existence of court review of the constitutionality of legislation,[686]

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[686] M. Farrand, supra at 97–98 (Gerry), 109 (King), 2 id. at 28 (Morris and perhaps Sherman). 73 (Wilson), 75 (Strong, but the remark is ambiguous). 76 (Martin), 78 (Mason), 79 (Gorham, but ambiguous), 80 (Rutledge), 92–93 (Madison), 248 (Pinckney), 299 (Morris), 376 (Williamson), 391 (Wilson), 428 (Rutledge), 430 (Madison), 440 (Madison), 589 (Madison); 3 id. at 220 (Martin). The only expressed opposition to judicial review came from Mercer with a weak seconding from Dickinson. "Mr. Mercer . . . disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontroulable." 2 id. at 298. "Mr. Dickinson was strongly impressed with the remark of Mr. Mercer as to the power of the Judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute." Id. at 299. Of course, the debates in the Convention were not available when the state ratifying conventions acted, so that the delegates could not have known these views about judicial review in order to have acted knowingly about them. Views, were, however, expressed in the ratifying conventions recognizing judicial review, some of them being uttered by Framers. 2 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution (1836). 131 (Samuel Adams, Massachusetts), 196–197 (Ellsworth, Connecticut). 348, 362 (Hamilton, New York): 445–446. 478 (Wilson, Pennsylvania), 3 id. at 324–25, 539, 541 (Henry, Virginia), 480 (Mason, Virginia), 532 (Madison, Virginia), 570 (Randolph, Virginia); 4 id. at 71 (Steele, North Carolina), 156–157 (Davie, North Carolina). In the Virginia convention, John Marshall observed if Congress "were to make a law not warranted by any of the powers enumerated, it would be considered by the judge as an infringement of the Constitution which they are to guard . . . They would declare it void . . . . To what quarter will you look for protection from an infringement on the constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection." 3 id. at 553–54. Both Madison and Hamilton similarly asserted the power of judicial review in their campaign for ratification. The Federalist (J. Cooke ed. 1961). *See* Nos. 39 and 44, at 256, 305 (Madison), Nos. 78 and 81, at 524–530, 541–552 (Hamilton). The persons supporting or at least indicating they thought judicial review existed did not constitute a majority of the Framers, but the absence of controverting statements, with the exception of the Mercer-Dickinson comments, indicates at least acquiescence if not agreements by the other Framers.

To be sure, subsequent comments of some of the Framers indicate an understanding contrary to those cited in the convention. *See, e.g.*, Charles Pinckney in 1799: "On no subject am I more convinced, than that it is an unsafe and dangerous doctrine in a republic, ever to suppose that a judge ought to possess the right of questioning or deciding upon the constitutionality of treaties, laws, or any act of the legislature. It is placing the opinion of an individual, or of two or three, above that of both branches of Congress, a doctrine which is not warranted by the Constitution, and will not, I hope, long have many advocates in this country." State Trials of the United States During the Administrations of Washington and Adams 412 (F. Wharton ed., 1849).

Madison's subsequent changes of position are striking. His remarks in the Philadelphia Convention, in the Virginia ratifying convention, and in The Federalist, cited above, all unequivocally favor the existence of judicial review. And in Congress arguing in support of the constitutional amendments providing a bill of rights, he observed: "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislature or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights," 1 Annals of Congress 457 (1789); 5 Writings of James Madison 385 (G. Hunt ed., 1904). Yet, in a private letter in 1788, he wrote: "In the state constitutions and indeed in the federal one also, no provision is made for the case of a disagreement in expound-