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"So Extraordinary, So Unprecedented an Authority":
A Conceptual Reconsideration of the Singular
Doctrine of Judicial Review

Anthony V. Baker*

I. INTRODUCTION: IN SEARCH OF "JUDICIAL REVIEW"

Of all the different engines of government spawned by the Founders and developed in the nation over the ensuing centuries, the institution of the United States Supreme Court is arguably America's most intriguing. While the Federal Legislature labors along routinely and the work of the chief executive shifts inexorably toward the center of the public eye, the Supreme Court continues along its shadowy, cabalistic way. Now, at the deconstructionist end of the twentieth century, the Supreme Court steadfastly resists deconstruction: its method remains mystery, its demeanor Delphic.2 Given this nation's almost mystical fascination with the "Founding Fathers," behind the veil as it were, the Court's function remains ostensibly oracular.3 Even as the styles of the

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1. A phrase employed by an Anti-Federalist editorialist under the nom de plume "Centinel," in an editorial originating in the PHILADELPHIA INDEPENDENT GAZETTEER, Feb. 26, 1788 (Centinel XVI), reacting to a presumed power of "constitutional review" in the proposed Supreme Court. Contemporaries attributed the Centinel essays to the then Pennsylvania Supreme Court Justice George Bryan, though historians have come to settle on his eldest son, Samuel (1759-1821), as the more likely author.

2. A term employed during the Depression to good effect by Thurman Arnold, then describing the Supreme Court as something akin to a "great Delphic oracle." THURMAN ARNOLD, THE SYMBOLS OF GOVERNMENT 117 (1935). Writing around the same time, Max Lerner similarly described the role acceded to by the Supreme Court for the American nation, characterizing its Justices as "Platonic guardians that watched over the mythical Greek republic." Max Lerner, Constitution and Court as Symbol, 46 YALE LJ. 1290, 1308 (1937). Little has changed in the intervening seventy years.

3. Professor John Attanasio offered without apology the analogy of "priest" for the American Supreme Court Justices, developing the parallels between "priest" and "judge" in Everyman's Constitutional Law: A Theory of the Power of Judicial Review, 72 GEO. L.J. 1665, 1701 (1984). Robert McCloskey described the Court's actions, in some segments of the
Legislature and, more and more, the Executive seem inevitably plodding, pedestrian and earth bound, the Supreme Court continues its rare, vital work, for all intents and purposes, in the clouds.4

Post-modern musings and jurisprudential "realism" notwithstanding, few Americans would deny an inevitable association between the institution of the Supreme Court and the notion of "power," in some reasonable understanding of the term. Taking the work of the Supreme Court in the Dred Scott5 decision as an example, and considering particularly the place of that decision in American political and cultural history, many historians have been moved to examine the possible catalytic effect of that decision upon the ensuing events leading to the commencement of the Civil War.6 Further, a search for the roots of the civil rights struggle of America's dispossessed peoples across the pages of its history invariably implicates the Supreme Court at every turn. Whether involving Native America,7 African-origin America,8 or feminist America,9 the Supreme Court has been in the middle of the developing struggle for political personhood in its various forms.

watching public's mind, as "its mythic business of consulting the oracle." ROBERT MCCLOSKEY, THE AMERICAN SUPREME COURT 27 (1960).

4. Carl Brent Swisher noted that the singular place of the Constitution in the symbolic mind of the American polity of 1857 "derived from a judgment higher than the minds of men." Carl Brent Swisher, Dred Scott One Hundred Years After, 19 THE JOURNAL OF POLITICS 165, 168 (1957). Professor Swisher is clear about the effect of such a view on the polity's image of that Constitution's keeper, the Supreme Court: "The Supreme Court, in other words, when it spoke in terms of the Constitution, spoke also with the overtures of deity." Id. Again, little has changed today.


6. The list of scholars acknowledging a Dred Scott/Civil War link reads like a "Who's Who" of antebellum-era legal and socio-political historians, including DON E. FEBRENBAUCHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978) (canvassing "the belief that [Dred Scott] . . . became a major causal link between the general forces of national disruption and the final crisis of Union in 1860-61."); ROBERT K. CARR, THE SUPREME COURT AND JUDICIAL REVIEW (1942) (Carr plainly referenced Dred Scott as "[the] case . . . which helped to bring about the Civil War."); and GEORGE FORT MILTON, THE EVE OF CONFLICT: STEPHEN A. DOUGLAS AND THE NEEDLESS WAR (1963) (the author specifically included the case among "perhaps six incidents, mere smudges on the face of history" in the absence of which there "might have been no Civil War."). Milton names as the other "smudges", Uncle Tom's Cabin, Bleeding Kansas, Bully Brooks' assault on Massachusetts Senator Charles Sumner, President Buchanan's hate for Stephen Douglas, and Harper's Ferry. Id. While the list of historians echoing these sentiments is immense, the reader should nevertheless remember that the Dred Scott/Civil War nexus remains labyrinthine in complexity.


Within the American context, then, given the Supreme Court’s status as the “appointed guardian of the Constitution,” it is all but pollyannaish to characterize the words of that singular institution as anything other than words of immense power.

If the reality of the power behind the Supreme Court’s words is all but undeniable, the source of that great power is equally certain: judicial review. Simply stated, given the “supremacy” of the Constitution in American government and life, the voice that interprets its precepts for a waiting, captive nation is a voice necessarily imbued with singular power derived from association with the document itself. Professor Alexander Bickel underscored the point well when he noted, “The power which distinguishes the Supreme Court of the United States is that of constitutional review of actions of the other branches of government, federal and state.”

A not-yet-Mr. Justice Felix Frankfurter was only mildly guilty of hyperbole, in the American context, when he baldly stated in 1930, “In good truth, the Supreme Court is the Constitution.” Given the general American reverence for the Constitution, a reverence presenting itself in a form very much like worship, the power

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11. Alexander Bickel unashamedly referred to it as “the most extraordinarily powerful court of law the world has ever known.” Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 1 (1962). Robert McCloskey echoed the sentiment in strikingly similar terms, describing the Supreme Court as “the most powerful court known to history.” McCloskey, *supra* note 3, at 225. No less an historical personage than Alexis de Tocqueville intimated as much as well, noting:

> When we have examined in detail the organization of the Supreme Court and the entire prerogatives which it exercises, we shall readily admit that a more imposing judicial power was never constituted by any people. The Supreme Court is placed higher than any other known tribunal, both by the nature of its rights and the class of justiciable parties which it controls.

Alexis de Tocqueville, *Democracy in America* 150 (Alfred A. Knopf ed., 1968). Interestingly, de Tocqueville went on to couch the potential influence of the Supreme Court in terms of the other competitive branches of government, noting accurately, if alarmingly:

> The President, who exercises a limited power, may err without causing great mischief in the state. Congress may decide amiss without destroying the Union, because the electoral body in which the Congress originates may cause it to retract its decision by changing its members. But if the Supreme Court is ever composed of imprudent or bad men, the Union may be plunged into anarchy or civil war.

*Id.* at 152. Given the way events unfolded historically after *Dred Scott*, the insightful French diplomat’s words must be seen as tinged with prophecy. Though written in 1835, his comments remain no less vital today.


15. The document has been publicly described by two different American notables of
inuring to the “final arbiter of constitutional questions” is quite palpable.

But this condition is not without attendant problems. Simply put, “[t]he greater the authority of the writers [of Supreme Court opinions], the more dangerous are their errors.” Apart from honest human errors, there is the more sinister danger of the Court deliberately listing toward mundane, partisan politics, and taking the Constitution captive along the way. Professor Bruce Ackerman put the matter succinctly in an immensely thoughtful treatment of Federalist 78 (among other things): “The problem with a Supreme Court, however, is obvious enough. What prevents it from misusing its constitutional authority to further one or another factional interest rather than to interpret the meaning of the past constitutional achievements of the American People?” Whether by mistake or by chicanery, the matter is the same — there remains a pressing need for an effective means of monitoring the deployment of so pristine a power as that managed by the Supreme Court under the American constitutional framework.

A fortiori, this concern raises a critical question — is there an effective means of “reviewing” the Supreme Court's judicial review? Indeed, American history has not lacked for intense, bitter
different eras — then Congressman Caleb Cushing in 1834, and Chief Justice William Howard Taft in 1922 — in the same reverent manner as America’s “Ark of Covenant.” Id. at xviii. Academic commentators who have noted the tendency of Americans to worship both the Constitution and constitutional institutions are legion.

16. These are the words of Daniel Webster, describing the “special privilege” of the judiciary, in his own arguments before the Supreme Court in Charles River Bridge v. Warren Bridge, 36 U.S. (11 Peters) 420 (1837). STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE 45 (1971).

17. T. Farrar, The Dred Scott Case, 85 THE NORTH AMERICAN REVIEW 392, 393 (1857). See also, in the same regard, DE TOCQUEVILLE, supra note 11. And, as Louis B. Boudin caustically suggested in 1932, the effects of such an error may not be limited to the offending case alone:

It is one of the essential weaknesses of Government by Judiciary that, as in all theocratic governments, based upon the sole power to expound a sacred text, its priests cannot afford to admit error without undermining the power of the priesthood and upsetting the form of government in which they are the ruling caste. Error must therefore be perpetuated, no matter what the consequences.

LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY 287-288 (1932).

18. Bruce Ackerman, The Storrs Lectures: Discovering the Constitution, 93 YALE L.J. 1013, 1030 (1984). Almost a century earlier Sidney Fisher anticipated the effect following from a negative answer to Professor Ackerman’s rhetorical question, when he averred that:

It would no longer be a judiciary but a party organ. It would represent not stability, but instability, and become, not a judge, but an advocate . . . . They would lose the confidence of the people, and when that is lost, reverence for the law and security for all right will soon be lost with it.

See Fisher, supra note 10, at 73.
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controversy over the Court's arguably erroneous or political misuse of the created power of judicial review. However, that controversy has inevitably presented itself in inflammatory political language, fueled by the party in the debate most politically inconvenienced by the allegedly partisan Court action. Through the imprecise appellation "judicial legislation" (or the more colorful "super legislature"), the Court is effectively accused, by both the Right and the Left, of illegally melding a legislative function to its limited judicial power and of favoring particular sides in the final settlements of judicial questions. Pressed in such partisan terms, criticisms of the Court are too easily dismissed as nothing more than the political "sour grapes" of the losing party; the vital issue of the Court's potentially ultra vires constitutional actions remains unanswered, and indeed unexplored.

The significance of this observation should not be easily passed over. After all, the Supreme Court is one of three co-equal branches of government in the unique and unprecedented American constitutional plan. The peculiarly powerful agent of judicial review, engrafted onto the Court as early as 1803, demands orthodoxy from the Court and, consequently, a careful, principled monitoring of all its activities. Questions of the functional metaphysics of the nature of its power, counter-majoritarian or counter-countermajoritarian, are of legitimate interest to academics and other students of the institution. However, they pale in comparison to the need for a precise means of reviewing the mediation of its immense influence. The preferred, convenient charge of "judicial legislation," with its particular political vulnerability, simply does not pass muster; something much more precise and effective is needed.

This, then, is the goal of this study — to suggest a new language of review in formulating a workable means of testing the constitutional orthodoxy of separate actions of the Supreme Court, language grounded in function rather than policy. The effort will necessarily begin with the development of an adequate American jurisprudence underlying the doctrine of judicial review, considering both relevant seventeenth and eighteenth century intellectual thought and notions of the doctrine existing in

19. As Robert McCloskey put it: "American constitutional history has been in large part a spasmodic running debate over the behavior of the Supreme Court." KAMMEN, supra note 14, at 9.

20. This is seen through the actions of Chief Justice John Marshall in the hallmark case of Marbury v. Madison, 5 U.S. (1 Cranch) 7 (1803).
pre-Constitution America. Thereafter, attention will be redirected to the contentions surrounding the proposed function of the Supreme Court as it developed in the intellectually vital Federalist/Anti-Federalist debate prior to the ratification of the Constitution in 1788, with a particular focus on Alexander Hamilton's imposing Federalist 7821 and its antithetical philosophical counterpart, Brutus XV.22 Next, attention will be paid to the words chosen by Mr. Chief Justice John Marshall in framing "judicial review" in Marbury v. Madison, and the differing interpretations to which the words are arguably susceptible. From those words a test of constitutional orthodoxy will be suggested, pertinent to the work of the Supreme Court generally, and illustrated by application to two historically significant cases: Dred Scott, and its striking ideological twin, Roe v. Wade.23

II. JUDICIAL REVIEW IN PRE-CONSTITUTION AMERICA

Scholars are by no means incorrect when they place the beginning of what might be called the modern notions of judicial review some time soon after the Civil War.24 Certainly the Supreme Court's antebellum reference to that power in annulling actions of state governments was rare, and, with regard to federal statute annulment, all but non-existent.25 However, it appears equally beyond argument that the rudimentary beginnings of a jurisprudence of judicial review are replete throughout Revolutionary and post-Revolutionary America. Certainly the Enlightenment foundation from which the nation effectively sprang would not have been resistant to the notion, and evidence of some sort of constitutional review philosophy is implicit, if not obvious, in the thoughts of the patriots, the words of the Founders and the actions of the states. A reasonably clear understanding of these

21. THE FEDERALIST No. 78 (Alexander Hamilton).
22. This essay was originally published in the NEW YORK JOURNAL, Mar. 20, 1788.
25. Professor Benjamin F. Wright put the number of antebellum Supreme Court cases specifically overturning state legislation at 60. BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 77 (1942). The number of cases in which a federal act was overturned by the Supreme Court prior to the Civil War is fixed at exactly one — the infamous Dred Scott decision. It is ironic (though perhaps not anomalous) that the first negative of an act of Congress after the power was defined by the Court in Marbury is so intimately connected with the most precipitous event in American history.
“roots” is a necessary and useful first step in underscoring the importance of an adequate vehicle for managing this unique American political power.

A. Constitutional Review — An Enlightenment Jurisprudence

As with much of what comes to be celebrated as uniquely American, judicial review traces its roots back to the thoughts, laws and customs of England. Though American-style judicial review has simply never been a central tenet of British constitutional jurisprudence, that nation preferring the unparalleled supremacy of its Parliament, its roots can nevertheless be traced to Great Britain, and that nation’s pre-eminent seventeenth century authority on the common law, Sir Edward Coke. First, in his famous Institutes, Coke contended for something much like the supremacy of law, postulating that Magna Charta and the common law were paramount, governing both the British Crown and Parliament itself. Further refinement might be found in his opinion in Dr. Bonham’s Case (1610), where then King’s Bench Chief Justice Coke viewed an act of Parliament authorizing licensing of physicians by the London College of Physicians to be void, as countering common law. While Coke’s novel suggestions were out of favor in England by the turn of the eighteenth century, they remained of wide interest across the ocean in America, for political reasons related to revolution.

Those “political reasons” might be more precisely described as colonial America’s increasing fascination with notions of limited

26. This subtitle might suggest a general review of the works of Western Enlightenment philosophers, most notably those of France and England. However, as British philosopher John Locke provides an adequate backdrop for the rather simple points the author desires to make here, a thorough review of the doctrine of judicial review against the breadth of Enlightenment thought will not be attempted, as it is not necessary here.

27. This is true at least after 1689, and as a direct result of the conclusion of the “Glorious Revolution” and the orchestrated ascendancy of William and Mary of Orange to the forever compromised English throne.


29. See Kelly & Harrison, supra note 24, at 46.

30. VIII Coke’s Reports 118 (1610).

31. Indeed, they came to be entirely superceded on this point by the principle laid down by Lord Blackstone thereafter, that:

[T]he power and jurisdiction of Parliament . . . is so transcendent and absolute that it cannot be confined . . . within any bounds . . . [t]his being the place where that absolute despotic power which must in all governments reside some where, is intrusted by the constitution of these kingdoms.

government, most articulately distilled and presented by English jurisprude John Locke in his substantial *Two Treatises of Government*. Published together in 1689, though written and circulated as early as 1680-81, they were not conceived as erudite pieces of pure jurisprudential thought, but rather as political polemics, intellectually favoring the supremacy of Parliament in British government and counter pointing Sir Robert Filmer's *Patriarcha*, which sought to locate supremacy solely in the Crown. In his *First Treatise*, in which "The False Principles and Foundation of Sir Robert Filmer and His Followers Are Detected and Overthrown," according to his provocative subtitle, Locke directly attacked Filmer's scheme of patriarchy that would have justified the monarchy's natural elevation to unrivaled governmental power. Having thoroughly accomplished his task, in his mind at least, Locke then turned his attention to ideal government based on natural right, carefully setting out his rich scheme in his *Second Treatise*. So crucial to developing colonial American thought concerning government and, in the end, revolution, the *Second Treatise* weaves between its lines rudimentary yet foundational notions of constitutional review and, more critically, reasonable limits constraining such review.

In his *Second Treatise*, "Concerning the True Original, Extent, and End of Civil Government," Locke posits humanity in the original as in "a State of perfect Freedom to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man." However, this "state of nature," as Locke denominates it, is not "a State of Licence," humanity being constrained under the "Law of Nature" strictly allowing that "no one ought to harm another in his Life, Health, Liberty or Possessions." And while it is every person's right to protect his freedom in the state of nature from anyone who would invade it contrary to the Law of Nature, he is naturally limited to

33. It is ironic that the philosophical document central to the triumph of Parliament over the King closing the "Glorious Revolution" would also figure prominently in Great Britain's inglorious defeat in the Revolutionary War, almost one century later.
34. *See Locke, supra* note 32, at 287.
35. *Id.* at 288-89.
36. Locke defines "two distinct Rights" against the contravener who "so far becomes degenerate, and declares himself to quit the Principles of Human Nature": The right of "Punishing the Crime for restraint, and preventing the like Offence" and the right "of taking reparation." *Id.* at 296. While the second inures to the injured party alone, of course, the
his own strength, in that state, in protecting his right, a limitation that is substantial indeed. Thus, while Locke's "state of nature" offers unparalleled freedoms, those freedoms are drastically mitigated by the reality that they might degenerate into a "state of war," by design of the more unprincipled in the same state, with costs up to and even including that natural denizen's very life. It is this extreme precariousness of life in the state of nature that impels individuals out of its simultaneous expansive freedoms and ultimate dangers, into the more restrained yet safer confines of "Civil Society."

It is in this deliberate, intelligent act of establishing civil, political society that Locke's innovative notion of limited government rests. For in order to protect life and limb, or at the very least property, individuals voluntarily quit the state of nature, ceding some of their natural rights and freedoms to a created, centralized government charged with protecting the society thus constituted. In this scheme, then, government distinctly arises from the people, is deliberately limited by specific act of the people creating it, and serves at the behest of and for the betterment of those same people. Being a government "of laws," it expresses itself in "the Legislative thereof to make Laws . . . as the publick good of the Society shall require," "to the Execution whereof" by an established Executive, and in "a Judge with Authority to determine all the Controversies." And of course, critical to American colonists and "patriots" of the late eighteenth century, the constituting people always and forever retain the exclusive right of dissolution of the

"right of punishing is in every body." Id. at 292.

37. "And hence it is that he who attempts to get another Man into his Absolute Power, does thereby put himself into a State of War with him; It being to be understood as a Declaration of a Design upon his Life." Id. at 297.

38. "Thus Mankind, notwithstanding all the Privileges of the state of Nature, being but in an ill condition while they remain in it, are quickly driven into Society." Id. at 370.

39. This arguably gave rise to the most famous aphorism attributed to John Locke: "The great and Chief end therefore of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property." Id. at 368-69 (emphasis omitted).

40. Locke puts the matter very succinctly: "Where ever therefore any numbers of Men are so united into one Society, as to quit everyone his Executive Power of the Law of Nature, and to resign it to the publick, there and there only is a Political, or Civil Society." Id. at 343 (emphasis omitted).

41. That is to say, "settled standing Rules; indifferent, and the same to all Parties" mediated by "Men having Authority from the Community, for the execution of those Rules." Id. at 342.

42. Id. at 343.
constituted government,\textsuperscript{43} when it appears to a majority to be in that society’s best interest to do so.

Implicit in Locke’s scheme of government created by and serving any coalescing political society are the critical functions of constitution and constitutional review. The former is the very enabling document by which civil government is both created and, importantly, limited in favor of the constituting society. The latter defines a process by which ambiguities in the meaning of aspects of the document can be mediated, and alleged conflicts between the constituting document and actions of the government constituted thereby, adjudged and resolved. While Locke is by no means clear as to the “how” of such a review function, there can be no doubt as to the “what” of it, as well as the importance of such review in the ordered workings of the constituted government. Neither can there be any doubt of this: that the organization inheriting the vital, delicate responsibility of constitutional review must necessarily be an animate, powerful one; indeed, the very viability of the created government and the civil society served by it will necessarily rest on the proper mediation of that singular function.

\textbf{B. Judicial Review in the Founding Phase — 1776 to 1787}

Notions of constitutional review generally, and judicial review specifically, were clearly present in the developing American thinking about government creation and management in pre-and immediate post-Revolutionary America. Even before the Revolutionary War (and in fact in anticipation of it), colonial voices could be heard calling for the voiding of petit acts of legislatures (in the specific cases in question, Parliament) that violated some perceived “higher law.” For example, when Boston merchants found themselves faced with the imminent renewal of writs of assistance by King’s Superior Courts in Massachusetts Colony under the infamous and detested Writs of Assistance Act,\textsuperscript{44} they

\begin{itemize}
\item \textsuperscript{43} Locke canvasses a series of legitimate reasons for dissolution of government by the original constituting people in his famous Chapter XIX: “Of the Dissolution of Government.” \textit{Id.} at 424-46.
\item \textsuperscript{44} This was an Act of British Parliament essentially authorizing the issuance of a generalized “John Doe” search warrant, giving the bearer broad powers to enter and search virtually any premises at virtually any time. \textit{Id.} at 47. Issued under authority of the English monarch and in that monarch’s name, they ran unbroken throughout the reign of the named monarch and required no individual process whatsoever to be invoked. \textit{Id.} For a concise discussion of their use and effect, and colonial arguments against them, see \textsc{Kelly & Harrison}, \textit{supra} note 24, at 47-48.
\end{itemize}
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retained young James Otis to prosecute and press their unequivocal negative. Otis' arguments on behalf of colonial concerns in 1761 were straightforward: "Thus reason and the (British) Constitution are both against this writ . . . No acts of Parliament can establish such a writ. Though it should be made in the very words of petition, it would be void. An act against the Constitution is void." Four years thereafter a colonial Virginia county court judge went so far as to hold the notorious Stamp Act of English Parliament to be void at law, contradicting as it did, in that court's view, both the British Constitution and Virginia's colonial charter rights. Even though these and other similar actions were immediately unsuccessful, they did engender significant post-Revolutionary effect.

In the intervening years between the successful conclusion of the American Revolution and the Constitutional Convention of 1787, some form of judicial review of acts of state legislatures was evident across the eastern seaboard. The State of New Jersey appears to have been the first to weigh in on the issue when a New Jersey state court invalidated a 1778 act of its own state legislature allowing for six-man juries in cases arising out of the confiscation of "enemy goods." Rhode Island followed suit in 1786 when a state court ruled an act of its legislature providing for the issuance of paper money to be void at law, as contravening the old Rhode Island Charter, that state's ersatz constitution at the time. North Carolina evinced a similar disposition when that state's supreme court voided a widely popular Revolutionary War Land Titles Act as violating a North Carolina constitutional provision guaranteeing to each of its citizens "undoubtedly a right to a decision of his property by trial by jury." Evidence of similar acts of rudimentary

45. Id. at 48 (as recorded by John Adams).
46. They added significantly to the popular sentiment which gave rise to U.S. Const. amend. IV, a significant piece of jurisprudence by any effective measure.
47. Holmes v. Walton, New Jersey (1780). There the Court held the statute violative of both the 1776 New Jersey State Constitution and the New Jersey common law. For a brief discussion of that case, see Kelly & Harbison, supra note 24, at 99.
48. Trevett v. Weeden, Rhode Island (1786). The issue was highly controversial in Rhode Island at the time. Controlled by paper money interests, the state legislature roundly condemned the actions of its court in a joint resolution, even seeking the removal of the judges from the bench. Kelly & Harbison, supra note 24, at 99-100.
49. Kelly & Harbison, supra note 24, at 99. The case under discussion here is Bayard v. Singleton, 1 N.C. (Mart.) 48 (1787). There the originating act of the state legislature confirmed titles on behalf of persons purchasing lands confiscated from Crown sympathizing "Tories" during the Revolutionary War. Id. As in Rhode Island, the offending judges were ordered to the bar of the legislature, though the actions of the Court were eventually
judicial review by state courts negating state legislative actions prior to the Constitution can also be found in Virginia (1782), New York (1784), Connecticut (1785), Massachusetts (1786) and New Hampshire (1787).  

Nor was the notion of some form of judicial negative over legislative actions unfamiliar to many of the Conventioners gathering in Philadelphia in the summer of 1787. In addition to the above-noted North Carolina conventioners, Elbridge Gerry of the Massachusetts delegation specifically made note of the fact that "[i]n some States, the Judges had actually set aside laws as being against the Constitution . . . with general approbation." Luther Martin of Maryland similarly observed, "[a]s to the constitutionality of laws, that point will come before the Judges in their proper official character." James Madison appended a republican twist to the argument, pointedly noting "[a] law violating a Constitution established by the people themselves would be considered by the Judges as null and void." Alexander Hamilton added:

[Limitations on the Legislative authority] can be preserved, in practice, in no other way than through the medium of Courts of Justice, whose duty it must be to declare all Acts contrary to the manifest tenor of the Constitution void. Without this, all reservations of particular rights or privileges would amount to nothing.

Indeed, Professor Charles Warren definitively and persuasively asserts that the entire Constitutional Convention was indirectly exposed to instances of state judicial negatives of legislative acts, and he named fully two dozen of its attendees who came to explicitly support some form of active constitutional review deliberately situated in the Judiciary.
The notion of constitutional review of legislative action at least partially involving the proposed judiciary was before the momentous 1787 Convention virtually from the beginning. Indeed, submitted on the second official Convention day (May 29, 1787), the "Virginia Resolutions" included in their number "Resolution 8" proposing the formation of the Executive and a convenient number of the National Judiciary into a "Council of revision with authority to examine every act of the National Legislature before it shall operate." James Madison argued strongly in favor of such a negating arrangement (along with fellow avowed nationalists Gouverneur Morris, James Wilson and Charles Pinckney), averring that "the judges must share the veto power because the executive and judicial branches acting together would be too weak to withstand the assaults of Congress." In convention amendments dated July 24, August 6 and September 10, 1787, the "Judicial Power" came to "extend to all cases both in law and equity of South Carolina and Abraham Baldwin of Georgia, besides the aforementioned Gerry, Martin, Madison and Hamilton.

55. THE VIRGINIA RESOLUTIONS OF 29 MAY, reprinted in THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION. VOLUME I. CONSTITUTIONAL DOCUMENTS AND RECORDS, 1776-1787, 244 (Merrill Jensen ed., State Historical Society of Wisconsin 1976). It is worth noting that the proposed system of constitutional review in the tendered Virginia Plan did not anticipate judicial review per se, but rather envisioned a hybrid "executive/judicial" entity to which that responsibility would devolve. This "secondary institution" imitated Pennsylvania in its own state constitution (1776), which called for the creation of a separate elected body (the "Council of Censors"), serving limited terms, whose responsibility it was, among other significant things, to enquire whether the constitution has been preserved inviolate in every part; and whether the legislative and executive branches of government... assumed to themselves, or exercised other or greater powers than they are intitled (sic) to by the constitution" and to "recommend to the legislature the repealing such laws as appear to them to have been enacted contrary to the principles of the constitution." PA CONST. of 1776, Sect. 47 (1776). Though this study considers the development of judicial review from Revolutionary times forward, it is worth remembering that only the fact of the necessity of constitutional review was static throughout this period; the means by which this review should effectively be conducted were indeed very fluid, intellectually and politically, and remained so through the 1803 decision of the Supreme Court in Marbury, and in fact beyond. These competitive views of "constitution," and, hence, constitutional review, can be seen in pure form in the contrasting visions of Mr. Chief Justice Taney, writing for the majority, and Mr. Justice Joseph Story, writing passionately in dissent, in Charles River Bridge. See supra note 16. The matter was more or less settled there, in the Chief Justice's majority opinion, and "contractarian judicial review" quickly grew to be the order of the antebellum day.


57. This wording specifically replaced "Jurisdiction of the Supreme Court." Id. at 281. And, by logical inference, it extended the power of the proposed Court in some unstated way. This amending language was submitted to the Convention by a "Committee of Style" consisting of Chair William Samuel Johns of Connecticut, Rufus King of Massachusetts,
arising under this constitution" — language that is presently included in the Constitution. Though the final product did not specifically include language of judicial review inuring to the newly proposed Court, events immediately following the close of the Convention suggest such a power to have been in the minds of at least some of the Conventioners who were responsible for the document's final draft.

Specifically, through the involvement of several delegates to the 1787 constitutional deliberations in Philadelphia, notions of a judicial negative approaching full judicial review surfaced in several of the state constitutional ratifying conventions. James Wilson positively raised the matter in the Pennsylvania Ratifying Convention, declaring to the assembly on December 1, 1787, a clear remedy for extra-constitutional actions of the proposed legislature:

Alexander Hamilton, Gouverneur Morris and James Madison, the latter three staunch nationalists, adding Mr. King to their number as delegates supporting active judicial review. It was adopted by vote of the full Convention on September 10, 1787. Id. at 270. An implied inclusion of judicial review within the scope of the amending language can only be surmised, without definitive support.

58. This language was added by the above noted Committee of Style and adopted by vote of the full Convention September 10, 1787. Id. This language would appear to strengthen notions of implied judicial review within the Supreme Court enabling language, with at least some limited external support. For example, in the Pennsylvania State Constitutional Ratifying Convention, delegate Robert Whitehill based his arguments against ratification partly on powers extended to the Supreme Court "too extensive for the safety and happiness of the people." ROBERT WHITEHALL, SPEECH BEFORE THE PENNSYLVANIA STATE CONSTITUTIONAL RATIFICATION CONVENTION (December 7, 1787), reprinted in THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, VOLUME II, RATIFICATION OF THE CONSTITUTION BY THE STATE OF PENNSYLVANIA 513 (Merill Jensen ed., State Historical Society of Wisconsin 1976). Presumably he referred to notions of "judicial review." Later that same day delegate and Constitutional Conventioner James Wilson opposed Whitehill in the following illuminating language:

The Article respecting the judicial department is objected to as going too far and is supposed to carry a very indefinite meaning. Let us examine this — the judicial power shall extend to all cases in law and equity, arising under this Constitution and the laws of the United States. Controversies may certainly arise under this Constitution and the laws of the United States, and is it not proper that there should be judges to decide them? The honorable gentleman from Cumberland (Robert Whitehill) says, that laws may be made inconsistent with the Constitution; and that therefore the powers given to the judges are dangerous . . . I think the contrary inference true. If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence . . . [of] 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.

"When [the judges] . . . consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void." Constitutional Conventioner Oliver Ellsworth was equally articulate in favor of a firm power of judicial review for the Supreme Court as proposed under the Constitution, noting bluntly:

If the general legislature should at any time over leap their [constitutional] limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges . . . will declare it to be void.

While little can be generalized from the above examples, they do establish the fact that at least two significant Conventioners left Philadelphia in the late summer of 1787 with some explicit understanding of judicial review falling to the created Court under the creating document. Equally important is the fact that those same Conventioners, and probably others like them, saw such review in relatively narrow terms, apparently restricting it to the negating of acts of Congress reasonably perceived to be in contravention of the letter of the Constitution. The significance of this apparent restriction will be explored more thoroughly hereafter.

III. POST-CONSTITUTION JUDICIAL REVIEW — NEGATIVITY AND CREATIVITY

The years between the completion of the draft United States Constitution in September, 1787, and the not inauspicious pronouncements of Chief Justice John Marshall in *Marbury v. Madison* saw several significant developments in relation to "judi-

59. James Wilson, Speech Before the Pennsylvania State Constitutional Ratification Convention (Dec. 7, 1787), reprinted in The Documentary History of the Ratification of the Constitution, supra note 58, at 451. Wilson repeated like arguments at other points in the debates, specifically December 4, 1787, and December 7, 1787; the latter argument was editorialized in the Pennsylvania Herald, Dec. 8, 1787. Id. at 492, 517, 524.

cial review." First, the debate on both the "what" and the "whether" of a judicial constitutional negative figured importantly — if not prominently — in the intellectually vivid Federalist/Anti-Federalist debates immediately prior to the eventual ratification of the Constitution. Much of significance can be found in those debates that is directly relevant to this present reconsideration of judicial review. The last years of the momentous eighteenth century in America saw the issue of a judicial constitutional negative move more closely to the center of American political thinking in the wake of the Alien and Sedition Acts debates. Of course, the matter was "settled" by the Supreme Court in 1803, in favor of some rudimentary notion of "judicial review," although this article will go on to consider a more fundamental question arising from the intriguing work of the Chief Justice in Marbury — precisely "which judicial review" did the Chief Justice's words embrace?

A. "Brutus," "Publius," and the Limited Judicial Negative

As might be expected of those persons registering genuine fear of strong central government in the constitutional ratification period, individuals gathered together loosely under the "Anti-Federalist" banner wrote broadly and vigorously against a host of anticipated ills deriving from the proposed Constitution. Among the concerns expressed were those explicitly related to the proposed Supreme Court. General doubts were raised about the breadth of jurisdiction advanced to the proposed Court — law, equity, and, in certain instances, fact — and the departure from the British model of diffusion of these separable functions to individualized courts. Anti-Federalists also floated nameless fears that the state court systems would come to be fully eclipsed by the more glamorous pro-

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61. Directly after the Constitutional Convention closed in Philadelphia, the issue of ratification having then devolved to the popular forum, proponents and opponents of the draft Constitution turned with equal zeal to the only "mass" medium available to influence the popular will — the newspaper. Detailed essays began to appear in significant communities across the young country, bearing such imposing noms des plumes as "Brutus," "Centinel," and "Cincinnatus" on the Anti-Federalist ledger (opponents of strong "federal" government), and "Americanus," "Fabius," and, most notably, "Publius" for the Federalists (proponents of stronger central government), all seeking to influence the final outcome. Conducted from October, 1787, through mid-summer of 1788, when the ratification battle was won by the Federalist side, the debates proved entertaining and informative in their day, and richly interesting historically thereafter.

62. More will be said about these Acts herein.

posed federal courts. However, the most virulent and troubling criticisms of the proposed Court centered on the notion of "counter majoritarianism" — the Court's effective supremacy over the legislative and executive branches as a consequence of the practical workings of "judicial review." And nowhere were these arguments more pristinely or forcefully advanced than in the essay denominated "Brutus XV."65

Continuing a critique of the proposed Court commenced in "Brutus XI," published in the New York Journal on January 31, 1788, and carried on in the same journal over the ensuing seven weeks, the author of "Brutus XV" focused immediately on the "immense powers" afforded the Court under the proposed Constitution.66 "Brutus" clearly articulated his view of the debilitating effects of the immense power complained of:

[T]he judges under this constitution will controul the legislature, for the supreme court are authorised in the last resort, to determine what is the extent of the powers of the Congress; they are to give the Constitution an explanation, and there is no power above them to sit aside their judgment.67

This charge relates to counter majoritarianism of the most virile strain — final decisions on acts of the legislature ultimately falling to an institution removed from the people and fully insulated from their ready reach. Indeed, "Brutus" rails against it throughout the


66. "BRUTUS XV," supra note 65, at 372. "[T]he supreme court under this constitution would be exalted above all other power in the government, and subject to no controul . . . . I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers . . . ." Id.

67. Id. at 372-73. The nature of that power was equally clear — judicial review, in some form or fashion: "The supreme court then have a right, independent of the legislature, to give a construction to the constitution and every part of it . . . . If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void . . . ." Id. at 376.
"Brutus" warned that even the "errors" of such a body are beyond the peoples' reach, and therefore beyond amendment or even adjustment. The result, according to "Brutus," was a created governmental entity fully and finally above even the creating people themselves — a tyranny in the fullest sense considered by Locke, Montesquieu and Rousseau.

A far different portrait of the nature and power of the proposed Supreme Court flows from the contrapuntal pen of "Publius" in the famous Federalist 78. Commencing with a view as to the "necessity of a federal judicature" in a limited constitutional republic, Hamilton minces no words in positing and denominating the responsibility falling to such a judicature in such a republic — constitutional review:

By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

The reality of such a responsibility appears to be a matter of common sense to Hamilton — the nature of the legislative limitation being one of law deriving from the Constitution, it is incongruous to allow the limited legislature to police its own limitations. And neither does this limited negative raise the . . . [Court] above either the legislature or the people, as "Brutus" had pointedly charged, but rather:

It only supposed that the power of the people is superior to both; and that where the will of the legislature declared in its

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68. "The judicial under this system have a power which is above the legislative, and which indeed transcends any power before given to a judicial by any free government under heaven." Id. at 373.
69. "There is no power above them that can correct their errors or control their decisions — The adjudications of this court are final and irreversible, for there is no court above them to which appeals can lie, either in error or on the merits." Id. at 374.
70. ALEXANDER HAMILTON, "PUBLIUS" THE FEDERALIST NO. 78 (1788), reprinted in THE DEBATE ON THE CONSTITUTION, PART TWO, supra note 65, at 467-75.
71. Id. at 467.
72. Id. at 469.
73. Id. at 470.
statutes, stands in opposition to that of the people declared in
the constitution, the judges ought to be governed by the latter,
rather than the former. They ought to regulate their decisions
by the fundamental laws, rather than by those which are not
fundamental.74

Neither is Hamilton shy about the effect of so weighty a respon-
sibility on the power relationship between the three separate fed-
eral government entities — “the judiciary is beyond comparison the
weakest of the three departments of power”75 — though he does
append a caveat important to the tenor of this study:

[T]hough individual oppression may now and then proceed
from the courts of justice, the general liberty of the people
can never be endangered from that quarter: I mean, so long as
the judiciary remains truly distinct from both the legislative
and executive. For I agree that “there is no liberty, if the
power of judging be not separated from the legislative and
executive powers.76

While “Brutus” and “Publius” clearly occupy opposite positions in
the Federalist/Anti-Federalist debates regarding the nature and
effect of the proposed Supreme Court, this study is benefited more
by a view to the commonalities of the two essays than their differ-
ences. Both acknowledge some constitutional review power inuring
to the Court by virtue of the enabling Constitution, though they are
not in agreement as to its propriety, nature or ultimate effect. Both
seem to posit that implied review in the essential character of a
“negative” rather than a “positive,” each writer employing the negat-
ing notion of “voiding” to characterize the work of the Court in this
regard.77 And while each approaches the matter differently, “Bru-

74. Id. Here Hamilton essentially suggests the review power of the Court to lie more
correctly in the nature of a “counter-counter majoritarianism,” the colorful phrase preferred
by modern day students of judicial review. As the true jurisprudential nature of judicial
review is not the specific subject of this paper, nothing more is appropriate here than the
pointing out of this fact.

75. Id. at 468. Here Hamilton is reiterating his more famous earlier stated aphorism:
 “[T]he judiciary, from the nature of its functions, will always be the least dangerous to the
political rights of the constitution.” Id. He cites Montesquieu in his text in support of the
general point.

76. Id. at 468-69 (emphasis added). Here he relies on Montesquieu again in the quoted
material.

77. “Brutus” notes: “If, therefore, the legislature pass any laws inconsistent with the
sense the judges put upon the constitution, they will declare it void . . .” “BRUTUS” xv, supra
note 65, at 376. Hamilton joined him in a similar negative characterization of the implied
power falling to the Court “whose duty it must be to declare all acts contrary to the manifest
tus" via the dire language of fear and alarm, and "Publius" from the more emotionally distant language of vague danger, each impliedly recognizes some nameless, ominous effect associated with the Court's wandering out of its narrow negating role into something broader and more vigorous. As this latter point of agreement involves the ultimate role and effect of the Supreme Court in the most delicately balanced governmental system in the world, it cannot be passed over without further scrutiny.

For the moment, let us return to the Lockean "bottom-up" scheme of government creation. "People" (the ultimate sovereigns, by beneficence of nature) self-interestedly quit the "state of nature" and endow government with just such powers (and no more) as are necessary for the protection of their persons and effects. That government naturally expresses itself in three separable forms with demarcated functions — the legislative (bearing the creative function), the executive (bearing the administrative or synthesizing function), and the judiciary (bearing the enforcement and management functions). While any blurring of the carefully drawn lines between the three federal functionaries might be debilitating, it is not difficult to view such blurring involving the Supreme Court to be especially so, for the simple reason that it alone is the one department lying outside the easy reach of the constituting people. Should the court engraft anything like a creative role to its negative judicial functions, the results might be seen as potentially dire indeed. With these things in mind, we might now turn atten-

78. The "endowing document" memorializing this power transfer by which government is initiated is the "constitution," of course, which name derives from its ultimate constituting nature and effect. In the Lockean scheme presently considered, the importance of the constituting document cannot be overstated; it literally denotes with a bright line the place where the constituted government's power ends and the people's retained "natural" rights continue. More mundanely, the legislative uses law to create ways and means for management and smooth function of the civil society it serves; the executive both actuates those plans and manages them for the benefit of the civil society it serves; and the judiciary (among other things) mediates the vital constituting agreement between the constituted government and the constituting civil society. All functions are important, of course, but, put in these terms, the paramount function of the Supreme Court might be more easily seen.

80. This establishes the logic behind Hamilton's strong averment that "liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments . . . ." See Hamilton, supra note 70, at 469.

81. Locke, Rousseau and Montesquieu agreed that such an amalgamation of power would effectively result in bald tyranny — benign or vital, as it may choose to express itself — but tyranny in any event. Speaking in a "great debate" in the U.S. Congress in 1802 involving the very matter of judicial review, Rep. Archibald Henderson agreed: "Concentrating judicial and legislative power in the same hands . . . is the very definition of tyranny; and wherever
tion to *Marbury v. Madison*, considering what the words of Chief Justice Marshall may have accomplished in relation to the important concept of the particular "judicial" form of constitutional review embraced by the particular republic in question.

B. Marshall, Marbury and "Creative" Judicial Review

The years between the ratification of the Constitution and the decision of the Supreme Court in *Marbury* saw the issue of constitutional negative/review occupy a small yet important part in the nation's ensuing discovery of the true nature of its singular charter. Various institutions in line for the "office" of constitutional reviewer made themselves known in the suddenly energized public forum of the 1790's, though it is likely that a majority of interested persons favored the judiciary as the best repository for the important role. With the passage of President John Adams' *Alien and Sedition Acts* in 1798, this issue moved to the forefront of political concern, with several states claiming in themselves the valid right of constitutional review within their borders against the vociferous objections of others. The Supreme Court first entered the picture in 1796 in you find it, the people are slaves, whether they call their government a monarchy, republic or democracy." See *Warren*, *supra* note 49, at 175.

82. Kelly and Harbison report that "Prior to 1803, a decided majority of the bench and bar had apparently considered judicial review a necessary part of the constitutional system." *See Kelly & Harbison*, *supra* note 24, at 230.

83. In real anticipation of possible war with France in and around 1798, President Adams conceived and Congress passed *An Act Concerning Aliens* (approved June 25, 1798) and *Sedition Act* (approved July 14, 1798). Aimed at French and Irish immigrants feared as "spies," the first raised the naturalization waiting period from 5 to 14 years and gave to the Executive unprecedented unilateral departure and removal powers over aliens, while the second criminalized seditious writings, broadly defined to include "malicious" utterances against the government. Of dubious constitutionality, the Acts were in fact widely popular in the xenophobic pre-war atmosphere of the day, though of limited actual effect. They resulted in a sum total of 25 prosecutions, 10 convictions and 1 deportation throughout their duration. However, the debate concerning their constitutionality was potent and formative. First Kentucky and then Virginia declared the Acts of no force within their respective borders, claiming for themselves and all states the power of constitutional negative over federal legislation. State after state passed resolutions vilifying the Kentucky/Virginia initiative, usually in strident and inflammatory language. Those states specifically placing this review power conceptually in the hands of the Federal Judiciary included Rhode Island (February, 1799: "The judicial power shall extend to all cases arising under the laws of the United States"); Massachusetts (February 9, 1799: "[T]he decision of all cases in law and equity, arising under the Constitution . . . are exclusively vested by the people in the judicial courts of the United States."); New Hampshire (June 14, 1799: "[T]he proper tribunals to determine the Constitutionality of the laws of the general government is . . . the judicial Department."); and Vermont (October 30, 1799: "[The power] to decide on the constitutionality of laws made by the general government [is] . . . vested in the Judiciary courts of the Union."). Thomas Jefferson repealed the personally detested Acts shortly after succeeding Adams to the Presidency,
the case of *Hylton v. United States*\(^8^4\) wherein the Court appeared to take for granted the fact that it was empowered to determine the constitutionality of a Congressional action, though it did not explicitly state so.\(^8^5\) By the turn of the eighteenth century, the stage was nicely set for the important decision of the Court in *Marbury*.

The story behind the first great constitutional law decision emanating from the Supreme Court\(^8^6\) is well known, and so will be given only the barest treatment here.\(^8^7\) Stunned by an unexpected electoral defeat to Thomas Jefferson, President John Adams and his Federalists sought to extend the Federalist presence in government long after his and his party’s departure from office. Taking advantage of a Congressional act related to the District of Columbia passed in 1801, President Adams first created a series of new Justice of the Peace offices and filled the posts with Federalist appointees. The commissioning documents were duly signed by the President and sealed by his Secretary of State, the Honorable John Marshall. But in the rushed events of the Adams administration’s closing days, several commissions remained to be delivered to the appointees by the incoming Secretary of State, James Madison. Not in any way amused by what he viewed as blatant “pork barreling,” newly inaugurated President Jefferson ordered Madison not to deliver the same — the commissions were thereafter conveniently “lost” in some corner of the Secretary of State’s office. One of the frustrated appointees, Mr. William Marbury, brought an original action in mandamus before the Supreme Court and its recently appointed Chief Justice — the same John Marshall — seeking delivery of the signed and sealed commission allowing him to legally accede to his coveted office.\(^8^8\)


84. 3 U.S. (3 Dallas) 171 (1796).

85. Kelly and Harbison note, “[b]y 1800, nearly all federal justices, as well as a majority of the legal profession, had accepted the principle that the Supreme Court could declare acts of Congress unconstitutional and therefore invalid.” See Kelly & Harbison, *supra* note 24, at 193. Nevertheless, it would be simply wrong to suggest that such a view was universal.

86. Carl Brent Swisher called *Marbury v. Madison* “the first of outstanding permanent importance to be decided by the Supreme Court.” Carl Brent Swisher, *American Constitutional Development* 101 (1943).


88. Marbury claimed original jurisdiction to lie with the Supreme Court by virtue of the enabling legislation of the Judicature Act of 1789, thus broadening that Court’s original juris-
Speaking on behalf of all six voices then sitting and active on the Supreme Court, the Chief Justice carefully laid out the issues in the politically delicate case and settled each of them consistently with his and his party's partisan predilections. Mr. Marbury's commissioning was indeed complete with the President's signature and the Secretary of State's seal, giving him a vested, legal right in the sought after commission; and, that right being vested and legally in his favor, the laws of the country must naturally afford some kind of responsive remedy.

The Chief Justice began his approach to the fateful third issue — whether the "proper remedy" embraced mandamus issued by the Supreme Court — by separating it into component parts. He settled the first part quickly and categorically: "This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record." It was in his treatment of the second part — whether that remedy should issue *originally* from the Court — that matters became interesting, and indeed historic. If one simply noted the plain language of the Judiciary Act of 1789 that established the Supreme Court and authorized it to "issue writs of mandamus . . . to any . . . persons holding office, under the authority of the United States," the matter would have appeared to have fallen entirely in Mr. Marbury's favor, unless "the law . . . [was] unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purported to confer and assign." Proceeding, however, under the direction of his bold and now famous aphorism that "it is emphatically the province and duty of the judicial department to say what the law is," the Chief Justice found original jurisdiction in his Court to be

diction beyond that explicitly granted in the Constitution. An outcome from the Marshall-led Supreme Court in favor of the man whose very name he had signed as Secretary of State on the undelivered document in question was so widely expected that President Jefferson was rumored to have ordered impeachment articles prepared for the Chief Justice, to be acted on upon release of his expected decision.

89. One of the great innovations brought to the bench by the "father of the Supreme Court" was the insistence upon a solo opinion from an unanimous Court whenever possible — *per curiam* — doing away with its previous practice, adopted from the British House of Lords, of opinions *seriatim*. The intent was to create a public impression of a united Court, one that tended to speak "with one voice" as it were. In this way the institution grew tremendously in status and mystique throughout the tenure of Chief Justice Marshall's leadership.

90. See supra note 20, at 173.
91. Id.
92. Id.
93. Id. at 177.
narrowly delimited by the Constitution itself, with the startling result that “[t]he authority, therefore, given to the Supreme Court, by the [Judiciary Act of 1789] ... to issue writs of mandamus to public officers, appears not to be warranted by the constitution ... .”94 President Jefferson, therefore, had won95 — Mr. Marbury did not receive from the Court the thing it had categorically found him to have been fully deserving of by right. But the Supreme Court had won also, drawing to itself a singular authority that would prove dramatic in the hundreds of years following.

While much can be said about the notion of “judicial review” deriving from Chief Justice Marshall’s cleverly crafted opinion in Marbury, this study is content to focus attention on the very last word of his often repeated pronouncement, that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”96 As an averment of vision, it is a weighty statement without doubt; as an exposition of “judicial review” it should be seen as imprecise, and thereby profoundly problematic. To begin with, it is quite simply incorrect, either in the Lockean sense of mediating the constituting document on behalf of its creators, or in the “constitutional negative” sense preferred by the Founders and the subject of apparent agreement throughout the constitutional ratification period. Revisiting Locke, it is always and forever “the people” — the creators of limited government and the erectors of its boundaries — who “say what the law is.”97 The Court possesses a more mundane role of alerting “the people,” in pertinent fact, when a boundary they have deliberately drawn has been transgressed by a governmental entity that they have deliberately created. Given the ultimate effect of the Court’s words when exercising constitutional review, it is more precise and, therefore, more valuable, as a matter of constitutional orthodoxy, to recast the emphatic “province and duty” of the Court in terms of what the (inferior) law is not — “the people” remaining the only entity empowered to set out what the (superior) law in fact is.

With regard to the early American notions of “judicial review”

94. Id. at 176.

95. No fool, of course, in political matters or anything else, President Jefferson was fully and frustratingly aware of the pyrrhic nature of the “victory” Chief Justice Marshall had offered him, and wrote against the Chief Justice and his extreme notion of constitutional review throughout the remainder of his storied political career.

96. As with President Clinton, so with the phrase in question — much depends on “what the meaning of the word is”!

97. Here, of course, I refer to the “superior law” which trumps all inferior laws in the republican sense.
from which the Marshallian statement would appear to have originated, the language problem would seem to become even more critical. For all the various notions of "constitutional" or "judicial" review preceding *Marbury* appeared to share in common the notion of a negative outcome at their conclusion, a rendering of something "to be not," if you will, rather than "to (creatively) be." There is a sense of "negativity" in these originating notions of judicial review, a sense of something deconstructed or rendered inert at the full end of its work, rather than something created, or *new*, left in its wake. It is in this counterposition of creativity and negativity that a more precise and instructive language of review of the ultimate work of the Supreme Court might be formulated, one that moves deliberately away from partisan political attacks (and equally partisan political dismissals) toward a value-neutral check of its vitality, consistent with Lockean constitutional orthodoxy. And in theory, at least, such an effective test would appear to be necessary, as, given the association of constitutional review, creativity, and tyranny outlined earlier, the sort of mischief such an entity might effectively engender when acting "creatively" rather than "negatively," even if unwittingly, might be very great indeed.

IV. A LEGACY OF "CREATIVE" REVIEW

Stripped of shrill and obfuscating charges of "judicial legislation" and "super legislature," the problems associated with "creative judicial review" remain both potent and immense. Indeed, the presently preferred challenge language of "super legislature" adds to its other disabilities the fact that it is palpably imprecise, and, arguably, dangerous in its imprecision. A "creative" Supreme Court is not actually "legislative" — "super" or otherwise — nor does it act in a truly legislative manner (as that term derives meaning in the American context). Rather, such a Court acts in a capacity far more troublesome than this. In fact, the entity that leaves something new in the wake of its work with the Constitution is acting more in the nature of a *sitting constitutional convention*. Its pronouncements are in fact edicts — they are ratified by no one and become, of an instant, the "supreme law of the land." In truth, a healthy constitutional system can (and probably must) live with some of this; but if the reviewing entity makes unratified edicts in relation to fundamental animating principles of the republic — principles involving human rights, natural law and the like — the results can be fright-

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98. These are "load-bearing" beams, if you will, in the American constitutional edi-
ening. An exploration of this thesis in the context of two of the most notorious cases in the history of the United States Supreme Court — *Dred Scott* and *Roe v. Wade* — should prove illuminative.

A. *Dred Scott v. John F.A. Sandford*

Nothing struck more at the heart of the new republic than this fundamental human dichotomy/hypocrisy — purloined labor via enforced perpetual human bondage in the very shadow of virile revolutionary rhetoric of equality. Southern financial commitment to the inhuman trade through the first third of the nineteenth century grew even as its moral acceptability plummeted, both at home and abroad, though a dark, restless genius from South Carolina, John C. Calhoun, did much to reinvigorate Southern self-delusion regarding slavery through his widely disseminated “positive good” speech. The late 1840’s saw the end of a politically motivated war with Mexico and the development of a new, dangerous issue thereafter: whether Southerners would be allowed (by law) to join northerners in lucrative westward territorial expansion, carrying their “peculiar property” with them. It was at precisely this time, and in direct consequence of this inflammatory controversy surrounding “territorial slavery” that an odd, remarkable thing occurred — politicians began to openly admit that the political process was breaking down with regard to its ability to compromise the intractable matter of slavery in America, territorial or otherwise. Instead, politicians turned optimistically to the Supreme

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99. This is applied in a non-pejorative sense.
100. Indeed, University of Wisconsin legal historian Arthur McEvoy is entirely correct in employing in tandem two otherwise incompatible terms to describe America at its foundational roots — *slave republic*. And neither was this dichotomy lost on eighteenth century America. The number of American “founders” commenting on the anti-revolutionary irony of the slavery institution, including many who themselves owned slaves, is notoriously immense.
101. Delivered during the fiery debates surrounding a Senate resolution to censure “abolition petitions” and pass them unread from the Senate floor, Senator Calhoun reconfigured the morality of slavery in a way theretofore thought to have been impossible, stating baldly:

But I take higher ground. I hold that in the present state of civilization, where two races of different origin, and distinguished by color, and other physical differences, as well as intellectual, are brought together, the relation now existing in the slave-holding States between the two, is, instead of an evil, a good — a positive good.


Defending his remarkable thesis in eloquent tones, his words were received as anathema among anti-slavery apologists, but “manna” in the South. From words like these an aggressive Southern confidence eventually coalesced that had its fateful fulfillment in the Civil War.
Court for a resolution of the issue.\textsuperscript{102} History is also relatively homogeneous in its belief that the Court itself, both cognizant of the remarkable political atmosphere of that day regarding slavery and aware of the eyes of the nation upon it in this regard, came also to embrace this odd idea of "settling" the otherwise labyrinthine political issue.\textsuperscript{103} It had its first opportunity to work this proposed magic with the \textit{Dred Scott} case.

Born into slavery in Missouri and held in bondage there in the St. Louis area for most of his life, Dred Scott based his claim for freedom on two separate earlier occurrences — first, residence with his "master" for a period of approximately eighteen months in the Wisconsin Territories west of the Mississippi River (present day Minnesota);\textsuperscript{104} second, residence for an equivalent period of time, under similar circumstances, in the "free state" of Illinois.\textsuperscript{105} He pressed his claim in state court and was successful at trial, receiving a verdict in favor of his freedom, though it was reversed on defendant's appeal to the Missouri State Supreme Court, in a split

\begin{itemize}
\item \textbf{102.} While it is easy to document the fact of this transformation — every major late antebellum political compromise of the slavery issue, from the Clayton Compromise (1848) through the "Great Compromise" of 1850 and the infamous Kansas/Nebraska Act (1854) included a clause providing direct appellate jurisdiction of slavery related issues to the Supreme Court — it is much more difficult to understand why. Yet the phenomenon was real. Political leaders as diverse as Jefferson Davis and John C. Calhoun on the one side, and Stephen Douglas and Abraham Lincoln on the other, men who could agree on nothing by the close of the 1840s, all met together on this single remarkable point — the volatile matter of the place of slavery within the republic would be fully and finally settled by the United States Supreme Court. Though it is impolitic to judge actions of another age by present day standards, the naiveté remains striking.

\item \textbf{103.} Justice James M. Wayne of Georgia, one of the Supreme Court Justices sitting on the \textit{Dred Scott} Court, left no doubt as to the Court's ill-fated motivations in this regard: "The case involves private rights of value and constitutional principles of the highest importance, about which there had become such a difference of opinion that the peace and harmony of the country required the settlement of them by judicial decision." \textsc{Loren Miller}, \textsc{The Petitioners: The Story of the Supreme Court of the United States and the Negro} 76-77 (1966). Mr. Chief Justice Roger Brooke Taney and others on his bench are on record with similar remarkable pronouncements.

\item \textbf{104.} This area was rendered forever free territory by operation of Thomas Jefferson's Northwest Ordinance of 1787. Dred's legal argument held that, having taken up some form of residence there, in a place where slavery was legally outlawed, the positive law incidents of slavery effectively dissipated and were replaced by the natural right of freedom. His arguments were by no means specious in this regard — many thousands of "slaves" had received freedom on just such a theory in state courts across the nation, including Southern state courts. Indeed, Dred Scott's argument was fully supported by Missouri state court precedent at the time it was made.

\item \textbf{105.} The details surrounding all aspects of the thoroughly unique case of \textit{Dred Scott} are fascinating, both in their drama, story, and historical significance. The student interested in learning more about the matter could not do better than Professor Fehrenbacher's Pulitzer Prize winning treatment of the subject. \textsc{See Don E. Fehrenbacher, supra note 6}.\
\end{itemize}
decision, 2-1.

When a motion for a new trial in state court was denied, counsel on behalf of Dred Scott relied on diversity jurisdiction to remove the matter into the federal courts. The suit wound its way through the federal courts, yielding a verdict against Dred Scott in the federal circuit court, and finally arrived in Roger Brooke Taney's Supreme Court in 1856, some ten years after it was commenced. After two sets of oral arguments (February 11-14 and December 15-18, 1856) and an aborted plan of the Court to write a short, non controversial opinion against his freedom based on earlier, relatively benign Supreme Court precedent, Chief Justice Taney delivered the self-styled “Opinion of the Court,” one of the most odious opinions in the institution's history.

While the gist of Mr. Taney's ruling was that the Supreme Court did not have jurisdiction to hear Dred Scott's freedom claim, his opinion made no effort to simply stop there. In the Chief Justice's opinion, Dred Scott, and indeed all African origin persons in the country, "slave" or free, were incapable of receiving and maintaining American citizenship due to a naturally debilitated and inferior

106. By that stage Dred Scott argued that his "papers" were owned by Mr. John F.A. Sandford, a purported millionaire fur trader residing in New York, who it appears had never actually met Dred, but who took the "papers" from his sister, Dred's original "owner," for all intents and purposes. Counsel for Dred Scott simply took advantage of the purported diversity of citizenship to "make a federal case out of it."

107. This precedent was Strader v. Graham, 51 U.S. (10 Howard) 82 (1850), a case originating in Kentucky involving men held in bondage in Kentucky who claimed freedom based on extended residence in Ohio on behalf of and with the permission of their "master." In that case, the Court was relatively succinct: regardless of the effect of prior extended residency in a "free" state, they had voluntarily returned to Kentucky — were making their claim to freedom from there in fact — where the status of slavery had "re-attached." Such a simple treatment of Dred Scott's case was clearly available to the Court, and it is a matter of endless historical speculation why it was not preferred by Chief Justice Taney and his bench. For a general treatment of this point, see ROBERT McCloskey, supra note 3, at 94.

108. This is an ironic euphemism given the reality that each Justice weighed in with a separate opinion on the matter, producing over 240 printed pages in total, and clear agreement on very little. Indeed, one academic cites the contemporaneous work of noted Supreme Court historian George Ticknor Curtis who, upon carefully analyzing and harmonizing the opinions of each Justice ruling in Dred Scott, concluded that "there was no 'majority' decision at all." Frederick S. Allis, Jr., The Dred Scott Labyrinth, reprinted in TEACHERS OF HISTORY: ESSAYS IN HONOR OF LAURENCE BRADFORD PACKARD 348 (H. Stuart Hughes ed., 1954). The reversion to seriatim opinions in Dred Scott had its own debilitating effect on the authority of the decision. In this regard, John P. Frank notes, quite rightly, "If ever there was a case in which the majority at least should have spoken with one voice, it was here. The discord stripped the Court of the Olympian quality which it needs particularly when delivering a judgment that will offend a large section of the country." JOHN P. FRANK, MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE 83 (1958).
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state attending the entire race. Chief Justice Taney further averred that “slaves” occupied the status of “property” in the American context and that Congress’ power to govern the territories did not derive from the plain language of Article IV, Section 3 of the Constitution. As a result of these limitations, the Court concluded that Congress had no power to abolish slavery in the territories, rendering the Missouri Compromise of 1820 unconstitutional and void.

The opinion of Mr. Chief Justice Taney provides a rich milieu from which to consider the effects of “creative” versus “negative” judicial review. His opinion arguably left much “new” in its wake, and left a nation trembling as a consequence of his creative work. For example, on March 5, 1857, the day before the release of the Dred Scott decision, the Constitution said precisely nothing about the citizenship status of African-origin individuals, “slave” or free, living in the United States. By the very next day, all African-origin persons were divested of any and all privileges of citizenship whatsoever, rendering them civil “phantoms” in the American landscape. In the early morning of March 6, 1857, the constitutional status of the “slave” was as it always had been — murky at best, and highly contested. By that evening, the “slave” was rendered property at law, distinctly and expressly so by application of the Constitution itself.

109. See supra note 23, at 404ff. Chief Justice Taney noted:

[T]hey are not included, and were not intended to be included, under the word “citizens” in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

Id. at 404-05.

110. Id. at 451.
111. Id. at 432-49.
112. Id. at 450.
113. Id. at 452.
114. Indeed, in Williams v. Ash, 42 U.S. (1 Howard) 1 (1843), Chief Justice Roger Taney presiding, the Court heard arguments on behalf of a “slave,” for freedom from a “master” who had allegedly violated a bequest by which he had taken possession of that person. Apparently brought to the Court on the strength of diversity jurisdiction, the “slave” being an original resident of Maryland and the delinquent “master” residing in Tennessee, the Court heard the case without qualm, finding on behalf of the plaintiff by granting freedom.

115. And this in the face of the contravening words of James Madison himself, on the very floor of the Constitutional Convention, when he gave clear support for his (successful) insistence that the word “slave” not appear in the document itself: “Mr. MADISON thought it wrong to admit in the Constitution the idea that there could be property in men.” 1787
Similarly, on March 5, 1857, Congress maintained control over the territories, including control over the issue of territorial slavery. By nightfall that power was obliterated — not by thoughtful action of the people but by “edict” of the Court — and every square inch of U.S. Territory was “slave” territory, the contrary desires of the very territorial residents themselves notwithstanding. Indeed, following from the suggested notion of constitutional orthodoxy proposed earlier, the only “negative” thing accomplished by Dred Scott was the negation of the 1820 Missouri Compromise, an act that Congress had in fact repealed three years prior to the Dred Scott ruling.

The consequences of “creative” judicial review in the wake of Dred Scott might reasonably be described as astounding. Politically, the effects of the decision could not have been more disruptive to the nation. The Democratic Party was split literally in two as a result of the decision, and the fledgling Republican Party drove

The ruling ran afoul even of early pronouncements of the Court itself, particularly its ruling under Chief Justice John Marshall in Boyce v. Anderson, 27 U.S. (2 Peters) 150 (1829). There the plaintiff brought an action for the value of cargo lost in the nature of “slaves” drowned in passage due to the alleged negligence of defendant. The Court refused to apply the standard of “negligence” to the matter but rather “gross negligence,” as “[t]he doctrine of common carrier did not apply to the case of carrying intelligent beings, such as negroes.” Id. at 153. Chief Justice Marshall went on to note “In the nature of things, and in his character . . . [the slave] resembles a passenger, not a package of goods. It would seem reasonable, therefore, that the responsibility of a carrier should be measured by the law which applies to passengers, rather than by that which is applicable to the carriage of common goods.” Id. at 155.

Indeed Mr. Taney’s ruling arguably had the same effect in the states, transforming every state into a “slave” state. If U.S. Const. amend. V protected a person’s slave property in a territory, why would it not have a similar effect in a state, even a “free state?” At least one farmer entering the free state of Iowa believed that very thing, according to a small town newspaper in Kenosha, Wisconsin (reprinting a note from the Fairfield (Iowa) Ledger): “The Fairfield Ledger is informed in good authority, that a Missouri slaveholder has removed to Warren County, in that State, and brought with him five or six slaves whom he claims a right to keep and work on the free soil of Iowa, under the Dred Scott decision.” Kenosha Tribune and Telegraph, Dec. 3, 1857, at 2. The short editorial statement that followed said much about the post-Dred Scott state of the nation: “Iowa owes it to herself to strike the manacles from every slave, brought within her limits, by explicit and peremptory statute.” Id.

This repeal was an integral part of the Kansas/Nebraska compromise (1854).

Following leading Democratic Presidential hopeful Stephen Douglas’ refusal to accede to Southern Democratic demands to incorporate “Dred Scott” language regarding ter-
through the breach behind its nationally obscure candidate, Abraham Lincoln, to the executive office in 1860. But beyond its remarkable political effects, Mr. Justice Taney’s “creative” review had revolutionary effects on the Constitution itself, essentially “denaturalizing” the original 1787 version and leaving a very different document in its place — one that anti-slavery interests could not live with, and one that pro-slavery interests would die for. The creative mischief of the Court in *Dred Scott* was eventually corrected by constitutional amendment — three such amendments, in fact — when “the people” had their Lockean say about the kind of document by which the civil society that they had created would be directed. But not before the very right of “the people” to the constitution of their choice was settled apart from either politics or law by “the grim logic of marching men.”

**B. Roe v. Wade**

The similarities between *Dred Scott* and the ensuing action of the Supreme Court in *Roe v. Wade* some one hundred sixteen years later are remarkable. Both cases derived from a vital question about fundamental human rights with passionate adherents on both sides of the central issue, and a broad, interested, undecided majority holding the fiercely contested middle ground. Both cases arrived at their Courts as a matter of last resort, the respective political processes having actually or apparently failed to bring satisfactory closure to the vexing issues before the nation. In attempting to
"settle" the questions before the respective Courts, both eschewed available judicial compromises in favor of firm, straightforward decisions in which one side was undeniably preferred as "winner," and this by identical judicial majorities, 7-2. And in both cases, despite their individual mandates and clearly expressed desires to the contrary, the turbulent events following their releases undeniably demonstrated that they effectively settled nothing.\footnote{121}

Accepting appellant's challenge to a Texas statute "substantially unchanged" from the original nineteenth century legislative act criminalizing abortion in that State,\footnote{122} Mr. Justice Blackmun's "Opinion of the Court"\footnote{123} wasted no time in setting out its own particular view of the task before it. This view would govern the way it conceived of the problem and tailored the result: "Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection."\footnote{124} The Court began by setting out the broad constitutional arena within which the contest should be conducted: "[O]n behalf of herself and all other women 'similar situated' ", appellant Roe "claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments."\footnote{125} Thereafter, the Court set about its "settling" task in earnest, finding first that "[t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."\footnote{126}

Turning to the matter of the place of the fetus in the mix of

\footnote{121}{In addition, some would argue that the cases were not dissimilar in result, \textit{Dred Scott} setting off the most horrific war in the nation's history, and \textit{Roe} commencing a "war" of its own, less spectacular but no less deadly, with casualties numbering in the tens of millions, to borrow from the polemical views of one side in the tortured debate. \textit{Dred Scott}'s war lasted four awful years. Following the problematic analogy to its logical conclusion, \textit{Roe}'s "war," lately (and tragically) adding living, sentient human beings to its "casualty list," rages on.}

\footnote{122}{See \textit{Roe}, 410 U.S. at 177 (Rehnquist, J., dissenting). Add irony to the things connecting \textit{Dred Scott} and \textit{Roe} — the Texas originating statute was passed in the same year \textit{Dred Scott} was decided, 1857.}

\footnote{123}{The opinion was concurred in by Mr. Chief Justice Burger, and Justices Douglas, Brennan, Stewart, Marshall and Powell. Justices Rehnquist and White dissented.}

\footnote{124}{See \textit{Roe}, 410 U.S. at 116 (emphasis added). This "settling" matter will be further explored herein.}

\footnote{125}{Id. at 120.}

\footnote{126}{Id. at 153.}
“rights bearing” entities, the Court was equally sure that “[a]ll this [prior reasoning] . . . together with our observation, supra, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn . . . .”¹²⁷ Mixing in its earlier determination of the existence of “important state interests in regulation [of abortion at some level],”¹²⁸ the Court was ready to present its novel “settlement” of the issue: (1.) the woman (and physician) owned exclusive rights to the abortion decision in the first trimester of pregnancy;¹²⁹ (2.) in the second trimester the State gained the right to “regulate the abortion procedure to the extent the regulation reasonably relates to the preservation and protection of maternal health”;¹³⁰ and (3.) the State could regulate abortion to the level of prohibiting it altogether “at viability”¹³¹ (roughly at the beginning of the third trimester) by demonstrating “important and legitimate interest in potential life.”¹³²

In keeping with the thesis of this study, it can easily be seen that there is much “creative” in the opinion of the Supreme Court in Roe v. Wade, with attendant complications. To begin with, there is the matter of the Court’s self-accepted role of “settling” the difficult national dilemma. Apart from the daunting nature implicit in such a task,¹³³ and imputing no ill motives to the accepting Court, its own sense of its responsibilities in matters such as are presented in Dred Scott and Roe is quite simply wrong in any reasonable sense of American constitutional orthodoxy. The Court cannot be charged with “settling” such matters but rather with discovering how the Constitution would have them settled, if at all. The Constitution is not that of the Justices’ subjective understandings, or even those of

¹²⁷. Id. at 158.
¹²⁸. Id. at 154.
¹²⁹. Roe, 410 U.S. at 163.
¹³⁰. Id.
¹³¹. Id.
¹³². Id.
¹³³. Significant within the community of those sharing academic interest in the Supreme Court is the subset of scholars who believe some questions to be inherently “too hot” for that institution to handle. According to these scholars, the better thing, for itself and for the nation, is for the Court to effectively “pass” on such questions, trusting them to the political institutions. Don Fehrenbacher states the matter plainly on behalf of that subset, noting: “[A]lthough judges did do much of the work of drawing the line between State and national authority, some controversies were too crucial and/or too aggravated to be resolved in any courtroom.” CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH 38 (1989). The present author is determinedly not a member of that thoughtful camp.
the Founders, but instead that of the original ratifiers of the charter, those “people” who voluntarily left the “state of nature” and set the metes and bounds of government years ago. If the Court can find no whisper of a position among the original ratifiers on such a question, Lockean orthodoxy would require it to highlight that reality and let the matter be. By definition such issues are quintessentially political, belonging of right to the “polity” for satisfactory settlement, either by petit acts (legislation) or grands (Constitutional amendments), in the creative arena of political government. To move deliberately beyond these bounds is to wholly embrace what has been denominated here “creative constitutionalism,” reshaping the reach of the document by unorthodox means — indeed outside the singular creative power of the “people” themselves — with naturally following negative results.

Beyond even the creative notion of “settlement” itself, it is undeniable that the Supreme Court left a very different world in its wake after the completion of the majority opinion in Roe. To begin with, the Court further entrenched the “right of privacy” within the penumbral confines of the Constitution, though admittedly (of necessity) between its lines, unilaterally extending that right beyond any reasonable apprehension of what the ratifying people

134. James Madison himself fully understood and anticipated the jurisprudential fallacy of “original intentism” in looking to the “the Founders” for ultimate meaning in the Constitution, noting directly that:

[If a key to the meaning of the Constitution was to be “sought elsewhere” than in the text itself, it must not be in the opinion or intentions of the body which planned and proposed the Constitution, but in the sense attached to it by the people in their respective State Conventions where it received all the authority which it possesses . . . .]

CHARLES WARREN, supra note 49, at 67-68. Madison elaborated further on the important point, in no less certain terms, noting that, “as presumptive evidence of the general understanding, at the time, of the language used [in the Constitution], it must be kept in mind that the only authoritative intentions were those of the people of the States as expressed through the Conventions which ratified the Constitution.” Id. at 68.

135. Though the scope of this study does not allow a definitive statement on the issue, the immediate and strong negative reactions from a significant portion of the interested public following both Dred Scott and Roe at least implicates some level of visceral response to the co-opting of constitutional process on the part of the Supreme Court, in the highly contentious area of fundamental “human rights” at least. Indeed, with regard to Dred Scott, a selective review of local presses over the period of time from its release through the 1860 election all but establishes this to have been the case. See Anthony V. Baker, “The Authors of All Our Troubles: The Press, the Supreme Court and the Civil War,” 8 THE JOURNAL OF SOUTHERN LEGAL HISTORY 29 (2000).

136. The Court was not coy about this, candidly noting: “The Constitution does not explicitly mention any right of privacy.” See Roe, 410 U.S. at 152.
might have envisioned for the constituting document. In addition, the Court appended a versatility to that privacy right unheard of prior to Roe, causing it to balance precariously between the competing interests of the pregnant woman, the fetus and the state, both collapsing and expanding simultaneously. Further, the role of the state in the matter of abortion was dramatically and unilaterally recreated by the Court, its legitimate reach being redrawn short of the pregnant woman and the fetus she carried, by virtue of the effectively expanding Constitution. And, of course, while the fetus occupied a doubtful place in the rights pantheon of the Constitution immediately prior to Roe, it dropped entirely out of consideration (or protection) in that regard by virtue of the work of the Court in that case.

As with Dred Scott before it, the catalytic effects of Roe v. Wade on the nature of the abortion debate, and on constitutionalism more broadly, are all but undeniable. What was (prior to Roe) and remains in essence a “political issue,” implicating the entire polity and deserving of reasoned debate in the public forum, has been effectively removed from that venue and transferred to the much more dramatic arena of “supreme law” under the Constitution. Relationships between the interested parties in the debate changed as well following Roe, from focused political opponents to strident Constitutional foes, without effective process to mediate their honestly held differences. Relationships of the opposing parties to

137. Whether one considers the late eighteenth century ratifiers, responsible for the “First, Fourth, Fifth, [and/or] Ninth [Amendments]” (See supra note 120) or their post-1860 counterparts responsible for the “Fourteenth Amendment” (see supra note 120), the result is exactly the same. Indeed, with regard to application of the Fourteenth Amendment, by the Court’s own admission, through its laboriously traced history in Roe, ratification of that amendment occurred roughly contemporaneously with the national sweep toward incrimination of abortion. To read an extension of privacy to abortion in this regard would appear to be indelicate at best.

138. Here, of course, the author refers to the unique counter-switch in privacy interests between the pregnant woman and the state over the life of the pregnancy, the one shrinking even as the other expands, the fetus benefiting from this fluid state of protection each day that it “survives.”

139. This is so at least until the point of “viability” as defined by the Court, when the state regains legitimate constitutional power to act of its own accord on behalf of the fetus. It is highly doubtful that the notion of “viability” was in any way a part of the considerations of those persons called on to memorialize rights within the supreme law of their land, either in the late 1780s, when the Bill of Rights was insisted upon by the polity, or in 1868, at the passage of Amendment XIV.

140. This latter consequence — the destruction of an effective mediation process — should not be underplayed. As long as the debate stayed in the political arena, it remained amenable (arguably) to the comparatively more streamlined and manipulable political process, seeking to fashion a creative and sensitive solution to the problem. Following Roe's cre-
law were suddenly thrown out of kilter as well, rendering each of them in an opposite role in relation to both criminal and constitutional law following Roe. In short, much as its predecessor body in Dred Scott, the Supreme Court in Roe v. Wade worked changes in America, palpable changes affecting both “the people” and their fundamental law. In the context of this article’s thesis, this assertion is by no means unimportant.

V. CONCLUSION: RE-REVIEWING JUDICIAL REVIEW

When the men traveled to Philadelphia from their various villages, hamlets, homesteads and cities in the summer of 1787 to consider the vagaries and details of pure government, they did so under the most difficult of circumstances. Clearly, they approached their daunting task in a crucible of singular and pristine pressures, from within and from without, that only served to more dramatically highlight the impossibility of what they had determined to do. Domestically, the motley thirteen member collection of hostile fiefdoms comprising the United States under the Articles of Confederation showed undeniable evidences of fissure portending imminent and spectacular disintegration before 1790, short of some dramatic and powerfully redemptive change. Worse, England gave hints of an intention to recommence a war temporarily halted by the 1783 Treaty of Paris, with a fledgling nation effectively incap-

ative constitutionalization of the issue, however, the more streamlined process has necessarily given way entirely to the much more unwieldy and intractable processes related to constitutional change — changing (or protecting) the Court, or the Constitution itself. In addition, with that change has come an undeniable transformation in the parties' relationship to one another, infusing a stridency and desperation not present in the same degree prior to Roe, and of continuing incendiary effect today.

141. While the ultimate effect of this legal transmogrification — changing parties to opposite sides in relation to both criminal and constitutional law — cannot be precisely determined within the scope of this work, it can reasonably be speculated upon as great.

142. “Thirteen Sovereignties pulling against each other” peerless Revolutionary War General George Washington lamented in private correspondence to James Madison, November 5, 1786, which would, without intervention of “a liberal, and energetic Constitution” have the untoward effect of bringing “ruin on the whole.” Letter from George Washington to James Madison (November 5, 1786), in 29 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745-1799, 52 (John C. Fitzpatrick ed., 1939).

143. Included among the crises wracking domestic America by the mid-1780s was rampant, uncontrollable post-War inflation, economic protectionism in the form of exorbitant interstate currency exchange rates (mediating such varying circulation currencies as the moidores, dubloons, pistoles, gold johannesses, English and French crowns, pounds sterling and Spanish milled “dollars” or, more colloquially, “pieces of eight”), and violent tax revolts across the Massachusetts countryside throughout late 1786 and into the early months of 1787, such as the one popularly led by Revolutionary War Patriot Daniel Shays, with the real threat of others in its wake.
ble of raising a national militia as a result of the weakness of its own constituting document.\textsuperscript{144} Evidences of the urgency attending the proposed Convention of 1787 are rife within the private writings of many of the patriots calling for immediate and virile national action in the face of the panoply of post-Articles horribles facing them.\textsuperscript{145}

The difficult conditions under which the singular work of 1787 was contemplated underscore the scope of what was accomplished in Philadelphia that summer. None of the men destined for civil beatification as "Founding Fathers" as a result of their collective work were fully satisfied with the final result of their marathon hours of debate and compromise.\textsuperscript{146} Indeed, only thirty-nine of the fifty-five men participating in the 1787 debates were signatories to the final document. The objecting sixteen included such notable names as Revolutionary War patriot George Mason of Virginia and renowned Massachusetts politician Elbridge Gerry. Nevertheless, the draft outlining a wholly unique edifice of republican-democratic government was presented before "the people" represented in specially convened state assemblies across the eastern seaboard for consideration and final vote. And as the decisions of those assemblies trickled in across the nation throughout late 1787 and into 1788, first from Delaware,\textsuperscript{147} and, in rapid succession thereafter,
from Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, Maryland, South Carolina, and, momentously, from New Hampshire, the improbable experiment in popular sovereignty was fully initiated.

Had he been alive, John Locke would heartily have commended these remarkable machinations of political thought and government creation in “the colonies” at the end of the eighteenth century. After all, how many political philosophers have the opportunity of seeing their intricate theories of government spring suddenly to life before a watching, and very probably wondering, world? Moreover, he would have implicitly understood the importance of an ordered and organized process of dispute resolution regarding any controversy about the constituting document. Such controversy would involve the very boundaries of power — that power delegated by “the people” to their self-created and directed government, and that power jealously retained to themselves — and would thus be of paramount concern to the constituted republic. And he would have coldly comprehended one other thing of note — namely, the power inuring to the institution owning that responsibility.

The “Founding Fathers” similarly anticipated the need for mediation power within the very framework of the government they were busy creating in 1787. They had the benefit of a rich if not large collection of guiding precedents, in the form of state actions of judiciaries reviewing and negating acts of state legislatures deemed in contravention of overarching, fundamental law. They carried that understanding into the 1787 Convention, with Madison's remarkable recording of those debates belying rudimentary understanding of judicial review throughout. The matter of judicial negative received precise and intense debate by both Federalist and Anti-Federalist...
apologists throughout the stormy ratification period. Thus, particu-
larly in the wake of the *Alien* and *Sedition Acts* controversy, by
the turn of the eighteenth/nineteenth centuries, notions of Supreme
Court judicial review of acts of the Federal Legislature were rou-
tinely a part of national public discourse, and almost entirely with-
out controversy.

Thus, when Chief Justice Marshall completed his total reserva-
tion of the constitutional negative to his branch of the tri-partite
federal government in 1803, his actions could not reasonably have
been viewed as unanticipated by his contemporaries, or even par-
ticularly controversial. Indeed, the Chief Justice himself did not
even necessarily consider the power he deliberately garnered to his
Court to have been the final word on the matter. Speaking privately
less than one year after his important pronouncement in *Marbury*,
the Chief Justice admitted that "[a] reversal of those legal opinions
[of the Supreme Court] deemed unsound by the legislature would
certainly better comport with American institutions and character"
than the process of impeachment then being contemplated and
threatened by Jeffersonian Republicans. More importantly, it
appears clear from his historic opinion that the Chief Justice envi-
visioned the power inuring to the Court from his words to exist
entirely in the negative. This, too, was not controversial, squaring
completely with the common sense jurisprudential notions of John
Locke, and the more clearly described limits of the power articu-
lated plainly by Alexander Hamilton in *Federalist 78*.

Which leaves the not insignificant matter of what I have dubbed
here as "creative" judicial review. Clearly such a variation of the
necessary policing power finds no jurisprudential support in the
subtleties of Lockean thought; indeed, it could not. Moreover, it
appears to have no support in the articulations of the "Founders"
and their contemporaries. Indeed, such a formulation of judicial
review would appear to be counter-majoritarian and anti-republican
in the purest form in which those criticisms can be imagined. Yet
the power must undeniably be seen to exist, potently and danger-
ously so, if the above treatments of *Dred Scott* and *Roe v. Wade*
are accurate in any reasonable degree.

Discussions regarding "power" in relation to the Supreme Court
are by no means new, of course. However, where the matter of
"judicial review" is concerned, they have almost exclusively been
mandated in the crucible of partisan, polemical argument, obscur-

156. *Kelly & Harbison, supra* note 24, at 231.
ing some of the subtle and important nuances lying beneath the polemics. This exploration is by no means benign and inconsequential given the centrality and importance of the matters at its heart. For this reason, and others even more timely and more directly at issue,\footnote{Note, in this regard, the recent work of the Supreme Court in \textit{Dickerson v. United States}. There, the Court reviewed the decision of the 4\textsuperscript{th} Circuit Court of Appeals in \textit{United States v. Dickerson}, 166 F.3d 667 (4\textsuperscript{th} Cir. 1999), upholding the constitutionality and the applicability of \textsection{3501} to voluntary criminal confessions given in "technical violation" of the warnings otherwise mandated by Mr. Chief Justice Earl Warren's opinion of the Court in \textit{Miranda v. Arizona}, 384 U.S. 436, 86 S. Ct. 1602 (1966), allowing the admission into evidence of such confessions in spite of the \textit{Miranda} limitations. In essence, the Court elaborated on the timbre of its \textit{own voice}, as it were, determining the effect of Congress' deliberate legislative attempt to limit the Court's creative constitutionality in \textit{Miranda}, deciding, in the end, whether that voice is indeed \textit{ex cathedra} and final. While almost all attention focused on the fate of \textit{Miranda} therein, the case nevertheless implicated and potentially defined a rare, important, \textit{Marbury}-like moment, one which effectively heightened the urgency of the thesis and discussion of this paper, it would seem.} it simply can not be ignored. The academy is uniquely qualified to conduct the kind of debate that the matters raised herein would seem to call for, and to do so in the kind of constructive atmosphere that the importance of the issues all but demands. In light of that importance, framed by issues raised in this article, and with an appropriate spirit of modesty, I would invite the discussions to begin again.