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LA VIE EN ROSE: JEREMY WALDRON AND RICHARD FALLON'S MEANDER THROUGH THE WONDERLAND OF JUDICIAL REVIEW

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I. RIGHTS VERSUS STRUCTURE

Form and substance, philosophers caution, are not differences in kind but interchangeable pawns, baubles that can be placed in the service of any cause, and so prove themselves good for nothing. This admonition strikes at the heart of Jeremy Waldron's "core case" against judicial review[1] and Richard Fallon's "uneasy"[2] rebuttal. Proceeding in lock-

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1 Jeremy Waldron, *The Core of the Case Against Judical Review*, 115 YALE L.J. 1346 (2006).

2 Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1729 (2008). Fallon's stumbling apology for judicial review finds its political match in President Bill Clinton's backhanded endorsement of abortion as something that should be "safe, legal and rare." Reasoning by analogy Fallon says that, *first*, by making the infringement of constitutional rights more rare judicial review contributes to the citizens' safety in the same way the *guilty beyond a reasonable doubt* standard—by making false convictions rare—keeps the innocent safe. *Id.* at 1695, 1696, 1706 & 1708. "An even closer analogy," Fallon then claims, is America's "multipart system of lawmaking," whose myriad checks and balances make it "difficult for majorities to legislate." *Id.* at 1706–07. As it is better to acquit the guilty than incarcerate the innocent, "it is presumptively worse for legislation to be enacted than not enacted, largely because of the threat that legislation might violate individual rights." *Id.* at 1707. The exclusionary rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), provides Fallon a "third analogy" which he is less inclined to rely on because this *judicially* mandated weighing of the scales against conviction

step Waldron and Fallon agree that judicial review to protect fundamental rights and judicial review to police "structural constitutional norms"[3] are different such that they can pass credible judgment on the propriety of judicial review used to "strike down statutes for violations of individual rights"[4] without so much as considering structural review. Waldron and Fallon further take it for granted that the two varieties of structural review they identify—review for "violations of federalism" and for "violation of . . . separation of powers principles" are the same.[5] These wooden identities and

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and in favor of acquittal "may tend to presuppose (rather than help to establish) the desirability of judicial review." Falon, *supra*, at 1707 n.56 (citing Miranda v. Arizona, 384 U.S. 436 (1966)). Analogies, however many or finely drawn they may be, are inherently suspect because they focus our attention on the ways diverse things look alike and away from their differences. Yet we ignore difference at our peril; and it would be perilous indeed not to follow the thread of difference Fallon has twisted into a knot of alleged likenesses. Working backwards from Fallon's "third analogy" we remark that *Miranda* is controversial precisely because there is a trenchant difference between lay jurors chosen from the people exercising the faculty of reasonable doubt as a matter of fact on a case by case basis; and a judicially imposed system imposed from on high which tips the scales in favor of acquittal not by giving the accused the benefit of the doubt but by discarding incriminating evidence which, if admitted, would establish guilt beyond a reasonable doubt in a juror's mind. Fallon's second analogy fails for the same reason. The only authority he cites for the proposition that the legislative process makes legislation difficult is *The Federalist No. 51* (James Madison), but there Madison says the opposite of what Fallon would have liked him to say. The subject of *The Federalist No. 51* is faction and how it should be controlled. The way is not to limit or check democracy by the anti-democratic externality of judicial review but to expand its sphere, to allow faction to multiply and prosper. The rough and tumble propagation of representative voices, not sterile recourse to a judge is, Madison expressly emphasizes, "[the] republican remedy for the diseases most incident to republican government." THE FEDERALIST NO. 10, at 84 (James Madison) (Clinton Rositer ed., 1961). Which brings us round to Fallon's first analogy, that a judge performing judicial review resembles a juror exercising reasonable doubt. This is not so. A means controlled by the citizens themselves not to convict the innocent is a far different proposition than a judicial mandate affirmatively articulating and then vouchsafing constitutional rights whose very substance is a matter of controversy and conjecture. While everyone agrees the innocent *should not* go to jail there is no consensus whether *The Bill of Rights* positively protects a woman's right to have an abortion or a person's election to engage in consensual sodomy. *See*, Lawrence v. Texas, 539 U.S. 558 (2003); Planned Parenthood v. Casey, 505 U.S. 833 (1992). Fichte's observation that at least so far as the "idea" is concerned "[t]he will of any single person is actually universal law, for all persons will the same thing" is factually correct when it comes to protecting the innocent, but dead wrong when less transparent forms of liberty are at stake. JOHANN GOTTLIEB FICHTE, SYSTEM OF ETHICS 241 (Daniel Breazeale & Guenter Zöller eds., New York: Cambridge University Press, 2005) (1798).

3 Fallon, *supra* note 2, at 1729. Waldron uses the related term "structural issues." Waldron, *supra* note 1, at 1358.

4 Waldron, *supra* note 1, at 1357.

5 Amongst the "structural constitutional norms," whose protection he declines to address Fallon expressly includes both the separation of powers principle and the "norms of constitutional federalism." Fallon, *supra* note 2, at 1729. Waldron is

differences permit Fallon and Waldron to distinguish a "structural constitution" apart from the "Bill of Rights."[6] Yet if there is one point of indecision the Framers wanted us to grasp it is that this kind of bright line division between substance and form,[7] between the essence of governmental functions and their structure, is illusory.

Madison takes up the subject directly when he "examine[s] the particular structure of th[e] government, and the distribution of th[e] mass of power among its constituent parts." He concedes that the powers enumerated in the Constitution are indistinctly blended amongst the various structures of the proposed government, but implores the people not to reject it on that basis, as incompatible with the ideal of "regular symmetry"[8] and the "beauty of form."[9] These he condemns as "abstract," some "artificial structure" which an "ingenious theorist [might] bestow on a Constitution planned in his closet or in his imagination," but which has no real world application.[10] Madison further insists that "parchment barriers," however finely drawn, are an ineffective restraint on the "encroaching spirit of power;"[11] that the difference, for example, between legislation and adjudication lies, not so much in the nature of the thing, but in the eye of the beholder.[12] "[W]hat," he asks "are many of the most important acts of legislation, but so many judicial determinations . . . ?" The inquiry is, if anything, more *a propos* today than in his time, for while Madison assumes that legislative judgments will not "concern[] the rights of single

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equally clear that the Constitution's "structural constraints" comprehend both the separation of powers principle and federalism. Waldron, *supra* note 1, at 1358.

6 Waldron, *supra* note 1, at 1358.

7 "The use of words is to express ideas," Madison asserts, but they are unequal to the task. "Inaccuracy" is "unavoidable" and it increases exponentially "according to the complexity and novelty of the objects defined." Even "[w]hen the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated." THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961).

8 *Id.* at 230.

9 THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

10 THE FEDERALIST NO. 37, *supra* note 7, at 230.

11 THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

12 "The faculties of the mind itself have never yet been distinguished and defined, with satisfactory precision, by all the efforts of the most acute and metaphysical philosophers. Sense, perception, judgment, desire, volition, memory, imagination, are found to be separated by such delicate shades and minute gradations that their boundaries have eluded the most subtle investigations, and remain a pregnant source of ingenious disquisition and controversy." THE FEDERALIST NO. 37, *supra* note 7, at 227.

persons"[13] the entire thrust of Waldron and Fallon's concern is whether the legislature or the judiciary[14] should determine individual rights.[15]

In light of Madison's instruction that "no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, [the] three great provinces"[16] of government, and his affirmation that the "impossibility and inexpediency of avoiding any mixture whatever,"[17] the distinction between *rights* and *structure*[18] which Waldron and

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13 THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

14 Waldron and Fallon's shared understanding that in a democracy the legislature should prevail and that judicial review is both dangerous and aberrant directly contradicts Madison's overarching fear of an uncontrollable legislature swallowing up everything into its "impetuous vortex," and Hamilton's insistent characterization of the judiciary as "next to nothing," and "the least dangerous" branch. THE FEDERALIST NO. 48, *supra* note 11, at 309; THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Waldron and Fallon accept, without question or analysis of any kind, Alexander Bickel's contrary judgment that what Hamilton called "the least dangerous" branch is in fact "the most extraordinarily powerful court of law the world has ever known." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 1 (2d ed. 1986). Should we not at least take another hard look at Hamilton's understanding that a judiciary lacking both the legislature's *purse*, and the executive's *sword* is in fact a toothless tiger? Is this not the still controlling lesson of *Ex parte Merryman*—of a president ignoring with impunity a judgment that his actions are unconstitutional? 17 F. Cas. 144 (C.C.D. Md. 1861). And while Waldron shows nothing but disdain for "[the] panic-stricken refusal among pro-choice advocates to even consider the case against judicial review," their fear of legislative supremacy is surely consonant with Madison's. Waldron, *supra* note 1, at 1351. One of the great ironies in today's abortion war is that those who condemn *Roe v. Wade*, 410 U.S. 113 (1973), as impossible to square with the Framers' original intent entirely overlook Madison's fear of the legislature and Hamilton's understanding of the judiciary as impotent.

15 It is both ironic and instructive that the most vexing issue in Madison's day was *taxation*, and that he questioned the legitimacy of a legislature to decide it, whereas today's most vexing issue is abortion and our attention is riveted on whether the judiciary may legitimately opine on that. "The apportionment of taxes on the various descriptions of property is," Madison declares, "an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice. Every shilling with which they overburden the inferior number, is a shilling saved to their own pockets." THE FEDERALIST NO. 10, *supra* note 13, at 80. Reversing the order, today's champions of legislative supremacy claim that politics not the judiciary must give "answers" to the "cruel questions" of the rights of life and of choice. Webster v. Reprod. Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part).

16 THE FEDERALIST NO. 37, *supra* note 7, at 228.

17 THE FEDERALIST NO. 47, *supra* note 9, at 304.

18 This Chinese wall entirely misapprehends Hamilton's understanding that the Constitution requires no separate Bill of Rights, that it is rather itself a Bill of Rights including both "the political privileges of the citizens in the *structure* and administration of the government," and the "immunities and modes of proceeding, which are relative to *personal and private concerns*." THE FEDERALIST NO. 84, at 515 (Alexander Hamilton) (Clinton Rossiter ed., 1961). This is no hallucination but the common ground of vigorous dissent in the notorious *Slaughter-House Cases*, 83 U.S. 36 (1873). Emphasizing that "[t]he terms privileges and immunities" are not

Fallon are so keen to interpose is not only ineffective but deleterious to the very "nature of a free government" where a synthetic "chain of connection" not an analytic differential "binds the whole fabric of the constitution in one indissoluble bond of unity and amity."[19]

Waldron, who first sets the rules by which Fallon then consents to play, confines his authority for the difference between *structural* review and *rights* review to one terse footnote which reads as follows: "The most famous judicial defense of judicial review, *Marbury v. Madison*, had nothing to do with individual rights. It was about Congress's power to appoint and remove justices of the peace."[20] Hardly! *Marbury* was about the scope of the Supreme Court's appellate jurisdiction which Marshall found lacking.[21] Whatever Marshall said about judicial review was *dicta.* For Waldron to parse that; to limit Marshall's sweeping "theory" of the "written constitution" as the one authority against which all acts repugnant to it must fail to the facts of a case Marshall

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new to the *Fourteenth Amendment* but originate "in the constitution itself" Justice Field—joined by the Chief Justice and Associate Justices Swayne and Bradley—is categorical in his insistence that when a legislature acts to violate the citizens' fundamental freedoms (freedoms like "the right of free labor") "it requires no aid from any bill of rights to render them void." *Id.* at 97, 110–11 (Field, J., dissenting). Justice Bradley, writing separately, is even more uncompromising. Asserting first that the privileges and immunities protected by the Constitution itself are "comprehensive in their character" he goes on to say that "even if the Constitution were silent, the fundamental privileges and immunities of citizens, as such, would be no less real and no less violable than they are now" with the advent of a *Fourteenth Amendment* he deems redundant. *Id.* at 118, 119. Had these voices been attended to; had the controversial 5-4 judgment gone the other way; had the Court, following the dissenters, recognized the citizens' privileges and immunities as "fundamental," indistinguishable from the "most sacred and imprescriptible rights of man," and as the *terra firma* of judicial review, had it, understood "'[t]he privileges and immunities' of a citizen of the United States" to include, "among other things, the fundamental rights of life, liberty and property," and "the inalienable right of every citizen to pursue his happiness," one cannot help but wonder whether the morass of *substantive due process* in which we are now inextricably mired might have been altogether avoided. *Id.* at 97, 110–11 (Field, J., dissenting); *Id.* at 126 (Swayne, J., dissenting). Had the Court not elected to "turn" a Privileges and Immunities Clause "meant for bread into a stone" would the individual citizen's substantive rights as a person not be more secure than they today appear on the shifting sands of due process? *Id.* at 129 (Swayne, J. dissenting).

19 THE FEDERALIST NO. 47, *supra* note 9, at 304 (citing N.H. CONST.).

20 Waldron, *supra* note 1, at 1357, n.35.

21 The court noted in *Cohen v. Virginia*, 19 U.S. 264, 400 (1821):

> In the case of Marbury v. Madison, the single question before the Court, so far as that case can be applied to this, was, whether the legislature could give this Court original jurisdiction in a case in which the Constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The Court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case.

had no business to hear, is not convincing because it is not reasoned; and without a reasoned argument for distinguishing *structural* issues from *rights* issues, Waldron's criticism of "courts [that] strike down statutes for violations of individual rights in exactly the spirit in which they strike down statutes for violations of federalism or separation of powers principles,"[22] is as ephemeral as the "spirit" which moves him to conflate the "separation of powers" issue which Marshall was attending to in *Marbury* with the issue of federalism, nowhere on Marshall's horizon at the time. If Waldron expects us to believe him that *Marbury* was not about *individual rights* he must in turn concede that it was not about *federalism* either absent which his *ad homonym* castigation of unnamed "People" who say "[l]egislatures are subject to judicial review anyway, for federalism reasons . . . [s]o why not exploit that practice to develop rights-based judicial review as well?"[23] is, to be blunt, an example of the blind leading the blind.

II. RIGHTS VERSUS FEDERALISM

A. *The Bill of Rights Redacted*

Waldron further endeavors to quarantine (for purposes of eradication) the particular virulence of *rights' review* by limiting his inquiry to a society that "cherishes rights to an extent that has led to the adoption of an official written bill or declaration of rights of the familiar kind," a Bill of Rights that corresponds "for example [to] the rights provisions of the U.S. Constitution and its amendments."[24] How this codicil can be relied upon to distinguish *rights*' review from *federalism* review is hard to fathom, unless Waldron has elected, without telling anyone, to excise its *Tenth Amendment.* If, as Waldron repeatedly asserts, his "core" case against judicial review rests on a Bill of Rights that addresses only "individual" and "minority rights,"[25] then it is inapplicable to judicial review in America where the rights the *Tenth Amemdment* affords to

22 Waldron, *supra* note 1, at 1357.

23 *Id.* at 1358 n.38.

24 *Id.* at 1365. In the society Waldron is "imagining," if "there is to be judicial review of legislation, it will presumably center on the Bill of Rights." *Id.* at 1371, 1380.

25 *Id.* at 1380, 1393.

the several states is co-existent and inextricably intertwined with the individual and minority rights of every citizen regardless of where he or she resides.[26] Were the protection afforded s*tates' rights* under the *Tenth Amendment* not on equal footing with the protection afforded *civil rights* under the *Fourteenth Amendment* Chief Justice Rehnquist could not have successfully pleaded the "limitations . . . necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government" in enlisting a majority of justices[27] to strike down federal legislation expressly tailored by Congress to combat "pervasive bias in various state justice systems against victims of gender-motivated violence."[28] If Waldron and Fallon subscribe to Justice Souter's competing theory of the *Tenth Amendment* as a dead judicial letter "without any provision comparable to the specific guarantees proposed for individual liberties," then they must also endorse the consequence: "that politics, not judicial review, should mediate between state and national interests."[29] Yet this they hesitate to do.

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26 While no one can stop Waldron from disparaging our Constitution as "some antique piece of ill-thought-through eighteenth- or nineteenth-century prose," as a matter of opinion, *id.* at 1383, nothing can justify his utter disregard for the express declaration of the Tenth Amendment that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people," U.S. CONST. amend X, or the considerable corpus of judicial review it has spawned, and—Justice Thomas' dramatic laments that the Tenth Amendment has been effectively excised from the Constitution notwithstanding—continues to spawn.

27 Waldron's wholesale endorsement of legislative supremacy is difficult to square with his disdain for the fact that the Supreme Court decides cases by majority vote. Waldron, *supra* note 1, at 1353. If, as Waldron suggests, "majority voting among a small number of unelected and unaccountable judges . . . disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights," and if such "voting among Justices" may not be "an appropriate basis for the settlement of structural terms of association among a free and democratic people," the will of Congress, not the practice of judicial review is the culprit. *Id.* at 1353, 1358. Waldron's further claim to "have always been intrigued by the fact that courts make their decisions by voting" is difficult to square with the facts. *Id.* at 1391. Putting aside the fact that most courts do not decide this way, and focusing on Waldron's real target, the *9 member* composition of the Supreme Court, Waldron should surely know that the Constitution says nothing about the Court's membership, and that if it was once 6 persons, once 7, once 10, if Franklin Roosevelt once endeavored to change its composition altogether, if the justices once rode circuit to decide cases alone, all this is because the people's representatives in Congress have ordained that it be so.

28 U.S. v. Morrison, 529 U.S. 598, 619, 620 (2000).

29 *Id.* at 647 (Souter, J., dissenting).

B. *A Legion of Legislatures Ignored*

Waldron appears further to exclude judicial review in America from the purview of his study with the first of his four express assumptions: "a society with . . . democratic institutions in reasonably good working order, including *a representative legislature* elected on the basis of universal adult suffrage."[30] Whether Waldron means to excise all federal republics or only the United States where presently fifty-one separate legislatures are at work simultaneously in what some liken to laboratories of democracy[31] is for him to clarify. The fact is that such federations do exist; and that amongst the "non-totalitarian societies" without judicial review to which Fallon (accepting Waldron's assumption of "a representative legislature") alludes, none are federations.[32] Waldron's express insistence on just one "representative legislature" makes it easy for him to prove his case for legislative supremacy but it runs directly against the vital grain of federalism absent which there would have been no United States. The framers credited Montesquieu's judgment that a democracy with only one legislature is appropriate for only a small country.[33] They followed Montesquieu's suggestion that for a large land mass with culturally and geographically diverse populations a federation composed of several states each of which retains its own internal government[34] is the only means of promulgating democracy successfully.[35] Capable of withstanding both "external force" and internal "abuse[]" this "form" of "society prevents all manner of inconveniences."[36]

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30 Waldron, *supra* note 1, at 1360 (emphasis added).

31 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

32 Fallon, *supra* note 2, 1709 n.61.

33 "It is natural for a republic to have only a small territory; otherwise it cannot long subsist." 1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, DE L'ESPRIT DES LOIS 276 (Gallimard 1995) (1748) [hereinafter MONTESQUIEU, L'ESPRIT] (translation provided by author) *accord.* CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 120 (Thomas Nugent trans., Hafner Press 1975) (1748) [hereinafter MONTESQUIEU, SPIRIT].

34 MONTESQUIEU, L'ESPRIT, *supra* note 33, at 289 *accord*. MONTESQUIEU, SPIRIT, *supra* note 33, 126–28.

35 "'It is very probable,' (says [Montesquieu]) 'that mankind would have been obliged at length to live constantly under the government of a SINGLE PERSON, had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical government. I mean a CONFEDERATE REPUBLIC.'" THE FEDERALIST NO. 9, at 74 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (citation omitted).

36 *Id.*

C. *Adequate and Independent State Law Grounds*

Given his indifference to the opportunities and challenges endemic to federalism,[37] it is more than a little startling that Waldron elects to open[38] his case against judicial review with a decision by state judges in a state court that strikes down a state marriage statute on the adequate and independent state law grounds of a state *Constitution* "more protective of individual liberty and equality than the Federal Constitution,"[39] and *exempt* from federal judicial review.[40] Let's begin with the irony. Had there been no such state constitutional protection the state court judgment against which Waldron rails would have been subject to further review, and, in all likelihood, have been reversed. To which Waldron would respond, so what? As all roads lead to Rome, all judicial review (regarding individual rights) is bad.[41] Look only at the fact that the Massachusetts court disenfranchised the people of Massachusetts, not that a more robust judicial review at the federal level would have restored it. Two wrongs don't make a right. No; but the proximate cause of the particular wrong with which Waldron chooses to begin his argument is the *immunity* from judicial review *federalism* affords. If it is "fundamental that state courts be left free and

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37 Hamilton understands that federalism may take many forms, that the "Lycian confederacy" which Montesquieu extols as a model may not be a perfect fit for America. Rather,

> [t]he extent, modifications, and objects of the federal authority are mere matters of discretion. So long as the separate organization of the members be not abolished; so long as it exists, by a constitutional necessity, for local purposes; though it should be in perfect subordination to the general authority of the union, it would still be, in fact and in theory, an association of states, or a confederacy. The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government.

THE FEDERALIST NO. 9, *supra* note 35, at 76.

38 Waldron, *supra* note 1, at 1348.

39 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

40 Arizona v. Evans, 514 U.S. 1, 8 (1995) ("[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.").

41 The fact, as reported in the *Boston Herald,* a daily newspaper generally considered of the tabloid variety, that the *Goodridge* "decision heartened many people" is, Waldron asserts, "the last good thing" he will have to say about judicial review. Waldron, *supra* note 1, at 1348.

unfettered . . . in interpreting their state constitutions"[42] the *Tenth Amendment*, not, as Waldron mischievously suggests, an overreaching, "deviant," and "illegitimate"[43] *rights* review, is to blame.

D. *Uniformity Eschewed*

Waldron's pogrom against judicial review and Fallon's halting[44] defense further fail even to acknowledge, no less address, Hamilton and Marshall's observation, obvious enough, that if "Congress is not a local legislature," but is rather "the legislature of the Union,"[45] there ought "to be a constitutional method of giving efficacy to constitutional provisions"[46] and to the laws, consistent with Article III's extension of the "judicial power to all cases, in law and equity, arising under this Constitution [and] the laws of the United States."[47] This jurisdictional grant, Hamilton and Marshall argue in unison, is compelled by the "axiom" that "the propriety of the judicial power of a government [must be] coextensive with its legislative" power.[48] "The mere necessity of uniformity in the interpretation of the national laws, decides the question.[49] Thirteen independent courts of final

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42 Minnesota v. Nat'l Tea Co., 309 U.S. 551, 556 (1940).

43 Waldron, *supra* note 1, at 1346, 1353, 1349 (citation omitted).

44 The apparent source of his discomfort is that Fallon can only commit to judicial review if "fundamental rights are threatened." Fallon, *supra* note 2, at 1729.

45 Cohens v. Virginia, 19 U.S. 264, 429 (1821).

46 THE FEDERALIST NO. 80, at 475 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

> This power must either be a direct negative on the State laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former, and, I presume, will be most agreeable to the States.

Id. at 476.

47 U.S. CONST. art. III, § 2.

48 THE FEDERALIST NO. 80, *supra* note 46, at 476. "If any proposition may be considered as a political axiom, this, we think, may be so considered." Cohens v. Virginia, 19 U.S. at 383.

49 Waldron's apparent preference for multi-form state legislation regarding rights is epistemologically inconsistent with his express understanding that the "personal" and "minority" rights contained in his imaginary Bill of Rights have a uniform truth value just waiting to be discovered. He admonishes that "we should choose political procedures that are most likely to get at the truth about rights, whatever that truth turns out to be." Waldron, *supra* note 1, at 1373. How a procedure that permits his Bill of Rights to say X in one state and Y in another fosters the kind of uniform truth he is seeking is impossible to discern. *See*, Allan C. Hutchinson, *A 'Hard Core' Case Against Judicial Review*, 121 HARV. L. REV. F. 57 (2008) (critiquing Waldron and

jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed."[50]

Hamilton's endorsement of judicial review in pursuit of unity is not in any sense limited to the structural aspects of federalism. Quite the contrary! In asking "[w]hat, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them" he is not limiting judicial review to such improprieties as "[t]he imposition of duties on imported articles, and the emission of paper money" by the several states.[51] In asserting that a Bill of Rights is unnecessary to ensure "that the liberty of the press shall not be restrained," because "no power is given by which restrictions may be imposed"[52] he is affirming—contrary to Waldron—both that the federal judiciary[53] must have the power to protect fundamental rights against unconstitutional encroachments by the several states, and that no bill of particulars is required to vouchsafe this oversight. The "truth is" Hamilton goes on to

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Fallon's joint and several belief that there exists a "reliable epistemological grounds for reaching correct decisions on rights disputes.").

50 THE FEDERALIST NO. 80, *supra* note 45, at 476. Marshall persuasively rebuts the claim that the states can be entrusted to uphold the Constitution and the laws as competently as his Supreme Court with the observation—which history has proven correct—that "[w]e have no assurance that we shall be less divided than we have been." Cohens v. Virginia, 19 U.S. at 386. As for the means by which a federation can secure compliance by the confederated states with the federal laws Marshall opines that "[c]ourts of justice are the means most usually employed; and it is reasonable to expect that a government should repose on its own Courts, rather than on others. There is certainly nothing in the circumstances under which our Constitution was formed; nothing in the history of the times, which would justify the opinion that the confidence reposed in the States was so implicit as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union." *Id.* at 387–88. In advancing his case for *legislative supremacy* does Waldron mean to suggest that the federal legislature should assume the role presently played by the Supreme Court and conduct *federal legislative review* of the *states' legislative enactments* to assure conformity with the federal "Constitution" and "the laws of the United States"? *See* U.S. CONST. art. III. Such is the logical end of Waldron's illogical argument: people disenfranchising one another.

51 THE FEDERALIST NO. 80, *supra* note 46, at 475.

52 THE FEDERALIST NO. 84, *supra* note 18, at 513–514.

53 When he says that the "national government" is "vested" with the power to prohibit the states "from doing a variety of things, some of which are incompatible with the interests of the Union, and others with the principles of good government" he surely cannot mean either the legislature or the executive. THE FEDERALIST NO. 80; *supra* note 46, at 475; *see* THE FEDERALIST NO. 84, *supra* note 18. Neither Waldron nor Fallon address the issue of whether the federal legislature has the power to restrain the state legislatures. The answer of course hinges on the Tenth Amendment, which instructs that matters of local concern must be left to local control.

assert "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS." As the "constitution of each State is its bill of rights," the "proposed Constitution, if adopted, will be the bill of rights of the Union" comprehending both "the political privileges of the citizens in the *structure* and administration of the government," and the "immunities and modes of proceeding, which are relative to *personal and private concerns*." All this, Hamilton goes on to say "we have seen . . . attended to . . . . Adverting therefore to the substantial meaning of a bill of rights, it is absurd to allege that it is not to be found in the work of the convention."[54] If, as Madison and Marshall assert, the great advantage of the Union is that the national government has the "ability to act on individuals directly, instead of acting through the instrumentality of State governments,"[55] and if these individuals are to remain free then reciprocity is required. As the national government commands obedience to the national laws it must also provide "protection of individuals" under those laws. In this vein Marshall says that if the "laws reach the individual without the aid of any other power" they must also "protect him from punishment for performing his duty in executing them."[56] Hamilton is more explicit still. He is insistent not only that the national government "must carry its agency to the persons of the citizens," but that this "majesty" be "manifested through the medium of the courts of justice." Here, he says, the government "must be able to address itself immediately to the hopes and fears of individuals," as well as enforce its power upon them.[57] Given this precedent one need not fall back upon general principles of equity to insist that the enforcement power of the federal courts is not a one-way ratchet. The government (seeking law enforcement against the individual, and the individual (seeking rights' vindication against the government) enjoy an equal entitlement to the administration of justice.[58]

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54 THE FEDERALIST NO. 84, *supra* note 18, at 515. While some may say "it does not go far enough . . . it will not be easy to make this appear." In any event "it can with no propriety be contended that there is no such thing." *Id.*

55 Cohens v. Virginia, 19 U.S. 264, 388 (1821); THE FEDERALIST NO. 16 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

56 Cohens v. Virginia, 19 U.S. at 388–89.

57 THE FEDERALIST NO. 16, *supra* note 55, at 116.

58 If there is a fatal flaw in the Framers' designs on justice as an indifferently sharpened two edge sword, it surfaces here. As Madison recognizes that none of the three co-ordinate branches of government may decide a separation-of-powers dispute amongst them because a party may not judge his own cause, so too the judges—as agents of the government—may not sit in judgment of a dispute between the

government and an individual. The common understanding of a juridical act, in essence and structure, as "[t]he interaction between two human beings, A and B, which necessarily provokes the intervention of an impartial and disinterested third, C," would seem to preclude any pre-determined judicial *interest* or allegiance whatsoever, Hamilton's makeshift solutions of lifetime tenure and guaranteed emolument not withstanding. ALEXANDRE KOJÈVE, ESQUISSE D'UNE PHÉNOMÉNOLOGIE DU DROIT 28 (Gallimard 1981) [hereinafter KOJÈVE, ESQUISSE] (translation provided by author) *accord*. ALEXANDER KOJÈVE, OUTLINE OF A PHENOMENOLOGY OF RIGHT 42 (Bryan-Paul Frost ed., Bryan-Paul Frost & Robert Howse trans., Rowman & Littlefield Publishers 2000) [hereinafter KOJÈVE, OUTLINE]; THE FEDERALIST NO. 78, *supra* note 14. One solution to the problem, adopted to explain the phenomenon of European constitutions is to envisage them as "imposed on kings with the goal of prohibiting the king from confounding the interests of the state with those of his dynasty, which is to say his Family, or with his other private interests. The Constitution annulled the action of the king when he acted as a private person in the name of the state. The Constitution was thus a rule of law applicable to interactions between individuals and a *private person* (implicated in the concrete person of the king)." KOJÈVE, ESQUISSE, *supra*, at 162 (translation provided by author) *accord*. KOJÈVE, OUTLINE, *supra*, at 147–48. Thus when an individual claims that a governmental act is contrary to the Constitution what he is actually saying is that the Government, or its agent, is acting beyond the bounds of the constitution and as a private person. KOJÈVE, ESQUISSE, *supra*, at 162 *accord*. KOJÈVE, OUTLINE, *supra*, at 148. If this is so "[t]he Government can legitimately act as an impartial third party in a Constitutional matter because the governmental actor whose conduct is challenged is conceived as a private person other than the Government even if this person is also, unconstitutionally the Government. . . . When so acting as a private person this actor is not acting as the government and so the State can be a disinterested third party with regard to him and its action against him can be that of a Judge." KOJÈVE, ESQUISSE, *supra*, at 162-63 (translation provided by author) *accord*. KOJÈVE, OUTLINE, *supra*, at 149. Hamilton, of course, bristled at any comparison of the American Constitution to any European analogue all of which he disdained as "stipulations between kings and their subjects." Hamilton particularly vilified *Magna Carta* as a concession "obtained by the barons, sword in hand from King John." Such parsimony, he says, has "no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations." THE FEDERALIST NO. 84, *supra* note 18, at 513. This wholly different conception of the American Constitution can also ground and maintain judicial disinterest in disputes between the government (so-called) and an individual person. Since the people, strictly speaking, are the state, when a person claims that legislation is unconstitutional, his dispute is not with some disembodied state but with the People themselves no different, in principle than himself, and different in fact only because the *Individual* on one side of the *v.* is exerting his will in person while *The People* on the other side exert theirs collectively. Hegel—unconcerned about whether it is semantically or epistemologically correct to speak of rights against the state—suggests that if they could be asserted and vindicated without a concomitant sacrifice of "freedom in common" an unbridgeable chasm would not necessarily open. GEORG WILHELM FRIEDRICH HEGEL, *Introduction* to *the German Constitution*, in POLITICAL WRITINGS 6, 6–15 (Lawrence Dickey & H. B. Nisbet eds., Cambridge University Press 1999) (1798–1802). "[I]n the dimension of time, this totality [individual and state united], secure in its absolute equilibrium, balances between the opposites." GEORG WILHELM FRIEDRICH HEGEL, NATURAL LAW 124 (T. M. Knox trans., Univ. of Penn. Press 1975) (1802–1803). In lamenting why "Germany is no longer a state," and decrying the then current state of German affairs, Hegel concludes that "[t]he German political edifice is nothing more that the sum of the rights which the individual parts have extracted from the whole, and this

Fallon (while hesitantly critical) would have us embrace Waldron, and himself following in Waldron's train, as a "system-designer"[59] who has "plowed rich ground."[60] Fallon exhorts us to applaud him and Waldron for avoiding microscopic analysis "on how the Supreme Court of the United States should interpret the Constitution of the United States under current circumstances," and for recognizing that the "proper domain of constitutional theory is broader;" that "it should encompass inquiries into what provisions for judicial review (if any) ought to exist in constitutions for all societies whose people and legislatures are seriously committed to respecting rights."[61] Perhaps, but absent recognition of and an accounting for the difference between federations with multiple sovereign legislatures and countries where just one suffices, the endeavors of Waldron and Fallon, joint and several, remain inadequate to comprehend the constitutional imperative to reconcile the rights of the one with the rights of the many expressly "reserved" to the "States" and the "people"[62] indifferently.

III. SEPARATION-OF-POWERS IGNORED

A. *The Fear of Legislative Supremacy*

Deafening as Waldron and Fallon's silence on the subject of *federalism* may be, it is not as jarring as the dissonance that characterizes their disregard for the separation of powers aspect of judicial review. The legislative supremacy Waldron champions and Fallon would only reluctantly abridge is precisely what the Framers most feared should a stalemate between the "three great provinces" of government arise. According to Madison the problem is endemic. Since the legislative, executive and judicial branches are "perfectly coordinate by the terms of their common commission" none can "pretend to an exclusive or superior right of settling the boundaries between their respective powers." Recourse to the

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justice, which watches carefully to ensure that no power remains in the hands of the state, is the essence of the constitution." HEGEL, *The German Constitution*, *supra*, at 13.

59 Fallon, s*upra* note 2, at 1733.

60 *Id.* at 1734.

61 *Id.* at 1734.

62 U.S. CONST. amend X.

people themselves for resolution, then, "seems strictly consonant to the republican theory." As the "people" are "only legitimate fountain of power" their "authority" must control "whenever it may be necessary to enlarge, diminish, or new-model the powers of the government." So logic would demand that "whenever any one of the departments may commit encroachments on the chartered authorities of the others" the people should likewise decide the issue. Yet this Madison will not allow, and he raises "insuperable objections."[63]

Popular resolution of power struggles arising within the government must be foreclosed, not just because the logistics of such referenda are unmanageable, but because even if the practical details could be worked out, plebiscites aimed to keep "the several departments of power within their constitutional limits . . . could never be expected to turn on the true merits of the question." Instead the legislature would almost always prevail.[64] Given the legislators' immediate connections "of blood, of friendship, and of acquaintance" with the people they represent "it can hardly be supposed that the adverse party would have an equal chance for a favorable issue."[65] The bond between the people and their elected representatives is such that not only would the legislators "be able to plead their cause most successfully with the people," but "they would probably be constituted themselves the judges" as "[t]he same influence which had gained them an election into the legislature, would gain them a seat in the convention" which then "would be composed chiefly of men who had been, who actually were, or who expected to be, members of the department whose conduct was arraigned." So the legislators would be "parties to the very question to be decided by them."[66] This is something which "justice" as the "end of government" and "liberty" its avatar[67] cannot tolerate. "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time."[68]

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63 THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

64 THE FEDERALIST NO. 49, *supra* note 63, at 317. While Madison concedes that now and again the executive might win out over an egregiously overzealous legislature, he envisages no circumstance or threat of judicial supremacy. *Id.*

65 *Id.* at 316.

66 *Id.*

67 THE FEDERALIST NO. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961).

68 THE FEDERALIST NO. 10, *supra* note 2, at 79.

B. *A Law Court without Judges*

As Heidegger puzzled over Kant's apparent determination to posit his transcendental deduction—the "condition which precedes all experience, and which makes experience itself possible"—as a "question of right (*quid juris)*;"[69] and came to question whether "a 'legal action' underlie[s] the problem of the intrinsic possibility of ontology,"[70] we should take Madison (Kant's American contemporary) at his word and inquire whether such a strictly juridical proceeding underlies the intrinsic possibility of democracy as well. Madison expressly analogizes boundary disputes[71] between the three departments of government to a legal case subject to the rule that parties may not act as judges in their own cause. Yet if each of the three departments on trial must recuse itself because its "interest" in the outcome biases its "judgment,"[72] and if the people are likewise unable to "sit in judgment"[73] then exactly who or what is competent to preside? What kind of case is this, brought in what kind of court?[74]

An improved "science of politics,"[75] Madison replies, has "so contriv[ed] the interior structure of the government"[76] that justice will administer itself. "In the compound republic of America," Madison (unlike Fallon, unlike Waldron) takes care to distinguish from "a single republic," "the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments." While Madison says only that these processes of division provide a "double security" we have come to liken them to the splitting of an atom.[77] Madison confirms the aptness of the metaphor in

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69 IMMANUEL KANT, CRITIQUE OF PURE REASON 120, 136 (Norman Kemp Smith trans., Palgrave Macmillan 2003) (1781). Only the "highest tribunal," Kant expressly says, has jurisdiction to hear this question, is sufficiently impartial to conduct the "laborious interrogation of all those dialectical witnesses that a transcendental reason" rounds up and "brings forward in support of its pretensions." *Id.* at 549, 570.

70 MARTIN HEIDEGGER, KANT AND THE PROBLEM OF METAPHYSICS 90 (James S. Churchill trans., 1st ed. Indiana 1975).

71 THE FEDERALIST NO. 49, *supra* note 63.

72 THE FEDERALIST NO. 10, *supra* note 2.

73 THE FEDERALIST NO. 49, *supra* note 63, at 317.

74 *See* Michael Halley, *The Ghost Ship Constitution*, 14 REVIEW OF CONSTITUTIONAL STUDIES (forthcoming 2009).

75 THE FEDERALIST NO. 9, *supra* note 35, at 72.

76 THE FEDERALIST NO. 51, *supra* note 67, at 320.

77 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy J., concurring).

describing the resultant chain reaction: a "society . . . broken into so many parts, interests, and classes of citizens," as to preclude the imposition of any "unjust combination." How so? Madison says only that interest will negate interest, but he cites no authority other than his personal "reflection on human nature," lamenting on what a shame it is that "devices" such as pitting ambition against ambition "should be necessary to control the abuses of government."[78] Is this really what is going on? If so, there is little to decide between the "genius" of the Framers' "idea"[79] and Kant's notoriously evil "race of devils" summoning their "intelligen[ce]" to arrange each "selfish inclination" so that "one moderates or destroys the ruinous effect of the other."[80]

C. *The Ground of Democracy*

If we are to take Madison seriously then Waldron has things exactly reversed in endeavoring to "look directly at judicial review and see what it is premised on."[81] The real challenge, as Madison forthrightly accepts it, is to look directly at democracy and see what *it* is premised on. While Waldron never does get around to revealing the premise he seeks, Madison is clear. If democracy is not ruled over by a system of impartial, disinterested justice, then no matter the "genius"[82] of the citizens, "passion" will "wrest the scepter" from reason, and republican governance will be indistinguishable from

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78 THE FEDERALIST NO. 51, *supra* note 67, at 322.

79 U.S. Term Limits, Inc. v. Thornton, 514 U.S. at 838.

80 Immanuel Kant, *First Supplement, Perpetual Peace* (1795), *available at* http://www.constitution.org/kant/1stsup.htm. As Schelling (Madison's German contemporary) insisted that "what has reality merely in our intuition," must be "reflected to us as something present outside us" and that the task of philosophy is to "materialize[] the laws of mind into laws of nature," not to make things up, so Madison surely had no interest in grounding his "science of politics" in thin air. If, as he maintains, government can be arranged in such a manner that justice, and the disinterested judgment on which it must rely, is self executing, he must have some principle in mind. Schelling checked the conceptual answers he derived from subjective thought against the objective measurements of contemporary physics. Justice Kennedy follows suit in likening our divided, and sub-divided, government to a physical process ruled by physical laws. Is this not Madison's understanding as well? His axiom—that "where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary"—is indifferent from Newton's *Third Law* of equal and opposite action and reaction. THE FEDERALIST NO. 10, *supra* note 2, at 83.

81 Waldron, *supra* note 1, at 1351.

82 The Framers refer repeatedly to "the genius of the people of America" without ever telling us just what this entails. THE FEDERALIST NOS. 12, 39 & 55; *see* Halley, *supra* note 74.

"mob" rule.[83]

In eliminating judges from his conception of justice Madison forthrightly accomplishes what Montesquieu could only impose as an illusion and what Hamilton endeavors to accomplish through outright deceit. In consonance with Montesquieu, Madison feared all human judgment as necessarily interested and inherently unjust. Montesquieu resigned himself to this "terrible" fact and counseled that it should be made to look innocuous, like nothing at all, by eliminating standing courts in favor of roving tribunals and substituting anonymous and interchangeable citizens for the unmistakable identity of professional jurists. In Madison's scheme the judges are eliminated outright. No human agency of any description, covert or manifest, is to sit in judgment and decide a separation of powers dispute. Contrast Hamilton who affirms the necessity of judges to conduct both rights and federalism review but insists that there is no need for alarm because the judges assigned the task lack both the sword and the purse and have only judgment which, he says—duplicitously misquoting Montesquieu—is next to nothing.[84] How the judgment of man as the most "terrible" thing[85] for Montesquieu can credibly become a nullity by dint of Hamilton's say so (attributed to Montesquieu) is difficult to discern.[86]

D. *A Principle Without a Ground*

Madison's resolve to withhold both the franchise and judicial review in the face of a separation of powers dispute today attracts neither notice nor controversy. Judicial review to keep the departments in their place proceeds—at least so far as Waldron and Fallon—without disturbance. This is remarkable; for while the Constitution is express in affording some protection for both individual and states' rights, and so

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83 THE FEDERALIST NO. 55, at 342 (James Madison) (Clinton Rossiter ed., 1961).

84 THE FEDERALIST NO. 78, *supra* note 14.

85 MONTESQUIEU, L'ESPRIT, *supra* note 33, at 330 *accord*. MONTESQUIEU, SPIRIT, *supra* note 33, 153.

86 *See* Halley, *supra* note 74. In exhorting the People of the State of New York to ratify the Constitution Hamilton says that while his "arguments will be open to all, and may be judged of by all," his "motives must remain in the depository of [his] own breast." Against this backdrop his further contention that "[t]he consciousness of good intentions disdains ambiguity" rings hollow. His characterization of judgment as innocuous suffers from something far worse than ambiguity. It directly contradicts the authority on which he relies to propound it. THE FEDERALIST NO. 1, at 36 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

provides at least a plausible pretext for judicial review to vindicate those rights, the Framers were deliberate in their firm decision not to write a separation of powers provision into the document. While they acknowledged "the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down," in some of the state constitutions, they considered it a dead letter because—in identifying the legislators as the most notorious and recidivist interlopers—they could not find "a single instance in which the several departments of power have been kept absolutely separate and distinct."[87]

Waldron and Fallon's refusal to attend to Madison's conception of the legislature as "an impetuous vortex" that extends "the sphere of its activity"[88] to co-opt even the judicial power[89] silently undermines their baseline assumption of legislative legitimacy and their common conception of judicial review as aberrant. More corrosive still is how they clutch and cling to a written Bill of Rights as the only possible justification for judicial review. This generalized version of Robert Bork's textualism—that "the framers' intentions with respect to freedoms are the sole legitimate premise from which constitutional analysis may proceed"[90] would seem to afford equal dignity to federalism review (pursuant to the Tenth Amendment) and the so-called rights' review Fallon and Waldron afford higher ground. However, what most compromises Waldron and Fallon is the fact that there is nothing in the text of the Constitution or the Framers' gloss allowing for judicial review as presently conducted by our Supreme Court on the alleged basis of "fundamental separation-of-powers principles." When the Justices of the Court most committed to textualism and to original intent say that these "principles" are not to be derived "from some judicially imagined matrix, but from the sum total of the individual separation-of-powers provisions that the Constitution sets forth"[91] one gets that intoxicating feeling Alice must have had when she first looked through the glass to discover Wonderland. Any treatment of judicial review purporting to see clearly must remove these rose colored glasses and begin with an honest undertaking to understand

87 THE FEDERALIST NO. 47, *supra* note 9, at 304.

88 THE FEDERALIST NO. 48, *supra* note 11, at 309.

89 THE FEDERALIST NO. 10, *supra* note 2.

90 Robert H. Bork, The Francis Boyer Lectures on Public Policy: Tradition and Morality in Constitutional Law, American Enterprise Institute for Public Policy Research (1984), *available at* http://www.aei.org/speech/449.

91 Boumediene v. Bush, 128 S. Ct. 2229, 2297 (2008) (Scalia. J. dissenting).

afresh how John Marshall succeeded in expanding the perfectly logical, self-evident, and uncontroversial proposition[92] that the judicial role is to "say what the law is"[93] to include a general superintendence over the structure of the entire government. This is the straw that stirs the drink of judicial review however diversely Fallon, Waldron and others[94] may elect to mix it.

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92 "All new laws," Madison asserts, "though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." THE FEDERALIST NO. 37, *supra* note 7, at 229.

93 Marbury v. Madison, 5 U.S. 137, 177 (1803).

94 Fallon acknowledges the popularity of the practice—akin to rearranging the deckchairs on the Titanic—of differentiating between the varieties of judicial review and picking one's favorites. Fallon, *supra* note 2, at 1369, n.123 (referencing JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980) (arguing that judicial review is appropriate in cases involving individual rights, but not in those involving federalism issues or the respective powers of Congress and the President)).