

Book Review*

Marbury v. Madison: *The Origins and Legacy of Judicial Review*. By William E. Nelson. Lawrence, Kans.: University Press of Kansas, 2000. 142pp. \$29.95 (hardback), \$12.95 (paper).

*Reviewed by Brannon P. Denning***

¶1 Is there anything interesting left to be said about *Marbury v. Madison*¹ or judicial review? After decades of seemingly interminable debate about whether judicial review is a bulwark of constitutional government or an alien, countermajoritarian institution that should be used, if at all, only sparingly,² one might be forgiven for instinctively answering “no.” I am pleased to report, however, that such a negative answer would be premature. William Nelson has written an elegant essay on *Marbury* and judicial review that should prove useful to anyone interested in its origins and evolution.

¶2 Nelson’s book, *Marbury v. Madison: The Origins and Legacy of Judicial Review*,³ is divided into nine chapters. The first two discuss the origins of judicial review and its tentative appearance on the American stage prior to *Marbury*. The next three chapters describe *Marbury*, the political context in which it arose, and its aftermath. Also included is a wonderful thumbnail sketch of Chief Justice John Marshall, whose singular personality Nelson rightly credits for bringing *Marbury* off successfully. In the final four chapters Nelson charts the evolution of judicial review, particularly the erosion of the legal-political distinction that he argues is central to the original *Marbury* decision. The final chapter tries to reconcile this new model of judicial review with that articulated in *Marbury*.

¶3 Nelson’s book succeeds, in part, because he avoids the well-trod controversies over the Constitution’s textual sanction for judicial review, the number and validity of pre-*Marbury* precedents for judicial review, and whether judicial review as articulated by Chief Justice Marshall in *Marbury* bears any resemblance to the judicial review exercised by courts today.⁴ (Nelson assumes that the two are

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1. 5 U.S. (1 Cranch) 137 (1803).

2. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); CHARLES A. BEARD, *THE SUPREME COURT AND THE CONSTITUTION* (1938); RAOUL BERGER, *CONGRESS V. THE SUPREME COURT* (1969); LEARNED HAND, *THE BILL OF RIGHTS* (1958); 1–2 WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953); James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

3. WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS OF JUDICIAL REVIEW* (2000).

4. For recent works taking strong positions on these questions, see, for example, ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* (1989); SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* (1990); CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* (1986).

different, and that there is something in the new “political” model of judicial review that is valuable.)

¶14 Nelson instead seeks to (i) illustrate how *Marbury* attempted to reconcile eighteenth-century constitutional theory to nineteenth-century political reality; and (ii) show how the institution of judicial review has evolved in the nearly two centuries following *Marbury*.⁵ “The core thesis of this book is that in *Marbury v. Madison*, Chief Justice John Marshall drew a line, which nearly all of the citizens of his time believed ought to be drawn, between the legal and the political—between those matters on which all Americans agreed and those matters which were subject to fluctuation and change through democratic politics.”⁶

The Judiciary and Eighteenth-Century Politics

¶15 Nelson’s first chapter sketches a picture of an eighteenth-century world of politics in the American colonies before the Revolutionary War. Nelson makes a compelling case that understanding this world is essential if we are to make sense of *Marbury* free from anachronism. Colonial courts, Nelson argues, were often the only link between the central government and the outlying communities. “In some colonies, such as Massachusetts and Virginia, the judiciary was virtually the whole of local government. . . .”⁷ Because the colonial courts performed myriad governmental functions, “Americans as late as the 1780s did not routinely distinguish the judiciary as an independent branch of government that exercised only ‘judicial’ functions” and did not “draw a clear distinction between law and politics.”⁸

¶16 Lest the power of these early tribunals and their judges be overstated, Nelson also reminds us that, with a few exceptions, “colonial judges could not enter a judgment or impose any but the most trivial of penalties without a jury verdict.”⁹ These colonial juries, moreover, “usually possessed the power to find both law and fact in the cases in which they sat”¹⁰ and were not bound by instructions given to them by judges—which in any case were often unclear or contradictory.¹¹ According to Nelson, the enormous power accorded juries in the eighteenth century tells us three things about the legal landscape of that time.

¶17 First, “it reveals the communitarian locus of power and the weakness of central government authorities.”¹² If the central government was weak, and the judiciary only marginally stronger than the other branches, the effective exercise

5. NELSON, *supra* note 3, at 7.

6. *Id.* at 8.

7. *Id.* at 13.

8. *Id.* at 13–14.

9. *Id.* at 16.

10. *Id.*

11. *Id.* at 16, 17.

12. *Id.* at 19.

of governmental power depended upon general agreement on legal norms and their proper application. If such a consensus was not obtained, then judgments went unenforced, crimes unpunished. Second, the colonial arrangement reflected the “fixed and certain nature of the law.”¹³ At first this seems paradoxical. How could juries empowered to decide questions of law and fact signify the fixed nature of law? Nelson concludes that “[t]he law-finding power of juries suggests ineluctably that jurors came to court with shared preconceptions about the substance of the law.”¹⁴ He cites the lack of complaints about inconsistent jury verdicts as additional evidence supporting his conclusion, and adds that juries lost their power to decide legal questions when such inconsistencies did develop.¹⁵

¶18 In the face of societal conflict caused by competing interest groups, however, this order disintegrated beginning “after the end in 1763 of the Seven Years War,” known here as the French and Indian War.¹⁶ First, the transmontane ambitions of the colonists came into conflict with British efforts to mollify Indian tribes living in the path of westward expansion. Second, financial difficulties arising from the defeat of the French in North America and a British desire to see the colonies bear their fair share of their defense ran headlong into the Americans’ desire for a more laissez-faire attitude on the part of the mother country.¹⁷

¶19 Though the Revolution had been fought to restore the way of life prior to 1763, Nelson argues that “independence . . . reshaped American politics. . . .” The Continental Congress had to make choices in its conduct of the war, “choices among possible policies that were in conflict with each other—choices that favored some interest groups over others” and thus reduced the possibility of achieving consensus.¹⁸

¶10 The experience of making choices among competing policy concerns encouraged the newly constituted state legislatures to discard the old notion of law as a “brooding omnipresence” and embrace a more creative and activist lawmaking function than had been thought possible or appropriate under the old order.¹⁹ At the same time, a belief in transcendent principles of law that no government was free to change persisted; some began criticizing state legislatures for ignoring those fundamental principles in their efforts to implement the “will of the people.” If the legislatures could not always be counted on to protect these rights, where should protection be sought? Gradually, the courts emerged as the bodies that would mediate between popular will and transcendent law. By the 1780s,

13. *Id.* at 21.

14. *Id.*

15. *Id.* at 22.

16. *Id.* at 28.

17. *See id.* at 28–29.

18. *Id.* at 30.

19. *See id.* at 32–33. Nelson writes: “By enacting new laws, legislatures reinforced the ideology of popular lawmaking power and forged an active, creative legislative process in lieu of one that had depended on the derivation of rules from preexisting shared principles.” *Id.* at 33.

there were a series of state court cases “in which claims akin to modern requests for judicial review were advanced,” which were granted a respectful hearing from judges, if not from legislators.²⁰

¶11 Legislatures, not surprisingly, resisted the calls for a larger judicial role in the protection of fundamental legal principles. Such a role seemed to undermine the Revolutionary principle of popular sovereignty—the so-called “Spirit of ’76.” “The appearance of these competing ideologies was closely related to the division in American politics in the 1790s between Federalists, who generally viewed law as a reflection of fixed and transcendent principles, and Republicans, who considered it the embodiment of popular will.”²¹ This bitter partisan conflict, which colored the debates on nearly every major issue in the 1790s, and in which the Republicans largely prevailed after the 1800 presidential election, constitutes the background against which *Marbury v. Madison* came to the Court.

John Marshall and *Marbury*

¶12 Nelson begins the second section of his book, which covers *Marbury* and its early effects, with a thumbnail biography of John Marshall. Though a Virginian, Marshall shared none of his state contemporaries’ parochialism. A Revolutionary War veteran and protégé of Washington, Marshall was a moderate Federalist and committed nationalist, whose experience in the Continental Army had also taught him the importance of consensus and cooperation, and of a strong central government.²²

¶13 Despite attempts by early biographers to denigrate Marshall’s legal prowess, Nelson makes it clear that Marshall quickly became one of his state’s leading advocates after he mustered out of the army and was called to the bar. Marshall was also active in politics, serving in state and local government, and as a delegate to the Virginia convention that ratified the new Constitution.²³ Marshall soon garnered national attention. And after initially refusing offers of federal posts, Marshall served in the Adams administration as an envoy to France, as a member of Congress, and as Adams’s secretary of state.²⁴ Marshall’s loyal service to Adams convinced the outgoing president to make Marshall his nominee to fill the chief justice seat vacated by the ailing Oliver Ellsworth.²⁵ Thus, it was Marshall, “the highest-ranking officeholder of the outgoing Federalist Party,” who administered the oath of office to his kinsman Thomas Jefferson on March 4, 1801, providing a symbolic bridge in the first peaceful transition of power from one party to another under the Constitution.²⁶ Nelson correctly sees Marshall’s

20. *Id.* at 36–37.

21. *Id.* at 37–38.

22. *See id.* at 41–42.

23. *See id.* at 43–44.

24. *See id.* at 47–49.

25. *See id.* at 51.

26. *Id.* at 52.

trademark moderation and desire for consensus as his defining features and as the keys to his success on the Court.²⁷

¶14 Moderation and consensus, however, were not the order of the day at the dawn of the Jefferson administration. The Jeffersonians' first order of business was to dismantle what they considered to be the Federalists' intolerable parting shot: the Judiciary Act of 1801.²⁸ Republicans were incensed because "late-eighteenth- and early-nineteenth century government did not possess a large bureaucracy capable of enforcing the law. . . . Judges constituted the only body of officials through which central governing officials could have a presence in localities."²⁹ As a result of the 1801 Judiciary Act, Federalist judges would be in a position to frustrate Jeffersonian policies. Moreover, the 1801 Act upset a number of compromises, fashioned at the 1787 Constitutional Convention, that were intended to prevent the federal judiciary from becoming too powerful *vis-a-vis* state courts and to secure the power of juries to decide questions of law, as well as fact.³⁰

¶15 The Jeffersonians responded with the Judiciary Act of 1802, which undid most of the work of the 1801 Act. The new administration's secretary of state, James Madison, also refused to deliver undelivered commissions to some of the "midnight judges," including one to a William Marbury, who had been confirmed as a justice of the peace for the District of Columbia. Nelson's discussion of the actual *Marbury* decision is clear and concise. Because it is central to his account of the opinion's success, Nelson highlights the techniques that Marshall used to vindicate what was seen as Marbury's indisputable right to his property, i.e., his commission, while avoiding direct conflict with the Jeffersonians—a conflict in which Marshall knew the Court could not triumph.³¹

¶16 According to Nelson, Marshall's conception of judicial review sought "to reconcile popular will and legal principle, not to make one either superior or subservient to the other"; nor did the justices "declare themselves to be the ultimate arbiters of the nation's constitutional policy choices"³² The Court succeeded by "distinguishing between the domain of law and the domain of politics."³³

Indeed, the foundation of Marshall's constitutional jurisprudence is the distinction between political matters, to be resolved by the legislative and executive branches in the new democratic, majoritarian style, and legal matters, to be resolved by the judiciary in the government-by-consensus style that had prevailed in most eighteenth-century American Courts.³⁴

27. *Id.* at 53.

28. Jefferson regarded the "midnight judges" bill as a personal affront from his friend Adams. It was one of the issues that resulted in the discontinuation of their friendship for many years.

29. NELSON, *supra* note 3, at 54.

30. *See id.* at 57–58.

31. *See id.* at 60–68.

32. *Id.* at 59.

33. *Id.*

34. *Id.*

¶17 One question that puzzles many modern students is why *Marbury* generated so little contemporary controversy, if its holding was so revolutionary. Nelson makes clear that Marshall's embrace of judicial review was hardly "revolutionary," since precedents for judicial review existed in the states, and many of the framers at the Philadelphia Convention had assumed that courts would have some power to review legislative acts for constitutionality.³⁵ He also notes that the appeal to consensus values embodied in the written constitution was inherently attractive to early-nineteenth-century Americans; as was the idea of the law as protector of private property, at least to "politically-active Americans" who either had property or who expected to become property owners in the future.³⁶

¶18 If anything, *Marbury* helped solidify and legitimate judicial review in state courts. According to his survey, "the courts by 1820 had begun to hold legislation unconstitutional with some frequency. . . ."³⁷ But Nelson cautions us to keep in mind the fact that

[e]arly nineteenth-century courts . . . still sought to leave . . . to legislatures the resolution of conflicts between organized social interest groups. Once a legislature had resolved a conflict in a manner having widespread public support, judges would in practice view the resolution as that of the people at large . . . and would give it conclusive effect at least as long as unconstitutionality was not manifest.³⁸

What was *not* part of the nineteenth-century theory of judicial review was any notion of the judiciary as a protector of civil liberties against overweening majorities.

¶19 But this eventually changed. Just as the social pressures that accompanied the agitation for American independence irreparably fragmented the communitarian consensus that lay at the heart of eighteenth-century legal thought,³⁹ the consensus about the law-politics dichotomy experienced a similar breakdown as more groups became politically active and began to question the inviolability of property rights.⁴⁰ "As a result," Nelson writes, "some new foundation for judicial review was needed."⁴¹

Evolution of Judicial Review after *Marbury*

¶20 The final section of Nelson's book details the evolution that judicial review underwent in the late nineteenth and early twentieth centuries—in particular, the

35. See, e.g., *id.* at 66.

36. *Id.* at 73.

37. *Id.* at 82.

38. *Id.*

39. See *supra* ¶¶ 8–9.

40. NELSON, *supra* note 3, at 83 ("[T]he political consensus underlying the early-nineteenth-century practice of judicial review could not endure. As the circle of politically active Americans expanded during the course of the century, constitutional principles, especially principles about the sanctity of private property, became the subject of political debate.")

41. *Id.*

dramatic increase in judicial protection of individual rights at the end of the Second World War. He closes with some thoughts on the relevance of *Marbury* to the very different institution of judicial review familiar to us today.

¶21 “By the end of the nineteenth-century,” Nelson writes, “judicial review had become an accepted feature of American law.”⁴² One consequence of its acceptance was both an increase in its use and “an increase in the controversial nature of many of the issues on which judges passed.”⁴³ It was about this time that courts began to hint at the defense-of-minority-rights justification for judicial review. The rights protected at first, however, were those of property owners seeking judicial review of popular social and economic reforms, like minimum wage and maximum hours laws.⁴⁴ Instead of deferring to these majority policy choices, courts held that they violated federal and state constitutional protections, triggering the first round of elite and academic critiques of judicial review. “From the perspective of progressive reformers and historians who . . . would author the first histories of judicial review, protecting private property against regulatory legislation involved policy choices and judicial intrusion into the domain of politics.”⁴⁵

¶22 While some of these early progressive critics like Felix Frankfurter and Learned Hand would remain consistent in their reluctance to exercise judicial review,⁴⁶ many other judges and scholars saw a new role for judicial review in the protection of individual liberties. At the heart of this reconsideration of judicial review was the worldwide spectacle of communist and fascist governments oppressing minority groups within their own countries—often with the enthusiastic support of a majority of the populace.⁴⁷

¶23 The test of a government’s legitimacy, Nelson argues, became not whether its institutions complied with the “will of the people,” but whether the government could be counted on to protect the civil liberties of even unpopular minority groups.⁴⁸ In cases where majoritarian political processes were being used to oppress minorities, silence their political voices, or abridge civil liberties, said Justice Harlan Fiske Stone in the famous footnote four to *Carolene Products v. United States*, those choices are entitled to less deference from the court.⁴⁹ A

42. *Id.* at 86.

43. *Id.* at 87.

44. *See id.* at 89–90.

45. *Id.* at 94.

46. *See Minersville School District v. Gobitis*, 310 U.S. 586, 597–98 (1940) (Frankfurter, J.) (refusing to strike down state flag salute law, as applied to Jehovah’s Witness children who objected on religious grounds); HAND, *supra* note 2, at 73–74 (“For myself, it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.”).

47. *See NELSON, supra* note 3, at 97–99.

48. Nelson argues that it is this *Carolene Products* theory of judicial review, more than the judicial review of *Marbury v. Madison*, that accounts for the increased acceptance and use of constitutional courts and judicial review throughout the world following the end of World War II. *See id.* at 104–13. Nelson is to be commended, even in this brief essay, for his attempt to bring a comparative perspective to judicial review and constitutional adjudication.

49. *See United States v. Carolene Products, Inc.*, 304 U.S. 144, 153 n.4 (1938).

few years later in *West Virginia Board of Education v. Barnette*, Justice Jackson eloquently articulated the “new” theory of judicial review when he declared that civil liberties ought not ever be the subject of a majority vote.⁵⁰ *Brown* soon followed, as did a whole host of decisions in the 1960s and 1970s, in which the Court staked out territory in the realms of free speech and religion, as well as privacy and autonomy, where government could not approach.⁵¹

¶124 If “[p]rotecting discrete and insular racial, ethnic, and religious minorities is a mid- twentieth-century idea, not an eighteenth- or nineteenth-century one,”⁵² then what contemporary relevance does *Marbury* or Marshall’s conception of judicial review have for us? Nelson would answer, “very little”: its fine distinctions between law and policy are ones that few believe exist now, if they ever did; and this thin reading of *Marbury* is irrelevant to the rest of the world, argues Nelson, which found in judicial review the way to protect various minority groups from the ravages of majority politics.⁵³

¶125 So a broader reading of *Marbury* is necessary, and is possible, says Nelson. Instead of a reading of the case and of constitutional law as “a body of . . . positivist commands by the sovereign people . . . that have been incorporated into the text of the Constitution,” judicial review as developed in *Marbury* “can be understood . . . as giving authority to the Supreme Court of the United States and to other constitutional courts throughout the world to identify and enforce, even against majoritarian legislation, values widely shared by the people as a whole.”⁵⁴ Judicial review is relevant today, Nelson argues, because “it gives effect to a consensus . . . that . . . has become widely shared by Americans and most other people in the world: a consensus that racial, religious, and comparable forms of discrimination are profoundly evil and unjust.”⁵⁵ Judicial review “has become the institutional mechanism through which people can advance policies that promote justice and equality and prevent injustice and discrimination.”⁵⁶

50. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. *Id.*

51. See NELSON, *supra* note 3, at 100–03.

52. *Id.* at 103.

53. See *id.* at 118–19.

54. *Id.* at 119; see also BICKEL, *supra* note 2, at 235 (stating that “there are issues of the first and of final importance . . . which the Court may pick, define, and decide in its fulfillment of its role as the constitutional authority of last resort” and that the challenge for constitutional theory is to deduce “[h]ow and whence” the justices “devise or derive principles which they are prepared to impose without recourse upon a democratic society”).

55. See *id.* at 118–19.

56. *Id.* at 119; see also BICKEL, *supra* note 2, at 236 (characterizing the role of Supreme Court Justices as one of “immers[ing] themselves in the traditions of our society” in order that they might “extract ‘fundamental presuppositions’ . . . from the evolving morality of our tradition”).

Is a “Broader” Reading of *Marbury* Necessary?

¶126 Much of Nelson’s book succeeds admirably; in particular, his ability to evoke and explain the legal and constitutional conditions that prevailed both prior to the American Revolution, and in the years immediately preceding *Marbury*. He clearly lays out how judicial review flourished in the years after *Marbury*. His descriptions of the evolution of judicial review in the 1930s, however, and his arguments for a “broader” reading of *Marbury* seem wanting.

¶127 First, even when state and federal courts were going out of their way to protect “property” against encroachment by legislatures, they were in a sense protecting a minority from the excesses of elected majorities. That they weren’t protecting, say, freedom of speech, hardly changes the fact that judges still felt they were enforcing principles of law, reflected in a written constitution, and approved by the people as security against the impulses of temporary majorities.

¶128 Second, it is curious that Nelson fails to mention that the *Carolene Products* footnote approach to judicial review was purchased at a price: the near-total refusal of the Court to examine so-called “economic and social legislation” for constitutionality, unless it was so manifestly irrational that the Court could not even hypothesize a rational basis for its enactment. Among other things, this meant that the Court was not going to police structural protections built into the Constitution—enumerated powers, separation of powers, federalism, and the like—that were understood by the Framers to protect liberty by limiting potential growth of governmental power. Having removed all of those brakes and set the federal juggernaut in motion during the New Deal, the protection of civil liberties seemed to many to be the last best hope to keep the individual from drowning in a sea of governmental power.

¶129 Third, if a communitarian consensus about fundamental values to be protected proved impossible to maintain in the face of societal conflict that arose following the Revolution, it seems too much to hope that such consensus can be forged by non-elected judges in a multi-ethnic, polycentric political atmosphere like that existing in America today. While Nelson is probably correct when he identifies the elimination of racial discrimination as a goal most Americans would agree is worth pursuing, even a cursory examination of the affirmative action debate illustrates that a gap exists between opposition to discrimination and agreement as to its proper remedy. Similarly, “equality” can mean everything from mere removal of barriers to opportunity to a set of minimal entitlements for all citizens. When the alternative is debate over the form and content of fundamental values led by the members of the federal judiciary, I do not find *Marbury*’s focus on the written nature of constitutions as narrow and arid as Nelson seems to. Instead of interminable debates over the meaning of “equality” and “justice” or over which values are sufficiently “fundamental” to warrant judicial enforcement, the Constitution’s written-ness can serve as a common point of reference not only

for judges and legislators, but also for the people as well—even if there is some disagreement over what, exactly, those words *require*.

¶130 Finally, recent scholarship should make us question Nelson's somewhat triumphalist account of judicial review in furthering the cause of civil liberties. *The Hollow Hope*, the title of a book by political scientist Gerald Rosenberg, trenchantly conveys the recent doubts that the judiciary can effect durable social change in the face of a hostile, committed minority.⁵⁷ The federal judiciary's growing conservatism, reflected in its recent federalism decisions,⁵⁸ and its prominent role in the recent presidential election⁵⁹ probably ensures that many liberals will join the chorus of voices calling for a curbing of the Court's role.⁶⁰

¶131 Nevertheless, while anyone adopting Nelson's fine book for classroom use should use his take on contemporary judicial review as the beginning of a debate, and not as the last word, his book is extremely valuable for making such arguments in a clear manner, free of jargon and cant. What precedes his defense of a "minority rights" model of judicial review, moreover, provides readers with a good beginning for arriving at their own conclusions.⁶¹ Whatever my quibbles with the latter part of the book, they do not detract from the larger achievement: Nelson's clear, insightful exploration of the origins and evolution of what has to be one of the great contributions of America to world constitutional and political theory. I would recommend Nelson's book to anyone who wants to develop a more complete, historically accurate picture of the *Marbury* case. Nelson's account of modern judicial review, moreover, raises valuable questions about the role of judicial review in our contemporary democratic society that could be profitably explored in constitutional law courses at any level.

57. GERALD ROSENBERG, *THE HOLLOW HOPE: CAN THE COURTS BRING ABOUT SOCIAL CHANGE?* (1991); see also Michael Klarman, *Rethinking the Civil Rights and Civil Liberties Revolution*, 82 VA. L. REV. 1 (1996).

58. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (striking down the civil-suit provision of the Violence Against Women Act); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that principles of federalism and sovereign immunity found in the structure of the Constitution and the Eleventh Amendment immunized state from suit under the federal Fair Labor Standards Act).

59. See *Bush v. Gore*, 121 S. Ct. 525 (2000).

60. See, e.g., MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

61. The editors of the series of which Nelson's book is a part wisely decided to forego extensive footnoting, opting instead for bibliographical essays at the end. That provided by Nelson furnishes more than enough starting material for anyone wishing to explore the subject of judicial review in more depth.