tested 2000 presidential election,[680] despite the fact that the Constitution vests in Congress the authority to count electoral votes, and further provides for selection of the President by the House of Representatives if no candidate receives a majority of electoral votes.[681]

JUDICIAL REVIEW

The Establishment of Judicial Review

Judicial review is one of the distinctive features of United States constitutional law. It is no small wonder, then, to find that the power of the federal courts to test federal and state legislative enactments and other actions by the standards of what the Constitution grants and withholds is nowhere expressly conveyed. But it is hardly noteworthy that its legitimacy has been challenged from the first, and, while now accepted generally, it still has detractors and its supporters disagree about its doctrinal basis and its application.[682] Although it was first asserted in *Marbury v. Madison*[683] to strike down an act of Congress as inconsistent with the Constitution, judicial review did not spring full-blown from the brain of Chief Justice Marshall. The concept had been long known, having been utilized in a much more limited form by Privy Council review of colonial legislation and its validity under the colonial charters,[684] and there were several instances known to the Framers of state court invalidation of state legislation as inconsistent with state constitutions.[685]

Practically all of the framers who expressed an opinion on the issue in the Convention appear to have assumed and welcomed the

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[680] *See* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000); and Bush v. Gore, 531 U.S. 98 (2000).

[681] 12th Amendment.

[682] *See* the richly detailed summary and citations to authority in G. GUNTHER, CONSTITUTIONAL LAW 1–38 (12th ed. 1991); For expositions on the legitimacy of judicial review, *see* L. HAND, THE BILL OF RIGHTS (1958); H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW:SELECTED ESSAYS 1–15 (1961); A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1–33 (1962); R. BERGER, CONGRESS V. THE SUPREME COURT (1969). For an extensive historical attack on judicial review, *see* 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES chs. 27–29 (1953), with which *compare* Hart, *Book Review*, 67 HARV. L. REV. 1456 (1954). A brief review of the ongoing debate on the subject, in a work that now is a classic attack on judicial review, is Westin, *Introduction: Charles Beard and American Debate over Judicial Review, 1790–1961*, in C. BEARD, THE SUPREME COURT AND THE CONSTITUTION 1–34 (1962 reissue of 1938 ed.), and bibliography at 133–149. While much of the debate focuses on judicial review of acts of Congress, the similar review of state acts has occasioned much controversy as well.

[683] 5 U.S. (1 Cr.) 137 (1803). A state act was held inconsistent with a treaty in Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

[684] J. Goebel, supra at 60–95.

[685] Id. at 96–142.