

# Constitutional Designs: Lessons We Can Learn from the Early American Republic

Cristina E. Parau<sup>1</sup> and J. Wittmeier Bains<sup>2</sup>

*Romanian Journal of Comparative Law* 2, 2013, pp. 348-382

**Abstract:** This article addresses the vexed question of who should have the “last word” in saying what a democratic constitution means in controversies between the Judiciary and the other Branches of government. The aim is to contribute to debates in post-Communist Central and Eastern Europe (CEE), which to date have been dominated by the paradigm of a Constitutional Court (CC) with monopoly power to expound the constitution. This institutional configuration sits uneasily with the separation of powers and checks and balances – shibboleths which are nonetheless poorly understood in CEE. It is believed that the American Founders, who invented these practical mechanisms in their modern and now universally accepted forms, may offer particularly fruitful insights which constitutional designers everywhere could learn from.

## Introduction

A singular post-World War II trend in the Western world, identified and analysed by political scientists and socio-legal scholars, stands out for its ubiquity: the expansion of both domestic and supranational judicial power.<sup>3</sup> Buoyed by a paradigm that, whether rightly or wrongly, taxes Parliamentary democracy for the horrors of World War II, constitutional reformers have come to see the empowerment of the judiciary over politics as an essential check on untrammelled democracy. In one jurisdiction after another, even in the most conservative and authoritarian civil law traditions like China<sup>4</sup>, supranational courts as well as Constitutional or Supreme Courts have been empowered, or have empowered themselves to “strike down” with finality statutes of Parliament on grounds of unconstitutionality. Such developments which go well beyond judicial review in the classical sense have inspired the claim that the classical paradigm of parliamentary supremacy is now dead<sup>5</sup>, having been supplanted by what has been termed “judicial supremacy”<sup>6</sup> or even “juristocracy”<sup>7</sup>. Ordinary courts, too, have not remained immune to these trends. Over the last twenty years, judiciary revisions to insulate the judiciary from politics *via* Judiciary Councils that began in post-Communist CEE over genuine concerns over judicial independence and the rule of law have spread to Western European countries that have never had any problems with the rule of law or judiciary

---

<sup>1</sup> Lecturer, Department of Politics and International Relations, University of Oxford.

<sup>2</sup> Independent Researcher and Practitioner.

<sup>3</sup> Alter, Karen J. (2001). *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*. Oxford: Oxford University Press; Kingsbury, Benedict (ed.) (1999). Symposium Issue: The Proliferation of International Tribunals: Piecing Together the Puzzle, *New York University Journal of International Law and Politics*, 31; Stone Sweet, Alec (2000). *Governing with Judges*. Oxford: Oxford University Press.

<sup>4</sup> Ip, Eric (2010). *The Supreme People's Court and The Transformation of Judicial Politics in Contemporary China*. Thesis, Centre for Socio-Legal Studies, University of Oxford.

<sup>5</sup> Stone Sweet, p. 1.

<sup>6</sup> Whittington, Keith E. (2007). *Political Foundations of Judicial Supremacy. The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*. Princeton: Princeton University Press.

<sup>7</sup> Hirschl, Ran (2004). *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge, Mass., London: Harvard University Press.

independence.<sup>8</sup> Such developments raise concerns in some quarters about the creation of a self-governing branch of government, effectively a “state within a state”, that sits out of the mutual checks and balances that in a democracy ought to be exercised by the other branches of government.<sup>9</sup>

Although comparative works on the evolution of judiciaries in CEE remain scarce in comparison to accounts about developments in the USA and Western Europe, they show, beyond doubt, that CEE countries have too, formally if not yet in spirit, joined the global trend toward this “judicialization of politics”.<sup>10</sup> Institutional designs that enable it have followed a transnational template originating in the policy consensus of the transnational legal professional community that orbits the CoE and that has driven European integration from its inception.<sup>11</sup> The template is founded on the following core beliefs: that judges ought to be and can be insulated from politics; that laws and constitutions are “living documents” whose meaning only judges can discover; that judge-made public policy is at least as democratically legitimate as that of the elected representatives; and in general that judicial empowerment over politics effectively is the rule of law.<sup>12</sup> In practice, the template entails transferring more rather than less power to courts and restricting rather than expanding political representation in judiciary governance and constitutional interpretation. The template as implemented in CEE has consisted of a three-prong institutional designs: a majority-magistrate Constitutional Court (CC)<sup>13</sup> comprising a majority of jurists with final authority over the meaning of the Constitution; a Judiciary Council modelled on the Italian model to autonomously self-govern the judiciary branch; and a specialist Training Academy monopolising the education of magistrates.<sup>14</sup> The upshot of all this is that ample scope for

---

<sup>8</sup> Backer, Inge Lorange (2007). “The Norwegian Reform of Civil Procedure”, *Scandinavian Studies in Law*, 51, Stockholm: Stockholm Institute for Scandinavian Law; Russell, Peter H. and Kate Malleson (eds.) (2006). *Appointing judges in an age of judicial power : critical perspectives from around the world*. Toronto; Buffalo: University of Toronto Press; Seibert-Fohr, Anja (ed.) (2012). *Judicial Independence in Transition*. Heidelberg: Springer.

<sup>9</sup> Guarnieri, Carlo (2004). "Appointment and Career of Judges in Continental Europe: The Rise of Judicial Self-government " *Legal Studies* 24:1-2, 169-187, Guarnieri, Carlo" (forthcoming) “Judicial Independence in Europe: Threat or Resource for Democracy?” *Representation - The Journal of Representative Democracy*; Parau, Cristina E. (2012). "The Drive for Judicial Supremacy in Central and Eastern Europe", in Anja Seibert-Fohr (ed.), *Judicial Independence in Transition*. Heidelberg: Springer, pp. 619-667; Parau, Cristina E. (2013b). "Romania's Transnational Constitution: A Tradition of Elite Learning and Self-empowerment ", in Denis Galligan and Mila Versteeg (eds.), *The Social and Political Foundations of Constitutions*. Cambridge: Cambridge University Press.

<sup>10</sup> Tate, Neal and Torbjörn Vallinder (eds.) (1995). *The Global Expansion of Judicial Power*. New York: New York University Press.

<sup>11</sup> Alter, Karen (2007). "Jurist Social Movements in Europe: The Role of Euro-Law Associations in European Integration (1953-1975)." *EUSA Review* 20:4, 6-12; Parau, Cristina E. (2014). "Explaining Judiciary Governance in Central and Eastern Europe: External Incentives, Transnational Elites and Parliament Inaction." *Europe-Asia Studies* forthcoming; Vauchez, Antoine (2008). "The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)." *International Political Sociology* 2:2, 128-144.

<sup>12</sup> Parau, The Drive for Judicial Supremacy; Sadurski, Wojciech (2008). *Rights before Courts. A Study of Constitutional Courts of Post-Communist States of Central and Eastern Europe*. Dordrecht, The Netherlands: Springer.

<sup>13</sup> If magistrates do not hold the majority of seats on a CC then arguably such a court is not properly counted as part of the judiciary.

<sup>14</sup> Czarnota, Adam, Martin Krygier and Wojciech Sadurski (eds.) (2005). *Rethinking the Rule of Law after Communism*. Budapest: Central European University Press; Magen, Amichai and Leonardo Morlino (eds.) (2009). *International Actors, Democratization and the Rule of Law: Anchoring Democracy?* Abingdon: Routledge; Parau, Cristina E. (2013a). "The Dormancy of Parliaments: The Invisible Cause of Judiciary

policy-making discretion has been ceded to judges, whether they have taken this opportunity or not.<sup>15</sup> The bulk of this judicialization of politics might have been most prominent at the level of the Constitutional rather than the ordinary courts. This might be a misleading picture, however, contingent upon the dearth of evidence and research on the ordinary judiciary's activism. In any case, it is only a matter of time, a question of generational change, before ordinary courts too will make inroads into public policy making. This has actually happened even in Western countries with a strong tradition of judicial deference to parliament.<sup>16</sup>

This brings us to the central concern of this article: to explore institutional designs alternative to judicial supremacy. This means alternatives to constitutional interpretation by CCs, which is the most conspicuous form of public policy-making by apex courts<sup>17</sup>, and even alternatives which exclude CCs altogether. Judicial supremacy is defined as

the ability of the Supreme [or Constitutional] Court to erase the distinction between its own opinions interpreting the Constitution and the actual Constitution itself. The Court claims authority not only to look into the meaning of the Constitution as a guide to the justices' own actions, but also and more importantly to say what the Constitution means, for themselves and for everyone else.<sup>18</sup>

Judicial supremacy is to be distinguished from judicial review proper, with which it is too often confounded, even by some of the most renowned contemporary political scientists and jurists: "The 'Jeffersonian' concept [judicial review proper as discussed below] is easily mistaken and misstated. It does not contemplate defiance of judicial orders, or disregard of the principle of *res judicata*; thus it cannot be fairly characterized as 'arbitrary review'".<sup>19</sup> Plain judicial review without more, which existed in the United States even before *Marbury*, is the proper right of judges to find innocent, unilaterally without recourse, persons subordinate to State power in jeopardy of losing life, liberty or property to State action. This constitutes the Judiciary's core check-and-balancing function, and may or may not entail a power to "strike down" the very acts of parliament in order to maintain the defendant's innocence. Either way, it is one of the chief guaranties of the rule of law, and some of the world's oldest democracies, like Britain and the United States, have had it for centuries.<sup>20</sup>

---

Empowerment in Central and Eastern Europe." *Representation - The Journal of Representative Democracy* (forthcoming); Piana, Daniela (2007). "Unpacking Policy Transfer, Discovering Actors: The French Model of Judicial Education Between Enlargement and Judicial Cooperation in the EU." *French Politics* 5:33-65; Piana, Daniela (2010). *Judicial Accountabilities in New Europe*. Farnham: Ashgate; Sadurski, *Rights before Courts*; Seibert-Fohr, *Judicial Independence*.

<sup>15</sup> Matczak, Marcin, Matyas Bencze and Zdenek Kühn (2010). "Constitutions, EU Law and Judicial Strategies in the Czech Republic, Hungary and Poland." *Journal of Public Policy* 30:1, 81-99; Parau, The Drive for Judicial Supremacy.

<sup>16</sup> Stone Sweet, *Governing with judges*.

<sup>17</sup> Dahl, Robert (1957). "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law* 6:291.

<sup>18</sup> Whittington, *Political Foundations*, p. xi.

<sup>19</sup> Engdahl, David E. (1992). "John Marshall's 'Jeffersonian' Concept of Judicial Review." *Duke Law Journal* 42:2, 279-339, p. 281; cf. Ward, Kenneth, "Legislative Primacy: A Neglected Alternative to Judicial Supremacy" (May 2006). Available at SSRN: <http://ssrn.com/abstract=899607> or <http://dx.doi.org/10.2139/ssrn.899607>.

<sup>20</sup> Barnett, Randy E. (2004). *Restoring the Lost Constitution. The Presumption of Liberty*. Princeton and Oxford: Princeton University Press; Blackstone, William ([1765] 1979). *Commentaries on The Laws of England*. Chicago: Chicago University Press.

Judicial supremacy sits very uneasily in a democratic polity, or with the rule of law, inasmuch as:

(1) interpretation is too important to be left to a single branch, and therefore judicial supremacy is procedurally deficient; (2) a single branch interpretation produces inadequate substantive results – there is a need for more voices to yield the best results; (3) other branches need to carry out their responsibilities [which includes constitutional interpretation]; (4) judicial supremacy contravenes ... substantive principles or commitments, like democracy or equality; and (5) judicial supremacy squashes broad-based awareness of, and commitment to, constitutional principles.<sup>21</sup>

By contrast, plain judicial review is essential to the harmonious co-existence of democracy and the rights of individuals.

### **Why the need for alternatives to judicial supremacy?**

The relatively smooth creation of CCs in the early 1990s and the relatively unchallenged consolidation of their authority ever since appear to make constitutional interpretation by CCs the most settled question of judiciary design in CEE. But although it might be supposed that CEE Europeans simply prefer this aspect of judicial supremacy, and have chosen CCs accordingly, this rationalist stereotype does not in fact reflect the realities of CEE. Post-Communist constitutions were adopted in haste in many countries, as in Romania, the Czech Republic, and Moldova<sup>22</sup>, and the drafters did not avail themselves of a broad range of expertise on constitutional law. Generally there was little input from even the political elite, let alone society at large, about the relationship between the judiciary and the elected branches. East Europeans relied on models promoted by transnational legal professional elites acting through the CoE and later the European Commission, assuming them archetypically superior Western arrangements.<sup>23</sup>

But the adoption of new constitutions directly after the fall of Communism marked only the beginning of the process by which CEE political institutions have been taking shape. Recent controversies in Hungary and Romania over the curtailment of the powers of CCs and/or the autonomy of the Judiciary Council suggest that CEE political actors have realised through experience that the new judicial institutions are constraining them in ways that they did not foresee. These recent examples illustrate the fact that twenty years after the fall of Communism the question of the appropriate institutional designs of the relationship between courts and democratically elected branches of government has not been settled once for ever.

Indeed, in Romania, for example, there continues to be dissatisfaction with the functioning of the CC as witness that the powers of the CC are again an item on the current, 2013

---

<sup>21</sup> Gant, Scott E. (1997). "Judicial Supremacy and Nonjudicial Interpretation of the Constitution." *Hastings Constitutional Law Quarterly* 24:359-414, p. 405; see also Bellamy, Richard (2008). "The Democratic Constitution: Why Europeans Should Avoid American Style Constitutional Judicial Review." *European Political Science* 7:9-20; Waldron, Jeremy (1995). "The Wisdom of the Multitude: Some Reflections on Book 3, Chapter 11 of Aristotle's Politics." *Political Theory* 23:4, 563-584; Waldron, Jeremy (2006). "The Core of the Case Against Judicial Review." *The Yale Law Journal* 115.

<sup>22</sup> Author's interviews with constitutional drafters in Romania, Moldova and the Czech Republic 2009-2010.

<sup>23</sup> Iorgovan, Antonie (1998). *Odiseea elaborării Constituției*. Târgu Mureș: Vatra Românească; Parau, Explaining Judiciary Governance.

constitutional revision agenda. Indeed one of the Theses on the Constitutional Revision state that the aim of the new Constitution is to “strengthen the credibility, and independence and efficiency of the CC”.<sup>24</sup> Proposals range from the “strengthening the role and competences” to “establishing the procedure for nominating judges of the Constitutional Court and its competences” to “nominating CC judges from among Supreme Court justices”.<sup>25</sup> The fact that the CC is again on the constitutional revision agenda illustrates a clear point: more than twenty years after the CC was created conflict over its role and powers continues to persist. Romanian constitutional designers are still struggling with the question of how much power the court should have, or in the words of a recent report on a model Constitution: “What competences should the CC have and exercise that does not create the danger that it would monopolise the position of arbiter of political life becoming a final decision-maker on institutional-political matters”.<sup>26</sup> Apparently some would like to go as far as to reintroduce the provision that Parliament can overturn a decision of a CC, a provision that existed in the 1991 Romanian Constitution. Others are very critical of any limits placed on CC power: why have a CC at all if its decisions are not going to be obeyed all the time?

What follows speaks exactly to this question, but from a perspective that seeks to stand outside the straitjacket of the CC paradigm. The focus herein is on the practical workings of alternative institutional mechanisms of constitutional interpretation. Practical examples are drawn from American legal history, primarily before the Civil War. Looking back to the days of democracy in America as witnessed by de Tocqueville serves a twofold purpose.<sup>27</sup> The first is to investigate how constitutional interpretation was understood in both theory and practice by the Framers of the world’s first fully articulated separation of powers, the plan that serves as master template for all constitutional architecture in modern times, including Romania’s.<sup>28</sup> Many of those who had taken a hand in forging the new government became the American Republic’s first and greatest politicians. How did they view and how did they play their role as political office-holders in determining the Constitution’s meaning? It is critical to focus the analysis on elected politicians, as in CEE constitutional and statutory reforms pertaining to judiciary power have almost invariably been shaped by legal professionals with a self-interest in augmenting “their” power; meaning not just their individual power (although that is served too by the power to conceive and draft the basic law) but also that of the legal professional peer-group they identify with.<sup>29</sup> A tendency to unconscious self-empowerment may mislead the elite to neglect adequately considering how a government of divided powers and checks and balances functions best as a whole.

Three modes of constitutional interpretation alternative to judicial supremacy can be found in the contemporary constitutional-legal literature: executive supremacy; legislative supremacy

---

<sup>24</sup> Parlamentul României (2013). Hotărâre privind aprobarea tezelor revizuirii constituției. București: Parlamentul României, p. 12.

<sup>25</sup> *Ibid.*

<sup>26</sup> Barbu, Daniel, Valentin Constantin, Bogdan Dima, Manuel Gutan, Gheorghe Piperea, Corneliu L. Popescu and Simina Elena Tanasescu (2013). *Reforma constitutională: analiza și proiectii. Raportul comisiei pentru o nouă Constituție*. p. 15.

<sup>27</sup> Cf. Levinson, Sanford (2003). "Why I do not teach Marbury (except to Eastern Europeans) and why you shouldn't either." *Wake Forest L. Rev.* 38, 553-578.

<sup>28</sup> Constitution of Romania, art. I, § 4.

<sup>29</sup> Madsen, Michael Rask and Antoine Vauchez (2005). "European Constitutionalism at the Cradle, Law and Lawyers in the Construction of a European Political Order (1920-1960)", in Harm Schepel and Alex Jettinghoff (eds.), *In Lawyers' Circles. Lawyers and European Legal Integration*. The Hague: Elzevir Reed; Parau, Explaining Judiciary Governance.

or primacy; and co-equality (*aka* departmentalism).<sup>30</sup> The first two are interesting but in their pure type are unstable equilibria that fail to constitute a viable scheme of government based on mutual checks and balances. Co-equality is the most promising, yet also perhaps the most deficient in what is the most important aspect of that theory: on the basis of what criterion should one branch of government or the other have the final word over what the constitution means? As Gant (1997: 405) puts it, departmentalists “refuse to acknowledge the havoc wrought by departmentalism, or explain sufficiently how such chaos is to be avoided”, the chaos in question being the result of confusion over who shall have the final word. A solution is proposed herein to try and supply this deficiency.

## Separation of powers, checks and balances and Ground Due Process

America’s Framers understood constitutional interpretation as a particularist process arising from settling “cases” or contests over issues of right or of policy. This stands in contrast with the widespread (but not universal) European practice of abstract constitutional interpretation. James Madison, the US Constitution’s chief Framers, could thus write, “the meaning of ... a Constitution, so far as it depends on Judicial interpretation, was to result from a course of particular decisions, and not ... from a previous and abstract comment on the subject”.<sup>31</sup> Because interpretation was always concrete and never abstract, the solution to a constitutional controversy could spring from any quarter, not only from some grand, central oracle, and not even necessarily from the Judiciary at all. This is highly relevant to countries with a CC and centralised judicial review such as Romania for it presents an alternative that is almost never considered.

The Framers conceived cases of constitutional interpretation as divided into two distinct classes: (1) cases of a judiciary nature (the “judiciary class”), and (2) all other cases (the “residual class”).<sup>32</sup> As the labelling suggests, this distinction is pivotal for understanding the role of the Judiciary. Such a division was already firmly established in men’s minds<sup>33</sup> before the 1787 Constitutional Convention was held and proved uncontroversial within it, as witness the following brief but revealing excerpt from Madison’s *Notes of Debates* concerning the extent of the Supreme Court’s jurisdiction:

---

<sup>30</sup> Bellamy, Richard (2007). *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*. Cambridge: Cambridge University Press; Easterbrook, Frank H. (1990). "Presidential Review." *CASE. W. RES. L. REV.* 40:905-929; Fisher, Louis (1984). "Constitutional Interpretation by Members of Congress." *N. C. L. Review* 63:707-747; Gant, Judicial Supremacy and Nonjudicial Interpretation; Meese, Edwin, 3rd (1986). "The Law of the Constitution." *Tulane Law Review* 61:979-990; Miller, Geoffrey P. (1993). "The President's Power of Interpretation: Implications of A Unified Theory of Constitutional Law." *Law and Contemporary Problems* 56:4, 35-61; Murphy, Walter F. (1986). "Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter." *The Review of Politics* 48:3, 401-423; Paulsen, Michael Stokes (1993). "The Merryman Power and The Dilemma of Autonomous Executive Branch Interpretation." *Cardozo Law Review* 15:81-111; Paulsen, Michael Stokes (1994). "The Most Dangerous Branch: Executive Power to Say What the Law Is." *Geo L. J.* 83, 217-345; Paulsen, Michael Stokes (2008). "Lincoln and Judicial Authority." *Notre Dame L. Rev.* 83:1227-1302; Ward, Legislative Primacy; Whittington, Keith E. (2002). "Extrajudicial Constitutional Interpretation: Three Objections and Responses." *N.C. L. Rev.* 80:773-852; Whittington, *Political Foundations*.

<sup>31</sup> Jefferson, Thomas (1819c). "To Spencer Roane, 2 Sept. 1819", [http://www.constitution.org/jm/18190902\\_roane.htm](http://www.constitution.org/jm/18190902_roane.htm), Accessed 2 June 2013.

<sup>32</sup>cf. Fallon, Richard H. Jr. (2003). "Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension." *California Law Review* 91:1, 1-57.

<sup>33</sup> Fallon, Richard H. (2009). *Hart and Wechsler's The federal courts and the federal system*. New York, NY: Thomson Reuters/Foundation Press.

Doc[to]r. JOHNSON moved to insert the words “this Constitution and the” before the word “laws” [thus: “The judicial Power shall extend to all Cases, in Law and Equity, arising under *this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; etc.*”]

Mr. MADISON doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.

The motion of Doctr. Johnson was agreed to *nem[ine] con[tradiciente i.e. unanimously]* it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature.<sup>34</sup>

The logical structure of Madison’s reservation to give the Judiciary power to decide all constitutional matters should be noted first of all: assuming only that the whole Convention could not be so stupid as to take away power with one hand and give it right back with the left, it follows that they could not have intended the Court to determine its own constitutional jurisdiction; otherwise, nothing would prevent it from giving itself a jurisdiction that swept-in anything whatever that the Founders may have considered off limits. This means the judicial doctrine of justiciability (*i.e.* the Supreme Court’s theory of its own jurisdictional limits) must be precluded as dispositive. The Framers appear to have believed they have settled once for ever the jurisdiction of the Court, precluding the Court deciding what its jurisdiction is. The Court may propose its jurisdiction, but the other two Branches dispose, else the Court could take all the power it chose to. Next, common sense suggests that a constitutional interpretation partakes of a “judiciary nature” if it requires done, what judges do: – determine the guilt or innocence of defendants prosecuted by the Federal authorities. Where guilt or innocence is not the issue, the Judiciary as a whole has no jurisdiction. Finally, note the spontaneous unanimity of the Framers. The author was able to find no other instance of unanimity on a substantive issue on record. Not even Doctor Johnson objected to Madison’s reservation; they seemed to shrug as if it were self-evident. It cannot be said, then, that the Convention left the matter of the Supreme Court’s jurisdictional limitations unsettled; and if the Court’s opinion in *Marbury v. Madison* trespasses beyond those limitations, then it must be judged unconstitutional.<sup>35</sup>

---

<sup>34</sup> Madison, James (1840). *Notes on the Debates in the Federal Convention of 1787 reported by James Madison*. New York and London: W. W. Norton & Company, p. 538-9.

<sup>35</sup> Consulting Madison’s *Notes* may imply an Originalist approach to constitutional interpretation, critics of which question the validity of using sources like these as authoritative for contemporary interpretations (Farber, Daniel A. (1988). "The Originalism Debate: A Guide for the Perplexed." *Ohio St. L.J.* 39:1085-1106; Hutson, James H. (1986). "The Creation of the Constitution: The Integrity of the Documentary Record.", *Tex. L. Rev.* 65:1, 1-39. According to Farber (1988: 1091)

the convention debates themselves were not considered to have any authoritative status as a source of meaning because the Constitution took its authority from its adoption by the sovereign People: ‘We, the People’ referred to the ratifiers, not the members of the Convention. Given this understanding, the Framers themselves were merely scribes, drafting a document for possible use by others – little different from staff members in Congress who help draft legislation for Congress to consider. It seems somewhat unlikely that the intent of the scribes was thought to be binding on the ratifiers ... Of course, even if it is correct, this conclusion would not mean that the Convention debates should be

The Judiciary Branch plays a role – though not necessarily a decisive one – in the disposition of judiciary-class interpretations *only*; it is denied jurisdiction in residual-class cases, except insofar as it defends its own powers, against the other Branches’ encroachments. On the other hand, all three Branches, not only the Judiciary, play a role in the “judiciary” class, each through its own processes, parliamentary, administrative or judicial.

It is commonly supposed that judicial process is “adjudication”, while parliamentary process concerns “public policy”. This dichotomy, however, is academic; the two abstract categories broadly overlap in reality, and this intersection is the most important and contested domain of official decision-making:

In one way of looking at it, adjudication is what courts do and legislation is what legislatures do ... It is much more common, however, to see the two as *methods of decision* that might or might not characterise any given activity of a court or a legislature. In the oldest and simplest version of this view, though not in the current understanding of lawyers, what legislatures do when they legislate is make law, and what courts do when they adjudicate is apply law to facts. But it is perfectly possible for a legislature to adjudicate and for a court to legislate.<sup>36</sup>

Not every parliamentary or administrative proceeding determines guilt or innocence, but very many do; and each Branch has its own characteristic role in the entire concatenation of due processes that constitute adjudication from start to finish. To clarify:

- the Legislative Branch enacting (not voting down) prohibitions of personal behaviour is finding violators guilty *prospectively* – *i.e.* without proceeding to detection, prosecution, trial or punishment.

---

disregarded. Besides their intrinsic interest, they are also strong evidence of the understanding of reasonable readers of the period.

This, however, is a truncated, unrealistic notion of the relationship between Congressmen and their staffs, or the ratifying public and their representatives in a constitutional convention. Staffers are anything but “mere scribes”; they are trusted delegates chosen precisely because Congressmen consider them faithful agents of their own intentions. Of course agents may drift away from their principals’ purposes, but a situation like ratification of a document as important as a constitution – (in contrast, say, to the complex bookkeeping of a big business enterprise, where fraud is more easily concealed) – is one where “agent drift” is *most* likely to be spotted and corrected. Absent evidence of such correction, it may be presumed that the agents’ and principals’ intentions were one. And the speculative objection must be rejected that the principals might have missed their agents’ errors, and but for that would have expressed other intentions. As a practical matter the principals’ silence works as a kind of *estoppel* precluding all counterfactual hypotheses. One cannot imagine either the Framers or the ratifiers disagreeing on this point, as otherwise no legal meaning could ever be fixed. In Romania and other post-Communist countries in CEE this is less of an issue, as many contemporary politicians were amongst those who drafted the first or subsequent constitutions now prevailing, and may be expected to know their own and their peers’ intentions concerning the CC and other organic issues (assuming they had one that they actually understood: the evidence suggests elected politicians did not in fact have any understanding of CC judicial review, let alone alternatives to it, having relied implicitly on constitutional law academics, who in turn imitated their peers in the West (Parau, *Explaining Judiciary Governance*).

<sup>36</sup> Kennedy, Duncan (1997). *A Critique of Adjudication (Fin de Siècle)*. Cambridge, Mass.; London: Harvard University Press.

- Whom the Executive detect and prosecute (and he does not pardon) are found guilty *presumptively* – officers of the Executive have evidence that named persons have violated the prohibition, but this is subject to judicial override.<sup>37</sup>
- Judicial condemnation determines guilt *finally*.
- Post-trial or *retrospective* findings of guilt (but not of innocence) are precluded.

Each one of these steps is necessary to Ground Due Process, which will be discussed below. Any judicial proceeding that circumvents any one of them is therefore constitutionally a nullity. It is also explained more fully below how parliamentary and administrative findings of *innocence* override *judicial* findings to the contrary.

Note that extra-judicial processes contribute decisively to the disposition of cases of the “judiciary” class, so-called *not* because only the Judiciary is entitled to partake in them, but because they are the only cases of constitutional interpretation that the Judiciary is entitled to partake in! By the same token, judicial processes even if confined to adjudication of guilt and innocence may equally have far-reaching public-policy repercussions: “Adjudication is a very important ingredient in the policy process, both as carried out by courts and administrative agencies. It is often through the settlement of individual cases and controversies that policies are clarified and given concrete meaning for individuals”.<sup>38</sup>

The final analysis must yield the conclusion that the continued possession of life, liberty or property depends absolutely on continuation of a status of innocent. One must not think of innocence and guilt as just a commonplace binary opposition; it is a fork of destiny which is asymmetrical in every sense – legal, moral and political. The guilty man is *legally* liable for penal sanctions and compensatory damages; *morally* he is disgraced before his peers, who are far more apt to shun than aid him; *politically* he is exposed defenceless to State power. The man found innocent is immune from these catastrophic consequences.

The American Framers envisioned the determination of guilt and innocence as occurring in the context of separation of powers. They conceived separation of powers as an expedient to render the determination process asymmetrical such that innocence is *structurally* easier to find than guilt:

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be *essential to the preservation of liberty*, it is evident that each department should have a will of its own ... the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. ... Ambition must be made to counteract ambition. ... It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But

---

<sup>37</sup> Duff, R. A. (2012). "Presuming Innocence", in Lucia Zedner and Julian V. Roberts (ed.), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth*. Oxford: Oxford University Press, .

<sup>38</sup> Woll, Peter (1974). *Public Policy*. Boston: Winthrop Publishers Inc..

what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.<sup>39</sup>

By contrast, the contemporary understanding of the end-purpose of separation of powers, and especially how it might be achieved, suffers from lack of clarity.<sup>40</sup> It has been this author's observation that constitutional designers in CEE do indeed take for granted the "tautological justifications of 17<sup>th</sup> and 18<sup>th</sup> century political theorists such as Montesquieu".<sup>41</sup> In post-Communist CEE the separation of powers, without being understood, quickly acquired unquestionable status and has been misapplied to justify Judiciary institutional autonomy and the abolition of all checks and balances upon it by the other Branches.<sup>42</sup> This misconception has become a transnational trend affecting Judiciaries even in countries with the tradition of Great Britain, as witness 2005 constitutional reforms abolishing the Lord Chancellor's power to appoint judges, even though the English Judiciary has been indisputably independent and impartial for centuries. CCs may have been less tainted than ordinary judiciaries by this trend, although calls to staff them with "apolitical" and "professional" experts instead of politically experienced and previously elected representatives suggest that similar ambitions are waiting for the right political opportunity.<sup>43</sup>

Yet the purpose of separation of powers is not to create exclusive preserves of action for each Branch of government, like a misconceived scheme to deregulate a national State monopoly by dividing it into several regional monopolies. Madison specifically warned against this sort of "mere taxonomy", a conception of the separation of powers that would create autonomous spheres of influence due to a too-absolute separation:

The concentrating [of the respective powers] ... in the same hands, is precisely the definition of despotic government. It will be no alleviation, that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one.<sup>44</sup>

Or,

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-

---

<sup>39</sup> Madison, James (1788a). "The Federalist No 51. The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments." *Independent Journal*, <http://www.constitution.org/fed/federa51.htm>, Accessed 2 June 2012, emphasis added.

<sup>40</sup> Vile, M. J. C. (1998). *Constitutionalism and Separation of Powers*. Indianapolis: Liberty Fund; Waldron, Jeremy, *Separation of Powers or Division of Power?* (April 24, 2012). NYU School of Law, Public Law Research Paper No. 12-20. Available at SSRN: <http://ssrn.com/abstract=2045638> or <http://dx.doi.org/10.2139/ssrn.2045638>.

<sup>41</sup> Waldron, Separation of powers, p. 1.

<sup>42</sup> Emmert, Frank (2002). "Editorial: The Independence of Judges - A Concept Often Misunderstood in Central and Eastern Europe." *European Journal of Law Reform* 3:4, 405-409; Parau, The Drive for Judicial Supremacy.

<sup>43</sup> Comisia Prezidențială de Analiză a Regimului Politic și Constituțional din România (2009). *Raport al Comisiei Prezidențiale de Analiză a Regimului Politic și Constituțional din România – Pentru consolidarea statului de drept*. București: Președinția României, p. 64.

<sup>44</sup> Madison, James (1788c). "The Federalist No. 48. These Departments Should Not Be So Far Separated as to Have No Constitutional Control Over Each Other", [http://avalon.law.yale.edu/18th\\_century/fed48.asp](http://avalon.law.yale.edu/18th_century/fed48.asp), accessed 2 October 2009.

appointed, or elective, may justly be pronounced the very definition of tyranny. ... In order to form correct ideas on [the separation of powers], it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct. The oracle ... on this subject is the celebrated Montesquieu ... [who] has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavour ... to ascertain his meaning on this point. ... From these facts [here omitted] ... it may clearly be inferred that, in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," [Montesquieu] did not mean that these departments ought to have no PARTIAL AGENCY in, or no CONTROL over, the acts of each other. His meaning, as his own words import ... can amount to no more than this, that where the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted.<sup>45</sup>

And, in Federalist No. 48:

It was shown in [No. 47] that the political apothegm there examined does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other. ... unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.<sup>46</sup>

The purpose of separation of powers is to require multiple assents to the exertion of state power on individuals from the several separate Branches. This requirement has been called a rule of "Unanimous Concurrence" and compared to common law jury practice.<sup>47</sup> As a jury verdict to convict must be unanimous<sup>48</sup>, so on a larger scale, all three Branches must concur in finding the Federal defendant guilty in *every* judiciary-class determination. Failing this, the defendant is innocent. Herein lies the asymmetry: lack of unanimity determines innocence, *i.e. just one* branch finding innocent (failing to find guilty) overrides *both* of the others' determinations to the contrary. The power to withhold concurrence constitutes each Branch's most important check and balance on the others. This then is the sole purpose of separation of powers: to provide the [Federal] defendant *multiple chances of being found innocent*. The American Constitution gives at least three chances – or more if one counts checks and balances between as well as within the several branches, like the division of Congress into two Houses, or the right of juries to adjudicate independently of judges. Separation of powers potentiate mutual checks and balances between government "departments" so that "no one

---

<sup>45</sup> Madison, James (1788b). "The Federalist No. 47. The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts", [http://avalon.law.yale.edu/18th\\_century/fed47.asp](http://avalon.law.yale.edu/18th_century/fed47.asp), accessed 1 October 2008.

<sup>46</sup> Madison, The Federalist No. 48.

<sup>47</sup> Bains, Wittmeier J. (forthcoming). *Ground Due Process and The Unconstitutionality of Fourteenth Amendment Jurisprudence*; on "concurrent review" see also Mendelson, Wallace (1961). "Jefferson on Judicial Review--A Reply to Professor Krislov." *J. Pub. L.* 10:113-124; and Wolfe, Christopher (1986). *The rise of modern judicial review: from constitutional interpretation to judge-made law*. New York: Basic Books.

<sup>48</sup> Blackstone, *Commentaries on The Laws of England*.

could transcend their legal limits, without being effectually checked and restrained by the others”<sup>49</sup>, forestalling arbitrary government in which the people’s liberty might be abused.

This conception of the separation of powers as purposing the provision of multiple chances of being found innocent may be a new insight into the *theory* of constitutional design, but it is contended that in ages past it was instinct in the *practice* of constitutional government. By its discoverer it is termed “Ground Due Process”.<sup>50</sup> It posits that *the “last word” in saying what the US Constitution means in judiciary-class controversies accrues to whichever branch finds the Federal defendant in jeopardy innocent*. It denotes the ground of constitutional legitimacy for all other adjudicative proceedings, such as Notice and a Hearing<sup>51</sup>, Ground Due Process is prior to such secondary due processes in its obligatoriness on government bodies, and is ultimately the procedural essence of the rule of law. If Ground Due Process is denied, then justice risks miscarrying and the proceedings risk being illegitimate, even if the other processes have been duly observed.<sup>52</sup>

This theory sheds new light on the meaning of checks and balances. To check and balance the judiciary to the extent of finding persons innocent (retrospectively if necessary) is a competence of democratically elected powers of government to correct particular errors even in final judicial decisions of apex courts. (Taking into account both classes of constitutional interpretation, redress may entail correcting the decision in detail, nullifying it, or ignoring it, as appropriate.) This is important insofar as checks and balances are poorly understood by constitution framers in CEE, who tend to confound it with accountability procedures like the appointments process<sup>53</sup> which, however, allow no retrospective correction of unjust decisions – what checks and balances are useful for. Impeachment, though a possible remedy in cases of misappointment, is nonetheless a “blunt instrument” the high transaction costs of which have dis-incentivised regular attempt. Moreover, impeachment can be abused to threaten judges’ decisional independence.<sup>54</sup>

The theory also has implications for our understanding of the role of judges in a democracy and the proper limit of their jurisdiction. An argument often heard that when legislatures fail to act to regulate an area of life, this justifies judges intervening to regulate it themselves.<sup>55</sup> It is crucial to understand that Legislative inaction may never be counted a “failure” by other Branches of government without damage to Ground Due Process and everything that rides on it. Inaction means something and, regardless of the motives for it, it *constitutes* a finding of innocence in a divided government. When courts “step into” a vacuum of legislation, using it as a pretext, they are vesting themselves with an “extra-jurisdiction” by which they purport to find persons guilty (not innocent!) unilaterally and without recourse. It is in fact a violation of

---

<sup>49</sup> Madison, The Federalist No. 48.

<sup>50</sup> Bains, *Ground Due Process*.

<sup>51</sup> *cf.* Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), in which the Supreme Court held, “[The State of] Wisconsin’s prejudgment garnishment of wages procedure, with its ... taking of property without notice and prior hearing, violates the fundamental principles of procedural due process”.

<sup>52</sup> Bains, *Ground Due Process*.

<sup>53</sup> Parau, The Drive for Judicial Supremacy.

<sup>54</sup> Ferejohn, John (1999). "Independent Judges, Dependent Judiciary: Explaining Judicial Independence." *Southern California Law Review* 72:353-372.

<sup>55</sup> Schapiro, Robert A. (1989-1990). "The Legislative Injunction: A Remedy for Unconstitutional Legislative Inaction." *Yale L.J.* 99 231-250.

separation of powers, and other Branches have a right and indeed a duty to check and balance it.<sup>56</sup>

The unilateral property restitutions in Romania vividly illustrate the point. Certain Romanian courts began restituting to their original owners property confiscated half a century before by the Communist State and converted to residences thereafter. Lacking all legislative basis they nonetheless deemed themselves competent to proceed on the basis of an abstract statement of principle in the Constitution which obligates the State to uphold the right to private property, and a Civil Code precept stating that private property rights are inviolable. Neither statement defined with any particularity the rights – especially the *liabilities* – specifically of parties to restitution claims.<sup>57</sup> Activism like this would not have been justified even if the Constitution had defined property rights in explicit detail. Courts are obligated by the Ground Due Process arising from the separation of powers to decline proceedings against tenants in possession to find them guilty of trespass and evict them absent explicit legislative authorisation.<sup>58</sup> Even exempting the tenants from eviction while reassigning the property is a dubious proceeding without more than a statement of principle in a constitution. For example, the original confiscation might be deemed (by Parliament) an “eminent domain” proceeding entitling the original owners to monetary compensation but not repossession.

Constitutions cannot in themselves determine guilt, nor should any constitutional provision be used as pretext thereto by judges purporting to “interpret” them. All provisions that might imply guilt or liability in certain parties are to be construed, not as *determining* guilt but as so many *grants of power to the Legislature* – whether implied (e.g. “social rights” to others’ incomes through taxation) or express – to determine it *prospectively*. Congressional inaction accordingly means that the Congressional majority are unwilling, for whatever reason, to “prospect” the guilt of a given class of persons. Especially provisions which apply directly to private persons, like civil rights provisions, do not operate and must not be construed as pretexts for finding guilty, but the reverse. But by the same token, judges do have plenary, unilateral power to find innocent without authorisation of the Legislative, derived from the sheer logic of divided government. The Constitution’s meaning as applied to persons subordinate to Federal/State power is to be discovered in the summation and comparison of concrete, particular determinations of innocence or guilt under the constraints of Ground Due Process.<sup>59</sup>

---

<sup>56</sup> Pop, Teofil (1996). "Continutul sintagmei 'depasirea atributiilor puterii judecatoresti'" *Dreptul* 10:34-42.

<sup>57</sup> Parau, Cristina E. (2010). *The Role of Courts in a Democracy: Alternatives to Judicial Supremacy*. Oxford, Foundation for Law, Justice and Society; Parau, *The Drive for Judicial Supremacy*.

<sup>58</sup> It is true that common law courts might find persons guilty of trespass to land without specific Parliamentary enactment, but this is because they could rely on the royal legislation of the twelfth and thirteenth centuries, *viz.* the writ of trespass *quare clausum fregit* (Blackstone, *Commentaries on The Laws of England*). Although judge-“made” in the sense of *elaborated*, common law rested not on constitutional interpretation, but on royal writs which constituted prior *legislative* determinations of guilt. If proof were necessary, then witness that the British Parliament has always wielded power at will to override common law, in general and in particular, by statutory enactment. By contrast, constitutional law cannot be overridden, to find innocent notwithstanding judicial determinations to the contrary. Here precisely lies the danger of judicial supremacy and judicial activism.

<sup>59</sup> Bains, *Ground Due Process*.

## The courts have no jurisdiction over co-equal branches of government

The judiciary class consists *only* of constitutional interpretations where the issue is the *guilt*<sup>60</sup> or *innocence* of the “Federal defendant” – be it a State of the Union or an individual – whom the authorities have put *in jeopardy* of life, liberty or property (to deprive him of which a finding of guilt would lawfully entitle them). The residual class comprises all constitutional interpretations that Madison and the Convention had denied to the Judiciary. This would include the kind of cases often referred to as “political”, such as disputes over competence between the Branches of government; always bearing in mind that it is the political Branches who are constitutionally entitled to decide which cases are political and not the Judiciary.

That the Judiciary cannot decide which cases are political and which are not is an issue relevant to contemporary Romanian constitutional designers, who are still struggling with the question of how much power the court should have, or in the words of a recent report on a model constitution: “What competences should the CC have and exercise that does not create the danger that it would monopolise the position of arbiter of political life becoming a final decision-maker on institutional-political matters?”<sup>61</sup> The experience of the United States suggests that this issue is unlikely to be settled soon: constitutional designers are hardly likely to come up with an optimal solution, because one does not exist. The choice in reality is between a CC with so little power as to matter little as an institution – (so why have one at all?), – and one empowered to dictate political life, given sufficient jurisdiction. The reason is that any definition of “political” versus “judiciary” questions can be interpreted however the CC wants, without recourse by the political Branches. Left to decide with finality what is a “political question” and what it is not, it will have in effect plenary power to determine its own jurisdiction. American scholars’ lamentations over the demise of the political question doctrine in the USA is a vivid illustration that a court with the last word on its own jurisdiction has in fact unlimited jurisdiction:

[T]he political questions doctrine carving out areas of the Constitution for congressional interpretative responsibility remains, after all, judicial doctrine. The court always controls the carving, in effect delegating some interpretive disputes to the legislature to resolve but retaining the authority to rescind that delegation, as in fact it had done in the legislative reapportionment cases.<sup>62</sup>

The failure of the political question doctrine has come to be perceived in the USA as “part of a larger trend in which the Supreme Court has embraced the view that it alone among the three branches of government has the power and competency to provide the full substantive meaning of all constitutional provisions”<sup>63</sup> This aspect of the American experience suggest that Romanians must either submit to a CC that dictates political life or else renounce the institution altogether.

A middle ground might be possible, however, and the CC could play an innocuous role if it merely had advisory not obligatory jurisdiction similar to an ombudsman but more focussed

---

<sup>60</sup> The term *guilt* may be construed, where required, in a broad sense that includes “responsibility” in civil cases as well as “guilt” in criminal cases.

<sup>61</sup> Barbu et al., *Reforma constitutională*, p. 15.

<sup>62</sup> Whittington, *Political Foundations*, p. 16.

<sup>63</sup> Barkow, Rachel E. (2002). “More Supreme Than Court? The Fall of the Political Question Doctrine and The Rise of Judicial Supremacy.” *Columbia Law Review* 102:2, 237-247, p. 237.

and more comprehensive. Of course, one must wonder why libertine violators would care about a CC with merely advisory powers. One answer would be because its findings can and should become electoral campaign issues. Romanian readers might find interesting an observation of James Madison in *Federalist* No. 48 concerning the Council of Censors of the State of Pennsylvania:

The other State which I shall take for an example is Pennsylvania; and the other authority, the Council of Censors, which assembled in the years 1783 and 1784. A part of the duty of this body, as marked out by the constitution, was "to inquire whether the constitution had been preserved inviolate in every part; and whether the legislative and executive branches of government had performed their duty as guardians of the people, or assumed to themselves, or exercised, other or greater powers than they are entitled to by the constitution". In the execution of this trust, the council were necessarily led to a comparison of both the legislative and executive proceedings, with the constitutional powers of these departments; and from the facts enumerated, and to the truth of most of which both sides in the council subscribed, it appears that the constitution had been flagrantly violated by the legislature in a variety of important instances ... Those who wish to see the several particulars falling under each of these heads, may consult the journals of the council, which are in print. Some of them, it will be found, may be imputable to peculiar circumstances connected with the war; but the greater part of them may be considered as the spontaneous shoots of an ill-constituted government.<sup>64</sup>

The Council apparently did influence the political conduct of the people of that State, as they convened a constitutional convention in 1789, directly after the time Madison wrote these words, which produced a new constitution in 1790.<sup>65</sup> This was a far more drastic step than simply to vote for a new government pledged to right the legislative errors of the previous one.

Although Romania and many other post-Communist CEE countries are not federations, the political question doctrine debates in the USA is applicable to them, as the many Constitutional Courts in the region do actually have the power to settle conflict between government authorities. In Romania, it is unclear that a new constitution could eliminate this competence, notwithstanding opinions that it ought to do, so as to prevent the continuation of the "construction of a new series of formal powers for certain public authorities" (and likely for the Court itself):

[O]ne of the solutions concerning the competences of the Constitutional Court is to eliminate its competences regarding adjudication of juridical conflicts of a constitutional nature [*i.e.* political questions], the purpose being that of allowing freedom to the political authorities to negotiate and reach a compromise over conflicts that appear between themselves.<sup>66</sup>

---

<sup>64</sup> Madison, *The Federalist* No. 48.

<sup>65</sup> Pennsylvania Bar Association (2013). "Pennsylvania's Constitution: A Brief History", <http://www.pabarcr.org/history.asp>, accessed 6 June 2013.

<sup>66</sup> Barbu et al. *Reforma constitutională*, p. 108; see also Parau, *The Drive for Judicial Supremacy*.

Indeed, the American Framers assumed that, being “co-equal and co-ordinate”<sup>67</sup> not subordinate to the Judiciary, the political Branches cannot be defendants before it. Office-holders are quite capable of “high crimes and misdemeanours”<sup>68</sup>, of course, but this creates no jurisdiction in the courts to furnish a remedy. Quite the contrary, the American Framers assigned jurisdiction over Federal officials to Congress sitting *qua* Court of Impeachment – their one concession to the English heritage of parliamentary sovereignty. Adjudication of conflict between co-equal Branches was precisely the kind of jurisdictional contest that erupted between President Jefferson and Chief Justice Marshall in the celebrated case of *Marbury v. Madison*. According to the widespread myth it was settled in favour of the latter; fact and reason, however, suggest otherwise.

Defeated incumbent President John Adams remained in office during the two weeks between the Electoral College’s decision for Jefferson on February 17, 1801 and his inauguration as the new President on March 4. The Federalist Party in Congress had also been defeated by Jefferson’s party, and now as a “lame duck” tried to pack the Judiciary through the infamous Midnight Judges Act, which doubled the Judiciary’s size overnight. Adams strove to the last minute to install Federalist partisans who he hoped would hobble the new Administration from the bench. One of them was John Marshall, Adams’s Secretary of State, who stayed on as acting Secretary even after taking up his Chief Justiceship. Another was William Marbury. All the commissions had been signed and sealed, but some, like Marbury’s, could not be delivered before time ran out. The undelivered commissions were claimed invalid, as being incomplete.<sup>69</sup> Jefferson refused to deliver them and Marbury sued in the Supreme Court, naming as “defendant” the new Secretary of State, James Madison (the chief architect of the Constitution). In Madison’s view as well nothing forbade discretionary non-delivery. At this point Marshall should have recused himself from the case due to his obvious conflict of interest, yet quite improperly demurred, in line with the Federalist Party’s overall pattern of misconduct. He ruled non-delivery (1) illegal and (2) remediable by the Judiciary. Conclusion (1) relied on the common law of property, a dubious line of reasoning that assimilated public office to private ownership. Let the reader be reminded that Marbury was the plaintiff in this case, not the defendant. He never stood in jeopardy of losing anything truly belonging to him by inalienable right, only the “right” to a government job, which made no part of the (considerable) property he owned apart from government. Conclusion (2) was a far graver error: it breached the separation of powers, asserted judicial super-ordination, and in effect usurped Congress’s impeachment jurisdiction. This point will be more fully developed below.<sup>70</sup>

President Jefferson reacted vehemently to the attempt to establish judicial supremacy, both in deed – *viz.* repeatedly disregarding Marshall’s commands – and word. Years after retiring from public office, he kept corresponding on the subject. His extant letters make abundantly clear that judicial supremacy *negates* checks and balances by ensconcing the judiciary in an impregnable vantage-point that overshadows what are supposed to be co-equal Branches. In a missive nowadays viewed as a definitive statement both of the antebellum understanding of the US Constitution and of the actual working of a system of separation of powers and checks and balances, he discussed the matter at some length:

---

<sup>67</sup> Madison, *The Federalist* No. 47.

<sup>68</sup> U.S. Const. art. II, § 4.

<sup>69</sup> Turner, Kathryn (1961). "The Midnight Judges." *University of Pennsylvania Law Review* 109:4, 494-523.

<sup>70</sup> O’Fallon, James M. (1992). "Marbury." *Stanford Law Review* 44:219-260; McCloskey, Robert G. and Sanford Levinson (2010). *The American Supreme Court*. Chicago, Ill.: University of Chicago Press.

In denying the right they [the Federal Judiciary] usurp of exclusively explaining the constitution, I go further than you do, if I understand rightly your quotation from the [*Hampden*] *Federalist* [newspaper], of an opinion that ‘the judiciary is the last resort in relation to the other departments of the government, but not in relation to the rights of the parties to the compact under which the judiciary is derived.’ If this opinion be sound, then indeed is our constitution a complete *felo de se*. For intending to establish three departments, co-ordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone, the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation. ... The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please. ... My construction of the constitution is very different from that you quote. It is that each department 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; and especially, where it is to act ultimately and without appeal. I will explain myself by examples, which, having occurred while I was in office, are better known to me, and the principles which governed them. [The Congress under President Adams’ Federalist Party] had passed the [Alien and Sedition Acts of 1798]. The federal courts had subjected certain individuals to its penalties, of fine and imprisonment. On coming into office, I released these individuals by the power of pardon committed to executive discretion, which could never be more properly exercised than where citizens were suffering ... under a law unauthorized by the constitution, and therefore null. In the case of Marbury and Madison, the federal judges declared that commissions, signed and sealed by the President [Adams], were valid, although not delivered. I deemed delivery essential ... They cannot issue a *mandamus*\* (\* the constitution controlling the common law in this particular [*Thomas Jefferson’s footnote*]) to the President or legislature, or to any of their officers [acting at their command]. When the British treaty of 180- arrived, without any provision against the impressment of our seamen, I determined not to ratify it. The Senate thought I should ask their advice. ... The constitution had made their advice necessary to confirm a treaty, but not to reject it. ... These are examples of my position, that each of the three departments has equally the right to decide for itself what is its duty under the constitution, without any regard to what the others may have decided for themselves under a similar question.<sup>71</sup>

It remains only to add that disregard for the opinions of the other Branches is the precondition for exerting any check or balance on them in the first place.

Note well that nowhere does Jefferson suggest that the Supreme Court was not competent to find Federal defendants innocent, unilaterally and without recourse; he merely contested its competence to find Presidents guilty – or to command them *sub poena*:

---

<sup>71</sup> Jefferson, Thomas (1819a). "Letter to George Hay, 20 June 1807", in Paul L. Ford (ed.), *The Works of Thomas Jefferson*. New York and London: G. P. Putnam's Sons.

I did not see till last night the opinion of [Marshall] on the *subpoena duces tecum* against the President [in Aaron Burr's 1807 treason trial].<sup>72</sup> Considering the question there as *coram non iudice* [lack of jurisdiction], I did not read his argument with much attention. ... Laying down the position generally, that all persons owe obedience to subpoenas, he admits no exception unless it can be produced in his law books. ... The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the commands of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive.

Jefferson's general rule of decision in case of inter-Branch disagreement under a separation of powers works out in the residual class of constitutional interpretations differently than in the judiciary class. The last word amid the judiciary class was shown to rest with whoever (if anyone) finds innocent. This rule yields an unambiguous result in every case, in the briefest possible time – a critical advantage when the life, liberty or property of sub-ordinate persons exposed to Federal power is hanging in the balance. Comprising cases that feature neither guilt *vs.* innocence nor jeopardy, residual-class decisions, by contrast, have not the same urgency. Some controversies may run on for years without necessarily causing any greater damage than a hasty resolution might have caused; years of experience may be necessary and, in fact, advisable for the best solution to transpire. The Judiciary – the Federal Judiciary in the USA or the Constitutional Court in Romania – properly has no role in such cases, except in case it must defend its own ordinary powers from encroachment by other Branches. Specifically, the Judiciary has no authority to arbitrate Executive-Legislative disputes, and should never have the last word in such cases.

The US President's War Powers, for example, entail a perpetual tug-of-war with Congress.<sup>73</sup> It may never be definitively settled in every detail. The Federal Judiciary, though declining to intervene, yet conceivably might impact the situation, while remaining within its jurisdiction,

---

<sup>72</sup> *US v. Burr*, 25 F. Cas. 25 *et passim* (C.C.D. Va. 1807). Aaron Burr had been Jefferson's Vice-President during his first term (1801-1805). Burr allegedly conspired to invade Mexico in violation of the Neutrality Act and/or to lead the western States into secession. It was Jefferson himself who denounced and indicted Burr based on letters received from interested parties who (unbeknownst to Jefferson) had libelled Burr. John Marshall tried the case as Circuit Judge, an ancient duty of Supreme Court Justices, subpoenaing the President to produce the letters and other evidence demanded by Burr's legal counsel. Interpreting the *duces tecum* ["bring with thee"] literally, as demanding his personal attendance, Jefferson complied only in part, sending written documents on, but for the rest becoming the first US President to invoke Executive Privilege, in parallel with the British Crown prerogative (Cappelletti, Mauro and C. J. Golden (1973). "Crown Privilege and Executive Privilege: A British Response to an American Controversy." *Stanford Law Review* 25:6, 836-844; Bergert, Raoul (1974). "The President, Congress, and the Courts." *The Yale Law Journal* 83:6, 1111-1155).

<sup>73</sup> Whiting, William (1862). *The war powers of the President, and the legislative powers of Congress in relation to rebellion, treason and slavery*. Boston: J.L. Shore; Lehman, J. F. (1992). *Making war: the 200-year-old battle between the president and Congress over how America goes to war*. New Jersey: Scribner; Howell, William G. and Jon C. Pevehouse (2007). *While dangers gather: congressional checks on presidential war powers*. Princeton, N.J.; Oxford: Princeton University Press.

by finding young men innocent who resist military conscription, should the President have led the country into war without Congress having declared it.<sup>74</sup> Insofar as residual-class controversies are definitively resolved, the last word may fall to any Branch, in accordance with Jefferson's rule of thumb that each is final arbiter of its own acts within its own sphere. It only needs to be pointed out that this is still a *proximate* last word; the *ultimate* last word lies with the States and/or the people whose suffrages constitute the two Branches wielding what was supposed, before judicialisation of politics, to be the preponderant power. The American Framers intended that contests over the Constitution's meaning should be an ordinary part of political campaigning in elections to the Presidency and Congress, as clearly envisioned by Madison:

As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory, to recur to the same original authority [...] whenever any one of the departments may commit encroachments on the chartered authorities of the others [...]; and how are the encroachments of the stronger to be prevented, or the wrongs of the weaker to be redressed, without an appeal to the people themselves, who, as the grantors of the commissions, can alone declare its true meaning, and enforce its observance?<sup>75</sup>

From all of the foregoing it is easy to see that the true power of judicial review, even the power to strike down Congressional statutes (pursuant to finding innocent), far from depending on *Marbury*, is senior to it and rests on quite different foundations. Indeed, recent scholarship has traced the origins of judicial review in the USA back to the 1765 Stamp Act crisis, which broke out when the British Parliament imposed a direct tax on their American colonies that required newspapers, magazines, legal documents and other matter to be printed on paper produced and "stamped" in London. The Act met great resistance in the colonies and is now recognised as a prime mover of the American Revolution of 1775.<sup>76</sup> Judges were urged by the Whig Party, who at the time were the King's "loyal opposition", to decline to enforce the Act. This move has been interpreted by contemporary scholars to be one of the first "approximations [*sic*] of judicial review" –

an argument that judges, *no less* than anyone else, should resist unconstitutional laws. This obligation did not arise from any special competence the judges possessed as judges, and it certainly was not based on the notion of constitutional law was ordinary law subject to judicial control. It was, rather, simply, another instance of the right of every citizen to refuse to recognize the validity of constitutional laws – a "political-legal" duty and responsibility rather than a strictly legal one.<sup>77</sup>

---

<sup>74</sup> Berk v. Laird, 317 F. Supp. 715 (E.D.N.Y. 1970); Ratner, Leonard G. (1970-71). "The Coordinated Warmaking Power--Legislative, Executive, and Judicial Roles." *S. Cal. L. Rev.* 44:461-489; Firmage, Edwin B. (1977-1978). "War Powers and the Political Question Doctrine." *U. Colo. L. Rev.* 49:65-102.

<sup>75</sup> Madison, James (1788d). "The Federalist No. 49. Method of Guarding Against the Encroachments of Any One Department of Government by Appealing to the People Through a Convention", [http://avalon.law.yale.edu/18th\\_century/fed49.asp](http://avalon.law.yale.edu/18th_century/fed49.asp), accessed 1 October 2008.

<sup>76</sup> Morgan, Edmund S. (1948). "Colonial Ideas of Parliamentary Power 1764-1766." *The William and Mary Quarterly* 5:3, 311-341.

<sup>77</sup> Kramer, Larry (2004). *The People Themselves: Popular Constitutionalism and Judicial Review*. New York: Oxford University Press. pp. 38-9.

## Judicial review versus judicial supremacy and judicialisation of politics

As is well known, Marshall shrewdly evaded a frontal assault on a sitting President.<sup>78</sup> In the long run this stratagem succeeded: years after Jefferson had left the Presidency, Marshall was still ruling from the bench, and Jefferson was reduced to lamenting that “[t]he judiciary of the United States is the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric”.<sup>79</sup>

Importantly, Madison, the architect of that fabric, expressed unease about the Marshall Court, too. In a letter to Jefferson in which he demurred to second Jefferson’s project of referring the constitution to the interpretations of popular assemblies, he nonetheless drew a bright line between the Federal Judiciary’s supremacy over to the States – which as constituents of the Federal power are, after all, sub-ordinate to it – and its non-supremacy as to the co-ordinate Federal Branches at all times:

To refer every point of disagreement to the people in Conventions would be a process too tardy, too troublesome, & too expensive ... Nor would the issue be safe if left to a compromise between the two Govts [Federal and State] *the case of a disagreement between different Govts being essentially different from a disagreement between branches of the same Govt. In the latter case neither party being able to consummate its will without the concurrence of the other, there is a necessity on both to consult and to accommodate.* Not so, [as between Federal and State] Govts each possessing every branch of power necessary to carry its purpose into compleat effect. It here becomes a question between Independent Nations, with no other *dernier* resort than physical force.<sup>80</sup>

Again in 1824 he distinguished between two main principles of constitutional interpretation, Originalism *versus* the so-called “living constitution” that has opened the door to judicial supremacy and the judicialisation of politics. Their antithesis vexes the politics of the Judiciary and judicial proceedings in the US to this day.<sup>81</sup> The man who did the most to shape the Constitution on the floor of the 1787 Convention resolutely took the side of Originalism against what we now call judicialisation:

I entirely concur in the propriety of resorting to the [Original] sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no Security for a consistent and stable, more than for a faithful exercise of its powers. If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of

---

<sup>78</sup> Engdahl, David E. (1992). "John Marshall's "Jeffersonian" Concept of Judicial Review." *Duke Law Journal* 42:2, 279-339.

<sup>79</sup> Jefferson, Thomas (1820). "To Thomas Ritchie Monticello, December 25, 1820", in (ed.), *The Letters of Thomas Jefferson 1743-1826*. <http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson>, accessed 1 June 2013.

<sup>80</sup> Madison, James (1823). "James Madison to Thomas Jefferson, 27 June 1823", [http://press-pubs.uchicago.edu/founders/print\\_documents/a3\\_2\\_1s77.html](http://press-pubs.uchicago.edu/founders/print_documents/a3_2_1s77.html), accessed 3 June 2013, emphasis added.

<sup>81</sup> Farber, Daniel A. (1988). "The Originalism Debate: A Guide for the Perplexed." *Ohio St. L.J.* 39:1085-1106; Scalia, Antonin (1989). "Originalism: The Lesser Evil." *U. Cin. L. Rev* 57:849.

the Government must partake of the changes to which the words and phrases of all living languages are constantly subject. What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense. ... the language of our Constitution is already undergoing [judicial] interpretations unknown to its founders ... take the word “consolidate” in the address of the Convention prefixed to the Constitution [the meaning of which Madison himself was an eyewitness to]. It then and there meant to give strength and solidity to the Union of the States. In its current & controversial application [by the Judiciary] it means a destruction of the States, by transfusing their powers into the government of the Union.<sup>82</sup>

To deny that Marshall’s judicial philosophy was laying a foundation not so much for *review* as for *judicialisation*, one would have to deny any real distinction between the two terms. But there is a difference and it implicates the role of judges and judicial checks and balances in a liberal constitutional order – are judges to limit the powers of government or expand them? It is extraordinary fact that a politician should be alarmed by a judicial ruling that expanded the powers of government. Yet that is exactly how ex-President Madison was struck by the ruling in what has become a landmark case in American constitutional law, *McCulloch v. Maryland*, where John Marshall reinterpreted strict necessity to mean mere expedience in the enabling clause providing: “Congress shall have Power – To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers”. Here is how Madison clinched judicialisation of politics – as distinct from judicial review – as the character of the Marshall Court:

[Concerning] the Judgment of the Supreme Court ... in the case of M’Culloch agst. the State of Maryland (17 U.S. [4 Wheat] 316 (1819)) ... I have found [fault with] their latitudinary mode of expounding the Constitution ... I have always supposed that the meaning of a law, and ... of a Constitution, so far as it depends on Judicial interpretation, was to result from a course of particular decisions, and not from a previous and abstract comment ... [The Marshall interpretation] seems to break down the landmarks intended by a specification of the Powers of Congress, and to substitute for a definite connection between means and ends, a Legislative discretion ... to which no practical limit can be assigned. ... [He has ruled that] ... the expediency & constitutionality of means for carrying into effect a specified Power are convertible terms ... suppose Congress ... pass unconstitutional laws not to accomplish objects not specified in the Constitution, but the same laws as means expedient, convenient or conducive to the accomplishment of objects entrusted to the Government; by what handle could the Court take hold of the case? We are told that it was the policy of the old Government of France to grant monopolies, such as that of Tobacco, in order to create funds in particular hands from which loans could be made to the Public, adequate capitalists not being formed in that Country in the ordinary course of commerce. Were Congress to grant a like monopoly merely to aggrandize those enjoying it, the Court might consistently say, that this not being an object entrusted to the Governr. the grant was unconstitutional and void. Should Congress however grant the monopoly according to the French

---

<sup>82</sup> Jefferson, Thomas (1824). "To Henry Lee, June 25, 1824", [http://www.constitution.org/jm/18240625\\_lee.htm](http://www.constitution.org/jm/18240625_lee.htm), accessed 3 June 2013.

policy as a means judged by them to be necessary, expedient or conducive to the borrowing of money, which is an object entrusted to them by the Constitution, it seems clear that the Court, adhering to its doctrine, could not interfere ... [T]hose who shared in what passed in the State Conventions, thro' which the people ratified the Constitution, with respect to the extent of the powers vested in Congress, cannot easily be persuaded that the avowal of such a rule would not have prevented its ratification. ... [If Congress wants more powers] a regular mode of making proper alterations has been providently inserted in the Constitution itself. It is anxiously to be wished therefore, that no innovations may take place in other modes, one of which would be a constructive assumption of powers never meant to be granted. ... [A] limited Govt. may be limited in its sovereignty as well with respect to the means as to the objects of his powers; and that to give an extent to the former, superseding the limits to the latter, is in effect to convert a limited into an unlimited Govt.<sup>83</sup>

No starker contrast could subsist than between *judicial review* and its methods, which tend to limit concentration of power, and *judicialisation of politics* and its methods, which accelerate it. In the *McCulloch* opinion note the implicit removal of weighty issues from any resort or referral to popular consent, and the complicity with the unavowable ambitions of politicians; epitomising the phenomenon as Stone Sweet's *Governing With Judges* (2000) and others have theorised it, *e.g.*:

As presidential authority to interpret the Constitution wanes, judicial authority waxes. The authority is not simply seized by the Court, however. It is surrendered, often willingly and even eagerly, by political officials. ... the heightened judicial authority to say what the Constitution means is a respite from the responsibility and burdens of leadership. In such unfortunate but ordinary circumstances, the Court and the president can have a working and mutually beneficial relationship. For most national political leaders most of the time ... judicial supremacy and the Court's efforts at constitutional interpretation are at worst an annoyance and at best a godsend.<sup>84</sup>

### **“For every injury there must be a remedy”**

It is a precept universally received in post-Communist CEE that for every injury there must be a remedy. Courts are assumed to be the universal *locus* where all remedies are found; therefore, the courts must have cognizance of all injuries lest access to justice is denied. This would entail illimitable jurisdiction, and Marshall relied on this precept in *Marbury*. Without prejudice to either Jefferson's or Marshall's stances, it is conceded that a unilateral power in each Branch to find the accused innocent, although forming the core of the system of checks and balances in the “judiciary” class of cases, may not exhaust all of the remedies that might be wielded by a protagonist Branch, including the courts, against any official malfeasance of an antagonist one. Private citizens may be justified to “take the offensive” in vindicating their rights against official malfeasances less than wrongful jeopardy, by suing the officials in the courts. Marshall, rightly enough, noted in his opinion that –

---

<sup>83</sup> Madison, James (1819). "To Spencer Roane, Sept. 2; 1819.", [http://www.constitution.org/jm/18190902\\_roane.htm](http://www.constitution.org/jm/18190902_roane.htm), accessed 3 June 2013.

<sup>84</sup> Whittington, *Political Foundations*, p.287.

[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain, the King himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.<sup>85</sup>

The US Executive Branch, especially in the person of its unelected appointees, may well act commendably to condescend to comply with court judgments *in routine matters* in the same spirit as they condescend to waive sovereign immunity in lawsuits for their own breaches of contract with private suppliers. But note well that the English courts conclusively presume that the King can do no wrong – meaning that, though he may condescend to obey the courts as a matter of “customary law”, they cannot sanction him if he will not. This implies that in America, too, Executive condescension is rightly set aside for the duration once the case turns on *constitutional interpretation* (above all, on the President’s prerogatives and powers), and once judicial demands, as in *Marbury*, begin to smack of sub-ordination of the Chief Executive to the Judiciary power. What then of the rights of aggrieved plaintiffs? Marshall makes an even stronger claim in his *Marbury* opinion as to the omni-competence of the Federal Judiciary, quoting Blackstone, the great eighteenth-century expositor of the common law:

In the third volume of his Commentaries, page 23, Blackstone states two cases in which a remedy is afforded by mere operation of law. “In all other cases,” he says, “it is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded.” And afterwards, page 109 of the same volume, he says, “I am next to consider such injuries as are cognizable by the Courts of common law. And herein I shall for the present only remark that all possible injuries whatsoever that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals are, for that very reason, within the cognizance of the common law courts of justice, for it is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress.”<sup>86</sup>

The reader is perhaps aware that the legal context makes words like “right”, “injury” and “cognizance” tricky and technical: folks may feel aggrieved at another’s bad act without it being “cognizable” in a court of common law. Suppose your boss promises you a salary rise, and you borrow on credit anticipating a greater ability to repay; but then he reneges, leaving you deeply indebted. A court will not “cognize” this as a remediable “injury”, even if he put it in writing, and regardless of your detrimental reliance on the broken promise or the outrage and betrayal you feel, since no enforceable contract between him and you can arise without *quid pro quo* (“consideration” in common law). Marshall’s conclusions of law in *Marbury*, then, rested upon (1) his own prior definition of a judicial commission as a “right”, plus (2) the assumption of an undivided power in the Judiciary to tailor any and all remedies. Whence came the right asserted in *Marbury* – or other rights, for that matter? In England the short answer is, from the statutes of Parliament or the King’s writ; in either case, not from the constitution but from an unified Legislative source. Finding in his law books no specific

---

<sup>85</sup> 5 U.S. [1 Cranch] 137 at 163.

<sup>86</sup> *Ibid.*

definition of a right to a judicial post (else surely he would have cited it), Marshall just decided it ought to be a right, then proceeded to enjoin the President to enforce it – against himself. Such a proceeding, however, is a far cry from the Judiciary that Hamilton envisioned when, in writings advocating ratification of the new Constitution, he refuted opponents who expressed fears over the judicial supremacy exhibited by Marshall. Hamilton promised that –

[t]he judiciary ... has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.<sup>87</sup>

That Marshall believed the Court was *not* so dependent is conclusive that he was marching to a different drummer, reasoning in some ways diametrically opposed to the Framers. Arguably he overrelied on the common law to the omission of the very Constitution which myth claims he was vindicating (this was Jefferson's view). The matter is vexed by the gnarled relationship of English common law to the US Constitution – or to any constitution having a separation of powers. It is not an exact fit. The Framers' scheme of dividing government into co-ordinate Branches continually righting each other sits uneasily with many if not all common law precedents. Specifically, the *locus* of remedy cannot be as centralised in a divided government as in one where the King-in-Parliament have undivided, absolute power, and where the checks and balances that be, are internal to that sovereign institution. British political history has been a gradual process of trammelling the Crown with obligations to act only with the consent of Parliament; enabling the latter to assert and finally to entrench its own supremacy. Judges who began as servants of the Crown have ended up servants of Parliament.<sup>88</sup> Either way, the *locus* of remedy becomes wholly centralised because so, fundamentally, is the government. John Marshall may have been encouraged by common law "meta-logic" to conceive himself as reconstituting a consolidated "fountainhead of all remedies". If this is true, it might explain much and would expose *Marbury* and Marshall's jurisprudence generally, as the *fons et origo* less of judicial review proper than of that "galloping centralisation" which, especially since the twentieth-century New Deal, has superseded a Constitution devoted to "limited government".<sup>89</sup> To some extent this is already the boilerplate account of Marshall in the history and law books; what has been missing is the accurate characterisation of the Court's tendency as anything but "judicial review" in any rigorous acceptation of that word; as well as an appreciation of what has been undermined and lost, namely a workable, not a cosmetic separation of powers and checks and balances.<sup>90</sup>

---

<sup>87</sup> Hamilton, Alexander (1788). "The Federalist No. 78. The Judiciary Department", <http://www.constitution.org/fed/federa78.htm>, accessed 15 June 2013.

<sup>88</sup> Blackstone, William ([1765] 1979). *Commentaries on The Laws of England*. Chicago: Chicago University Press; Stevens, Robert (2005). *The English judges: their role in the changing constitution*. Oxford: Hart.

<sup>89</sup> In the words of Judge Posner "the Constitution is a charter of negative rather than positive liberties ... The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services" (Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) [http://www.leagle.com/decision-result/?xmlidoc/19831915715F2d1200\\_11730.xml/docbase/CSLWAR1-1950-1985](http://www.leagle.com/decision-result/?xmlidoc/19831915715F2d1200_11730.xml/docbase/CSLWAR1-1950-1985), Accessed 10 June 2013).

<sup>90</sup> Cf. Fallon, Richard H. Jr. (2003). "Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension." *California Law Review* 91:1, 1-57.

Many a thorny issue raised by John Marshall's tenure is unresolved still, both in America and in Europe. Aggrieved parties often have (or think they have) nowhere else to turn but to the courts when suffering government abuses that nevertheless stop short of criminal indictment. Consider the frightening abuses of the US government's surveillance power under the PRISM programme lately exposed in the press. Both influential Senators and the American Civil Liberties Union have responded precisely by filing lawsuits in Federal court.<sup>91</sup> Nevertheless, in a divided government one might expect the power to remedy to be divided. What is missing from the picture is the engagement of Congress, which has potential to offer remedies spanning the gamut from "constituent service" all the way up to impeachment.<sup>92</sup> In the Constitutional Convention, George Mason, an influential delegate from Virginia and later the drafter of the American Bill of Rights, insisted Congress should meet each year to bring its "inquisitorial power" to bear, including, without limitation, impeachment.<sup>93</sup>

However, a design flaw in the US Constitution has hobbled impeachment procedure with a practically unattainable two-thirds majority threshold to convict, not just the President but any common bureaucrat, even though the Court's maximal sanction was limited to removal and debarment from public office. This probably explains why Congress never gave the world an example of the Legislature as an effectual source of remedy, because of the insuperably high transaction costs of mobilising and organising its impeachment powers. Hence it has never armed its *Congressional oversight* with real teeth, hence the perfunctory spot-checking that nowadays passes by that name. Lowering the threshold to convict anyone other than the President and Vice-President, either in America or elsewhere, to a simple majority might breathe new life into the institution. Ombudsmen could then bring the peoples' complaints before a joint Impeachment Committee of both Houses of Congress (or parliament elsewhere) that would have power, *via* highest-ranking privileged motions, to convene formal sessions of the Court of Impeachment. Or perhaps the trials themselves could even be entrusted to the Committee.<sup>94</sup> Many remedies that more properly belong to Legislative oversight have been "delegated" to the courts, a typical example being Freedom of Information actions. But judicial procedure is excessively formal, time-consuming and, above all, prohibitively expensive for the majority of ordinary folk. If backed up by a real threat of impeachment, however, which could be leveraged to exact consent orders and even sanctions avoidable only by resignation, ordinary freedom of information requests could be routine cases of constituent service by MPs. Instead, Congress's power is vitiated by its unfortunate propensity to delegate responsibility to anyone but itself, and transaction costs are surely a major cause of this state of affairs. That non-majoritarian institutions like courts and bureaucracies should have become the remedialists of choice by default may be an indicator of deep degeneracy in the contemporary practice of democracy.<sup>95</sup>

---

<sup>91</sup> Haldane, Matt (2013). "Senator Paul calls for lawsuit over government surveillance". *Reuters*. Washington, <http://www.reuters.com/article/2013/06/13/us-usa-security-paul-idUSBRE95C1C620130613>, accessed 10 June 2013.

<sup>92</sup> *cf.* Fisher, Constitutional Interpretation by Members of Congress; Mikva, Abner J. (1982-1983). "How Well Does Congress Support and Defend the Constitution?" *N.C. L. Rev.* 61:587-611.

<sup>93</sup> Madison, James (1787). "Notes of Debates in the Federal Convention of 1787, Tuesday, August 7", <http://teachingamericanhistory.org/convention/debates/0807-2/>, accessed 10 June 2013.

<sup>94</sup> *cf.* Turley, Jonathan (1998-1999). "Congress As Grand Jury: The Role of the House of Representatives in the Impeachment of an American President." *Geo. Wash. L. Rev.* 67 735-90.

<sup>95</sup> Many in CEE will, no doubt, challenge a legislature's partisanism and unfitness to exercise its impeachment power on a regular basis. This is largely due to the fact that even today, *Marbury* has enormous prestige all over the world, including even authoritarian countries such as China. Romania has not escaped its sway. This prestige

## Conclusions

The framers of the Romanian constitutional would do well to take note of the contemporary rediscovery of the Founding Fathers' original vision in American scholarly circles. It is an unexpected development that stems from a deep dissatisfaction precisely with judiciary supremacy, substantial dissent with which is found not just in populist quarters but even amongst intellectual elites in academia. To Romanians as indeed to Western Europeans this is news which has not filtered through;<sup>96</sup> perhaps obscured by substantial differences of institutional configuration between the two sides of the Atlantic. America's presidentialism contrasts with Europe's parliamentarism, and "judicial review" in America is decentralised and concrete, while in Europe it is centralised and carried on in both abstract and concrete modes. Europeans need to realise, however, that the judicialisation of politics percolated into Europe originally from America, and that they have yet to understand how or why it became an unquestioned norm on the Old Continent. In brief, Europeans err in supposing that lessons from America have no applicability here.

Of the several theories of constitutional interpretation alternative to judicial supremacy that may be found in the contemporary American constitutional law literature, departmentalism (the contemporary term for co-equality) emerges as the most promising, if also the least understood in relation to the most urgent question of constitutional interpretation: the criteria for determining which Branch of the divided government should have the "last word" on the constitution's meaning? A historical reconstruction of the vision and practice of the American Founders leads to the solution proposed herein under the label of Ground Due Process, which prioritises individual liberty. In the process it impedes concentration of power in the hands of permanent elites, including legal professional elites, and forestalls their deleterious impact on democracy and the rule of law, especially in the long run. Adjuvent reforms stemming from a new appreciation of the role of parliamentary oversight would consolidate rather than dilute parliamentary democracy, while at the same time providing a workable alternative to judicial supremacy and the unrealistic expectations that have been invested in courts to remedy every injury and protect individuals from every abuse of State power.

At first blush, Romanians, especially legal professionals, may react to the challenge to CC supremacy outlined herein with disbelief. After all, it goes against some of the core claims that they and the transnational peers they esteem so highly have made and nostrums they have ceaselessly advocated since 1989. It is hoped nonetheless that the insights of the American Framers into the intrinsic nature of divided government may open the door to novel avenues of exploration and debate in Romania and elsewhere, helping to finesse the

---

has blinded many to the true merits and true demerits of the case. The actual *Marbury* and the mythical *Marbury* are two different animals (Fallon, *Marbury* and the Constitutional Mind). The mythical animal has towered over the landscape only since 1950. Let us recall its actual and all-too-human origin. Those who would believe Congress "too partisan" to reliably carry out the "impartial" functions of a court should have to strain his own credulity to maintain the impartiality of John Marshall in the teeth of so much evidence to the contrary in the *Marbury* affair itself. As Adams's Secretary of State and one of his most trusted advisors, Marshall would have been an accomplice in, and quite possibly the mastermind of the court-packing scheme to ensconce Federalist Party loyalists inside the Judiciary. As a loyalist himself, he was appointed one of the Midnight Judges. Further to the plot, he affixed the Seal of the United States to *Marbury*'s commission with his own hand, but did not scruple to sit in judgment in a case deciding whether his own creature had a "right" to take possession of an office created for him by Marshall himself. Yet this machination is nowadays touted around the world as warrant for the impartiality of judges and a talisman legitimising what is in effect Judiciary supremacy.

<sup>96</sup> Levinson, *Why I do not teach Marbury* (except to Eastern Europeans).

stalemated contest – as fruitless as it is insoluble – over “exactly” how much power to give an institution as intrinsically problematic as the Constitutional Court.