and prior to *Marbury* the power seems very generally to have been assumed to exist by the Justices themselves.[687] In enacting the Judiciary Act of 1789, Congress explicitly provided for the exercise of the power,[688] and in other debates questions of constitutionality and of judicial review were prominent.[689] Nonetheless, although judicial review is consistent with several provisions of the Constitution and the argument for its existence may be derived from them, these provisions do not compel the conclusion that the Framers intended judicial review nor that it must exist. It was Chief Justice Mar-

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ing them; and as the courts are generally the last in making the decision, it results to them by refusing or not refusing to execute a law, to stamp it with the final character. This makes the Judiciary Department paramount in fact to the legislature, which was never intended and can never be proper." Id. at 294. At the height of the dispute over the Alien and Sedition Acts, Madison authored a resolution ultimately passed by the Virginia legislature which, though milder, and more restrained than one authored by Jefferson and passed by the Kentucky legislature, asserted the power of the states, though not of one state or of the state legislatures alone, to "interpose" themselves to halt the application of an unconstitutional law. 3 I. BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION, 1787–1800 460–464, 467–471 (1950); Report on the Resolutions of 1798, 6 Writings of James Madison, op. cit., 341–406. Embarrassed by the claim of the nullificationists in later years that his resolution supported their position, Madison distinguished his and their positions and again asserted his belief in judicial review. 6 I. Brant, *supra*, 481–485, 488–489.

The various statements made and positions taken by the Framers have been culled and categorized and argued over many times. For a recent compilation reviewing the previous efforts, *see* R. Berger, supra, chs. 3–4.

687 Thus, the Justices on circuit refused to administer a pension act on the grounds of its unconstitutionally, *see Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), and "Finality of Judgment as an Attribute of Judicial Power," supra. Chief Justice Jay and other Justices wrote that the imposition of circuit duty on Justices was unconstitutional, although they never mailed the letter, supra, in Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796), a feigned suit, the constitutionality of a federal law was argued before the Justices and upheld on the merits, in Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1797), a state law was overturned, and dicta in several opinions asserted the principle. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798) (Justice Iredell), and several Justices on circuit, quoted in J. Goebel, supra, at 589–592.

688 In enacting the Judiciary Act of 1789, 1 Stat. 73, Congress chose not to vest "federal question" jurisdiction in the federal courts but to leave to the state courts the enforcement of claims under the Constitution and federal laws. In § 25, 1 Stat. 85, Congress provided for review by the Supreme Court of final judgments in state courts (1) ". . . where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity;" (2) ". . . where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity;" or (3) ". . . where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed" thereunder. The ruling below was to be "re-examined and reversed or affirmed in the Supreme Court . . . ."

689 *See* in particular the debate on the President's removal powers, discussed supra, "The Removal Power" with statements excerpted in R. Berger, supra at 144–150. Debates on the Alien and Sedition Acts and on the power of Congress to repeal the Judiciary Act of 1801 similarly saw recognition of judicial review of acts of Congress. C. Warren, supra at 107–124.