Political Jurisprudence and the Role of the Supreme Court: Framing the Judicial Power in the Federal Convention of 1787

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ABSTRACT

The modern shift toward abstract review and discretionary jurisdiction has heightened perennial controversy over the role of the Supreme Court in constitutional politics. Through close analysis of the framers' deliberations in the Federal Convention, this article seeks to shed light on that controversy. The institutional logic at work in the debate tasked the Court with settling conflict arising from the federal system and enforcing constitutional limits on the state and federal governments alike. Given that "all interference between the general and local Governments should be obviated as much as possible," the framers opted to confine that interference to the judicial process. In this legalization of federal conflict, settling constitutional questions was not merely incidental to the process of deciding particular cases, but became an essential function of the Court. In this way, the framers laid the groundwork of modern controversy over the political dimensions of judicial review in the institutional architecture of the Constitution.

Writing in 1957, with the deference of the New Deal Court a fading memory and the activism of the Warren Court in its infancy, Robert Dahl succinctly captured perennial American ambivalence toward the interpretive role of the Supreme Court in the constitutional order: "As a political institution, the Court is highly unusual, not least because Americans are not quite willing to accept the fact that it *is* a political institution and not quite capable of denying it; so

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that frequently we take both positions at once. This is confusing to foreigners, amusing to logicians, and rewarding to ordinary Americans who thus manage to retain the best of both worlds" (1957, 279). At the heart of the ambivalence Dahl describes is a tension between the legal forms and the political implications of judicial action, a tension that has only increased in the intervening years as the Supreme Court has gained increasing discretion and independence in the exercise of it own jurisdiction. This article looks to the debates in the Federal Convention of 1787 to explore the extent to which the framers of the Constitution may have anticipated the tension arising from the exercise of discretionary jurisdiction by the modern Supreme Court and perhaps even laid the groundwork for it in the institutional architecture of the constitutional order.

In addition to elucidating the degree of consonance between the modern Court and the framers' Constitution, this investigation will also sharpen our understanding of the ways in which the Supreme Court's interpretive role in the American polity may appropriately be characterized as "political." That label has been applied all too indiscriminately since the advent of the "political jurisprudence" framework in public law scholarship (Shapiro 1964) and its progeny, the concept of "politicization" (Stone Sweet 2000). "Political" in these instances turns out to be an equivocal term that could refer either to the political ramifications of the Court's interpretive role in the constitutional order, which I will argue is native to the framers' institutional logic, or to the abandonment of jurisprudential reasoning for frankly political decision-making criteria, which is quite foreign to it.

DISCRETIONARY JURISDICTION AND JUDICIALIZATION

The ambivalence noted by Dahl is perhaps best modeled in recent criticism of the certiorari process whereby the Court itself determines which cases it will, and will not, hear. As the hallmark of the modern discretionary court, such agenda-setting authority is deliberately designed to permit the justices to confine themselves to cases presenting questions of national importance, suggesting that the primary concern of the Supreme Court is the selection and settlement of important questions, while the case at hand is merely the occasion—or pretense, if one prefers a more pejorative term—for settling those questions (Perry 1991).[1] This is said to depart from the traditional judicial activity of

1. Though often taken for granted as part and parcel of the Court's institutional identity, this jurisdictional discretion was in fact conferred on the Court by institutional reforms in the early twentieth century, the most important coming in 1925 at the behest of the justices themselves (Murphy 1962; Crowe 2007). Chief Justice Taft gave clear articulation to the institutional implications of the reform in promoting the justices' proposed bill before Congress: "The Supreme Court's function is for the purpose of expounding and stabilizing principles

case-bound concrete review wherein a court may set aside an unconstitutional law in a particular instance, but the authority of the court extends only to settling the case at hand. While future cases are affected through the operation of precedent, the concern of the court is primarily the case before it and not the prospective settlement of general questions. Critics therefore warn that the agenda-setting discretion that drives the certiorari process turns the judicial function on its head by making the settlement of the case the means and the general rule the end rather than the other way round (Hartnett 2000). The resulting tendency toward abstract constitutional review hearkens to notions of judicial supremacy, insofar as settling the general question, rather than just the particular case, presumes to control the future acts not only of inferior courts through precedent but of other departments of the government as well (Stone Sweet and Shapiro 2002; Whittington 2007). And thus does judicial decision-making arguably take on the purposes of prospective legislation rather than remedial adjudication. Edward Hartnett's influential assessment of the certiorari process accordingly connects the agenda-setting power indicative of abstract review to the broader controversy over the proper extent of judicial custodianship (and informal amendment) of the Constitution: "While it is understandable that those who treat Justices of the Supreme Court as the nation's moral leaders would endorse judicial review coupled with broad agenda-setting power, it is past time to frankly acknowledge that such views are nothing more than a call for mixed government, with one branch—the judiciary—representing the interests and views of the 'better' class of society" (2000, 1733–37; see also McDowell 1988; Bork 1990; Wolfe 1994).

Objections of this sort to the politicizing tendencies of discretionary jurisdiction have gained empirical support from institutionalist efforts to understand the global expansion of judicial power as a trend toward the "judicialization" of politics and the "politicization" of courts (Stone Sweet 2000; see also Tate and Vallinder 1997; Hirschl 2004). Alec Stone Sweet (2000) has argued, for example, that the move toward discretionary jurisdiction and abstract constitutional review—that is, the review of laws outside the context of particular cases—by constitutional courts involves an unavoidable measure of politicization of the judiciary. Constitution makers in Europe are said to have done a superior job of accommodating this reality by establishing separate constitutional arbiters institutionally distinct from the ordinary judicial process. These constitutional courts thus absorb the political consequences

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of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit" (*Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearings on H.R. 10479, Before the Committee on the Judiciary*, 67th Cong., 2d sess. [1922], 2–3).

of judicialization while the ordinary judicial process remains shielded from it. In the United States, however, the political activity of constitutional review and the legal activity of case-bound adjudication are combined in an emphatically judicial body, simulating politicized abstract review while retaining the legal forms of concrete review (Stone Sweet and Shapiro 2002). From this perspective, the institutional architecture of the American judiciary would seem to be at odds with itself, suffering a disjunction between the legal forms of case-by-case adjudication and the necessarily political function of constitutional review.

A similar finding results from Michael Zuckert's study (2009) of James Madison's failed alternatives to judicial review at the Federal Convention of 1787. As we will see, these included a congressional veto on state laws to protect federal interests and minority factions from state encroachment and the inclusion of judges in a Council of Revision to police the system of separated powers. By "exercis[ing] a kind of judgment typical of political rather than legal decision, and operating in the fluid and less structured context of politics rather than a suit at law," Congress and the Council of Revision could go further than courts as arbiters of constitutional norms in ensuring the justice and wisdom of laws. By dispensing with these political alternatives and conferring their broad interpretive functions on the Court, the framers effectively limited the review power to "narrowly constitutional issues raised in genuinely legal cases." But the need for the broader political functions Madison identified remained. This produces an incisive Madisonian critique of modern judicial review, and of the Constitution, that sees the convention's decision to consign such a vast interpretive role to judges as a "built-in disproportion between the political tasks and the legal tools with which these are supposed to be accomplished" (Zuckert 2009, 76–77).[2]

This apparent disjunction between the legal forms and political functions of the Court has moved would-be reformers to proffer a number of solutions, two of which are particularly worthy of attention because of their growing popularity.[3] One solution, usually put forward by advocates of political juris-

2. I build on Zuckert's approach by taking in the wider range of alternatives—not just Madison's—through a narrative account of the development of the judicial role in the convention. I thus provide a basis for grasping the institutional rationale for the judicialized alternative that emerged from the deliberative process. At the same time, I suggest that while this was certainly "an institution that nobody quite planned" and one marked by significant tensions, I would not go so far as to describe these tensions as "insuperable," nor characterize them as "contradictions" (Zuckert 2009, 57).

3. Of course, some scholars would deny the existence of any real problem, even given the disjunction between the legal forms and political functions of the Court. For example, taking their inspiration from Dahl (1957), some adherents of the regime politics approach to constitutional development (Graber 1993, 2006; Gillman 2002; see also Ackerman 1991) suggest that even as currently structured, the Supreme Court is not in fact a counter-majoritarian

prudence wrestling with their own democratic scruples, seeks to bring the institutional forms of the Court into greater conformity with its political role by, for example, replacing tenure during good behavior with term limits for the justices (Levinson 2006, chap. 4). Yet another solution, favored by advocates of "popular constitutionalism," seeks to eliminate or at least drastically minimize the judicial role in constitutional enforcement in favor of reliance on political processes (Tushnet 1999; Kramer 2004; see also Corwin 1906; Beard 1913; Crosskey 1953, 2:100; Hyneman 1963).[4] Though they differ in many respects, these two solutions share Hartnett's departmentalist conviction that the relationship between the legal forms and political functions of judicial review is a disjunction to be eliminated rather than a tension to be maintained.

But this desire to erase the tension by marginalizing judicial review or by tying the Court more tightly to electoral processes ignores key distinctions in the way we apply the label "political" to constitutional arbiters. On its own, the language of politicization commonly employed by public law scholars fails to capture the full range of alternative institutional models for constitutional review—and it falls short in the same way the older concept of political jurisprudence did. In the first place, "political" in these instances turns out to be an equivocal term that could describe either of two institutional characteristics of the modern court. It could refer to the political ramifications of the interpretive constitutional function of the Supreme Court. That is, by addressing broad questions of constitutional authority, the Court necessarily insinuates itself into existing political conflicts or instigates national political controversy where little or none had existed. And it does so in a way that claims authority to bind the government to its favored interpretation of the Constitution. Yet the Court may enter the political fray even as it employs jurisprudential, and not

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institution, but one quite sensitive to the changing needs and convictions of the dominant national coalition. Others have, on the basis of natural law (Arkes 1990), libertarian (Barnett 2013), or common law (Strauss 2010) jurisprudential theories, defended the expansive interpretive role of courts on the grounds of institutional fitness for the task.

4. Other scholars have drawn on colonial (Bilder 2006; Gerber 2011) and founding-era sources (Prakash and Yoo 2003; Barnett 2004) to forcefully repudiate these challenges to judicial nullification of federal and state laws. While the present analysis joins these studies in affirming judicial review as a legitimate exercise of judicial power over against its recent critics and their predecessors, its animating purpose is to move beyond them by adopting a broader focus on the place of judicial review within the institutional architecture of the Constitution. I do this by considering judicial review in contrast with the other available modes of constitutional enforcement and management of federal conflict that were considered but rejected by the framers. While a number of others have modeled such an approach in studying the development of the judicial provisions in the Federal Convention, these have been overwhelmingly concerned with matters of judicial structure and jurisdiction, largely without connecting these to modern controversy over the discretionary court (see, e.g., Clinton 1984; Amar 1985; Glashausser 2010).

frankly political, criteria for deciding cases (or for deciding which cases to decide). Alternatively, the Court may become "political" by candidly shedding the forms of jurisprudence and adopting the deliberative modes of a legislative assembly. I will argue that the framers anticipated and laid the groundwork for the former kind of political jurisprudence—that is, for a partial judicialization of politics—even as they carefully erected barriers to the latter wholesale politicization of the judiciary. Moreover, the dichotomy between the traditional legal activity of deciding particular cases through concrete review and the political activity of deciding general questions through abstract review—a dichotomy pervading the judicialization and departmentalism literatures—turns out to be a gross oversimplification. If by "traditional" we mean the procedure employed in the formation of the common law and in the development of American constitutional law, then we must acknowledge that the precedent-setting aspect of deciding cases can hardly be called incidental.

THE FEDERAL CONVENTION OF 1787

I will argue that the modern tension between the legal forms and the political implications of judicial action was anticipated in a remarkably sophisticated way by the framers of the Constitution and embedded in the institutional architecture of the constitutional order. The framers' institutional logic tasked the Supreme Court with settling federal conflict and enforcing constitutional limits. And this stemmed not from an elitist preference for judges over politicians, but from an institutional preference for legal rather than political settlement of conflict arising from the federal system and a preference for judicial rather than legislative enforcement of constitutional limits. Given that "all interference between the general and local Governments should be obviated as much as possible," and the unlikelihood of obtaining that object, the framers opted to confine that interference as much as possible to the judicial process (Farrand 1937, 1:49). They therefore conceived of the judicial role not merely as the deciding of cases, but as the settlement of important questions *by means of* deciding cases. That is, settling questions of law was not merely incidental to the process of deciding particular cases, but was a centrally important function of the Supreme Court. Accordingly, the confinement of judicial power to the settlement of concrete cases, insofar as it came up in the framing debate, was not an emblem of the strictly limited judicial role, but was conceived as a check on the judges' ability to decide controversies prospectively and hypothetically. Indeed, it was its confinement to particular cases that made the Court an apt forum for the settlement of federal conflict. The framers, it would seem, deliberately utilized a legal institution to perform the interpretive constitutional function, seeking "the best of both worlds," as Dahl wryly suggested. Thus, far from being antag-

onistic toward the ambiguity inherent in the discretionary court, the framers' institutional logic may support it insofar as it tends to judicialize constitutional disputes that might have been left to political settlement. For the framers, however, this does not convert judgment into an act of political will, for the ambiguity in the judicial role arises from the politically significant nature of the questions presented and not from the kind of reasoning employed by judges. That is to say, the Court's institutional task is unavoidably political, but its mode of deliberation remains fundamentally jurisprudential.

My approach to the framers' deliberations begins from the premise that the institutional place of judicial power should be understood in the context of the whole system of government established by the Constitution. And the debates are rich with this kind of insight into the judicial function for those willing to dig deeper than explicit statements on the review power (Clinton 1984; Amar 1985; Glashausser 2010; Zuckert 2009). Because of the constructive nature of the deliberative process involved in framing a constitution, especially the one that produced the US Constitution, it is quite plausible that the framers of the instrument may "see farther or better" into the long-term implications of the text and its institutional embodiment than those charged with ratifying it (Storing 1981, 6).[5]

The ensuing analysis of the convention's deliberations is organized into three sections. The first traces the emergence of the Court as the preferred arbiter of disputes arising from the collision of state and federal authority, a process I describe as the legalization of federal conflict. The second section focuses more specifically on the delegates' views on the judicial power to set aside unconstitutional laws, which found repeated expression throughout the convention as a doctrine of constitutional supremacy (as distinct from legislative supremacy) and was enshrined in the text late in the proceedings. The third section draws these narratives together to partially vindicate the modern discretionary court as a legitimate elaboration of the constitutional order and at the same time to buttress key limits on judicial discretion that are emphatically reinforced by the framers' deliberations.

5. Institutional developments may thus be contained in the "genetic code" of the Constitution (Tulis 1987, 8) and be occasioned by the changing attributes of the political context in which the Constitution operates (Tulis 1991; Nichols 1994). The constitutional legitimacy of such developments might therefore be best determined by reference to the institutional logic of the constitutional order, by an evaluation of the purposes to which each institutional feature of that order is directed. Examining both the circumstances that occasioned the framing of the Constitution and the narrative of the debate that produced that instrument's language is, one might argue, the best means of discovering such an institutional logic. Moreover, this approach has the virtue of appealing to those who do not ascribe normative weight to the judgments of a dead generation. For even if the framers' intent is not seen as authoritative, the institutional logic manifested in their deliberations may prove persuasive, especially if that logic better explains the actual development of the constitutional order over time.

LEGALIZATION AND JUDICIALIZATION OF FEDERAL CONFLICT

Rendering the federal government institutionally independent of the states through direct enforcement of laws on individuals—that is, dispensing with the states as intermediaries and creating a direct connection between the people and the the federal government—was the fundamental task of the convention. But this was not by itself sufficient to secure federal authority from state encroachment. No serious proposal—save perhaps Alexander Hamilton's—stripped the states of their reserved powers. And so long as the states were left free to regulate their own citizens, conflicts over the extent of federal authority would arise. It would often happen that the federal and state governments would attempt to regulate the same individuals and lay on them conflicting obligations. It did no good merely to declare the laws of the Union supreme; some resolution would have to be given to the conflict. At least five alternatives surface in the course of the debates: (1) a declaration of federal supremacy with an attendant power to forcibly compel states into compliance, (2) a discretionary congressional veto on state laws prior to their operation, (3) a discretionary veto wielded by the executive of each state who was in turn to be appointed by Congress, (4) a constitutional veto wielded by Congress, and (5) a declaration of federal supremacy with resolution in the state and inferior federal courts with an appeal to the Supreme Court.

It is useful to think of these five mechanisms as falling along a spectrum with a forcible resolution at one end and a legal resolution at the other. In between range a number of political resolutions. The convention's deliberations tended to move from the forcible resolution to the legal one. The forcible resolution faded from view early with the demise of the New Jersey Plan, and while Madison frequently revived the congressional veto on state laws and pushed energetically for a political resolution, the deliberations moved gradually in the direction of a legal resolution. It would perhaps be more precise to say that the delegates opted decisively for the legal resolution quite early but made that determination incrementally more explicit in the language of the document, primarily through the provision establishing the supremacy of federal laws.

Oliver Ellsworth would later summarize the framers' strategy in the Connecticut ratifying convention. After asserting the power of judicial review as a barrier to encroachments of the federal government on state authority and vice versa, Ellsworth concedes that

> if the United States and the individual states will quarrel, if they want to fight, they may do it, and no frame of government can possibly prevent it. It is sufficient for this Constitution, that, so far from laying them un-

> der a necessity of contending, it provides every reasonable check against it. . . . Hence we see how necessary for the Union is a coercive principle. No man pretends the contrary: we all see and feel this necessity. The only question is, Shall it be a coercion of law, or a coercion of arms? There is no other possible alternative. Where will those who oppose a coercion of law come out? Where will they end? A necessary consequence of their principles is a war of the states one against the other. (Farrand 1937, 3:241)

We will proceed by looking at the various alternatives as they developed in the convention, beginning with the Virginia Plan and ending with the eventual solution embodied in the Article VI Supremacy Clause.

THE VIRGINIA PLAN: VETO ON STATE LAWS

The Virginia Plan, as originally proposed, sought to vest in Congress the power "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof" (Farrand 1937, 1:21). This provision exhibits forcible, political, and legal means of resolution. The political character of the veto power derives from the fact that it is to be wielded by the legislature. But this same provision also lends a legal character to the veto power, for Congress is not given a discretionary veto on state laws, but only a constitutional veto. Laws may be struck down only for "contravening . . . the articles of Union." This power was augmented slightly on May 31 to permit Congress a veto on states contravening treaties as well, but this still preserved the semi-legal character of the power (1:54). The forcible character of the power, of course, flows from the last line of the passage, whereby the legislature is empowered "to call forth the force of the Union" against delinquent states. This forcible component of the plan would be the first to fall.

The first and most important step toward the legalization of federal disputes was the growing conviction that direct contact, especially in the form of military force, between the state and federal governments must be avoided as far as possible. Early on, George Mason emphasized the institutional separation of state and federal governments that attended direct enforcement. Mason "argued very cogently that punishment could not in the nature of things be executed on the States collectively, and therefore that such a Govt was necessary as could directly operate on individuals, and would punish those only whose guilt required it" (Farrand 1937, 1:34 [May 30]). "Under the existing

Confederacy," Mason later added, "Congs. represent the *States* not the *people* of the States: their acts operate on the *States* not on the individuals" (1:133 [June 6]; see also Madison's comments on May 30, 1:37). Reinforcing Mason's point, James Wilson argued that defiance of federal laws issued primarily from the state governments, not the people: "All interference between the general and local Governments should be obviated as much as possible. On examination it would be found that the opposition of States to federal measures had proceeded much more from the officers of the States, than from the people at large" (1:49 [May 31]; see also Wilson's comments on June 5, 1:132–33). Wilson's insight derives at least in part from his extensive experience with the appellate prize court established by Congress during the Revolution—the court had encountered considerable opposition in attempting to overturn the decisions of state admiralty courts (see Bourgignon 1977). In fact, this would later move Wilson to urge the creation of federal courts of first instance, especially with respect to admiralty jurisdiction (Farrand 1937, 1:124 [June 5]). Vesting both original and appellate jurisdiction over federal causes would avoid interaction with the state judiciaries.[6]

This whole line of reasoning proves sufficiently compelling to alter Madison's position on coercive remedies for states. The last order of business on May 31 was the powers of Congress. The convention passed (almost unanimously) Madison's ambiguous definition of federal powers as "all cases to which the State Legislatures were individually incompetent." Then they passed the veto on state laws without dissent. Finally, though, they came to the use of force against delinquent states. Here Madison, heeding the advice of Mason and Wilson, recognized the self-destructive potential of such a direct contact between the states and the federal government: "Mr. Madison observed that the more he reflected on the use of force, the more he doubted the practicability, the justice and the efficacy of it when applied to people collectively and not individually. A Union of the States containing such an ingredient seemed to provide for its own destruction. The use of force agst. a State, would look more like a declaration of war, than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound" (Farrand 1937, 1:54). Then, on June 2, when John Dickenson moved to involve the state legislatures in the impeachment of the executive, Madison joined Wilson in declaring it "bad policy to intro-

6. Tellingly, the existence and extent of inferior federal courts would become central to the contest in the First Congress between advocates of federal power and those seeking continued reliance on the state courts in the first instance (Brogdon 2016). Moreover, it was no accident that one of the first actions of the South Carolina nullifiers in 1832 was to remove cases regarding collection of revenues from the federal courts. This would force the federal government to deal directly with the state rather than with its citizens individually (Brogdon 2011).

duce such a mixture of the State authorities, where their agency could be otherwise supplied" (1:86). For the remainder of the convention, the delegates would periodically return to this problem, searching out means of resolving intergovernmental conflict that would keep the Union from the brink of war. This object pushed the delegates toward legalization of disputes and efforts to eliminate institutional contact between the state and federal governments. Madison, however, sought throughout the convention to retain the political character of federal conflicts through the veto on state laws (Farrand 1937, 1:318, 319, 447, 2:440, 589; see also Zuckert 1986, 189; 2009). But the Committee of the Whole, which would complete its work on June 13, was the last major stage of the convention through which the veto would survive.

The elimination of the forcible remedy from the Virginia Plan did not leave the federal government bereft of remedies for state encroachment. The most basic remedy was inherent in direct enforcement and a vigorous executive, as Madison had learned from Mason and Wilson. Direct enforcement, in turn, means judicial proceedings. The Virginia Plan had anticipated this need, providing a national judiciary with jurisdiction over "questions which involve the national peace and harmony" and over a number of more particular questions prone to incite intergovernmental conflict. The prevention of such conflicts in fact seemed to be the primary purpose of judicial power under the Virginia Plan, while the principle of coextensiveness was utterly neglected. National jurisdiction consisted almost entirely of questions that either could not be safely settled by state courts or might be particularly prone to create conflict.

THE NEW JERSEY PLAN: ADVENT OF THE SUPREMACY CLAUSE

The Committee of the Whole reported the amended provisions of the Virginia Plan on June 13. The following day, James Paterson of New Jersey announced the intention of several small state delegations to form a "purely federal" alternative to the Virginia Plan; the convention adjourned for the day "that leisure might be given for the purpose" (Farrand 1937, 1:240). As promised, the plan that Paterson read the following day was an attempt to retain the "purely federal" structure of authority established by the Articles of Confederation—a Union of equal states—while augmenting the federal government with more extensive power and the means to enforce compliance with its determinations. The implications of this are readily apparent in the plan. The mode of ratification specified in the Articles was to be retained, and the states were to enjoy an equality of suffrage in the legislature. The executive was given authority to execute the laws, but it is not clear what this meant in a government exercised over states rather than individuals. The federal judiciary was to consist of one supreme tribunal, and its original jurisdiction was to reach to no more

than the impeachment of national officers, leaving the whole of original jurisdiction over federal questions in the hands of the state judges. Federal appellate jurisdiction was limited to admiralty cases, the construction of treaties, cases involving foreign interests, and cases involving trade regulations or the collection of federal revenue.

It is not clear how a federal government thus constituted could prevent encroachments on its authority without recourse to military force. The appellate jurisdiction of the federal court was no answer, for it was not coextensive with the laws or the Constitution. The answer to the difficulty lay in the sixth resolution of the plan:

> 6. Resd. That all Acts of the U. States in Congs. made by virtue & in pursuance of the powers hereby & by the articles of confederation vested in them, and all Treaties made & ratified under the authority of the U. States shall be the *supreme law of the respective States* so far forth as those Acts or Treaties shall relate to the said States or their Citizens, and that the *Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding*; and that if any State, or any body of men in any State shall oppose or prevent ye. Carrying into execution such acts or treaties, *the federal Executive shall be authorized to call forth ye power of the Confederated States*, or so much thereof as may be necessary to enforce and compel an obedience to such Acts, or an Observance of such Treaties. (Farrand 1937, 1:245; emphasis added)

It is ironic that the Supremacy Clause, the cornerstone of federal supremacy, is first proposed by those seeking to limit the extent of national power. It makes sense, however, when we recognize that a declaration of federal supremacy is a small price to pay for the institutional enfeeblement of the government of the Union. A government truly capable of direct enforcement and equipped with an extensive federal judiciary, an energetic executive, and a national legislature would put teeth in a supremacy clause. The provision in the New Jersey Plan, however, was ultimately a parchment barrier. True enough, it permitted the executive to enforce compliance through military action, but a resort to military force was always an ultimate remedy whether it received explicit recognition or not. Furthermore, the fact that all cases arising under this provision were to be decided in the state judiciaries and rely on the state executive for enforcement left little hope that national judicial power would be an adequate means of preventing state encroachment. Nonetheless, by introducing the Supremacy Clause, Paterson and his compatriots had conceded an important principle, one that would eventually bear much fruit.

THE HAMILTON PLAN

Finding both the Virginia and New Jersey Plans inadequate, Hamilton rose on Monday, June 18, to suggest an alternative to both. Central to Hamilton's alternative is an effort to implant in the state governments themselves adequate safeguards against encroachment on federal power. The tenth provision of Hamilton's plan illustrates the approach: "All laws of the particular States contrary to the Constitution or laws of the United States to be utterly void; and the better to prevent such laws being passed, the Governour or president of each state shall be appointed by the General Government and shall have a negative upon the laws about to be passed in the State of which he is Governour or President" (Farrand 1937, 1:293).

Hamilton recognized the inadequacy of a supremacy clause without an institutional means of enforcement short of military force. He understood that the point was to stave off a forcible resolution of disputes. Here he provides a political resolution by vesting a discretionary veto in the governors of the states and in turn making the governors accountable for their office to the federal government. To prevent forcible resolution, Hamilton urged that states also be forbidden to maintain "any forces land or Naval" and that the state militias be placed under the "sole and exclusive direction of the United States" and further suggested that Congress be empowered "to institute Courts in each State for the determination of all matters of general concern," thereby providing a forum for legal resolution as well (Farrand 1937, 1:292–93).

RESURRECTION OF THE SUPREMACY CLAUSE

Hamilton's proposal was simply too nationalistic to garner support in the convention. It did, however, serve to highlight the moderate character of the Virginia Plan (Storing 1995, 25–26). It is no wonder, then, that on June 19 the convention adopted the Virginia Plan (as reported by the Committee of the Whole) as the basis for its deliberations. As they then stood, the resolutions included a constitutional veto on state laws, a power of direct enforcement vested in the executive, and federal courts with jurisdiction over questions involving the national peace and harmony (Farrand 1937, 1:236–37).

On July 17, the convention took up the veto on state laws, which was met with a number of objections. Gouverneur Morris "opposed this power as likely to be terrible to the States, and not necessary, if sufficient Legislative authority should be given to the Genl. Government." "A law that ought to be negatived," he later observed, "will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a National law." Roger Sherman "thought [the veto] unnecessary, as the Courts of the States would not

consider as valid any law contravening the Authority of the Union," while Luther Martin "considered the power as improper & inadmissible. Shall all the laws of the States be sent up to the Genl. Legislature before they shall be permitted to operate?" Thus, it was argued, the veto on state laws is an impediment to ratification, impracticable, and unnecessary. Madison attempted a defense, arguing that the federal judiciary would be too slow in reviewing state laws, that the state judges were not reliable, and that repeal by Congress would take too long to pass. But he was not able to persuade his fellow delegates, and the convention eliminated the veto on state laws from the plan, in effect opting for a legal resolution to federal disputes (Farrand 1937, 2:27–28 [July 17]).

As a substitution for this power, Martin proposed to reinsert a version of the Supremacy Clause and make explicit the legal character of intergovernmental disputes: "The Legislative acts of the U.S. made by virtue & in pursuance of the articles of Union, and all treaties made & ratified under the authority of the U.S. shall be the supreme law of the respective states, as far as those acts or treaties shall relate to the said States, or their Citizens and inhabitants – & that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding" (Farrand 1937, 2:28–29).

Martin had very carefully framed this language to limit its implications. As he later explained in his *Reply to the Landholder*, federal jurisdiction had not yet been extended to all cases arising under national laws and treaties. Martin therefore expected that "every question of that kind would have been determined in the first instance in the courts of the respective states; had this been the case," the state judiciaries would be primarily responsible for deciding both the constitutionality of federal laws and treaties and the degree to which state laws conflicted with these. Martin also pointed out that his rendition of the Supremacy Clause only recognized the power of state judges to invalidate provisions of state law, not provisions of state constitutions. If national "treaties or laws were inconsistent with our [state] constitution and bill of rights, the judiciaries of this state would be bound to reject the first and abide by the last, since in the form [in which] I introduced the clause" federal laws and treaties "were not proposed nor meant to be superior to our constitution and bill of rights" (Farrand 1937, 3:287).

EXTENDING FEDERAL SUPREMACY THROUGH JURISDICTION

Martin's insertion of the Supremacy Clause was the decisive moment at which the convention made explicit the legal character of intergovernmental disputes. What remained to be decided (or, at least, explicitly recognized) was

the important question whether these disputes would be settled primarily by state courts or by federal courts. Martin had carefully embodied limits in the Supremacy Clause to ensure that federal institutions would not dominate the resolution of intergovernmental disputes, but these fell in quick succession.

The expansion of the Supremacy Clause in fact began the next day, when Madison proposed to extend federal jurisdiction "to all cases arising under the national laws" and thereby put the decision of any case arising under the Supremacy Clause potentially within the jurisdiction of a federal court (Farrand 1937, 2:46). Another of Martin's limits would die by the hand of the Committee of Detail. The committee's report, presented to the delegates on August 6, amended the last part of the Supremacy Clause to read, "anything in the *Constitutions* or laws of the several States to the contrary notwithstanding" (2:183; emphasis added). A final defeat came on August 23, when John Rutlidge proposed an amendment that would alter the first line of the Supremacy Clause. The new language read, "This Constitution and the laws of the U.S. made in pursuance thereof, and all treaties made under the authority of the U.S. shall be the supreme law" of the land (2:389). Under the original clause, only federal legislative enactments and treaties would form a basis for striking down provisions of state laws and constitutions. By making the Constitution part of the supreme law of the land, the convention rendered the provisions of the Constitution potentially self-enforcing. A federal court could then adjudicate constitutional limits on states, such as those contained in the tenth section of Article I, even in absence of federal legislative action.

But judicial enforcement presupposes jurisdiction. Thus, we need to give some attention to subsequent alterations in the jurisdictional menu that may have reinforced and extended this tendency to throw federal and constitutional conflict into the Supreme Court. On August 27, the delegates voted to extend federal jurisdiction "to all cases arising under this Constitution . . . and treaties" in addition to "laws of the United States" (Farrand 1937, 2:430–31). This extension of jurisdiction to constitutional questions has obvious implications for the exercise of judicial review, which we will explore in some detail below, but more importantly it gave the judiciary a field of jurisdiction independent of congressional action. Without this extension, federal jurisdiction would reach only as far as federal legislation. Many provisions of the Constitution, however, would require no legislative action. The most obvious example is the list of prohibitions on states now embodied in the tenth section of Article I. Had the convention not extended the judicial power to all cases arising under the Constitution, such limitations would be judicially unenforceable until Congress passed enacting legislation to make the limitations effective. The judiciary would likewise lack the jurisdiction to hear cases arising from executive actions, from the interstate comity provisions of Article IV, and from

any portions of the Civil War and voting rights amendments not backed up by congressional enactments. Congress could thereby nullify important constitutional provisions merely by its inaction. By extending federal jurisdiction in this way, the convention provided a means of enforcement for every provision of the Constitution and empowered the federal judiciary as the guarantor of constitutional limitations on the states.

This observation raises two important points. First, this is an important step in the legalization of conflict. Without a provision of this sort, direct confrontation between the political branches of the federal government and the state governments would attend every effort to enforce limits on state power. By throwing the matter into federal court, the conflict takes the more sedate form of legal arguments. Second, it is not clear whether the Court's role here is exclusive or coordinate. Take, for instance, the enforcement clauses of the Civil War and voting rights amendments, which explicitly authorize Congress to pass enacting legislation. That the framers of those amendments went to the trouble of including explicit legislative authorizations suggests that some doubt existed as to Congress's implied power to enforce limits on the states.[7] The extension of federal jurisdiction to all constitutional questions makes similar enforcement clauses for the judiciary unnecessary.

CONSTITUTIONAL SUPREMACY AND JUDICIAL REVIEW

The rationale for employing federal courts as a legal forum for the settlement of federal conflict extended to the settlement of constitutional questions more generally. The need for an arbiter of federal–state collisions coincided with the emerging consensus in favor of giving popular sovereignty expression through constitutional supremacy rather than legislative supremacy, a development that augmented the relative independence and authority of the judiciary as a coequal branch of government (LaCroix 2007). The judicial power vested in federal courts included the power to set aside both federal and state actions that transgressed constitutional limits. Not only was judicial review of state and federal laws presumed to exist as an inherent function of independent judicial power, but it also arguably found its way into the text of Articles III and VI late in the convention's proceedings.[8]

7. It is worth noting that the abolitionist argument against the constitutionality of the fugitive slave law rested on the assumption that, absent an explicit grant of authority, Congress had no power to carry the fugitive slave law into effect—that that provision of Article IV was thus a mere solemn agreement between the states and not a legitimate subject of federal legislation. A representative example of this reasoning may be found in Salmon P. Chase's speech in the case of Matilda, an escaped slave (Gillman et al. 2013, 1:207).

8. The evidence presented in this section for a presumption among the delegates that judicial review would exist as an implication of a written constitution and that this was re-

JUDICIAL REVIEW AS AN IMPLIED POWER

Most accounts of judicial review do not adduce its legitimacy from the text of the Constitution, but rather from the fact that there is a constitutional text. Indeed, the two most famous apologias for judicial review, Alexander Hamilton's in *Federalist* 78 (Hamilton et al. 1961, 521–30) and John Marshall's in *Marbury v. Madison* (1803), rely primarily on the inherent functions of judicial power in a system of constitutional supremacy (though it is important to note that Marshall takes care to buttress the inherent review power with a textual argument as well). And this is in keeping with the views of those who framed the Constitution. By 1787, leading American statesmen had come to view the power to invalidate a legislative enactment in conflict with constitutional law as one that inhered in an independent judiciary. The evidence to this effect from the debates in the Federal Convention is exceedingly strong, as a brief review of Madison's notes will demonstrate.

Judicial review was first mentioned in the debate over the Council of Revision on June 4, when Elbridge Gerry raised doubts about whether the judiciary ought to have a share in it and moved to confine it to the executive. To include the judges in it, he argued, would be redundant, "as they will have a sufficient check agnst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality. In some States the Judges had actually set aside laws as being agst. the Constitution. This was done too with general approbation." As though to emphasize that this is to be a nonpolitical power, he also noted, "It was quite foreign from the nature of ye. office to make them judges of the policy of public measures" (Farrand 1937, 1:97–98). Rufus King seconded the motion, "observing that the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation" (1:98). Butler Pierce's notes record King's further comment that "they will no doubt stop the operation of such as shall appear repugnant to the constitution" (1:109). Before moving on, we ought to note that the comments recorded here refer to judicial review of federal laws, as these were the laws to be reviewed by the Council of Revision. Furthermore, no dissent from the views expressed by Gerry and King is recorded by Madison or the other observers whose notes are contained in Farrand's *Records*.

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flected in the text of the Constitution is by no means unknown to the existing literature. For example, Prakash and Yoo (2003) provide a thorough presentation of the same evidence. I have provided a de novo account here for two reasons. First, my account differs from theirs insofar as it places primary emphasis on situating statements relevant to judicial review in the broader narrative of the debate on the judicial power and constitutional enforcement. Second, the narrative is essential for understanding the efforts of the framers to erect firm barriers to the politicization of courts even as they sought a partial legalization of constitutional conflict.

Judicial review surfaced again on July 17 in the midst of the debate over the proposed veto on state laws to be wielded by the national legislature. "Mr. Sherman thought it unnecessary, as the Courts of the States would not consider as valid any law contravening the Authority of the Union, and which the legislature would wish to be negatived" (Farrand 1937, 2:27). Defending the veto on state laws, Madison did not dispute the existence of the review power, but its practicability. "[The states] can pass laws which will accomplish their injurious objects before they can be repealed by the Genl Legislre. or be set aside by the National Tribunals. . . . A power of negativing the improper laws of the States is at once the most mild & certain means of preserving the harmony of the system." Madison was likewise loath to rely on state judges to ensure conformity with constitutional standards. "Confidence cannot be put in the State Tribunals as guardians of the National authority and interests. In all the States these are more or less dependt. on the Legislatures." Gouverneur Morris responded that he "was more & more opposed to the negative. The proposal of it would disgust all the States. A law that ought to be negatived will be set aside in the Judiciary depatmt. and if that security should fail; may be repealed by a Nationl. law" (2:28).

On July 21, Wilson moved to reinsert the judiciary in the revisionary power of the executive and revive the Council of Revision. His reasons for desiring the inclusion of the judiciary are instructive: "The Judiciary ought to have an opportunity of remonstrating agst projected encroachments on the people as well as themselves. It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect" (Farrand 1937, 2:73). Wilson here points to both the extent and limits of the judicial role. The review power takes the form of legal construction, not political discretion. Gerry reinforced Wilson's view. "It was making Statesmen of the Judges; and setting them up as the guardians of the Rights of the people," he warned. "It was making the Expositors of the Laws, the Legislators which ought never to be done" (2:75). Martin likewise disapproved of involving judges in the exercise of political discretion:

> A knowledge of mankind, and of Legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislature. And 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. It is necessary that the Supreme Judiciary should

> have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating agst. popular measures of the Legislature. (2:77)

Mason's response to Martin both acknowledged the legitimacy of the review power and set limits to its exercise:

> It had been said (by Mr. L. Martin) that if the Judges were joined in this check on the laws, they would have a double negative, since in their expository capacity of Judges they would have one negative. He would reply that in this capacity they could impede in one case only, the operation of laws. 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. He wished the further use to be made of the Judges, of giving aid in preventing every improper law. Their aid will be the more valuable as they are in the habit and practice of considering laws in their true principles, and in all their consequences. (2:78)

Surprisingly, the first objection to judicial review was not voiced until August 15, when Madison again attempted to involve the judges in the revision of federal laws, this time giving them a concurrent veto with the executive. Mercer approved the motion and "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 uncontroulable" (Farrand 1937, 2:298). Dickenson "was strongly impressed with the remark of Mr. Mercer as to the power of the Judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute. The Justiciary of Aragon he observed became by degrees the lawgiver" (2:299). In reply to them both, Morris said, "he 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" (2:299).

LAYING THE TEXTUAL FOUNDATION FOR JUDICIAL REVIEW

The review power of federal courts, already presumed by the delegates to exist, found its way into the text late in the convention's proceedings. The textual support for this power might best be summarized by taking note of the interaction of key provisions of Article III and the Supremacy Clause of Article VI. The latter reads as follows: "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" (Farrand 1937, 2:603). Observing that Article III extends the judicial power "to all cases arising under the Constitution and laws of the United States," Daniel Webster would later argue in his famous exchange with Robert Hayne in the Senate that the text had thereby settled on the Supreme Court the power ultimately to decide controversies over whether a law was "made in pursuance" of the Constitution, and thus part of the supreme law of the land under Article VI. "These two provisions . . . cover the whole ground. They are, in truth, the key-stone of the arch. With these, it is a Constitution; without them, it is a Confederation" (Belz 2000, 137).

Webster's argument for a nexus between the Supremacy Clause and Article III jurisdiction receives some support from the narrative of the convention debate, as these two provisions were amended within days of one another to produce the textual interaction. On August 23, Rutlidge moved to alter the first part of the Supremacy Clause, adding the Constitution to laws and treaties as the constituent parts of the "supreme Law" (Farrand 1937, 2:389). This arguably made explicit the status of the Constitution as a justiciable source of law in settling legal controversies in court. Then, on August 27, the delegates voted to add "all cases arising under this Constitution" to the jurisdictional menu of Article III (2:430), effectively drawing any case in which the outcome hinges on a provision of the Constitution within the purview of the federal judiciary (assuming, of course, that the parties have standing and the case presents a real controversy). And, since only laws "made in pursuance of" the Constitution were to be considered "the supreme Law of the Land," it would fall to federal courts ultimately to decide upon the constitutionality of federal laws in cases before them. The remainder of the Supremacy Clause, of course, affirmed the power of state judges to set aside unconstitutional state laws, and appeals from these decisions to the federal Supreme Court would surely qualify as cases arising under the Constitution.

A major objection to this narrative arises from Larry Kramer's treatment of the convention debates in his widely read plea for a "return" to popular constitutionalism. While he acknowledges that the Supremacy Clause is the germ of review of state laws and that the power conferred by it on state judges extends by implication to federal judges as well, he also denies any clear affirmation of the power to set aside federal law. Even after reviewing Wilson's and Mason's comments in the Council of Revision debate, he contends that the exchange is inconclusive because the matter under discussion there was how to secure better laws and not how to prevent unconstitutional ones (Kramer 2004, 73–78). But the rejection of the Council of Revision, as we have seen,

rested significantly on the stated assumption that judges would exercise a constitutional review power over federal law, however narrow one might wish to construe it.

More importantly, Kramer's cursory analysis of the convention omits entirely the critically important reaction that William Samuel Johnson's motion to insert "this Constitution" in the jurisdictional menu had elicited on August 27. Madison immediately raised an objection. "Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department" (Farrand 1937, 2:430). Madison's critical response assumes that jurisdiction over cases arising under the Constitution inevitably involves an exposition of the Constitution independent of legislative determination and that the text, as thus amended, would condone judicial review. That Madison, like Kramer, would prefer to rely on the political branches for constitutional enforcement is well established at this point, hence his reservations. But his apparent view that extending the judicial power to "all cases arising under this constitution" was tantamount to a textual codification of judicial review is of tremendous import and militates powerfully against Kramer's skepticism of judicial authority to review the constitutionality of federal laws.

Despite these objections, Johnson's motion carried unanimously without any sort of qualification, but Madison entered a significant clarification in his notes that has been the object of controversy and merits some brief attention here. "The motion of Docr. Johnson was agreed to nem:con," he recorded, "it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature" (Farrand 1937, 2:430). Madison does not indicate whether this constructive limitation received the verbal assent of the delegates or was merely adduced from their silence following his remark, so its authority for our understanding of the text is dubious. But even if it were taken at face value, it is not clear precisely what Madison means by "cases of a Judiciary nature." One might read his argument as an earlier version of Judge Gibson's famous critique of judicial review in *Eakin v. Raub*, 12 S. & R. 330 (Pa. 1825), denying that the Constitution is available to the judge as a justiciable source of law. Judges, this argument goes, must be deaf and blind to the provisions of the Constitution, except that they may look into provisions "of a Judiciary nature," such as those contained in Article III (and of which *Marbury* is a prime example).[9] If this is Madison's construction, it faces a grave difficulty

9. Judge Gibson's argument is complex, but the relevant part can be stated somewhat succinctly. The Federalist argument on behalf of judicial review, articulated in *Federalist* 78 (Hamilton et al. 1961) and in *Marbury v. Madison* (1803), rests on an analogy between con-

insofar as it stands in some tension with the text of Article III. No one would argue that, under this clause, the judiciary may construe only those federal laws and treaties that are "of a Judiciary nature." So why should the Constitution, which is not distinguished in the text from these other sources of law, be only partially accessible to adjudication? One could certainly argue, as Judge Gibson later does, that there is a relevant distinction to be made between a statute as ordinary law and a constitution as fundamental law, and that only the latter is available by implication to judges in legal cases. But including the Constitution in the jurisdictional menu did not leave the matter to implication; it made the Constitution a rule of decision in appropriate legal cases. In any case, this reading of Madison's language jumps too quickly to the conclusion that by "cases of a Judiciary nature" he means cases arising under a judicial provision of the Constitution. He does not refer to constitutional provisions of a judiciary nature; he refers instead to *cases* of a judiciary nature. He thus more plausibly means that the judiciary may apply the Constitution in justiciable cases properly before a court of law and may not presume to settle hypothetical or general constitutional controversies not arising in a concrete legal case. Given this reading, Madison's qualification of judicial review is roughly equivalent to the case and controversy doctrine, which not only has textual support but also is treated by Madison as the essence of the "judicial power" conferred on the judges by Article III. Thus, to the extent that we rely on that language to buttress the power of judicial review, we preserve the essential limits of the judicial function.

THE DISCRETIONARY COURT AND THE CONSTITUTION

Recall the constitutional concerns we set out to address. The modern shift toward the activity of abstract constitutional review, observable in the Court's discretionary control of its docket and its attendant agenda-setting power, potentially threatens to politicize the judicial power (Stone Sweet 2000, chap. 7; Stone Sweet and Shapiro 2002). In particular, the criteria employed to select

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stitutional construction and statutory construction. The Constitution, the argument goes, is a law like any other and may be consulted by judges when relevant to the decision of a case appropriately before them. The Constitution is, of course, a fundamental law, but a law nonetheless. Gibson does not challenge the claim that the Constitution is a fundamental law; he instead challenges the analogy between it and statutory law. Only the latter, he argues, is an appropriate basis for the adjudication of disputes. "It is the business of the judiciary to interpret the laws, not scan the authority of the lawgiver; and without the latter, it cannot take cognizance of a collision between a law and the constitution" (*Eakin v. Raub*, 12 S. & R. at 348–49). Judges must be blind to the law of the Constitution; their task is merely to give effect to the will of the legislature—unless, of course, the Constitution itself contains some explicit grant of power to the judges to look into the Constitution and determine the agreement between it and acts of the legislature.

cases allegedly push the justices away from the limited role of adjudicating particular cases and controversies on the merits and toward a broader policy-making role. Critics worry that precedent-setting and issue settlement concerns now compete with the interests of the particular litigants as criteria for decision. Moreover, the volume of petitions limits the impact of the case and controversy requirement by presenting the justices with a continual menu of cases from which to choose (though one might just as well point out that it is precisely the volume of potential cases that calls for judicial discretion to triage them). And discretionary review of state courts makes the Supreme Court the "policy maker" with respect to "whether the judicial power of the United States shall be called into play at all" when cases implicating federal questions or interests arise in state trials (Hartnett 2000, 1728). The harshest critics of this drift toward abstract constitutional review thus do not deny the legitimacy of judicial review per se, but they do insist that judicial review should be a mere incident of deciding particular cases. That is to say, we should expect judges to give effect to the Constitution when confronting a conflict of laws in a particular case, but we should not look to the Court as an institutional arbiter of constitutional questions and of federal conflicts more generally. To do so, these critics would argue, is to invite politicization and enact judicial supremacy.

But the foregoing analysis reveals this framing of the issue as something of a false dichotomy. Movement toward the model of abstract review does perhaps contribute to politicization and judicial supremacy by focusing the Court's attention on settling general questions rather than deciding particular cases, but it does not inevitably lead to these consequences. The institutional rationale on display in the deliberations of the framers reveals a role for the Supreme Court that goes considerably beyond the concerns of litigants in seeking to settle important questions, but it does so in a way that is limited by the legal forms of the judicial process and in keeping with the preservation of a distinct and not wholly politicized judicial power. The framers recognized the legitimacy of judicial review as a principal institutional means of preserving constitutional limits on both the federal and state governments and of mediating collisions between the two. The exercise of judicial review was repeatedly raised as an alternative to other institutional means of settling federal conflict and enforcing constitutional limits. Thus, the framers quite consciously treated particular cases as means of settling larger questions of public importance, insinuating the judicial power into politically divisive controversies. The review power in the US Constitution was a valid implication of the judicial function and therefore somehow central to it. And the fitness of judges to perform this function flowed not so much from their elite status as from the institutional advantages of an adversarial legal process, which channeled conflicts over federal power, especially as these implicated collisions with the states, away from the hazard-

ous processes of forcible and political resolution and toward the tamer procedural forms of legal dispute.

This tendency in the framers' deliberations to look to courts for the preservation of written constitutional norms thus anticipated the modern global trend of "judicial empowerment through constitutionalization" observed by scholars of comparative constitutionalism (Hirschl 2004, 212). At the same time, in contradistinction to the prevailing modern approach, the framers chose to leave the review power as an implication of the traditional power of deciding cases rather than setting it off as an adjudicatory function distinct from the ordinary judicial process (Stone Sweet and Shapiro 2002). That is, judicial review remains a derivative of the traditional judicial function even as it plays a decidedly political role in the life of the polity.

This means that, while supportive of a fairly broad understanding of judicial review, the framers' deliberations do not redound entirely to the benefit of judicial discretion. They also reveal significant limits. There was, for example, considerable disagreement over the fitness of judges to play a formal part in the *prospective* revision of laws through participation in the executive veto. Would they add some unique competency to deliberations on the wisdom of legislative enactments? On this the delegates were divided, though we should note that the convention consistently rejected the Council of Revision despite the support it received from influential members such as Madison and Wilson. But most importantly, their very disagreement points to a deeper consensus on the more fundamental matter of the grounds for exercising the review power. The manifest motive for involving judges in the Council of Revision is that they cannot in their normal capacity consider the wisdom or justice of a law apart from promulgated constitutional standards. In order to employ such extraconstitutional standards, the judges would need some sort of express authorization in the Constitution. Madison's proposal to give a panel of judges a concurrent veto was one such authorization.[10] Importantly, however, this would not have enabled all federal judges, acting as judges, to veto laws on the basis of policy, but only those composing the council convened for that purpose. In short, the underlying consensus among the delegates held that judges, when acting as judges in courts of law, may set aside a law that conflicts with the Constitution, but this decision is an exercise of legal, not political, judgment.

The framers' deliberations also furnish strong support for the case and controversy requirement, as well as other threshold doctrines such as political

10. A similar authorization was contained in a document submitted by Edmund Randolph on July 10: "that any individual conceiving himself injured or oppressed by the partiality or injustice of a law of any particular State may resort to the National Judiciary, who may adjudge such law to be void, if found contrary to the principles of equity and justice" (Farrand, 1937, 3:56).

questions and standing. Confinement to live cases was conceived as a conscious check on judicial excess. Madison, Wilson, and Mason faced considerable opposition to any effort to empower the judges to exercise something like the review power outside the context of particular justiciable disputes. Indeed, as we have seen, Madison himself had misgivings about submitting constitutional questions to the judges except insofar as they are presented in a concrete legal case. Standing requirements in particular ought therefore to be scrupulously preserved as a means of preventing metamorphosis into an illicit Council of Revision.

At the same time, it is essential to recognize that the case and controversy requirement was not then, and is not now, comprehensively descriptive of the judicial role. It is instead better conceived as recognition of the potential tension that existed between the Supreme Court's novel institutional functions of mediating federal conflict and securing constitutional limits on one hand and the traditional judicial function of deciding particular cases on the other. These two aspects of the framers' understanding of judicial power—its limitation to justiciable cases and its use of those cases as occasions to address broader questions—cannot be divorced from one another, and both find their way into the text of the Constitution. The resulting tension in the judicial role, which performs the function of abstract review through the forms of concrete review, was not an unintentional blunder, but a deliberate effort to channel constitutional questions and federal conflict, unavoidably political matters, into a legal forum. To place this finding in terms native to institutionalist analysis of judicial politics, the framers sought to effect a modest judicialization of politics while avoiding wholesale politicization of the judiciary.

More generally, the complex judicial role that emerges from this account of the framers' deliberations tends to undermine the conventional view that judicial supremacy and departmentalism are mutually exclusive systems of constitutional enforcement. It rather confirms the historical-institutionalist insight that they are alternating, and sometimes concurrent, modes of constitutional politics (Whittington 2007). By this account, the framers laid the groundwork for abstract constitutional review (and attendant claims of judicial supremacy) while also channeling these decisions through a legal process that is bounded by its political context—particularly the system of separated powers—and thus subject to legitimate challenge by the political branches. The institutional architecture of the Constitution may establish the conditions for the interpretive contest, but it does not pick the winner a priori.

Though often cited as a paradigmatic specimen of departmentalism, such complexity was reflected in Abraham Lincoln's challenge to the controlling authority of the Court's decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857). He insisted on the right of the political branches to engage in coordinate con-

struction, but he did not exclude the possibility that the Court might—and in many cases should—ultimately prevail. While the Court, with the blessing of the nation's political elite, presumed to have "settled" the questions of black citizenship and slavery in the territories, Lincoln insisted that the Court had only decided these contested constitutional questions as applied to the particular case of Dred Scott. Speaking to an audience in Springfield, Illinois, in 1857, he quoted approvingly from president Andrew Jackson's veto of the bank bill a generation earlier, declaring that judicial decisions "should not be regarded as deciding questions of constitutional power, except where the acquiescence of the people and the States can be considered as well settled." Instead, "Congress, the executive and the court must each for itself be guided by its own opinion of the Constitution" (Lincoln 2001, 356–57).

Yet Lincoln was not content to stop with Jackson's departmentalist argument, but went beyond it insofar as he recognized that coordinate construction does not foreclose the possibility that the Court will often win the interpretive battle. "We think its decisions on Constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution." That the Court's precedents would control national policy was certainly the case where a decision was unanimous, unbiased, and in keeping with the "steady practice" of the government. This in itself is hardly a departure from departmentalist orthodoxy. But Lincoln goes further and suggests that, even when "wanting" in these respects, if the case "had been before the court more than once, and had there been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent" (Lincoln 2001, 354–55). The Court, it seems, can wear down or win over the political branches through a prudent adherence to a controversial line of reasoning. Notably, in Lincoln's account the weakness of the *Dred Scott* decision rests heavily on his contention that it is a departure from precedent—"that all there ever was, in the way of precedent up to the *Dred Scott* decision, on the points therein decided, had been against that decision" (Lincoln 2001, 357). Lincoln's argument thus implies a delicate balance between the prevailing authority of the Court to "say what the law is" in a manner that is binding on the government and the exceptional authority of the political branches to challenge the Court's interpretive authority. And there is a powerful argument to be made that this delicate balance tends to play out in a stable and rational manner in American political development (Whittington 2007).

In sum, the text of the Constitution, as its development in the Federal Convention shows, deploys judicial offices both as strictly adjudicatory and as po-

litical institutions. Some delegates, Madison in particular, would have carried this yet further by involving judges in the prospective review and revision of laws, thus anticipating the European model of abstract review by more than a century. The institutional architecture that emerged instead preserved the forms of jurisprudence while performing the functions of a political institution, creating a potential tension in the role of the Supreme Court. We must decide how to navigate that tension. If one is to remain faithful to the institutional rationale of the text, eliminating its political functions will not suffice. This has been the gist of much clamor for popular constitutionalism as an alternative to judicial custodianship of the Constitution. At the same time, dispensing with the formal barriers to naked political activism by judges would destroy the very virtues on which the framers relied when they settled these adjudicatory functions on the Court in the first place. Courts, to remain fit arbiters of these questions, must retain their jurisprudential virtues, and such virtues are inseparable from the institutional forms of legal proceedings. Standing rules and confinement to real cases—"cases of a Judiciary nature," as Madison put it—are therefore integral to the Constitution's design, as are the institutional protections of tenure during good behavior and irreducible salary. For these not only protect the independence of judges from undue political influence but also *deprive* judges of any plausible claim to speak as democratic representatives. They must speak for the law as judges or for themselves as aristocratic rulers.

Thus, in coming to a fuller appreciation of the institutional complexity of the Court's "political" role in the American polity, we are not transcending the framers' understanding of the judicial role, but learning from it. As C. Herman Pritchett admonished his fellow students of the Court in the midst of the behavioral revolution, "political scientists who have done so much to put the 'political' in 'political jurisprudence' need to emphasize that it is still 'jurisprudence.' It is judging in a political context, but it is still judging; and judging is something different from legislating or administering. Judges make choices, but they are not the 'free' choices of Congressmen" (1969, 42). Dahl's remark, with which this article began, was perhaps merely intended as playful ribbing, carrying as it did a heavy undercurrent of irony, but there is a sense in which Americans have enjoyed the "best of both worlds" with respect to the Supreme Court's role in the constitutional order, and we can learn from the institutional logic of the framers how to keep doing so.

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