

THE POWER OF CONGRESS TO MAKE THE SUPREME COURT MORE LIKE A COUNCIL OF REVISION

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Although the Federal Convention of 1787 considered proposing a Council of Revision as part of the new government it devised,¹ it ultimately provided for no such body but did provide for a Supreme Court.² Professor Richard Fallon's work makes possible a sharper understanding of the consequences of that choice.³ This Essay builds on that work and on Professor Garrett West's contribution to the Symposium for which this Essay was prepared, in assessing Congress's power to create a system in which the Supreme Court strongly resembles the thing it is not.⁴ I argue that although Congress can move the system in the direction of one with a Council of Revision, aspects of the Constitution that Fallon expounded impose substantial limits on the legislature's ability to achieve that goal.

This Essay first describes the account of judicial review in the U.S. constitutional system that is familiar from *Marbury v. Madison*⁵ and draws out some implications that may be less familiar. I then describe a form of abstract constitutional review that uses a Council of Revision and note some ways in which the latter differs from the former. Finally, this Essay explores constitutional limits on Congress's ability to change the structure of judicial review so that it closely resembles one with a Council of Revision.

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¹ At the Federal Convention's meeting on May 29, 1787, Edmund Randolph presented on behalf of the Virginia delegation several resolutions to guide drafting a new constitution. Resolution 8 called for a "council of revision," to be composed of the national Executive and a "convenient number" of the national judiciary that would "examine every act of the National Legislature before it shall operate." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., rev. ed. 1937) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

² U.S. CONST. art. III, § 1.

³ Especially important in this connection are Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487 (2018); Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915 (2011); and Richard H. Fallon, Jr., *Commentary, As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000) [hereinafter Fallon, *As-Applied and Facial Challenges*].

⁴ See E. Garrett West, *Abstract Review in Article III Courts*, 139 HARV. L. REV. 1892, 1903-06 (2026).

⁵ 5 U.S. (1 Cranch) 137 (1803).

I. JUDICIAL REVIEW UNDER THE UNMEDIATED RULE OF LAW

As expounded in *Marbury*, and further by Fallon, the Constitution provides for the unmediated rule of law.

A first principle of the U.S. Constitution is that the Constitution operates directly on the content of the legal system. Sometimes the Constitution itself prescribes the rule applicable in a concrete situation. More often, the Constitution constrains the content of the applicable subconstitutional law, for example by invalidating state laws that impair the obligation of contracts.⁶ When the Constitution imposes constraints, it leaves makers of subconstitutional law substantial room for choice. The Contracts Clause does not determine, for example, when and whether specific performance will be available. By affecting the content of the law, the Constitution contributes to the legal norms in a system in which government officials are bound by and implement those norms: the rule of law.

Marbury's rule of law is unmediated in that the Constitution establishes no institutions or principles devoted specifically to implementing the Constitution. Rather, when the Constitution is involved, government institutions perform the same functions they would perform even when the Constitution is not involved. For example, whether a case involving the Constitution is within the jurisdiction of an Article III court depends on whether it presents a case or controversy subject to the judicial power.⁷ Remedies in constitutional cases follow the law of remedies, whatever it is.⁸ Non-remedial consequences of constitutional cases, as to preclusion and stare decisis, are determined by the rules of preclusion and stare decisis.⁹ The courts that decide constitutional cases are the same courts that decide cases with no constitutional component.

Two features of the form of judicial review described in *Marbury* are noteworthy. First, when the Constitution displaces an inconsistent provision of subconstitutional law, the displacement takes place when the

⁶ See, e.g., U.S. CONST. art. I, § 10, cl. 1 (providing that no state shall pass any “Law impairing the Obligation of Contracts”).

⁷ Compare, e.g., *Allen v. Wright*, 468 U.S. 737, 766 (1984) (applying case or controversy requirement to constitutional challenge), with *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–74 (1992) (applying case or controversy requirement to statutory challenge).

⁸ For example, *Trump v. CASA, Inc.*, 145 S. Ct. 2540 (2025), is a case in which the merits turned on the constitutional question of citizenship at birth and the Court relied on a statutory principle about the law of remedies that applies in constitutional and non-constitutional cases alike. See *id.* at 2550.

⁹ See *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (holding that issue preclusion applies in constitutional cases brought under 42 U.S.C. § 1983); *Martin v. Wilks*, 490 U.S. 755, 759 (1989) (deciding a constitutional case on the basis of standard preclusion principles).

subconstitutional provision is adopted.¹⁰ Invalidity appears *ab initio*.¹¹ *Ab initio* invalidity can be recognized later by courts or other enforcing institutions and can be recognized with respect to events that have already taken place.

Next, the *Marbury* system has important consequences for executive officials. First, the system allows and perhaps requires executive review: Executive officials' duty to carry out the law does not extend to purported norms that are not law because of the Constitution.¹² Because the rule of law is unmediated, courts have no monopoly on deciding whether a subconstitutional enactment is consistent with the Constitution. Like courts, executive officials implement the law, and to know what the law is, they may need to apply the Constitution. Second, the Constitution permits what is now called executive nonacquiescence in judicial decisions.¹³ Principles of *stare decisis* therefore apply to courts and not non-judicial officials. The Constitution thus provides for the unmediated rule of law by both the Executive and the judiciary.

II. ABSTRACT CONSTITUTIONAL REVIEW THROUGH A COUNCIL OF REVISION

At the Federal Convention, the Framers considered and rejected a proposal to create a body that would have engaged in a form of abstract review of proposed statutes on constitutional grounds, a body they called a Council of Revision.¹⁴ To focus the question about Congress's ability to make the U.S. system resemble one with a Council of Revision, I discuss one specific form of that kind of institution.¹⁵

The central feature of that kind of system is that some constitutional questions are conclusively resolved during the lawmaking process, with the Council of Revision performing a function in that process. In this model, before a bill becomes law, it is submitted to the Council. That body is charged with resolving constitutional questions about the

¹⁰ *Marbury*, 5 U.S. (1 Cranch) at 178.

¹¹ See *Collins v. Yellen*, 141 S. Ct. 1761, 1788–89 (2021) (explaining that an unconstitutional provision of a statute “is never really part of the body of governing law (because the Constitution automatically displaces any conflicting statutory provision from the moment of the provision’s enactment)”).

¹² See Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RESV. L. REV. 905, 905, 923–24 (1989) (explaining how the principles underlying *Marbury* imply a constitutional review function for the Executive).

¹³ See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 687–88, 718–19 (1989) (describing the practice of executive nonacquiescence and its rationale).

¹⁴ See RECORDS OF THE FEDERAL CONVENTION, *supra* note 1, at 21.

¹⁵ For another description of how the Framers who discussed the Council of Revision believed it might work, see Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 955–57 (2018).

consistency of the rules in the bill with the Constitution. The Council thus considers questions of facial or rule-level constitutionality.¹⁶

If the Council of Revision disapproves a bill, I assume, the bill does not become a law. The Council therefore has an absolute veto on legislation. Once a bill becomes a law through the process that includes the Council of Revision, the law is no longer subject to constitutional challenge on the grounds that the Council is charged with considering. Because of the latter feature, the Constitution sometimes does not directly affect the validity of enactments, but rather sometimes is mediated by the Council's decisions. A statute validly enacted through the process that includes the Council cannot be invalid on constitutional grounds that are within the Council's purview.

As to the constitutional issues the Council addresses, a system of this kind does not include *ab initio* invalidity, executive review, or executive nonacquiescence. Duly enacted laws cannot be facially invalid. Because the Council's decisions help determine the content of the law, the results of those decisions become part of the law. Executive review therefore does not operate as to the issues the Council conclusively resolves. Executive nonacquiescence also is not possible as to those issues because the validity of laws that have survived the Council's review is not a question on which executive officials' views might differ from those of the courts.

A *Marbury*-type system can functionally resemble a system with a Council of Revision if that *Marbury* system includes additional features that make it more like one with a Council. One feature consists of constitutional norms that operate at rule level and therefore can produce rule-level invalidity for a subconstitutional norm. Another is strong vertical *stare decisis*, in which all courts regard themselves as absolutely bound by the precedents of a highest court as to a category of legal questions.¹⁷ A third is a principle that implementing officials are required to treat the highest court's precedents as conclusive. The last principle limits executive review and limits executive nonacquiescence.

III. LIMITS ON CONGRESS'S POWER TO MAKE THE SUPREME COURT MORE LIKE A COUNCIL OF REVISION

How much can Congress arrange the U.S. system of judicial review so that it resembles one with a Council of Revision, with the Supreme Court of the United States as the Council? That question has two

¹⁶ Questions of rule-level or facial constitutionality can properly be resolved during the legislative process because answering them does not require information about specific situations. For Fallon's seminal discussion of facial challenges in the *Marbury* system of judicial review, see generally Fallon, *As-Applied and Facial Challenges*, *supra* note 3.

¹⁷ See *id.* at 1339-40 (pointing out that because of rules of precedent, a Supreme Court holding that a statutory provision is invalid at rule level "would bind all lower courts in all future cases," *id.* at 1340).

components, one involving relations inside the judicial hierarchy and the other involving the courts' relations with other government officials and private persons. With respect to the intra-judiciary component, the question concerns the extent to which the appellate hierarchy that the Constitution establishes can be adjusted so that, for some issues, the highest tribunal and only that tribunal decides the issue when it arises in a case.

On the vertical question, I agree with West that Congress's authority is extensive and probably adequate to the task.¹⁸ In cases that are within the Article III appellate jurisdiction of the Supreme Court, Congress can direct lower courts to stay any judgments pending Supreme Court decision.¹⁹ As to the lower federal courts, that power comes from Congress's authority to constitute those tribunals and to provide the rules that carry the judicial power into execution.²⁰ As to state courts, although Congress has no power specifically over their jurisdiction or remedies, Congress can limit state courts' remedies in the service of the Supreme Court's jurisdiction.²¹ If Congress decides to enable only the Supreme Court to give a remedy in a constitutional case, it has power to do so. Congress can also legislate so that the Court's appellate jurisdiction is mandatory as to cases and issues chosen by Congress.²²

Matters are more complicated with respect to private persons and with respect to non-judicial implementing officials, both state and federal. One limit on Congress's power is especially important with respect to private people. That limit involves time. In a system with a Council of Revision, enactments do not purport to go into effect before the Council has reviewed them, and once they go into effect, they are binding. A Council of Revision therefore always acts in a sense prospectively because its decision to approve a bill changes the law as of the point of approval, by adding the new enactment to the body of governing law.

In the *Marbury* system, time elapses between an enactment and any judicial decision concerning its constitutionality. Events that take place during that period are subject to the law. If a private person engages in conduct that violates a statute with a criminal penalty, but the statute

¹⁸ West, *supra* note 4, at 1901–02.

¹⁹ Cf. Daniel Epps & Alan M. Trammell, Essay, *The False Promise of Jurisdiction Stripping*, 123 COLUM. L. REV. 2077, 2140–45 (2023) (discussing Congress's power to affect sequencing of federal courts' appellate jurisdiction).

²⁰ *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941) (“Congress has undoubted power to regulate the practice and procedure of federal courts . . .”).

²¹ See, e.g., *Pierce County v. Guillen*, 537 U.S. 129, 147–48 (2003); *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 363 (1952).

²² In *Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810), the Supreme Court held that its appellate jurisdiction comes directly from Article III and that when a statute purports to grant the Court appellate jurisdiction and confers less than Article III confers, the statute is an exercise of Congress's power to make exceptions to the Court's appellate jurisdiction. See *id.* at 313. *Durousseau* implies that the appellate jurisdiction granted by Article III is mandatory and that any discretion the Court has comes from Congress.

is unconstitutional, the conduct is not a crime. As a result, the Constitution imposes limits on Congress's ability to reproduce the wholly prospective character of decisions by a Council of Revision. Congress has no power to provide that decisions on constitutional questions are to be effective only prospectively and that statutes are therefore binding until they are "struck down."

The Constitution also limits Congress's power to displace executive review and executive nonacquiescence. As to the former, executive officials are obliged to carry out the law, and therefore, constitutional limits on Congress's power to make law are limits on its ability to create duties for officials who implement the law. In that respect, the Federal Executive is independent of the federal legislature.

Congress's power to restrict executive nonacquiescence is similarly limited by the Executive's independence from the other two branches. Judicial precedent is gloss on law, not law strictly speaking, so the Executive's obligation to implement the law does not include an obligation to follow the courts. A congressional requirement that executive officials follow Supreme Court precedent would put those officials in the position of lower courts. But the Executive is independent of the judiciary and not part of the judicial hierarchy. Executive nonacquiescence in judicial precedents is consistent with executive officials' obligation to follow judgments because the precedential force of judicial decisions goes beyond the judgment the court renders.

That observation about the Executive's obligation to comply with judgments suggests a means by which Congress might be able to make the Supreme Court more like a Council of Revision. Congress might authorize courts to issue judgments to executive officials requiring those officials to follow the law as the Supreme Court has expounded it.

Congress's ability to enable the courts to issue binding judgments that implement Supreme Court precedents is limited by separation of powers principles that ground the Supreme Court's Article III doctrines. I will briefly describe one important limit on the courts' power to direct the Executive's activities.

Underlying the Supreme Court's Article III standing doctrine is the principle that private persons lack standing to enforce other persons' obligation to comply with the law as such.²³ Instead of pointing only to a violation of the law, a private person must point to a different injury that gives that person standing to sue. That principle is especially important when a private person sues the Executive; the private plaintiff must allege some injury distinct from a claimed failure to comply with the law.

²³ See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-74 (1992) (stating that plaintiffs who rely only on "every citizen's interest in proper application of the Constitution and laws," *id.* at 573, present no justiciable case or controversy under Article III).

An important example appears in the Supreme Court's cases involving federal spending programs, which are today a substantial part of the Executive's operations. *Frothingham v. Mellon*²⁴ was a suit by a federal taxpayer who argued that a federal spending program exceeded Congress's power and who sought an injunction against the program.²⁵ According to the Court, enjoining the expenditures would not alleviate the taxpayer's private harm because Congress might spend the money on another program, and a private person may not enforce the Executive's pure obligation to comply with the law.²⁶

As later developments showed, the *Frothingham* principle can create a gap between Supreme Court precedents and the ability of private people to enforce those precedents against the Executive. In the 1936 case *United States v. Butler*,²⁷ the Court considered a constitutional challenge to a spending program brought by a private person who paid a tax that was earmarked for the expenditures.²⁸ Butler sought not an injunction against the spending but relief from the tax on the grounds that the related spending was unconstitutional.²⁹ The Court found the spending program exceeded Congress's power and gave Butler relief from the tax, at the same time establishing a precedent concerning federal spending power.³⁰ But many New Deal spending programs that probably were inconsistent with *Butler* were insulated from judicial challenge because they were funded from general revenues, not earmarked taxes.³¹ *Butler*'s holding about federal power did not stop those programs because potential plaintiffs' lack of standing prevented the courts from giving relief.³² Free of judicial oversight, the Roosevelt Administration and its supporters in Congress could implement their own views about federal power, not the Court's.

Just as the Constitution does not create a Council of Revision, it does not enable Congress to give the courts the role of generally ensuring that the Executive complies with the law. Professor Crocker's introduction to this Symposium raises the question whether, and to what extent, the role of the courts is to keep the rest of the government generally within

²⁴ 262 U.S. 447 (1923).

²⁵ *Id.* at 479–80.

²⁶ *Id.* at 487–89 (finding that the effect on future taxes of the spending challenged was too remote to justify an injunction and that to give relief would be “to assume a position of authority over the governmental acts of another and co-equal department,” *id.* at 489).

²⁷ 297 U.S. 1 (1936).

²⁸ *Id.* at 57.

²⁹ *See id.* at 58 (resting *Butler*'s standing on the tax and distinguishing *Frothingham* on the grounds that *Butler* did not seek an injunction against spending).

³⁰ *See id.* at 64–65 (concluding that the commerce power did not extend to regulating agricultural production, a local activity, and that the spending power did not justify the statute).

³¹ *See* Barry Cushman, *The Hughes Court and Constitutional Consultation*, 1998 J. SUP. CT. HIST. 79, 92 (explaining that because of *Frothingham* “an appropriation might exceed congressional authority to spend for the general welfare, but the federal courts would nevertheless refuse to restrain the expenditure”).

³² *See id.*

the bounds of the law.³³ A Council of Revision might be seen as a way to keep the legislature generally within the Constitution, and derivatively to do so for the Executive, which implements the legislature's enactments. The Constitution does not adopt the principle that the courts are charged with the function of generally ensuring compliance with the law, however. Rather, the Constitution has features including ab initio invalidity of unconstitutional enactments, an independent Executive, and a judiciary that decides cases and controversies. Those features and others produce a judicial role that is narrower than keeping the government within legal bounds. No one in Richard Fallon's generation understood the practical consequences of the Constitution's intricacies better than he did. As his work shows, the law is in the details.

³³ Katherine Mims Crocker, *Introduction: To Keep Government Generally Within the Bounds of Law*, 139 HARV. L. REV. 1734, 1736–37 (2026).