

ON BEING “BOUND THEREBY”

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I propose revising Article VI, paragraph 2, of the United States Constitution to read as follows (my amendments noted in italics):

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. The judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. *The Supreme Court shall have appellate jurisdiction to review the decisions of the judges in the several states on questions concerning this Constitution, the laws of the United States, and treaties made under the authority of the United States.*

As this redrafting suggests, I seek to fill in the textual gap between Article III and the Supremacy Clause on the question of the Supreme Court’s power to review decisions of state courts that are based on federal law. The current state of the doctrine holds that the two provisions, read together, add up to something like a constitutional norm that the Supreme Court should have some power to review state-court decisions. This norm is a result of a form of common law constitutionalism in which the text has interacted with interpretations by judges, politicians, and the people to generate an almost supra-textual structural understanding.¹

For many observers, that mix of text, caselaw, and underlying theory is sufficient to cement the Court’s power of vertical judicial review of state-court decisions. In courses on federal courts and constitutional law, students and professors

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1. See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010) (explaining the common law understanding of constitutional interpretation); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 932 (1996) (“Particularly if a textual approach draws ‘structural’ inferences (as it probably must to be plausible), textual interpretation is a high legal art form.”).

routinely spend hours flipping back and forth between Articles III and VI, reading them together and constructing chains of logic to arrive at a partially interstitial, partially extrapolated conception of what the document says about the Supreme Court's authority to overturn state courts' decisions. But for critics, this amalgam is not a sufficient basis for the Court to exercise this power, and it is in anticipation of future litigation—and in recognition of past controversies—that I propose making the power part of the constitutional text.

The accumulated common law of Supreme Court review of state courts' decisions rests on a triangulation among three sources: (1) reading Articles III and the Supremacy Clause together, such that the Court is both the ultimate structural repository of the “judicial Power of the United States”² and the force that determines when the “Judges in every State”³ have failed to be bound by the supreme law of the land; (2) the Court's own decisions, from *Martin v. Hunter's Lessee*⁴ and *Cohens v. Virginia*⁵ in the early nineteenth century to *Testa v. Katt*⁶ and *Cooper v. Aaron*⁷ in the twentieth; and (3) section 25 of the foundational Judiciary Act of 1789,⁸ which established the Court's review of state courts' decisions by the mechanism of a writ of error. Other bases for this authority include the debates at the Constitutional Convention and in the state ratifying conventions.⁹ The supremacy of the Court, and its resulting authority to invalidate decisions of the highest courts of the states, have therefore been established through a blend of textual, doctrinal, and statutory sources. The power is supremacy in action, put into practice over the course of at least two

2. U.S. CONST. art. III, § 1.

3. U.S. CONST. art. VI, cl. 2.

4. 14 U.S. 304 (1816) (holding that the Supreme Court had jurisdiction to review state courts' decisions in civil cases).

5. 19 U.S. 264 (1819) (holding that the Supreme Court had jurisdiction to review state courts' decisions in criminal cases).

6. 330 U.S. 386 (1947) (requiring state courts to enforce U.S. penal laws and rejecting Rhode Island's claim that it, as a sovereign, could not be compelled to enforce the penal laws of another sovereign).

7. 358 U.S. 1 (1958) (holding that all state officials—legislative, executive, and judicial—were bound by the Court's decision in *Brown v. Board of Education*, and that the Court would enforce this holding against the state of Arkansas).

8. 1 Stat. 73–93.

9. In the Virginia ratification convention, for example, Edmund Randolph insisted, “If a particular state should be at liberty, through its judiciary, to prevent or impede the operation of the general government, the latter must soon be undermined. It is, then, necessary that its jurisdiction should ‘extend to all cases in law and equity arising under this Constitution and the laws of the United States.’” See 3 JONATHAN ELLIOT, DEBATES 570 (Lippencott Co., 1891).

centuries’ worth of theory and interpretation. It is so central to the Constitution’s federal structure that one might have a hard time imagining that it could be attacked.

Some foundational practices and concepts of the American constitutional structure are so deeply ingrained in the political and legal system, as well as the nation’s self-narrative, that they do seem essentially unchallengeable. Examples include judicial review, the separation of powers, and federalism itself. None of these is explicitly set out in the Constitution, and yet each of them is a fundamental, supra-constitutional element of the nation’s legal structure—perhaps due, at least in part, to the fact that none of them is confined to a mere textual provision. Supreme Court review of state-court decisions might also seem to fall into this category. As Henry Wheaton wrote in 1821,

This supremacy is expressly declared in the Constitution; and if it were not declared, it must necessarily be so, from the very nature of our federative government. Where there is collision and repugnancy, the parts cannot control the whole; the whole must control the parts: otherwise there would be worse confusion than if we had no General Government.¹⁰

At various times in the nation’s history, however, determined groups of individuals have mounted campaigns to use Congress’ power under Article III, section 2, to make “exceptions and regulations” to the Supreme Court’s appellate jurisdiction as a means of removing specific subjects from the Court’s appellate review or to cut off that review altogether. The early national period, which witnessed the creation of the review under the 1789 Judiciary Act and its endorsement by the Marshall Court, provides ample evidence of the vigor with which opponents attacked the Court’s jurisdiction to review state adjudications. Many critics, most notably several prominent Virginia judges, argued that granting the Supreme Court the power to overturn state-court decisions, even on issues of federal law, amounted to an invasion of state sovereignty—what modern commentators might term a commandeering of the state judiciary. In the Virginia Court of Appeals’ decision in *Hunter v. Martin*, which was subsequently invalidated in Justice Joseph Story’s opinion for the Court in *Martin v. Hunter’s Lessee*, Judge William Cabell wrote:

10. Henry Wheaton, *The Dangers of the Union*, 12 CONST. COMMENT. 249, 253 (James Pfander ed., 1995).

It must have been foreseen that controversies would somehow arise as to the boundaries of the two jurisdictions. Yet the constitution has provided no umpire, has erected no tribunal by which they shall be settled. The omission proceeded, probably, from the belief, that such a tribunal would produce evils greater than those of the occasional collision which it would be designed to remedy.¹¹

For Cabell and other critics, those greater evils included threats to local authority and potentially antidemocratic federal aggrandizement.¹² Fifteen years after the Court's decision in *Martin*, as the nullification crisis gathered force, the Judiciary Committee of the House of Representatives endorsed a bill to repeal section 25 of the Judiciary Act of 1789.¹³ The repeal effort ultimately failed, but efforts to limit or repeal the Court's jurisdiction over state-court decisions regularly continue to appear and galvanize political attention, even if only briefly.¹⁴

On one hand, then, there is an apparent common-law-based constitutional consensus that the Supreme Court has jurisdiction to review at least some state-court cases, and that section 25—or its expanded, modern incarnation, 28 U.S.C. § 1257—is practically constitutionally required. On the other hand, however, the text does not explicitly provide for such review, rendering the review vulnerable to attack by anyone who opposes broad federal power as a general matter or who disapproves of what the Court says about a particular

11. *Hunter v. Martin*, 4 Munf. 1, 5 (Va. 1815). Like his outspoken and politically active colleague Spencer Roane, Cabell was relatively untroubled by the prospect of inferior federal courts as the mechanism by which the judicial power of the U.S. would be exercised to maintain federal supremacy. Cabell's concern was what he regarded as the invasion of the judicial power of the sovereign states by the Supreme Court's writs of error more than the expansion of federal power through federal institutions. *Id.* at 9. On early national commentators' conception of the relationship between Supreme Court review of state-court decisions and the establishment and jurisdiction of the inferior federal courts, see Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 *LAW & HIST. REV.* (forthcoming 2012).

12. Indeed, Cabell endorsed inferior federal courts as a preferable means of assuaging concerns about federal uniformity. "All the purposes of the constitution of the United States will be answered by the erection of Federal Courts, into which any party, plaintiff or defendant, concerned in a case of federal cognizance, may carry it for adjudication." 4 Munf. at 9.

13. On the attempt at repeal, see Mark Graber, *James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831 Repeal of Section 25*, 88 *OR. L. REV.* 95 (2009).

14. See, e.g., S. 481, 97th Cong. (1981); S. 1742, 97th Cong. (1981) (bills introduced by Senator Jesse Helms providing that neither the Supreme Court nor any federal district court shall have jurisdiction of any case arising out of state or local law or rule "which relates to voluntary prayer in public schools and buildings").

substantive issue. Those observers who are most supportive of the review also tend to be comfortable with its status as an implicit constitutional norm, and indeed with such implicit norms in general. This leaves the practice open to attack by critics, who point to the review’s lack of firm textual background and who are themselves often uneasy with practices that are based on non- or supra-textual foundations.

Without an explicit guarantee in the text of the Constitution, one could imagine a scenario in which Congress repealed section 25 of the 1789 Judiciary Act and its modern statutory descendants, pursuant to Congress’s powers under Article III, sec. 2 to make “exceptions and regulations” to the Supreme Court’s appellate jurisdiction. The Court’s appellate power would thus be limited to appeals from the inferior federal courts. The question would then become the scope of Congress’s “exceptions and regulations” authority. An influential line of thought beginning with Henry Hart’s 1953 *Dialogue* maintains that any exceptions Congress makes to the Court’s jurisdiction “must not be such as will destroy the essential role of the Supreme Court in the constitutional plan.”¹⁵ In addition, Justice Story’s opinion in *Martin* offers a full-throated structural argument that the review is constitutionally required.¹⁶ Nevertheless, one wonders how far such an argument would go toward convincing a hypothetical group of committed textualists and state sovereigntists that not only are the judges in the states “bound” by the supreme law of the land, this bindingness must be given institutional force through the Supreme Court’s oversight of state courts where federal issues are concerned.

Although textualist and originalist arguments might respond that my proposal represents an unwarranted extension of the Supreme Court’s—and perhaps the federal government’s—authority, I submit that the adoption of Article III plus the Supremacy Clause in fact represented not the outer boundary of what the founders believed would be the general government’s power to rein in the states, but a toned-down version of blunter control mechanisms proposed at the Constitutional Convention.

15. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953). The argument is also often termed the “essential functions” theory. See, e.g., Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960).

16. *Martin*, 14 U.S. at 327–345. See generally Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B. U. L. REV. 205 (1985) (giving a modern adaptation of Story’s arguments).

Most notable among these leashes was James Madison's proposal to give the federal government (either the Senate or a "council of revision" comprising the president and some number of Supreme Court justices) the power to veto legislative acts by the states.¹⁷ Madison clearly envisioned the veto as a means of establishing the federal level of government as a gatekeeper over state legislators.¹⁸ With the convention's rejection of Madison's veto, the delegates turned from a legislation-centered mechanism of policing the states to the looser, judicially focused device of the Supremacy Clause plus Article III. In the 1770s and early 1780s, many observers believed that dividing sovereignty required careful delineation of legislative powers. By 1789, that consensus had shifted to focus on courts as the overseers of the balance between sovereigns.

In proposing this revision to help close the gap between the text and the accumulated constitutional sensibility about Supreme Court review of state court decisions, my principal concern is to ground the clause's sweeping, self-executing definition of the "supreme law of the land" in a specific legal institution. Given the belief of many delegates to the Constitutional Convention that a judicial solution to the problem of supremacy was preferable to legislative approaches such as Madison's negative, and given the sharp disagreement among the delegates about the propriety of establishing inferior federal courts, the Supreme Court can reasonably be viewed as the locus of supremacy. Indeed, the dominance in traditional doctrinal narratives of the "Madisonian Compromise," according to which the drafters of the Constitution agreed to postpone the divisive question of the creation of inferior federal courts to the first Congress, suggests that a meta-rule setting forth the mechanics of supremacy belongs in the federalism-mediating domain of Article VI rather than in Article III, with its emphasis on the separation of powers between the Court and Congress.¹⁹

17. See ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 132–75 (2010) (discussing the bases of authority for a central government).

18. For example, Madison argued on the floor of the convention that "[t]he States [could] of themselves pass no operative act, any more than one branch of a Legislature where there are two branches can proceed without the other." 1 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 165 (1966) (Madison's statements from June 8 to the Committee of the Whole).

19. For the foundational statement of the Madisonian compromise, see RICHARD H. FALLON, JR., ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 7–9 (4th ed. 1996). See also Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52–56 (1975); Robert N. Clinton, *A*

Indeed, the “shall” language in my proposal, combined with the broad definition of the set of cases over which the Court shall have appellate jurisdiction, is intended to leave room for Congress to regulate the precise boundaries of the Court’s appellate jurisdiction under the Exceptions Clause of Article III. To do otherwise—e.g., by adding language to Article III, section 2, paragraph 2 along the lines of “although the power to make such exceptions and regulations shall not extend to the cases mentioned in Article VI, para. 2”—would make mandatory the full extent of the Court’s appellate power. That interpretation, if treated not just as a forward-looking amendment to the Constitution but rather as a reassertion of a single correct original understanding of the Constitution, would suggest that section 25 itself was in some essential sense void, insofar as it did not grant appellate jurisdiction to the Court in cases where the state court had upheld, rather than denying, a claim of federal right. My proposal aims to provide a textual foundation for a common law norm in line with both eighteenth-century views and evolving constitutional practice, not to use a narrow quasi-historical methodology to deny the ultimately deeply historical fact of change over time.

For similar reasons, I do not propose amending the Constitution to guarantee judicial review as a general matter. In their broadest sense, debates over the necessity, meaning, and valence of judicial review—in both its vertical, federalism-focused form and its horizontal, separation-of-powers form—have lain at the heart of Anglo-American law since the early seventeenth century.²⁰ I would not wish to enshrine a particular twenty-first (or, worse, twentieth-century) view of those debates in the Constitution. One broad constitutional value, arguably shared by both originalists and living-constitutionalists, is that certain broad constitutional values are so foundational that they resist a parol-evidence-rule approach to constitutional interpretation that attempts to freeze those values by fixing them in text.

An explicit constitutional statement of the Supreme Court’s jurisdiction to review state-court decisions is thus a historically appropriate endorsement of the Court’s role as a watchdog over

Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III, 132 U. PA. L. REV. 741, 763–64 (1984).

20. See generally Mary Sarah Bilder, *Idea or Practice: A Brief Historiography of Judicial Review*, 20 J. POL’Y HIST. 6 (2008) (presenting a history of judicial review and federalism concepts).

the federal-state balance and the Republic's founding commitment to multiple levels of governmental authority. Such a provision would maintain the twin founding values of multiplicity and supremacy: multiplicity by recognizing both the federal and state levels of government as constitutionally required and significant; supremacy by providing an institutional mechanism to ensure that the judges in the states truly are bound by the Constitution, laws, and treaties of the United States. Congress could continue to make regulations and exceptions to the Court's appellate jurisdiction pursuant to Article III, section 2, but it could not eliminate the review altogether. The review is already present in the common law Constitution and in practice. The structural commitment already exists. What remains unfinished is the textual ratification and the explicit institutional settlement.