

# ARE THE JUDICIAL SAFEGUARDS OF FEDERALISM THE ULTIMATE FORM OF CONSERVATIVE JUDICIAL ACTIVISM?

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## INTRODUCTION

For the first time since the New Deal era, the Supreme Court stands ready and willing to enforce the Constitution's subject-matter limits on the federal government's powers. Rather than relegating the safeguarding of federalism to the Constitution's political safeguards,<sup>1</sup> the Supreme Court has reclaimed its role as a bulwark of a limited Constitution. Whether reining in legislative attempts to federalize crime under the cover of the Commerce Clause<sup>2</sup> or restraining Congress from subjecting the states to private damage actions,<sup>3</sup> the Court has shown an old-fashioned interest in the rights of states and the limits on federal power.

Some protest that this return to constitutional first principles amounts to a judicial "revolution."<sup>4</sup> In particular, some

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1. Herbert Wechsler famously coined the phrase "the Political Safeguards of Federalism" to encompass those constitutional provisions that ensured that the political branches remained responsive to the states. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954). Though Wechsler emphasized the political safeguards, he never concluded that the judiciary ought not to review the constitutionality of federal statutes. *Id.* at 559.

2. See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

3. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 57-73 (1996).

4. See Larry Kramer, *The Supreme Court 2000 Term: Forward: We the*

judges and scholars have condemned the Supreme Court's resumption of an active role in enforcing the limits of federal power. One Justice claimed that we ought not bother trying to limit the reach of the Commerce Clause because drawing distinctions between activities that do affect commerce and those that do not, such as crime, is formalistic, impracticable, and repeats past mistakes.<sup>5</sup> Others claim that the Court has its history wrong, arguing, for example, that the Commerce Clause was originally understood in a broad, non-formal sense,<sup>6</sup> or that the Constitution, as originally interpreted, subjected states to private damage actions.<sup>7</sup>

While such objections quibbled with the details of these federalism cases, some scholars and justices voiced a far more fundamental complaint: the courts lack a legitimate role in second-guessing the political branches.<sup>8</sup> These individuals contend that the Constitution's Framers never expected or desired the courts to enforce limits on federal power.<sup>9</sup> Instead, goes the argument, the members of the political branches should debate

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*Court*, 115 HARV. L. REV. 4, 129 (2001) [hereinafter Kramer, *We the Court*] (claiming that "[w]e are witnessing the beginnings of a constitutional revolution"); *id.* at 137 (claiming that real revolution began in 1995).

5. See *Morrison*, 529 U.S. at 642 (Souter, J., dissenting); Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 297 (1997) (warning against "superficial and formalistic factors" in Commerce Clause analysis).

6. See *Lopez*, 514 U.S. at 604 (Souter, J., dissenting) (observing that the Marshall Court originally recognized a "broad" commerce power in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

7. See *Seminole Tribe*, 517 U.S. at 100 (Souter, J., dissenting) (discussing the history of sovereign immunity).

8. See *Morrison*, 529 U.S. at 660 (Breyer, J., dissenting) ("within the bounds of the rational, Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance");

[t]he objection to reviving traditional state spheres of action as a consideration in commerce analysis, however, not only rests on the portent of incoherence, but is compounded by a further defect just as fundamental. The defect, in essence, is the majority's rejection of the Framers' considered judgment that politics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy.

*Id.* at 647 (Souter, J., dissenting). See also Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) [hereinafter Kramer, *Political Safeguards*]; Kramer, *We the Court*, *supra* note 4.

9. Kramer, *We the Court*, *supra* note 4, at 67 (claiming that judicial review never crossed the minds of the vast majority of participants in ratification discussions).

and enforce limits on themselves. After all, the Constitution contains mechanisms that permit the states to protect themselves from an overreaching federal government, such as the electoral college's selection of the President. Moreover, no more powerful defender of state powers exists than the People themselves. Should the People regard the federal government as overstepping its proper bounds, they eventually will rein in Congress.<sup>10</sup> As an original matter, the Framers regarded the Constitution's political safeguards as the appropriate and exclusive means for enforcing limits on federal power.<sup>11</sup>

Adherents of these views perceive the revival of judicial safeguards of federalism not only as wrong-headed, but also as conservative judicial activism writ large.<sup>12</sup> After all, the very tools conservative jurists typically use to justify the judicial safeguards of federalism—text, structure, history—actually reveal that the courts should play no such role. Indeed, these jurists' renewed scrutiny of federal power rests on nothing less than “phony” originalism.<sup>13</sup>

One could press the argument further and argue that the judicial safeguards of federalism are the *ultimate* form of conservative judicial activism. Such a far-reaching critique would not merely characterize a few of the federalism opinions as wrong or countermajoritarian. Rather *each and every* judicial

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10. See *id.* at 72–74.

11. In truth, doubts about whether the courts ought to enforce subject matter limits on federal power surfaced far earlier than the modern critics. The most prominent scholar in favor of wholly abandoning judicial review of the scope of federal power, Jesse Choper, argued that the judiciary's institutional capital was better spent safeguarding individual rights because the states were capable of looking after their own interests. Yet while making this argument, Choper never quite suggested that judicial review of the limits on federal power was somehow illegitimate, as the modern critics insist. Instead, Choper viewed such review as a waste of valuable resources. See generally JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175 (1980). See also Jesse H. Choper, *The Scope of National Powers Vis-à-vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977).

12. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 99 (2000) (Stevens, J., dissenting) (claiming that Court's judicial activism in the sovereign immunity context was a “radical departure” from prior precedent); Kramer, *We the Court*, *supra* note 4, at 129 (claiming that the Rehnquist Court's activism amounts to a particularly pernicious type of activism because the Court has not left any constitutional question for people to resolve); Kramer, *Political Safeguards*, *supra* note 8, at 290 (tagging the Rehnquist Court's federalism cases a “radical experiment in judicial activism”).

13. Kramer, *Political Safeguards*, *supra* note 8, at 291. By “phony” originalism, Kramer means historically false originalist claims.

opinion limiting federal power is activist because the judiciary has improperly anointed itself the guardian of federalism and usurped decisions that the Constitution actually left to Congress, the President, and ultimately, the People. Arguably a variant of this argument underlies much of Professor Larry Kramer's recent writings on federalism.<sup>14</sup>

In my view, no one can credibly deny that the Constitution's political safeguards shield the states' powers and prerogatives. That was the very purpose of the political safeguards. Moreover, it goes without saying that a resolute citizenry can safeguard federalism either through the ballot box or, if need be, the bullet. Politicians generally respond to sustained and vocal majorities, and when they do not, popular revolution may render them irrelevant.

Yet to go further and claim that the Framers originally intended that these political safeguards to be federalism's *only* defenses is to commit a historical error. To accuse members of the federal judiciary of judicial "activism"<sup>15</sup> compounds that error. This symposium piece challenges the claim that the Framers understood the political safeguards to be the exclusive safeguards of federalism. In my view, the latter assertion is inconsistent with the Constitution's text, structure, and original understanding. Part I maintains that the Constitution's text implicitly provides for judicial review of the constitutionality of federal legislation. Part II recounts statements of the Framers that reveal they understood that the Constitution provided for judicial review.

As we shall see, nothing in the Constitution's text, structure, or history permits the courts to exercise judicial review over individual rights or subject matter limits on state powers while simultaneously refraining from the exercise of judicial review where the Constitution's subject matter limitations on federal power are concerned. Rather, the Framers understood the Constitution to empower both federal and state courts to enforce the Constitution's explicit and implicit limits on federal power. While the recent judicial turn toward limiting federal

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14. See generally, Kramer, *We the Court*, *supra* note 4; and Kramer, *Political Safeguards*, *supra* note 8.

15. See Kramer, *We the Court*, *supra* note 4, at 129 (decrying "activism" of the Rehnquist Court); Kramer, *Political Safeguards*, *supra* note 8, at 290 (labeling the Supreme Court's federalism jurisprudence "a radical experiment in judicial activism").

power might be “activist” in any number of senses of that word, it is not “activist” because of a supposed inconsistency with the Framers’ design regarding the safeguarding of federalism.

## I. THE CONSTITUTION IMPLICITLY AUTHORIZES JUDICIAL REVIEW OF FEDERAL LEGISLATION

Though the Constitution seemingly lacks a provision unequivocally sanctioning judicial review of federal legislation, the Framers nonetheless understood the Constitution as authorizing and permitting such review. In reading the Constitution in this way, the Framers approached judicial review in much the same way they dealt with the separation of powers. To modern eyes, the Framers never codified the latter concept. Yet the Framers sensibly read the first three Articles of the Constitution as embodying basic separation of powers principles.<sup>16</sup> Indeed, few scholars today have much difficulty discerning these implicit principles in the Constitution.<sup>17</sup> Similarly, as discussed in the next Part, the Framers regarded judicial review as an essential part of any sound, limited government. Based on a presumption in favor of judicial review, the Framers understandably read various constitutional provisions (such as Article III’s grant of jurisdiction over “cases arising under the Constitution”) as authorizing and permitting judicial review to constrain congressional overreaching. Just as the Constitution contemplates that none of the three branches will exercise the powers of the others, so to does it contemplate judicial review in general and judicial review of the limits of federal power in particular.

How does the Constitution’s text tap into the presumption in favor of judicial review? First, the Supremacy Clause indi-

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16. See *e.g.*, THE FEDERALIST NO. 47 (James Madison) (observing that under the Constitution, the President cannot make law and Congress cannot exercise executive prerogatives).

17. Despite the lack of an explicit provision barring one branch from ever exercising the powers of another branch, few readers of the Constitution believe that the executive may exercise the legislative or judicial power. In other words, even though our Constitution lacks a provision akin to the one found in the Massachusetts Constitution of 1780, people understand that one branch cannot exercise the powers allotted to another. See MASS. CONST. OF 1780, part I, § 30 (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”).

rectly empowers courts to review federal legislation. The Supremacy Clause explicitly commands judicial review of state constitutions and laws when it provides that, notwithstanding state laws and constitutions to the contrary, "the Judges in every State" shall be bound to the federal Constitution and "laws which shall be made in pursuance thereof."<sup>18</sup> Even most opponents of judicial review of federal legislation admit that the Constitution authorizes judicial review of state constitutions and laws for consistency with the federal constitution and laws.<sup>19</sup> Hence, the Constitution does not simply contain political rules addressed only to Congress and the President. Rather, at least in these narrow circumstances, scholars generally agree that the Constitution itself is law for the courts to enforce.

By requiring state court review of state law, the Supremacy Clause implicitly authorizes state courts to review federal legislation as well. In deciding whether state statutes and constitutions will survive in the face of a contrary federal statute, the Supremacy Clause does not command that state courts always prefer federal statute. Not *every* federal statute is supreme and therefore entitled to trump contrary state law. Rather, the Supremacy Clause only requires that federal statutes "made in pursuance" of the Constitution trump contrary state law. Because the Supremacy Clause does not mandate preemption every time a federal statute conflicts with a state law, state courts presented with such conflicts necessarily must decide when the federal statute will trump and when the state law will prevail. In other words, state judges must decide which federal statutes trump state law and which must give way to state law. In so doing, these state courts engage in judicial review of federal legislation.

If state courts may adjudge the constitutionality of laws that Congress and the President enacted (in order to judge when state laws must yield to federal statutes), the Constitution likely contemplates that the federal courts may exercise

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18. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.").

19. See e.g., Kramer, *We The Court*, *supra* note 4, at 60 (claiming that the Framers clearly decided to adopt judicial review of state constitutions and laws).

the same type of review. The Supreme Court, designed to ensure national uniformity and to review the rulings of the state courts, simply must have the power to affirm state court decisions that allow state law to trump contrary federal statutes.<sup>20</sup> Moreover, the Constitution likely contemplates that lower federal courts could review the constitutionality of federal legislation.

While the Supremacy Clause intimates the propriety of judicial review of federal legislation by state courts, the Framers more likely viewed Article III as the source of federal courts' authority to review federal legislation. Article III grants the federal courts "the judicial power of the United States" and provides that such power extends to "cases arising under the Constitution."<sup>21</sup> While a narrow interpretation of the category of cases "arising under the Constitution" would only allow challenges to allegedly unconstitutional federal executive or state action, the text itself contains no such constraints. Cases challenging the constitutionality of federal legislation also could be said to "aris[e] under the Constitution." Indeed, the historical evidence (discussed below) indicates that the Framers likely read Article III as authorizing federal courts to adjudicate constitutional challenges to federal laws.<sup>22</sup> In other words, the Framers understood Article III as permitting federal courts to strike down federal statutes that failed to measure up to the federal Constitution.

The Judiciary Act of 1789 supports these readings of the Supremacy Clause and Article III. There, the first Congress confirmed that the Constitution contemplates that federal and state courts would exercise judicial review of federal legislation. Section twenty-five of the 1789 Act gave the Supreme Court jurisdiction over the decisions of the highest state courts "where is drawn in question the validity of a treaty or statute of . . . the United States." That Act also provided the Supreme Court with authority to reverse or affirm the state court's decision.<sup>23</sup> A state court could only meaningfully "question" the va-

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20. If the Supreme Court could only affirm (or assume) the constitutionality of federal legislation, then the ability of state courts to allow state law to trump federal statutes when the latter were unconstitutional would be rather meaningless. The end result would be that each and every federal statute necessarily would trump state constitutions and statutes.

21. U.S. CONST. art. III, § 1 and § 2, cl. 1.

22. See *infra* pp. 1370–81.

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

lidity of a federal treaty or statute by refusing to enforce such a federal law because it was unconstitutional. In other words, Congress understood that the state courts would review the constitutionality of federal legislation, at least when state and federal law conflicted.

Moreover, in recognizing that the Supreme Court could affirm a state court decision that invalidated a federal treaty or statute, Section twenty-five anticipated that the highest federal court also could exercise judicial review. After all, the Supreme Court engages in a species of judicial review when affirming such a state court decision. If members of Congress thought that the Supreme Court could affirm a state court decision that voided federal legislation, members also likely believed that the Supreme Court could review the constitutionality of federal legislation more generally. Whether the case originated in the state courts, the lower federal courts, or the Supreme Court, the Supreme Court itself could review the constitutionality of legislation.

Once again, my claim is not that the Constitution's text must be understood as constitutionalizing all forms of judicial review. Instead, my claim is that given the Framers' background presumption of judicial review (which I will defend later), they naturally construed a Constitution capable of permitting judicial review of federal legislation as if it clearly authorized it. Only such a view of the Framers and the Constitution can explain the numerous comments from the founding era in which speakers and writers read the Constitution as if it obviously authorized judicial review. In constructing a case that the presumption of judicial review existed at the founding, the next Parts recount the statements of the proponents and opponents of the Constitution which evince the understanding that the Constitution authorized and permitted judicial review.

## II. THE FRAMERS CONTEMPLATED JUDICIAL REVIEW

The best evidence that the Constitution authorized judicial review of federal legislation comes from those who drafted and ratified it.<sup>24</sup> By the time of the founding, influential Framers

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24. In relying upon the statements of the Framers, I refrain from making an "original intention" argument. Rather, I believe that the best reading of the text (as originally understood) was that it authorized judicial review of all types of legislation. The clear statements from the founding era supporting judicial review of



understood that judicial review was a sound and wise feature of a limited constitution. In drafting the Constitution in Philadelphia and in debating the Constitution in the states, the Framers repeatedly evinced an understanding that the Constitution authorized and permitted judicial review of the limits of federal power. Federalists generally praised this constitutional feature, claiming that it would keep Congress in check. Anti-federalists did not deny the availability of judicial review. Instead, they complained that the federal judiciary was not sufficiently independent of Congress to ensure that judicial review of federal legislation would provide a meaningful check on Congress. In the face of the numerous statements reading the Constitution as permitting, authorizing, and even mandating judicial review of federal legislation, no delegate declared that the Constitution either did not authorize judicial review or affirmatively forbade its exercise.<sup>25</sup>

The Philadelphia Convention records amply reflect the consensus in favor of judicial review as the delegates favorably discussed judicial review in various contexts. For instance, when discussing whether the federal judiciary should exercise a share of the veto power (as part of a revisionary council), several delegates noted that such authority was unnecessary because the federal judiciary could review the constitutionality of federal legislation.<sup>26</sup> Massachusetts delegate Elbridge Gerry doubted that the judiciary ought to share in the veto, because "they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality. In some States the Judges had [actually] set aside laws as being against the Constitution. This was done too with general approba-

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federal legislation only buttress that reading because people of all political persuasions read the Constitution as authorizing/permitting such judicial review.

25. Although there were some at the Philadelphia Convention who expressed doubts about the wisdom and/or propriety of judicial review, no one has come forward with any evidence that once the Constitution was finalized, people denied that the Constitution authorized such review.

26. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 21 (Max Farrand ed., 1966) [hereinafter RECORDS]. The revisionary council, consisting of the President and members of the federal judiciary, was to exercise the veto authority. Some delegates thought the judiciary's participation in the exercise of the veto was unnecessary because of judicial review. In other words, these delegates insisted that judges already could protect judicial prerogatives by ignoring or striking down unconstitutional statutes.

tion."<sup>27</sup> Rufus King, also of Massachusetts, concurred, noting that the "Judicial ought not to join in the negative of a Law, because the Judges will have the expounding of those Laws when they come before them; and they will no doubt stop the operation of such as shall appear repugnant to the constitution."<sup>28</sup> Gerry convinced the Committee of the Whole to postpone consideration of the revisionary council in favor of a purely executive veto.<sup>29</sup>

When James Wilson reintroduced the idea of a revisionary council, he freely conceded that "the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights."<sup>30</sup> But, Wilson argued, this power was not co-extensive with a share in the veto because only the latter authority enabled judges to prevent unjust, unwise, dangerous, or destructive laws.<sup>31</sup> Likewise, George Mason observed that though judges could void an unconstitutional law, they could do nothing to invalidate unjust or oppressive laws.<sup>32</sup> Perhaps summing up the sentiments of those who sought to give the judiciary a share in the veto, Madison asserted that besides judicial review, the veto was useful as "an additional" means of protecting the judiciary.<sup>33</sup> These discussions reveal that many delegates understood that the federal courts could exercise ju-

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27. 1 *id.* at 97.

28. 1 *id.* at 109. Much later, Luther Martin repeated the arguments voiced by Gerry and King. "As to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative." 2 *id.* at 76.

29. 1 *id.* at 98. The Committee of the Whole, a committee comprising all the delegates, offered the delegates a less formal means of considering constitutional proposals.

30. 2 *id.* at 73.

31. 2 *id.*

32. 2 *id.* at 78. When Madison subsequently tried to revive the concept of a judicial veto, two delegates criticized judicial review. Though John Francis Mercer favored Madison's idea, he "disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontrollable." 2 *id.* at 298. John Dickinson agreed with Mercer that judges should not be able to set aside laws, yet he was not sure what should serve as a substitute. 2 *id.* at 299. Their views were swiftly rejected by Gouverneur Morris: He "could not agree that the Judiciary . . . should be bound to say that a direct violation of the Constitution was law. A controul over the legislature might have its inconveniences." Yet the more significant danger would arise in the absence of judicial review. Because legislatures could be expected to usurp authority, judicial review would prove valuable. 2 *id.*

33. 2 *id.* at 74.

dicial review, with some delegates reasoning that judicial review rendered judicial participation in the veto unnecessary. Others noted that judicial review did not go far enough as it failed to authorize the federal courts to halt unwise or oppressive legislation.

Likewise, when discussing the procedures for the Constitution's ratification, both Gouverneur Morris and James Madison assumed the existence of judicial review. Gouverneur Morris raised the specter that the courts might void the Constitution if all state legislatures did not ratify it. Responding to those who wished to see a bare majority of the state legislatures ratify the Constitution, instead of the unanimity required by the Articles of Confederation,<sup>34</sup> Morris claimed that judges might refuse to recognize the validity of such a Constitution. He argued that "[l]egislative alterations not conformable to the federal compact [the Articles], would clearly not be valid. The Judges would consider them as null & void."<sup>35</sup> On the other hand, Morris contended, if the people ratified the Constitution, the judges would accept it as law even if it evaded the Article's unanimity rule.<sup>36</sup> Therefore, while judges might strike down constitutions ratified by the legislatures as null and void, popularly ratified constitutions would not share the same fate.

James Madison also favored popular ratification of the Constitution but for a different reason—it ensured that there would be judicial review of contrary legislation. In Madison's view, only popular ratification of the Constitution would secure the role of judicial review. He argued that a "law violating a constitution established by the people themselves, would be considered by the Judges as null & void."<sup>37</sup> In contrast, a constitution ratified by the state legislatures would constitute a treaty and could not be safeguarded by judicial review.<sup>38</sup> Both Madison and Morris understood—and assumed—the propriety and availability of judicial review.

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34. The Articles required that amendments to the Articles be unanimously agreed to by the legislatures of all the states. *See* Articles of Confederation, art. XIII. Accordingly, many argued that if the Articles were to be replaced by the Constitution, all the state legislatures had to approve the Constitution.

35. 2 RECORDS, *supra* note 26, at 92.

36. 2 *id.*

37. 2 *id.* at 93.

38. 2 *id.*

Delegates recognized the propriety of judicial review in other contexts, such as individual rights<sup>39</sup> and federalism,<sup>40</sup> without linking their understandings to specific language approved by the Convention.<sup>41</sup> This pattern reflects the understanding amongst the delegates that judicial review did not directly arise from any particular provision, but instead followed almost ineluctably from the concept of a limited, written Constitution and the existence of a judiciary. In establishing a "judicial power of the United States" that could decide cases "arising under the Constitution," our Constitution drew on this background rule about the delegates' understanding of the judiciary's proper role and authorized judicial review by federal courts. By not barring, and thereby implicitly permitting, concurrent state court jurisdiction over some constitutional cases, the Constitution also allowed state court judges to engage in judicial review.

While the discussions at Philadelphia assumed the existence of judicial review of federal legislation by state and federal courts, skeptics might dismiss the relevance of these records because delegates spoke about judicial review before the Constitution assumed its "final" form. Because the final version of the Constitution did not seemingly explicitly codify judicial review of federal law, it might have failed to live up to the expectations of some delegates. After all, the delegates considered all sorts of proposals, not all of which made their way into the Constitution. Perhaps some delegates wrongly assumed that the Constitution would contain an explicit judicial review provision. If so, when the Convention failed to adopt a provision that unambiguously sanctioned judicial review of federal legislation, the Convention failed to live up to the expectations of some of the delegates. Hence, a skeptic might argue that the Constitution does not sanction judicial review of federal legislation because it lacks a provision that would have codified it.

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39. See 2 *id.* at 376 (comments of Hugh Williamson of North Carolina discussing the federal *ex post facto* clause) and at 440 (comments of James Madison on the state *ex post facto* clause).

40. In the context of whether Congress ought to have a veto over state laws, many delegates assumed that the state courts would stand ready to void state law contrary to federal law. See 2 *id.* at 27 (comments of Roger Sherman); 2 *id.* at 28 (comments of Gouverneur Morris).

41. In other words, delegates assumed the existence of judicial review without citing any language from the Constitution (or to draft language approved by the delegates). The delegates understood that any Constitution that they eventually approved would permit judicial review.

As the rest of this Part makes clear, the public ratification debates belie such a skeptical reading of the Philadelphia records. More important, the public ratification debates refute such a reading of the Constitution. Though to the modern reader, the Constitution does not unambiguously sanction judicial review of federal legislation, the participants in public ratification debates had absolutely no difficulty discerning the propriety of judicial review of federal legislation. In ratifying conventions, and in pamphlets and letters, both opponents and proponents of the Constitution noted that it authorized/permitted judicial review. Whether discussing individual rights or the scope of federal power, participants understood that the courts would exercise judicial review over federal legislation.

Participants in the ratification debates did not base this understanding on any particular constitutional provision. Rather, given the desirability of judicial review, the participants understandably read the Constitution as permitting and authorizing judicial review. The "natural presumption" was that the courts, federal and state, could engage in judicial review. In the face of many who relied on this natural presumption in assuming the propriety of judicial review of federal legislation, I am aware of no one who suggested that a court's refusal to enforce unconstitutional federal legislation would somehow be unauthorized or improper.

As in Philadelphia, participants in the public ratification debates remarked that the courts would safeguard individual rights. At the Virginia ratifying convention, John Marshall argued that the judiciary would provide succor to victims of federal brutality, stating, "[to] what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the Judiciary? There is no other body that can afford such a protection . . . . Were a law made to authori[z]e [brutality], it would be void."<sup>42</sup> Virginia Governor Edmund Randolph made similar claims. He argued that even if Congress imposed excessive bail and fines and mandated cruel and unusual punishments, "[j]udges must judge contrary to justice"<sup>43</sup> for these punishments to matter. Likewise, Randolph contended, if general warrants were authorized,

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42. 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1432 (John Kaminski et al. eds., 1993) [hereinafter DOCUMENTARY].

43. 10 *id.* at 1351.

would not the federal judiciary “be independent enough to prevent such oppressive practices? If they will not do justice to persons injured, may not they go to our own State judiciaries and obtain it?”<sup>44</sup> At the Massachusetts ratifying convention, Theophilus Parsons denied that the absence of a bill of rights would matter. He argued that because “no power was given to Congress to infringe on any one of the natural rights of the people . . . should they attempt it without constitutional authority, the act would be a nullity, and could not be enforced.”<sup>45</sup> Marshall, Randolph, and Parsons voiced the common view: If Congress violated the rights of the people, the judiciary would ignore the statute. Each assumed the propriety and desirability of judicial review of federal legislation.

Federalists also cited judicial review as a mechanism of restraining federal power vis-à-vis the states. Sometimes they responded to anti-federalist fears about particular clauses. For example, while defending the Necessary and Proper Clause, James Madison, “Aristedes,” and George Nicholas argued that the courts would nullify improper or unnecessary federal laws.<sup>46</sup> With the judiciary ready to enforce the Constitution, they contended that Congress could not stretch the Sweeping Clause too far. Similarly, John Marshall dismissed concerns that the Supremacy Clause ensured federal omnipotence:

Has the government of the United States power to make laws on every subject? . . . Can they make laws affecting the

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44. 10 *id.* at 1352.

45. 6 *id.* at 1450.

46. If Congress misconstrued the Necessary and Proper Clause and exercised excessive power, Publius noted, the consequence would be the same “as if they should misconstrue or enlarge any other power vested in them . . . [or] if the State legislatures should violate their respective constitutional authorities. In the first instance, the success of the usurpation [would] depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts.” THE FEDERALIST NO. 44, at 235 (James Madison) (George W. Carey & James McClellan eds., 2001). “Aristides”—Alexander Contee Hanson—made a similar claim about the sweeping clause. Though Congress would first judge the extent of its authority, “every judge in the union, whether of federal or state appointment (and some persons would say every jury), will have a right to reject any act, handed to him as a law, which he may conceive repugnant to the Constitution.” 15 DOCUMENTARY, *supra* note 42, at 531. At the Virginia ratifying convention, George Nicholas sought to temper fears of the Sweeping and the General Welfare Clauses. “[W]ho is to determine the extent of such powers? I say the same power which in all well regulated communities determines the extent of Legislative powers—if they exceed these powers, the Judiciary will declare it void.” 10 *id.* at 1327.

mode of transferring property, or contracts, or claims, between citizens of the same state? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard: They would not consider such a law as coming under their jurisdiction. They would declare it void.<sup>47</sup>

Though Madison, Marshall, and Nicholas each cited judicial review in particular contexts, they did not claim that judicial review would exist to curb federal overreaching only with respect to the clauses they discussed. Instead, they cited a generally available mechanism of limiting federal power—judicial review—as a reason not to fear arguably broad federal authority in the Constitution.

Indeed, in other instances, federalists glowingly spoke of judicial review in the abstract, referring to judicial review almost as a panacea for concerns about federal legislative overreaching. For instance, Madison observed in one of the Federalist papers that the Constitution established the Supreme Court as the “tribunal” to “ultimately” decide “the boundary between” the state and national governments in an impartial manner.<sup>48</sup> John Dickinson, who expressed qualms about judicial review at Philadelphia, listed, as one of the many checks on federal authority, the “federal independent judges, so much concerned in the execution of the laws, and in the determination of their constitutionality.”<sup>49</sup>

Other participants expressed similar thoughts in ratification conventions. At the Connecticut ratifying convention, Oliver Ellsworth identified judicial review as a potent check on a runaway Congress:

If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void;

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47. 10 *id.* at 1431. At the same convention, Edmund Pendleton made an analogous point regarding western land claims. Even if Congress passed laws regarding the validity of such claims, the courts would take no cognizance of them because Congress lacked legislative authority over such claims. 10 *id.* at 1200–01.

48. THE FEDERALIST NO. 39, at 198 (James Madison) (George W. Carey & James McClellan eds., 2001).

49. 17 DOCUMENTARY, *supra* note 42, at 182.

and the judicial power, the national judges, who to secure their impartiality are to be made independent, will declare it to be void.<sup>50</sup>

At the Pennsylvania convention, James Wilson likewise-praised judicial review for its potential to constrain Congress:

I say, under this Constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department . . . . [I]t is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass . . . notwithstanding that transgression; but when it comes to be discussed before the judges when they consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void. And judges, independent and not obliged to look to every session for a continuance of their salaries, will behave with intrepidity, and refuse to the act the sanction of judicial authority.<sup>51</sup>

Both Wilson and Ellsworth understood that independent judges conduced towards the beneficial exercise of judicial review. Judges would likely feel more secure in voiding unconstitutional federal statutes if they had guaranteed minimum salaries and could only be removed by impeachment. Each of these federalists (and the others previously discussed) understood that the federal courts would keep the legislature within its constitutional limits.

While federalists praised judicial review's potential for constraining Congress, none of the anti-federalists ever responded by denying judicial review's legitimacy. In fact, the anti-federalists generally accepted that the Constitution authorized judicial review. Nevertheless, anti-federalists cleverly cited judicial review as a reason to reject the Constitution. First, despite the arguments of federalists, some anti-federalists vigorously denied that judicial review would meaningfully check Congress in practice. In other words, judicial review, though possible under the Constitution, would not serve as an effectual legislative check. Second, other anti-federalists took the opposite tack and insisted that judicial re-

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50. 3 *id.* at 553.

51. 2 *id.* at 450-51.



view would work *too well* and prevent beneficial legislation by handcuffing Congress.

As noted, some anti-federalists denied that judicial review would appreciably curb federal legislative power. For instance, the “Federal Farmer” claimed that the judiciary’s equity power would enable them to uphold otherwise unconstitutional federal tax laws:

Suppose a case arising under the constitution—suppose the question judicially moved, whether, by the constitution, congress can suppress a state tax laid on polls, lands, or as an excise duty, which may be supposed to interfere with a federal tax. By the letter of the constitution, Congress will appear to have no power to do it: but then the judges may decide the question on principles of equity . . . .<sup>52</sup>

By this argument, although the judges could exercise judicial review, they could also choose to use their equitable powers to uphold otherwise unconstitutional federal laws. Taking a slightly different tack, Patrick Henry insinuated that federal judges would lack the stomach to defy Congress:

Are you sure that your Federal Judiciary will act thus [strike down unconstitutional laws]? 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>53</sup>

Henry’s complaint acknowledged that the federal judiciary could engage in judicial review. He merely doubted whether they would be resolute enough to deserve the “highest enco-

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52. 17 *id.* at 341. In a letter to Samuel Adams, Samuel Osgood made the exact same claim about equity jurisdiction potentially subverting judicial review of the limits on federal power. “[S]uppose then, any State should object to the exercise of Power by Congress as infringing the Constitution of the State, the legal remedy is to try the Question before the Supreme Judicial Court.” 15 *id.* at 265. Yet they could go beyond “the Letter of the general or State Constitutions, to consider & determine upon it, in Equity—This is in Fact leaving the matter to the Judges of the Supreme Judicial Court.” 15 *id.* In other words, federal courts would use their equity powers to vindicate federal power grabs.

53. 10 *id.* at 1219.

mium."<sup>54</sup> Neither the "Federal Farmer" nor Henry denied that the federal courts could use judicial review to curb congressional overreaching. They instead denied that judicial review would restrain Congress in practice.

Some anti-federalists took a second approach and claimed that judicial review would work too well and hobble Congress. Attempting to turn the federalist's arguments against them, anti-federalists argued that the courts would void desirable federal legislation. For instance, anti-federalists claimed that if Congress enacted beneficial legislation barring federal courts from reviewing factual findings made by federal juries, the courts would strike such legislation down as unconstitutional. Patrick Henry claimed that Congress could not prohibit appeals relating to facts because "the Federal Judges, if they spoke the sentiments of independent men, would declare their prohibition nugatory and void."<sup>55</sup> More generally, Henry contended, Congress could not "depart from the Constitution; and their laws in opposition to the Constitution would be void."<sup>56</sup> Likewise, George Mason complained that judicial review would force Congress to pay off Revolutionary War debts in full because any law that redeemed the debt below par would be *ex post facto*:

Will it not be the duty of the Federal Court to say, that such laws are prohibited? This goes to the destruction and annihilation of all the citizens of the United States, to enrich a few . . . . As an express power is given to the Federal Court to take cognizance of such controversies, and to declare null all *ex post facto* laws.<sup>57</sup>

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54. 10 *id.*

55. 10 *id.* at 1420-21. Recall that Henry also claimed that judicial review would not actually check Congress. Hence, Henry argued in the alternative. Judicial review was a phantom check. But if it really could check Congress, the courts also would strike down beneficial legislation that was unconstitutional.

56. 10 *id.* at 1361-62. Earlier, George Mason similarly claimed that an amendment would be necessary to prevent the Supreme Court from reviewing factual findings. Even if Congress passed a law declaring that appellate judges could not review facts, "will not the Court be still judges of the fact consistently with this Constitution?" 10 *id.* at 1407.

57. 10 *id.* at 1361. The Virginia Convention yields one more exchange when an opponent of the Constitution wielded judicial review as a weapon. William Grayson complained that the Constitution abrogated state immunity against suit by foreign governments but still required the foreign government's consent before a state could sue it. Congress could not solve this supposed problem: "It is fixed in

In other words, judicial review would shackle Congress and prevent the passage of beneficial federal legislation.

Denying that the courts could review the constitutionality of federal legislation would have more powerfully answered those who praised judicial review as a check on Congress' power. Yet anti-federalists never made such an argument. Instead, they merely denied the efficacy of judicial review or argued that judicial review would preclude all sorts of useful federal laws. Presumably, anti-federalists never voiced the argument that the Constitution did not authorize judicial review of federal legislation because they could not sensibly make it. Readers of the Constitution understood that it authorized judicial review. Had anti-federalists denied the legitimacy of judicial review, federalists likely would have dismissed such arguments as desperate and misleading. Indeed, they could have cited numerous anti-federalists for the proposition that the Constitution sanctioned judicial review of federal legislation.

## CONCLUSION

Why did so many statesmen of the founding era believe that the Constitution authorized judicial review? After all, modern readers have great difficulty discerning an unambiguous textual basis for judicial review of federal legislation. Though the Framers generally agreed that the courts ought to void unconstitutional laws, this principle did not arise from any particular constitutional provision.<sup>58</sup> Instead, as Hamilton wrote in the Federalist No. 78, judicial review arose "from the general theory of a limited Constitution"<sup>59</sup> and from the "natural presumption" 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>60</sup> Because state constitutions were

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the Constitution that they [states] shall become parties. This is not reciprocal. If the Congress cannot make a law against the Constitution, I apprehend they cannot make a law to abridge it. The Judges are to defend it. They can neither abridge nor extend it." 10 *id.* at 1448.

58. THE FEDERALIST NO. 81, at 482 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

59. THE FEDERALIST NO. 78, at 403–404 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

60. *Id.*

based on the same “natural presumption,” they also sanctioned judicial review.<sup>61</sup> Given the existence of the “natural presumption,” readers of the Constitution understood that it authorized and permitted judicial review of federal legislation. By granting the federal judiciary the “judicial power” and extending it to cases “arising under the Constitution,” the Constitution tapped into this “natural presumption” of judicial review. The same natural presumption convinced the Constitution’s readers that it did not bar and thus permitted state courts to void unconstitutional federal statutes. Given the existence of this presumption, had the Framers wished to preclude judicial review of federal legislation, they would have included an explicit provision denying that power to the federal and state courts.

If the court’s recent resumption of its historical role in enforcing subject matter limitations on federal power is to be denounced as “activist,” that criticism should not rest on the mistaken argument that the Court lacks textual or historical authority for its actions. This admittedly quick synopsis of the original understanding of judicial review reveals that those seeking to deny its legitimacy on the grounds that the Constitution’s text does not authorize it or that the Framers never envisioned it are simply in error.

On the latter point, ample evidence reveals that the Constitution’s proponents and opponents recognized the legitimacy of such review. Future justices, senators, and representatives and even a future president recognized that both federal and state courts would police the boundary between state and federal power and nullify federal statutes that went beyond the limits of federal authority. On the former point about the Constitution’s text, we ought not suppose that the Framers wrongly assumed that the Constitution permitted, authorized, and even mandated, judicial review when it did no such thing. Rather, we ought to accept Hamilton’s amply supported assertion that during the late eighteenth century in America, the “natural presumption” was that the courts would serve as the constitutional check on the legislature. Given that the wording of the Constitution clearly admits the possibility of review (even to the modern reader) and given the numerous statements of the Framers, it is nothing short of amazing that reputable scholars continue to deny the propriety of judicial review.

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61. *Id.* at 404.