. U.S. CONST. art. III, § 2.

138. "Brutus" XI, *supra* note 133, at 132.

139. *Id.* at 132-35.

140. *Id.* at 133.

141. Diamond, *supra* note 131, at 659.

142. *Id.*

143. See GUNTHER, *supra* note 8, at 13.

nections that, because of the familiarity of Publius's overall argument, may otherwise go unnoticed.

Publius began his explanation for judicial review with two important claims. First, a limited constitution<sup>144</sup> requires an independent judiciary.<sup>145</sup> Constitutional limitations (in this instance, limitations chiefly on legislative power) can be maintained in practice only through judicial enforcement, since it is the duty of courts "to declare all acts contrary to the manifest tenor of the constitution void."<sup>146</sup> Second, reserving rights under a constitution without judicial review would be pointless.<sup>147</sup> What do these claims mean, and what questions do they raise?

By making a limited constitution dependent on the existence of an independent judiciary, Publius made what is uncontroversial—a universal desire for a limited constitution—dependent on the existence of what is controversial<sup>148</sup>—a genuinely independent judiciary. If sound, his claim forces critics either to abandon the pursuit of a limited constitution or to accept the necessity of a truly independent judiciary.

Publius connected judicial review with the need for an independent judiciary when he claimed that judicial review ensures the limits originally imposed by the Constitution. Here it is not merely the existence of an independent judiciary that matters, but an independent judiciary with the duty and authority to invalidate unconstitutional legislation. Constitutional limits would fade away in practice, Publius suggested, without the force of judicial review. In this way, Publius responded to Brutus's argument that conferring independence on federal judges is undesirable because it shields them from being removed for erroneous adjudication.<sup>149</sup> His response implied that the benefits of an independent judiciary outweigh the risks (however real) of erroneous adjudication.

144. Hamilton defined a "limited constitution" as one that imposes limits on the legislature's authority. See *THE FEDERALIST* No. 78, at 524 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). At a minimum, this definition requires a constitution not to permit an omniscient legislature: government must be prohibited from exercising legislative power in specified ways.

145. See *id.*

146. *Id.*

147. *Id.*

148. The idea of a judiciary independent of majoritarian processes was alien to American experience before the 1780s. *Supra* note 100.

149. See "*Brutus*" XI, *supra* note 133, at 129.

He also connected judicial review with the separation of powers. Without judicial review, Publius wrote, it would be pointless to reserve on paper what could not be preserved in practice.

Will it be sufficient to mark with precision the boundaries of these departments in the Constitution of the government, and to trust to these *parchment barriers* against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American [state] Constitutions. But experience assures us, that the efficacy of the provision has been greatly over-rated; and that some more adequate defence is indispensably necessary for the more feeble, against the more powerful members of the government. The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex.<sup>150</sup>

From this it follows that both a limited constitution and the separation of powers depend for their practical effectuation on the existence of judicial review.

Publius then replied to the argument that judicial review makes the judiciary superior to the legislature. This argument, he perceived, depends on the proposition that "the authority

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150. THE FEDERALIST No. 48, *supra* note 144, at 332-33 (James Madison) (emphasis added). By his reference to unadorned declarations of the principle of separation of powers, Madison was probably thinking of declarations like those then contained in the constitutions of Virginia and Massachusetts.

The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time; except that the Justices of the County Courts shall be eligible to either House of Assembly.

VA. CONST. of 1776, *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 52 (William F. Swindler ed., 1979). The Virginia Constitution of 1776 thus provided only a single exception to its declaration of the principle of separation of powers: "Justices of the County Courts" could run for a seat in the state legislature. *Id.* The Massachusetts Constitution of 1780 allowed for no exceptions at all.

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men.

MASS. CONST. of 1780, art. XXX, *reprinted in* 5 *id.* at 96.

which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void."<sup>151</sup>

Publius's response to this argument moved through several stages. He began with the principle that "every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void."<sup>152</sup> In support of this principle, Publius launched an argument *ad absurdum*. If this principle were not true, he wrote, deputy would govern principal, servant would rule master, popular representatives would be superior to the people whom they represent, and people acting by virtue of delegated power "may do not only what their powers do not authorise, but what they forbid."<sup>153</sup> Since these propositions are absurd, Publius implied, the principle of judicial review must be true.

Next he addressed the argument that Congress is authorized to make its own interpretations of the constitutionality of its acts. He challenged this argument on two grounds. First, the argument cannot be presumed without explicit textual support, which, Publius suggested, the Constitution does not provide. Also, one cannot presume that the Constitution authorizes congressional representatives "to substitute their *will* to that of their constituents."<sup>154</sup> This objection simply restates a form of the principle he earlier defended: every legislative act must conform itself to the constituent acts of the people, or it is void.<sup>155</sup>

In place of these *misunderstandings* of judicial power, Publius offered a particular *understanding* of the place and appropriate role of judicial power within the political system created and anticipated by the new constitution. "It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."<sup>156</sup> Publius thus declared that the federal judiciary was *designed* to check the tendency of legislatures to exceed their authority.<sup>157</sup>

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151. THE FEDERALIST No. 78, *supra* note 144, at 524.

152. *Id.*

153. *Id.*

154. *Id.* at 525.

155. *See id.* at 524-25.

156. *Id.* at 525.

157. *See id.*

If this proposition is true, two inferences follow: legislative power can pose a genuine threat to constitutional government, and the federal judiciary has the constitutional authority to repel that threat. Publius's statement also means that the Constitution imposes certain limits on legislative authority. (He made that clear by earlier defining the Constitution as a limited constitution and a limited constitution as one that imposes limits on legislative authority.)<sup>158</sup> The threat Publius perceived is the possibility of the legislature—in this instance Congress—exceeding its constitutional authority. By his claim that the Constitution authorizes the federal judiciary to enforce the constitutional limits on congressional action, Publius articulated a significant *constitutional* role for federal judges. They were to be not merely the arbiters of disputes between states or individuals, but the means by which popularly elected legislators are prevented from stepping outside their constitutional bounds. Publius conceived of judicial review as a significant check on legislative power. Thus the idea of judicial review acting as a check on legislative authority did not originate in the fertile mind of Justice Marshall.

How did Publius justify authorizing judges to invalidate legislation duly passed by popular representatives? He did so first by defining the Constitution as fundamental law.<sup>159</sup> Since legal interpretation properly belongs with the courts,<sup>160</sup> and since constitutional interpretation is a subset of legal interpretation, courts have authority to interpret the Constitution just as they have the authority to interpret a piece of ordinary legislation.<sup>161</sup>

Although it might be possible to conceive of a constitution that is not defined as fundamental law, two considerations weigh against interpreting the American Constitution in that manner. First, the Constitution itself states that it is "the supreme Law of the Land."<sup>162</sup> While Article VI also categorizes federal laws and treaties as supreme law, the Constitution appears first in that list, a textual placement that has been generally interpreted to indicate the superiority of the Constitution over the other two kinds of law.<sup>163</sup> Second, not defining

158. *Id.* at 524.

159. *Id.* at 525.

160. *Id.*

161. *See id.*

162. U.S. CONST. art. VI.

163. *See Reid v. Covert*, 354 U.S. 1 (1957) (holding that the Constitution is

the Constitution as fundamental *law*, which can be judicially interpreted and applied, raises serious problems of enforcement. How should constitutional limits be enforced if not through the courts? Should we trust Congress to enforce the constitutional limits on its own authority? If one chooses not to enforce a constitution at all, what means can prevent a legislature from usurping more power than the constitution authorizes? Without enforcing the limits on congressional power, could we honestly call our Constitution limited in any meaningful sense of the term?

Publius next considered judicial review itself: What should a court do when faced with "an irreconcilable variance"<sup>164</sup> between an ordinary statute and a constitutional provision? "[T]hat which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."<sup>165</sup> This statement has been so often repeated that it may be useful to unpack its logic.

First, Publius began with the premise of "irreconcilable variance"<sup>166</sup> between an ordinary act of Congress and a provision of the Constitution. What that means Publius did not explain, but it seems fair to say that the variance could not be slight or superficial to qualify as "irreconcilable." At least it means that Publius envisioned the exercise of judicial review when a court could not consistently apply both a statute and a constitutional provision to decide a case.

Second, Publius said that a subordinate law must yield to a superior one. That proposition states a truism, but it does not necessarily follow, as Publius tried to suggest, that the Constitution is superior to congressional statutes. One can conceive of a reasonable political regime in which a constitution is defined as law, but law that may yield to a strong legislative mandate, such as a three-fourths vote. Only when a constitution is defined as *fundamental* law, as law superior to every other category of law, does Publius's argument necessarily follow. For if the Constitution is fundamental law, Publius soundly argued that every law that is not fundamental must yield to

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superior to treaties); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803) (holding that the Constitution is superior to ordinary statutes).

164. THE FEDERALIST No. 78, *supra* note 144, at 525.

165. *Id.*

166. *Id.*

constitutional law. This step in Publius's argument therefore depends on the premise that the Constitution is fundamental law. Publius concluded that "the power of the people"<sup>167</sup> is superior to both legislatures and courts; neither body is superior to the other.<sup>168</sup>

Comparison with Brutus's argument at this stage is enlightening. Brutus and Publius agreed on their description of judicial review in nearly every detail: the grant of judicial authority entailed the power of judicial review, which would operate on state and federal courts alike. However, they disagreed about what judicial review meant for the states and the relative power of courts and legislatures. Brutus thought judicial review meant the "subversion"<sup>169</sup> of the states, while Publius thought it meant the protection of the people from legislative encroachments. Their point of disagreement therefore did not turn on the existence or nonexistence of judicial review. It did not even turn on the scope of judicial review. It turned solely on the question whether judicial review would yield desirable consequences for the American people, and the answer to that question depended on whether one viewed the states as protective or oppressive of individual rights. Judicial review was acknowledged by Federalist and Antifederalist alike to be a fact of the new constitutional regime.

Both Constitutional Convention records and succeeding debates in the press demonstrate that the concept of judicial review was widely discussed long before Justice Marshall decided *Marbury v. Madison*. But was the concept raised in the state ratifying conventions?

## V. STATE RATIFYING CONVENTIONS

Several delegates to the state ratifying conventions spoke about judicial review. What follows will be only a sample of such remarks, but it is an important sample. The records of the ratifying conventions are often—I think unduly—ignored. We have some evidence that Madison, the guiding force behind the writing and adoption of the Constitution, thought them the most important historical evidence of constitutional meaning. In a letter to Major Henry Lee, Madison wrote,

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167. *Id.*

168. *Id.*

169. "Brutus" XI, *supra* note 133, at 133.

I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful, exercise of its powers.<sup>170</sup>

Leaving aside the question of ranking the historical records in order of relative importance, I will now present some illustrative remarks about judicial review made by delegates to the state ratifying conventions. These remarks will receive only a brief introduction, because they largely reiterate a theory of judicial review already discussed at length.

In the Connecticut Convention, Oliver Ellsworth made the same connections between judicial independence, popular sovereignty, and judicial review for which Publius argued at length.

This constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the constitution does not authorise, it is void; and the judicial power, the national judges, who to secure their impartiality are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is an usurpation upon the general government, the law is void, and upright independent judges will declare it to be so.<sup>171</sup>

James Wilson made a similar statement, with even more clarity, in the Philadelphia Convention. His statement is particularly significant because of his status as "second only to Madison in terms of his influence on the drafting of the Constitution."<sup>172</sup>

I had occasion, on a former day, to state that the power of the constitution was paramount to the power of the legislature, acting under that constitution. For it is possible that the

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170. Letter from James Madison to H. Lee (June 25, 1824), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON FOURTH PRESIDENT OF THE UNITED STATES 442 (Philadelphia, J.B. Lippincott & Co. 1865).

171. Oliver Ellsworth, Speech to the Connecticut Ratifying Convention (Jan. 7, 1788), reprinted in 1 DEBATE, *supra* note 133, at 877, 883.

172. Dionisopoulos & Peterson, *supra* note 127, at 59.



legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual *mode*, notwithstanding that transgression; but when it comes to be discussed before the judges—when they consider its principles, and find it to be incompatible with the superior power of the constitution, it is their duty to pronounce it void; and judges independent, and not obliged to look to every session, for a continuance of their salaries, will behave with intrepidity, and refuse to act the sanction of judicial authority.<sup>173</sup>

Other statements came from two surprising quarters in the Virginia Convention. First, Patrick Henry, who led the Virginia Antifederalists,<sup>174</sup> objected to the Constitution because he was unsure whether federal judges would rule invalid congressional acts that exceeded constitutional bounds.

The Honorable Gentleman did our Judiciary honour in saying, that they had firmness to counteract the Legislature in some cases. Yes, Sir, our Judges opposed the acts of the Legislature. We have this land mark to guide us.—They had fortitude to declare that they were the Judiciary and would oppose unconstitutional acts. Are you sure that your Federal Judiciary will act thus? Is that Judiciary so well constructed and so independent of the other branches, as our State Judiciary? Where are your land-marks in this Government? I will be bold to say you cannot find any in it. I take it as the highest encomium on this country, that the acts of the Legislature, if unconstitutional, are liable to be opposed by the Judiciary.<sup>175</sup>

Second, in what may be the most surprising remark of all, John Marshall himself spoke of judicial review as a protection—maybe the only effective protection—against unconstitutional acts by government. “To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the Judiciary? There is no other body that can afford such a protection.”<sup>176</sup>

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173. James Wilson, Speech to the Pennsylvania Ratifying Convention (Dec. 1, 1787), reprinted in 1 DEBATE, *supra* note 133, at 820, 823.

174. See CLINTON, *supra* note 13, at 68.

175. Patrick Henry, Speech to the Virginia Ratifying Convention (June 12, 1788), reprinted in 2 DEBATE, *supra* note 133, at 673, 684-85.

176. John Marshall, Speech to the Virginia Ratifying Convention (June 20, 1788), reprinted in 2 DEBATE, *supra* note 133, at 730, 732-33.

In short, delegates from every region and from both Antifederalist and Federalist camps delivered clear remarks about the existence and importance of judicial review for the new constitutional regime. Once again, Justice Marshall's supposed innovation in *Marbury* appears less than innovative. Remarks by delegates to the Constitutional Convention, Wilson's statement to the Pennsylvania Convention, and arguments by Publius and Brutus together form a coherent theory of judicial review,<sup>177</sup> which was available to Justice Marshall when he wrote the Court's opinion in *Marbury*.

#### VI. RESHAPING THE DISCUSSION OF JUDICIAL REVIEW

This Comment began by asking what the Founders said about judicial review. The historical evidence presented here demonstrates that they said more about it than is commonly supposed. Many of the most influential Founders spoke of judicial review as if it were a part of the authority granted to courts by the Constitution. And they mainly agreed that the principal benefit of judicial review is that it would keep legislatures, both federal and state, from straying outside the boundaries marked by the Constitution.

In *Federalist 51*, Publius made a well-known statement about the design and purpose behind the Constitution, as exemplified by its application of the separation of powers. It will shed some light on the Founders' theory of judicial review.

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. . . . Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to controul the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place,

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177. See Dionisopoulos & Peterson, *supra* note 127, at 63.

oblige it to controul itself. A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.<sup>178</sup>

Here Publius explains that the basic political principle, the separation of powers, would languish in practice if not for the "auxiliary precautions" commonly known as checks and balances. Supposed violations of the separation of powers, such as the participation of the President in legislation through the exercise of veto power,<sup>179</sup> are paradoxically devices to keep the separation of powers from becoming only a paper declaration.

By articulating statements made by the Founders about judicial review as a coherent theory, and by applying the same kind of reasoning to judicial review that Publius applied to the separation of powers and checks and balances, it is possible to see how the Founders could have defended their theory of judicial review as coherent and cogent. Popular sovereignty is a fundamental political principle in our society. But a constitutional declaration that the people are sovereign would not be enough, in practice, to maintain the integrity of the principle.<sup>180</sup> Without some means of ensuring fidelity to the largest exertions of popular sovereignty—the political commitments recorded in constitutional text—popular sovereignty would exist in name only. The "auxiliary precaution" designed to maintain that fidelity is judicial review.

Judicial review stands in a paradoxical relationship to popular sovereignty. Just as checks and balances appear to violate the principle of the separation of powers by involving each branch in the business of the others, judicial review appears to violate the principle of popular sovereignty by allowing unelected judges to invalidate the acts of popularly elected representatives. However, if we accept Publius's reasoning, it is necessary to allow some violations of the principle in theory to preserve the principle in practice. Given the connection many

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178. THE FEDERALIST No. 51, *supra* note 144, at 349 (James Madison).

179. See U.S. CONST. art. I, § 7.

180. During the Constitutional Convention, Madison acknowledged the necessity of checking legislative power. "Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions; & suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles." 2 RECORDS, *supra* note 15, at 74; see also *supra* note 150 and accompanying text (discussing a similar statement by Madison in *The Federalist*).

Framers drew between judicial review and popular sovereignty, it is fair to say that judicial review was designed to preserve popular sovereignty, not destroy it. Judicial review was designed to hold government faithful to the constitutional commitments of the people.

This early theory of judicial review ought to be treated as the appropriate reference point when discussing the proper scope of the exercise of judicial review. Without such an historical reference point, constitutional theory can slip its moorings and drift rudderless on a sea of so-called pure theory.<sup>181</sup> A theory designed without regard for history obscures more than it clarifies in a field as deeply influenced by the presence of the past as constitutional law. The early theory of judicial review provides a means of getting one's bearings and maintaining close ties with the changing realities of our national life. However, it should not be taken for more than that—especially not as a final resting place. Serious, robust discussion about the proper scope of the Court's exercise of judicial review ought to continue because it has intrinsic value. But it remains valuable only so far as it is tempered by an acute awareness of history.

Returning to the question of historical legitimacy, the weight of evidence falls against the opinion of Crosskey, Hand, and others. Marshall did not need to invent the concept of judicial review; it had been already conceived and discussed by delegates to the Constitutional Convention, by Brutus and Publius, and by members of the state ratifying conventions. "The Marshall Court did not create judicial review. Rather, it presented a classical statement on behalf of judicial review."<sup>182</sup>

Therefore, to the degree that scholars conceive of judicial review as resting on an historical basis of questionable legitimacy,<sup>183</sup> both the policymaking conception of judicial review held by the *Cooper* Court and the legislative deference expressed by the *Williamson* Court ought to be rejected. The Supreme Court has no historical support to occupy either the zenith of the American constitutional order or its nadir. If these conceptual extremes were rejected, there would remain a wide range of alternative ways of discussing judicial review whose soundness scholars and practitioners would continue to fruitfully debate. But the extremes represented by *Cooper* and

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181. See CLINTON, *supra* note 13, at 10.

182. Dionisopoulos & Peterson, *supra* note 127, at 75.

183. See *supra* text accompanying notes 40-44.

*Williamson* should be no longer treated as serious theoretical positions.

## VII. CONCLUSION

Judicial review was not the invention of Chief Justice Marshall and the Supreme Court in *Marbury v. Madison*. The historical evidence presented in this Comment demonstrates instead that a coherent theory of judicial review already existed, which enabled Marshall to decide *Marbury* without resorting to a judicial version of Original Sin.<sup>184</sup> Contrary to Judge Hand and Professor Crosskey, the history of constitutional drafting and ratification shows that the historical roots of judicial review run deep into constitutional soil. This historical conclusion undermines the Court's conception of its power in *Cooper v. Aaron* and *Williamson v. Lee Optical Co.*; judicial review confers on the Court neither the power to range across the constitutional landscape looking for violations to correct<sup>185</sup> nor the power to cloister itself from cases that present a conflict between a statute and the Constitution.<sup>186</sup> These extreme positions in the discussion of judicial review should be abandoned as historically baseless. We should resolve to abandon them and to use the early theory of judicial review as a point of reference. By doing so, we would reshape the discussion of judicial review. Could such reshaping free us to discuss in more fruitful and, perhaps, less polarizing ways the constitutional power of judges to address our nation's most vexing political disputes?

Shawn Gunnarson

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184. Cf. CLINTON, *supra* note 13, at 6 (contending that the orthodox reading of *Marbury* leads to the opinion that "judicial review is thereby tainted with something like original sin").

185. See *id.* at 29.

186. Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 (1964).