

## The Constitution before the Court: alternatives to ‘juristocracy’ in the era of the American Founding

...although the legal constitution is more democratic, yet by means of the social system and customs it is carried on rather as an oligarchy [...] so that the previously existing laws continue although power is in the hands of the party that changed the constitution.

- Aristotle, *Politics*, Book IV, Chapter V.<sup>1</sup>

In 1788, a year after the Federal Convention, James Madison expressed a degree of discontent about the Constitution which he had played a pivotal role in creating. At both the Federal and State levels, Madison remarked in a letter to Thomas Jefferson, ‘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 the Judiciary Department paramount in fact to the Legislature, which was never intended, and can never be proper’.<sup>2</sup> Madison’s concern was hardly misplaced. Today it cannot be denied that the Supreme Court has arrogated to itself a position of remarkable power in the American political system, tantamount to a ‘Super-Legislature’ with the final decision over vast swathes of both governmental and private activity, and an unassailable paramouncy with regards to constitutional questions.<sup>3</sup> What makes this situation all the more remarkable, however, is how unremarkable Madison’s pessimism about judicial power was at the time of the Founding. Although the exercise of a final say over the constitutionality of legislation by the courts had its defenders at the time of the Revolution and the creation of the Constitution, they were considerably outnumbered by opponents of judicial review. As late as the 1820s, Jefferson could still argue that regarding ‘judges as the ultimate arbiters of all constitutional questions [was] a very dangerous doctrine indeed, and one which would

---

<sup>1</sup> Aristotle, *Politics*, ed. H. Rackham (William Heinemann: London, 1959), p.307.

<sup>2</sup> James Madison, ‘Observations on the ‘Draught of a Constitution for Virginia’’, in *The Writings of James Madison*, ed. Gaillard Hunt, 9 vols., (G. Putnam’s Sons: New York and London, 1900), v, 284-294, p.293. Emphasis mine. For Jefferson’s proposal, see Thomas Jefferson, ‘Proposed Constitution for Virginia, in *The Works of Thomas Jefferson*, ed. Paul Leicester Ford, 12 vols., (G.P. Putnam’s Sons: New York and London, 1904), iii, 147-165, pp.161-162.

<sup>3</sup> On the concept of the Supreme Court as ‘Super-Legislature’, see Brian Leiter, ‘Constitutional Law, Moral Judgement, and the Supreme Court as Super-Legislature’, *Hastings Law Journal*, 66, (2015), 1601-1616.

place us under the despotism of an oligarchy’, one whose sovereign power could be found nowhere in the Constitution.<sup>4</sup>

The history of the United States Supreme Court has been written many times, often as a contribution to contemporary debates on the nature and limits of judicial power. Such debates are, perhaps, as fierce today as they have been at any time in the history of the Constitution, and the expansive suite of powers now exercised by the Court has defenders and opponents on both the ‘Right’ and ‘Left’. Late twentieth and early twenty-first century debates between ‘conservative’ ‘Originalism’ and ‘liberal’ ‘Living Constitutionalism’ have largely subsided in favour of a more complex constellation of doctrines, including right-wing ‘Common Good Constitutionalist’ judicial activists and left-wing anti-juristocratic strict constitutionalists.<sup>5</sup> But despite these controversies, and their perennial nature in the history of the United States, the pre-history of the Court, the meaning and operation of the Constitution before the exercise of judicial review, and the alternatives in which its authors believed have only rarely been treated at length. Most historians of the Constitution, whether opposed to judicial review or not, continue to assume that it was, nonetheless, either inherent in the Constitution from the beginning, or that its ascendancy was guaranteed because the Founders offered no viable alternative means of arbitrating constitutional disputes.<sup>6</sup>

This paper offers a new account of opposition to judicial review at the Founding, the alternatives espoused by the founding generation, and the lessons which might be derived from their account of a free constitution today. It does so in three parts. The first reconstructs debates on judicial review at the time of the Revolution and at the Constitutional Convention and presents a new account

---

<sup>4</sup> Thomas Jefferson, Letter to William Jarvis, 28<sup>th</sup> September 1820, in *Works*, xii, 161-164, p.162.

<sup>5</sup> The most famous defences of the former are Adrian Vermeule, ‘Beyond Originalism’, *The Atlantic* [<https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/>], Last accessed 12/04/2024] and Adrian Vermeule, *Common Good Constitutionalism*, (Polity: London, 2022). For the latter, see variously Mark Tushnet, *Taking the Constitution Away from the Courts*, (Princeton University Press: Princeton, 2020) and Mark Tushnet and Bojan Bugarcic, *Power to the People: Constitutionalism in the Age of Populism*, (Oxford University Press: Oxford, 2022), Jeremy Waldron ‘Denouncing Dobbs and Opposing Judicial Review’, *NYU School of Law, Public Law Research Paper*, No. 22-39 (2023), Ryan D. Doerfler and Samuel Moyn, ‘Democratizing the Supreme Court’, *California Law Review*, 109:5, (2021), 1712-20, and Martin Loughlin, *Against Constitutionalism* (Harvard University Press: Cambridge, 2022), pp.16-22.

<sup>6</sup> For two excellent summaries of this debate from the historical and legal professions, see respectively Gordon S. Wood, ‘The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less’, *Washington and Lee Law Review*, 56, (1999), 787-809 and Sarikrishna B. Prakash and John C. Yoo, ‘The Origins of Judicial Review’, *University of Chicago Law Review*, 70:3, (2003), 887-982.

of the extent to which eighteenth century American political thinkers opposed judicial review as both un-republican and corrosive to the perpetuation of the constitution. The second considers an alternative model of constitutional guardianship and control discussed at the time of the Convention, with a particular focus on Madison's idea of a 'revisionary power'. In so doing, it also offers a new account of what having 'a constitution' meant at the time of the Founding, which argues that the Framers' conception of constitutionalism occupied a median between modern 'legal' and 'political' constitutional models. Finally, the third part forms a long conclusion which offers a brief account of the emergence of modern constitutional judicial review over the course of the nineteenth and twentieth centuries, the changes which it wrought to the constitution outside the established process of amendment, and its contemporary political consequences. The paper concludes by offering preliminary suggestions towards a programme of constitutional and institutional reform, oriented towards a reassertion of the primacy of politics and 'the political' in the American constitutional order.

### **Judicial review at the Founding**

By some accounts, judicial review is an ancient idea, found at Athens and Rome millennia ago. At the very least, the idea that the courts could rule actions taken by public authorities contrary to the law or to the constitution to be illegal was common in Europe long before the American Revolution, if somewhat sporadically practiced. On the other hand, the idea that even *laws* could be struck down as 'unconstitutional' is a distinctly modern one. It was not entirely original to the United States, as some historians have argued, and had some pedigree in the thought of Montesquieu and in a broader tradition centred on the defence of 'fundamental laws' against the encroachment of royal authority both in continental Europe and Great Britain.<sup>7</sup> But the first recognisably modern arguments for judicial review and incidences of its implementation are to be found in the United States at around the time of the Revolution because of the emergence of the modern, codified, constitution in that period. In fact, the doctrine of judicial review was slow to develop. A notable early argument in its favour can

---

<sup>7</sup> Judith Shklar, *Montesquieu*, (Oxford University Press: Oxford, 1987), pp.111-113 and Loughlin, *Against Constitutionalism*, pp.2-3.

be found in James Otis' 1763 pamphlet *The Rights of the British Colonies Asserted* which argued that legislation unfaithful to the constitution could not stand, but pronounced the British Parliament the sole legitimate arbiter of such matters as the highest judicial authority in the land.<sup>8</sup> Likewise, in an illustrative case of 1766, the Court of Hustings for Northampton County in Virginia at once found that the Stamp Act was unconstitutional but refused to strike it down.<sup>9</sup>

Nor did any of the state constitutions enumerate a judicial power to consider the constitutionality of laws. This was not, it should be noted, due to an absence of interest in the means of enforcing a codified constitution. Already in 1776 Pennsylvania had created an institution to do so, called the 'Council of Censors', whose duty it was to

enquire whether the constitution has been preserved inviolate in every part; and whether the legislative and executive branches of government have performed their duty as guardians of the people, or assumed to themselves, or exercised other or greater powers than they are intitled [sic] to by the constitution.<sup>10</sup>

This institution was directly elected by the people every seven years, and also possessed the power to initiate the reform of the constitution by a new convention. Although it was copied in the Vermont Constitution of 1777, in Pennsylvania it was abolished in 1790, having met only once.<sup>11</sup> Likewise, in its Constitution of 1777, the state of New York created an institution called the 'Council of Revision', composed of the Governor, the Chancellor (then the senior most judicial figure in the state) and members of the state Supreme Court.<sup>12</sup> Its members collectively exercised a limited veto over state legislation, which could be overturned by a supermajority of 2/3rds in both houses, a power which it exercised 128 times between 1777 and 1821.<sup>13</sup> This Council, designed to prevent the passage of

---

<sup>8</sup> James Otis, *The Rights of the British Colonies Asserted and Proved*, in Bruce Frohnen (ed.), *The American Republic: Primary Sources*, (Liberty Fund: Indianapolis, 2002), 178-201. On the claim that Otis had thus 'invented' the idea of unconstitutional laws, see Michael Sandel, *Democracy's discontent: America in search of a public philosophy*, (Harvard University Press: Cambridge, 1996), pp.29-30.

<sup>9</sup> J. Hampden Dougherty, *Power of Federal Judiciary Over Legislation: its origin, the power to set aside laws, boundaries of the power, judicial independence, existing evils and remedies*, (Putnam: New York, 1912), p.18.

<sup>10</sup> 'Pennsylvania Constitution, 1776', pp.64-65.

<sup>11</sup> On which, see Angus Harwood Brown, 'The Pennsylvania Council of Censors and the debate on the guardian of the constitution in the early United States', *American Journal of Legal History*, forthcoming.

<sup>12</sup> 'Constitution of New York (1777)', in Horst Dippel (ed.), *Constitutions of the World from the late 18<sup>th</sup> Century to the Middle of the 19<sup>th</sup> Century*, (KG Saur: Munich, 2009), xiii, 85-86.

<sup>13</sup> *ibid.*

‘improper’ laws was also widely regarded as a form of constitutional control by contemporaries, as shall be discussed below, and formed a median between a purely ‘political’ constitutional guardian like the Council of Censors and a purely ‘legal’ guardian like a modern constitutional court. For the creators of these institutions, it was obvious that the judiciary would not suffice as the safeguard of the constitution.

It was not until after the Revolution that a state court would try and strike down an act of legislation on the grounds of its unconstitutionality. In *Trevett v. Weeden* (1786), the Superior Court of Judicature of Rhode Island ruled that a law withholding the right to trial by jury from vendors who had refused to accept paper money was unconstitutional and overturned it.<sup>14</sup> But this decision and similar decisions in other states which followed remained controversial. The issue was further put to the test in *Bayard v. Singleton* (1787), heard by North Carolina’s Court of Conference, in which the daughter of a Loyalist whose property had been confiscated during the Revolution challenged a 1785 law which prevented state courts from hearing cases about the restitution of Loyalist property.<sup>15</sup> Since the state Constitution of 1776 had required trial by jury in all cases involving potential loss of property rights, the 1785 act appeared manifestly unconstitutional. But the Court was reluctant to act against the legislature: it chose to do so only after a significant delay, having hoped that the legislature would repeal the act in the meantime allowing the case to be heard without controversy. The legislature, however, refused to repeal the law despite its unconstitutionality and denied the courts had the power to do so themselves. Yet, as the future United States Justice James Iredell argued, it followed from the nature of a codified constitution that ‘The power of the Assembly is limited and defined by the constitution’ and that this power was, therefore, subject to judicial oversight.<sup>16</sup> The ‘omnipotence’ of the British Parliament did not attain in North Carolina, Iredell argued, because it was precisely in order to escape ‘the *insolent despotism* of Great Britain’ that the American states had elected to be governed under codified constitutions limiting legislative power.<sup>17</sup> Consequently, since

---

<sup>14</sup> Dougherty, *Power of Federal Judiciary*, pp.28-31.

<sup>15</sup> *ibid.*, 31-34.

<sup>16</sup> James Iredell, ‘To the Public’, in *Life and Correspondence of James Iredell*, 2 vols., (D. Appleton and Co.: New York, 1857-1858), ii, 145-149, p.146.

<sup>17</sup> *ibid.*

the Constitution was a species of law which the legislature could not change by ordinary legislative means, any laws it passed contrary to it were, therefore ‘without lawful authority’.<sup>18</sup>

Although Iredell was neither a judge of nor party to the case, the Court would ultimately follow his argument: the case was heard on the basis that the Constitution trumped the 1785 act forbidding it to be (and the property in question not restored). But this decision sparked a significant controversy, which would bleed over into the Constitutional Convention in Philadelphia that year. Thus, in August 1787, Richard Dobbs Spaight, then a delegate to the Convention from North Carolina, and later Governor of that state issued a letter to Iredell seeking to refute his claims. ‘[I]t would have been absurd, and contrary to the practice of all the world’, Spaight argued,

had the Constitution vested such powers in [the courts], as they would have operated as an absolute negative on the proceedings of the Legislature, which no judiciary ought ever to possess: and the State, instead of being governed by the representatives in general Assembly, would be subject to the will of three individuals, who united in their own persons the legislative and judiciary powers, which no monarch in Europe enjoys, and which would be more despotic than the Roman Decemvirate, and equally as insufferable.<sup>19</sup>

It did not matter, Spaight argued, that the legislature could, conceivably, pass unconstitutional laws without such oversight, since the illegitimacy of such actions was far outweighed by the illegitimacy of judges exercising a share in the legislative power. And, whilst he lamented that ‘our Constitution, unfortunately, has not provided a sufficient check to prevent the intemperate and unjust proceedings of our Legislature’, Spaight remained convinced that only expressly political checks could suffice.<sup>20</sup> Annual election, Spaight suggested, represented a far more acceptable check to potential legislative tyranny than transferring ‘despotic’ powers to judges, because it left the decision over unconstitutionality in the hands of elective and political authorities.<sup>21</sup>

In a reply of 26<sup>th</sup> August, Iredell reiterated his earlier position, arguing that Spaight had missed that the legal logic of a system with a codified constitution demanded that judges exercise the

---

<sup>18</sup> *ibid.*, p.148.

<sup>19</sup> Richard Dobbs Spaight, ‘Letter to James Iredell, 12<sup>th</sup> August 1787’, in *Life and Correspondence of James Iredell*, ii, 168-170, p.169.

<sup>20</sup> *ibid.*

<sup>21</sup> *ibid.*, pp.169-170.

power of judicial review. As he explained, ‘The Constitution, [...] *being a fundamental law* [...] the judicial power, in the exercise of their authority, must take notice of it as the groundwork of that as well as of all other authority’, and he continued, ‘as no article of the Constitution can be repealed by a legislature, which derives its whole power from it, it follows either that the *fundamental unrepealable* law must be obeyed, by the rejection of an act unwarranted by and inconsistent with it[.]’<sup>22</sup> Today, it is Iredell’s position which is most widely accepted, both in the United States and elsewhere in the world. Indeed, it is remarkably similar to Hans Kelsen’s argument in for judicial review, which contemporary European public lawyers sometimes position as an alternative to the American theory of constitutional enforcement.<sup>23</sup> But in 1787, it was Spaight who, writing from the Convention in Philadelphia, spoke for the majority of the Founding generation and Iredell, who had been unable to attend due to straitened financial circumstances, who was in the minority.

The idea that judges should have or share in the power to annul unconstitutional legislation was debated on no fewer than nine occasions at the Federal Constitutional Convention of 1787, albeit in connection with other issues concerning the judiciary and the nature of the constitution, and the issue of what we now call judicial review was never tackled head on by the Convention.<sup>24</sup> The term ‘judicial review’ was not itself coined until 1914, by the American historian Edward Corwin.<sup>25</sup> Consequently, historians, political theorists, and lawyers remain divided on whether or not the authors of the Constitution ‘intended’ for the Supreme Court to be able to exercise the right to review the constitutionality of legislation and that this was simply self-evident in the logic of a codified constitution, whether it was not intended but was inherent in the mechanics of the Constitution itself, or whether it was rejected by the Framers but foisted upon the young republic by the Marshall Court.<sup>26</sup>

---

<sup>22</sup> James Iredell, ‘Letter to Spaight, 26<sup>th</sup> August 1787’, in *Life and Correspondence of James Iredell*, ii, 172-176, 173.

<sup>23</sup> See, Hans Kelsen, ‘On the Nature and Development of Constitutional Adjudication’ in in Lars Vinx, ed. *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, (Cambridge University Press: Cambridge, 2015), 22-78, p.27-33 and 35-43.

<sup>24</sup> In Max Farrand (ed.), *The Records of the Federal Convention of 1787*, 3 vols., (Yale University Press: New Haven, 1927), see in vol.1 the debates of 4<sup>th</sup> June, pp.97-98, pp.108-109, 6<sup>th</sup> June, pp.138-140, 11<sup>th</sup> June, p.207, and 20<sup>th</sup> June, p.341, and in vol.2, those of July 17<sup>th</sup>, p.28, July 21<sup>st</sup>, pp.73-83, July 23<sup>rd</sup>, pp.92-93, August 15<sup>th</sup>, pp.298-301, and August 28<sup>th</sup>, p.440.

<sup>25</sup> Edward S. Corwin, *The doctrine of judicial review, its legal and historical basis, and other essays*, (Princeton University Press: Princeton, 1914).

<sup>26</sup> For the first perspective, see Prakash and John C. Yoo, ‘The Origins of Judicial Review’ and John N. Rakove, ‘The Origins of Judicial Review: A Plea for new Contexts’, *Stanford Law Review*, 49:5, (1997), 1031-1064,

This paper does not pretend to be able to settle this debate, but it hopes to reiterate and clarify some of the most significant evidence from the Federal Convention. Although the delegates were not a monolith, their general view of judicial power over legislation was negative. Thus, for example, John Mercer expressed scepticism towards any kind of judicial role in interpreting the constitution, on the grounds that ‘He disapproved of the Doctrine that the Judges as expositors of the Constitution should have the authority to declare a law void. He thought laws ought to be well and cautiously made, and then be uncontrollable.’<sup>27</sup> The same point was made by John Dickinson of Pennsylvania, who claimed that in exercising such a power, the judiciary would ‘bec[o]me by degrees the lawgiver’ in the republic.<sup>28</sup> Most of the delegates to the Convention held, as Gunning Bedford Jr. put it, that entrusting the constitution to the judiciary was unnecessary because ‘it would be sufficient to mark out in the Constitution the boundaries to the Legislative Authority, which would give all the requisite security to the rights of the other departments’ which would then ‘be under no external control whatever’ outside the self-regulation of the system of checks and balances.<sup>29</sup>

But the delegates’ reasons for opposition were not homogenous. Although Mercer, Dickinson, and Bedford all apparently opposed granting the judiciary power over legislation on the grounds that it was an infringement on the people’s legislative power, as exercised through their representatives, others presented different cases. Madison, for example, argued that the judiciary could not serve as the guardian of the constitution on its own, because its position was too insecure. ‘In R[hode] Island,’ Madison reminded the other delegates, ‘the Judges who refused to execute an unconstitutional law were displaced, and others substituted, by the Legislature who would be willing instruments of the wicked & arbitrary plans of their masters.’<sup>30</sup> He would expand upon this case against the creation of any sort of independent constitutional guardian in the *Federalist Papers*. There, he condemned the idea of a separation of powers and limited government enforced by a constitutional guardian as mere

---

pp.1046-1048, and for the second, Wood, ‘The Origins of Judicial Review Revisited’, and for the third, see Larry D. Kramer, The Supreme Court, 2000 Term: Foreword, ‘We the Court’, *Harvard Law Review*, 115:1 (2001), 4-169. This is certainly very far from an exhaustive list.

<sup>27</sup> Farrand (ed.), *Records*, ii, p.298.

<sup>28</sup> *ibid.*, p.299.

<sup>29</sup> *ibid.*, pp.100-101.

<sup>30</sup> *ibid.*, ii, p.28. July 17<sup>th</sup>.

‘parchment barriers against the encroaching spirit of power’.<sup>31</sup> Instead of ‘mere demarkations [sic] on parchment of the constitutional limits of the several departments’,<sup>32</sup> Madison argued that the integrity of the constitutional limits placed on political institutions could be achieved only through horizontal relations of mutual limitation, as each branch – the executive, the two houses of the legislature, and the judiciary – exercised a veto over one another. Thus, Madison argued in Federalist No.50, the failure of Pennsylvanian Council of Censors, which had been unable to prevent violations of the state constitution, ‘proves at the same time by its researches, the existence of the disease [of constitutional violation], and by its example the inefficacy of the remedy’.<sup>33</sup> Only a system in which partisan ambitions could be made to check one another could be a true safeguard against constitutional violation. A constitutional court – or supreme court exercising constitutional review – would face all the same issues. Other delegates still raised further objections to the exercise of a judicial control over legislation. The future presidential candidate Charles Pinckney, for example, ‘opposed the interference of the Judges in the Legislative business: it will involve them in parties, and give a previous tincture to their opinions’,<sup>34</sup> a position which he shared with Roger Sherman, who ‘disapproved of Judges meddling in politics and parties.’<sup>35</sup>

Certainly, these objections were not universal. Gouverneur Morris in particular expressed scepticism that the courts could ever ‘be bound to say that a direct violation of the Constitution was law’, despite his own doubts as to the efficacy of a distinct constitutional guardian, likewise conditioned by the Pennsylvanian experience.<sup>36</sup> And Morris largely defended this in terms familiar today, arguing that ‘Legislative alterations not conformable to the federal compact, would clearly not be valid. The Judges would consider them as null & void’ because only the unanimous consent of the states or a majority of the assembled people could alter the constitution.<sup>37</sup> Likewise, although Alexander Hamilton did not speak in any of these debates at the Convention, in the 78<sup>th</sup> of the

---

<sup>31</sup> James Madison, ‘Federalist No.48’, in Alexander Hamilton, John Jay and James Madison, *The Federalist*, ed. Terence Ball, (Cambridge: Cambridge University Press, 2002), 241-244, pp.241 and 243-244.

<sup>32</sup> *ibid.*, p.244.

<sup>33</sup> James Madison, ‘Federalist No.50’, in Hamilton, Jay, and Madison, *The Federalist*, 248-251, p.250.

<sup>34</sup> Farrand, *Records*, ii, p.298.

<sup>35</sup> *ibid.*, ii, p.300.

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.*, ii, p.92.

*Federalist Papers* he presented his now famous case that, since ‘the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents’, the courts must possess the power to strike down statutes which contradicted the constitution.<sup>38</sup> But in its Hamiltonian form judicial power was quite limited, since it could amount only to the exercise of ‘judgement’ and never of political ‘will’.<sup>39</sup> Judges could adjudicate cases of clear violations of the constitution but, Hamilton seemed to suggest, never make their own choices on matters of genuine disagreement. One could certainly draw the same conclusion from Morris’ references to ‘direct violations of the constitution’ as the correct target for judicial arbitration.

The Constitution itself was effectively silent on the matter. The Supreme Court was by far the weakest part of the Federal government, and its powers were entirely within the gift of Congress, which could not only alter its form or composition, but also establish ‘exceptions’ or ‘regulations’ to its powers. As established in Article III, section 2 of the Constitution, the Supreme Court was empowered to resolve cases

arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.<sup>40</sup>

Its authority thus extended to dealing with cases affecting diplomats abroad or the foreign relations of states, which were the only issues over which it had original jurisdiction. In all others it was simply the highest appellate court in the land.<sup>41</sup> Did this give the Court the right to strike down legislation passed by Congress? Perhaps: the Constitution had, after all, established its own supremacy over other forms of law, reading:

---

<sup>38</sup> Alexander Hamilton, ‘Federalist No.78’, in *The Federalist*, 377-383, p.380.

<sup>39</sup> *ibid.*, pp.378-381.

<sup>40</sup> United States Constitution, Article III, Section 2.

<sup>41</sup> *ibid.*

This constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.<sup>42</sup>

But this passage too left matters ambiguous. Was the federal legislature, which after all could make many of the abovementioned laws, bound to obey judicial rulings against it, or did such restrictions apply only to the states? Was the Supreme Court's main job to adjudicate between competing state and federal claims under the constitution, as Pinckney suggested at the Convention, or simply to maintain the hierarchy between the two levels of authority as Madison, at times implied?<sup>43</sup>

In the 1790s, supporters of judicial review began to win out, as exemplified by the young James Kent's stirring defence of the role of lawyers as guardians of the constitution, and the doctrine began to take root on the newly installed Marshall Court, in cases like *Hylton v. United States* (1796) and *Calder v. Bull* (1798).<sup>44</sup> But the Court's role remained uncertain. In 1798 even James Iredell, by then an Associate Justice, expressed his belief that whilst the Court was empowered to strike down legislation as unconstitutional, this was a power of "a delicate and awful nature, [and] the Court will never resort to that authority, but in a clear and urgent case".<sup>45</sup> Justice Bushrod Washington concurred in the case of *Cooper v. Telfair* (1800), arguing that the Court should always assume legislation was constitutional unless doing so was reasonably impossible.<sup>46</sup> At the beginning of the nineteenth century, the issue was partially resolved in favour of the Court's right to exercise judicial review of federal statutes, as outlined by Chief Justice John Marshall in *Marbury v. Madison* (1803). Yet as we have seen, even after this, judicial review remained controversial. As esteemed a father of the United States as Jefferson continued to bitterly oppose judicial review to the end of his life, whilst Madison remained equivocal about its abuse long after he left the national scene. That judicial review nonetheless persevered was largely because, following Iredell's warning, the Supreme Court was generally sparing in its use. As Davison M. Douglas has shown, the Supreme Court did not cite

---

<sup>42</sup> United States Constitution, Article VI.

<sup>43</sup> Farrand, *Records*, ii, p.248.

<sup>44</sup> Wood, 'The Origins of Judicial Review Revisited', p.798.

<sup>45</sup> *Calder v. Bull* 2 U.S. 386 (1798), 386-401, p.399.

<sup>46</sup> *Cooper v. Telfair*, 4 U.S., 14-, pp.18-19.

*Marbury* as precedent to justify the annulment of a statute until 1887, although the use of the Court's power of judicial review did cause recurrent crises of judicial legitimacy and engender calls for the Court's abolition or reform throughout the nineteenth century, particularly surrounding *Dred Scott v. Sandford* (1857).<sup>47</sup> Despite this, there is a good case to be made that some of the leading figures of the Founding generation, including Madison, would not have been happy even with this relatively limited conception of judicial power, let alone its expansive modern form. As we will not turn to consider, many delegates to the Convention, as well as other leading figures of the 1780s-90s, favoured an alternative model of constitutional guardianship centred on the maintenance of 'political' control over the constitution and grounded in a far more flexible vision of constitutionalism than has become ascendant in the United States today.

### **Political Constitutionalism and the Revisionary Power**

When James Madison arrived at the Federal Convention in 1787, he came with a plan already written for the United States' constitutional destiny. If in some ways his 'Virginia Plan' resembled the Federal Constitution eventually created, it departed from it in substituting for either a powerful Supreme Court *or* a veto-wielding executive a 'Council of Revision' modelled on that found in New York's 1777 state Constitution.<sup>48</sup> As the plan explained:

[T]he Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negated by \_\_\_\_ members of each branch.<sup>49</sup>

---

<sup>47</sup> Davidson M. Douglas, 'The Rhetorical Uses of *Marbury v. Madison*: The Emergence of a 'Great Case'', *Wake Forest Law Review*, 38, (2003), 375-413.

<sup>48</sup> 'Constitution of New York (1777)', in Horst Dippel (ed.), *Constitutions of the World from the late 18<sup>th</sup> Century to the Middle of the 19<sup>th</sup> Century*, (KG Saur: Munich, 2009), xiii, 85-86.

<sup>49</sup> Max Farrand (ed.), *The Records of the Federal Convention of 1787*, (Yale University Press: New Haven, 1927), p.21.

Some historians have argued that this was just an unusual species of the executive veto found in the federal Constitution of 1788, reinforced by the judiciary, but Madison did not see it this way.<sup>50</sup> Instead, as Madison would argue in a letter written shortly after the end of the Convention which was critical of both the idea of empowering the judiciary to serve as the guardian of the constitution and what he saw as a misunderstanding of the concept in Thomas Jefferson's proposal for a Council of Revision in his proposal for a new Virginian Constitution, "A revisionary power is meant as a check to precipitate, to unjust, and to *unconstitutional* laws."<sup>51</sup> In other words, the Council of Revision was intended to serve, amongst other functions, as an *ex ante* review of the constitutionality of all federal legislation, a power of review which the Virginia Plan only granted to the federal courts over *state* legislation. This, Madison conceded, was not a perfect solution and, adhering to a stricter vision of the separation of powers, he later proposed instead granting a veto to both the President and Supreme Court, subject to legislative override as he had in the final debate on the Council of Revision at the convention.<sup>52</sup> Nonetheless, he argued, it was better than allowing the courts the exercise of constitutional judicial review, which amounted, as we have seen, to "mak[ing] the Judiciary Department paramount in fact to the Legislatures, which was never intended and can never be proper."<sup>53</sup>

Unlike judicial review, the Council of Revision won many supporters at the Convention, and some version of the idea was proposed four times, although it was rejected by substantial margins on each occasion.<sup>54</sup> As Gunning Bedford Jr. argued, such a Council would represent a happy median

---

<sup>50</sup> On this debate, see John Agresto, *The Supreme Court and Constitutional Democracy*, (Cornell University Press: Ithaca, 1984), pp.60-62 and Larry D. Kramer, *The People Themselves Popular Constitutionalism and Judicial Review*, (Oxford University Press: Oxford, 2005) pp.75-77, who contend that the debate on the Council of Revision was essentially around the system of checks and balances and the need to reinforce the executive veto, which ultimately resolved itself into the pure executive veto in the Constitution of 1787. For the alternative view, see Jonathan Riley, 'Imagining Another Madisonian Republic', in John Ferejohn, Jack N. Rakove, and Jonathan Riley (eds.), *Constitutionalism and Democratic Rule*, (Cambridge University Press: Cambridge, 2001), 170-204, pp173-182 and Jeffrey H. Anderson, 'Learning from the Great Council of Revision Debate', *Review of Politics*, 68, (2006), 79-100 who consider the Council of Revision as a developed proposal for a conciliar check upon legislative power distinct from the executive veto and with a role as protector of the constitution.

<sup>51</sup> James Madison, 'Observations on the "Draught of a Constitution for Virginia"', p.293. Emphasis mine. For Jefferson's proposal, see Thomas Jefferson, 'Proposed Constitution for Virginia, in *Works*, iii, 147-165, pp.161-162.

<sup>52</sup> Madison, 'Observations on the "Draught of a Constitution for Virginia"', pp.293-294.

<sup>53</sup> *ibid.*, p.294.

<sup>54</sup> See the debates of Monday 4<sup>th</sup> June, 6<sup>th</sup> June, 24<sup>th</sup> June and 15<sup>th</sup> August 1787 in *Records of the Federal Convention*.

between unconstrained government and the rule of judges, creating the conditions in which “it would be sufficient to mark out in the Constitution the boundaries to the Legislative Authority, which would give all the requisite security to the rights of the other departments” which would then “be under no external control whatever” outside the self-regulation of the system of checks and balances.<sup>55</sup> Even sceptics about judicial power like John Mercer expressed support for the Council of Revision and “heartily approved” of Madison’s proposal, because it represented exactly the situation which he hoped for in which laws would be made well based on constitutionally sound principles, but would then be unalterable except by future legislatures.<sup>56</sup> The idea of a Council of Revision was also supported, albeit in a slightly different form, by Pinckney, despite his later denials and claims to have always supported the system which the Delegates eventually reached by compromise.<sup>57</sup> And, despite, its defeat at the time of the Convention, the idea of a Council of Revision continued to enjoy support amongst prospective constitutional reformers in the early years of the republic. As we have already seen, Jefferson had proposed inserting a Council of Revision into the Constitution of Virginia in 1787. But it was also supported by Jefferson’s friend, the Italian-American revolutionary arms-smuggler and journalist Filippo Mazzei, who suggested modifying the Council of Revision into a new ‘Council of Six’ with wide-ranging powers as the guardian of the constitution, apparently under the influence of Madison’s homonymous cousin, the Bishop of Virginia.<sup>58</sup> The idea of a Council of Revision even influenced constitution-making during the French Revolution, having first been transmitted to France by Louis-Guillaume Otto during the Convention, later influencing constitutional proposals forwarded by Nicolas Dèmeunier in 1791 and, via Mazzei, Benjamin Constant’s idea of a *Pouvoir Neutre* at the dawn of the nineteenth century.<sup>59</sup>

---

<sup>55</sup> *ibid.*, pp.100-101.

<sup>56</sup> *ibid.*, ii, p.298.

<sup>57</sup> See, Charles Pinckney, ‘Observations on the plan of government submitted to the Federal Convention and ‘The Draught of a Federal Government to be agreed upon between the free and independent states of America’ in *Records of the Federal Convention*, iii, 106-111, p.110 and 604-609, p.606. For Farrand’s identification of Pinckney as the author of the latter and Pinckney’s highly editorialised version of the plan, see ‘The Pinckney Plan’ in *Records of the Federal Convention*, iii, 595-609.

<sup>58</sup> Filippo Mazzei, *Recherches historiques et politiques sur les Etats-Unis de l’Amérique Septentrionale*, 4 vols., (Chez Froullé: Paris, 1788), iii, pp.373-378.

<sup>59</sup> See respectively, Louis-Guillaume Otto, ‘Mr. [Louis-Guillaume Otto] au Comte de Montmorin, Secrétaire d’Etat aux affaires étrangères, 10 Juin 1787’, in *Records of the Federal Convention*, 39-45, p.42; Jean-Nicholas Dèmeunier, Speech of 5<sup>th</sup> September 1789, *AP*, vol.8, 565-566, p.565; Benjamin Constant, ‘Additions à l’Ouvrage intitulé des Moyens de constituer une République dans un grand Pays’, in *Benjamin*

Although this might seem like an interesting but minor incident in the constitutional history of the United States, it actually illuminates rather a lot about how at least some of the Founders understood the nature of the constitution which they were writing. Unlike the modern Supreme Court, a Council of Revision would have exercised only a relatively weak *ex ante* control over the constitutionality of legislation, capable of overriding legislation only before it was signed by the President, but unable to strike it down on the grounds of unconstitutionality after the fact. Further, this did not constitute an absolute negative, because the Council of Revision's veto could itself be overruled by a supermajority in the legislature, as its New York forebear found on seventeen of the twenty-eight occasions that it exercised its power.<sup>60</sup> Thus, unlike the Supreme Court and other constitutional courts today, a federal Council of Revision would have been able only to prevent the passage of unconstitutional legislation, not to revisit old constitutional issues as new cases arose to put them to the test. Nor would it have exercised any authority over state legislation, a power which the Supreme Court itself expressed unease at exercising as late as the 1870s.<sup>61</sup>

The relationship between the legislative power and the constitution would also have been markedly different in this original Madisonian system. In place of a rigid constitution set above the ordinary legislative power, the United States would, whether intentionally or not, have found itself with a relatively *flexible* constitution. Whilst the national legislature would not be able to *amend* this constitution, it would exercise a power to override its provisions, if a majority of 2/3<sup>rd</sup>s could be persuaded of the political rectitude of doing so, because this was all that was required to override the Council of Revision's constitutional negative. The result would have been that, in place of the highly inflexible Constitution found today, the United States might have had a constitution whose provisions could be superseded by the people's representatives where a sufficiently large section of the country

---

*Constant, Œuvres Complètes*, ed. François Rosset, Série 1: Œuvres, 32 vols., (De Gruyter: Berlin, 1993-2024), iv, 683-703, p.695.

<sup>60</sup> Francis Newton Thorpe (ed.), *The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America*, 7 vols., (Government Printing Office: Washington, D.C., 1909), v, p.2629.

<sup>61</sup> For example, Justice Samuel Miller argued in the *Slaughter-House Cases* (1877) that striking down state legislation on the basis of the Federal Bill of Rights would be to "constitute this court as a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights." Samuel Freeman Miller, *Slaughter-House Cases*, 83 U.S. 16, 36-83, p.78.

believed that doing so represented the common good, the national interest, or simply the best course of political action. Such a constitutional settlement would be mid-way between the ‘legal’ constitutionalism which has predominated in the United States since the Founding and the ‘political’ constitutionalism of the United Kingdom, in which the constitution itself is subordinated to political concerns and ordinary political authorities.<sup>62</sup> Under this system, once a law had been passed without the Council’s veto, Madison maintained ‘It should not be allowed the Judges or the Executive to pronounce a law thus enacted, unconstitutional & invalid.’<sup>63</sup> Such a Constitution would not act as an insurmountable check upon the passage of legislation, but merely to ensure that constitutionally controversial legislation enjoyed the support of a significant majority. It would not, as modern constitutions are, be a total limit on legislative action, but a set of guidelines for the exercise of political power, and constitutional questions would remain within the domain of politics, rather than being resolved from above by judicial fiat. On this model, the constitution would ensure fidelity to the ‘rules of the game’ but maintain the primacy of politics over the law.

Whether this was intentional or not on the part of most delegates is not entirely clear, but this quite bold revised account of early American constitutionalism would appear entirely in line with Madison’s stated theory of constitutional government. As we have seen, Madison was vehemently opposed to creating a situation in which the judicial power would become ‘paramount’ over the legislature, and he was also sceptical of the efficacy of entrusting the preservation of liberty to ‘parchment barriers against the encroaching spirit of power’.<sup>64</sup> Instead, as Jack Rakove has demonstrated, Madison believed that liberty and constitutional government were best preserved through a pragmatic and flexible attitude towards collective political existence, which rejected doctrinaire adherence to fixed principles.<sup>65</sup> This was not only a question of legitimacy, but also one of political survival. As Madison was more than aware, republics had often fallen prey to overly rigid

---

<sup>62</sup> The rigid distinction between these two modes of thinking has recently been challenged by Aileen Kavanagh, on which more below. Aileen Kavanagh, *The Collaborative Constitution*, (Cambridge University Press: Cambridge, 2023), see especially the Introduction, pp.1-28 and Chapter 1, pp.31-57.

<sup>63</sup> Madison, ‘Observations on the “Draught of a Constitution for Virginia”’, pp.293-294.

<sup>64</sup> James Madison, ‘Federalist No.48’, pp.241 and 243-244.

<sup>65</sup> Jack N. Rakove, ‘Judicial Power in the Constitutional Theory of James Madison’, *William and Mary Law Review*, 43:4, (2001-2002), 1513-1547.

constitutions incapable of providing recourse to change as the exigencies of the moment demanded. Indeed, as is discussed at length in the *Federalist Papers*, at the very moment that the United States was slouching towards Philadelphia to be born, the ‘republican monarchy’ of Poland-Lithuania, was racing towards dissolution on exactly this basis.<sup>66</sup> The idea that constitutions must be flexible to survive contact with real politics is one of the dominant themes of the *Federalist Papers*. Adrian Vermeule has termed this implicit theory the ‘Publius Paradox’, which holds that: ‘[i]f the bonds of constitutionalism are drawn too tight, they will be thrown off altogether when imperative need arises.’<sup>67</sup> But where Vermeule suggests that this resulted in a defence of emergency executive power, this paper suggests that it also led Madison and others amongst the authors of the Constitution to embrace a ‘weak’ conception of constitutionalism which could weather the storm of political change and crisis.

Unlike Jefferson and many of his other friends and contemporaries, however, Madison was sceptical that such change was best brought about through recurrent constitutional conventions, which he believed were more liable to produce conflict and reduce the constitution itself to an object of division and partisanship.<sup>68</sup> What was instead needed was a compromise between too rigid and too changeable a constitution: a constitution which could hold fast over time, but which could be overridden if the situation demanded it. Such a system would ensure that ‘changes *to* the constitution would not become changes *of* the constitution’, as Constant would later put it.<sup>69</sup> Constitutional change could be brought about without unsettling the state through a general revolution and a change of constitution affected either by an extraordinary act of the people *or* through a more or less violent transfer of power in an emergency situation. The Constitution, sanctioned by the people at an extraordinary founding moment, would offer a stable and legitimate source of governmental power, but would be able to change as the needs of the moment demanded if an extraordinary majority

---

<sup>66</sup> See, for example, *Federalist Nos.* 14, 19, 22, and 39.

<sup>67</sup> Adrian Vermeule, ‘The Publius Paradox’, *The Modern Law Review*, 82:1, (2019), 1-16, p.2.

<sup>68</sup> Madison, ‘Federalist No.50’, pp.248-249.

<sup>69</sup> Benjamin Constant, ‘De la possibilité d’une constitution républicaine dans un grand pays’, in *Œuvres Complètes*, iv, 355-679, p.654. ‘Ce serait donc une chose salutaire que de laisser aux pouvoirs constitués dans l’État, un moyen régulier d’améliorations constitutionnelles; alors les changements à la constitution ne deviendraient pas des changements de constitution.’ Emphasis mine.

enabled its abrogation on a case-by-case basis, by overriding the checks to the passage of unconstitutional legislation.

It is now, hopefully, clearer what we meant when we referred to a median between an absolutely rigid ‘legal constitution’ and an entirely flexible ‘political constitution’ earlier in this paper. This alternative Madisonian constitution was one which, unlike in the United Kingdom, would not be alterable by and would limit the ordinary exercise of political power but which, unlike in the United States today, would not be a permanent impediment to political change.<sup>70</sup> Which is not to say that this ever represented a perfectly worked out constitutional doctrine. It was, after all, not one which was adopted, nor one which has been tested, experimented with, rationalised, and made legible by the long experience of history and the test of practical application. Nor was Madison consistent in this view: the older Madison expressed fear that under such a system, ‘every new Legislative opinion might make a new Constitution’ in the 1820s.<sup>71</sup> In fact, Madison may never even have entirely worked out the constitutional implications of making a limited *ex ante* ‘revisionary power’ the principle guardian of the constitution, although as we have seen its practical consequences fit neatly with his broader constitutional thinking. But whether he did or not, putting these different aspects of his vision together and ‘imagining another Madisonian constitution’, to borrow Jonathan Riley’s phrase, provides us with an alternative vision of what the constitutional order in the United States might look like.<sup>72</sup> And for all the lacunae which Madison did not fill, it is an alternative vision which has arresting implications for thinking about the prospect of constitutional reform today.

---

<sup>70</sup> Interestingly, Bruce Ackerman suggests that the legislative-driven process of constitutional amendment was intended to accomplish a similar effect, writing that ‘Both higher and normal lawmaking were federalistic and assembly-driven processes. A success on the higher track would be codified in a legislative-looking document called an “amendment”; a success on the normal track would be codified in one called a “statute.” This system, Ackerman contends, broke down during the Jefferson Administration. Bruce Ackerman, *We the People: Foundations*, (Harvard University Press: Cambridge, 1993), p.70.

<sup>71</sup> Quoted in Rakove, ‘Judicial Power’, p.1546.

<sup>72</sup> Riley, ‘Imagining Another Madisonian Republic’.

## Putting the Constitution before the Court

The life of the law in America, Justice Oliver Wendell Holmes Jr. famously remarked, ‘has not been logic: it has been experience’.<sup>73</sup> As Holmes explained, rather than following a rational blueprint, of either divine or human origin, ‘The law embodies the story of a nation’s development through many centuries’ and was a product of the trials of history and not of ‘the axioms and corollaries of a book of mathematics’.<sup>74</sup> Although Holmes’ object of study was the Anglo-American Common Law, his observation applies equally to the field of American constitutional law. As perhaps the most idiosyncratic living historian of American Constitutionalism, Bruce Ackerman, has long contended, the formal continuity of the United States Constitution obscures the dramatic changes to the American constitutional order which have been wrought since the Founding.<sup>75</sup> The recent ascent of the Supreme Court to an undisputed position as the final arbiter of American political life must surely count amongst such revolutions.<sup>76</sup> According to a growing academic and polemical literature critical of the rise of ‘juristocracy’, the crisis of contemporary constitutionalism is precisely the product of the dramatic expansion of the field of subjects for adjudication by constitutional courts since the latter half of the twentieth century, which has had a broadly depoliticising effect and deleterious consequences for democratic politics.<sup>77</sup> For its critics, the increasing judicialization of politics affected by modern constitutional courts has produced a juristocracy in which the most important political issues are removed from the arena of democratic politics and into the hands of judges acting as

---

<sup>73</sup> Oliver Wendell Holmes Jr., *The Common Law*, (London: Macmillan, 1881), p.1.

<sup>74</sup> *ibid.*

<sup>75</sup> Ackerman, *We the People: Foundations*, pp.58-163 This contention is explored at length in the second volume, see Bruce Ackerman, *We the People: Transformations*, (Harvard University Press: Cambridge, 1998).

<sup>76</sup> As Ackerman argues in the third volume of his *We the People* trilogy, this has been particularly the case since the Civil Rights Revolution of the 1960s. Bruce Ackerman, *We the People: The Civil Rights Revolution*, (Harvard University Press: Cambridge, 2014).

<sup>77</sup> For an earlier statement of this perspective, see Jeremy Waldron, ‘The Core of the Case Against Judicial Review’, *Yale Law Journal*, 115:6, (2006), 1386-95. For more recent interventions, see Doerfler and Moyn, ‘Democratizing the Supreme Court’, Samuel Moyn, ‘Written Statement of Samuel Moyn to the Presidential Commission on the Supreme Court of the United States’ published online, June 30<sup>th</sup> 2021, [<https://www.whitehouse.gov/wp-content/uploads/2021/06/Moyn-Testimony.pdf>, Last accessed 12/04/2024], pp.3-4 and Loughlin, Against, pp.16-22. In the popular press, see amongst many other articles, Ryan D. Doerfler and Samuel Moyn, ‘The Constitution Is Broken and Should Not Be Reclaimed’, *New York Times*, 19<sup>th</sup> August, 2022, [<https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html>, Last accessed 12/04/2024] and Ryan D. Doerfler and Samuel Moyn, ‘A Plea to Liberals on the Supreme Court: Dissent With Democracy in Mind’, *New York Times*, 20<sup>th</sup> December, 2022, [<https://www.nytimes.com/2022/12/20/opinion/supreme-court-liberal-dissent.html>, Last accessed 12/04/2024]

interpreters of a more or less static constitution. Empowered by both an increase in the range of subjects for judicial oversight and an expansive view of the nature of judicial review over a 'living' constitution, influential jurists and political theorists have come to argue that the rule of law has given way to the rule of judges "and a regime of judge-made law" as the British jurist and former judge Jonathan Sumption has put it.<sup>78</sup>

Although this process began in the early twentieth century with the rise of the administrative state, it has accelerated since the 1960s as the expansion of individual, human, and civil rights legislation has brought almost all of human life within the purview of judicial power.<sup>79</sup> In principle, there is nothing undemocratic about this. As Hamilton wrote, in a constitutional democracy, it is eminently sensible that "the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."<sup>80</sup> In practice, however, not all constitutions represent the intention of the people. Many have ossified under the onerous pressure of near impossible amendment rules, as in the United States, in other cases, a now vast body of international legal obligations and supranational constitutional laws bind states even where the will of the people inclines towards change. Constitutionalism, founded upon the principle of the people's supremacy over all other sources of political power, now places obstacles to the exercise of power by electoral majorities which even popular majorities are increasingly unable to alter and which, in the case of international obligations, even supermajorities are unable to remove. Not only is the legitimacy of such limits normatively dubious, but it has also produced a concomitant collapse in the public legitimacy of both constitutional limits and the judicial institutions which enforce them, with deleterious consequences for the prospects of constitutional government.

What, therefore, is to be done? In the American case (upon which I will now focus) one answer, provided by Jeremy Waldron, Samuel Moyn and Ryan Doerffler, is for courts to abdicate some of the expansive new powers which they have acquired over the last century and return to a

---

<sup>78</sup> Jonathan Sumption, *Trials of the State: Law and the Decline of Politics*, (Polity: London, 2019), p.x. See Loughlin, *Against Constitutionalism*, pp.1-24.

<sup>79</sup> Loughlin, *Against Constitutionalism*, pp.111-163, 179-190.

<sup>80</sup> Alexander Hamilton, 'Federalist No.78', p.380.

deferential stance towards the political process.<sup>81</sup> As Moyn and Doerffler have argued, this could be achieved either through voluntary self-limitation or, more probably, through serious institutional reform effected by the legislative branch (which retains the power to determine the composition, powers, and form of the Supreme Court under the constitution).<sup>82</sup> Another, more radical possibility, proposed by the British jurist Martin Loughlin is to reject constitutionalism altogether, a possibility which Loughlin leaves vague and may encompass both the abolition of courts exercising judicial review or of the written, binding, constitution as such.<sup>83</sup> In a related vein, Mark Tushnet has proposed the replacement of judicial constitutionalism with a popular and populist constitutionalism enforced equally by the three branches of government and the people themselves.<sup>84</sup> Yet the prospects of representative and democratic government without constitutionalism, and therefore without some mechanism for the enforcement of the constitution, seem poor. But perhaps the ideas from the American Founding discussed in this paper provide one possible answer.

As we have seen, towards the end of his life, Madison began to fear that, were the legislature empowered to override constitutional limits, ‘every new Legislative opinion might make a new Constitution’. For this reason, we can surmise, the elder Madison would have rejected his youthful enthusiasm for entrusting the final say on the constitutionality of legislation to a Council of Revision, and he appeared to be warming to the Supreme Court as an alternative, impartial, constitutional umpire. But, when Madison wrote, judicial review remained uncommon. The judiciary appeared, largely, to have been tamed by the Jeffersonian ‘Revolution of 1800’ and subordinated to electoral-political authority.<sup>85</sup> Conditions today could not be more different. Regardless of where one stands on the composition of recent Supreme Courts, it is quite clear that the Supreme Court as an institution now possesses considerable power beyond the scope of popular accountability, which its members have proven willing to wield to more or less partisan ends for at least half a century. In so doing, they

---

<sup>81</sup> Waldron ‘Denouncing Dobbs’.

<sup>82</sup> Doerffler and Samuel Moyn, ‘Democratizing the Supreme Court’.

<sup>83</sup> Although Loughlin’s book is entitled *Against Constitutionalism*, there is no concrete alternative to constitutional government given, although Loughlin associates ‘constitutionalism’ explicitly with judicial review and, at times, differentiates it from the existence of a constitution without specifying what this entails.

<sup>84</sup> Mark Tushnet, *Taking the Constitution Away from the Courts*.

<sup>85</sup> Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy*, (Harvard University Press: Cambridge, 2005), pp.163-198.

have facilitated such change to the constitutional order of the United States that we might credibly fear that every new *Judicial* opinion threatens a new Constitution. This being so, the case against entrusting the final say on the constitutionality of legislation to a legislative supermajority looks far less threatening to constitutional integrity than it did to Madison.

The model of the Council of Revision also has the distinct advantage that it balances between ‘political’ visions of the constitution, which would abolish restraints on duly constituted political authorities altogether, and legal constitutions which allow constitutional flexibility only on extraordinary occasions. Under this system, most unconstitutional legislation could be prevented by an authority combining the legal expertise of the judiciary with the political legitimacy and prudence of the executive, stopping a power-hungry legislative majority from infringing upon the rights of the other branches or the people. But it would not stop an overwhelming popular majority from passing popular legislation on the basis of constitutional contradiction, or, worse still, allow an unelected Supreme Court to overturn legislation supported by all the other branches years after the fact. And if this model seems fanciful, it should be noted that it functioned as intended in New York for almost half a century and that it quite closely resembles the *ex-ante* review of the compatibility between statutes and the constitution by the *Conseil constitutionnel* in France.<sup>86</sup> In both cases, entrusting a limited constitutional negative to an explicitly political institution did not lead to the breakdown of the constitution or open violation thereof by other institutions. Nor is this solution as radical as it first seems: it would deprive the courts only of the right to strike down statute, not to review administrative or executive actions, nor to determine the meaning the law. All, in other words, that it would do is ensure that the will of the legislature, as the most direct expression of the people, would be the ultimate arbiter of legislative constitutionality, provided a significant majority could be arraigned in favour of a constitutionally ambiguous statute.

As we have already seen, there are a number of potential advantages to this model identified by its Madisonian supporters, including that it would allow greater constitutional flexibility, and that it would possess greater legitimacy than the exercise of judicial review. To this I would only add a few

---

<sup>86</sup> On the *Conseil constitutionnel*, see Guillaume Tusseau, ‘The End of a French Anomaly’, *Pouvoirs*, 137, 5-17.

observations about the respective natures of judicial and political authorities and the long-term stability of the political process. Whether or not the Founders intended its exercise, no one disputes that judicial review remained underdeveloped at the time of the founding, its precise nature remaining to be worked out through its exercise. For the writers of the Constitution judicial power was supposed, as we have seen, to be exercised within a very limited sphere, offering considerable discretion to political authorities on matters of policy. This is obviously not the case today. Partly this is because the law now intrudes far further into our lives than it did at the end of the eighteenth century, partly it is because individuals and corporate entities claim far more (and far more robust) rights against states today than in 1787. Judges were largely expected to remain relatively apolitical actors confined to a distinct sphere of legal procedure. Today we think about these things quite differently. Experience has shown that all constitutional, and many other legal, questions are also *political* in their nature and that the convention of judicial neutrality does not change this.<sup>87</sup> Consequently, judges are drawn into explicitly political and often *partisan* disputes in which they may lack the legitimacy to override political programmes supported by democratic majorities and by which they are transformed into partisans of one faction or another, however they rule.

Such a situation is deleterious to the conduct of politics, threatening to suck all politics, to misuse a Madisonian phrase, into an ‘impetuous vortex’ of legal arbitration, reducing it from open struggle over the direction of our common life into a matter of technical arbitration, obscuring a legal oligarchy.<sup>88</sup> But it also undermines the judiciary, transforming it from a third party capable of commanding the respect necessary to resolve legal disputes to a distrusted object of partisan hatreds. Taking some of the most controversial questions out of the hands of the courts thus has the dual benefit of preventing constitutional issues from being removed from the sphere of political contestation entirely *and* of preventing the ordinary judiciary from being drawn into politics. In a sense, this latter benefit is the more important of the two: although it lacks the glamour of

---

<sup>87</sup> The classic statement of this case is found in Carl Schmitt, ‘The guardian of the constitution: Schmitt’s argument against constitutional review’, in Lars Vinx, ed. *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, (Cambridge University Press: Cambridge, 2015), 79-124.

<sup>88</sup> James Madison, ‘The Federalist No.48’, p.241. Madison, of course, believed this vortex to be the claims to unlimited power of the legislature.

constitutional law, *ordinary* law is more important in the ordinary course of life. Constitutional crises are mercifully rare, but a great many people will interact with the ordinary courts, and it is of vital importance that their neutrality and public legitimacy are not impugned by a perception of judicial politicisation.

These are not simply idle academic concerns, but bare seriously upon the operation and legitimacy of the constitution of the United States and other countries which have adopted the practice of judicial review, a camp from which there are now almost no dissenters in the democratic world. This paper has been driven by a conviction that although contemporary critics of juristocracy have accurately diagnosed the disease, they seem unable to chart a path forward for their patient, and that history may yet hold out the possibility of a cure. The model offered by the Council of Revision may not be that cure. But its importance to the Founding generation, the alternative constitutional vision which underscored it, and its differences to the contemporary model, hold out the tantalising possibility of alternative constitutional structures, which may yet breathe new life into constitutional democracy and restore the primacy of politics.

**Angus Harwood Brown**

**Gonville and Caius College, University of Cambridge**