CLARIFYING DEPARTMENTALISM: HOW THE FRAMERS' VISION OF JUDICIAL AND PRESIDENTIAL REVIEW MAKES THE CASE FOR DEDUCTIVE JUDICIAL SUPREMACY

TABLE OF CONTENTS

"After the Destruction of the King in Great Britain, a more pure and unmixed tyranny sprang up in the parliament than had been exercised by the monarch."
-James Wilson[1]

"[I]f the whole legislature ... should attempt to overleap the bounds, prescribed to them by the people, I, in administering the public justice of the country, will ... [point] to the constitution, [and] will say ... here is the limit of your authority; and hither, shall you go, but no further."

-George Wythe, Commonwealth v. Caton[2]

INTRODUCTION

John Adams once defined a "republic" as "a government of laws and not of men."[3] Even Adams would acknowledge, however, that laws must have their limits, and that men, as the makers and interpreters of laws, must necessarily define what those limits are.[4]

---

1. JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 408 (Gaillard Hunt & James Brown Scott eds., Oxford University Press 1920) [hereinafter MADISON, DEBATES].

2. 8 Va. (4 Call) 5, 8 (1782).

3. MASS. CONST. of 1780, art. XXX; JOHN ADAMS, NOVANGUS (1774), *reprinted in* 4 THE WORKS OF JOHN ADAMS 99, 106 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1969) (1856); *see also* THOMAS PAINE, *Common Sense*, *reprinted in* COMMON SENSE, THE RIGHTS OF MAN, AND OTHER ESSENTIAL WRITINGS OF THOMAS PAINE 23, 48-49 (Sidney Hook ed., NAL Penguin Inc. 1969) (1776) ("But where, says some, is the King of America? I'll tell you. Friend, he reigns above, and doth not make havoc of mankind like the Royal Brute of Britain. Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth [and] placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know, that so far we approve of monarchy, that in America THE LAW IS KING.").

4. *See* JOHN ADAMS, THOUGHTS ON GOVERNMENT (1776), *reprinted in* THE WORKS OF JOHN ADAMS, *supra* note 3, at 193, 198 (describing the division of power between the three branches of government to prevent any branch from surpassing the constitutionally imposed limitations on its power ("[T]he judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that.")). In fact, Professor Scott Gerber notes that the Framers, particularly those in Virginia, relied on John Adams's early writings about the judiciary's role in keeping lawmakers within their proper bounds in canonizing the state courts' power of judicial review. Scott D. Gerber, *The Political Theory of an Independent Judiciary*, 116 YALE

Indeed, in the American legal system, the idea that men can invalidate legislation that directly contradicts the Constitution has become an almost axiomatic constitutional directive. Not only does the Constitution itself implicitly support this position,[5] but the nullification of unconstitutional laws is also consistent with America's early political climate, which emphasized contractual constraints upon government authority[6] and the necessity of limited government power.[7]

This anxiety toward overzealous government, as well as the legislative power that such a government would entail, is ubiquitously manifest within the Founding documents. In *Federalist No. 1*, for example, Alexander Hamilton cautioned readers against one of the proposed Constitution's main criticisms: that the national government would expand its powers at the expense of individual and state liberty.[8] "An enlightened zeal for the energy and efficiency of government," he wrote, "will be stigmatized as the offspring of a temper fond of despotic power and hostile to the principles of liberty."[9] Madison echoed Hamilton's reassurances, reminding the Constitution's skeptics that the Framers had created "neither [a] wholly *national* nor [a] wholly *federal*"[10] political system that would

---

L.J. POCKET PART 223, 228 (2007), http://thepocketpart.org/2007/01/09/gerber.html.

5. *See* U.S. CONST. art. VI, § 1, 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." (emphasis added)); *see also* THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The Constitution ought to be preferred to the statute ....").

6. *See, e.g.*, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 268-70 (1969) (discussing the notion of constitutions as contracts that limit the powers that the government may properly exercise).

7. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 60 (2005) ("Jefferson and Madison aimed to structure government power so as to promote compliance with the specific legal rights and rules established by the underlying state or federal constitution itself. Thus Jefferson spoke of enforcing the 'legal limits' on each part of government, and Madison claimed that the federal Constitution's very structure would maintain the rules 'laid down in the Constitution,' would keep the branches in their constitutionally 'proper' places, and would thus safeguard 'public rights' and 'the rights of the people' against improper 'encroachments.'").

8. THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 5, at 29.

9. *Id.*

10. THE FEDERALIST NO. 39 (James Madison), *supra* note 5, at 242.

prove incapable of abusing its delineated constitutional authority.[11] This desire to prevent the national government from perverting its inherently limited capabilities continued even after the Constitution's ratification. In Washington's administration, for instance, Thomas Jefferson opposed Congress's ability to pass a bill authorizing the creation of a national bank. "To take a single step beyond the boundaries [of the Constitution]," Jefferson wrote, "is to take possession of a boundless field of power, no longer susceptible of any definition."[12]

And yet, despite the Framers' apparent agreement that the national government—and more specifically, the national legislature—should not overstep its proper bounds, Madison's notes from the Constitutional Convention contain scant evidence that the delegates favorably discussed judicial review.[13] Even more puzzling is the fact that the Convention delegates only briefly mentioned other potential mechanisms (e.g., presidential review) for remedying the passage of unconstitutional statutes.[14] Certainly, this lack of clarity did *not* mean that the Framers granted to Congress an unlimited legislative power. To the contrary, *The Federalist* warned that "[t]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."[15] Given the legislature's propensity to increase its own lawmaking prerogative, some Founders advocated the necessity of imposing constitutional limits that would prevent Congress from

---

11. *See id.* Madison also noted that delegated powers should be narrowly construed. *See, e.g.*, THE FEDERALIST NO. 41 (James Madison), *supra* note 5, at 258 ("It has been urged and echoed that the power 'to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States,' amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction.").

12. Thomas Jefferson, *Opinion on the Constitutionality of a National Bank* (Feb. 15, 1791), *reprinted in* THOMAS JEFFERSON: WRITINGS 416, 416 (Merrill D. Peterson ed., 1984).

13. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 904 (1985) ("[T]he Philadelphia framers did not discuss in detail how they intended their end product to be interpreted ...."). *But see* MADISON, DEBATES, *supra* note 1, at 51 (noting that James Wilson had originally suggested the possibility of jointly vesting the President and the Supreme Court with an absolute veto).

14. *See, e.g.*, *infra* notes 97-98 and accompanying text.

15. THE FEDERALIST NO. 48 (James Madison), *supra* note 5, at 306.

either adjudicating[16] or enforcing[17] its own legislation. In other words, they wished to avoid a system in which the legislature would "*decid[e] rights* which should have been left to *judiciary controversy*, [or to] *the direction of the executive*."[18] This emphasis on the ability of the legislature's coordinate branches to "decide rights" seemed to indicate that those branches might each possess some nominal degree of *interpretive sovereignty* with which no other branch, least of all Congress, could constitutionally interfere. For some Framers, then, the Constitution appeared to defend a system that vested each branch with the ability to make its own constitutional judgments.

Despite this apparent belief in constitutional review, however, the Framers failed to indicate how each branch's interpretations would relate to each other, to define the areas in which each branch's interpretations would predominate, or to identify what each branch's sphere of constitutional interpretation could permissibly include. In short, even though the Founders clearly intended a system that vested the power to review congressional legislation in multiple constitutional actors (namely, the President and the Supreme Court), they did not specify exactly *how* that interpretive power should be divided.[19] In so doing, the Framers rendered their constitutional creation incomplete. By leaving open the possibility that multiple constitutional actors might disagree about a statute's constitutionality, the Framers appeared to have unwittingly inhibited the political system's ability to control unconstitutional legislation.

Because the Framers obviously sought to prevent the national government's ability to overstep its proper bounds by passing such legislation, this Note seeks to reexamine the indicia of constitutional review that the Framers sewed into the fabric of the American legal system. It then argues that the Framers intended to create a system that honored departmentalism, but that also filtered department-

16. *See, e.g.*, THE FEDERALIST NO. 47 (James Madison), *supra* note 5, at 300 (quoting Montesquieu ("Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*.")).

17. *See, e.g.*, *id.* (quoting Montesquieu ("'When the legislative and the executive powers are united in the same person or body,' says he, 'there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.'")).

18. THE FEDERALIST NO. 48 (James Madison), *supra* note 5, at 308.

19. *See* discussion *infra* Part II.B.

alism through an informal heirarchy of multilayered constitutional review. This informal hierarchy best reflected a departmental system of deductive judicial supremacy, in which each branch of the national government engages in constitutional review, but in which the Supreme Court provides the most telling assessments of constitutionality.[20]

This Note is pertinent because, as Professors Gary Lawson and Christopher Moore documented only a decade ago, "no one ... has even attempted to put forth a plausible originalist case for a generalized judicial supremacy in constitutional interpretation. Instead, those who defend judicial supremacy ... have done so on grounds unrelated to the Constitution's original public meaning."[21] This Note seeks to provide precisely what Lawson and Moore claim is lacking in constitutional scholarship: an originalist case for judicial supremacy that properly takes into account the Founders' consideration of both judicial and presidential review. In so doing, this Note attempts to define the Founders' political creation in understandable and concrete constitutional terms.

Part I lays the groundwork for the existence of American constitutional review. Parts II and III examine two forms of this constitutional review: judicial and presidential review. Part IV introduces American departmental theory of government and explains the modern concept of deductive judicial supremacy. Finally, Part V proposes a paradigm to explain the interrelation of presidential and judicial review in the multilayered interpretive framework that the Framers created. In so doing, it likens the Framers' proposed system to the modern notion of deductive judicial supremacy—though in a way that takes into account the executive and the judiciary's comparative relationship to the legislature instead of simply considering the Supreme Court and the legislature alone.

Methodologically, this Note appears to operate upon a contestable premise: that the intent of the "Framers" can be properly discerned. With this limitation in mind, this Note does not seek to establish that *every* Framer intended there to be presidential review, judicial review, or some combination of the two—as such a proposition could

---

20. *See* Youngstown Sheet & Tube Co. v. Sawyer, 348 U.S. 579, 637 (Jackson, J., concurring).

21. Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1292 (1996).

be easily disproven by even the most cursory glance at the historical record.[22] Nor does it aim to standardize the Framers' beliefs about whether the President's or the Supreme Court's constitutional determinations should predominate. Rather, this Note means to show that by supporting judicial and presidential review, the Framers *intended* to establish an interpretive departmentalist paradigm that is best characterized as a system of deductive judicial supremacy. It is this limited proposition, as well as the underlying analytical methodology supporting it, for which this Note makes a valuable legal contribution.[23]

In documenting the Framers' generalized intent, this Note does *not* suggest that "original intent" is the appropriate canon to guide modern constitutional interpretation. In fact, some Framers outwardly opposed the use of intent.[24] This Note merely aims to *document* how the Framers intended each component of departmental constitutional review to one another, briefly contend that these structural intentions form one plausible way to reconcile departmentalism with judicial supremacy, and advise that the Framers' general intent in the area of departmental constitutional

---

22. Indeed, many Framers did not believe in the idea of judicial review, and still others opposed the idea of a powerful executive that was capable of interpreting congressional legislation. *See* discussion *infra* Part III.A.1; *see also* Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 214 (1980) ("[A]n intentionalist must necessarily use circumstantial evidence to educe a collective or general intent."). For this reason, this Note aims to provide a generalized, moderate intentionalist view of the interpretive relationship between the presidency and the Supreme Court. *See id.* (arguing that it is justifiable for moderate originalists to treat the particular Framers' writings or statements as evidence of the Framers' generalized intent). It does not broadly advocate original intent as a workable canon of constitutional interpretation, but merely documents the Framers' intentions as they pertain to departmental constitutional review and infers the hierarchical way in which the Framers designed such departmental review to operate. This Note thus avoids many of the pitfalls inherent to the canon of original intent. *See, e.g.*, *id.* at 221 ("The act of translation required [for those who advocate original intent] … involves the counterfactual and imaginary act of projecting the adopters' concepts and attitudes into a future they probably could not have envisioned. When the interpreter engages in this sort of projection, she is in a fantasy world more of her own than of the adopters' making.").

23. For the sake of clarification, this Note uses the terms "Founders" and "Framers" interchangeably.

24. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 89 (2004) (quoting Edmund Randolph ("But ought not the constitution to be decided on by the import of its own expressions? What may not be the consequence if an almost unknown history should govern the construction?")).

review coincides with the enduring, pragmatic integrity of the Constitution itself. Rather than focus purely on the constitutional text ("interpretation"), this Note documents the Framers' intent in a way that informs the inter-branch structure that the text created. In so doing, it does not see to transcribe the original meaning of the text itself—as the Constitution contains virtually no express, textual guidance on the issue of how judicial and presidential review should interrelate.[25] Instead, this Note articulates a workable framework for governmental actors to implement ("construction") that is *both* consistent with the Framers' intentions and the Constitution that they created, *and* workable as a matter of structural constitutional law.

I. THE PRAGMATIC REASONING BEHIND THE FRAMERS' VISION OF CONSTITUTIONAL REVIEW

As Madison famously argued in *Federalist No. 51*, "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men," he continued, "the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[26] Madison's predilections resonated well with other Framers, who aimed both to define firmly the bounds of the national government and to counteract the partisanship of governmental actors through a system of enumerated checks and balances.[27] This system included certain internal checks (often pitting each branch against one another) and external checks (which took into account a "pluralistic view" of society and made it difficult for any one group to control the na-

25. For more guidance on the original public meaning canon of constitutional interpretation, see generally *id.*; *see also* Lawrence B. Solum, *Semantic Originalism* 4 (Illinois Pub. Law & Legal Theory Research Working Group, Paper No. 07-24), *available at* http://papers.ssrn.com/abstract=1120244 ("[*O*]*riginal public meaning originalists* believe that the original meaning of the Constitution is a function of the original public meaning (or 'conventional semantic meaning') of a given constitutional provision at the time the provision was framed and ratified.").

26. THE FEDERALIST NO. 51 (James Madison), *supra* note 5, at 319.

27. *See* RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM 50 (1970).

tional government).[28] The Framers wove these checks throughout the Constitution's procedural framework—making clear that each branch possessed some nominal degree of autonomy from its coordinate branches, and that a system that delegated powers to all branches would be most capable of controlling the excesses of any one.[29]

In the legislative process, however, the enumerated constitutional checks and balances are decidedly front-loaded. Although the Constitution imposes qualifications on Representatives[30] and Senators[31] to help filter against unwise legislation,[32] specifies a general method by which laws are to be passed,[33] and prescribes a list of the areas in which Congress may appropriately legislate,[34] the *text* does not expressly prescribe any particular process for overturning legislation that might satisfy the necessary procedural prerequisites, but might nevertheless be substantively unconstitutional.[35]

---

28. *Id.* at 54-55. This view represented that held by Jefferson, Adams, and Madison. *Id.* at 55 ("Like John Adams, [Madison] saw with great clarity the importance of supplementing the internal balance of the constitution with the external balance of the various interests and forces that made up society. Here Madisonian pluralism owes a great deal to the example of religious toleration and religious liberty that had already been established in eighteenth-century America.").

29. *See, e.g.*, U.S. CONST. art. I, § 3, cl. 6 (giving the Senate "the sole power to try all Impeachments"); art. I, § 7, cl. 3 (granting Congress the power to override vetoes); art. II, § 2, cl. 1 (giving the President the power to pardon); art. III, § 2 (according the Supreme Court original jurisdiction "[i]n all cases affecting Ambassadors, other public Ministers and Consuls," and those in which a State shall be party).

30. U.S. CONST. art. I, § 2, cl. 2.

31. U.S. CONST. art. I, § 3, cl. 3.

32. *Cf.* THE FEDERALIST NO. 62 (James Madison), *supra* note 5, 374-75 ("The propriety of [the distinctions between the qualifications for the House of Representatives and the Senate] is explained by the nature of the senatorial trust, which, requiring greater extent of information and stability of character, requires at the same time that the senator should have reached a period of life most likely to supply these advantages; and which, participating immediately in transactions with foreign nations, ought to be exercised by none who are not thoroughly weaned from the prepossessions and habits incident to foreign birth and education. The term of nine years appears to be a prudent mediocrity between a total exclusion of adopted citizens, whose merits and talents may claim a share in the public confidence, and an indiscriminate and hasty admission of them, which might create a channel for foreign influence on the national councils.").

33. U.S. CONST. art. I, § 7.

34. U.S. CONST. art. I, § 9.

35. Indeed, Article III only provides that:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their

Similarly, it does not indicate the standard that the body responsible for overturning such unconstitutional legislation should use in making its determinations, or advise how the constitutional judgments of each branch should relate to each other.

One explanation for these omissions is that the Framers did not foresee that a properly designed constitutional system, in which checks and balances play so crucial a role in the legislative process, would ever produce unconstitutional laws. Convention Delegate John Mercer, for example, thought that the sort of laws resulting from the Constitution's legislative matrix "ought to be well and cautiously made, and then ... be uncontroulable."[36] Mercer's logic implied that the front-loaded system of checks and balances[37] would serve preemptively to neutralize any unconstitutional actions that poisoned otherwise proper legislation, and that any determinations of constitutionality would necessarily occur at the time when Congress initially contemplated legislation rather than the date when that legislation ultimately took effect. As a result, Mercer viewed judicial review—and presumably any form of constitutional review—as an unnecessary "interference ... in the Legislative business."[38]

Mercer's logic seems counterintuitive, however, when placed within the context of a Constitution that stressed internal checks on each branch's power. Considering the Framers' proclivities toward limited government, the more plausible explanation for the Constitution's lack of specificity about constitutional review is that many Convention delegates simply assumed that the government they established would necessarily entail it.[39] To assume otherwise—that is, to defend a system in which the legislature serves as

---

> Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1. Similarly, Article II affords the President a limited veto on legislative enactments. *See infra* Part III.C.1.

36. MADISON, DEBATES, *supra* note 1, at 406.

37. *See supra* notes 30-34 and accompanying text.

38. MADISON, DEBATES, *supra* note 1, at 406 (quoting Charles Pinkney's opposition to judicial interference in Legislative business).

39. *See* Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 507-08 (2006).

the sole judge of its actions—would be to contradict the constitutional framework defended in *The Federalist*.

Certainly, *The Federalist* specified that "none of [the three branches of government] ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers."[40] But, again, Madison also argued that the legislature is the most powerful branch[41] and suggested the real possibility that it could, contrary to Mercer's views, expand beyond its delegated authority in ways detrimental to its coordinate branches.[42] Constitutional review proved necessary, then, to prevent this sort of legislative monolith from forming.

To be sure, Congress could still pass unconstitutional laws, but those laws must overcome, as Akhil Amar explains, "an ingenious system of constitutional checks and choke points designed to minimize the likelihood that *arguably unconstitutional* federal law[s] would pass and take effect."[43] Even if such laws do pass, and "constitutional interpreters outside the legislature deemed [those laws to be] unconstitutional, they could—via executive pardons and nonenforcement, ... judicial review, ... and the like—render the statute a virtual dead letter...."[44] This separation of interpretive discretion that Amar describes, which made possible the substantive invalidation of otherwise procedurally proper legislation, became "for many Americans an 'essential precaution in favor of liberty.'"[45] Amar's perspective on the necessity of constitutional review is also consistent with Alexander Hamilton's rationale in *Federalist No. 78*. Writing that "[n]o legislative act ... contrary to the Constitution, can be valid," for example, Hamilton emphatically argued in favor of

40. THE FEDERALIST NO. 48 (James Madison), *supra* note 5, at 305.

41. *Id.* at 307.

42. *Id.* ("It is not unfrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere. On the other side, the executive power being restrained within a narrower compass and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves. Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.").

43. AMAR, *supra* note 7, at 62.

44. *Id.*

45. WOOD, *supra* note 6, at 549.

limiting Congress's power. "To deny [that the Constitution supersedes congressional authority]," Hamilton wrote, "would be to affirm that the deputy is greater than his principal; that the servant is above his master … that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid."[46]

In light of these systematic restraints, it is hardly surprising that many of the Founders supported checks on the legislature similar to the limitations imposed on other elements of the new national government. If, as Mercer claimed, there was no constitutional review in the American legal system, then that system would be less capable of controlling legislative abuse. Rather than check one branch's power against another, the legislature would serve as the judge of its own strength.[47] This self-monitoring discretion would permit the legislature potentially to expand beyond the enumerated bounds outlined in Article I—to the point that it infringed upon the powers of either the other two branches, or upon the powers of the states.

The Constitution's failure to provide explicitly for substantive review of constitutional determinations,[48] then, need not prevent such review from taking place. As Madison noted in *Federalist No. 48*, "a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."[49] Put differently, the Constitution's textual system of checks and balances might not always be sufficient to withstand the aggregation of power into the hands of a particular branch, especially in the legislative context. If the Framers envisioned no *extra textual* mechanism to adjudicate the constitutionality of legislative actions, there would be no way to ensure that legislative actions remained faithful to the constitutional *text*. With congressional self interest in reelection[50] and its

46. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 5, at 466.

47. *See supra* notes 38-42 and accompanying text.

48. *See, e.g.*, *infra* note 105 and accompanying text.

49. THE FEDERALIST NO. 48 (James Madison), *supra* note 5, at 313.

50. *See* THE FEDERALIST NO. 52 (James Madison), *supra* note 5, at 327 ("[The House of Representatives] should have an immediate *dependence on*, and an intimate sympathy with, the people.") (emphasis added). The Senate, of course, was not popularly elected until 1913. U.S. CONST. amend. XVII. However, Madison's second point—that Congress as a whole has a tendency to expand its own powers—holds as true for the Senate as it does for the House.

tendency to impede upon the other branches by drawing their powers into its own "impetuous vortex,"[51] the need for an additional legislative check becomes even more apparent.

The real question, then, is not *whether* the Founders authorized constitutional review, but *how* they designed such review to occur—through a joint effort by two equally powerful branches, or through a system in which each branch would possess some interpretive autonomy, but which vested one branch with a wider swath of constitutional deference. To understand how the Framers distributed the power of constitutional review between the branches, however, it is first necessary to understand how they envisioned the power itself.

II. JUDICIAL REVIEW

Louis Jaffe once wrote that "[t]he availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."[52] Despite the fact that the Framers did not discuss judicial review in substantial depth at the Constitutional Convention,[53] the historical evidence suggests that many of them nevertheless regarded it with the same deference as Jaffe did when he wrote in the mid-twentieth century.

A. State Judicial Review

1. The Foundations of State Judicial Review

Even before the Constitutional Convention, judicial review possessed a rich history at the state level. Professor Mary Sarah Bilder, for instance, argues "that judicial review was initially taken for granted" because the Founders "presumed that courts would void legislation that was repugnant or contrary to a [state] constitution."[54] Bilder claimed that the Founders largely accepted judicial

---

See supra notes 15-18 and accompanying text.

51. THE FEDERALIST NO. 48 (James Madison), *supra* note 5, at 309.

52. Louis L. Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 401, 401 (1958).

53. *See supra* note 13 and accompanying text.

54. Bilder, *supra* note 39, at 507-08.

review because it built upon a practice already deeply entrenched in the fabric of colonial legal interpretation: corporate charters.[55] In other words, England had structured colonial settlements, including Virginia and Massachusetts Bay, as "corporations,"[56] and "[c]orporate treatises declared that corporate bylaws could not be *repugnant* to the laws of the nation."[57] As a consequence of colonial courts' routine hierarchical evaluation of corporate charters against the backdrop of English law, the Founders' experience with those charters might have intellectually predisposed them to accept the hierarchical system of federal constitutional review—under which courts similarly evaluated laws based on their incompatibility with, or repugnancy to, the United States Constitution.[58]

Judicial review proved especially widespread in Virginia. Every member of the Virginia ratifying convention who spoke on judicial review, for example, supported the practice.[59] Patrick Henry argued in its favor, claiming that the Virginia state judges in the *Case of the Prisoners*[60] "had [the] fortitude to declare that they were the Judiciary and would oppose unconstitutional acts."[61] Similarly, John Marshall wrote that "[i]f [Congress made] 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 .... [and] [t]hey would declare it void."[62] Other supporters of judicial review included the first U.S. Attorney General Edmund Randolph,

---

55. *See id.*

56. *Id.* at 535.

57. *Id.* at 514 (emphasis added).

58. *See id.* at 511. The Framers' corporate-based familiarity with judicial review, however, did not mean that the Framers viewed states as corporations. In fact, quite the opposite. *See, e.g.*, James Wilson, Speech on the Constitution (Oct. 6, 1787), *reprinted in* FOUNDING AMERICA: DOCUMENTS FROM THE REVOLUTION TO THE BILL OF RIGHTS 425 (Jack N. Rakove ed., 2006); *see also* Kurt T. Lash, *Leaving the* Chisholm *Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577, 1692 (2009) (documenting how some Founders—namely, Massachusetts's James Sullivan—did not think states should be reduced "to mere nonsovereign corporation[s]" or completely consolidated under "a solely sovereign national government").

59. William Michael Treanor, *The* Case of the Prisoners *and the Origins of Judicial Review*, 143 U. PA. L. REV. 491, 562 (1994) [hereinafter Treanor, *Prisoners*].

60. Commonwealth v. Caton, 8 Va. (4 Call) 5 (1782).

61. Treanor, *Prisoners*, *supra* note 59, at 563 (quoting 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1219 (John P. Kaminiski & Gaspare J. Saladino eds., 1990) [hereinafter DOCUMENTARY HISTORY]).

62. *Id.* (quoting 10 DOCUMENTARY HISTORY, *supra* note 61, at 1431).

William Grayson (who argued that judicial review provided a means to check an oppressive Congress), George Mason (who spoke of the judiciary's ability to declare certain laws—specifically, *ex post facto* laws—unconstitutional), and Edmund Pendleton (who claimed that "honest judges" would never submit to unconstitutional laws).[63]

Given the political climate out of which Virginia attorneys grew, Virginians' support for judicial review was not surprising. In addition to the *Case of the Prisoners*, in which a Virginia court first declared a state law unconstitutional,[64] Virginians had also witnessed *Kamper v. Hawkins*,[65] in which the court explicitly exercised judicial review on the basis that "the people were 'the only sovereign power,'" and that the legislature remained subordinate to people's wishes.[66] As an advocate in *Kamper*, St. George Tucker had no problem advocating for judicial oversight of legislative actions, despite the fact that the Virginia Constitution's drafters' had not explicitly included judicial review in the text of the constitution itself.[67] In so doing, Tucker implicitly claimed that constitutions included the concept of extra textual checks on improper legislation, and that judges' ability effectively to adjudicate cases necessarily entailed an ability to make determinations of substantive legal validity about laws that in some way undermined the constitutions that the popular will had charged them to uphold.[68] This Virginia precedent favoring judicial review unquestionably influenced Marshall's decision in *Marbury v. Madison*,[69] in which the Supreme Court famously rubberstamped judicial review by reiterating that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[70]

---

63. *Id.* at 563 n.338.

64. *Id.* at 569. In this case, future United States Attorney General Edmund Randolph argued on behalf of the state, but contrary to the interest of his client, argued that the court had the power to hold a state statute unconstitutional. *Id.* at 507.

65. 3 Va. (1 Va. Cas.) 20 (Va. Gen. Ct. 1793).

66. CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 65 (1996).

67. *Cf.* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 927 (2003) [hereinafter Prakash & Yoo, *Origins*] (noting that several state courts exercised judicial review despite the absence of an explicit provision in their state constitutions authorizing them to do so).

68. *See* HOBSON, *supra* note 66, at 66.

69. 5 U.S. (1 Cranch) 137, 177 (1803); *see also* HOBSON, *supra* note 66, at 66.

70. *Marbury*, 5 U.S. (1 Cranch) at 177.

2. The Spread of State Judicial Review

Other states also recognized the necessity of judicial review. New York, for instance, created a "Council of Revision," which included judges of the state supreme court, to veto improper legislation.[71] In seven other states, courts struck down statutes inconsistent with the state's higher law.[72] And in four of those seven states, parties did not even challenge statutes that directly contradicted state constitutions—indicating that the concept of state judicial review "was apparently an expansive one" that vested judges with much discretion in evaluating the constitutionality of laws, including those that did not directly contradict state higher law.[73]

The Founders routinely supported state judges who struck down improper legislation. In Rhode Island, for example, Madison lauded "[j]udges who refused to execute an unconstitutional law."[74] In Massachusetts, Elbridge Gerry[75] praised the "general approbation" with which other state judges had set aside inappropriate laws.[76] And in *Federalist No. 78*, Hamilton commended state review of unconstitutional legislation.[77] In fact, by the time states had begun to debate ratification, appreciation of judicial review had become so widespread that "[d]elegates to the state conventions discussed judicial review in no fewer than seven of the ratification conventions in almost thirty instances," and "[o]utside the conventions, Americans confirmed that the Constitution authorized judicial review in pamphlets and in newspapers across twelve states."[78] As one South Carolina court emphatically held in *Ham v. M'Claws*, "It is clear that statutes passed against the plain and obvious

71. N.Y. CONST. of 1777, art. III.

72. *See* Prakash & Yoo, *Origins*, *supra* note 67, at 933; *see also* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 497 (2005) [hereinafter Treanor, *Judicial Review*].

73. Treanor, *Judicial Review*, *supra* note 72, at 497.

74. Prakash & Yoo, *Origins*, *supra* note 67, at 934 (alteration in original).

75. Gerry, incidentally, represented one of three delegates who remained at the Constitutional Convention until its conclusion, but not sign the final document. Gerry, Elbridge Biographical Information, http://bioguide.congress.gov/scripts/biodisplay.pl?index=g000139 (last visited Mar. 14, 2009).

76. Prakash & Yoo, *Origins*, *supra* note 67, at 934 (internal citation omitted).

77. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 5, at 470-71.

78. Prakash & Yoo, *Origins*, *supra* note 67, at 928.

principles of common right, and common reason, are absolutely null and void ...."[79]

B. National Judicial Review

The importance of judicial review in interpreting constitutions at the state level[80] demonstrated the necessity of some form of meaningful judicial review at the national level. In *Federalist No. 78*, for instance, Hamilton argued that "[a] constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body."[81] Hamilton further noted that "[t]he courts must declare the sense of the law"[82] and that "it is the province of the courts to liquidate [contradictory statutes] and fix their meaning and operation."[83] This position belied Hamilton's support for the notion that judicial review provided the best check against unconstitutional legislation by preventing the legislature from judging the scope of its own constitutional powers.[84] Indeed, Hamilton had served as one of the early advocates for judicial review, arguing a case in 1784 in which he "expounded the all-important doctrine judicial review—the notion that high courts had a right to scrutinize laws and if necessary declare them void."[85]

---

79. Treanor, *Judicial Review*, *supra* note 72, at 500 (quoting Ham v. M'Claws, 1 S.C.L. (1 Bay) 93, 98 (Ct. Com. Pl. 1789)).

80. *See* Prakash & Yoo, *Origins*, *supra* note 67, at 932-33 ("A written constitution created a focal point in pondering constitutional meaning and helped make possible judicial review.").

81. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 5, at 467.

82. *Id.* at 469.

83. *Id.* at 468.

84. *Id.* at 467 ("If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. *The interpretation of the laws is the proper and peculiar province of the courts*." (second emphasis added)).

85. RON CHERNOW, ALEXANDER HAMILTON 198 (2004) (discussing the case of *Rutgers v. Waddington*).

Hamilton claimed to support judicial review, in part, because by preventing the legislature from overstepping its proper bounds, judicial review helped ensure that the constitutional system would be most subservient to the American people.[86] Perhaps more importantly, however, judicial review also served as a check against the popular whims of the legislature by "keep[ing] the latter within the limits assigned to [its] authority."[87] Practically speaking, Hamilton believed that although the Founders did not create the judicial power to be superior to the legislative power, "[t]he interpretation of the laws is the proper and peculiar province of the courts,"[88] and that judges must "declare the sense of the law."[89] "[W]henever a particular statute contravenes the Constitution," Hamilton thus considered it "the *duty* of the judicial tribunals to adhere to the latter and disregard the former."[90]

Conceptual support for national judicial review grew after a Federalist Congress passed the Alien and Sedition Acts in 1798,[91] at which time many states opted to defer to the national judiciary rather than accept the nullification propositions advanced in Madison and Jefferson's Virginia and Kentucky resolutions.[92] A counter-resolution adopted in the New Hampshire House of

---

86. *Id.* at 467-68 ("[T]his conclusion [does not] by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."). The historical record supports the notion of judicial review as a means to preserve popular sovereignty. Akhil Amar noted, for example, that "[u]nder America's Constitution, founded on principles of popular sovereignty rather than legislative supremacy, the gulf between vertical review of state laws and horizontal review of congressional enactments would not seem quite so unbridgeable." AMAR, *supra* note 7, at 211. As a result, Amar claimed, "America's judiciary would indeed have the authority to hear claims that Congress had exceeded the powers given to it by the sovereign citizenry." *Id.*

87. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 5, at 467.

88. *Id.*

89. *Id.* at 469.

90. *Id.* at 468 (emphasis added).

91. *See* THE VIRGINIA REPORT OF 1799-1800, TOUCHING ALIEN AND SEDITION LAWS; TOGETHER WITH THE VIRGINIA RESOLUTIONS OF DECEMBER 21, 1798, THE DEBATE AND PROCEEDINGS THEREON IN THE HOUSE OF DELEGATES OF VIRGINIA, AND SEVERAL OTHER DOCUMENTS ILLUSTRATIVE OF THE REPORT AND RESOLUTIONS 17-21 (J.W. Randolph 1850) [hereinafter VIRGINIA REPORT].

92. Resolutions of Virginia of December 21, 1798, in VIRGINIA REPORT, *supra* note 91, at 27-28; Kentucky Resolution 10 Nov. 1798, 14 Nov. 1799, *in* 5 THE FOUNDERS' CONSTITUTION 131, 134-35 (Philip B. Kurland & Ralph Lerner eds., 1987).

Representatives, for example, provided that—contrary to Madison and Jefferson's implorations that states nullify unconstitutional federal legislation—"the state legislatures are not the proper tribunals to determine the constitutionality of the laws of the general government, [and] that the duty of such decision is properly and exclusively confided to the judicial department."[93] Employing similar reasoning, the Rhode Island legislature's counter-resolution argued that the Constitution "vests in the federal courts exclusively, and in the Supreme Court of the United States ultimately, the authority of deciding on the constitutionality of any act or law of the Congress of the United States."[94]

According to Professors Prakash and Yoo, the reason for this deference to the judiciary was clear: the Framers had quite clearly envisioned courts' "duty" to preserve the Constitution by negating the passage of unconstitutional laws.[95] "Though people disagreed on much else about the Constitution," they wrote, "all those who addressed judicial review agreed that the Constitution authorized the judiciary to ignore unconstitutional federal statutes."[96] The constitutional record supports Prakash and Yoo's opinion. When Madison proposed a joint veto for the President and the Supreme Court,[97] for instance, Delegates George Mason and Luther Martin objected. "Join [the Supreme Court] with the Executive in the [veto]," Martin claimed, "and [the Court] will have a double negative."[98] Though perhaps not intentional, Martin's statement implied that the Supreme Court *already* possessed a "negative" ability to declare laws unconstitutional through the process of judicial review.

Evidence favoring judicial review continued to mount shortly after the Constitution's ratification. As Professor Wallace Mendelson noted, by writing judicial review into the Judiciary Act of 1789, the Founders "[left] no doubt that judicial review of national legislation was generally contemplated before it was exercised by

93. State of New Hampshire, In the House of Representatives, June 14, 1799, *in* VIRGINIA REPORT, *supra* note 91, at 176.

94. State of Rhode Island and Providence Plantations, In General Assembly, February, A.D. 1799, *in* VIRGINIA REPORT, *supra* note 91, at 169.

95. *See* Prakash & Yoo, *Origins*, *supra* note 67, at 928.

96. *Id.*

97. *See infra* note 180 and accompanying text.

98. MADISON, DEBATES, *supra* note 1, at 297.

the Supreme Court in *Marbury v. Madison*."[99] Needless to say, it would have been impractical that the same Founders who had authored the Constitution would construct the Judiciary Act of 1789 to encompass a potentially very dangerous power (e.g., judicial review) if they did not intend the Constitution's text to permit it.

To be sure, judicial review had its critics. Delegate John Dickinson, for example, joined Delegate Mercer in objecting to judges' ability to set aside the law. According to Madison's Convention notes, Dickinson made clear his reasoning: "The Justiciary of Arragon he observed became by degrees, the lawgiver."[100] Similarly, not every Founder accepted state court bases for national judicial review. Though the state court justices in the *Case of the Prisoners* engaged in judicial review, for example, two of them did so without mentioning judicial review, two said that they agreed with courts' ability to declare statutes unconstitutional, but did not further elaborate on the judicial review procedure, and two of them objected to judicial review outright.[101] Indeed, only four of the eight justices both expressly supported judicial review *and* voted to invalidate the statute,[102] and Randolph's letter to Madison reveals his impression that the court had nearly dodged the question of judicial review entirely.[103]

The Founders' obsession with restraining the national government, however, nevertheless favorably disposed them to the idea of checks on the legislative. As Amar has described, "judicial review was less a unique attribute of judges than a symmetric counterpart to the constitutional negatives enjoyed by coordinate branches."[104] The fact that the Founders did not explicitly provide for "judicial

99. WALLACE MENDELSON, THE CONSTITUTION AND THE SUPREME COURT 2 (2d ed. 1965).

100. MADISON, DEBATES, *supra* note 1, at 407.

101. Treanor, *Prisoners*, *supra* note 59, at 530-31.

102. *Id.* at 531.

103. Letter from Edmund Randolph to James Madison (Nov. 8, 1782), *reprinted in* 5 THE PAPERS OF JAMES MADISON 262, 263 (William T. Hutchinson & William M.E. Rachal eds., 1967).

104. *See* AMAR, *supra* note 7, at 60-61 ("Modern Americans associate enforcement of the Constitution with the doctrine of judicial review, under which judges refuse to enforce federal statutes that they deem inconsistent with the supreme law of the Constitution. At the Founding, however, the Constitution integrated several enforcement devices in its general system of separated powers.").

review" in the Constitution,[105] therefore, should not imply their opposition to judicial checks on unconstitutional legislation.

III. PRESIDENTIAL REVIEW

A. The Basis for Presidential Review

Judicial review represented only one means through which the Founders ensured that inappropriate legislative actions would be constitutionally checked. Presidential review of laws, by contrast, provided another.[106] Though the Framers implicitly acknowledged the existence of presidential review, documents from the Founding and Enlightenment periods proved divided in the degree to which they supported the practice.

---

105. *See* Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 64 (2001). *But see* Prakash & Yoo, *Origins*, *supra* note 67, at 927 ("Fairly read, the historical evidence indicates that at the time of the Constitution's drafting and ratification, Americans generally regarded judicial review as an inevitable product of a limited, written constitution with a separation of powers. The evidence also refutes the claims of scholars who have asserted that the Founders did not regard the Constitution as authorizing judicial review of federal statutes."). Prakash and Yoo continue to say that "Federalists and Anti-Federalists alike understood that courts would be able to ignore unconstitutional federal statutes. Just as significant, no scholar has been able to cite *any* Federalist or Anti-Federalist who declared that the Constitution did not permit judicial review of federal legislation." *Id.* at 928. *But see supra* note 36 and accompanying text (showing that some Founders did oppose judicial review). They contend that the Supremacy Clause, which implicitly authorizes judicial review, only entitles laws "made in Pursuance" of the Constitution to constitutional supremacy. Prakash & Yoo, *Origins*, *supra* note 67, at 907. Rather than support judicial review, Kramer argues that the Framers intended popular constitutional interpretation to be the exclusive means of constitutional interpretation. *See generally* Larry D. Kramer, *"The Interest of Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697 (2006). Yoo and Prakash dispute Kramer's claim. *See* Saikrishna B. Prakash & John C. Yoo, *Questions for the Critics of Judicial Review*, 72 GEO. WASH. L. REV. 354, 355-56 (2003) [hereinafter Prakash & Yoo, *Questions*] ("[J]udicial review arises from provisions such as the Supremacy Clause and Article III's vesting of the judicial power in the federal courts in all cases arising under the Constitution and federal laws.").

106. *See* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 907 (1989-90).

1. Opposition to Excessive Executive Power

To be sure, the American constitutional system grew out of the political ideals of the Enlightenment,[107] which emphasized the supremacy of the legislature in political affairs.[108] The 1689 English Bill of Rights, for example, made it "illegal" for the executive to suspend or dispense laws or the laws' execution.[109] In much the same way, the Commonwealth of Virginia, which had served as an early bastion of judicial review, took steps explicitly to limit the powers of the executive. With language almost identical to that of the English Bill of Rights, it strongly cautioned against executive limitations of legislative pronouncements.[110] Before long, other states—most notably Delaware[111] and Vermont[112]—followed suit. In fact, by the time the issue of executive power arose at the Constitutional Convention, many of the delegates advocated provisions that would strictly limit the executive's interpretative authority. Madison, for instance, proposed that the Constitution should vest the executive only "with power to carry into effect the national laws, to appoint to offices in cases not otherwise provided for, and to *execute such other powers 'not Legislative nor Judiciary in their nature,'* as may from time to time be delegated by the national Legislature."[113] Though the delegates ultimately voted to

107. STEVEN D. SMITH, THE CONSTITUTION & THE PRIDE OF REASON 21 (1998) ("The American Constitution, we are accustomed to thinking, was a product of 'the Enlightenment.'").

108. *See, e.g.*, JOHN LOCKE, TWO TREATISES ON CIVIL GOVERNMENT § 150, at 270 (2d ed. 1887) (1689) ("In all cases, whilst the government subsists, the *legislative is the supreme power*.") (emphasis added).

109. Bill of Rights, 1 W. & M., 2d. sess., c. 2, 16 Dec. 1689, *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 92, at 1, 2.

110. Virginia Declaration of Rights 12 June 1776, *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 92, at 3, 3 ("That all power of suspending laws, or the execution of laws, by any authority, without consent of the Representatives of the people, is injurious to their rights, and ought not to be exercised.").

111. Delaware Declaration of Rights 11 Sept. 1776, *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 92, at 5, 6 ("That no Power of suspending laws, or the execution of laws, ought to be exercised unless by the Legislature.").

112. VT. CONST. of 1786, ch. 1, art. 17 ("The power of suspending laws, or the execution of laws, ought never to be exercised, but by the Legislature, or by authority derived from it, to be exercised in such particular cases only as the Legislature shall expressly provide for.").

113. MADISON, DEBATES, *supra* note 1, at 39 (emphasis added).

change this language,[114] they did so, according to Madison's description of their discussion, because the additional language limiting executive action seemed superfluous. Charles Pinckney, for example, "said [the additional words] were unnecessary, the object of them being included in the 'power to carry into effect the national laws.'"[115]

Even decades after the Constitution's ratification, Pinckney's view persisted. "The office of executing a law," William Rawle reflected, "excludes the right to judge of it...."[116] Rather, "[a] prompt submission to the law, and an immediate preparation to enforce it, are therefore absolutely necessary in relation to the authority from which the law has emanated."[117] Rawle continued: "'The president *shall take care that the laws shall be faithfully executed*.' The simplicity of the language accords with the general character of the instrument. It declares what is his duty, and it gives him no power beyond it."[118]

2. Support for a Moderate Review Power

Despite the fact that some Founders opposed presidential review of legislative actions, others strongly supported it. William Symmes, for example, acknowledged the broad swath of potential power that the Constitution delegated to the President to ensure the laws' faithful execution, rhetorically positing:

> Should a Federal law happen to be as generally expressed as the President's authority; must he not interpret the Act! For in many cases he must execute the laws independent of any judicial decision. And should the legislature direct the mode of executing the laws, or any particular law, is he obliged to comply, if he does not think it will amount to a faithful execution?[119]

---

114. *Id.* at 39-40.

115. *Id.* at 39 (internal footnote omitted).

116. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 147 (1829).

117. *Id.* at 147-48.

118. *Id.* at 149. And yet, Rawle also noted the difficulty of defining the exact scope of the President's power, writing that "it would be at once unnecessary and impossible to define all the modes in which [the executive power] may be executed ...." *Id.*

119. Letter from William Symmes to Captain Peter Osgood, *in* HERBERT J. STORING, 4 THE COMPLETE ANTI-FEDERALIST 55-62 (1981).

Similarly, Hamilton implicitly supported the idea of presidential review in *Federalist No. 70*, contending that executive energy is "essential ... to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy."[120]

This conception of the presidency as *preserver of constitutional freedom* carries heavy interpretive undertones. If the President is to protect against the "assaults" or "ambition" of the other branches, for example, he must be vested with the authority to reach constitutional interpretations that differ from the improper constitutional determinations of those other branches.[121] As a result, he would seemingly have the power to engage in constitutional review of legislative judgments.

B. The Practicality of Presidential Review

On the one hand, it seems strange to envision the President of the United States, who Hamilton repeatedly claimed would possess powers comparable to those exercised by the governor of New York,[122] as a major interpreter of constitutional dogma. In other words, if Hamilton intended *The Federalist* to reassure readers that the President's powers would be largely constrained, why would it, or any other Founding document, support the proposition that the executive power could be extended to encompass constitutional review?

---

120. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 5, at 421-22.

121. *See, e.g.*, Lawson & Moore, *supra* note 21, at 1287 (listing justifications for presidential independence when interpreting the Constitution).

122. THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 5, at 414 ("[I]f ... there be a resemblance to the king of Great Britain, there is not less a resemblance to ... the governor of New York. ... [t]here is a close analogy between [the President] and a governor of New York ...."). Indeed, Hamilton devoted much of *Federalist No. 69* to describing the similarities and noting the few differences between the presidency and the governorship of New York. *Id.* at 420 ("Hence it appears that except as to the concurrent authority of the President in the article of treaties, it would be difficult to determine whether that magistrate would, in the aggregate, possess more or less power than the governor of New York."); *see also* THE FEDERALIST NO. 67 (Alexander Hamilton), *supra* note 5, at 405-06 ("The authorities of a magistrate, in a few instances greater, in some instances less, than those of a governor of New York, have been magnified into more than royal prerogatives.").

On the other hand, Hamilton claimed that "[a] feeble executive implies a feeble execution of the government,"[123] that "[a] feeble execution is but another phrase for bad execution; and [that] a government ill executed, whatever it may be in theory, must be, in practice, a bad government."[124]

To synthesize both positions, then, perhaps Hamilton advocated a limited executive power that nonetheless entailed constitutional review as a necessary conduit to the exercise of the executive's other powers. Put differently, by granting the President the "energy" to engage in constitutional review, perhaps the Founders fortified the express powers of the executive branch,[125] which ensured its ability to check against both legislative encroachments and fraudulent (i.e. unconstitutional) judicial interpretations. This insurance proved necessary, Gouverneur Morris argued, because "the interest of [the] Executive is so inconsiderable [and] so transitory, and his means of defending it so feeble, that there is the justest ground to fear his want of firmness in resisting incroachments."[126] For practical reasons, Jefferson seemed to agree. "[T]he opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Executive also ... would make the judiciary a despotic branch."[127]

Jefferson's opinion indicates that the executive, like the judiciary, possesses the power to adjudge what is constitutional within his own sphere of conduct, and thus has the implicit *duty* to make constitutional determinations. At some point, after all, every law must be enacted and enforced. Because the President is involved in both of these processes,[128] constitutional determinations inherent to the processes must necessarily be included within the executive's "sphere of conduct." Much like the judiciary is limited in the sense that it can only adjudicate the sort of cases and controversies

123. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 5, at 422.

124. *Id.*

125. THE FEDERALIST NO. 51 (James Madison), *supra* note 5, at 319-20.

126. MADISON, DEBATES, *supra* note 1, at 297.

127. Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 311 n.1 (Paul Leicester Ford ed., 1897).

128. *See* Lawson & Moore, *supra* note 21, at 1280.

outlined in Article III,[129] so too is the executive limited by the actions of the legislature. Rather than simply "make law," the executive must wait for legislative pronouncements,[130] and interpret those pronouncements only after they pass through him during the legislative[131] and enforcement processes.[132] This processes include several instances in which the President *may* exercise, and which the Founders believed that he *would* exercise, some degree of constitutional review.

C. The Means of Presidential Review

As Judge Easterbrook wrote, "[p]residential review is ... a counterweight to judicial review" that can help to control judicial misinterpretation.[133] It is equally important, however, to regard presidential review as a "supplement" to judicial review—designed to snag instances of congressional abuse that do not reach the form of concrete cases that judges are constitutionally equipped to decide.[134] The means of presidential review, at least according to Judge Easterbrook, manifests itself at four different stages in the constitutional process: pardons, vetoes, additions, and proposals for legislation.[135] Because this Note focuses on the American constitutional system's ability to check unconstitutional statutes passed by Congress, its discussion of presidential review will necessarily focus

---

129. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and the Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

130. *See* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 10-11 (1993).

131. *See* Lawson & Moore, *supra* note 21, at 1303-04 (discussing the veto power).

132. *See, e.g.*, *id.* at 1286-87 (describing a two-step process for interpreting a law).

133. Easterbrook, *supra* note 106, at 929. In other words, if judges get it wrong, the President might get it right.

134. *See* Saikrishna Bangalore Prakash, *The Executive Duty To Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1639-40 (2008) (explaining the President's inability to obtain declaratory relief or an injunction when the President believes a statute is unconstitutional).

135. Easterbrook, *supra* note 106, at 907.

on the two of these four powers that were discussed in detail during the Constitutional Convention: the pardon and the veto. It will also focus on the President's ability to enforce selectively laws in ways he deems constitutional—a proposition which overlaps with the "additions" that Easterbrook described.[136]

1. The Qualified Veto

The veto represents the first way in which the President can defend the body politic from the poison of unconstitutional legislation. In describing that veto, Hamilton carefully distinguished between the *qualified* negative that the Constitution bestowed on the President[137] and the *absolute* negative possessed by the English monarch.[138] He very clearly supported the idea, however, that the Founders designed the presidential veto as a means of constitutional review. "The propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments," he wrote, "has been already more than once suggested."[139] The veto, then, "not only serve[d] as a shield to the executive, but it furnishe[d] an additional security against the enaction of improper laws."[140] There was no danger of the President using the veto too excessively, Hamilton claimed, because "a man of tolerable firmness would [only] avail himself of [it as a] constitutional means of defense, and would listen to the admonitions of duty and responsibility."[141] Instead of providing an avenue for potential executive abuse, the veto created a means through which unconstitutional legislation could be quickly and appropriately neutralized.

136. *Id.* at 908.

137. U.S. CONST. art I, § 7, cl. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.").

138. THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 5, at 415.

139. THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 5, at 441.

140. *Id.* ("It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.").

141. *Id.* at 443.

Most Founders agreed with Hamilton's implorations against the wisdom of vesting the same absolute negative in the President that the English constitution vested in the king.[142] Indeed, the Continental Congress complained of the king's refusal to "[a]ssent to Laws, the most wholesome and necessary for the public Good" in the Declaration of Independence.[143] Many Founders also agreed, however, with Hamilton's assessment of the necessity of some presidential negative.[144] Jefferson, for example, claimed that the veto represented a "shield ... to protect against invasions of the legislature...."[145] George Washington noted his "duty" to examine the constitutionality of the national bank once its constitutionality had been questioned.[146] Madison wrote of his presidential obligation to veto unconstitutional laws.[147] And after following Madison into office, James Monroe did likewise. "It is with deep regret," he noted, "... that I am compelled to object [to the passage of the Cumberland Road bill] ... under a conviction that Congress [does] not possess the power, under the constitution, to pass such a law."[148] These admissions clearly portray the veto as an exercise in constitutional review.

Although the Constitution's text might not explicitly have authorized substantive executive determinations of constitutional validity, presidential review enables the President better to fulfill

---

142. *See, e.g.*, EDWARD C. MASON, THE VETO POWER 20 (1890). *But see* MADISON, DEBATES, *supra* note 1, at 51 (quoting James Wilson ("The Executive ought to have an absolute negative. Without such a self-defence the Legislature can at any moment sink it into non-existence.")).

143. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).

144. *But see* MADISON, DEBATES, *supra* note 1, at 296 (noting that Elbridge Gerry supported only a very limited veto ("The object he conceived of the Revisionary power was merely to secure the Executive department [against] legislative encroachment.")). Gouverneur Morris also expressed fears that the legislature would encroach on the executive branch. *Id.* at 407. Hamilton would have agreed with these concerns. THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 5, at 442 (noting that "[t]he primary inducement to conferring the power in question upon the executive is to enable him to defend" against encroachments into his rights).

145. Jefferson, *supra* note 12, at 416, 420-21.

146. *See* Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81, 84 (2007) (citing Letter from George Washington to Alexander Hamilton (Feb. 16, 1791), *in* 31 WRITINGS OF GEORGE WASHINGTON 215 (John C. Fitzpatrick ed., 1939)).

147. *Id.* at 86.

148. *Id.*

his sworn oath of office—that is, "to the best of [his] Ability, preserve, protect and defend the Constitution of the United States."[149] As Professor Prakash argued, "The Constitution is not faithfully executed when the President violates the Constitution himself, assists the violations of others, or remains passive while others violate it, or so the argument goes."[150] And allowing for the passage of unconstitutional laws would no doubt violate the presidential oath. Put more simply, "[i]t is as much the duty of ... the President to decide upon the constitutionality of any bill or resolution which may be presented to [him] for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision."[151] Comparing the veto power even to the most revered medical terminology, Prakash further noted that for the President to refuse to exercise his constitutional judgment would be to violate the "presidential equivalent of the Hippocratic Oath: 'Do no constitutional harm.'"[152]

The veto power gives the President a weapon distinguishable from the interpretive power granted to the Supreme Court: the power to prevent a bill from becoming a law. Whereas nonenforcement of unconstitutional legislation does not "erase" a law from the United States Code, the veto of such legislation—barring a subsequent congressional override—actually prohibits the law from taking effect.[153] Certainly, there is no surer way to guard against the infringement of constitutional power than to eliminate the infringe-

149. U.S. CONST. art. II, § 1, cl. 7 ("Before he enter on the Execution of His Office, he shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will faithfully execute the Office of the President of the United States, *and will to the best of my Ability, preserve, protect and defend the Constitution of the United States*." (emphasis added)).

150. Prakash, *supra* note 146, at 83. Jefferson took the veto a step further. Not only was it acceptable for the President to veto unconstitutional legislation, Jefferson wrote, but sometimes practical considerations could surpass constitutional obligation, and the President could go beyond even his constitutional boundaries where the nation's self-preservation was at stake. *See id.* at 85 n.16.

151. Andrew Jackson, Veto Message (July 10, 1832), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 576, 582 (James D. Richardson ed., 1896). Constitutional Convention delegates briefly debated expanding the veto power to include Congressional resolutions. MADISON, DEBATES, *supra* note 1, at 408-09. Madison made the proposal, arguing that, "if the Negative of the President was confined to *bills*; it would be evaded by acts under the form and name of Resolutions, votes & c ...." *Id.* Every state but Massachusetts, Delaware, and North Carolina voted against the proposition. *Id.* at 409.

152. Prakash, *supra* note 146, at 83.

153. *See, e.g.*, Lawson & Moore, *supra* note 21, at 1306.

ment from ever taking place, which is exactly the sort of power that the President possesses with even a qualified veto.

2. The Pardon Power

With the pardon power, the Framers established a second means of constitutional review.[154] According to James Iredell, a delegate to the North Carolina ratifying convention, the Framers did this because—even though they believed "that the laws should be rigidly executed"—they realized the impossibility "for any general law to foresee and provide for all possible cases that may arise...."[155] As a result, it proved necessary to vest some government official with the discretion to determine the instances in which it would be unwise to apply otherwise proper legislative pronouncements. In placing this discretion in the hands of the President, the Founders demonstrated that the President, a person "of prudence and sound sense, would be better fitted, than a numerous assembly, in such delicate conjunctures, to weigh the motives for and against the remission of the punishment, and to ascertain all the facts without undue influence."[156]

The Framers' pardon power can be used in two ways. First, it entails review, not only of the substance of legislative pronouncements, but of the validity of uniformly applying such pronouncements. At its heart, this *is* constitutional review—for just as statutes can be unconstitutional *on their face* (which would fall within the realm of the veto), statutes can also be unconstitutional *as applied* (which would fall within the realm of the pardon).[157] Laws of this latter sort might be perfectly valid as a whole, but might nonetheless fail to pass constitutional muster in *particular* cases. In realizing that these situations should be left to the President to determine, the Founders "impose[d] no restraint upon

154. U.S. CONST. art. II, § 2, cl. 1 ("The President ... shall have the Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").

155. James Iredell, North Carolina Ratifying Convention (July 28, 1788), *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (Jonathan Elliot ed., 1836).

156. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1493 (1833).

157. *See* Lawson & Moore, *supra* note 21, at 1302-03.

[the President] by requiring him to consult others...." before making his pardoning decisions.[158]

Second, and more obviously, the pardoning power can be also used to check against conduct that is rendered unacceptable by facially *unconstitutional* legislation.[159] The President can use pardons of this remedial sort to nullify legislation that he might not have viewed as unconstitutional at the time it initially passed, or to discontinue unconstitutional statutes signed into law by a previous President. Jefferson, for example, pardoned those individuals convicted under the Alien and Sedition Acts, which were passed under his predecessor,[160] on the grounds that Congress had enacted those laws without any constitutional authority.[161]

3. Selective Execution

A third means of constitutional review consists of the President's ability to *enforce* (or *not enforce*) unconstitutional legislation. Rooted in the constitutional charge to the President to "faithfully execute" laws,[162] the President's power of execution necessarily entails some measure of constitutional interpretation.[163] After all, when a President enforces a law, he often does so without the benefit of a Supreme Court ruling on the law's constitutionality.[164] The President must thus enforce the law according to his best judgment. Certainly, in doing this, he takes into account the expressed intention of Congress by examining the four corners of

158. RAWLE, *supra* note 116, at 178.

159. Lawson & Moore, *supra* note 21, at 1302-03.

160. *See* An Act Supplementary to and To Amend the Act, Entitled "An Act to Establish an Uniform Rule of Naturalization, and to Repeal the Act Heretofore Passed on That Subject," 1 Stat. 566 (1798) (repealed 1802); An Act Concerning Aliens, 1 Stat. 570 (1798) (expired); An Act Respecting Alien Enemies, 1 Stat. 577 (1798) (expired); An Act in Addition to the Act, Entitled "An Act for the Punishment of Certain Crimes Against the United States," 1 Stat. 596 (1798) (expired).

161. Prakash, *supra* note 134, at 1617; *see* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 155, at 540-44 (Kentucky Resolutions of 1798 and 1799); *see also* AMAR, *supra* note 7, at 61 (noting that the new Republican House impeached Samuel Chase for misconduct in one of the impeachment trials, and only narrowly escaped conviction).

162. U.S. CONST. art. II, § 3.

163. Lawson & Moore, *supra* note 21, at 1280.

164. Prakash, *supra* note 134, at 1645.

the law that it passed. But the Framers did not require Congress to account for every conceivable contingency when exercising its lawmaking power because, frankly, such a task would be impossible for Congress to perform. When Congress passes a law, it necessarily passes a *general* rule.[165] Just like the Supreme Court adjudicates the constitutionality of general statutes by hearing *specific* cases, so too does the President determine the *specific* constitutional application of a *general* statute by deciding how, and in what circumstances, to enforce it.

The President's interpretive independence becomes further evident from the realization that the Framers did not indicate *how* he should enforce legislation, only that he *should* enforce it.[166] This grant of discretionary power ensured that executive actions would require some degree of interpretive autonomy from the legislative and judicial spheres. Although Congress might place statutory limits on executive discretion, the enforcement power ultimately rests with the President.[167]

Many Founders understood the necessity of a flexible enforcement power. In defending the executive's ability to make pronouncements about the laws he had been charged to enforce, for example, St. George Tucker remarked that "the obligation upon the President to take care that the laws be faithfully executed, drew after it this power, as a necessary incident thereto."[168] In the constitutional debates, George Mason and James Madison similarly moved to include within the presidential oath the phrase "and will *to the best of my judgment and power* preserve protect and defend the Constitution of the U.S.," which strongly implied an ability to both enforce and *interpret* congressional legislation.[169] And even decades after ratification, when the Supreme Court decided *Worcester v. Georgia*,[170] Andrew Jackson strongly suggested that the President's decision whether enforce a particular rule (e.g., a statute or a judicial precedent) is based on his determination of rule's constitu-

165. For the President's need to interpret a vague statute, see Lawson & Moore, *supra* note 21, at 1286.

166. *See* Prakash, *supra* note 134, at 1675-77.

167. *See* Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 465-66 (1987).

168. ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 346 (1803).

169. MADISON, DEBATES, *supra* note 1, at 472 (emphasis added).

170. 31 U.S. (6 Pet.) 515 (1832).

tional merits. "Well, John Marshall has made his decision," Jackson purportedly snapped, "now let him enforce it."[171]

Although the Founders most likely intended the "Take Care Clause"[172] to prevent the sort of flagrant refusal to enforce legislation that Jackson's response to *Worcester* so aptly demonstrated,[173] Presidents remain textually unconstrained in enforcing legislative enactments. The same ambiguous "Take Care Clause" that implies that the President must execute laws also leaves open the possibility that the President should not execute laws that undermine the constitutional text. In other words, if a President has an obligation to ensure the faithful execution of laws, and he faithfully executes an unconstitutional law, it would appear that he has simultaneously undermined the higher law (e.g., the Constitution) that he must also faithfully enforce. To avoid a logical contradiction, then, the Framers must have intended presidential nonenforcement to include the power of constitutional review.

IV. AMERICAN DEPARTMENTAL THEORY OF GOVERNMENT AND DEDUCTIVE JUDICIAL SUPREMACY

Because the Framers clearly intended both judicial and presidential review to occur, it is necessary to discuss the framework of *how* each power could occur in relation to the other. To do that, however, it is also helpful to describe the general theory of government under which the Framers justified a split in interpetive power between multiple constitutional actors. Best characterized as "departmental theory of government," this idea best reflects the Framers' support for a system that empowered the executive and the judiciary to each make its own constitutional determinations.

---

171. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 518 (1996) (internal citation omitted). Though Jackson directed his challenge to the Supreme Court (rather than to Congress), the tone of his words nevertheless demonstrate the degree to which the President's discretion in deciding how and when to exercise his or her enforcement power implicates some level of constitutional review—especially because Jackson disagreed with the constitutional basis of Marshall's decision.

172. U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed ....").

173. *See* Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 893-94 (1994).

After discussing a general view of American departmentalism, this Note will then proceed to do something that the Framers did not: define how, in a departmentalist system, the powers of each branch meshed together as part of one cohesive whole. To say that the Framers desired departmentalism, in other words, does not explain how they distributed power within their departmentalist creation. The remainder of this Note will discuss the departmentalist view necessary to support the judicial and presidential review previously discussed and propose a theoretical model (e.g., deductive judicial supremacy) to explain how the Framers' believed those powers would hierarchically interrelate.

A. The Reasoning Behind the American Departmental Theory of Government

In rationalizing the American constitutional system, Thomas Jefferson described an idea that theorists would later label "departmental theory."[174] According to Jefferson, "each department [of the national government] is truly independent of the others, and has an equal right to decide for itself ... the meaning of the constitution in the cases submitted to its action."[175] Similarly, Madison argued that both the executive and the judiciary can make their own decisions about the Constitution's text. Each branch, he wrote, "must, in the exercise of its functions, be guided by the text of the Constitution according to *its own interpretation* of it...."[176] As Professor Michael Paulsen notes, "a logical consequence of this [view] ... is that the executive, no less than the judiciary, has, within the sphere of its powers, independent authority to review the acts of the other two branches...."[177] And in a sense, this sort of interpretive sovereignty is all "departmental theory" really means. It represents the right of each branch to make its own constitutional

174. *See, e.g.*, James B. Staab, *The Tenth Amendment and Justice Scalia's "Split Personality*," 16 J.L. POL. 231, 260 (2000).

175. Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), *quoted in* CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR 374 n.57 (2007).

176. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 234-35 (1994) (emphasis added).

177. *Id.* at 240.

determinations, sometimes irrespective of the decisions made by other branches.[178]

Although it is true that not all scholars of departmentalism believe that the President can decline to follow judicial decisions,[179] this Note contends that the Founders conceptualized the executive as an independent constitutional actor empowered to exercise his own constitutional discretion. In other words, by granting a wide array of interpretive powers to both the executive and the courts, the Framers provided for a departmental system of government in which interpretive authority would be divided among coordinate branches. No one branch would possess the ability to adjudicate the constitutionality of its actions for other branches. Instead, each branch would prevent the other branches from unconstitutionally abusing their power to infringe upon the powers of the other branches, or undermining the Constitution that gave each of the branches life.

Madison implicitly acknowledged the reasonability of a departmental system at the Constitutional Convention, where he proposed a council of revision to review congressional legislation that would consist of *both the President and the Supreme Court*.[180] He wrote, for instance, that

> [e]very bill ... shall, before it becomes a law, be severally presented to the President of the United States, and to the judges of the supreme court for the revision.... If, upon such revision, [the President and Supreme Court] shall approve of it, they shall respectively signify their appropriation by signing it; but if, upon such revision, it shall appear improper to either, or both, to be passed into a law, it shall be returned, with the objections against it, to that house, in which it shall have originated....[181]

178. *See* KERMIT L. HALL, THE SUPREME COURT AND JUDICIAL REVIEW IN AMERICAN HISTORY 4 (1985).

179. *See, e.g.*, David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 115-16 (1993) (arguing for a moderate form of departmentalism under which presidential power to interpret independently the Constitution is tied to whether prior courts have ruled on the issues that the President desires to decide).

180. MADISON, DEBATES, *supra* note 1, at 405-06.

181. *Id.* at 406.

This proposed council of revision effectively created a joint veto power for the President and the Supreme Court. Though the other delegates ultimately rejected this proposal,[182] they did not completely alter the framework underlying Madison's suggestion. Although the council of revision would have reviewed legislation before it ultimately passed, the ratified Constitution allowed for the same degree of ex ante review, while also providing a measure of continual ex post review. Put more simply, the Constitution affords the President the power to sign bills into law, at which point he decides, ex ante, whether the law is constitutional. Then, after the law takes effect, the Constitution permits the Supreme Court, ex post, to hear cases involving both the substance and application of the law. Such a system accomplishes the same goals and utilizes the same actors as the proposed council of revision. Indeed the only difference between this framework and the framework suggested by Madison's proposal is that constitutional review is exercised by each of the actors at times different from one another—a fact which might represent a check in and of itself.

Because Madison desired to give a veto to both the judiciary and the executive, his proposal shows that he implicitly viewed the *executive veto* and the *judicial interpretive power* on similar grounds. When coupled with Hamilton's notes about the necessity of presidential review to preserve constitutional integrity[183] and the historical understanding of judicial review at the time of the Founding,[184] it becomes clear that the Framers viewed constitutional review by the executive and judicial branches as departmental measures that *combined* to check improper congressional actions. The inherent strength of the legislature, in other words, created the need for two branches to harness its potentially abusive power.

James Wilson echoed the need to double-check legislative prerogative by questioning whether the Convention "guarded [against] the danger [of legislative abuse] ... by a sufficient self-defensive power either to the Executive or Judiciary department."[185] Such an extreme check proved necessary, he argued, because the

182. *Id.*
183. *See supra* note 120 and accompanying text.
184. *See supra* Part II.
185. MADISON, DEBATES, *supra* note 1, at 408.

legislature could easily become the most despotic branch. "After the Destruction of the King in Great Britain," Wilson argued, "a more pure and unmixed tyranny sprang up in the parliament than had been exercised by the monarch."[186] Displaying an equal trepidation for legislative power, Madison wrote in *Federalist No. 48* that "[t]he judiciary and the executive ... were left dependent on the legislative [branch] for their subsistence in office, and some of them for their continuance in it."[187] He continued: "If, therefore, the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can be effectual; because in that case they may put their proceedings into the form of acts of Assembly, which will render them obligatory on the other branches."[188] Thus, it became necessary for the American constitutional government to provide a legislative control. The departmental system of interpretation that the Framers' created fulfilled this need. Indeed, modern scholars have widely conceded that the American Constitution reflects, even at a very basic level, some form of departmentalism.[189]

To be sure, Madison's admonitions against legislative encroachment on the judicial and executive powers did not mean that the Framers rigidly defined each branch's appropriate spheres. Certainly, each branch possessed some "core" powers within the Framers' constitutional system. For Congress, this core power was essentially legislative. For the President, it was executive. And for the Supreme Court, it was interpretive. Madison acknowledged, however, that in many cases, there would be some overlap between each branch's powers.[190] He excused this overlap so long as there was not "too great a mixture" between the branches.[191] In making this assessment, Madison realized that by passing and enforcing laws, Congress and the President necessarily possessed some interpretive powers—despite the fact that the power of "interpretation" represented the "core" power of the Supreme Court—and

186. *Id.*

187. THE FEDERALIST NO. 48 (James Madison), *supra* note 5, at 308.

188. *Id.*

189. Lawson & Moore, *supra* note 21, at 1270. *But see id.* n.7.

190. *See, e.g.*, THE FEDERALIST NO. 47 (James Madison), *supra* note 5, at 300 ("[T]here [was] not a single instance in which the several departments of power have been kept absolutely separate and distinct.").

191. *Id.* at 304.

plainly demonstrated his belief in departmental constitutional review.

B. Deductive Judicial Supremacy Generally Defined

Deductive judicial supremacy provides one means to rationalize the Framers' departmentalist creation. Such a system admits that "[i]n a republic, judges are not theoretically the lawgivers."[192] It also posits, however, that judges are in a unique position to interpret what the laws mean. In contrast to inductive judicial supremacy, which specifies that the law is what judges declare that it is,[193] deductive judicial supremacy presupposes that, as Justice Joseph Story famously remarked in the landmark case of *Swift v. Tyson*,[194] judicial opinions are "only evidence of what the laws are."[195] Deductive judicial reasoning, therefore, considers opinions to be like "prophecies"—they might provide the best indicator of what laws stand for, but need not necessarily dictate what the law is.[196] Judges do not displace lawmakers; they instead decipher each law's constitutional genetic code.

The rationale for deductive judicial supremacy is two-fold. First, courts are regarded as "relatively more expert" than other branches of government in interpreting constitutional issues.[197] Judges presumably have more experience with constitutional issues than other branches of government, and, consequently, might be in a more favorable position to determine an issue's constitutionality. Second, and somewhat contrarily, judges' expertise within the field of constitutional issues need not stop other branches from making their own constitutional determinations. The legislature, for example, makes a threshold determination of constitutionality before passing a particular law, and the President, as previously

192. Paul L. Colby, *Two Views on the Legitimacy of Nonacquiescence in Judicial Opinions*, 61 TUL. L. REV. 1041, 1041 (1987).

193. *Id.* at 1047 ("A principal consequence of induction as the accepted method of legal reasoning is the doctrine that nonparties must adhere to judicial opinions. This doctrine gives judicial opinions legislative effect, thereby bestowing on adjudicators the power of a lawgiver.").

194. 41 U.S. (16 Pet.) 1 (1842).

195. *Id.* at 18.

196. *See* Colby, *supra* note 192, at 1045.

197. *See, e.g.*, Hardin v. Ky. Utils. Co., 390 U.S. 1, 14 (1967) (Harlan, J., dissenting).

discussed, makes determinations of constitutionality when deciding to sign or enforce the act of the legislature.[198] This constitutional framework vests multiple actors with interpretive discretion, under the assumption that the degree to which judges remain faithful to the Constitution determines the degree to which their opinions are followed by other coordinate branches of government.[199]

Under this view, judicial opinions provide the *best* guidepost to constitutional legitimacy, but despite the wishes of those who argue for inductive judicial supremacy, they need not be the *only* guidepost. To the contrary, in a departmental system of government, judicial opinions merely represent, by the system's very definition, the interpretation of *one* coordinate department.[200] Of the available interpretations, those opinions might be regarded with the most weight, but they need not necessarily *always* predominate.

V. A FRAMEWORK UNDER WHICH DEDUCTIVE JUDICIAL SUPREMACY INFORMS DEPARTMENTALISM IS MOST CONSISTENT WITH THE FRAMERS' VISION OF CONSTITUTIONAL REVIEW

Given *both* the Framers' decision to endow multiple political organs with the power of constitutional review *and* their nonspecificity about how those powers should relate to one another, this Note argues that the modern theoretical concept of deductive judicial supremacy provides a useful benchmark to analyze the Framers' vision of American departmentalism. To understand exactly how the Framers' vision advances deductive judicial supremacy as the preferred form of departmentalism, however, it is helpful first to revisit a familiar constitutional analogue. This analogue provides a fluid framework that, if slightly altered to reflect the interpretive process, can illustrate how deductive judicial supremacy provides a filter on (ordinarily ad hoc) departmentalism and comports with the Framers' vision of constitutional review.

198. *See supra* Part III.
199. *See* Colby, *supra* note 192, at 1059-60.
200. *See supra* notes 176-78 and accompanying text.

A. Justice Jackson's Proposed Constitutional Framework

In the *Steel Seizure Case*,[201] Justice Jackson established a constitutional framework to describe how the President and Congress relate to one another. "Presidential powers," he wrote, "are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[202] According to Jackson, the President is strongest when he acts pursuant to the express or implied authorization of Congress.[203] In those circumstances, his powers include not only all the authority that the Founders delegated to the presidency in the Constitution, but also the powers given to him by Congress.[204] The opposite is true when the President "takes measures incompatible with the express or implied will of Congress," for then "[the President's] power is at its lowest ebb, ... [as he] he can only rely on his own constitutional powers minus any constitutional powers of Congress over the matter."[205] In between those two areas of action, Jackson claimed, there existed a "zone of twilight" over which the President and Congress have "concurrent authority."[206] In those situations, "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."[207]

In other words, Justice Jackson defined the extent of the executive's power by referencing two entities: first, the Constitution, and second, Congress. As the more powerful entity, as well as the party responsible for making the laws that often authorize presidential action, Congress provides the clearest guidance whether a President's actions are legally acceptable. Though Congress cannot interfere with the core powers that the Constitution grants to the President, the President is always most powerful when he acts pursuant to a congressional mandate.

---

201. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
202. *Id.* at 635 (Jackson, J., concurring).
203. *Id.* at 635-36.
204. *Id.*
205. *Id.* at 637.
206. *Id.*
207. *Id.*

Justice Jackson's concurrence in the *Steel Seizure Case* is now heavily valued for its explanation of how each branch's constitutional powers relate to one another, and it is widely applied to evaluate the constitutionality of presidential action.[208] Indeed, Justice Jackson's framework "has become the starting point for constitutional discussion of concurrent powers."[209]

But to what extent can Justice Jackson's framework also apply to the Framers' vision of *constitutional interpretation*? In other words, if Jackson's framework might serve as a model of how the branches *act* in relation to each other, why should a similar model not also accurately describe how the Framers thought the branches would *interpret* the Constitution in relation to each other? In light of deductive judicial theory, it therefore becomes necessary to recalibrate Justice Jackson's *Steel Seizure Case* framework to produce a model for describing the Framers' vision of constitutional interpretation.

B. Recalibrating Justice Jackson's Framework To Describe the Framers' Vision of Constitutional Review: Departmentalism Within a Deductive Judicial Supremacy Context

1. Step One: Determining Which Branch Should Possess the Greatest Interpretive Power

Given that both presidential and judicial review are necessary constitutional safeguards on the legislature's power,[210] which

208. *See, e.g.*, Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 10-12 (1982) (noting that the *Steel Seizure Case* proves the "principal modern authority on the relationship between the President and Congress," and that Justice Jackson's concurrence is now regarded as the most influential component of that decision); Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343, 352 (1989) (same). Justice Jackson's framework has also proven applicable to evaluating presidential action in the foreign affairs context. *See, e.g.*, Richard Henry Seamon, *Domestic Surveillance for International Terrorists: Presidential Power and Fourth Amendment Limits*, 35 HASTINGS CONST. L.Q. 449, 468 (2008). *But see* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 142 (1990) (arguing that though Justice Jackson's concurrence articulates "with unusual clarity … the concept of balanced institutional participation" in foreign affairs, Supreme Court jurisprudence has "dramatically [altered] the application of Justice Jackson's tripartite analysis in cases on foreign affairs").

209. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 94-96 (1996).

210. *See supra* Part IV.A.

process of constitutional review did the Framers envision as dominant? To approach this question in a different way, did the Framers envision judicial supremacy or presidential supremacy? And if the former, did the Framers envision a system of *deductive* judicial supremacy, which "conceives of judicial opinions as nothing more than explanation of actions taken" or as "evidence of what the laws are"?[211] Or did the Framers intend to create a system of *inductive* judicial supremacy—under which judicial opinions were essentially given a legislative effect, "thereby bestowing on adjudicators the power of a lawgiver"?[212] The former construct would allow the President to determine the constitutionality of laws that affect his particular sphere, while nevertheless acknowledging that the judiciary plays a vital interpretive role in explaining the law. The President, then, could (and perhaps should) take the judiciary's constitutional determination into account. The latter construct, on the other hand, would completely nullify the executive constitutional prerogative once a judicial judgment has been made. In essence, the Supreme Court's constitutional judgment would be the only judgment that mattered.

The answer to these questions is two-fold. First, as earlier demonstrated, the Founding documents illustrate that the Framers *did* intend a system of judicial supremacy. And second, the Framers' clear provision for a departmental system of constitutional interpretation, which envisioned both the President and the Supreme Court as major arbiters of statutes' constitutionality, is more compatible with a system of deductive judicial supremacy than it is with a system of inductive judicial supremacy. In other words, within their departmental creation, the Framers intended the judiciary to be the *most convincing authority* on the constitutionality of legislative actions.

As Marshall noted in *Marbury v. Madison*, for example, "it is emphatically the province of the judiciary to say what the law is."[213] Madison held similar views. Referring to the Supreme Court as an impartial tribunal free from the entanglements of other branches, he claimed that the Court "[was] clearly essential to prevent an

211. Colby, *supra* note 192, at 1045 (internal citation omitted).

212. *Id.* at 1047-48 ("[O]ne may conclude, as Chief Justice Hughes said of the Constitution, that the law is 'what the judges say it is.'").

213. *See supra* note 70 and accompanying text.

appeal to the sword and a dissolution of the compact; and that it ought to be established under the general rather than under the local governments."[214] Hamilton emphatically claimed that "[t]he interpretation of the laws is the proper and peculiar province of the courts."[215] The veracity of this claim is especially telling when juxtaposed to Hamilton's comparison of the presidency to the governorship of New York[216] and his imploration that the judiciary had the *duty* to adjudicate questions of constitutionality.[217] The strong implication of these statements is that the judiciary's role within the federal government is distinctly interpretive. For Hamilton, this unique role meant that the judiciary's constitutional interpretations should necessarily predominate over the other branches' constitutional interpretations—even if the judiciary remained less powerful in other, noninterpretive areas.[218] In other words, "the courts of justice … [uniquely served] as the bulwarks of a limited Constitution against legislative encroachments."[219] Multiple state legislatures seemed to agree with Hamilton's assessment—acknowledging that the Framers had reserved statutory interpretation to the judicial branch.[220] And even those Founders who opposed the Constitution commented upon the broad interpretive power reserved to the Supreme Court.[221] Though in many ways the Framers believed in the power of presidential review, they did not speak of presidential review in the same direct way in which they spoke of judicial review.[222]

Although the Framers intended to vest the judiciary with a large degree of interpretive discretion, however, they did not intend for courts to be the sole arbiter of constitutionality. It is no coincidence,

---

214. *See supra* note 70 and accompanying text.

215. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 5, at 467.

216. *See supra* note 120.

217. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 5, at 468.

218. *Id.* at 464 (noting that the Supreme Court possess "neither FORCE nor WILL but merely judgment").

219. *Id.* at 468.

220. *See supra* notes 89-92 and accompanying text.

221. Melancton Smith, Letters from the Federal Farmer (Oct. 1787), *reprinted in* FOUNDING AMERICA: DOCUMENTS FROM THE REVOLUTION TO THE BILL OF RIGHTS 461 (Jack N. Rakove ed., 2006) ("It is a very dangerous thing to vest in the same [Supreme Court] power to decide on the law, and also general powers in equity; for if the law [restrains it], [it need] only to step into [its] shoes of equity, and give what judgment [its] reason or opinion may dictate ….").

222. *See, e.g.*, *supra* notes 86-90 and accompanying text.

for instance, that the presidential oath of office obliges the President to "preserve, protect and defend the Constitution of the United States"[223] rather than to "preserve, protect and defend the Constitution of the United States *as interpreted by the Supreme Court*." The veto[224] and pardon powers[225] are also not limited in that way. And the Take Care Clause[226] does not say that the President "shall take Care that the Laws, *or the Supreme Court's pronouncements of Laws*, be faithfully executed." In other words, even though the Framers' description of the judiciary's role makes clear that, at least within the area of constitutional interpretation, they intended for the judiciary to predominate, the Constitution's implicit support for presidential review also reveals a departmental system in which multiple constitutional actors engage in meaningful constitutional review.

2. Step Two: Applying the Framework

After considering the Framers' belief that judges might perhaps provide the best indication of constitutionality, consider Justice Jackson's concurrence in the *Steel Seizure Case*, in which he established a structural system of government under which—true to the Framers' intentions—the legislature represented the most powerful branch. Now, keeping in line with the Framers' system of checks and balances, employ a similar framework to describe the structure of constitutional review. Only this time, imagine that the balance of power among the three branches is shifted to fit a mold similar to that supporting deductive judicial supremacy. In other words, the judiciary, rather than the legislature, is the most powerful interpretive branch.

Under this framework, the legislative and executive interpretive powers are at their zenith when those branches' constitutional interpretations fall in step with the Supreme Court's constitutional determinations. Each branch, however, possesses a certain "sphere" of power with which the other branches cannot constitutionally

223. U.S. CONST. art. II, § 1, cl. 8.

224. U.S. CONST. art. I, § 7, cl. 2.

225. U.S. CONST. art. II, § 2, cl. 1.

226. U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed ....").

interfere. The Supreme Court cannot tell a President, for example, to veto a law. It cannot tell the President the circumstances under which he is able to pardon criminal offenders. And, as is plainly obvious from the circumstances surrounding *Worcester v. Georgia*, the Court cannot force the President to honor judicial decisions.[227] Though "the courts ... are to be considered the bulwarks of a limited Constitution against legislative encroachments,"[228] they have "no influence over either the sword or the purse...."[229] The Supreme Court cannot, in other words, give efficacy to its own judgments.

Instead, the Framers believed that Supreme Court rulings would serve as the most appropriate barometer of constitutionality. The Court is not the only arbiter of constitutional validity. After all, since the Justices possess "neither FORCE nor WILL"[230] to effectuate their opinions, those opinions *cannot* stand alone. When combined with other means of reviewing congressional legislation, however, the Framers' constitutional vision becomes clear. Best captured by the framework that Hamilton outlined in *Federalist No. 78*, the Framers' system is one in which the judge, in classic deductive style, "declare[s] the sense of the law."[231] The burden then falls on the President, in exercising the powers inherent to his own sphere (that is, the veto, pardon, and enforcement powers) to *enforce* the law in a manner consistent with the constitutional judgments of the Supreme Court. This system of departmental theory, filtered through the lens of deductive judicial supremacy, best reflects the interpretive matrix of constitutional review that the Framers intended. This system also ensures that, in the words of Justice Jackson, "the Constitution diffuses power [to] better ... secure liberty [and] ... enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[232]

For these reasons, this Note argues that Justice Jackson's *Steel Seizure* framework adequately reflects the Framers' vision of hierarchical departmentalism and comports with the structural integrity of the Constitution. Though this Note does not advocate

227. *See supra* note 171 and accompanying text.

228. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 5, at 468.

229. *Id.* at 464.

230. *Id.*

231. *Id.* at 467.

232. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

intentionalism as a general interpretive theory, the ambiguity with which the Framers defined the relationship between the different forms of constitutional interpretation that are implicit in the Constitution's text warrants pragmatic reconsideration of the Framers' structural intentions when formulating American government. Under the framework this Note has suggested, both the President and the Supreme Court may disagree in their interpretations of laws. As a logical consequence of this disagreement, the President may choose to enforce a law in a way that directly challenges a Supreme Court decision. Because the Supreme Court can provide the best assessment of a statute's constitutionality, however, the Framers believed that the President *should* attempt to align his own constitutional determinations (in the form of vetoes, pardons, and enforcement) with Supreme Court precedent —assuming such precedent is readily available. By so doing, the President would ensure interpretive uniformity and demonstrate how Justice Jackson's proposed framework can provide a consistent interpretive model for American constitutional review.

Some scholars view Justice Jackson's framework and the notion of departmentalism to be at odds with one another.[233] This Note takes the opposite position—arguing that Justice Jackson's framework, when properly applied, can inform departmentalism rather than detract from it. Instead of representing an end at odds with the Framers' vision of departmentalism, Justice Jackson's framework could just as easily constitute a means to achieve it.

Consider, for example, the following hypothetical. Congress passes a bill pursuant to its Article I, Section 8 powers. At the point the President signs this bill into law, he believes that it is constitutional. Similarly, after the President signs the bill into law, he only enforces it in a way that he believes is constitutional. Nevertheless, a citizen challenges the constitutionality of the law in court—perhaps on the grounds that, *as applied* to him, the law constitutes a "taking" in violation of the Fifth Amendment. The case gradually makes it to the Supreme Court, and the Court sides with the affected citizen—striking down the law *as applied* to the citizen, but allowing it to remain in effect as a general statute. In response to

233. *See, e.g.*, MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 248 (1977) (suggesting that the Steel Seizure Case dealt "a telling blow to the … doctrine … that each branch of government was the arbiter of its own powers and responsibilities").

the Supreme Court's ruling, the President realizes that the law might also be unconstitutional as applied to other citizens, and consequently, changes the way in which he enforces the law as a whole to prevent citizens like the one who filed suit from being negatively affected by the law's application. In the case of nationally imposed criminal laws, the President might also pardon convicted offenders, refuse to prosecute various suspected offenders, veto the law before it takes affect, or refuse vigorously to execute an unconstitutional law signed by a previous President until the current President receives a meaningful Supreme Court judgment on the law's constitutionality.

In this proposed hypothetical, both the President and the Supreme Court engage in meaningful constitutional review. The President does so at the time the law initially takes effect (in deciding to sign, not veto, the proposed bill). The Supreme Court does so when the citizen sues to alter the law's application to him. And the President does so a second time after the Supreme Court issues a ruling indicating that the law might not be as uniformly constitutional as the President initially believed. The President's enforcement decision is made stronger by virtual of its overlap with the Supreme Court's decision because both branches present a uniform interpretive front against the congressional statute they challenge.

As seen in this hypothetical, deductive judicial supremacy does not assume away departmentalism. Rather, it acknowledges it. It also ensures that departmentalism is appropriately checked—filtering it through a Justice Jackson-like framework that adequately reflects the Framers' vision of constitutional review. This particular model of deductive judicial supremacy also takes into account the interpretations of all three national, constitutional actors (Congress, the President, and the Supreme Court) in a way consistent with the Framers' conception of constitutional checks and balances.

Certainly, the President faces no binding obligation to conform his own constitutional determinations to those of the Supreme Court (as would be the case in a system of *inductive*, rather than *deductive*, judicial supremacy). Given that one of the major purposes underlying the acceptance of constitutional review is to prevent the passage of unconstitutional legislation, however, the American government could best protect itself against such legislation if the

President and the Supreme Court exercised their powers of constitutional review in collaboration with one another. Otherwise, it would be more difficult for any branch appropriately to control improper legislation. If there exists an interpretive disagreement over a statute's constitutionality, for example, the statute implicitly appears less legitimate. If, on the other hand, the President reasonably defers to Supreme Court precedent, both branches could eliminate unnecessary confusion and ensure that Congress's unconstitutional actions are most effectively checked. This check reflects the sort of constitutional review that the Framers intend.

Though it is sometimes appropriate for the President and the Supreme Court to disagree in interpreting congressional statutes (demonstrating the need for both judicial and presidential review), interpretive uniformity is certainly preferable to interpretive disuniformity. Using Justice Jackson's framework as a structural model for interpretive sovereignty would contribute to this uniformity in a way consistent with the Founding documents, and thus prevent Congress from realizing its potential as the government's "most despotic branch."[234] The President checks the legislature at the front end (through the veto power, the pardon power, and the enforcement power) until the Court hears cases challenging the validity of statutes, at which point the Court can issue rulings with which the President can attempt to comply. In this way, multiple constitutional actors exercise constitutional review over congressional judgments, and Congress is most appropriately checked.

CONCLUSION

In the Constitution, the Framers created a system of government in which both the executive[235] and the judiciary[236] checked the legislature by each engaging in meaningful constitutional review. Yes, the Constitution did not expressly provide for either "presidential review" or "judicial review." And yes, the Constitution even failed to establish a standard of interpretation under which such review, if it did exist, should be properly exercised. The historical context of the Founding, however, strongly suggests that the

234. *See supra* notes 9, 185-86 and accompanying text.
235. *See supra* Part III.
236. *See supra* Part II.

Framers regarded both presidential review and judicial review as necessary bulwarks to a constitutional system premised upon the notions of balance and divided authority.

When evaluating the framework of constitutional review, then, it is necessary to keep in mind the way in which the Framers believed presidential and judicial review should relate to one another. In other words, although the Framers made sure that the executive and the judiciary remained supreme within their own respective areas of constitutional interpretation, they also viewed judicial review as providing perhaps the most telling *explanation* of constitutionality.[237] As a result, executive constitutional interpretation is most accurate when it coincides with judicial constitutional interpretation, even though the executive is not necessarily bound by judicial decisions and certainly maintains a sphere of discretion in which he possesses distinct interpretive sovereignty. This paradigm of deductive judicial supremacy, which reconciles multiple forms of constitutional review within one departmental framework, best reflects the Framers' intended constitutional design.

David W. Tyler[*]

237. *See supra* notes 172-76 and accompanying text.

*J.D. 2009, William and Mary School of Law; B.A. 2006, Phi Beta Kappa, Rhodes College. I would like to thank my family for its support, my classmates for their friendship, and the Law Review staff for its diligent work on my Note. I would also like to thank Professor Tim Huebner for sparking my interest in American legal history and Professor Alan Meese for his valuable feedback on my work.