Articles

FEDERALIST NO. 78 AND BRUTUS' NEGLECTED THESIS ON JUDICIAL SUPREMACY

*Shlomo Slonim**

Just three years ago the United States marked the bicentennial of *Marbury v. Madison*, the celebrated case that established the principle of judicial review in 1803. The novelty of a court asserting authority to declare laws unconstitutional was labelled by the noted historian Charles Beard as "the most unique contribution to the science of government which has been made by American political genius."[1] The occasion of the anniversary prompted a considerable outpouring of scholarly articles on the subject of judicial review,[2] many of them focusing on the ques-

* LL.B. (Melbourne), Ph.D. (Columbia), James G. McDonald Professor, Emeritus, of American History, Hebrew University of Jerusalem.

This article had its origin in a paper I delivered at a 2003 conference on Marbury v. Madison, sponsored by the University of London's Institute of United States Studies. I am grateful to the then-Director of the Institute, Gary L. McDowell, for the opportunity afforded me on that occasion for a keen discussion of the Brutus thesis.

1. CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 162 (The Macmillan Co. 1956) (1913). In the words of Alexander Bickel, thanks to judicial review, "[t]he least dangerous branch of the American government is 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).

2. Without any attempt to present an exhaustive list of such articles, see, for example, Christopher L. Eisgruber, Marbury v. Madison: *A Bicentennial Symposium*, 89 VA. L. REV. 1203 (2003); Davison M. Douglas, *Judicial Review: Blessing or Curse? Or Both? A Symposium in Commemoration of the Bicentennial of* Marbury v. Madison, 38 WAKE FOREST L. REV. 375 (2003); Jack N. Rakove, The *Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031 (1997); Theodore B. Olson, *Remembering* Marbury v. Madison, 7 GREEN BAG 35 (2003); Linda Greenhouse, *Because We Are Final: Judicial Review Two Hundred Years After* Marbury, 56 SMU L. REV. 781 (2003); Richard A. Fallon, Marbury *and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1 (2003); Theodore W. Ruger, *A Question*

tion whether the Rehnquist Court had not strayed from the generally accepted parameters of judicial review as recognized by the Court since the late nineteen-thirties.[3]

It is noteworthy that whenever *Marbury v. Madison* is discussed in works on constitutional law, text books or case books, reference is invariably made to Alexander Hamilton's discussion of judicial review in Federalist No. 78 as an early indication that the principle was regarded as a fundamental part of the system of government set up under the Constitution.[4] Surprisingly, these

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Which Convulses a Nation: The Early Republic's Greatest Debate About the Judicial Review Power, 117 HARV. L. REV. 826 (2004); Symposium, *The Rehnquist Court*, 99 NW.U. L. REV. 1 (2004); Harry F. Tepker, Marbury's *Legacy After Two Centuries*, 57 OKLA. L. REV. 127 (2004); Symposium, *Locating the Constitutional Center—Centrist Judges and Mainstream Values: A Multidisciplinary Exploration*, 83 N.C. L. REV. 1089 (2005); Symposium, *Theories of Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1341 (2005); Robert J. Reinstein, *Reconstructing* Marbury, 57 ARK. L. REV. 729 (2005); Sanford Levinson, *Why I Do Not Teach* Marbury *(Except to Eastern Europeans) and Why You Shouldn't Either*," 38 WAKE FOREST L. REV. 553 (2003); Eric J. Segall, *Why I Still Teach* Marbury *(And So Should You): A Response to Professor Levinson*, 6 U. PA. J. CONST. L. 573 (2004); Sanford Levinson, *Why I Still Won't Teach* Marbury *(Except in a Seminar), id.*, 588; Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005); Richard Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005); Symposium, Marbury *at 200: A Bicentennial Celebration of* Marbury v. Madison, 20 CONST. COMMENT. 1 (2003); Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706 (2003).

3. *See, e.g.*, Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4 (2001); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS, *passim* (1999); Ruth Colker and James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2003); Steven H. Goldberg, *Putting the Supreme Court Back in Place: Ideology Yes; Agenda No*, 17 GEO. J. LEGAL ETHICS 175 (2004); ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE (1996). Judge Bork goes so far as to propose the adoption of a constitutional amendment to enable Congress to formally override decisions of the courts.

Needless to say, various scholars have rallied to the defense of the Court and of the institution of judicial review generally. Prominent among them are John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL . L. REV. 1311 (1997); Saikrishna B. Prakash and John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001); Prakash and Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003). See also, in support of the Court's rulings, Lynn A. Baker and Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001); Steven A. Calabresi, *'A Government of Limited and Enumerated Powers': In Defense of* United States v. Lopez, 94 MICH. L. REV. 752 (1995); Randy E. Barnett, *The Original Meaning of the Judicial Power* (Boston University School of Law, Working Paper No. 03-18, 2004).

4. According to one authority, "Federalist No. 78 is second only to Marshall's *Marbury* opinion as the classic utterance on the subject" of judicial review. Leonard W. Levy, *Judicial Review, History, and Democracy: An Introduction, in* JUDICIAL REVIEW AND THE SUPREME COURT 6 (Leonard W. Levy ed., 1967). And in the words of another writer, "Hamilton, more than any other single man, is the author of judicial review as the nineteenth century was to know it." BENJAMIN F. WRIGHT, THE GROWTH OF

works, almost without exception, fail to refer to the Antifederalist Letters of Brutus to which this number of the Federalist Papers constitutes a response.[5] This is a regrettable omission since No. 78 cannot be properly understood except in the context of Brutus' charge that the Constitution provided, not only for judicial review, but for judicial supremacy.[6] Federalist No. 78 (and

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AMERICAN CONSTITUTIONAL LAW 23 (Univ. of Chicago Press 1967) (1942).

5. In examining some twenty case and text books, I found only one that referred to the essays of Brutus: ALPHEUS THOMAS MASON AND WILLIAM M. BEANEY, AMERICAN CONSTITUTIONAL LAW: INTRODUCTORY ESSAYS AND SELECTED CASES 32–35 (6th ed. 1978). In contrast, a classic work on judicial review, CHARLES GROVE HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY (2d ed. 1932), while it analyzes Federalist No. 78 extensively, does not contain a single reference to Brutus in the index. The same holds true for SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990). Even law reviews, which have a better record than casebooks or textbooks in noting Brutus, generally fail to appreciate the direct significance of Brutus' thesis for discussion of the subject of judicial supremacy. (One exception is Professor Michael Stokes Paulsen, whose work I discuss presently. See infra note 6.) Contrary to the common conception reflected in the various works, No. 78 was not the result of some spontaneous inspiration on Hamilton's part to endorse judicial review.

6. The first to note that Federalist No. 78 was prompted by Brutus' essays on the judiciary was Edward S. Corwin, in his celebrated work written during FDR's conflict with the Court over the New Deal, EDWARD S. CORWIN, COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT (1938). In an appendix, Corwin published three of Brutus' essays on the judiciary (Nos. 11, 12, 15). In the Preface to the book, he writes: "I would urge the reader to give some attention to the Appendix, for the 'Letters of Brutus' there given comprise the most thorough examination that was made prior to the Constitution's adoption of the power of the Supreme Court in interpreting it—an examination, moreover, which inspired Hamilton's much better known but less elaborate discussion of the subject in the Federalist." *Id.* at iii.

Despite the prominence which Corwin gave to Brutus' essays, there was very little sequel. It would appear that, in sum, only two articles focusing on Brutus have appeared in the interval that has elapsed since the Corwin work was published. One, the first complete edition of Brutus' essays, accompanied by a 20-page introduction: William Jeffrey Jr., *The Letters of Brutus: A Neglected Element in the Ratification Campaign of 1787-88*, 40 U. CIN. L. REV. 643–777 (1971). The second was an incisive analysis by Ann Diamond, *The Anti-Federalist 'Brutus,'* 6 POL. SCI. REV. 249–81 (1976). With the publication of 2 STORING, THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981), the text, with commentary and notes became readily available to researchers. (All citations to Brutus in the present article refer to the Storing edition.)

Leonard Levy and Gary L. McDowell both advert to the Brutus essays to explain the origin of No. 78. Leonard Levy, *supra* note 4, at 6; Gary L. McDowell, *Were the Anti-Federalists Right? Judicial Activism and the Problem of Consolidated Government*, 3 PUBLIUS 103 (1982).

Gary Wills, in his EXPLAINING AMERICA: THE FEDERALIST chs. 14–15 (1981), claims that Hamilton in No. 78 was, in fact, arguing for legislative supremacy rather than seeking to confirm the validity of judicial review. This novel interpretation does not appear to have received wider endorsement.

Professor Michael Paulsen's work in the past two decades recognizes the significance of Brutus' essays in the debate over judicial power at the time of the framing, and their role in spurring Hamilton to his rebuttal in The Federalist No. 78.

See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 245-52 (1994) (contending that the primary point of

succeeding numbers) represent merely the other half of a dialogue over the claim that judicial supremacy is inherent under the Constitution. Moreover, Brutus' views on judicial supremacy constitute a novel thesis which, to date, have not been sufficiently appreciated in the literature.[7] Hamilton's counterargument (mainly in Federalist Nos. 78 and 81), viewed in the light of Brutus' thesis, is seen to obfuscate the issue of judicial supremacy and, in effect, leaves Brutus' thesis unimpaired.

JUDICIAL REVIEW AND NATIONAL CONSOLIDATION

Perhaps the first thing to note is that Brutus did not question the right of the courts to exercise judicial review.

> [I]f the legislature pass laws, which, in the judgment of the court, they are not authorised to do by the constitution, the court will not take notice of them; for it will not be denied, that the constitution is the highest or supreme law. And the courts are vested with the supreme and uncontroulable power, to determine, in all cases that come before them, what the constitution means; they cannot, therefore, execute a law, which, in their judgment, opposes the constitution, unless we can suppose they can make a superior law give way to an inferior.[8]

In acknowledging that judicial review was within the province of the court, Brutus went on to outline the corollary: "[T]he judgment of the judicial, on the constitution, will become the rule to guide the legislature in their construction of their powers

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Hamilton's argument for judicial review in The Federalist No. 78 is to refute Brutus' charge of judicial supremacy); Michael Stokes Paulsen, Nixon *Now: The Courts and the Presidency after Twenty-five Years*, 83 MINN. L. REV. 1337, 1353-58 (1999) (arguing that judicial supremacy is contrary to all evidence of original public meaning and citing Brutus' argument as one that the framers, including Hamilton, were fully aware of and anxious to repudiate).

7. The identity of Brutus remains a mystery to this day. Most authorities incline to the view that he was Robert Yates, a judge on the New York Supreme Court, who was one of three delegates from New York to the 1787 Constitutional Convention. He and his fellow-delegate, John Lansing, left the Convention after less than a month, on the grounds that it was exceeding its authority in drafting a new constitution. Their departure deprived New York of a vote, since the third delegate, Alexander Hamilton, was left without a quorum. For discussion of the identity of Brutus, see Jeffrey, *supra* note 6, at 644–46, Diamond, *supra* note 6, at 252–53, 2 STORING, *supra* note 6, at 2:358. Corwin assumes, without discussion, that Yates was the author of the Brutus essays. Cecelia M. Kenyon makes the same assumption. "The Anti-Federalists," she says, "had no publicist more able than Robert Yates." CECELIA M. KENYON, THE ANTI-FEDERALISTS 323 (1966).

8. 2 STORING, *supra* note 6, at 2.9.148.

[since] the legislature . . . will not go over the limits by which the courts may adjudge they are confined."[9]

What concerned Brutus, in the first instance, was the use to which the court would apply judicial review in the service of national consolidation and how this would threaten the independence and survival of the states. The judicial power, Brutus warned, would operate to affirm and legitimate all the invasions of state power committed by the national legislature. "The real effect of this system of government, will . . . be brought home to the feelings of the people, through the medium of the judicial power." Therefore, he said, it was

> of great importance, to examine with care the nature and extent of the judicial power, because those who are to be vested with it, are to be placed in a situation altogether unprecedented in a free country. They are to be rendered totally independent, both of the people and the legislature.[10]

"Every extension of the power of the general legislature, as well as of the judicial powers, will increase the powers of the courts; and the dignity and importance of the judges, will be in proportion to the extent and magnitude of the powers they exercise."[11] Thus, "the judicial power will operate to effect, in the most certain, but yet silent and imperceptible, manner what is evidently the tendency of the constitution: —I mean, an entire subversion of the legislative, executive and judicial powers of the individual states."[12] By legitimating the expansive exercise of federal power, the courts would be contributing to the aggrandizement of the national government at the expense of the states. And the institution of a federal system of government, which presumed a meaningful role for the states in partnership with the national government, would be seen as a mere sham. "The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or controul their adjudications. From this court there is no appeal."[13] And presumably, the legislature itself could not set aside a judgment of this court, he said, "because they are authorized by the constitution to decide in the last resort. The legislature must be controuled by the

9. *Id.* at 2.9.148–49.
10. *Id.* at 2.9.130.
11. *Id.* at 2.9.142.
12. *Id.* at 2.9.139.
13. *Id.* at 2.9.138.

constitution, and not the constitution by them."[14] Given the power of the judiciary, it "will enable them to mould the government, into almost any shape they please."[15]

It was important, in Brutus' view, to appreciate that the court would be free to interpret the constitution, "not only according to its letter, but according to its spirit and intention; and having this power, they would strongly incline to give it such a construction as to extend the powers of the general government, as much as possible, to the diminution, and finally to the destruction, of that of the respective states."[16]

The "spirit" of the constitution, Brutus claimed, can best be deduced from the preamble to the Constitution, which included the comprehensive term "to provide for the general welfare." "[I]f the spirit of this system is to be known from its declared end and design in the preamble, its spirit is to subvert and abolish all the powers of the state government, and to embrace every object to which any government extends."[17] This conclusion is confirmed by the powers enumerated in Article 1, Section 8, which "extend to almost every thing about which any legislative power can be employed."[18] And if so, Brutus contended, "nothing can stand before it" (i.e., the national legislature).[19] This was particularly so in view of the expansive nature of the necessary and proper clause which would "undoubtedly be an excellent auxilliary to assist the courts to discover the spirit and reason of the constitution."[20] As a result, the powers of the government would extend "to every case, and reduce the state legislatures to nothing."[21] This conclusion emerged from the following analysis:

> [T]hese courts will have authority to decide upon the validity of the laws of any of the states, in all cases where they come in question before them. Where the constitution gives the general government exclusive jurisdiction, they will adjudge all laws made by the states, in such cases, void *ab initio*. Where the constitution gives them concurrent jurisdiction, the laws of the United States must prevail, because they are the supreme law. In such cases, therefore, the laws of the state legislatures must be repealed, restricted, or so construed, as to give full ef-

14. *Id.*
15. *Id.* at 2.9.144.
16. *Id.* at 2.9.145.
17. *Id.* at 2.9.151.
18. *Id.* at 2.9.152.
19. *Id.*
20. *Id.* at 2.9.153
21. *Id.* at 2.9.154.

> fect to the laws of the union on the same subject. . . . [I]n proportion as the general government acquires power and jurisdiction, by the liberal construction which the judges may give the constitution, will those of the states lose its rights, until they become so trifling and unimportant, as not to be worth having.[22]

JUDICIAL SUPREMACY

Beyond assessing the impact of judicial review on the states, Brutus proceeded to analyze its effect on the national sphere as well. Here he enunciated in very trenchant—indeed, prescient[23]—comments the reason why the Supreme Court would come to exercise, not only judicial review, but judicial supremacy.

The fundamental principle of ordered government, according to Brutus, is accountability. While separation of powers was an essential requirement of sound government, accountability, he insisted, was no less essential an ingredient.

> To have a government well administered in all its parts, it is requisite the different departments of it should be separated and lodged as much as may be in different hands. The legislative power should be in one body, the executive in another, and the judicial in one different from either—But still each of these bodies should be accountable for their conduct.[24] . . .
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> When great and extraordinary powers are vested in any man, or body of men, which in their exercise, may operate to the oppression of the people, it is of high importance that powerful checks should be formed to prevent the abuse of it. . . . [T]he true policy of a republican government is, to frame it in such manner, that all persons who are concerned in the government, are made accountable to some superior for

22. *Id.* at 2.9.158.

23. In his introductory essay, *What the Anti-Federalists Were For, in* THE COMPLETE ANTI-FEDERALIST, Herbert Storing writes: "The most farsighted of them, Brutus, very accurately anticipated the breadth with which the Supreme Court would construe its own powers and those of the general legislature and the line of reasoning that would be used." 1 STORING, THE COMPLETE ANTI-FEDERALIST 50 (Herbert J. Storing ed., 1981). Similarly, Ann Diamond comments: "In the papers on the judiciary . . . Brutus foresees with great accuracy, this history [of the Court], a feat unique to him." Diamond, *supra* note 6, at 255.

24. 2 STORING, *supra* note 6, at 2.9.197. For further comment by Brutus on the principle of the separation of powers, see *id.* at 2.9.203.

> their conduct in office. —This responsibility should ultimately rest with the People.[25]

With regard to the legislature, Brutus explained, the elected representatives are chosen by the people at stated periods, and are therefore amenable to popular control. Inferior courts are subject to the control of superior courts. "But on this plan we at last arrive at some supreme, over whom there is no power to controul but the people themselves."[26] The creation of an institution, which is not accountable at all to any outside body, "is repugnant to the principles of a free government," Brutus warned.[27] "The supreme court under this constitution would be exalted above all other power in the government, and subject to no controul.[28] . . . I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible."[29]

In his search for what might have been a suitable means of instituting accountability for the Supreme Court, Brutus refers to the precedent of the British judiciary.

> The judges in England are under the controul of the leigislature, for they are bound to determine according to the laws passed by them. But the 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 set aside their judgment.[30]

If the Framers of the Constitution followed the British precedent of making the judges independent, they should have also followed the British constitution "in instituting a tribunal in which their errors may be corrected."[31] In Britain, the judiciary was subject to appeals to the House of Lords by means of a writ of error, and the final disposition of a case was decided by the vote of all the Lords, lay peers no less than judicial.[32] In this

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25. *Id.* at 2.9.197.
26. *Id.*
27. *Id.*
28. *Id.* at 2.9.186.
29. *Id.*
30. *Id.* at 2.9.188.
31. *Id.*
32. *See generally,* ROBERT STEVENS, LAW AND POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY, 1800-1976, at 6–14 (1978); THE OXFORD COMPANION TO LAW 585 (David M. Walker ed., 1980); Thomas Beven, *The Appellate Jurisdiction of the House of Lords*, 17 L. Q. REV. 357, 365–69 (1901).

comment, Brutus was referring to the fact that the judges under the British system were not only bound by the laws of Parliament, but did not operate as the court of last resort. In contrast, under the Constitution, "the judicial . . . 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."[33] In England, judges had to be made completely independent so as to be undeterred from rendering judgment even contrary to the wishes of the Crown. There was no such necessity in the United States and the absolute independence of judges, without any accountability to any other body, was quite unwarranted. Brutus went on to point out another crucial distinction between the British and American systems of government—the ability of Parliament to severely restrict the broader impact of an unwarranted and inappropriate judicial interpretation of the constitution—a power entirely lacking to the U.S. Congress.

> The supreme court then have a right, independent of the legislature, to give a construction to the constitution and every part of it, and there is no power provided in this system to correct their construction or do it away. If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature. In England the judges are not only subject to have their decisions set aside by the house of lords, for error, but in cases where they give an explanation to the laws or constitution of the country, contrary to the sense of the parliament, though the parliament will not set aside the judgment of the court, yet, they have authority, by a new law, to explain a former one, and by this means to prevent a reception of such decisions. But no such power is in the [U.S.] legislature. The judges are supreme—and no law, explanatory of the constitution, will be binding on them.[34]

The end result was that,

> [t]here is no power above them to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the iegislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.[35]

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33. 2 STORING, *supra* note 6, at 2.9.188.
34. *Id.* at 2.9.193
35. *Id.* at 2.9.189. Brutus acknowledged that the election of judges would be "im-

Brutus dismissed the possibility that impeachment could serve as a factor to restrain the judiciary. Errors in judgment are not included under the heading of "high crimes and misdemeanors," he explained.[36] Likewise, he was not prepared to put his faith in the power of Congress under Article 3 of the Constitution to define the scope of the Court's appellate jurisdiction "with such Exceptions, and under such Regulations" as it may prescribe. To assume that Congress would "make provision against all the evils which are apprehended from this article" was to adopt faulty reasoning.[37]

> [T[his way of answering the objection made to the power, implies an admission that the power is in itself improper without restraint, and if so, why not restrict it in the first instance. . . . For to answer objections made to a power given to a government, by saying it will never be exercised, is really admitting that the power ought not to be exercised, and therefore ought not to be granted.[38]

This court, he reminded his readers, "will be authorized to decide upon the meaning of the constitution," on the basis of the natural meaning of the words and "also according to the spirit and intention" thereof, as conceived by the judges.[39] "In the exercise of this power they will not be subordinate to, but above the legislature."[40] His conclusion was that "when this power [of deciding the meaning of the Constitution] is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to controul them but *with a high hand and an outstretched arm.*"[41]

In sum, what Brutus was enunciating was an entirely original explanation for judicial review, which, he claimed, would

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proper." *Id.*

36. *Id.* at 2.9.192.

37. *Id.* at 2.9.185.

38. *Id.* See also, Brutus' comment on this provision in relation to the question of jury trial, *id.* at 2.9.176.

39. *Id.* at 2.9.193.

40. *Id.*

41. *Id.* at 2.9.196 (emphasis in original). At root, of course, Brutus was saying that judicial supremacy was not in accordance with democratic principles, but democracy, as such, did not really concern him. What did concern him was the operation of a body endowed with unbridled power, free to reign and dominate, because it was totally unaccountable to any other body, whether it be the electorate or their elected representatives. On the underlying incompatibility of judicial review with democracy, see BICKEL, *supra* note 1, at 18 ("Nothing . . . can alter the essential reality that judicial review is a deviant institution in the American democracy.").

lead inexorably to judicial supremacy. The essence of republican government, he contended, was accountability. In drafting the Constitution, the Framers had been remarkably successful in instituting a system of checks and balances so that no single part of the national government was free of accountability; there is, however, one exception, the Supreme Court. The Justices were not answerable to any body at all. They were at liberty to interpret the Constitution in any way they saw fit, and no part of the government could qualify or reject their interpretation. Since they would have the last word, it was their interpretation that would remain binding on all other sectors of the federal government.[42]

Various theses have been offered to explain the basis of judicial review.[43] The first was that of Chief Justice Marshall who found it in the terms of the Constitution itself. The Supremacy Clause in Article 6 of the Constitution stipulated that only those laws which were made "pursuant" to the Constitution were valid.[44] Others, in rejecting the textual basis of judicial review, found that it was a necessity because of the need for some institution to umpire the federal system.[45] Still others deemed judicial review an essential appurtenance of a written constitution.[46] Both of the latter theses would require the court to be quite restrictive in the exercise of judicial review. And there were yet others, such as Judge Learned Hand, who claimed that judicial review had no legal basis whatsoever under the Constitution. It was required only to prevent the "collapse" of the constitutional system.[47]

Brutus' argument is not that the text of the Constitution *mandates* judicial review, or even *authorizes* it, but that the structure of the Constitution *allows* for judicial supremacy. Since

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42. It was Justice Robert Jackson who coined the immortal aphorism: "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1952) (Jackson, J., dissenting). In similar fashion, Chief Justice Harlan Fiske Stone wrote: "While unconstitutional exercise of power by the executive and legislative branches is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint." U.S. v. Butler, 297 U.S. 1, 78–79 (1936) (Stone, J., dissenting).

43. For a review of the various theories, see WALTER F. MURPHY, JAMES E. FLEMING & WILLIAM F. HARRIS II, AMERICAN CONSTITUTIONAL INTERPRETATION 186–89 (1986).

44. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

45. For discussion of this thesis see BICKEL, *supra* note 1, at ch. 1.

46. *See* Murphy et al., *supra* note 43, at 187–188.

47. For discussion of the novel view of Judge Learned Hand, presented during his delivery of the 1958 Holmes Lectures at Harvard University, see the outstanding biography by GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 652–59 (1994).

there would be nothing to stop the court from declaring that a law was unconstitutional, it could, with impunity, proceed to do just that. The court, as it were, would be exercising constitutional jurisdiction by default. It was a failing of the architects of the Constitution that they had created a body, such as the Supreme Court, entirely free of any accountability. Judicial supremacy was not dictated by the Constitution, it was permitted under the Constitution because there was no power that could prevent the institution with the last say, the Supreme Court, from telling the other branches of government what they were allowed, or not allowed, to do. In short, Brutus contended, judicial supremacy was a direct consequence of the failure of the Framers to institute some sort of checks and balances on the Supreme Court as had been instituted on all other parts of the federal government.

Brutus' charge was clearly a severe remonstrance against the Framers of the Constitution and demanded a detailed answer if it was not to serve as a rallying point against ratification of the Constitution. If it was unduly alarmist, there was need to demonstrate, or at least to give the appearance of demonstrating, that the fears expressed were exaggerated and unwarranted. This was Hamilton's aim in Federalist No. 78 and the other numbers that followed.

HAMILTON'S RESPONSE: JUDICIAL REVIEW AFFIRMED

With reference to Federalist No. 78, it is important to note that it presents an answer to the question of how to react to federal aggrandizement of power that is very different from the one provided by Hamilton to the same question earlier in the Federalist Papers.[48] In Federalist No. 33 he had written:

> If the Federal Government should overpass the just bounds of its authority, and make tyrannical use of its powers; the people whose creature it is must appeal to the standard they have formed, and take such measures to redress the injury done to the constitution, as the exigency may suggest and prudence justify. . . .
>
> [A]cts of the larger society which are *not pursuant* to its constitutional powers but which are invasions of the residuary

48. *See* CORWIN, *supra* note 6, at 45.

> authorities of the smaller societies . . . will be merely acts of usurpation and will deserve to be treated as such.[49]

There is not a word here about judicial review or the role of the courts in striking down legislative acts violating the bounds of national authority. Redress lies with the people alone. Only after Brutus published his thesis on judicial supremacy did Hamilton proceed to advertise his view that judicial review could serve as a means of forestalling national encroachment on state authority.[50] In effect, Hamilton seized on Brutus' argument and, while denying the cataclysmic consequences Brutus predicted, adapted the argument to highlight the role of the court as a complete answer to the danger of national aggrandizement.[51]

In Federalist Nos. 78 and 81, Hamilton sought to provide a point-by-point rejoinder to Brutus' charges.

1. *The Virtue Of Appointing Judges To Serve "During Good Behaviour."*

To Hamilton, the Antifederalists' criticism of this term of office for judges was but a "symptom of the rage for objection which disorders their imaginations and judgments."[52] This term of office for members of the judiciary represented, in fact, "one of the most valuable of the modern improvements in the practice of government."[53] If in a monarchy it was "an excellent barrier to the despotism of the prince; in a republic it [was] a no less excellent barrier to the encroachments and oppressions of the representative body."[54] Hamilton sought to allay the fears of an activist judiciary. In a government composed of "different departments of power, . . . the judiciary, from the nature of its functions, will always be the least dangerous [branch] to the political rights of the Constitution."[55] While the executive "holds

49. THE FEDERALIST NO. 33 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

50. *See* CORWIN, *supra* note 6, at 45–46.

51. In the words of Leonard Levy, Federalist No. 78 "was an attempt to quiet the fears stimulated by Yates [Brutus]; turning the latter's argument against him." Levy, *supra* note 4, at 6. And according to William Jeffrey, "Alexander Hamilton, . . . was far indeed from uttering freshly-minted and indubitable truths about the power of the Supreme Court to declare the invalidity of congressional statutes. Compelled by the Constitution's text to acknowledge judicial review, Hamilton was unable to do more than repeat the assertions of 'Brutus' and attempt to minimize their alarmist impact and dismiss their argumentative force." Jeffrey, *supra* note 6, at 655.

52. THE FEDERALIST NO. 78 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

53. *Id.*

54. *Id.*

55. *Id.*

the sword of the community," and the legislature "commands the purse," the judiciary has "no influence" over either the sword or purse, and "can take no active resolution whatever."[56] Having "neither FORCE nor WILL, but merely judgment," it was dependent on "the aid of the executive arm even for the efficacy of its judgments."[57] "Permanency in office," said Hamilton, is vital to its "firmness and independence," to enable it to pronounce "all acts contrary to the manifest tenor of the Constitution void."[58] Under a limited constitution, where certain actions are proscribed, if the court were not to have this power "all the reservations of particular rights or privileges [enumerated] would amount to nothing."[59]

Of course, Brutus had stated that he could not conceive of any alternative to judges serving for life. "I do not object to the judges holding their commissions during good behaviour. I suppose it a proper provision provided they were made properly responsible."[60] However, granting the judges the power, as Hamilton would have it, to pronounce acts contrary to the "manifest tenor" of the Constitution void, was to grant them supremacy. No greater power exists in one person over another than the authority to make the second person's act null and void, so that the will of the first predominates. This absolute veto power in the judiciary imparted unlimited dominance over the other two branches, and Hamilton's references to the power of the purse or the sword were mere platitudes, since of what use are these "active" powers if they cannot be exercised except with the consent of the Court? Absent restrictions on the judges' unbridled freedom of action, there was no reason why they should not dictate to, and completely dominate, the other branches of government. To this, Hamilton took exception.

2. *Judicial Review Does Not Mean Judicial Supremacy.*

Declaring the acts of another branch of government void, said Hamilton, does not mean that the one making the pronouncement is necessarily supreme. It does not suppose "a superiority of the judicial to the legislative power."[61] Since a constitution emanating from the people "is, in fact, and must be

56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. 2 STORING, *supra* note 6, at 2.9.189.
61. THE FEDERALIST NO. 78 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

regarded by the judges, as a fundamental law" if there is "an irreconcileable variance" between the act of the legislature and the constitution, the judges have no choice but to prefer the constitution to the statute, "the intention of the people to the intention of their agents."[62]

This argument was mere casuistry on Hamilton's part, for several reasons. For one thing, what makes the judges more faithfully representative of the people than the elected "agents" of the people? If the latter consider their action to be consistent with the Constitution, from whence do the judges derive superior title to be "acting on behalf of the people" and declare it inconsistent? Indeed, the legislative "agents" are accountable to the people for their decisions, while the judges are not. So why should one assume that the determination of the judges is more authoritative and faithful to "the intention of the people" than that of their elected representatives?[63] Above all, what would prevent the judges from asserting that there was a contradiction between a statute and the Constitution, when on the face of the statute no such contradiction was apparent? Moreover, granting the judges the last word was subversive of the basic principle of republican government since it removes from the people, the ultimate judges, the right and the power to react and to rectify what they regard as a misreading of the constitution.

All of this had appeared in the final paragraph of Brutus' essay No. 15 dealing with the judiciary.[64]

> Had the construction of the constitution been left with the legislature, they would have explained it at their peril; if they exceed their powers, or sought to find, in the spirit of the constitution, more than was expressed in the letter, the people from whom they derived their power could remove them, and do themselves right; . . . A constitution is a compact of a people with their rulers; if the rulers break the compact, the people have a right and ought to remove them and do themselves justice; but in order to enable them to do this with the greater facility, those whom the people chuse at stated periods, should have the power in the last resort to determine the sense of the compact; if they determine contrary to the understanding of the people, an appeal will lie to the people at the

62. *Id.*

63. Bickel also presents a similar line of argument. BICKEL, *supra* note 1, at 4–5. And in the words of Ann Diamond, "Hamilton paints a picture of a court which is not only compatible with a representative democracy, but the essence of it; a court more democratic than the elected representatives of the people." Diamond, *supra* note 6, at 278.

64. 2 STORING, *supra* note 6, at 2.9.196.

> period when the rulers are to be elected, and they will have it in their power to remedy the evil; but when this power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to controul them but *with a high hand and an outstretched arm.*[65]

Furthermore, according to Brutus, it was vain to claim that declaring the acts of Congress void did not signify judicial superiority; in fact, that organ of government qualified to pronounce the last word exercises dominance. "[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 Congress; they are to give the constitution an explanation, and there is no power above them to set aside their judgment."[66] In reaction to this, Hamilton declares: "It can be of no weight to say that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature.... The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."[67] This, he says, would only go to show that there should be no judges "distinct" from the legislature.[68] Hamilton himself, however, offers no suggestion on how to forestall judges exercising WILL instead of JUDGMENT.

3. *Judicial Review as a Shield.*

Hamilton sought to demonstrate that judicial review would serve to protect two exposed groups. The courts, he said, would operate "as the bulwarks of a limited constitution against legislative encroachments."[69] Hamilton attempted thereby to reassure the states that the federal judiciary, far from being a threat to their sovereignty, as Brutus would have it, would act as their guardian in striking down every national attempt to encroach on state prerogatives. A second exposed group was that of minorities, and here, once again, the exercise of judicial review would operate to protect "the rights of individuals from the effects of those ill humours, which the arts of designing men, or the influ-

65. *Id.* (emphasis in original).
66. *Id.* at 2.9.188.
67. THE FEDERALIST NO. 78 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
68. *Id.*
69. *Id.*

ence of particular conjunctures, sometimes disseminate among the people themselves, and which, . . . occasion dangerous innovations in the government, and serious oppressions of the minor party in the community."[70]

Judicial independence was vital if the courts were to act against the legislative will in defending the rights of the states and of individuals. "It would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution, where legislative invasions of it had been instigated by the major voice of the community."[71] Judicial independence required permanency of appointment. "Inflexible and uniform adherence to the rights of the [states under the] Constitution and of individuals" could not be expected "from judges who hold their offices by a temporary commission."[72]

But, of course, Brutus had all along acknowledged that appointment during good behaviour was essential if judges were to enjoy that security and independence that would enable them to judge fairly and without fear of recrimination. This was not at issue. By raising the matter of tenure of office, Hamilton was raising a straw man to knock down and score points. Permanency in office did not preclude the judges from dominating the legislature or executive and dictating to these branches of government which policies could stand and which could not. Judicial independence, Brutus maintained, was vital, but it did not entail the right of judicial domination. The distinction between judicial review and judicial supremacy was clear. While the former allowed, and even required, that the court strike down any law that was manifestly contrary to the express provisions of the Constitution, it did not empower the court to assert the unconstitutionality of a law on the basis of a narrow and particularly subtle interpretation of the relevant constitutional provision. As Corwin has said:

> It is fairly evident that the Philadelphia Convention intended to provide . . . a method for enforcing the direct prohibitions of the Constitution on Congress; but by the same token, there was originally a clear logical implication against judicial review of broader range.[73]

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70. *Id.*
71. *Id.*
72. *Id.*
73. CORWIN, *supra* note 6, at 81. And Corwin adds: "In *Marbury v. Madison* unlimited judicial review was clearly asserted." *Id.* This, of course, was the great novelty of *Marbury v. Madison*—that the Court was competent to rule on matters of interpretation,

In effect, Hamilton took Brutus' charge that the exercise of judicial review by the Supreme Court would inevitably lead to the emasculation of the states and the consolidation of the country under one central government and cited judicial review as the best guarantee *against* national encroachment on state authority. He skillfully turned the tables on Brutus by brandishing judicial review as a foil against national aggrandizement, while conveniently forgetting that it could also serve to strike down state intrusions on national sovereignty. Only in Federalist No. 80 did he advert to this power over state legislation, but illustrated it solely with reference to such clear-cut prohibitions as the imposition of duties on imported articles and the issuance of paper money. Of necessity, he said, the federal courts would have to be empowered "to over-rule such as might be in manifest contravention of the articles of union."[74] Implicitly, Hamilton was suggesting that anything less than a "manifest contravention" of the Constitution would not encounter judicial disallowance. (The latter role would, of course, be precisely the nemesis of state authority to which Brutus referred.) At the same time, Hamilton sidestepped the central charge of Brutus that the Constitution, by allowing the judges to interpret the Constitution according to its "spirit," effectively conferred on them absolute sovereignty to tell the other branches of the national government what the Constitution permitted and what it did not. In No. 78, Hamilton simply declared that no one could suspect that the courts would attempt to impose their will on the co-ordinate branches of government, but did not explain why they would not. That analysis he left for No. 81.

4. *Judicial Supremacy Denied.*

Hamilton opened his discussion with a long extract, a sort of *précis*, of the Antifederalist argument—i.e., that of Brutus:

> The authority of the proposed supreme court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the *spirit* of the constitution, will enable that court to mould them into whatever shape it may think

whether in statutes or constitutional provisions, and not merely on explicit Congressional violations of the Constitution. As expressed by Bickel: "Marshall knew (and, indeed, it was true in this very case) that a statute's repugnancy to the Constitution is in most instances not self-evident; it is, rather, an issue of policy that someone must decide. The problem is who." BICKEL, *supra* note 1, at 3.

74. THE FEDERALIST NO. 80 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

> proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous. In Britain, the judicial power, in the last resort, resides in the house of lords, which is a branch of the legislature; and this part of the British government has been imitated in the State constitutions in general. The parliament of Great-Britain, and the legislatures of the several States, can at any time rectify, by law, the exceptionable decisions of their respective courts. But the errors and usurpations of the supreme court of the United States will be uncontrolable and remediless.[75]

In dismissing this conclusion, Hamilton asserted that the argument "will be found to be altogether made up of false reasoning upon misconceived fact."[76]

5. *Judicial Review Limited to Explicit Violations.*

"In the first place," said Hamilton, "there is not a syllable in the plan under consideration, which *directly* empowers the national courts to construe the laws according to the spirit of the constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every state."[77] Of course, Brutus had never said that the Constitution *explicitly* authorizes the judges to interpret the Constitution according to its spirit. It was sufficient that this power was nowhere denied.

6. *Unsuitability of Judiciary as Part of Legislature.*

Perhaps, said Hamilton, the Antifederalist complaint is directed to the fact that the Supreme Court was constituted as a separate body rather than "being one of the branches of the legislature, as in the government of Great Britain and that of the State [of New York]."[78] In Britain, of course, members of the House of Lords, lay peers no less than law lords, were empowered to rule on an appeal from a lower court and to void the decision. And Article 32 of the 1777 New York constitution provided for appeals "for correction of errors" to be heard by a

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75. *Id.* This *précis*, drawn from the very words of Brutus, make it absolutely clear that Publius Nos. 78–81 were composed as a response to Brutus' essays on the judiciary. In light of this fact, the comment in Benjamin Wright's 1942 study, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW, *supra* note 4 at 22, that it was "probably" in answer to Brutus' argument, seems out of place.

76. THE FEDERALIST NO. 81 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

77. *Id.*

78. *Id.*

court composed of "the president of the senate, . . . the senators, chancellor, and judges of the supreme court, or the major part of them," but denying the judges "a voice for . . . affirmance or reversal" of their earlier decision. Here Hamilton was finally addressing Brutus' primary complaint, that the national judiciary was totally free of accountability, in contrast to the way appeals were handled in Great Britain, for instance. The case of New York had not been mentioned by Brutus, but anyone familiar with the status of the judiciary there was undoubtedly aware that it paralleled the British example in conferring on the legislature—or on part of it—supervisory authority over the judiciary. In both instances, while the judges were free to express their views in matters of appeal, the final decision did not rest with the judges alone, but with the representatives of the people who were ultimately accountable to the electorate.[79]

In response, Hamilton argued that locating the judiciary within the legislature would come close to violating, at least partially, the separation of powers principle that was regarded by the Antifederalists as sacrosanct. It would also place the judiciary in a body marked by faction and politics, a most unsuitable setting for judicial determination. Moreover, it was even a "greater absurdity" to suggest that men "deficient" in knowledge of the law should be allowed to revise decisions reached by men expert in the law. All these considerations, said Hamilton, undoubtedly influenced most of the other states, other than New York, to commit the judicial power not to a part of their legislatures, but to a distinct and separate body.[80] And in any case, the

79. *Id.* It might sound incongruous today to hear that an appeal could be carried from the state's highest court to a non-judicial body. But New York was not alone in making provision for such appeals. New Jersey and Connecticut also provided for writs of error from the highest court in the state to non-judicial bodies. And, of course, the U.S. Senate serves as a tribunal to judge charges of impeachment. In Britain, thanks to parliamentary sovereignty, Parliament is, even today, free to nullify or revise judicial interpretations of the British constitution or of a statute. This, of course, is different from reversing the decision in a given case, but in terms of revising the legal principle involved, it is the same.

It is also important to recognize that this issue is quite distinct from the question that arose in *Hayburn's Case*. 2 U.S. (2 Dall.) 408, 409 (1792). In that case, it will be recalled, the justices of the Supreme Court refused to serve as commissioners to assess pension claims by veterans since the Secretary of War would have the final say in ruling on the application. This arrangement, the justices argued, confirmed that their ruling would be an administrative, rather than a judicial one. For discussion of *Hayburn's Case*, see S. SLONIM, FRAMERS' CONSTRUCTION/BEARDIAN DECONSTRUCTION: ESSAYS ON THE CONSTITUTIONAL DESIGN OF 1787 at 157–61 (2001).

80. *See generally, History of the Supreme Court of Judicature, 1691–1847, in* "DUELY & CONSTANTLY KEPT": A HISTORY OF THE NEW YORK SUPREME COURT, 1691–1847, at 2–10 (1991).

national legislature will be as free as the legislatures of these states to enact fresh laws to modify the decision of the court in future cases. Needless to say, none of these answers effectively dealt with Brutus' fundamental complaint that the authors of the Constitution had unwittingly created an institution which, in contrast to all other institutions under the Constitution, was totally free of checks and balances—and free, that is, of the basic requirement of any ordered system of government: accountability.

7. *The Threat of Impeachment.*

Finally, Hamilton contended, "the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom."[81] Occasional "misconstructions and contraventions of the will of the legislature may now and then happen," but these would not be serious or drastically "affect the order of the political system."[82] This could be inferred, Hamilton said, "from the general nature of the judicial power; from the objects to which it relates; from the manner in which it is exercised; from its comparative weakness, and from its total incapacity to support its usurpations by force."[83] And such an inference is "greatly fortified" by the "important constitutional check," which Congress could institute against the judges through impeachment.[84]

> This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body entrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations.[85]

Thus, in short, Hamilton rejected Brutus' argument regarding judicial supremacy by asserting, first of all, that the inherent weakness of the judiciary would ensure that it would not exercise a free-wheeling interpretation of the Constitution contrary to the wishes of Congress, and secondly, that the threat of impeach-

81. THE FEDERALIST NO. 81 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*

ment would serve as "a complete security" against the danger of judicial aggrandizement of authority.[86]

As noted earlier, Brutus had dismissed the threat of impeachment as an inhibiting factor against judicial supremacy. Nor is it necessary to refer to judicial history to demonstrate that all the other so-called "safeguards" adduced by Hamilton would be quite insufficient to restrain a judiciary bent on exercising judicial supremacy. Brutus had discounted in advance each of these so-called safeguards and had established quite clearly that, if the judges wished, the road to judicial supremacy was wide open to them. Hamilton's attempt, therefore, in Federalist Nos. 78 and 81, to rebut Brutus' conclusions on the danger of judicial supremacy constituted, in the final analysis, an abject failure. Brutus' thesis represented, and represents, a powerful indictment of the handiwork of the Framers, who unwittingly created one organ of government totally free of any checks and balances, despite the fact that this principle was supposed to be a mainstay of the republican system of government they were establishing. In the absence of any requirement of accountability, that organ of government was free to assert the right to "rule the roost" and exercise judicial supremacy.

It is noteworthy that Madison recognized this fact only belatedly, when the Constitution was already ratified and about to be implemented.[87] At the Constitutional Convention, Madison

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86. It is interesting to observe that Publius did not refer to the power of Congress under Article 3 of the Constitution to define the appellate jurisdiction of the Supreme Court, "with such exceptions, and under such Regulations as the Congress shall make," as a means of preventing judicial abuse of the power of judicial review. See Brutus' dismissal of such an argument in 2 STORING, *supra* note 6, at 2.9.176. Hamilton does refer to this provision at the end of Federalist No. 81, in answer to the charge that the Supreme Court would be empowered to revise jury determinations of fact. Perhaps he regarded congressional authority under the provision to define the scope of appellate jurisdiction as referring strictly to procedural, not substantive, matters. This issue, of course, arose directly in the Reconstruction case of *Ex parte McCardle*, 74 U.S. (1 Wall.) 506 (1868).

87. It is not clear that Madison saw Brutus' comments on the subject of judicial supremacy, or that they stimulated his thoughts on the subject. However, a personal letter to him by Alexander White, dated August 16, 1788, two months before his Observations on Jefferson's Draft, may have alerted him to the implications. ROBERT A. RUTLAND ET AL., THE PAPERS OF JAMES MADISON 11:233 (1977). White was reacting to a protest by the judges of the Virginia Court of Appeals against the new district court law, on the ground that it might be said to conflict with the Virginia constitution. He objected to the judges' assumption that "the Constitution is paramount [to] the Ordinary Legislature." *Id.* "It is possible," he wrote, "that wise and good men may differ in the construction of some parts of it." *Id.*

> The Assembly may pass an Act which they conceive perfectly consistent with the Constitution, the Judges may determine it inconsistent. Who is to decide the Contest? If the Judges opinion is to prevail, it places them above the Law, establishes an Oligarchy, vests absolute power in 15 men who hold their places

had proposed that the national legislature serve as the umpire of the federal system. He advocated arming that body with a veto over all state legislation.[88] Initially, the Convention accepted his proposal for a congressional veto over unconstitutional state legislation. With Congress acting as a constitutional court, the road to judicial review and supremacy would appear to have been largely foreclosed. Subsequently, however, the Convention rejected Madison's legislative veto entirely, and implicitly made the judiciary the umpire of the federal system.[89] This opened the door to judicial review of federal legislation generally, and hence, judicial supremacy. Madison was chagrined at the refusal of the Convention to adopt his legislative veto proposal.[90] His dismay over the prospect of judicial supremacy is reflected in his 1788 Observations on Jefferson's Draft Constitution for Virginia, in which he wrote as follows:[91]

> In the State Constitutions & indeed in the Fedl. one also, no provision is made for the case of a disagreement in expounding them; and as the Courts are generally the last in making their decision, it results to them, by refusing or not refusing to execute a law, to stamp it with its final character. This makes

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during life, and over whom the People have no controul. Much safer may it be left to the Assembly—they are the immediate representatives of the People, and should they pass an Act inconsistent with the principles of the Constitution in the oppinion of the Community at large, the Members concurring in the Act would be displaced at the next election, and evil removed in the course of a year. . . . It is their duty to expound the Laws and to give Judgement according to their true sense and meaning—but that they should have a right to execute or not to execute at their Will and Pleasure a clear express Statute, is I believe a novelty in Politicks, the consequences of which may not be easily foreseen.

Id. at 11:233.

88. *See* Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 WM. & MARY Q. 215 (1979). This article is one of the most important pieces to appear on the founding.

89. *See* SLONIM, *supra* note 79, at 256.

90. In a lengthy letter to Jefferson on October 24, 1787, Madison expressed the fear that the Constitution would be a failure. *See id.* at 116–17.

91. *Papers of James Madison*, 11:293. For a discussion of Madison's views on judicial review, see Ralph Ketcham, *James Madison and Judicial Review*, 8 SYRACUSE L. REV. 158 (1956-57), and Editorial Comment in 11 PJM 284–85.

Significantly, even after the passage of some thirty years, Madison was still not reconciled to judicial review of federal legislation. In a letter to President James Monroe in 1817, he recalled "the attempts in the Convention to vest in the Judiciary Department a qualified negative on Legislative bills." Such a control, restricted to Constitutional points, besides giving greater stability and system to the rules of expounding the Instrument, "would have precluded the question of a judiciary annulment of Legislative acts." *Letters and other Writings of James Madison*, vol. 3, p. 56 (N.Y.: Worthington, 1884) (cited by THORNTON ANDERSON, CREATING THE CONSTITUTION 141 n.22 (1993)).

> the Judiciary Dept paramount in fact to the Legislature, which was never intended, and can never be proper.[92]

He proposed that in each of these governments, after an intervening election, a super-majority of both houses of the legislature (two-thirds or three-fourths) be qualified to override an executive or judicial veto. "It sd. not be allowed the Judges or the Ex [ecutive] to pronounce a law thus enacted, unconstitul. & invalid," declared Madison. In the words of one prominent writer: "Madison's cardinal tenet was that unchecked power in human hands was liable to abuse, and hence [that] that government was 'least imperfect' which kept a check on all exercise of power and authority."[93] In relation to the Court, Madison, of course, never pursued this thought and nothing came of his proposal for reigning in the judiciary.

CONCLUSIONS

Federalist No. 78, which appeared even before the Constitution was ratified and entered into force, is well known as an early exposition of, and justification for, judicial review. What is less well known is that this essay by Hamilton represented a rejoinder to the contention of the Antifederalist essayist Brutus that the Constitution furnished the basis, not only for judicial review, but also for judicial supremacy. Sound government, Brutus had written, required that the three branches of government be both separated and accountable. Yet the Constitution, while it provided for checks and balances in relation to the legislature and executive, imposed no restraints on the Supreme Court. Once the tribunal was seized of a case, it would be free to rule as it chose and was accountable to no outside source. Since its voice would be the last pronouncement in the process of legislation, its

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92. Strangely enough, this comment did not prevent Madison some six months later, on June 8, 1789, from suggesting that the judiciary would act as a guardian of a bill of rights. In presenting a draft list of amendments to Congress, he said:

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

Papers of James Madison, 12:206–07.

The seeming contradiction might be cleared up if one assumes that Madison was referring here to the state level only. Alternatively, perhaps he accepted a role for the courts in protecting rights, but not in determining the scope of federal power in national-state affairs.

93. Ketcham, *supra* note 91, at 158.

ruling would effectively bind the other two branches. Government policy would thus be largely determined by an unelected body. Hamilton's attempt to deny Brutus's charge that the Constitution gave license to judicial supremacy is seen, upon analysis, to be quite unpersuasive. James Madison, Father of the Constitution, belatedly came to realize, and regret, the manner in which an unfettered court could exercise domination over the other two branches of the federal government. Under Madison's original constitutional scheme, the national legislature would serve as the umpire of the federal system, and the court's role would have been restricted. There would thus have been little room for judicial review of federal legislation, much less for judicial supremacy. But the Convention rejected his proposal for a legislative veto over state legislation, and, as a result, the court was ensconced as the umpire of the federal system. Therewith, judicial review, and with it, judicial supremacy, were—unwittingly perhaps—instituted under the U.S. Constitution.