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2004

## Unitary Judicial Review

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### Recommended Citation

Bradford R. Clark, Unitary Judicial Review, 72 *Geo. Wash. L. Rev.* 319 (2004).

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# Unitary Judicial Review

Bradford R. Clark\*

## *Introduction*

Two hundred years have passed since the Supreme Court's decision in *Marbury v. Madison*,<sup>1</sup> yet debate continues over the origins and legitimacy of judicial review. Although modern commentators generally accept judicial review with little or no reservation, some remain skeptical. One of the strongest and most sustained challenges comes from Larry Kramer, who believes that the Founders did not authorize judicial review of the scope of federal powers under the original Constitution. At the same time, Kramer maintains that the Founders expected judicial review both to prevent states from undermining federal supremacy and to enforce individual rights. Such attempts to divide judicial review, however, are inconsistent with the constitutional text and contradict key assumptions held by the Founders. As discussed below, the relevant materials suggest that judicial review is a unitary doctrine under the Supremacy Clause that requires courts to treat all parts of the Constitution as "the supreme Law of the Land"<sup>2</sup> and to disregard both state and federal law to the contrary.<sup>3</sup>

Brief elaboration is necessary to evaluate Professor Kramer's thesis. Kramer maintains that judicial review was not clearly established at the Founding because it was inconsistent with prevailing notions of popular sovereignty. In his view, popular sovereignty emerged from "the Revolutionary crisis of 1763–1776 . . . as the central principle of American constitutionalism."<sup>4</sup> For this reason, the Constitution "was *not* ordinary law," but rather "a special form of popular law, law made by the people to bind their governors."<sup>5</sup> According to Kramer, "in a regime of popular constitutionalism it was not the judiciary's responsibility to enforce the constitution against the legislature. It was the people's responsibility: a responsibility they discharged mainly through elections, but also, if necessary, by more 'revolutionary'

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\* Professor of Law, The George Washington University Law School. I thank Philip Hamburger, Larry Kramer, John Manning, Jon Molot, Sai Prakash, Art Wilmarth, and John Yoo for insightful comments and suggestions on an earlier draft. I also thank Brian Wesoloski for outstanding research assistance.

<sup>1</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). For a recent reevaluation of the conventional account of *Marbury*, see generally Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235 (2003).

<sup>2</sup> U.S. CONST. art. VI, cl. 2.

<sup>3</sup> The propriety of various judicial doctrines used to avoid and limit judicial review is beyond the scope of this Article. For a thought-provoking analysis challenging the doctrine of avoidance, see generally William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831 (2001). For the classic attempt to reconcile judicial review and judicial deference to agency interpretations of statutes, see Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

<sup>4</sup> Larry D. Kramer, *The Supreme Court 2000 Term—Foreward: We the Court*, 115 HARV. L. REV. 4, 47 (2001).

<sup>5</sup> *Id.* at 10.

means.”<sup>6</sup> In keeping with eighteenth century practice, the people could enforce the Constitution through “the right to vote,”<sup>7</sup> “the right to petition,”<sup>8</sup> “the right of free speech,”<sup>9</sup> the refusal of juries and grand juries to enforce unconstitutional laws,<sup>10</sup> and—as a last resort—“[m]ob action.”<sup>11</sup>

Based on these observations, Professor Kramer concludes that “[t]he status of judicial review on the eve of the Federal Convention was . . . uncertain at best.”<sup>12</sup> In order to overcome such uncertainty, Kramer would require specific evidence that the Founders intended judicial review in particular contexts. Kramer suggests that such evidence exists to support judicial review in two circumstances. First, he believes that “the Framers clearly decided to adopt judicial review as a device for controlling state laws,”<sup>13</sup> but that “[n]o similar decision was made to authorize judicial review of federal legislation.”<sup>14</sup> Second, he maintains that “while the Founders believed that the provisions delegating powers were not proper subjects for judicial involvement, many of them thought otherwise when it came to the rights-bearing provisions.”<sup>15</sup> Thus, in Kramer’s view, the Founders expected courts to review state law and to uphold individual rights, but not to police the bounds of federal power.

Although there is much to admire in Professor Kramer’s work, there are at least two difficulties with his proposed dichotomy. First, Kramer’s attempt to separate judicial review of state law from judicial review of federal statutes is inconsistent with the text of the Supremacy Clause. The Clause recognizes only three forms of federal law as “the supreme Law of the Land”—“[t]his 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.”<sup>16</sup> By its terms, therefore, the Clause requires

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<sup>6</sup> *Id.* at 49; *see also id.* (“It was the legislature’s delegated responsibility to decide whether a proposed law was constitutionally authorized, subject to oversight by the people. Courts simply had nothing to do with it, and they were acting as interlopers if they tried to second-guess the legislature’s decision.”).

<sup>7</sup> *Id.* at 27.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 28; *see also id.* at 31 (stating that “lawyers argued fundamental law to juries, which rendered verdicts based on their own interpretation and understanding of the constitution”).

<sup>11</sup> *Id.* at 28.

<sup>12</sup> *Id.* at 59. Kramer acknowledges uncertainty because “a few men reasoned that respect for popular sovereignty actually *required* judicial review.” *Id.* at 51. For these men, however, judicial review “was not an act of ordinary legal interpretation.” *Id.* at 54. Rather, it “was a *political*—perhaps we should say a ‘political-legal’ act of resistance.” *Id.* In Kramer’s view, this meant at most that “laws should be declared void only if ‘unconstitutional beyond dispute.’” *Id.* at 56.

<sup>13</sup> *Id.* at 61.

<sup>14</sup> *Id.* at 64.

<sup>15</sup> *Id.* at 125; *see also* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 287–88 (2000) (suggesting that “[t]he Framers of the Constitution expected, and may even have hoped, that judges would be active in reviewing the constitutionality” of federal statutes alleged to violate the Bill of Rights).

<sup>16</sup> U.S. CONST. art. VI, cl. 2 (emphasis added).

courts to prefer federal statutes to contrary state law only if the federal statute is consistent with “[t]his Constitution.” In other words, courts have no warrant to enforce *unconstitutional* federal statutes over contrary state law. This is true whether the federal statute in question violates the Constitution’s “provisions delegating powers” or its “rights-bearing provisions.”<sup>17</sup> Thus, in such cases, the Supremacy Clause explicitly conditions judicial review of state law on judicial review of federal statutes.

Second, Professor Kramer’s further attempt to distinguish judicial review under “the rights-bearing provisions” of the Constitution from judicial review under the “provisions delegating powers” contradicts widespread assumptions at the Founding about the nature and source of individual rights vis-à-vis the federal government. Federalists and Antifederalists agreed that individual rights would be secured—at least in part—by the Constitution’s limited delegation of powers to the federal government. Their disagreement was whether this feature alone would suffice to protect individual liberty.

The Antifederalists argued that a Bill of Rights was necessary to guarantee essential rights. The Federalists countered that a Bill of Rights was both unnecessary and dangerous. It was “unnecessary” because the federal government lacked power to interfere with the rights at issue. It was “dangerous” because it might erroneously imply that the federal government had power to invade other rights retained by the people. The Founders compromised by including the Ninth and Tenth Amendments in the Bill of Rights. As discussed below, these amendments negated any suggestion that the enumeration of rights implied the availability of federal power to invade other rights, and thus confirm that the Founders equated individual rights with the limited scope of federal powers. From this perspective, Professor Kramer’s suggestion that courts enforce “the rights-bearing provisions” of the Constitution but not the “provisions delegating powers” is anachronistic because it ignores the common purpose of these provisions and would create the very danger that the Founders sought to avoid.<sup>18</sup>

The Founders’ understanding that the Constitution secures individual rights by limiting federal power has important implications for judicial review. Professor Kramer’s work profitably reminds us that judicial supremacy—or, more precisely, judicial exclusivity—is at least in tension with Founders’ notions of popular sovereignty and popular constitutionalism. Such tension, however, does not eliminate the need for judicial review of federal statutes alleged to exceed the scope of federal powers. Such review—like judicial review of federal statutes under the Bill of Rights—is authorized by Article III and the Supremacy Clause. Thus, courts cannot simply enforce the Bill of Rights but decline to police the limits of federal power.<sup>19</sup> Given the Founders’ understanding of the source of individual rights vis-à-vis the federal government, courts should take a unitary approach to judicial review

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<sup>17</sup> Kramer, *supra* note 4, at 125.

<sup>18</sup> For a distinct argument that Professor Kramer’s critique of the Rehnquist Court’s approach to judicial review “proceeds from an anachronistic understanding of the foundational principles of *Marbury*,” see G. Edward White, *The Constitutional Journey of Marbury v. Madison*, 89 VA. L. REV. 1463, 1471 (2003).

<sup>19</sup> See Kramer, *supra* note 4, at 122.

under the Supremacy Clause and enforce both the Bill of Rights and the limits of federal power. Only then could courts uphold all of the rights “retained by the people.”<sup>20</sup>

### I. *Judicial Review and the Supremacy Clause*

Professor Kramer acknowledges that “the Framers clearly decided to adopt judicial review as a device for controlling state laws,”<sup>21</sup> but maintains that “[n]o similar decision was made to authorize judicial review of federal legislation.”<sup>22</sup> Like Jesse Choper before him, Kramer invokes the Supremacy Clause in support of this dichotomy.<sup>23</sup> In Kramer’s view, “adding the Supremacy Clause made explicit the authority to do something that might or might not have been implicit without it.”<sup>24</sup> According to Kramer, “An express command for judges to prefer federal to state law answered the leading objection to judicial review, which was that judges had not been authorized by the people to make such decisions.”<sup>25</sup>

This account overlooks the dual nature of the Supremacy Clause. Although the Clause requires state courts to follow “the supreme Law of the Land” over contrary state law,<sup>26</sup> the Clause conditions the supremacy of federal statutes on their being “made in Pursuance” of the Constitution.<sup>27</sup> Thus, the Clause constitutes an “express command for judges” not only “to prefer federal to state law,” but also to prefer the Constitution to federal statutes.<sup>28</sup> This means that, in deciding whether to follow state law or a contrary federal statute, courts must first resolve any challenges to the constitutionality of the federal statute at issue. Such review necessarily includes ascertaining whether the statute falls within the scope of Congress’s

<sup>20</sup> U.S. CONST. amend. IX.

<sup>21</sup> Kramer, *supra* note 4, at 61.

<sup>22</sup> *Id.* at 64. At one point, Kramer merely states that “the power of courts to review federal legislation was left unaddressed” at the Constitutional Convention. *Id.* at 67. At another point, he makes the affirmative argument that “the Founders believed that the provisions delegating powers [to Congress] were not proper subjects for judicial involvement.” *Id.* at 125; *see also* Kramer, *supra* note 15, at 235 (stating that “no one in the Founding generation would have imagined that courts could or should play a prominent role in defining the limits of federal power”).

<sup>23</sup> A quarter century ago, Jesse Choper urged courts to divide judicial review along similar lines. In Professor Choper’s view, “the constitutional issue whether federal action is beyond the authority of the central government and thus violates ‘states’ rights’ should be treated as nonjusticiable, with final resolution left to the political branches.” Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1557 (1977) [hereinafter Choper, *Scope of National Power*]. At the same time, he maintained that courts should actively “prevent state encroachment on national supremacy.” JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 205 (1980) [hereinafter CHOPER, JUDICIAL REVIEW].

<sup>24</sup> Kramer, *supra* note 4, at 63.

<sup>25</sup> *Id.*

<sup>26</sup> U.S. CONST. art. VI, cl. 2.

<sup>27</sup> *Id.*

<sup>28</sup> This section incorporates arguments made at greater length in Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91 (2003). For related arguments, see Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 903–13 (2003).

enumerated powers. The text, history and structure of the Constitution support this conclusion.

A. *Text*

The first half of the Supremacy Clause provides that “[t]his 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.”<sup>29</sup> Significantly, federal “Laws” qualify as “supreme” under the Clause only if they were “made in Pursuance” of the Constitution.<sup>30</sup> By its terms, therefore, the Supremacy Clause suggests that courts should prefer federal statutes to contrary state law only if the federal statutes themselves are constitutional.

The second half of the Supremacy Clause also supports judicial review of federal statutes. After defining “the supreme Law of the Land,” the Clause directs that “the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>31</sup> In so doing, the Clause “impressed state judges into national service, obliging them not only to subordinate their own state law obligations to federal ones, but also actively to police state law and void any (even the most fundamental) if it was inconsistent with any (even the least important) federal law.”<sup>32</sup> In order to comply with this command, however, state judges must identify “the supreme Law of the Land” with care. Thus, when a party challenges the constitutionality of a federal statute in state court, state judges must determine whether the statute was “made in Pursuance” of the Constitution in order to apply the Supremacy Clause.

If the Constitution authorizes state courts to review the constitutionality of federal statutes, then it necessarily authorizes the Supreme Court to do so as well. Article III gives the Supreme Court appellate jurisdiction over “all Cases, in Law and Equity, arising under this Constitution, the Laws of the

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<sup>29</sup> U.S. CONST. art. VI, cl. 2 (emphasis added).

<sup>30</sup> See *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (“Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States.”). Scholars continue to debate the extent to which the federal government may adopt treaties that either exceed the scope of Congress’s enumerated powers or otherwise violate the Constitution. See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 433–50 (1998) (criticizing the “nationalist view” of the treaty power); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1279–1315 (2000) (defending the “nationalist view” of the treaty power); Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98, 199 (2000) (critiquing Professor Golove’s analysis).

<sup>31</sup> U.S. CONST. art. VI, cl. 2. Caleb Nelson has recently examined this portion of the Supremacy Clause, and concluded that the relevant language constitutes a “non obstante” clause, a provision used to overcome the traditional rule that “repeals by implication in the law are not favored.” Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 237–46 (2000). The result, in his view, is that the “Supremacy Clause requires preemption [of state law] only when the rules provided by state and federal law contradict each other, so that a court cannot simultaneously follow both.” *Id.* at 303.

<sup>32</sup> James S. Liebman & William F. Ryan, “*Some Effectual Power*”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 764 (1998).

United States, and Treaties made, or which shall be made, under their Authority.”<sup>33</sup> As James Liebman and William Ryan have observed, “the parallel language of the ‘Arising Under’ and Supremacy Clauses was intentional and structurally crucial.”<sup>34</sup> Even if there were no lower federal courts with federal question jurisdiction,<sup>35</sup> Article III would authorize the Supreme Court to correct misapplications of the Supremacy Clause by state courts. Thus, while the Supremacy Clause obligates state judges to ascertain and enforce “the supreme Law of the Land,” Article III’s decision to vest appellate jurisdiction in the Supreme Court “add[s] a yet stronger (because independent, final, and effectual) external check on state judges—or, more accurately, a checking up on or spot-checking of state judicial decisions to assure that state judges are fulfilling *their* checking function vis-à-vis state law.”<sup>36</sup>

If the Supremacy Clause authorizes state courts and the Supreme Court to review the constitutionality of federal statutes, it is unlikely that the Founders meant to deny lower federal courts similar authority. These courts trace their jurisdiction in federal question cases to the same clause in Article III that authorizes the Supreme Court to exercise appellate jurisdiction in such cases.<sup>37</sup> In addition, as Alexander Hamilton observed, there seems to be “no impediment to the establishment of an appeal from the state courts, to the subordinate national tribunals.”<sup>38</sup> Rather, such questions appear “to be left to the discretion of the legislature.”<sup>39</sup> Because state courts review the constitutionality of federal statutes under the Supremacy Clause, lower federal courts exercising appellate jurisdiction would have to undertake such review as well. More fundamentally, if one believes—as Professor Kramer does—that the Supremacy Clause requires lower federal courts to prefer “the supreme Law of the Land” to contrary state law, then the Clause necessarily authorizes such courts to determine whether a particular federal statute was in fact “made in Pursuance” of the Constitution.<sup>40</sup>

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<sup>33</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>34</sup> Liebman & Ryan, *supra* note 32, at 708.

<sup>35</sup> Congress has discretion whether or not “[t]o constitute Tribunals inferior to the supreme Court,” U.S. CONST. art. I, § 8, cl. 9, which implies broad authority to define and limit their jurisdiction. *See, e.g.,* Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938); Sheldon v. Sill, 49 U.S. (8 How.) 441, 442 (1850). *See generally* Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671 (1997).

<sup>36</sup> Liebman & Ryan, *supra* note 32, at 771–72.

<sup>37</sup> U.S. CONST. art. III, § 2. Professor Wechsler reached a similar conclusion. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 4–5 (1959).

<sup>38</sup> THE FEDERALIST NO. 82, at 495 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>39</sup> *Id.*

<sup>40</sup> The Supreme Court’s jurisdiction over appeals from both state and lower federal courts also supports judicial review by lower federal courts. Through its power to create lower federal courts and control their jurisdiction, Congress has substantial discretion to determine whether state or federal courts will adjudicate cases arising under federal law. In either case, the Supreme Court generally has appellate jurisdiction over such cases. It would be odd to conclude that the Supreme Court can assess the constitutionality of federal statutes in cases coming from state courts, but not in cases coming from federal courts. This suggests that the Supremacy Clause requires federal courts—no less than state courts—to

## B. History

History confirms that the Supremacy Clause authorizes courts to review the constitutionality of federal statutes in order to identify “the supreme Law of the Land.” Delegates to the Federal Convention of 1787 widely acknowledged the need for supremacy with respect to matters properly assigned to the federal government. At the same time, delegates sought to prevent the new government from exceeding its enumerated powers at the expense of the states and the people. To further both goals, the Convention ultimately adopted the carefully worded Supremacy Clause in preference to several proposed alternatives. The Founders’ choice confirms that they expected the judiciary both to enforce the supremacy of federal law and to uphold the limits of federal power.

### 1. The Constitutional Convention

The Convention recognized from the outset that some mechanism was necessary to secure the supremacy of federal law over contrary state law.<sup>41</sup> As Jack Rakove has explained, “federalism questions were central to the origins of judicial review” because federalism “requires mechanisms to resolve the conflicts that arise when national and state legislation overlap.”<sup>42</sup> The Founders considered three mechanisms for resolving such conflicts, each of which looked to a different branch of government for its implementation.<sup>43</sup>

First, the Virginia Plan initially proposed authorizing the Union to use military force to coerce the states to comply with federal law.<sup>44</sup> The delegates were immediately opposed to the use of force.<sup>45</sup> At the outset, James

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identify and apply “the supreme Law of the Land,” that is, to determine whether an applicable federal statute was “made in Pursuance” of the Constitution.

<sup>41</sup> The proceedings of the Federal Convention of 1787, of course, cannot authoritatively establish the meaning of the constitutional text. They may, however, confirm the apparent meaning of the text. The Supremacy Clause, for example, establishes a rule of decision for courts that restricts “the supreme Law of the Land” to “Laws . . . made in Pursuance” of “[t]his Constitution.” Notwithstanding this text, Professor Kramer maintains that the Founders did not intend *courts* to determine whether federal statutes were “made in Pursuance” of the Constitution. As discussed in this section, however, the records of the Convention—particularly its consideration and rejection of the congressional negative—tend to refute Kramer’s view and confirm the apparent meaning of the text.

<sup>42</sup> Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1042 (1997).

<sup>43</sup> For a more detailed discussion of these alternatives, see Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1348–55 (2001). See also JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 171–72 (1996) (“In determining how national acts could be enforced against potential opposition, the Convention could choose among three mechanisms: the use of coercive force against defiant states . . . ; the negative on state laws; or the legal prosecution of individuals who violated or interfered with national law.”).

<sup>44</sup> See Notes of James Madison on the Federal Convention (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 17, 21 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (proposing that the National Legislature be authorized “to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof”).

<sup>45</sup> See Notes of James Madison on the Federal Convention (May 31, 1787), in 1 FARRAND’S RECORDS, *supra* note 44, at 47, 54 (“The use of force agst. a State, would look more like a declaration of war, than an infliction of punishment, and would probably be

Madison “observed that the more he reflected on the use of force, the more he doubted the practicability, the justice and the efficacy of it when applied to people collectively and not individually. A Union of the States containing such an ingredient seemed to provide for its own destruction.”<sup>46</sup> The Convention tabled the proposal and never seriously entertained this alternative.<sup>47</sup>

Second, the Virginia Plan suggested giving the national legislature power to negative state laws.<sup>48</sup> As originally proposed, this solution would have empowered Congress “to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of [the] Union.”<sup>49</sup> The Convention initially approved the proposal in this form.<sup>50</sup> Mr. Pinckney subsequently moved to expand the negative by proposing “that the National Legislature shd. have authority to negative all Laws which they shd. judge to be improper.”<sup>51</sup> The proposal of an unlimited congressional negative provoked strong objections by delegates from small states fearful of unchecked federal power. These objections proved decisive and the Convention rejected Pinckney’s proposal to expand the negative.<sup>52</sup> The Convention subsequently reconsidered and rejected even the original congressional negative.<sup>53</sup> Although limited on its face, the negative would have allowed Congress to determine for itself the scope of its powers vis-à-vis the states. This result was simply unacceptable to a majority of states at the Convention.<sup>54</sup>

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considered by the party attacked as a dissolution of all previous compacts by which it might be bound.”).

<sup>46</sup> *Id.* Madison’s views on this question were apparently unsettled until he spoke at the Convention. See Liebman & Ryan, *supra* note 32, at 710 (stating that private correspondence suggests that “Madison initially favored authorizing the federal government to use military force to bring recalcitrant states, and particularly state legislatures, into line with national law”).

<sup>47</sup> The New Jersey Plan subsequently proposed permitting “the federal Executive . . . to call forth ye power of the Confederated States . . . to enforce and compel an obedience to . . . Acts [of Congress], or an Observance of . . . Treaties.” Notes of James Madison on the Federal Convention (June 15, 1787), in 1 FARRAND’S RECORDS, *supra* note 44, at 242, 245. The proposal again generated decisive opposition from delegates including Alexander Hamilton. See Notes of James Madison on the Federal Convention (June 18, 1787), in 1 FARRAND’S RECORDS, *supra* note 44, at 282, 285 (“But how can this force be exerted on the States collectively. It is impossible. It amounts to a war between the parties. Foreign powers also will not be idle spectators. They will interpose, the confusion will increase, and a dissolution of the Union ensue.”).

<sup>48</sup> Notes of James Madison on the Federal Convention (May 31, 1787), in 1 FARRAND’S RECORDS, *supra* note 44, at 47, 54.

<sup>49</sup> Notes of James Madison on the Federal Convention (May 29, 1787), in 1 FARRAND’S RECORDS, *supra* note 44, at 17, 21.

<sup>50</sup> See Notes of James Madison on the Federal Convention (May 31, 1787), in 1 FARRAND’S RECORDS, *supra* note 44, at 47, 54 (approving the negative and adding “the words ‘or any Treaties subsisting under the authority of the Union’” to the end of the clause).

<sup>51</sup> Notes of James Madison on the Federal Convention (June 8, 1787), in 1 FARRAND’S RECORDS, *supra* note 44, at 164, 164.

<sup>52</sup> *Id.*

<sup>53</sup> See Notes of James Madison on the Federal Convention (July 17, 1787), in 2 FARRAND’S RECORDS, *supra* note 44, at 25, 27–28.

<sup>54</sup> *Id.* at 28 (rejecting “the power of negating laws of States” by a vote of seven

Finally, the New Jersey Plan would have required state courts (subject to federal appellate review) to enforce the Laws of the United States “made by virtue & in pursuance of the powers hereby . . . vested in them” as “the supreme law of the respective States.”<sup>55</sup> Although this “Supremacy Clause” was originally rejected as part of the New Jersey Plan, the Convention subsequently adopted the Clause immediately after rejecting the congressional negative.<sup>56</sup> Significantly, every version of the Supremacy Clause considered by the Convention tied the supremacy of federal statutes to their fidelity to the Constitution. For example, the provision initially adopted by the Convention recognized “the legislative acts of the United States made by virtue and in pursuance of the articles of Union” as “the supreme law of the respective States.”<sup>57</sup> As finally adopted, the Supremacy Clause designates “the Laws of the United States which shall be made in Pursuance” of “[t]his Constitution” as “the supreme Law of the Land.”<sup>58</sup> Thus, under all drafts of the Clause considered at the Convention, courts were required to disregard state law in favor of contrary federal statutes only if the statutes themselves were constitutional.<sup>59</sup>

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states to three). On this occasion, Madison reports that “Mr. Govr. Morris was more & more opposed to the negative. The proposal of it would disgust all the States. A law that ought to be negatived will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a Nationl. law.” *Id.* at 27–28.

<sup>55</sup> Notes of James Madison on the Federal Convention (June 15, 1787), in 1 FARRAND’S RECORDS, *supra* note 44, at 242, 245. The New Jersey Plan did not authorize the creation of lower federal courts. Rather, the Plan proposed that all cases arising under federal law be adjudicated “by the Common Law Judiciarys of the State[s]” in the first instance. *Id.* at 243. These decisions would have been subject to appellate review by “a federal Judiciary . . . to consist of a supreme Tribunal.” *Id.* at 244.

<sup>56</sup> See Journal of the Federal Convention (July 17, 1787), in 2 FARRAND’S RECORDS, *supra* note 44, at 21, 22. The Convention subsequently amended the Supremacy Clause to include the “Constitution” (in addition to “Laws” and “Treaties”), Notes of James Madison on the Federal Convention (Aug. 23, 1787), in 2 FARRAND’S RECORDS, *supra* note 44, at 384, 389, and to make clear that these three sources of federal law were not merely “the supreme law of the respective States,” but “the supreme Law of the Land,” Report of Committee of Style, in 2 FARRAND’S RECORDS, *supra* note 44, at 590, 603.

<sup>57</sup> Journal of the Federal Convention (July 17, 1787), in 2 FARRAND’S RECORDS, *supra* note 44, at 21, 22.

<sup>58</sup> U.S. CONST. art. VI, cl. 2.

<sup>59</sup> David Currie relies on the distinct language used by the Clause to describe “Laws” and “Treaties” to argue that the phrase “Laws . . . made in Pursuance” of “[t]his Constitution” was solely a temporal reference. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 72–73 (1985). In his view, this reading “furnishes a powerful argument *against* judicial review of Acts of Congress.” *Id.* at 73; see also Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1119 (2001) (“‘In Pursuance thereof’ means ‘after,’ not ‘consistent with.’”); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 21 (suggesting that the phrase might “mean merely that only those statutes adopted by Congress *after* the re-establishment and reconstitution of Congress pursuant to the Constitution itself shall be the supreme law of the land”). There are several difficulties with this interpretation. First, the distinctive language with respect to “Treaties” was added *after* the language used to describe “Laws.” Thus, it seems unlikely that the phrase adopted to describe “Laws” was intended to differentiate itself from a phrase yet to be drafted. See Clark, *supra* note 28, at 118. Second, even if the distinctive language used to describe “Laws” was meant to have temporal significance, there is substantial evidence that it was also meant to condition the supremacy of federal statutes on adherence to the limits of

The Founders' adoption of the Supremacy Clause and rejection of the congressional negative provides strong evidence that they intended courts—rather than Congress—to determine whether Congress had exceeded the scope of its enumerated powers. Proponents of the Supremacy Clause opposed the negative in part because it would have allowed Congress to judge the scope of its own powers. Assigning this responsibility to judges—including state judges—would establish both horizontal and vertical checks against congressional overreaching. The judicial branch would check the legislative branch and state agents would check the federal government. Further efforts to revive the congressional negative failed,<sup>60</sup> thus leaving resolution of conflicts between state and federal law to courts.

Recognizing the conditional nature of the Supremacy Clause helps to explain events at the Convention that Professor Kramer finds puzzling. For example, Kramer observes that immediately after the defeat of the congressional negative, “Luther Martin moved to incorporate into the Constitution the proposed Supremacy Clause from the defeated New Jersey Plan.”<sup>61</sup> According to Kramer,

Martin's decision to move this amendment after the legislative veto had already been defeated is curious. If, as Sherman and Morris had suggested, a legislative veto was unnecessary because judicial review was already implicit, why move *after* the veto had been voted down to add a provision explicitly ordering state judges to treat federal law as supreme? And why do so if you are Luther Martin and interested mostly in keeping any limits on state power as weak as possible?<sup>62</sup>

Kramer speculates that Martin wanted “to ensure that the legislative veto was dead once and for all.”<sup>63</sup> But even assuming that Martin's motives for introducing the Supremacy Clause are relevant to its meaning, Martin's motion appears to have been more than a mere defensive maneuver. Martin sought adoption of the Supremacy Clause because he (like the original

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Congress's enumerated powers. These functions are not mutually exclusive. *See id.* at 118–19. Third, the distinct language used to describe “Laws” and “Treaties” may actually support judicial review of federal statutes. Treaties concern our external relations with foreign nations, whereas laws generally focus on domestic matters. Although the Founders assigned nearly complete power over foreign relations to federal officials, they were unwilling to delegate similarly broad authority over internal affairs to the central government. Thus, it is not surprising that the Constitution expressly conditions the supremacy of federal “Laws”—but not “Treaties”—on adherence to the limits of federal power. *See id.* at 119.

<sup>60</sup> Near the end of the Convention, several delegates attempted to revive a congressional power “[t]o negative all laws passed by the several States interfering in the opinion of the Legislature with the General interests and the harmony of the Union.” Notes of James Madison on the Federal Convention (Aug. 23, 1787), in 2 FARRAND'S RECORDS, *supra* note 44, at 384, 390. Although this version of the negative would have required “that two thirds of the members of each House assent to” its exercise, *id.*, opponents again objected in strong terms and the Convention rejected the proposal. *See id.* at 391 (“If nothing else, this alone would damn and ought to damn the Constitution. Will any State ever agree to be bound hand & foot in this manner.”).

<sup>61</sup> Kramer, *supra* note 4, at 63.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

proponents of the New Jersey Plan) understood that the Clause would authorize courts to check *federal* as well as state power.

Professor Kramer's mistake lies in reading the Supremacy Clause as a one-sided provision that always favors the federal government at the expense of the states. In fact, the Clause was designed to be a double-edged sword—that is, an authorization for courts to keep both the federal government and the states within their proper spheres. The Clause requires state courts to prefer federal statutes to state law, but only if the statutes in question were “made in Pursuance” of the Constitution.<sup>64</sup> For this reason, Martin's motion was consistent with his well-known desire to protect the states against unwarranted federal legislation. He knew that if Congress exceeded its constitutional powers, the Supremacy Clause would allow state courts to disregard federal law. In other words, the price of federal supremacy was judicial review. From this perspective, it is not at all “curious” that Luther Martin—a delegate committed to keeping “limits on state power as weak as possible”—proposed the Supremacy Clause.

The conditional nature of the Supremacy Clause also sheds light on other matters that Professor Kramer finds difficult to explain. In discussing judicial review, Kramer recounts the Convention's consideration of a Council of Revision—a proposal to vest the power to veto federal legislation in the president and a convenient number of federal judges.<sup>65</sup> James Wilson favored the proposal on the ground that judicial review might prove inadequate to protect against “encroachments on the people as well as on [the Judiciary].”<sup>66</sup> Other delegates opposed the proposal on the ground that it would give judges too much power in conjunction with judicial review. For example, Luther Martin objected that because “the Constitutionality of laws . . . will come before the Judges in their proper official character,” putting judges on the Council of Revision would give them “a double negative.”<sup>67</sup> Finally, George Mason favored a Council of Revision because judicial review could eliminate some—but not all—of the “unjust and pernicious laws” that Congress might enact.<sup>68</sup> According to Mason, federal judges “could declare an unconstitutional law void,” but should give “a free course” to “every law however unjust oppressive or pernicious, which did not come plainly under this description.”<sup>69</sup>

Professor Kramer finds it “difficult to know what to make of this exchange.”<sup>70</sup> He acknowledges that Wilson envisioned at least limited judicial review, and that Martin and Mason “seemed to assume a broader power.”<sup>71</sup> Because the Council of Revision was rejected and “no other motion was made pertaining to the role of judges,” Kramer concludes that

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<sup>64</sup> U.S. CONST. art. VI, cl. 2.

<sup>65</sup> See Kramer, *supra* note 4, at 64–66.

<sup>66</sup> Notes of James Madison on the Federal Convention (July 21, 1787), in 2 FARRAND'S RECORDS, *supra* note 44, at 73, 73.

<sup>67</sup> *Id.* at 76.

<sup>68</sup> *Id.* at 78.

<sup>69</sup> *Id.*

<sup>70</sup> Kramer, *supra* note 4, at 66.

<sup>71</sup> *Id.*

“we are left uncertain as to what role, if any, judicial review was expected to play.”<sup>72</sup> Kramer offers several possible explanations “why none of the advocates of judicial review thought to make a motion to add this power.”<sup>73</sup> He hypothesizes that these delegates either “did not think it important to incorporate the power into the Constitution,” or they “believed any effort to add such a provision would fail.”<sup>74</sup> Kramer concludes that “[w]hatever the explanation, the power of courts to review federal legislation was left unaddressed.”<sup>75</sup>

Here again, Professor Kramer overlooks the dual role of the Supremacy Clause. Luther Martin had no reason to propose judicial review of federal statutes following rejection of the Council of Revision for the simple reason that he had already proposed—and the Convention had already approved—the Supremacy Clause. Having successfully urged the adoption of the Clause just four days earlier, Martin had every reason to expect that courts would exercise judicial review in the course of identifying “the supreme Law of the Land.” That is why, in opposing the Council of Revision, Martin confidently declared that “the Constitutionality of laws . . . will come before the Judges in their proper official character.”<sup>76</sup> At that point in the Convention, another motion pertaining to judicial review would have been superfluous.

## 2. The Ratification Debates

The ratification debates confirm that the Supremacy Clause tied judicial review of state law to judicial review of federal statutes.<sup>77</sup> Opponents of the Constitution argued that the Clause would enable the federal government to exercise unlimited power at the expense of the states.<sup>78</sup> Proponents of the Constitution responded by stressing the conditional nature of federal supremacy.<sup>79</sup> In Massachusetts, for example, Cassius defended the Supremacy Clause, “which knaves and blockheads have so often dressed up in false colours.”<sup>80</sup> After quoting the Clause in full, he explained how the Clause would actually constrain the federal government:

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 67.

<sup>75</sup> *Id.*

<sup>76</sup> Notes of James Madison on the Federal Convention (July 21, 1787), in 2 FARRAND’S RECORDS, *supra* note 44, at 73, 76.

<sup>77</sup> This Article examines the ratification debates not because the views expressed therein are necessarily authoritative as to the meaning of the Constitution, but because (like *The Federalist*) they have “significant interpretive value as a detailed, contemporaneous exposition of the Constitution by authors who were intimately familiar with its legal and political background.” John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1339 (1998).

<sup>78</sup> See RAKOVE, *supra* note 43, at 183–88.

<sup>79</sup> See generally Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1507–21 (2001) (discussing the ratification debates and the expectations regarding judicial review).

<sup>80</sup> Cassius VI, *To the Inhabitants of This State*, MASS. GAZETTE, Dec. 25, 1787, reprinted in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 511, 513 (John P. Kaminski & Gaspare J. Saladino eds., 1998) [hereinafter 5 DOCUMENTARY HISTORY].

This is the article which they say is so arbitrary and tyrannical, that unless you have a bill of rights to secure you, you are ruined forever. But in the name of common sense I would ask, . . . would it not be much easier to resort to the federal constitution, to see if *therein* power is given to Congress to make the law in question. If such power *is not* given, the *law* is in fact a *nullity*, and the people will not be bound thereby. For let it be remembered, that *such laws*, and *such only*, as are *founded on this constitution*, are to be the supreme law of the land . . . .<sup>81</sup>

George Nicholas, of Virginia, gave similar assurances regarding the dual nature of the Supremacy Clause. He stressed that the Clause does not “in any manner give them this unlimited power, because this [Clause] only declares those laws binding which are made in pursuance of or in conformity to the particular powers given by the constitution.”<sup>82</sup>

Similarly, in *The Federalist No. 33*, Alexander Hamilton defended the Supremacy Clause by emphasizing its limits:

If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed. . . . But it will not follow from this doctrine that acts of the larger society which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such.<sup>83</sup>

Although Hamilton thought that such a limitation on federal supremacy would have been implicit in any event, he stressed that the Supremacy Clause “*expressly* confines this supremacy to laws made *pursuant to the Constitution*.”<sup>84</sup>

<sup>81</sup> *Id.*

<sup>82</sup> Letter from George Nicholas (Feb. 16, 1788), in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 369, 369 (John P. Kaminski & Gaspare J. Saladino eds., 1988).

<sup>83</sup> THE FEDERALIST NO. 33, at 204 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also THE FEDERALIST NO. 27, at 177 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting “that the laws of the Confederacy, as to the *enumerated* and *legitimate* objects of its jurisdiction, will become the SUPREME LAW of the land”).

<sup>84</sup> THE FEDERALIST NO. 33, *supra* note 83, at 205. Professor Kramer might argue that these statements merely restate the limits of federal supremacy set forth in the Supremacy Clause, without addressing whether *courts* should enforce such limits. This reading is unpersuasive for several reasons. First, by its terms, the Supremacy Clause is a rule of decision for courts. Kramer himself argues that the Clause authorizes courts to review state law alleged to conflict with federal statutes. If the Clause authorizes judicial review in these circumstances, then—by its terms—it also authorizes judicial review of the federal statutes at issue. Second, as discussed, the Founders understood the Supremacy Clause as an alternative to the congressional negative. Whereas the latter would have allowed Congress to judge the scope of its own powers vis-à-vis the states, a principal purpose of the former was to reassign this task to courts. Finally, taken in context, the statements quoted in the text appear to contemplate judicial review.

### C. Structure

The constitutional structure also supports judicial review of the scope of federal powers. As discussed, the Founders selected the Supremacy Clause over the congressional negative largely because the small states refused to permit Congress to be the judge of its own powers.<sup>85</sup> Unlike the negative, the Supremacy Clause assigned resolution of federal-state conflicts to courts rather than Congress. By enlisting courts, the Founders established multiple checks against the abuse of federal power. Although the Founders gave states an important role in the composition and selection of the federal government (including Congress),<sup>86</sup> they were not content to rely exclusively on these “political safeguards of federalism” to prevent federal overreaching. To be sure, these mechanisms provided some assurance to the states, but not enough for them to adopt the congressional negative and thereby allow Congress to judge the scope of its own powers vis-à-vis the states and the people.<sup>87</sup> In this

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For example, Cassius argued that if the Constitution does not give power “to Congress to make the law in question,” then “the law is in fact a nullity, and the people will not be bound thereby.” Cassius VI, *supra* note 80, at 513. His reference to “the people,” of course, supports Professor Kramer’s conclusion that the Founders expected popular enforcement of the Constitution. But this recognition by no means forecloses judicial review as an additional safeguard. Indeed, Cassius made his observation in the course of contrasting the Supremacy Clause with a bill of rights as a means of restraining unwarranted federal legislation. Cassius argued that a bill of rights was unnecessary because it would be easier to prevent Congress from exceeding its powers under the Supremacy Clause. To the extent that Cassius expected courts to enforce a bill of rights, he presumably expected them to enforce the Supremacy Clause as well.

Similarly, Alexander Hamilton argued that acts of Congress “which are *not pursuant* to its constitutional powers” will not “become the supreme law of the land.” THE FEDERALIST NO. 33, *supra* note 83, at 204. “These will be merely acts of usurpation, and will deserve to be treated as such.” *Id.* Again, Hamilton might have contemplated popular resistance to such laws, but he undoubtedly contemplated judicial review as well. See THE FEDERALIST NO. 78, at 467–71 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Specifically, Hamilton made his remarks about the Supremacy Clause in the context of discussing a hypothetical federal statute “abrogating or preventing the collection of a tax laid by the authority of the State (unless upon imports and exports).” THE FEDERALIST NO. 33, *supra* note 83, at 205. Such a statute, he stressed, would not be the supreme law of the land, “but a usurpation of power not granted by the Constitution.” *Id.* Thus, he concluded “that the individual States would, under the proposed Constitution, retain an independent and uncontrollable authority to raise revenue to any extent of which they may stand in need, by every kind of taxation, except duties on imports and exports.” *Id.* These remarks necessarily imply that courts were neither bound nor authorized to enforce an unconstitutional federal statute over contrary state revenue laws.

<sup>85</sup> As initially approved, the negative would have empowered Congress “to negative all laws passed by the several States, contravening *in the opinion of the National Legislature* the articles of the Union.” Notes of James Madison on the Federal Convention (May 29, 1787), in 1 FARRAND’S RECORDS, *supra* note 44, at 17, 21 (emphasis added). By leaving this determination to Congress, the negative would have effectively vested Congress with absolute discretion to suspend state law. See Prakash & Yoo, *supra* note 79, at 1503 (stating that “in the absence of judicial review of federal laws, Congress would, in effect, have the unchecked power to veto state legislation”).

<sup>86</sup> See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543–44, 546–47 (1954); see also Clark, *supra* note 43, at 1328–72 (explaining how federal lawmaking procedures incorporate the political safeguards of federalism and preserve the governance prerogatives of the states).

<sup>87</sup> See *supra* notes 48–54 and accompanying text; see also THE FEDERALIST NO. 78, at

sense, the Founders' decision to adopt the Supremacy Clause instead of the negative followed the well-known maxim that no one should be the judge in his own cause.<sup>88</sup> Moreover, by assigning resolution of conflicts between state and federal law to courts, the Founders established an additional and distinct check against abuse of federal powers.

Both state and federal courts enjoy significant independence from Congress. State courts are creatures of state law and are thus generally insulated from congressional coercion or control. Similarly, by design, federal judges enjoy substantial independence from the political branches by virtue of constitutionally-mandated life tenure and salary protection.<sup>89</sup> The structural independence of the judiciary works in tandem with the Supremacy Clause to keep the federal government within its proper sphere. James Wilson stressed this point during the ratification debates:

If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void. For the power of the Constitution predominates. Anything, therefore, that shall be enacted by Congress contrary thereto will not have the force of law.<sup>90</sup>

Professor Kramer's position that the Founders authorized judicial review of state but not federal law not only contradicts the text of the Supremacy Clause, but also undercuts this important structural check. Thus, Kramer's approach would effectively negate the Founders' decision to adopt the Supremacy Clause in lieu of the congressional negative.

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467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("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.")

<sup>88</sup> See Philip A. Hamburger, *Revolution and Judicial Review: Chief Justice Holt's Opinion in City of London v. Wood*, 94 COLUM. L. REV. 2091 (1994) (linking the maxim that a person should not be the judge in his own cause to judicial review in early eighteenth century England); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 646 (1996) (explaining that the constitutional "separation of lawmaking from law-exposition promoted the rule of law and controlled arbitrary government"); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1283 (2002) ("Believing that no one ought to be 'judge in his own cause,' the Founders established three separate branches of government and positioned the judiciary to keep the political branches within the bounds of their lawful authority."); Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 305 (1989) (stating that "the notion that no man can be a judge in his own cause was among the earliest expressions of the rule of law in Anglo-American jurisprudence"); cf. THE FEDERALIST NO. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (defending federal jurisdiction over disputes between two states on the ground that "[n]o man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias").

<sup>89</sup> U.S. CONST. art. III, § 1.

<sup>90</sup> Debates of the Pennsylvania Convention (Dec. 7, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 512, 517 (Merrill Jensen ed., 1976) [hereinafter 2 DOCUMENTARY HISTORY].

## II. Judicial Review and Individual Rights

Again following Jesse Choper's example, Professor Kramer would recognize a second exception to "popular constitutionalism" in favor of judicial review to "enforc[e] individual rights."<sup>91</sup> Kramer finds support for this exception in the Founders' understanding of the Constitution's specific provisions designed to protect individual rights. In his view, "while the Founders believed that the provisions delegating powers were not proper subjects for judicial involvement, many of them thought otherwise when it came to the rights-bearing provisions."<sup>92</sup> After discussing the views of Thomas Jefferson, James Madison, and St. George Tucker, Kramer concludes that "[j]udicial protection of individual rights was thus established early as a hallmark of American jurisprudence."<sup>93</sup>

There are several difficulties with attempts to distinguish judicial review of federal statutes that threaten individual rights from judicial review of federal statutes that exceed the scope of Congress's enumerated powers. First, such attempts are inconsistent with the relevant constitutional text. The primary textual basis for judicial review of *any* federal statute is the Supremacy Clause, which recognizes "the Laws of the United States which shall be made in Pursuance" of "[t]his Constitution" as "the supreme Law of the Land."<sup>94</sup> If this language authorizes courts to review the constitutionality of federal statutes that violate the Ex Post Facto Clause, for example, then it also allows courts to review federal statutes that exceed the scope of Congress's enumerated powers. Thus, the text of the Supremacy Clause itself appears to foreclose modern attempts to divide judicial review according to the source of the constitutional defect alleged.

Second, the dichotomy proposed by Professors Choper and Kramer contradicts key assumptions held by the Founders about the nature and source of individual rights at the Founding. Those who framed and ratified the Constitution generally equated individual liberty with limited federal power. As Philip Hamburger has explained, the Founders "assumed that by enumerating federal powers, the people would remain free from the federal government in other respects and thereby would retain innumerable many

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<sup>91</sup> Kramer, *supra* note 4, at 125; see Choper, *Scope of National Power*, *supra* note 23, at 1577 (arguing that dispensing with judicial review of the scope of federal powers "would husband the Supreme Court's scarce political capital, and thus would enhance the Justices' ability to act in support of personal liberties").

<sup>92</sup> Kramer, *supra* note 4, at 125; see also *id.* at 124 (stating that while many Founders favored judicial review of the Constitution's rights-bearing provisions, "all but a very few believed [that the provisions delegating powers] were too indefinite and too political to afford a proper subject for intensive judicial scrutiny"); Kramer, *supra* note 15, at 287–88 (suggesting that "[t]he Framers of the Constitution expected, and may even have hoped, that judges would be active in reviewing the constitutionality" of federal statutes alleged to violate the Bill of Rights).

<sup>93</sup> Kramer, *supra* note 4, at 125; see also *id.* at 78 n.303 (discussing Madison's "reasoning behind his introduction of a Bill of Rights" and his embrace of judicial review). Here again, Professor Kramer follows in the footsteps of Jesse Choper. Professor Choper urged courts to abandon judicial review of the scope of federal powers in order to "husband the Supreme Court's scarce political capital, and thus . . . enhance the Justices' ability to act in support of personal liberties." Choper, *Scope of National Power*, *supra* note 23, at 1577.

<sup>94</sup> U.S. CONST. art. VI, cl. 2.

rights.”<sup>95</sup> Conversely, the Founders believed that the only rights they surrendered to the federal government were those encompassed by the powers enumerated in the new Constitution. Given this understanding, courts cannot protect individual liberty—as understood by the Founders—without enforcing both the rights-bearing and power-conferring provisions of the Constitution. From the Founders’ perspective, judicial review under both sets of provisions would have been equally necessary to preserve individual rights vis-à-vis the federal government.

Third, the Bill of Rights itself refutes attempts to bifurcate judicial review. The Ninth and Tenth Amendments reflect and reinforce the Founders’ understanding that limited federal power preserves individual liberty. Accordingly, if courts have authority to enforce individual rights guaranteed by the Bill of Rights, then they necessarily have authority to invalidate statutes that exceed Congress’s enumerated powers and thereby violate other rights “retained by the people.”<sup>96</sup> These considerations suggest that Professor Kramer should abandon efforts to divide judicial review and embrace unitary judicial review under the Supremacy Clause to uphold the Constitution in its entirety.

#### A. *The Textual Basis for Judicial Review*

Professor Kramer’s proposed distinction—between judicial review of federal statutes that threaten individual rights and judicial review of federal statutes that exceed the scope of federal powers—lacks a clear basis in the constitutional text. In fact, the text of the Supremacy Clause appears to foreclose any such distinction. As discussed in Part I, Kramer believes that the Supremacy Clause authorizes judicial review of *state* law,<sup>97</sup> but that “the power of courts to review federal legislation was left unaddressed.”<sup>98</sup> At the same time, he maintains that the “Framers of the Constitution expected, and may even have hoped, that judges would be active in reviewing the constitutionality of” federal statutes alleged to violate the Bill of Rights.<sup>99</sup> Kramer does not identify any particular provision of the constitutional text as authority for such review. Without such a provision, one would expect Kramer to conclude that “respect for popular sovereignty demanded that judges enforce properly enacted laws and leave constitutional questions to be settled elsewhere.”<sup>100</sup>

Professor Kramer might invoke the Supremacy Clause as a textual basis

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<sup>95</sup> Philip A. Hamburger, *Trivial Rights*, 70 NOTRE DAME L. REV. 1, 3 (1994). In other words, the Founders assumed what the Bill of Rights later made explicit—that is, the “powers not delegated to the United States by the Constitution,” U.S. CONST. amend. X, would leave undisturbed other rights “retained by the people,” U.S. CONST. amend. IX. See *infra* notes 147–176 and accompanying text.

<sup>96</sup> U.S. CONST. amend. IX.

<sup>97</sup> Kramer, *supra* note 4, at 61 (discussing the Supremacy Clause and stating that “the Framers clearly decided to adopt judicial review as a device for controlling state laws”); Kramer, *supra* note 15, at 243 (“The inclusion of the Supremacy Clause indicates that the Framers believed courts could play a role in enforcing the Constitution against the states.”).

<sup>98</sup> Kramer, *supra* note 4, at 67.

<sup>99</sup> Kramer, *supra* note 15, at 287–88.

<sup>100</sup> Kramer, *supra* note 4, at 48.

for judicial review of federal statutes alleged to violate the Bill of Rights. The Clause confers supremacy on “the Laws of the United States which shall be made in Pursuance” of “[t]his Constitution.”<sup>101</sup> According to Article V, constitutional amendments ratified in accordance with the procedures set forth therein “shall be valid to all Intents and Purposes, as Part of *this Constitution*.”<sup>102</sup> Federal statutes that violate the Bill of Rights, therefore, are not “made in Pursuance” of “[t]his Constitution” within the meaning of the Supremacy Clause. Thus, such statutes do not qualify as “the supreme Law of the Land,” and courts are not “bound thereby.”<sup>103</sup>

Once one identifies the Supremacy Clause as the basis for judicial review of federal statutes alleged to violate the Bill of Rights, however, there is no textual support for rejecting judicial review of statutes alleged to exceed Congress’s enumerated powers. The Clause requires courts to determine whether federal statutes were “made in Pursuance” of “[t]his Constitution.”<sup>104</sup> “This Constitution” encompasses both the original Constitution and subsequent amendments adopted under Article V. Thus, a federal statute that violates either portion of the Constitution fails to qualify as “the supreme Law of the Land.” In short, if—as Professor Kramer appears to assume—the Supremacy Clause authorizes judicial review of federal statutes that violate the Bill of Rights, then the Clause *a fortiori* authorizes judicial review of statutes that exceed the limits of federal power under the original Constitution.

The only potential way to avoid this conclusion would be to demonstrate that the Founders understood the Supremacy Clause’s reference to “[t]his Constitution” to encompass “the rights-bearing provisions” of the Constitution<sup>105</sup> but not “the provisions delegating powers.”<sup>106</sup> Even if one accepts Professor Kramer’s premise that a clear constitutional text can be overridden by the ratifiers’ contrary expectations, he has not even attempted such a demonstration. Nor is one possible. As the next section explains, the Founders understood the rights-bearing and powers-conferring provisions of the Constitution to be mutually reinforcing means of accomplishing the same ends—limiting federal powers and preserving individual rights.<sup>107</sup> Thus, if they anticipated judicial review with respect to either set of provisions, they almost certainly expected judicial review with respect to the other.

#### B. *Linking Individual Rights to the Scope of Federal Powers*

Professor Kramer maintains that the Founders had “disparate expectations for what courts should do when it came to different sorts of

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<sup>101</sup> U.S. CONST. art. VI, cl. 2.

<sup>102</sup> U.S. CONST. art. V (emphasis added).

<sup>103</sup> U.S. CONST. art. VI, cl. 2.

<sup>104</sup> *Id.*

<sup>105</sup> Kramer, *supra* note 4, at 125.

<sup>106</sup> *Id.*

<sup>107</sup> Professor Kramer might look to Article III, U.S. CONST. art. III, § 2, cl. 1, or the Oath Clause, U.S. CONST. art. VI, cl. 3, as an alternative textual basis for judicial review to enforce the rights-bearing provisions of the Constitution. Like the Supremacy Clause, however, these provisions are worded generally and thus appear to support judicial review of all federal statutes alleged to violate the Constitution or none at all.

questions.”<sup>108</sup> In his view, “the scope of judicial review in areas like . . . individual rights may have little relevance when it comes to assessing the Court’s practice in the historically distinct domain of federalism.”<sup>109</sup> Kramer’s attempt to separate individual rights from questions regarding the scope of federal power, however, is historically inaccurate and ultimately unpersuasive. There is substantial evidence arising from the debate over a Bill of Rights that the Founders understood individual rights vis-à-vis the federal government to depend in large measure on the limited nature of federal power. Given this understanding, it is anachronistic to distinguish sharply between judicial review under the Bill of Rights and judicial review of the scope of federal powers.

### 1. *Disputing the Necessity of a Bill of Rights*

The Founders paid relatively little attention to the enumeration of individual rights as such at the Constitutional Convention, focusing instead almost exclusively on the structure of the new federal government and the scope of its powers. As originally adopted, the Constitution specified only a handful of rights against the federal government, such as the prohibitions against bills of attainder and ex post facto laws,<sup>110</sup> and the right to a jury trial in criminal cases.<sup>111</sup> Late in the Convention, Charles Pinckney submitted a list of proposals to be referred to the Committee of Detail, including provisions that would have guaranteed several now familiar rights.<sup>112</sup> Pinckney proposed preserving the “liberty of the Press” and preventing the involuntary quartering of troops in time of peace.<sup>113</sup> These proposals were referred to the Committee of Detail “without debate or consideration,”<sup>114</sup> but failed to emerge from the Committee.

A few weeks later, George Mason stated that he “wished the plan had been prefaced with a Bill of Rights,” and suggested that “with the aid of the State declarations, a bill might be prepared in a few hours.”<sup>115</sup> Elbridge Gerry “moved for a Committee to prepare a Bill of Rights,” but the motion was defeated unanimously without substantial discussion.<sup>116</sup> Finally, Pinckney and Gerry made a more modest motion “to insert a declaration ‘that the liberty of the Press should be inviolably observed.’”<sup>117</sup> Roger Sherman argued that

<sup>108</sup> Kramer, *supra* note 15, at 288.

<sup>109</sup> *Id.*

<sup>110</sup> U.S. CONST. art. I, § 9, cl. 3.

<sup>111</sup> U.S. CONST. art. III, § 2, cl. 3.

<sup>112</sup> Notes of James Madison on the Federal Convention (Aug. 20, 1787), in 2 FARRAND’S RECORDS, *supra* note 44, at 340–42.

<sup>113</sup> *Id.* at 341.

<sup>114</sup> *Id.* at 342.

<sup>115</sup> Notes of James Madison on the Federal Convention (Sept. 12, 1787), in 2 FARRAND’S RECORDS, *supra* note 44, at 585, 587–88.

<sup>116</sup> *Id.* at 588. Arthur Wilmarth observes that their motion was defeated “either because most of the delegates were too exhausted to consider a new subject or, more likely, because they genuinely believed that the rights of state citizens would *not* be threatened by the Constitution.” Arthur E. Wilmarth, *The Original Purpose of the Bill of Rights: James Madison and the Founders’ Search for a Workable Balance Between Federal and State Power*, 26 AM. CRIM. L. REV. 1261, 1275 (1989).

<sup>117</sup> Notes of James Madison on the Federal Convention (Sept. 14, 1787), in 2

the declaration was “unnecessary” because the “power of Congress does not extend to the Press.”<sup>118</sup> The Convention apparently agreed and rejected the motion by a vote of seven states to four.<sup>119</sup>

Interest in adding a Bill of Rights, of course, did not end with the Convention. As Arthur Wilmarth has explained, the absence of such guarantees became a rallying cry for Antifederalists opposed to ratification.<sup>120</sup> The Federalists’ response was twofold. They argued that a Bill of Rights was both “unnecessary” and “dangerous.”<sup>121</sup> A Bill of Rights was *unnecessary* because the Constitution gives the federal government only enumerated, and therefore limited, powers. As Hamilton put it, “why declare that things shall not be done which there is no power to do?”<sup>122</sup> As discussed further below, Federalists also argued that a Bill of Rights was *dangerous* because it might suggest, contrary to the doctrine of enumerated federal powers, that Congress otherwise had implied power under the original Constitution to invade the rights singled out for protection.<sup>123</sup> These objections were repeated throughout the ratification debates.

The Federalists’ first argument was that the Constitution’s enumeration of powers effectively constrained the federal government’s ability to invade the rights that concerned Antifederalists.<sup>124</sup> In discussing the necessity of a Bill of Rights, many speakers focused on the liberty of the press. Alexander Hamilton inquired, “Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?”<sup>125</sup> Echoing the language of the Supremacy Clause, James Wilson made a similar point in Pennsylvania:

In answer to the gentleman from Fayette (John Smilie) on the subject of the press, I beg leave to make an observation; it is very true, sir, that this Constitution says nothing with regard to that subject, nor was it necessary, because it will be found that there is given to the general government no power whatsoever concerning it; and no law in pursuance of the Constitution can possibly be enacted to destroy that liberty.<sup>126</sup>

Also in Pennsylvania, “One of the People” wrote, “Their power is

FARRAND’S RECORDS, *supra* note 44, at 612, 617.

<sup>118</sup> *Id.* at 618.

<sup>119</sup> *Id.*

<sup>120</sup> *See* Wilmarth, *supra* note 116, at 1281.

<sup>121</sup> THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>122</sup> *Id.*

<sup>123</sup> *See* Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1226 (1990) (“A bill of rights would reverse the Constitution’s premise that all not granted was reserved; instead, the government would hold all power except what was prohibited in the bill of rights.”).

<sup>124</sup> *See* Hamburger, *supra* note 95, at 21; *see also* Wilmarth, *supra* note 116, at 1274 (noting that “the Federalists argued during the ratification debates that a federal bill of rights was unnecessary, because the sovereign people had delegated to the federal government only ‘enumerated powers’ that could not be used to infringe upon the people’s rights”).

<sup>125</sup> THE FEDERALIST NO. 84, at 513–14 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>126</sup> Debates of the Pennsylvania Convention (Dec. 1, 1787), in 2 DOCUMENTARY HISTORY, *supra* note 90, at 444, 454–55.

defined and limited by the 8th section of the first Article of the Constitution, and they have not power to take away the freedom of the press . . . .”<sup>127</sup> Edmund Randolph reiterated these views in Virginia: “Go through these powers, examine every one and tell me if the most exalted genius can prove that the liberty of the press is in danger.”<sup>128</sup> One of the “Middling-Interest” made the same point in Massachusetts: “The opposers of the new government have branched out the evils arising from the pretended want of a declaration of rights into several particulars—one of which is, that the LIBERTY OF THE PRESS is not provided for—But the real question is, where is it taken away?”<sup>129</sup> And, in Connecticut, Roger Sherman observed, “The liberty of the Press can be in no danger, because that is not put under the direction of the new government.”<sup>130</sup>

In these discussions, leading Federalists used the liberty of the press simply as one example to make their larger point that “[l]iberty is secured . . . by the limitation of [federal] powers.”<sup>131</sup> For instance, after contrasting the powers of the states with those of the federal government, James Wilson explained that a Bill of Rights was necessary to restrain the former but not the latter because the federal government was one of enumerated powers:

When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve . . . . But in delegating federal powers, another criterion was necessarily introduced, and the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union. Hence it is evident, that in the former case everything which is not reserved is given, but in the latter the reverse of the proposition prevails, and everything which is not given, is reserved. This distinction being recognized, will furnish an answer to those who think the omission of a bill of rights, a defect in the proposed Constitution: for it would have been superfluous and absurd to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of

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<sup>127</sup> One of the People, PENN. GAZETTE, Oct. 17, 1787, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 90, at 186, 190.

<sup>128</sup> Debates of the Virginia Convention (June 10, 1788), *in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1092, 1099–1100 (John P. Kaminski & Gaspare J. Saladino eds., 1990) [hereinafter 9 DOCUMENTARY HISTORY].

<sup>129</sup> One of the Middling-Interest, MASS. CENTINEL, Nov. 28, 1787, *reprinted in* 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 328, 331 (John P. Kaminski & Gaspare J. Saladino eds., 1997) [hereinafter 4 DOCUMENTARY HISTORY]; *see also id.* (reiterating that Congress “can never restrict the liberty of the press, unless they have some power given them by the constitution so to do, which no where appears”).

<sup>130</sup> Roger Sherman, *A Citizen of New Haven: Observations on the New Federal Constitution*, CONN. COURANT, Jan. 7, 1788, *reprinted in* 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 280, 282 (John P. Kaminski & Gaspare J. Saladino eds., 1984).

<sup>131</sup> Debates of the Virginia Convention (June 7, 1788), *in* 9 DOCUMENTARY HISTORY, *supra* note 128, at 1006, 1012; *see* Hamburger, *supra* note 95, at 25 (“In other words, publishing, like eating and drinking, was a freedom unaffected by the Constitution, because nothing was said in the enumeration of powers that would permit the federal government to legislate on the subject.”).

which we are not divested either by the intention or the act, that has brought that body into existence.<sup>132</sup>

Thomas Hartley of Pennsylvania also equated individual rights with the absence of federal power:

As soon as the independence of America was declared in the year 1776, from that instant all our natural rights were restored to us, and we were at liberty to adopt any form of government to which our views or our interests might incline us. This truth, expressly recognized by the act, declaring our independence, naturally produced another maxim, that whatever portion of those natural rights we did not transfer to the government was still reserved and retained by the people; for, if no power was delegated to the government, no right was resigned by the people; and if a part only of our national rights was delegated, is it not absurd to assert that we have relinquished the whole? Where then is the necessity of a formal declaration that those rights are still retained, of the resignation of which no evidence can possibly be produced?<sup>133</sup>

Edmund Pendleton made the same point in rejecting the need for amendments to establish the right to “trial by *Jury*” and “the Liberty of the *Press*”: “[I]s it not Safer to trust the two first rights to the Broad & Sure ground of this Principle—that the people being Established in the Grant itself as the *Fountain* of Power, *retain* every thing which is not granted?”<sup>134</sup>

In sum, Federalists generally regarded individual rights and limited federal power as essentially synonymous.<sup>135</sup> As a Massachusetts newspaper put it: “So, as the people now possess all the rights and all the power of freemen, what can the Congress have to do with those rights which they keep at home—which they do not throw into the common stock—over which they do not expressly give Congress any power?”<sup>136</sup> Hugh Williamson expressed the same understanding in North Carolina: “It is granted, and perfectly understood, that under the Government of the Assemblies of the States, and under the Government of the Congress, every right is reserved to the individual, which he has not expressly delegated to this, or that Legislature.”<sup>137</sup> Another commentator put the point more colorfully in

<sup>132</sup> James Wilson, Speech in the State House Yard (Oct. 6, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 90, at 167, 167–68.

<sup>133</sup> Debates of the Pennsylvania Convention (Nov. 30, 1787), *in* 2 DOCUMENTARY HISTORY, *supra* note 90, at 424, 430.

<sup>134</sup> Letter from Edmund Pendleton to Richard Henry Lee (June 14, 1788), *in* 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 178, 179–80 (John P. Kaminski & Gaspare J. Saladino eds., 1995).

<sup>135</sup> See Hamburger, *supra* note 95, at 3 (explaining that the framers of the Constitution “assumed that by enumerating federal powers, the people would remain free from the federal government in other respects and thereby would retain innumerable many rights”); *see also* McAfee, *supra* note 123, at 1226 (stating that “in this context, ‘rights’ and ‘powers’ are two sides of the same coin”).

<sup>136</sup> SALEM MERCURY, Jan. 8, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 80, at 652, 652.

<sup>137</sup> Hugh Williamson, Speech at Edenton, N.C. (Nov. 8, 1787), *in* N.Y. DAILY ADVERTISER, Feb. 25–27, 1788, *reprinted in* 16 THE DOCUMENTARY HISTORY OF THE

Massachusetts: “The first section in the federal form will help our eye-sight, if we are not determined to be blind, to see that we retain all our rights, which we have not expressly relinquished to the union.”<sup>138</sup>

Thus, there was widespread recognition among the Founders that individual rights vis-à-vis the federal government would be protected, at least in part, by the limited delegation of power to Congress under the new Constitution. Such recognition essentially forecloses any suggestion that courts could employ judicial review to protect individual rights but not to police the bounds of federal power. If the Founders hoped courts would protect individual rights under the new Constitution, then they necessarily hoped courts would keep Congress from invading such rights by exceeding the scope of its enumerated powers.

## 2. *The Danger That a Bill of Rights Could Expand Federal Power*

Many Founders feared that a Bill of Rights was not only unnecessary, but also dangerous to the rights of the people.<sup>139</sup> This fear rested on the widespread assumption that individual rights were secured by the limited nature of Congress’s powers. During the ratification period, many believed that a Bill of Rights—although intended to secure individual rights—would actually undermine such rights by unintentionally enlarging the scope of federal power by implication. Specifically, a Bill of Rights might have wrongly suggested that Congress had power under the original Constitution to violate the rights secured. Because it was impossible to specify all of the rights held against the federal government, a Bill of Rights might erroneously imply that Congress had power over other rights not specified and thus leave unenumerated rights less secure.<sup>140</sup> As Alexander Hamilton warned, a Bill of Rights “would contain various exceptions to powers which are not granted; and on this very account, would afford a colorable pretext to claim more than were granted.”<sup>141</sup>

Numerous participants in state ratifying conventions agreed that a Bill of Rights “would be not only unnecessary, but preposterous and dangerous.”<sup>142</sup> Equating individual rights with reserved powers, James Wilson explained this danger in the Pennsylvania Ratifying Convention:

A bill of rights annexed to a constitution is an enumeration of the

RATIFICATION OF THE CONSTITUTION 201, 202 (John P. Kaminski & Gaspare J. Saladino eds., 1986).

<sup>138</sup> One of the Middling-Interest, MASS. CENTINEL, Nov. 28, 1787, reprinted in 4 DOCUMENTARY HISTORY, *supra* note 129, at 328, 330.

<sup>139</sup> See Wilmarth, *supra* note 116, at 1285.

<sup>140</sup> See Hamburger, *supra* note 95, at 5; see also James Iredell, Statement at the North Carolina Ratifying Convention (July 28, 1788), reprinted in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 144, 149 (photo. reprint 1996) (Jonathan Elliot ed., 2d ed. 1836) [hereinafter DEBATES IN THE SEVERAL STATE CONVENTIONS] (“No man, let his ingenuity be what it will, could enumerate all the individual rights not relinquished by this Constitution.”).

<sup>141</sup> THE FEDERALIST NO. 84, at 481 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>142</sup> Debates of the Pennsylvania Convention (Nov. 28, 1787), in 2 DOCUMENTARY HISTORY, *supra* note 90, at 382, 387–89.

powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete.<sup>143</sup>

This danger was widely cited in opposition to a Bill of Rights. Samuel Holden Parsons, of Connecticut, wrote, “Every power not granted rests where all power was before lodged—and establishing any other bill of rights would be dangerous, as it would at least imply that nothing more was left with the people than the rights defined and secured in such bill of rights.”<sup>144</sup>

Similarly, Silas Lee, of Massachusetts, thought that a Bill of Rights could make the Constitution “far more dangerous” because “instead of lessening the powers of Congress, such a Bill would actually enlarge them—for instead of the Constitution’s being the limits or boundary line of Congress, the Bill of Rights only would be the sacred barrier, or mark not to be exceeded.”<sup>145</sup> James Madison also recognized the danger posed by a Bill of Rights, given his understanding that individual rights rested primarily on limited federal power. He asked rhetorically in the Virginia Ratifying Convention, “Can the General Government exercise any power not delegated? If an enumeration be made of our rights, will it not be implied, that every thing omitted, is given to the General Government?”<sup>146</sup>

### C. *Perfecting the Bill of Rights: The Ninth and Tenth Amendments*

The Founders ultimately responded to this danger by including the Ninth and Tenth Amendments in the Bill of Rights. These amendments represent formal recognition in the constitutional text that individual rights vis-à-vis the federal government rest not only on the rights-bearing provisions of the Constitution, but also on the limited scope of enumerated powers.<sup>147</sup> Although modern commentators have sought to expand the role of the Ninth Amendment to encompass unwritten or natural rights,<sup>148</sup> it is difficult to deny

<sup>143</sup> *Id.*

<sup>144</sup> Letter from Samuel Holden Parsons to William Cushing (Jan. 11, 1788), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 569, 569 (Merrill Jensen ed., 1978) [hereinafter 3 DOCUMENTARY HISTORY].

<sup>145</sup> Letter from Silas Lee to George Thatcher (Jan. 23, 1788), in 5 DOCUMENTARY HISTORY, *supra* note 80, at 780, 781.

<sup>146</sup> Debates of the Virginia Convention (June 24, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1473, 1501–02 (John P. Kaminski & Gaspare J. Saladino eds., 1993); see also Cassius II, *To Richard Henry Lee, Esquire, VA.* INDEP. CHRON., Apr. 9, 1788, reprinted in 9 DOCUMENTARY HISTORY, *supra* note 128, at 713, 715 (“But, as Congress can exercise no power, except such as are expressly given to them by the people, a bill of rights is, not only, unnecessary, but, would be, highly dangerous. Because, if an enumeration was made, it might, then be supposed, that every right was given up, but what was reserved.”).

<sup>147</sup> See generally McAfee, *supra* note 123; Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980).

<sup>148</sup> See generally LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 367–83 (1988); CALVIN R. MASSEY, SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION’S UNENUMERATED RIGHTS (1995); 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed., 1993); 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH

that the Amendment was originally designed (at least in part) to reinforce the limits of federal power. As discussed, Federalists and Antifederalists generally agreed during the ratification period that the new Constitution should limit federal power and protect individual rights, but differed over how best to achieve these goals. Antifederalists thought that relying solely on an enumeration of federal powers without a Bill of Rights would leave individual rights insecure. Federalists countered that adding a Bill of Rights would imply greater federal powers and thus actually threaten rather than protect individual liberty.

Ultimately, the Founders' solution to this dilemma was to proceed with a Bill of Rights, but to include provisions expressly negating any implied increase in federal powers or surrender of individual rights. This solution was originally proposed by Antifederalists during the ratification debates. For example, the Federal Farmer suggested that "we might advantageously enumerate the powers given, and then in general words . . . declare all powers, rights and privileges, are reserved, which are not explicitly and expressly given up."<sup>149</sup> George Mason pressed this solution at the Virginia Ratifying Convention:

[T]here ought to be some express declaration in the Constitution, asserting that rights not given to the general government were retained by the states. . . . [U]nless this was done, many valuable and important rights would be concluded to be given up by implication.<sup>150</sup>

The Founders' decision to adopt this approach undercuts Professor Kramer's suggestion that "the scope of judicial review in areas like . . . individual rights may have little relevance when it comes to assessing the Court's practice in the historically distinct domain of federalism."<sup>151</sup>

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AMENDMENT (Randy E. Barnett ed., 1989); Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988); Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49 (1992); Lawrence E. Mitchell, *The Ninth Amendment and the "Jurisprudence of Original Intent,"* 74 GEO. L.J. 1719, 1730 (1986); Jordan J. Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231 (1975); Symposium, *Interpreting the Ninth Amendment*, 64 CHI.-KENT L. REV. 37 (1988); John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967 (1993).

<sup>149</sup> The full passage reads as follows:

[A]s men appear generally to have their doubts about these silent reservations, we might advantageously enumerate the powers given, and then in general words, according to the mode adopted in the 2d art. of the confederation, declare all powers, rights and privileges, are reserved, which are not explicitly and expressly given up. People, and very wisely too, like to be express and explicit about their essential rights, and . . . there are infinite advantages in particularly enumerating many of the most essential rights reserved in all cases; and as to the less important ones, we may declare in general terms, that all not expressly surrendered are reserved.

Federal Farmer, *An Additional Number of Letters to the Republican* (May 2, 1788), in 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 265, 343 (John P. Kaminski & Gaspare J. Saladino eds., 1995).

<sup>150</sup> Debates of the Virginia Ratifying Convention (June 14, 1788), in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 797, 797 (Bernard Schwartz ed., 1971) [hereinafter THE BILL OF RIGHTS].

<sup>151</sup> Kramer, *supra* note 15, at 288.

Although the absence of a Bill of Rights did not prevent the minimum number of states from ultimately ratifying the Constitution, it did pose a potential threat to the future stability of the Union. Only four of the first nine states (Delaware, New Jersey, Georgia, and Connecticut) ratified the Constitution without substantial discussion of amendments.<sup>152</sup> Two conventions (Pennsylvania and Maryland) ratified, but appended minority reports urging alterations and amendments.<sup>153</sup> Three states (Massachusetts, South Carolina, and New Hampshire) ratified the Constitution, but proposed a variety of alterations or amendments for consideration by Congress.<sup>154</sup> Both Virginia and New York ratified the Constitution, but called for a second federal convention to adopt amendments.<sup>155</sup> North Carolina proposed additional amendments and refused to ratify the Constitution until amended.<sup>156</sup> Finally, Rhode Island rejected the Constitution in a special election and refused to reconsider before the First Federal Congress.<sup>157</sup>

These events made a strong impression on James Madison,<sup>158</sup> who won election to the First Congress from Virginia only after reversing his earlier position and publicly supporting consideration of a Bill of Rights by Congress.<sup>159</sup> True to his word, Madison introduced a set of amendments in the House on June 8, 1789.<sup>160</sup> In addition to singling out specific individual rights for protection, Madison proposed more general protections in the form of the Ninth and Tenth Amendments. The Tenth Amendment was the only provision of the Bill of Rights “proposed by every one of the state ratifying conventions that proposed amendments.”<sup>161</sup> The Ninth Amendment, by

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<sup>152</sup> CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS x (Helen E. Veit et al. eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS].

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at x–xi.

<sup>156</sup> *Id.* at xi.

<sup>157</sup> *Id.*

<sup>158</sup> In a letter to Richard Peters on August 19, 1789, Madison warned that without a Bill of Rights, opponents of the Constitution would “blow the Trumpet for a second Convention,” and that “[s]ome amendts. are necssy. for N. Carol[in]a.” *Id.* at 282. Similarly, Madison reminded the First Congress: “It cannot be a secret to the gentlemen in this house, that, notwithstanding the ratification of this system of government by eleven of the thirteen United States . . . ; yet still there is a great number of our constituents who are dissatisfied with it; among whom are many . . . respectable for the jealousy they have for their liberty, which, though mistaken in its object, is laudable in its motive.” *Id.* at 78.

<sup>159</sup> *Id.* at 159. Madison wrote to Richard Peters: “If the Candidates in Virga. for the House of Reps. had not taken this conciliary ground at the election, that State would have [*been*] represented almost wholly by disaffected characters, instead of the *federal* reps. now in Congs.” *Id.* at 282. The First Congress was comprised primarily of Federalists, but on March 29, 1789, Madison wrote to Thomas Jefferson: “Notwithstanding this character of the Body, I hope and expect that some conciliatory sacrifices will be made, in order to extinguish opposition to the system, or at least break the force of it, by detaching the deluded opponents from their designing leaders.” *Id.* at 225.

<sup>160</sup> *See id.* at 11–14. According to Professor Wilmarth, “Madison sponsored the Bill of Rights in the First Federal Congress both to persuade moderate Antifederalists to accept the Constitution, and to fulfill his own campaign pledge.” Wilmarth, *supra* note 116, at 1264.

<sup>161</sup> AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 123 (1998); *see also* Wilmarth, *supra* note 116, at 1281–82 (“No other proposed amendment

contrast, was an innovation specifically designed to guard against the danger posed by adding a finite Bill of Rights. As one member of the House explained, “unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the government.”<sup>162</sup>

Upon introducing the Bill of Rights in the first Congress, Madison underscored the function of the Ninth Amendment:

It has been objected also against the bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, *were intended to be assigned into the hands of the General Government, and were consequently insecure*. This is one of the most plausible arguments I ever heard urged against the admission of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the 4th resolution.<sup>163</sup>

As originally introduced, the clause to which Madison referred provided:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.<sup>164</sup>

As amended, this proposal became the Ninth Amendment,<sup>165</sup> and seemed to answer the most serious objections to a Bill of Rights. The Amendment ensured that the Bill of Rights would be understood not as an enlargement of federal powers, but merely “as an enumeration of exceptions to the enumeration of powers.”<sup>166</sup> Thus, for example, although Richard Parker still thought “a Bill of rights not necessary,”<sup>167</sup> he conceded that “I have no objection to such a bill of Rights as has been proposed by Mr. Maddison [sic]

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was included in the proceedings of all eight state conventions.”). As originally proposed by Madison, the provision that would become the Tenth Amendment stated: “The powers not delegated by this constitution, nor prohibited by it to the states, are reserved to the states respectively.” *CREATING THE BILL OF RIGHTS*, *supra* note 152, at 14.

<sup>162</sup> *Id.* at 87.

<sup>163</sup> *Id.* at 83 (emphasis added); 1 *ANNALS OF CONG.* 456 (Joseph Gales ed., 1789).

<sup>164</sup> Madison Resolution (June 8, 1789), *reprinted in* *CREATING THE BILL OF RIGHTS*, *supra* note 152, at 11, 13; 1 *ANNALS OF CONG.*, *supra* note 163, at 452. Madison’s proposal appears to have been based in part on an amendment recommended by the Virginia Ratifying Convention. That amendment provided that constitutional restrictions on Congress’s powers should not be construed “in any manner whatsoever, to extend the powers of Congress,” but should be understood only “as making exceptions to the specified powers . . . or otherwise, as inserted merely for greater caution.” *Debates of the Virginia Ratifying Convention* (June 24, 1788), *in* 2 *THE BILL OF RIGHTS*, *supra* note 150, at 814, 819.

<sup>165</sup> U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

<sup>166</sup> Hamburger, *supra* note 95, at 12.

<sup>167</sup> Letter from Richard Parker to Richard Henry Lee (July 6, 1788), *in* *CREATING THE BILL OF RIGHTS*, *supra* note 152, at 260, 260.

because we declare that we do not abridge our Rights by the reservation but that we retain all we have not specifically given.”<sup>168</sup>

For Madison, the Ninth and Tenth Amendments were designed to work together to guard against the same danger: unwarranted expansion of federal power at the expense of individual rights.<sup>169</sup> As he explained in a letter to George Washington, “If a line can be drawn between the power granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended.”<sup>170</sup> The Ninth and Tenth Amendments, however, are not “wholly redundant” of each other.<sup>171</sup> Rather, as Akhil Amar has explained, “each amendment complements the other without duplicating it.”<sup>172</sup> According to Professor Amar, “[t]he Tenth says that Congress must point to some explicit or implicit enumerated power before it can act,”<sup>173</sup> while “the Ninth warns readers not to infer from the mere enumeration of a right in the Bill of Rights that implicit federal power in fact exists in a given domain.”<sup>174</sup>

The history of the Bill of Rights confirms that the Founders understood that individual rights begin where federal power ends. Because they could not agree whether liberty would be best protected by limiting powers or enumerating rights, they ultimately adopted both mechanisms. As Professor Hamburger explained:

Thus, the Constitution reserved rights in two diametrically opposite ways. By specifying powers, it reserved to the people the undifferentiated mass of liberty they did not grant to the federal government—a general reservation of rights confirmed and preserved through the Ninth Amendment. By specifying

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<sup>168</sup> *Id.*

<sup>169</sup> See Wilmarth, *supra* note 116, at 1302 (explaining that “Madison understood that the reservation of rights to the people in the ninth amendment, and the reservation of powers to the states in the tenth amendment, would work together to restrain the extension of congressional powers by implication”).

<sup>170</sup> Letter from James Madison to George Washington (Dec. 5, 1789), in 5 THE WRITINGS OF JAMES MADISON 429, 432 (Gaillard Hunt ed., 1904).

<sup>171</sup> AMAR, *supra* note 161, at 123.

<sup>172</sup> *Id.* at 123–24.

<sup>173</sup> *Id.* at 124.

<sup>174</sup> *Id.* In this sense, “the people’s unenumerated rights were not unwritten, for they were reserved by the Constitution’s grant of powers to the federal government.” Hamburger, *supra* note 95, at 3. Professor McAfee likewise concludes that the Ninth and Tenth Amendments are not redundant:

On the residual rights reading, the ninth amendment serves the unique function of safeguarding the system of enumerated powers against a particular threat arguably presented by the enumeration of limitations on national power. If one takes seriously the Federalist “danger” argument, it would seem to make sense for the framers of the Bill of Rights to state explicitly that the enumeration of rights they provided neither exhausted the rights held by the people nor undermined the system of enumerated powers. The tenth amendment, on the other hand, answered a separate Antifederalist concern: that the omission of an express provision reserving all not granted, as was included in the Articles of Confederation, would be read to imply a government of general powers. The ninth and tenth amendments each serve to secure the design of enumerated powers and reserved rights and powers against the distinctive threats perceived to flow from listing exceptions to powers not granted and relying on implication rather than on express reservation.

McAfee, *supra* note 123, at 1306–07.

rights, the Constitution reserved some particular rights so that, for these, Americans would not have to rely merely upon the enumeration of powers. The distinct advantage of each method of reserving rights was repeatedly pointed out by its proponents.<sup>175</sup>

For this reason, it is historically inaccurate for modern commentators to draw a bright line between the Constitution's rights-bearing provisions and its power-granting provisions.<sup>176</sup> Both sets of provisions were understood to be interlocking mechanisms designed to safeguard individual liberty.

#### D. *Judicial Review Under the Bill of Rights*

Professor Kramer believes that the "Framers of the Constitution expected, and may even have hoped, that judges would be active in reviewing the constitutionality" of federal statutes alleged to violate the Bill of Rights.<sup>177</sup> There is substantial evidence to support this conclusion. At the outset, it is worth noting that many of the rights set forth in the Bill of Rights govern the functioning of the judiciary itself. For example, the Fourth Amendment provides that "no Warrants shall issue, but upon probable cause";<sup>178</sup> the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself";<sup>179</sup> the Sixth Amendment guarantees criminal defendants "the right to a speedy and public trial";<sup>180</sup> the Seventh Amendment preserves "the right of trial by jury" in civil cases;<sup>181</sup> and the Eighth Amendment prohibits the imposition of "[e]xcessive bail," "excessive fines," or "cruel and unusual punishments."<sup>182</sup> These provisions would be ineffectual if courts could not follow their commands in the face of contrary federal statutes.

One might attempt to confine judicial review to those provisions of the Bill of Rights addressed specifically to the judiciary. Under this approach, provisions designed to restrict Congress (such as the First Amendment) would essentially give rise to nonjusticiable political questions. There is little support, however, for this approach. To the contrary, there is crucial evidence that the Founders expected courts to enforce the Bill of Rights in its entirety. For example, on March 15, 1789, Thomas Jefferson wrote to James Madison in part to underscore "the legal check which it puts into the hands of the judiciary":

[I]n the arguments in favor of a declaration of rights you omit one which has a great weight with me, the legal check which it puts into the hands of the judiciary. [T]his body, which if rendered independent & kept strictly to their own department merits great

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<sup>175</sup> Hamburger, *supra* note 95, at 31.

<sup>176</sup> See Wilmarth, *supra* note 116, at 1297 (stating that "the Bill of Rights contains explicit guarantees of federalism that most of the Framers had believed to be inherent in the Constitution").

<sup>177</sup> Kramer, *supra* note 15, at 287–88.

<sup>178</sup> U.S. CONST. amend. IV.

<sup>179</sup> U.S. CONST. amend. V.

<sup>180</sup> U.S. CONST. amend. VI.

<sup>181</sup> U.S. CONST. amend. VII.

<sup>182</sup> U.S. CONST. amend. VIII.

confidence for their learning & integrity.<sup>183</sup>

Madison agreed and reiterated Jefferson's point when he introduced the Bill of Rights in the House of Representatives a few months later. Responding to the argument that a Bill of Rights was "unnecessary" because similar declarations had "been violated" in "a few particular states,"<sup>184</sup> Madison explained that judicial review would guard against similar violations by the federal government:

If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.<sup>185</sup>

This is an express statement by the sponsor of the Bill of Rights that courts would enforce the proposed amendments against "every encroachment upon rights" and against "every assumption of power."<sup>186</sup> Significantly, no member of the House rose to dispute Madison's understanding. At this point, judicial review to enforce the Constitution was apparently uncontroversial.

### III. Implications for Judicial Review

The Supremacy Clause and the Bill of Rights provide strong evidence that the Founders expected courts to review federal statutes to ensure compliance with all parts of "[t]his Constitution."<sup>187</sup> The decision to include the Ninth and Tenth Amendments in the Bill of Rights confirms the Founders' understanding that "the rights retained" by the people could be secured by "declaring that they shall not be abridged, or that [the power granted] shall not be extended."<sup>188</sup> As Madison explained, both methods "would seem to be the same thing."<sup>189</sup> Thus, contrary to modern suggestions, courts cannot separate

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<sup>183</sup> Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 152, at 218, 218.

<sup>184</sup> Debates in the House of Representatives (June 8, 1789), *reprinted in* *CREATING THE BILL OF RIGHTS*, *supra* note 152, at 69, 83.

<sup>185</sup> *Id.* at 83–84.

<sup>186</sup> Madison's expectations regarding judicial review are consistent with the views he expressed several years earlier. At the Convention, Madison favored adoption of the proposed Constitution by "State Conventions" rather than state "Legislatures." Notes of James Madison on the Federal Convention (July 23, 1787), in *2 FARRAND'S RECORDS*, *supra* note 44, at 93. His rationale was that legislative ratification might violate state constitutions and cause courts to invalidate such measures. As he put it, "A law violating a constitution established by the people themselves, would be considered by the Judges as null & void." *Id.* This argument carried the day and the Convention voted nine states to one to submit the proposed Constitution "to assemblies chosen by the people." *Id.* at 93–94. In light of these remarks, Madison undoubtedly expected judicial review under the United States Constitution as well because that instrument—like the state constitutions he discussed—was to be "established by the people themselves." *Id.* at 93.

<sup>187</sup> U.S. CONST. art. VI, cl. 2.

<sup>188</sup> Letter from James Madison to George Washington (Dec. 5, 1789), in *5 THE WRITINGS OF JAMES MADISON*, *supra* note 170, at 429, 432.

<sup>189</sup> *Id.*

judicial review of the scope of federal power from judicial review to enforce individual rights without threatening many of the rights “retained by the people.”

This “enumerated-powers, federalism-based reading”<sup>190</sup> of the Ninth Amendment suggests that the people retained innumerable rights against the federal government.<sup>191</sup> These include what Philip Hamburger describes as “trivial rights,”<sup>192</sup> echoing the language of Federalists who used sarcasm and ridicule following ratification to make their point that the Bill of Rights was either unnecessary or dangerous.<sup>193</sup> For example, in debating the need for an amendment to secure the right of assembly, Representative Sedgwick of Massachusetts maintained that an enumeration of this right was unnecessary. Specifically, he thought both that the right of assembly “is a self-evident, unalienable right which the people possess” and have not authorized Congress to abridge;<sup>194</sup> and that the right, in any event, was already implicit in the freedom of speech.<sup>195</sup> Sedgwick argued that if an amendment for this purpose was necessary, then the House

might have gone into a very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper; but [I] would ask the gentleman whether he thought it necessary to enter these trifles in a declaration of rights, in a Government where none of them were intended to be infringed.<sup>196</sup>

As Professor Hamburger points out, Sedgwick’s remarks echoed earlier arguments made during the ratification debates.<sup>197</sup>

For example, in December 1787, Oliver Ellsworth responded to Antifederalist complaints that the Constitution failed to secure the liberty of the press by equating this omission with the failure to specify numerous other rights:

Nor is liberty of conscience, or of matrimony, or of burial of the dead; it is enough that Congress have no power to prohibit either, and can have no temptation. This objection is answered in that the states have all the power originally, and Congress have only what the states grant them.<sup>198</sup>

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<sup>190</sup> AMAR, *supra* note 161, at 123–24.

<sup>191</sup> See Hamburger, *supra* note 95, at 30 (“Both Federalists and Anti-Federalists agreed that the rights of Americans were innumerable.”).

<sup>192</sup> *Id.* at 1.

<sup>193</sup> See *supra* notes 118–176 and accompanying text.

<sup>194</sup> 1 ANNALS OF CONG., *supra* note 163, at 759.

<sup>195</sup> *Id.* (“If people freely converse together, they must assemble for that purpose . . .”).

<sup>196</sup> *Id.* at 759–60. Not everyone agreed that the right to wear a hat was so trivial and therefore unlikely to be infringed. A Federalist from Virginia responded to Sedgwick by pointing out that “such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority.” *Id.* at 760.

<sup>197</sup> Hamburger, *supra* note 95, at 24.

<sup>198</sup> [Oliver Ellsworth], *A Landholder VI*, CONN. COURANT, Dec. 10, 1787, reprinted in 3 DOCUMENTARY HISTORY, *supra* note 144, at 487, 490.

Ellsworth's point was that the Constitution protected individual liberty by limiting federal power. As Thomas McAfee put it, "the founding generation was very comfortable with the idea that structural provisions, including provisions that define governmental powers and clarify that powers not granted are reserved, constitute individual rights provisions of the first order."<sup>199</sup> The Ninth Amendment reflects this understanding, and ensures that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>200</sup>

Professor Kramer fails to appreciate the relationship between individual rights and limited federal powers reflected in the Ninth Amendment. In his view, "[t]he most logical reading of the Ninth Amendment's reference to 'other' rights 'retained by the people' . . . is to rights already or potentially secured within the customary constitutional tradition."<sup>201</sup> To be fair, Kramer made this observation in the course of refuting the conclusion of modern commentators that the Amendment "was meant to preserve recognition of some ill-defined body of natural rights."<sup>202</sup> But neither the "customary constitution" interpretation nor the "natural rights" approach actually reflects how Madison understood the Amendment in historical context. As discussed, he included the Ninth Amendment in order to guard against any implication that rights not specified in the Bill of Rights "were intended to be assigned into the hands of the General Government, and were consequently insecure."<sup>203</sup> Once one appreciates the original function of the Ninth Amendment, it is difficult to conclude that the Founders considered questions relating to individual rights to be qualitatively different from questions concerning the scope of federal powers. To the contrary, the entire history of the Bill of Rights suggests that both Federalists and Antifederalists understood individual rights and limited federal powers to be flip sides of the same coin.<sup>204</sup>

Given this understanding, there is little historical basis for Professor Kramer's suggestion that the Founders intended courts to enforce individual rights but not to police the scope of federal powers. In fact, if accepted, this dichotomy would give rise to the very danger that opponents of the Bill of Rights feared: courts would protect only those rights specified in the Constitution and leave Congress free to invade all other rights retained by the people. The Antifederalists proposed—and the Federalists embraced—the Ninth Amendment precisely to avoid this result. Thus, by whatever means one approaches the relevant history, the events surrounding the adoption of the Bill of Rights tend to refute—rather than support—Professor Kramer's

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<sup>199</sup> McAfee, *supra* note 123, at 1225.

<sup>200</sup> U.S. CONST. amend. IX.

<sup>201</sup> Kramer, *supra* note 4, at 40.

<sup>202</sup> *Id.* at 39.

<sup>203</sup> Debates in the House of Representatives (June 8, 1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 152, at 69, 83; 1 ANNALS OF CONG., *supra* note 163, at 456.

<sup>204</sup> See McAfee, *supra* note 123, at 1226 ("The logic of the original Federalist objection to a bill of rights had been stated in terms of avoiding both enlarged powers and the elimination of retained rights: in this context, 'rights' and 'powers' are two sides of the same coin.").

thesis.<sup>205</sup>

Once one places the Ninth and Tenth Amendments in their historical context, it is not surprising that Madison considered both amendments essential to the preservation of individual liberty. Commentators sometimes regard one or both amendments as out of place in the Bill of Rights. The first eight amendments, it is said, deal with individual rights, whereas the Ninth and Tenth Amendments concern only the collective rights of the people and the states.<sup>206</sup> But once one recognizes that the Founders understood individual rights to depend primarily on the absence of federal power, it was at least as important to the cause of freedom for the Founders to limit federal power as it was to enumerate particular rights. From this perspective, all ten amendments function to protect individual liberty against federal interference. Thus, courts could not decline to review the scope of federal powers without necessarily failing to protect individual rights as understood by the Founders.

The controversy surrounding the infamous Sedition Act<sup>207</sup> provides an example. In 1798, Federalists enacted a statute making it a crime to “write, print, utter or publish . . . any false, scandalous and malicious” words about the president or Congress.<sup>208</sup> As Akhil Amar notes, the Sedition Act “was a textbook example of attempted self-dealing among the people’s agents; it criminalized libel of incumbents, but not challengers,” and it “conveniently provided for its own expiration after the next election.”<sup>209</sup> Antifederalists, like James Madison, attacked the constitutionality of the Act. In so doing, however, Madison did not rely exclusively—or even primarily—on the First Amendment. Rather, his principal argument was that Congress lacked express or implied power to punish seditious libel or otherwise regulate the press.<sup>210</sup>

The Sedition Act expired in 1801, thus denying the Supreme Court the

<sup>205</sup> In this sense, although Professor Kramer claims that his views represent the original understanding of judicial review, they are much more in keeping with the sentiments of modern commentators than those of the Founders. As Philip Hamburger points out, “the general protection of unenumerated rights by means of the enumeration of powers has been so thoroughly undermined that many modern legal scholars may wonder how it could once have been taken seriously.” Hamburger, *supra* note 95, at 32.

<sup>206</sup> See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1688 n.1 (2d ed. 1988) (noting that the “Bill of Rights, the first eight amendments to the Constitution, on their face constrain only the conduct of the federal government”); Chief Justice Robert N. Wilentz, *The New Constitution*, Speech at Princeton University (Jan. 15, 1985), in *Speeches by Chief Justice Robert N. Wilentz*, 49 *RUTGERS L. REV.* 887, 890 (1997) (stating that the Bill of Rights is “usually thought of as the first eight amendments to the United States Constitution”).

<sup>207</sup> Act of July 14, 1798, 1 Stat. 596 (expired 1801).

<sup>208</sup> *Id.*

<sup>209</sup> AMAR, *supra* note 161, at 23.

<sup>210</sup> See James Madison’s Report on the Virginia Resolutions (1799–1800), in 4 *DEBATES IN THE SEVERAL STATE CONVENTIONS*, *supra* note 140, at 546, 561–68; see also Wilmarth, *supra* note 116, at 1312 (“The Tenth Amendment established, in Madison’s opinion, a presumption in favor of reserved state powers and placed the burden on the federal government to prove that its actions were authorized by powers ‘enumerated in the Constitution, and such as were fairly incident to them.’” (quoting James Madison’s Report on the Virginia Resolutions (1799–1800), in 4 *DEBATES IN THE SEVERAL STATE CONVENTIONS*, *supra* note 140, at 546, 571)).

opportunity to consider its constitutionality. Had a case reached the Court, however, Professor Kramer's position suggests that the Court should have entertained arguments that the Act violated the First Amendment, but not that it exceeded Congress's enumerated powers. This undoubtedly would have surprised James Madison and would have left individuals prosecuted under the Act in a precarious position. At the time, the First Amendment did not obviously apply to the Sedition Act because it "was regarded as guaranteeing nothing more than the common law definition of freedom of the press: the freedom to publish without prior restraint."<sup>211</sup> As numerous Founders recognized, the more fundamental protection of the freedom of the press flowed from the fact that the "power of Congress does not extend to the Press."<sup>212</sup>

Professor Kramer argues eloquently that the "special role of the Supreme Court in protecting individual rights scarcely needs justification."<sup>213</sup> He nonetheless goes on to explain, "Questions of individual right are, practically by definition, least well handled by majoritarian institutions and better dealt with in a forum whose structure and culture encourage deliberation and attention to principle over expediency or immediate interest."<sup>214</sup> The Sedition Act provides a glaring example of the threat posed by "majoritarian institutions" to individual liberty. Yet, Professor Kramer's ahistorical dichotomy between "rights" and "powers" would have deprived individuals prosecuted under the Act of effective judicial review.

The limited nature of federal power, of course, does not merely protect the freedom of the press. As the Founders expected, it would protect innumerable rights—such as the right to wear a hat, to marry, or to bury the dead—against federal interference.<sup>215</sup> *United States v. Lopez*<sup>216</sup> provides a modern example. There, the Supreme Court ruled that the federal Gun-Free School Zones Act—criminalizing mere possession of guns in a school zone—exceeded the scope of Congress's enumerated powers.<sup>217</sup> This conclusion

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<sup>211</sup> Gary D. Rowe, Note, *The Sound of Silence: United States v. Hudson & Goodwin, the Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919, 936 (1992) (citing LEONARD W. LEVY, *THE EMERGENCE OF A FREE PRESS* 220–349 (1985)).

<sup>212</sup> Notes of James Madison on the Federal Convention (Sept. 14, 1787), in 2 FARRAND'S RECORDS, *supra* note 44, at 612, 618; *see supra* notes 110–138 and accompanying text.

<sup>213</sup> Kramer, *supra* note 4, at 126.

<sup>214</sup> *Id.* For an exploration of similar themes as applied to the modern administrative state, see Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 12–41 (2000) (explaining that the Founders expected the judiciary—unlike the political branches—to exercise "judgment" rather than "will").

<sup>215</sup> *See supra* notes 108–146 and accompanying text. For example, the desire to preserve such local rights against federal interference arguably animates the judicially-recognized domestic relations exception to diversity jurisdiction, which generally prevents federal courts from hearing divorce, alimony, and child custody cases. *See, e.g.*, 7 *Ankenbrandt v. Richards*, 504 U.S. 689, 693–701 (1992). *But cf.* Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA. L. REV. 1073 (1994) (criticizing the domestic relations exception).

<sup>216</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>217</sup> *Id.* at 551.

made it unnecessary for the Court to determine whether the Act also violated the right “to keep and bear Arms” within the meaning of the Second Amendment.<sup>218</sup> Assuming no Second Amendment violation, however, the only potential constitutional protection that Mr. Lopez had against interference by the federal government with his liberty was the limited nature of Congress’s powers. Left to Congress’s unreviewable discretion, such liberty would be insecure. Thus, like the rights enumerated in the first eight amendments, “others retained by the people” would also seem to be “better dealt with in a forum whose structure and culture encourage deliberation and attention to principle over expediency or immediate interest.”<sup>219</sup> *Lopez* upholds this principle and gives continuing effect to the Founders’ understanding that “[l]iberty is secured . . . by the limitation of [federal] powers.”<sup>220</sup>

### Conclusion

Professor Kramer has made important contributions to our understanding of judicial review through his exploration of its origins and development. His suggestion that the propriety of judicial review turns on the nature of the constitutional provision at issue, however, is ultimately unpersuasive. Professor Kramer endorses judicial review to prevent states from interfering with federal supremacy and to enforce the Constitution’s rights-bearing provisions, but he disputes the historical basis for judicial review to police the limits of federal power. This dichotomy collapses, however, in light of the text of the Supremacy Clause and the Founders’ understanding regarding the nature and source of individual rights vis-à-vis the federal government. The Supremacy Clause permits courts to disregard state law only when it conflicts with a federal statute “made in Pursuance” of “[t]his Constitution.” Thus, of necessity, judicial review of state law often entails judicial review of the scope of federal powers. Similarly, the Founders regarded the Bill of Rights as only a *partial* enumeration of rights. The Ninth and Tenth Amendments confirm that the people retained other rights by virtue of their limited delegation of power to the federal government. For this reason, courts cannot uphold the full range of individual rights contemplated by the Founders without taking a unitary approach to judicial review—that is, by enforcing both the Bill of Rights and the limits of federal power.

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<sup>218</sup> U.S. CONST. amend. II.

<sup>219</sup> Kramer, *supra* note 4, at 126.

<sup>220</sup> Debates of the Virginia Convention (June 7, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 128, at 1006, 1012. Of course, there are legitimate differences over the proper scope of federal powers, but such differences do not relieve courts of their obligation to decide cases in accordance with the Constitution, which sometimes necessarily entails ascertaining whether a specific federal statute falls within the scope of Congress’s enumerated powers.