

JEFFERSON ON JUDICIAL REVIEW: CONSISTENCY THROUGH CHANGE

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RECENT AMERICAN history suggests that the "liberal" attitude toward judicial review varies with the relative "liberalism" of the Supreme Court. When in the years just prior to 1937 the Court was generally more conservative than the legislative branches of government, "liberals" found judicial review quite undemocratic. More recently—and particularly since the *School Segregation Cases*¹—"liberals" have found judicial review a useful adjunct to democracy.² Conversely, of course, the "conservative" view of the Court has shifted from veneration to distrust. Thomas Jefferson's attitude toward the judiciary seems to have been similarly flexible, though his "inconsistency" is better explained not in terms of the comparative "liberalism" of the various agencies of government, but in terms of their changing, relative tendencies towards "tyranny." Finding that Jefferson was at first more hospitable toward judicial review than he was later on, Dumas Malone offers this explanation:

he generally opposed such tyrannies as seemed most menacing at a particular time. . . . [At first] the danger of judicial supremacy was exceedingly remote. Also, the American government was heavily overbalanced on the side of the states, and neither here nor elsewhere in this period of constitutional discussion did he appear as a notable champion of the latter. The dangers of the new system [a Federalist judiciary headed by John Marshall] which impressed him most, when he finally learned just what it was to be, were those relating to the liberty of individuals.³

Mr. Malone does not spell out the details of the alleged Jeffersonian switch. A recent critic argues that there was no switch; that Jefferson consistently rejected judicial review, and steadfastly supported what may be called "concurrent review."⁴ The latter contemplates that each of the three branches of government "is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action . . ."⁵ The present thesis is that while Jefferson

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¹ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

² See Roche, Book Review, 2 MASS. REV. 573 (1961).

³ MALONE, *JEFFERSON AND THE RIGHTS OF MAN* 163-64 (1951).

⁴ Krislov, *The Alleged Inconsistency: A Revised Version*, 10 J. PUB. L. 117 (1961). This was a response to Mendelson, *Jefferson on Judicial Review*, 10 J. PUB. L. 113 (1961).

⁵ Letter to Judge Roane, Sept. 6, 1819, 15 THE WRITINGS OF THOMAS JEFFERSON 212, 214 (Bergh ed. 1904).

undoubtedly advocated concurrent review after 1800, earlier he favored a far more important role for the judiciary.

In his famous *Notes on Virginia* (1782), Jefferson examined his state's government and found it wanting, particularly in that its constitution (1776) was only a legislative act and as such alterable by legislation.⁶ Thus, in his view there was "no legal obstacle to the assumption by the assembly of all the powers legislative, executive, and judiciary. . . ."⁷ In 1783 he proposed a new constitution to be adopted by a constitutional convention whose product would be supreme vis-à-vis ordinary legislation—the new document to contain the following provision: "The General Assembly shall not have power to infringe this constitution. . . ."⁸ To enforce this, *i.e.*, to provide a safeguard against legislative tyranny of the kind that he feared under the existing constitution, he provided a "legal obstacle." This was a special Council of Revision made up of representatives of the executive and judicial branches, and armed with the power to veto legislation.⁹ Obviously in this era Jefferson was not satisfied to let a simple legislative majority enjoy the freedom from an outside, *over-ruling* power that concurrent review contemplates.

In 1784 he listed the "rational and necessary" objects for the attainment of which he had "long wished to see a [state constitutional] convention called." Among the objects listed was "making our constitution paramount [vis-à-vis] . . . the ordinary legislature so that all acts contradictory to it may be *adjudged* null. . . ."¹⁰

By 1786 he seemed to consider judicial review an accepted principle throughout the country: "I have not heard that in the other states they have ever infringed their constitutions; and I suppose they have not done it; as the judges would consider any law as void, which was contrary to the constitution."¹¹ Shortly thereafter in 1787 he wrote Madison with respect to the proposed Constitution of the United States: "I like the negative [veto] given to the Executive, conjointly with a third of either House; though I should have liked it better, had the judiciary been associated for that purpose,

⁶ 2 *Id.* at 1, 165–74.

⁷ *Id.* at 173.

⁸ Jefferson's Draft of a Constitution for Virginia (1783), 6 THE PAPERS OF THOMAS JEFFERSON 294, 298 (Boyd ed. 1952).

⁹ *Id.* at 302–03.

¹⁰ Letter to Pendleton, May 25, 1784, 7 THE PAPERS OF THOMAS JEFFERSON 292, 293 (Boyd ed. 1952). (Emphasis added.) As Mr. Krislov recognizes, *supra* note 4, at 121, concurrent review contemplates that a court may refuse to enforce a measure which it deems unconstitutional. Unlike judicial review, this does not mean that the court may invalidate the measure, *i.e.*, adjudge it null and void.

¹¹ Letter to Demeunier, Jan. 24, 1786, 10 THE WRITINGS OF THOMAS JEFFERSON 11, 18 (Bergh ed. 1904).

or invested separately with a similar power.”¹² Obviously Jefferson wanted the judiciary to have some part in a veto, or “legal obstacle,” against legislative tyranny—whether it was the council-of-revision type, or a separate judicial veto, did not seem to matter. Obviously, too, at this juncture Jefferson thought the judiciary was to have no veto power at all either “conjointly” or “separately”—otherwise he would not have written that “he should have liked it better,” if the Constitution had provided for one or the other.

Shortly thereafter in *The Federalist*, No. 78, Hamilton demonstrated that a judicial veto (judicial review) was implicit in the Constitution. Indeed the views thus expressed are reflected in large part in *Marbury v. Madison*.¹³ Then evidently accepting Hamilton’s position,¹⁴ though of course he may have come upon it elsewhere, Jefferson reversed himself by recognizing the existence of a judicial veto—which he endorsed in rather lyrical terms. Writing Madison in 1789 about the proposed Bill of Rights, he counseled:

In the arguments in favor of a declaration of rights, you omit one which has great weight with me; the legal check which it puts into the hands of the judiciary. This is a body, which, if rendered independent and kept strictly to their own department, merits great confidence for their learning and integrity. In fact, what degree of confidence would be too much, for a body composed of such men as Wythe, Blair and Pendleton?¹⁵

It seems clear that the “legal check” here contemplated was the exact equivalent in *purpose and desired effect* of the “legal obstacle” that he had mentioned in conjunction with the Virginia constitution; namely, a device to enforce the principle that the legislature “shall not have power to infringe this constitution. . . .” After all, in the 1787 letter to Madison, Jefferson refers to the council-of-revision type of veto and the separate judicial veto as though he deemed them equally desirable *alternatives* as checks upon legislative abuse. It may well be that, given a choice, Jefferson would have preferred the former—as his draft proposal of a constitution for the State of Virginia suggests. But with respect to the federal constitution he had little choice. It came to him largely as a *fait accompli*, and plainly there was far more likelihood of finding in it a judicial veto than a council of revision.

¹² Letter to Madison, Dec. 20, 1787, 6 *id.* at 385, 387. Emphasis added to those words which Mr. Krislov appears to have overlooked—overlooking them results in a distorted understanding of the letter, and a gratuitous mistake about an “overnight” change of mind. Krislov, *supra* note 4, at 119, 122.

¹³ 5 U.S. (1 Cranch) 137 (1803).

¹⁴ Mr. Krislov asserts that Jefferson had not read the *Federalist* carefully, *supra* note 4, at 122. Jefferson wrote, “I read it with care, pleasure and improvement . . .” Letter to Madison, Nov. 18, 1788, 7 *THE WRITINGS OF THOMAS JEFFERSON* 183 (Bergh ed. 1904).

¹⁵ Letter to Madison, March 15, 1789, 7 *id.* at 309. Speaking of an exchange of thoughts that culminated in this letter, Irving Brant said, “Thus it was through Jefferson that Madison was brought to the doctrine of judicial review, and it was from Madison that Jefferson derived the idea (but not the details) of the Kentucky Resolutions.” 3 *JAMES MADISON: FATHER OF THE CONSTITUTION* 267 (1950).

It is suggested that the "legal check" which Jefferson had in mind at this juncture was nothing more than concurrent review. But the latter means merely that while the judiciary may construe the Constitution in matters that come before it, such constructions are not binding upon other branches of government. In short the legislature is its own independent judge of the validity of its own conduct. This was precisely the defect of the Virginia constitution against which Jefferson had fought—the defect he proposed to cure by a super-legislative provision that the "General Assembly shall not have power to infringe this constitution . . ." ¹⁶ (This provision of course was to be enforced by an *outside* "legal obstacle.") Similarly concurrent review does not seem to jibe with either the "conjoint" negative, or the "negative . . . invested separately" in the judiciary, one or the other of which Jefferson felt should have been in the federal constitution as a device for *overriding* Congress.¹⁷ Nor does concurrent review sound like an argument of such "great weight" that Jefferson would suggest Madison should use it in support of the proposed Bill of Rights.¹⁸ If Madison had argued concurrent review publicly and been questioned on the point, he would have had to admit that it would have no binding effect upon Congress, the executive, or any other agency of government (including the states?)—that, whatever the Supreme Court might hold, no other branch of government would be under any legal or moral obligation to follow anything but its own conception of the limits of its own power. For example, the Court might hold a particular established church unconstitutional, nevertheless it would be perfectly legal for Congress and the executive to maintain the establishment. I suggest that this was not the "weighty argument" that Jefferson thought should be used in support of the Bill of Rights—but rather that he had in mind the kind of argument he himself had used with respect to the need for a "legal obstacle" to restrain the Virginia legislature from violating state constitutional limitations.

Having suggested that Jefferson believed in judicial review (or something quite similar) prior to 1800, and that he abandoned it in favor of concurrent review thereafter, I must now attempt to account for the change. My position like Dumas Malone's, comes to this: Jefferson's means changed in the face of changing circumstances; his ends remained constant. When in the beginning "the danger of judicial supremacy seemed exceedingly remote," when Congress seemed dangerous and the federal judiciary the most "harmless" branch of government,¹⁹ a beefing-up of judicial power would promote balanced government. Later, when in Jefferson's view judicial supremacy became a

¹⁶ Jefferson's Draft of a Constitution for Virginia (1783), 6 THE PAPERS OF THOMAS JEFFERSON 294, 298 (Boyd ed. 1952).

¹⁷ See text at note 12 *supra*.

¹⁸ See text at note 15 *supra*.

¹⁹ See text at notes 21 & 23 *infra*.

reality, a reduction of court power would promote balance. If he was flexible as to means, Jefferson's "deeper consistency lay in his continued advocacy of a balanced government."²⁰

In the same 1789 letter to Madison in which he expressed "great confidence" in a properly organized judiciary, Jefferson observed that: "The executive, in our governments, is not the sole, it is scarcely the principal object of my jealousy. The tyranny of the legislatures is the most formidable dread at present, and will be for many years. That of the executive will come in its turn; but it will be at a remote period."²¹ Since, as he saw it then, the danger lay in the legislature and the executive, he would naturally look for protection in other quarters. He found it not only in a "legal check" (as we have seen), but also in state check: "The jealousy of the subordinate governments is a precious reliance."²² This of course found expression later in the Virginia and Kentucky Resolutions. The point is that Jefferson's attention prior to 1800 was oriented toward Congress and the executive as the dangerous branches of government. It cannot be said that he was thinking only of the moment, for he observed that while the one was immediately dangerous, the other would be a threat later. Yet he foresaw no trouble from the judiciary. Later he recognized his error:

At the establishment of our constitutions, the judiciary bodies were supposed to be the most helpless and harmless members of the government. Experience, however, soon showed in what way they were to become the most dangerous; that the insufficiency of the means provided for their removal gave them a freehold and irresponsibility in office.²³

What had happened in the interval between these two letters that changed Jefferson's mind about the relative danger of the courts and the other branches of government is plain. The Federalists had adopted the Alien and Sedition Acts (1798) in an effort to defeat Jefferson's Republican Party. Federalist judges had enforced the sedition provisions viciously. When these moves had failed to secure the great election of 1800 for the Federalist Party, it used its last days in office to expand and pack the federal bench (1801). As Jefferson saw it, the Federalists:

have retired into the judiciary as a stronghold. There the remains of federalism are to be preserved and fed from the treasury, and from that battery all the works of republicanism are to be beaten down and erased. By a fraudulent use of the Constitution, which has made judges irremovable, they have multiplied useless judges merely to strengthen their phalanx.²⁴

²⁰ MALONE, *op. cit.* *supra* note 3, at 163.

²¹ Letter to Madison, *supra* note 15, at 312.

²² *Id.* at 311.

²³ Letter to Coray, Oct. 31, 1823, 7 THE WRITINGS OF THOMAS JEFFERSON 318, 322 (Washington ed. 1854).

²⁴ Letter to Dickinson, Dec. 19, 1801, 10 THE WRITINGS OF THOMAS JEFFERSON 301, 302 (Bergh ed. 1904).

These fears of an overriding judiciary were confirmed some two years later in *Marbury v. Madison*.²⁵ The Jeffersonians had defeated their Federalist rivals in the political arena—only to find them entrenched in the judiciary with the formidable power of judicial review. Under such circumstances, perhaps, a Jeffersonian change in attitude as to the extent of judicial power is not quite the “needless and redundant” change in principle “at a moment of triumph” that Mr. Krislov has suggested.²⁶

I do not find that Jefferson ever formulated the doctrine of concurrent review prior to 1801, *i.e.*, prior to his discovery that the judicial lamb had become in fact a wolf. As late as September, 1798, he wrote to a friend that despite the “alarm and jealousy” then sweeping the country “the laws of the land, administered by upright judges, would protect you from any exercise of power unauthorized by the Constitution of the United States.”²⁷ Is it likely that Jefferson would have spoken thus of “unauthorized” power, if at that time he believed at least three agencies had the power—independently and concurrently—to determine what was authorized and what was not?

Concurrent review may have been an afterthought inspired by the Federalist threat to destroy Jeffersonianism from a stronghold in the judiciary. The most immediate difficulty from the Jeffersonian point of view was that Federalist judges, including some Supreme Court Justices on Circuit, abused the Bill of Rights by abetting persecution in a series of Sedition Act cases.²⁸ The judiciary having failed to provide the “legal check,” Jefferson (with Madison) turned to his second line of defense (the state check) in the Virginia and Kentucky Resolutions (1798–1799). When this also failed, and *after he became President*, he may have hit upon concurrent review. In any case what seems to have been his first enunciation of that doctrine appeared in the draft of a message to Congress (December, 1801). But, for whatever reason, it was deleted before delivery.²⁹

It is noteworthy that in the context of the Sedition Act convictions concurrent review is not entirely unlike political supremacy. If the courts had gone along with Jefferson's understanding of the Bill of Rights, well and good. When they failed to do so concurrent review provided the rationale for a “final” check via the executive pardoning power and the legislative power to repay fines. It may be significant that in what appears to be Jefferson's first “published” exposition of the doctrine (the year after *Marbury v. Madison*), he illustrated his point by reference to the Sedition Act prosecutions:

²⁵ 5 U.S. (1 Cranch) 137 (1803).

²⁶ Krislov, *supra* note 4, at 123.

²⁷ Letter to Rowan, Sept. 26, 1798, 10 THE WRITINGS OF THOMAS JEFFERSON 59, 61 (Bergh ed. 1904).

²⁸ See SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 88–98 (1954).

²⁹ 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 265–66 (1935).

nothing in the Constitution has given [the judges] a right to decide for the Executive, more than to the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. The judges, believing the [Sedition] law constitutional, had a right to pass a sentence of fine and imprisonment: because the power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, were [sic] bound to remit the execution of it; because that power has been confided to them [sic] by the Constitution.³⁰

As a matter of fact, President Jefferson did pardon all who had been convicted and stopped all pending Sedition Act prosecutions. Similarly, Congress did in fact repay the fines that had been imposed. It is crucial that Jefferson says he exercised the pardoning power not on grounds of mercy or new evidence, but on constitutional grounds. Yet in the end he was not completely sure that even concurrent review by judges was desirable. Thus, in 1815 he observed that: "another opinion entertained by some men of such judgment and information as to lessen my confidence in my own. . . . [holds] that the legislature alone is the exclusive expounder of the sense of the Constitution, in every part of it whatever."³¹

Mr. Krislov tries to explain the absence of a "precise statement of concurrent review prior to 1801" with the assertion that "comment on construction of written, superior constitutions was academic prior to 1789 . . ."³² In fact there was considerable non-academic discussion of that problem. "For the period between ca. 1778 and 1789, evidence of the evolving theory or practice of reviewing legislation against a constitutional standard is available with regard, *inter alia*, to Virginia, Rhode Island, the Carolinas, New York, Connecticut, Massachusetts, and New Jersey."³³ Indeed, Jefferson's *Notes on Virginia* (1782) were in part one side of a debate on the issue of whether the Virginia constitution of 1776 was a "written, superior constitution" or merely a legislative act.³⁴ The other side of the debate is reflected in *Commonwealth v. Caton*,³⁵ in which seven of the eight judges of Virginia's highest court "were of opinion, that [they] had power to declare any resolution or act of the legislature, or of either branch of it, to be unconstitutional and void . . ."³⁶ Jefferson's position, of course, was completely sympathetic in principle; his point being merely that, since the 1776 constitution was only an ordinary statute, it offered no real "legal obstacle" to legislative tyranny.

³⁰ Letter to Mrs. John Adams, Sept. 11, 1804, 11 THE WRITINGS OF THOMAS JEFFERSON 49, 50-51 (Bergh ed. 1904).

³¹ Letter to Torrance, 14 *id.* at 302, 305.

³² Krislov, *supra* note 4, at 119, 120.

³³ DOWLING, CASES ON CONSTITUTIONAL LAW 70 (5th ed. 1954). See also HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY ch. 5 (1932).

³⁴ See text at notes 6 and 7 *supra*.

³⁵ 8 Va. (4 Call.) 5 (1782).

³⁶ *Id.* at 20.

Accordingly, as we have seen, he advocated a "written, superior constitution" that would remove all doubt as to whether or not there were effective limitations on legislative authority.

It was in *Commonwealth v. Caton* that Jefferson's great legal hero, Judge Wythe, proclaimed: "[I]f the whole legislature . . . should overleap the bounds prescribed to them by the people, I . . . will meet the united powers, at my seat in this tribunal; and, pointing to the Constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further."³⁷ It is difficult to believe that, if in this era the articulate Jefferson favored concurrent review, he could in view of *Caton* use the term "legal check" without explaining that he meant concurrent, rather than judicial, review. Indeed, an explanation would seem especially necessary in a letter to a fellow Virginia specialist in constitutional law. Yet this is precisely the term he used *simpliciter* in writing to Madison that "In the arguments in favor of a declaration of rights, you omit one which has great weight with me; the legal check which it puts into the hands of the judiciary."³⁸ The point need not be put on such narrow grounds. Is it likely that Jefferson would use in a *special, unexplained* sense a term which so naturally described a doctrine that had been spelled out in the *Federalist* and in the "evolving theory or practice" of most states—to say nothing of *Dr. Bonham's Case*,³⁹ colonial experience with the Privy Council,⁴⁰ Otis' famous argument against Writs of Assistance, and Jefferson's own letter of 1786 in which he seemed to consider judicial review as a generally accepted principle.⁴¹

Even Mr. Krislov has not been able to find any Jeffersonian enunciation of the doctrine of concurrent review to which the term "legal check" in the 1789 letter may have been a shorthand reference. Insisting that Jefferson favored concurrent review throughout his career, Mr. Krislov offers nothing but a "presage" of that doctrine prior to 1801.⁴² This he purports to find in a letter of June 20, 1787, in which Jefferson urged qualified judicial, as opposed to exclusive congressional, control over state legislation in the interest of national supremacy:

the plaintiff urges the Confederation, and the treaty made under that, as controlling the State law; the [state] judges are weak enough to decide according to the views of their legislature. An appeal to a federal court sets all to rights. It will be said, that this court may encroach on the jurisdiction of the State courts. It may. But there will be a power, to wit, Congress, to watch and restrain them.⁴³

³⁷ *Id.* at 8.

³⁸ Letter to Madison, *supra* note 15, at 309.

³⁹ 8 Coke Reports 114a, 118a (1610).

⁴⁰ See, e.g., HAINES, *op. cit.* *supra* note 33, at ch. 3.

⁴¹ *Ibid.* See text at note 11 *supra*.

⁴² Krislov, *supra* note 4, at 120, 121.

⁴³ Letter to Madison, June 20, 1787, 6 THE WRITINGS OF THOMAS JEFFERSON 131, 133 (Bergh ed. 1904).

I suggest that this is no evidence of even a "presage" of concurrent review. The essence of the latter is that the agency reviewed is not bound by the review, but being "truly independent . . . has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action. . . ." ⁴⁴ Obviously in the letter in question Jefferson did not even vaguely contemplate any such concurrent authority for the states. Similarly the suggested relationship between Congress and the federal judiciary is a vertical or appellate, not a concurrent, relationship. It leaves no possibility of two or more competing interpretations of the same constitutional provision (which is the vice of concurrent review). As though recognizing the weakness of his own position on this point, Mr. Krislov slides away from it by concluding that in any case "the one concept [that Jefferson's proposal] . . . is clearly inconsistent with is the notion of an inherent and unique power of judicial interpretation." ⁴⁵ This thrust is wide of the mark; no one has claimed that Jefferson believed in an "inherent and unique power of judicial interpretation." ⁴⁶ What has been suggested is that prior to 1800 Jefferson believed in judicial review. Moreover the review of *state* legislation that he here proposed is remarkably like that recognized in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, ⁴⁷ and more recently in *Prudential Life Ins. Co. v. Benjamin*. ⁴⁸ If what these cases and Jefferson suggest constitutes a modified judicial review, it relates only to *state* measures. It has no bearing on Jefferson's conception of the "legal check" upon national acts *except to suggest that in the early period Jefferson wanted final authoritative, rather than concurrent, interpretations of the Constitution.*

The only other purported hint of concurrent review that Mr. Krislov has been able to find prior to 1801 is Jefferson's statement that: "The negative of the President is the shield provided by the Constitution to protect against the invasions of the legislature: 1. The right of the Executive. 2. Of the Judiciary. 3. Of the States" ⁴⁹ Of course the presidential veto may protect the states, the executive and the judiciary. If that converts judicial review into concurrent review, we have never had judicial review in this country. "It would seem," Mr. Krislov says, "that under exclusive review the judiciary would have been well able to take care of itself in the realm of constitutional interpretation." ⁵⁰ His point apparently is that Jefferson would not have men-

⁴⁴ Letter to Judge Roane, *supra* note 5, at 214.

⁴⁵ Krislov, *supra* note 4, at 121.

⁴⁶ If Jefferson thought any agency had an "inherent and unique power" of interpretation, presumably it would be the states. See discussion below with respect to the Virginia and Kentucky Resolution.

⁴⁷ 59 U.S. (18 How.) 421 (1856).

⁴⁸ 328 U.S. 408 (1946).

⁴⁹ Opinion Against the Constitutionality of a National Bank, 3 THE WRITINGS OF THOMAS JEFFERSON 145, 152 (Bergh ed. 1904).

⁵⁰ Krislov, *supra* note 4, at 121.

tioned presidential protection of the judiciary, if he had thought the courts had their own, more effective, power of judicial review to protect themselves. The answer is that few, if any, advocates of judicial review have ever suggested that it and the presidential veto are mutually exclusive, incompatible, or that either makes the other superfluous. One difference between them is that the veto gives its protection *ab initio*; judicial review cannot protect anything until after a case arises—and there is no guarantee that one will arise. The short of it is that the presidential veto and judicial review have existed side by side since *Marbury v. Madison*.

As suggested above, when Jefferson in the early period found legislatures and executives the chief source of danger, he would naturally seek protection in other quarters—namely, in a “legal check” and a state check. Mr. Krislov finds it “difficult to imagine why the judiciary should be granted exclusive power vis-à-vis the other two branches, yet share constitutional interpretation with the states.”⁵¹ Let Madison enlighten him:

However true, therefore, it may be that the judicial department is, in all questions submitted to it by the forms of the Constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the authorities of the other Departments of the [national] Government; not in relation to the rights of the parties to the constitutional compact [i.e. the states], from which the judicial as well as the other departments hold their delegated trusts.⁵²

In this passage, of course, Madison was explaining the theory of the Virginia and Kentucky Resolutions; namely, that the states, as “*the sovereign parties to the Constitution*,” must have the ultimate power of interpretation as an extraordinary safeguard against a failure in the regular, internal check and balance system.

Finally Mr. Krislov says that my “argument boils down to the hypothesis that Jefferson concocted concurrent review in order to explain his pardoning of the victims of the Alien and Sedition Acts.”⁵³ Apparently as Mr. Krislow indicates, Jefferson needed no excuse for the exercise of a clearly granted power in a “highly popular” cause. Why, then, did he go out of his way to give the elaborate and “unnecessary” explanation? Presumably because he was using the happy occasion as a vehicle to launch a new doctrine for future use in cases that might not be so clear, or so popular.

Mr. Krislov’s original article⁵⁴ questions the evidence that Jefferson favored *judicial* review prior to 1800, and clearly established that he favored *concurrent* review thereafter. But this is no substitute for affirmative evidence of what Jefferson stood for in the earlier period. Later,⁵⁵ as though recognizing this

⁵¹ *Id.* at 120.

⁵² 4 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 549–50 (1836).

⁵³ Krislov, *supra* note 4, at 123.

⁵⁴ Krislov, *Jefferson on Judicial Review*, 9 J. PUB. L. 374 (1960).

⁵⁵ Krislov, *The Alleged Inconsistency*, 10 J. PUB. L. 117, 120–21 (1961).

difficulty, Mr. Krislov offered the two "presages" discussed above—one of which, I suggest, entails no element of concurrency whatsoever: the other is simply a statement by Jefferson that the presidential veto is a "shield" to protect other agencies from congressional abuse (such a shield, of course, is completely compatible with judicial review; indeed, the two have lived side by side for more than a century and a half).

If my own evidence of what Jefferson thought in the early period falls short of conclusive proof, may we in the face of it *assume* that his "great silence" with respect to concurrent review prior to 1801 even presaged that doctrine? What a coincidence that, after years of constitutional discussion, Jefferson expounded concurrent review only after courts had replaced legislatures as "the great object of [his] fear. . . ."—and only after his first defenses (the "legal check" and the state check) had failed. Above all, how convenient to have thought of it (if such was the case) just as he came into control of the legislative and executive branches—when his opponents had retired into the judiciary as a battery of opposition to all that Jefferson cherished.