

POPULAR SOVEREIGNTY, JUDICIAL SUPREMACY, AND THE AMERICAN REVOLUTION: WHY THE JUDICIARY CANNOT BE THE FINAL ARBITER OF CONSTITUTIONS

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The development of constitutional government in Great Britain and America is inseparable from the debate and the conflict over sovereignty. In Britain, parliamentary sovereignty triumphed over the divine right of kings to form the foundation of British liberty. In America, popular sovereignty triumphed over parliamentary/legislative sovereignty to render government the servant of the people. Without acceptance of popular sovereignty, judicial review would likely be unknown in the United States.¹ Under parliamentary/legislative sovereignty, the legislative body exercises ultimate authority over statutory law and fundamental law. The legislature can make or repeal law as it sees fit. With the exception of revolution, neither the judiciary, nor the executive, nor the people can override the legislature's will.

Under popular sovereignty, the executive, legislative, and judiciary are mere agents of the people and the people's constitution.

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1. Judicial review is the “[p]ower of courts to review decisions of another department or level of government.” BLACK’S LAW DICTIONARY 849 (6th ed. 1990).

In performing their constitutional functions, the branches must interpret the constitution to ensure that their actions conform to the instrument. In the judicial context, a court must compare a statute in controversy with the text of the constitution before giving effect to the statute. For example, if a constitution secures the right to trial by jury in all civil actions where the amount in controversy exceeds \$100 and the legislature passes a statute increasing the jurisdictional amount to \$500, a non-jury verdict for \$400 would be void if one of the litigants had demanded a jury trial. The judiciary would be bound to declare such a judgment a nullity on the grounds that an act of the legislature cannot alter the people's fundamental law.

Although judicial review naturally flows from principles of popular sovereignty, judicial supremacy does not. Judicial supremacy, as framed by the United States Supreme Court in *Cooper v. Aaron*, provides that "the federal judiciary is supreme in the exposition of the law of the Constitution."² Once the judiciary interprets a constitutional provision, neither the executive nor legislature can offer a competing interpretation in the performance of their constitutional duties. The matter is settled because the judiciary has spoken.

This Article shows that Americans of the founding generation understood judicial review not as a counterweight against popular government, but as a consequence of popular sovereignty and, indeed, as a support of it. The original understanding of judicial review not only differs from the doctrine of judicial supremacy later embraced by the modern Supreme Court in decisions like *Cooper v.*

2. 358 U.S. 1, 18 (1958); see also *Baker v. Carr*, 369 U.S. 186, 211 (1962) (describing the Court as the "ultimate interpreter of the Constitution").

Aaron, but is actually incompatible with the modern conception of judicial supremacy.

Section One of this Article traces the defeat of divine right theory in England and the emergence of parliamentary sovereignty. Section Two considers the American colonists' rejection of parliamentary sovereignty during the Revolution and their establishment of popular sovereignty as the cardinal principle of American constitutionalism. Section Three studies English precedent often cited as the basis for the American doctrine of judicial review, and shows that these English cases, as simple exercises in statutory construction, cannot be classified as precursors to American judicial review. Section Four examines the development of judicial review in American state courts both prior to and after ratification of the United States Constitution. This final section also examines *Marbury v. Madison* in the context of these early state court decisions and concludes that Chief Justice Marshall never contemplated establishing the Supreme Court as the final arbiter of our Constitution. A believer in popular sovereignty, Marshall would not have reverted to British practice whereby a branch of government has total control over fundamental law. Instead, the *Marbury* opinion—like the state decisions before it—simply recognized that the judiciary is a co-equal branch of government empowered to interpret the Constitution along with the president and Congress.

I

THE STRUGGLE OVER SOVEREIGNTY IN STUART ENGLAND

The acceptance of popular sovereignty in the United States cannot be understood outside the context of English history and the conflict between the Crown and Parliament. The English Civil War and Glorious Revolution set the stage for the American Revolution

and radical ideas about the power of the people. Principles of popular sovereignty were first seriously debated during the 1640s in England. With the defeat of royalist forces and the execution of the king, Englishmen examined the tenets of monarchical and republican theory. But for the instability of the Interregnum, theorists and soldiers arguing for popular sovereignty could have taken a tremendous leap forward in the realm of political science. Although unsuccessful in England, these heterodox theorists put forward ideas that seventy years later would take hold in America.

A. The Influence of Jean Bodin

Sovereignty is the supreme power of governance.³ Any discussion of sovereignty should begin with Jean Bodin's *République*, which was first published in 1576.⁴ This book is the earliest known comprehensive discussion of the doctrine of sovereignty.⁵ In *République*, Bodin began with the proposition that a ruler "is absolutely sovereign who recognizes nothing, after God, that is greater than himself."⁶ Sovereign princes were, in Bodin's words, God's "lieutenants for commanding other men;" therefore, "[c]ontempt for one's sovereign prince is contempt toward God, of whom he is the earthly image."⁷ For Bodin, there were seven prerogatives of sovereignty: (1) declaring war and peace, (2) hearing appeals from inferior officials, (3) removing and appointing

3. See BLACK'S LAW DICTIONARY 1396 (6th ed. 1990) (describing sovereignty as "[t]he supreme, absolute, and uncontrollable power by which any independent state is governed").

4. The version I rely on here contains four translated chapters from the original work. JEAN BODIN, ON SOVEREIGNTY (Julian H. Franklin ed., Cambridge Univ. Press 1992) (1576).

5. See JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT 17 (1999) (describing Bodin as "the founder of modern theories of legislative sovereignty").

6. BODIN, *supra* note 4, at 4.

7. *Id.* at 46.

government functionaries, (4) imposing taxes, (5) granting pardons, (6) coining money, and (7) requiring subjects to swear loyalty oaths.⁸

Importantly, Bodin believed that the prerogatives of sovereign power were “indivisible.”⁹ Only one entity could exercise the seven prerogatives. Otherwise, the supposed co-sovereigns would clash until one prevailed as the ultimate sovereign. Bodin did recognize that the sovereign entity could be one man (a monarchy), a few elite (an aristocracy), or the entire population (a democracy).¹⁰ But, the tenor of his work is geared toward that of a monarchy—the system with which he and his contemporaries were most familiar.

Although Bodin spoke of absolute sovereignty, he believed that natural law placed certain limits on the sovereign’s power.¹¹ Precise natural law principles are difficult to define, but Bodin claimed that at a minimum, the natural law required a sovereign to respect the property of his people. According to Bodin, “[i]f the prince, then, does not have the power to overstep the bounds of natural law, which has been established by God, of whom he is the image, he will also not be able to take another’s property without just and reasonable

8. *Id.* at 58–59.

9. *Id.* at 104.

10. *Id.* at 89.

11. *See id.* at 13 (“But as for divine and natural laws, every prince on earth is subject to them, and it is not in their power to contravene them unless they wish to be guilty of treason against God.”). Natural law is a difficult term to define. Perhaps one of the best descriptions comes from Peter J. Stanlis:

Natural Law was an emanation of God’s reason and will, revealed to all mankind. Since fundamental moral laws were self-evident, all normal men were capable through unaided “right reason” of perceiving the difference between moral right and wrong. The natural law was an eternal, unchangeable, and universal ethical norm or standard, whose validity was independent of man’s will; therefore, at all times, in all circumstances and everywhere it bound all individuals, races, nations, and governments.

PETER J. STANLIS, EDMUND BURKE AND THE NATURAL LAW 7, 251–54 (1986).

cause—as by purchase, exchange, lawful confiscation.”¹² If the king did violate the natural law by wrongfully depriving a subject of his property, the only remedy was a polite remonstrance. The real wrong, in Bodin’s mind, was to God. Thus, the subject was forbidden to resist the sovereign prince in cases where natural law had been violated.¹³

Bodin’s thinking about sovereignty provides a backdrop for discussions between the Stuart monarchs and Parliament about the locus of sovereignty in the English system. They both saw sovereignty as indivisible, but they differed on its location. The Stuarts claimed that sovereignty resided in the king’s royal person whereas Parliament contended that the king was only sovereign when working in conjunction with Parliament. The king especially agreed with Bodin’s description of the prince as God’s lieutenant on earth and the concomitant inability of Parliament or the people to punish him for violation of positive or natural law. In the end, Englishmen rejected this royal immunity because of the Crown’s abuse of power.

B. The Stuart Monarchs and the Divine Right of Kings

James I is the English monarch most closely associated with the divine right theory.¹⁴ Philosophically, James was a monarch cut from the Bodin mold.¹⁵ Although ignorant of England and its system of

12. BODIN, *supra* note 4, at 39.

13. *See id.* at 46 (“Contempt for one’s sovereign prince is contempt toward God, of whom he is the earthly image. That is why God, speaking to Samuel, from whom the people had demanded a different prince, said ‘It is me that they have wronged.’”).

14. For a recent biography of James, see generally PAULINE CROFT, KING JAMES (2003). For a brief discussion of James’s rise to power and rule, see generally 2 WINSTON CHURCHILL, A HISTORY OF THE ENGLISH SPEAKING PEOPLES: THE NEW WORLD 119–31 (1956).

15. For the influence of Bodin on James I, see Harold Berman, *The Origins of Historical Jurisprudence*, 103 YALE L.J. 1651, 1667–73 (1994).

government, James was well versed in the divine right of kings¹⁶ and expected total obedience from his subjects.¹⁷ He saw the realm as one great chain of being¹⁸ in which he occupied a spot just under God. James's brand of divine right consisted of four elements: indefeasibility of hereditary right, accountability of kings to God alone, non-resistance of subjects, and divine ordination of monarchy as a governing institution.¹⁹

The English clergy were instrumental in helping James spread this message to the people. Considering that under the Act of Supremacy in 1534,²⁰ the king was the head of the Church in England, such propaganda from the pulpit is not surprising.²¹ A prime example of this is a sermon preached by William Goodwin in 1614. "Who can lay his hand upon God's annointed," asked Goodwin, "and be innocent? Who can? No man, [b]ecause God hath planted him above all men, and hath given no man authority to punish Him; God alone will take vengeance on his sinnes."²² Goodwin recognized that a monarch could be cruel to his people.

16. See J.P. SUMMERVILLE, *POLITICS AND IDEOLOGY IN ENGLAND 1603–1640*, at 9 (1986) (discussing divine right of kings).

17. James's theory "was by no means new to England but for some seventy years had been implicit, and often explicit, in the language of supporters of the Tudor monarchy." Berman, *supra* note 15, at 1673.

18. SIR THOMAS SMITH, *DE REPUBLICA ANGLORUM* (1583), reprinted in *SOURCES AND DEBATES IN ENGLISH HISTORY: 1485–1714*, at 7 (Newton Key & Robert Bucholz eds., 2004).

19. Joyce Lee Malcolm, *Introduction* to 1 *THE STRUGGLE FOR SOVEREIGNTY: SEVENTEENTH CENTURY POLITICAL TRACTS xxxv–xxxvi* (Joyce Lee Malcolm ed., 1999) [hereinafter *STRUGGLE FOR SOVEREIGNTY*].

20. R.R. PALMER & JOEL COLTON, *A HISTORY OF THE MODERN WORLD* 79 (1978).

21. Summerville has gone so far as to describe the church as "the king's ministry of propaganda." SUMMERVILLE, *supra* note 16, at 10.

22. William Goodwin, *A Sermon Preached Before the Kings Most Excellent Maiestie at Woodstoke* (1614), reprinted in 1 *STRUGGLE FOR SOVEREIGNTY*, *supra* note 19, at 38 (emphasis omitted).

God, however, preferred order to rebellion and thus prohibited any kind of revolutionary act:

God, which is the God of order, & not of confusion, foresaw in his wisdom, that it were better for the estates of Kingdoms, & lesse injurious to his Church, if the insolency of a wicked King, were sometimes tolerated without controll, than that the estate of his chiefe deputy, and Lieutenant upon the earth should be subjected to change and alteration, to deprivation, or deposing, at the pleasure and partialitie of either Priest, or of People.²³

Roger Maynwarding further advised the people that suffering would make them “martyrs,” whereas civil disobedience would make them “traitors” in the eyes of God and subject to eternal damnation.²⁴

With regard to Parliament as an institution, the royalists believed that Parliament was not a necessary ingredient for the realm’s governance. In 1626, Sir Dudley Carleton warned Englishmen that the king could easily fall “out of love with parliaments” and “be enforced to use new counsels” in governing the kingdom.²⁵ At this time in English history, the king had much control over Parliament: He decided when it should convene and disperse, and no statute could pass without his consent.

While the king asserted that he “was beholden to no elective power,”²⁶ Parliament had significant control over the purse strings and ordinary legislation. As early as the fourteenth century, English

23. *Id.* at 41–42 (emphasis omitted).

24. ROGER MAYNWARDING, RELIGION AND ALEGIANCE (1627), *reprinted in* 1 STRUGGLE FOR SOVEREIGNTY, *supra* note 19, at 64. James I went so far as to call himself a “god.” “Kings are justly called gods for that they exercise a manner or resemblance of divine power upon earth, for if you will consider the attributes to God you shall see how they agree in the person of a king.” James I, Speech to Parliament (1610), *in* THE STUART CONSTITUTION 1603–1688: DOCUMENTS AND COMMENTARY 11, 12 (J.P. Kenyon ed., 1986) [hereinafter THE STUART CONSTITUTION].

25. Dudley Carleton, Speech to the House of Commons (1626), *in* THE STUART CONSTITUTION, *supra* note 24, at 45.

26. The Earl of Salisbury, Speech to Parliament (1610), *in* THE STUART CONSTITUTION, *supra* note 24, at 11.

kings had agreed that no tallage or aid would be levied without the consent of the freeman of the realm.²⁷ Hence, actual practice differed somewhat from royalist theory.

In contrast to the royalists, parliamentarians emphasized the doctrine of king-in-parliament. “[F]or in acts of parliament, be they laws, grounds, or whatsoever else,” observed MP James Whitelocke in 1610, “the act and power is the king’s but with the assent of the Lords and Commons, which maketh it the most sovereign and supreme power above all and controllable by none.”²⁸ Under parliamentary theory, the king, Lords, and Commons together in one house were omni-competent. God had conferred the power of governance on the entire community, and this community, in turn, delegated powers to the king “subject to the conditions that he make laws and impose taxes only in Parliament.”²⁹ In other words, the Lords and Commons were the king’s partners in governance of the realm

English history is replete with challenges to royal power, but the struggles between the Stuarts and their parliaments would become an all-or-nothing affair. Much of this tension was caused by events on the Continent, where European monarchs were limiting the power of (and in some cases eliminating) representative assemblies.³⁰ Desperately short of funds because of extravagance at court and inefficiency in government administration,³¹ James frightened many

27. DONALD W. HANSON, FROM KINGDOM TO COMMONWEALTH 156 (1970).

28. James Whitelocke, Speech on Impositions (1610), in THE STUART CONSTITUTION, *supra* note 24, at 60, 61.

29. GOLDSWORTHY, *supra* note 5, at 96.

30. BARRY COWARD, THE STUART AGE 110 (1994).

31. See LACEY BALDWIN SMITH, THE REALM OF ENGLAND 205 (1983) (describing James I as “unskilled in the craft of running a centralized, semi-institutionalized and efficient bureaucracy. He saw crown offices primarily as means of rewarding good friends and only secondarily as

of the Commons by resorting to schemes for extra-parliamentary revenue. The selling of titles, forced loans, increases in the customs duties, and more frequent use of patents and monopolies brought additional monies into the king's coffers.³² The monarch's reliance on Parliament for money had always been critical to the growth and maintenance of parliamentary power. Hence, James's efforts seemed to threaten the very existence of Parliament.

Tensions between the parliamentarians and royalists during James's reign were very real, but they were also manageable. Once Charles I assumed the throne in 1625, the divide between the competing camps grew to such an extent that civil war was inevitable. Unlike his father, Charles involved England in foreign wars with France and Spain. The wars caused the Crown's finances to become more impecunious, which in turn caused Charles to exercise his so-called emergency prerogative powers to raise revenue.³³ Rejecting Parliament's demands, the king responded that "[t]he good of monarchy is the uniting a nation under one head to resist invasion from abroad and insurrection at home."³⁴ He further insisted that under the laws of the realm "the government . . . is [en]trusted to the king."³⁵ Within a few short months, the English Civil War would begin.

positions of administrative responsibility . . . [and] surrounded himself with Scottish cronies, charming young men, and worthless Englishmen").

32. COWARD, *supra* note 30, at 152.

33. The greatest controversy was perhaps the King's levying of Tunnage and Poundage, which Parliaments typically granted for the life of the king. In the case of Charles, Parliament granted these taxes on wine and other commodities for only one year. SMITH, *supra* note 31, at 217-22.

34. Charles I, The King's Answer to the Nineteen Propositions (1642), in THE STUART CONSTITUTION, *supra* note 24, at 18.

35. *Id.*

C. The English Civil War and Political Heterodoxy

Battle soon proved that royal forces were no match for Parliament's New Model Army ("NMA") under the leadership of Thomas Fairfax and Oliver Cromwell. Unlike past armies, success in the NMA was based on merit rather than bloodlines. So effective was the NMA that by 1646, Charles surrendered to Scottish authorities, and by 1649, he was executed. The NMA was more than just a fighting force; it also had a political agenda. In Putney, the NMA set up a debating society where men elected from the various regiments discussed the proper framework and foundation of a just society. With the collapse of the old order, the soldiers as well as civilians were free to put forward heterodox opinions representing viewpoints from across the political spectrum. On the extreme left were the "Diggers," a group advocating the abolishment of private property and the creation of a communistic state.³⁶ More conservative elements favored establishment of some sort of limited monarchy. Others argued that a new government should be grounded in republican principles.

Although unsuccessful, there was a sizeable movement that advocated revolutionary principles of popular sovereignty. Up until this point in English history, there were primarily two competing views of ultimate sovereignty. Royalists argued that ultimate sovereignty resided in the king, and parliamentarians argued that it resided with the king-in-parliament. With the king dead, claims arose in the late 1640s that the NMA was sovereign and an expression of the people's will. In other words, the NMA was the people.³⁷

36. CHURCHILL, *supra* note 14, at 228.

37. EDMUND S. MORGAN, *INVENTING THE PEOPLE* 78–79 (1988).

A group within the NMA known as the “Levellers,”³⁸ however, developed the novel idea that ultimate authority resided in the people themselves. Institutions of government, under the Leveller theory, were but agents of the people and could only exercise delegated powers with the consent of the people. In the words of Leveller leader John Lilburne, it was “tyrannical” for any person to “assume unto himself a power, authority and jurisdiction, to rule, govern or reign over any sort of men in the world without their free consent”³⁹ And, according to another Leveller, Richard Orton, if ever the people’s agents exceeded the delegated powers, all power “returneth from whence it came, even to the hands of the [people].”⁴⁰

To put theory into practice, the Levellers created the Agreement of the People, which would have required the signature of all citizens before it became effective. In essence, this was a written constitution whereby the people, as ultimate sovereigns, delegated certain powers to their representatives.

That the power of this, and all future Representatives of this nation is inferior only to theirs who choose them, and doth extend, without the consent or concurrence of any other person or persons, to the enacting, altering, and repealing of laws; to the erecting and abolishing of offices and courts; to the appointing, removing, and calling to account magistrates and officers of all degrees; to the making of war and peace; to the treating with

38. For a discussion of the views of the Levellers and their transformation into a civilian reform group, see G.P. GOOCH, *ENGLISH DEMOCRATIC IDEAS IN THE SEVENTEENTH CENTURY* 118–34 (1954).

39. JOHN LILBURNE, *THE FREE-MAN’S FREEDOM VINDICATED* (1646), *reprinted in PURITANISM AND LIBERTY: BEING THE ARMY DEBATES* (1647–9), at 317, 317 (A.S.P. Woodhouse ed., 2d ed. 1950) [hereinafter *PURITANISM AND LIBERTY*].

40. RICHARD OVERTON, *AN APPEAL FROM THE COMMONS TO THE FREE PEOPLE* (1647), *reprinted in PURITANISM AND LIBERTY*, *supra* note 39, at 323, 327.

foreign states; and generally to whatsoever is not expressly or impliedly reserved by the represented to themselves.⁴¹

There then followed a reservation of rights that prohibited the representatives from doing such things as interfering with religion or conscripting citizens.⁴² The ideas of the Levellers were radical and ahead of their time. Unfortunately, the Agreement of the People was rejected by the dominant political powers, and Leveller leaders were charged with sedition. The essence of Leveller theory would not be embraced until the next century when a people emerging from their own revolution had the courage to challenge long-held beliefs about sovereignty.

D. Restoration and Triumph of Parliament

The instability of the Civil War and Interregnum resulted in a restoration of the Stuart monarchy. The Stuart restoration, however, settled very little. Claims that supreme authority resided in the king survived the execution of Charles I and were again trotted out during the reigns of Charles II and James II. For example, John Brydall in 1681 described the king as “the sole Legislator” who alone “gives Life, and Being, and Title of Laws” with or without the consent of Parliament.⁴³ Parliament, in Brydall’s words, was “only Consultative or Preparative” in the making of law.⁴⁴ An anonymous royalist pamphleteer writing in 1683 was more blunt: “In the presence of His Majesty, both, or either Houses of Parliament, have no Power to command So the Power of both or either Houses of Parliament,

41. AN AGREEMENT OF THE PEOPLE, *reprinted in* PURITANISM AND LIBERTY, *supra* note 39, at 443, 444.

42. *Id.*

43. JOHN BRYDALL, THE ABSURDITY OF THAT NEW DEvised STATE-PRINCIPLE, *reprinted in* 2 STRUGGLE FOR SOVEREIGNTY, *supra* note 19, at 787.

44. *Id.* (emphasis omitted).

is but upon sufferance, in the presence of their Sovereign His Majesty.”⁴⁵

Because of fears of Catholic absolutism and James’s assertion of control over local government,⁴⁶ James’s Protestant magnates invited William of Orange and Mary to save the realm. With the nation’s quick embrace of William, James tossed the Great Seal into the Thames and fled to the court of Louis XIV. William became the provisional leader of the government upon James’s “abdication.” He then issued writs for a Convention Parliament to meet to decide the fate of the Crown. Though there was some support for bringing James back under certain limitations, James ended this talk when he announced that he would not accept limits on his royal authority. Because of James’s recalcitrance, William and Mary were offered and accepted the throne. They also agreed to certain limitations on royal power as enumerated in the English Bill of Rights.⁴⁷ The key provisions of the Bill of Rights forbade the monarch from suspending laws without the consent of Parliament, from using the prerogative power to gain extra-parliamentary grants of revenue, and from creating or maintaining standing armies without the consent of Parliament.⁴⁸ This acceptance of limited power marked the successful conclusion of the so-called Glorious Revolution.

The Bill of Rights did not put forth the doctrine of parliamentary supremacy, nor did it disclaim the divine right of kings. Nonetheless,

45. THE ARRAIGNMENT OF CO-ORDINATE POWER, *reprinted in* 2 STRUGGLE FOR SOVEREIGNTY, *supra* note 19, at 800.

46. See JOHN MILLER, THE GLORIOUS REVOLUTION 3 (1983) (noting that James “thought in terms of simple polar opposites and found in the Catholic Church an unquestionable authority, which (he felt) other Churches lacked”).

47. J.R. JONES, THE REVOLUTION OF 1688 IN ENGLAND 316 (1972).

48. THE BILL OF RIGHTS (1689), *reprinted in* FROM MAGNA CARTA TO THE CONSTITUTION 39 (David L. Brooks ed., 1993).

the Glorious Revolution did mark the beginning of parliamentary sovereignty in the Bodin mold. With the monarch unable to raise significant revenues without parliamentary consent, Parliament effectively assumed the helm of the ship of state. What began as an advisory council of great magnates was fast becoming the ultimate sovereign in the English political system.

In summary, the 1600s was a century of great change and debate. The century began with a monarch devoted to the divine right of kings and ended with the ignominious flight of his grandson. The efforts of the Stuarts to rule without Parliament resulted in the demise of their beloved divine right theory and the weakening of the monarchy. God's supposed Lieutenant on earth had lost much of his luster. Although it would be some time before Parliament reduced the monarch to a mere figurehead, the Stuarts' refusal to exit a gilded road that no longer led into the future accelerated this process.

The instability caused by clashes between the Crown and Parliament in the 1640s permitted Englishmen to debate the first principles of society. And in that debate some voices argued for popular sovereignty to replace divine right theory. Under the Leveller theory, departments of government were but the servants of the omnipotent people. To put theory into practice, the Levellers created a written constitution called the Agreement of the People. The Agreement was ahead of its time and offered an alternative to divine right and parliamentary supremacy. Although England was not ready to embrace popular sovereignty, it would not be long until thirteen English colonies would embrace it.

II

SOVEREIGNTY AND THE AMERICAN REVOLUTION

In the decades prior to the American Revolution, the principle of parliamentary sovereignty was well established. Until the American colonists began to rethink the concept of sovereignty in the 1760s, most British subjects at home and abroad agreed on the locus of sovereignty. Parliament was the bedrock of British liberty—the champion of the people in the battle against royal absolutism. This stability of parliamentary supremacy promised that the king would never again challenge Parliament, and that the various concepts of sovereignty and society put forward in the Putney debates during the Civil War would not threaten the status quo. All was good with the British constitution until the mother country developed a renewed interest in her North American colonies.

A. Blackstone on Parliamentary Sovereignty

During the 1760s, the place and power of Parliament was memorialized by the great William Blackstone in his *Commentaries on the Laws of England*. Parliament, according to Blackstone, consisted of “the king’s majesty, sitting there in his royal political capacity, and the three estates of the realm; the lords spiritual, the lords temporal, (who sit, together with the king, in one house) and the commons, who sit by themselves in another.”⁴⁹ The *Commentaries* thus recognized that the principle of king-in-parliament was settled. The Stuart proposition that the Lords and Commons were dispensable was but a part of history. Blackstone

49. WILLIAM BLACKSTONE, 1 COMMENTARIES *153.

was clear that “[t]he crown cannot begin of itself any alteration in the present established law. . . .”⁵⁰

Regarding the power of Parliament, Blackstone described it as follows:

It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil military, maritime, or criminal; this being the place where that *absolute despotic power*, which must, in all governments, reside somewhere, is entrusted by the constitution of these kingdoms.⁵¹

Nor was fundamental law beyond the reach of parliament in Blackstone’s estimation: “It can change and create afresh even the constitution of the kingdom”⁵² Once Parliament takes an action regarding the constitution or a lesser matter, “no authority upon earth can undo” it.⁵³

The phrase “no authority” also included the people of Great Britain. Under the accepted doctrine, if Parliament enacted pernicious laws that threatened the liberty of the people, “the subjects of this kingdom are left without all manner of remedy.”⁵⁴ Parliament was not an agent or trustee of the people and thus subject to their sanction—Parliament was sovereign.⁵⁵ Blackstone specifically took

50. *Id.* at *154; *see also id.* at *155 (“Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done”).

51. *Id.* at *160 (emphasis added).

52. *Id.* at *161.

53. *Id.*

54. *Id.*

55. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 9 (8th ed., Liberty Fund 1982) (1885); *see also* John V. Jezierski, *James Wilson and Blackstone on the Nature and Location of Sovereignty* 32 J. HIST. IDEAS 95, 103 (1971) (“In short, Parliament was able to do everything that was not naturally impossible, and what it did no authority on earth was able to undo.”).

aim at John Locke's assertion that Parliament was "only a fiduciary power to act for certain ends" and that the people possessed "supreme power to remove or alter the legislative[] when they find the legislative act contrary to the trust reposed in them."⁵⁶ Blackstone derided Locke's logic as "theory" and alien to the British constitution as it had actually developed.⁵⁷ Without elaboration, he refused to adopt or argue from Locke's reasoning and instead affirmed "that the power of parliament is absolute and without control."⁵⁸

This absolute power followed British subjects within the empire. As explained during the Stamp Act crisis by Martin Howard, Jr., "[e]very Englishmen, therefore, is subject to [Parliament's] jurisdiction, and it follows him wherever he goes. It is of the essence of government, that there should be a supreme head, and it would be a solecism in politicks to talk of members independent of it."⁵⁹ Thus, the British constitution's concept of sovereignty applied to the American colonists as if the colonists resided in London. So long as they resided on soil controlled by Great Britain, Parliament was their master.

B. De Facto Home Rule

The decades before the American Revolution were dynamic. Between 1750 and 1770, Britain's North American colonists doubled from 1 million to 2 million.⁶⁰ With this increase in population came

56. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 77-78 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690) (emphasis omitted).

57. BLACKSTONE, *supra* note 49, at *162.

58. *Id.*

59. MARTIN HOWARD, JR., A LETTER FROM A GENTLEMAN AT HALIFAX (1765), *reprinted in* TRACTS OF THE AMERICAN REVOLUTION 63, 67 (Merrill Jensen ed., 1967).

60. GORDON S. WOOD, THE AMERICAN REVOLUTION 6 (2002).

an increase in the colonies' value to the mother country. Colonial imports from Britain rose from a little under £1 million to over £2 million.⁶¹ Taking colonial exports into account, the mother country enjoyed a £500,000 trade surplus with the colonies.⁶²

Although profitability was the main purpose for possession of colonies, there was no master or centralized plan to achieve this result. The colonies developed naturally on the backs of enterprising individuals. Britain's imperial structure was dilapidated and inefficient—certainly incapable of hindering the growing colonies.⁶³ This neglect of colonial matters left Americans with a strong sense of self-sufficiency and self-government.⁶⁴ British officials were seldom in a position to interfere with colonists' economic and social pursuits, and the colonists took advantage of their independence—often to the benefit of the empire. This independence was the case not just in North America, but throughout the peripheries of the empire. Local bodies in Wales, Scotland, and Ireland enjoyed an independence that would have been unthinkable under a more centralized, European monarchy.⁶⁵ Such a localization of power was a direct result of Parliament's triumph in the Glorious Revolution and the Crown's inability to raise revenue without resorting to the British Parliament or the representative assemblies of the various colonies.⁶⁶

This hands-off approach to the colonies changed with the conclusion of the Seven Years' War in 1763. The victorious British

61. *Id.* at 13.

62. *Id.* at 14–15.

63. *Id.* at 5.

64. SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 181–82 (1965).

65. JACK P. GREENE, *PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES 1607–1788*, at 63 (1986).

66. *Id.* at 64.

forces acquired vast new territories in North America from France and Spain. While the new territory promised to be a great boon for the empire, the cost of its acquisition was high. The war debt rose to £317 million with £5 million in annual interest.⁶⁷ Considering that the empire's peacetime budget was about £8 million, the debt was staggering.⁶⁸ In addition to this preexisting debt, Britain faced the prospect of additional expenditures in organizing the new territories and appointing royal officials. Britain also faced the prospect of keeping the peace with hostile Indian tribes that unhappily found themselves under British jurisdiction. The ever-present colonial hunger for land made conflict inevitable; therefore, Britain estimated that it would need 10,000 regular troops stationed in North America to handle the peacekeeping duties.⁶⁹

Raising additional revenue was not an easy task. Britons suffered under a heavy tax burden and many felt that the colonists gained the most benefit from the victory over France.⁷⁰ Taxation in Britain had reached upwards of thirty percent of landowners' incomes before the Seven Years' War.⁷¹ The British Treasury estimated that the average colonist paid one-fiftieth of the taxes paid by the average British subject living in the mother country.⁷² Hence, Britons of all classes and parties believed it was time for the colonists to pay something towards their own defense.⁷³

67. WOOD, *supra* note 60, at 17.

68. *Id.*

69. *Id.* at 18.

70. W.E. WOODWARD, A NEW AMERICAN HISTORY 126–27 (1938).

71. *Id.* at 126.

72. PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 132 (1997).

73. *Id.*

C. Imperial Restructuring

The first revenue-generating measure passed by Parliament was the Sugar Act of 1764.⁷⁴ As stated in its preamble, the purpose of the Act was “defraying the expences of defending, protecting, and securing” the North American colonies.⁷⁵ The Sugar Act lowered the duties on foreign molasses, but increased the duties on various luxury items such as linen, silk, and wine.⁷⁶ The increased duties were ill-timed because the North American colonies were experiencing a post-war economic downturn.⁷⁷ A flurry of protests followed as the colonists realized that the Sugar Act would be the first of many other parliamentary intrusions on their independent existence.

The next intervention was the infamous Stamp Act of 1765.⁷⁸ It was the first direct, internal tax to be levied on the North American colonies by Parliament.⁷⁹ The Act required that almost every form of paper used in the colonies be affixed with an official stamp. Hence, the tax increased the price of legal documents, almanacs, newspapers, pamphlets, calendars, and numerous other items used by all classes of colonial society.⁸⁰ Colonists regarded it with almost universal odium.

The colonists believed that the Stamp Act, if accepted, would create a precedent harmful to American liberties. The importance of

74. The Sugar Act (1764), in PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1766, at 4 (Edmund S. Morgan ed., 1959) [hereinafter PROLOGUE TO REVOLUTION].

75. *Id.* at 4.

76. *Id.* at 5.

77. WOOD, *supra* note 60, at 27.

78. The Stamp Act (1765), in PROLOGUE TO REVOLUTION, *supra* note 74, at 35.

79. MORISON, *supra* note 64, at 185.

80. The Stamp Act, *supra* note 78, at 35–43.

precedent or custom was indispensable to the British constitution. Because it was unwritten, the British constitution necessarily relied more on custom or precedent than the current United States Constitution. Precedent certainly carries much weight in the American system, but those unhappy with precedent may also turn to the Constitution's text and history when arguing for the overturn of precedent. With no text, and therefore no discussion or debate prior to adopting the text, British subjects necessarily were limited to the custom of the realm as evidenced by prior course of conduct. Accordingly, when subjects feared that Parliament or the king was inserting a dangerous innovation into the constitutional order, they were duty-bound to create a "record" with protests and often refusals to abide by the unconstitutional act.⁸¹ If they failed to do so, a subsequent king or Parliament could build further on the precedent.

The Boston Tea Party—typically treated as a mere tax protest—is a good example of the importance of precedent. Though the Tea Act of 1773 reduced the price of tea, the colonists felt compelled to take action to prevent Parliament from setting a revenue precedent. Under commercial rules, a ship entering a colonial harbor was not permitted to leave without offloading its cargo. If the tea was offloaded, a duty would be paid; if it was not offloaded within twenty days, the cargo would be seized by customs officials who would retain a portion of the merchandise to satisfy the duty. The Tea Party occurred on the nineteenth day that the ships bearing tea had been in the harbor. The colonists destroyed the tea so it could not be seized by the customs officials and the duty technically "paid" to form the basis of a precedent.⁸² With this background, one can better

81. See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 9–34 (2004).

82. *Id.* at 18.

understand why the colonists so vehemently opposed the Stamp Act as the first direct, internal tax levied by Parliament. They simply could not afford for such a tax to become precedent.

The resolutions and protests from the various colonial assemblies shared a number of characteristics. First, they pointed to the lack of precedent for Parliament levying direct, internal taxes on the colonies. In the words of the Maryland assembly:

[H]is Majestys liege People of this Ancient Province have always enjoyed the Right of being Governed by Laws to which they themselves have consented in the Articles of Taxes and internal Polity and that the same hath never been forfeited or any other way Yielded up but hath been Constantly recognized by the King and People of Great Britain.⁸³

Often connected to the precedent argument was a “knowledge” argument based on divergent local circumstances. The Virginia House of Burgesses lectured Parliament that only representatives chosen by the people “can . . . know what Taxes the People are able to bear, or the easiest Method of raising them.”⁸⁴ Considering the challenges of travel and communications in the eighteenth century, this was a strong argument. Parliament was attempting to enact a comprehensive, one-size-fits-all tax on colonies as different as South Carolina and Massachusetts. A complex task made all the more difficult because no member of Parliament was from either colony and very few, if any, had personal knowledge of the colonial circumstances.

The knowledge problem aside, the colonials also protested that the members of Parliament levying the tax on the colonies would not feel the pinch of the tax. According to the Virginia House of

83. The Maryland Resolves (1765), in PROLOGUE TO REVOLUTION, *supra* note 74, at 52, 53.

84. The Resolutions as Printed in *The Journal of the House of Burgesses* (1765), in PROLOGUE TO REVOLUTION, *supra* note 74, at 47, 48.

Burgesses, this shared burden by elected representatives “is the only Security against a burthensome Taxation, and the distinguishing Characteristic of British Freedom, without which the ancient Constitution cannot exist.”⁸⁵ When legislating for Britain, a member of Parliament would feel the bite of tax or ill-conceived law in the same manner as electors and those non-electors who were “virtually represented.” This was not true for American colonists virtually represented in Parliament. Members of Parliament could not feel the effects of laws on the colonials, nor were they present to witness the effects. Thus, the doctrine of shared burdens proved to be a compelling argument against virtual representation.⁸⁶

Keying in on representation, the colonial assemblies also made the famous taxation-without-representation argument known by every schoolchild. The phrase “no taxation without representation,” however, is a bit more complicated than most Americans have been led to believe. Under the customs of the British constitution, taxation was a gift from the people to the king and was thereby distinguished from ordinary legislation.⁸⁷ Because one cannot gift something if one does not have a claim to it, taxation was closely tied to representation.⁸⁸ The Connecticut assembly expressed the ideas as follows:

That in the Opinion of this House, An Act for raising Money by Duties or Taxes differs from other Acts of Legislation, in that it is

85. *Id.*

86. JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO TAX 239–41 (1987).

87. DANIEL DULANY, CONSIDERATIONS ON THE PROPRIETY OF IMPOSING TAXES IN THE BRITISH COLONIES FOR THE PURPOSE OF RAISING A REVENUE BY ACT OF PARLIAMENT (1765), reprinted in TRACTS OF THE AMERICAN REVOLUTION, *supra* note 59, at 94, 95–96; EDMUND S. MORGAN, INVENTING THE PEOPLE 239–40 (1988).

88. DULANY, *supra* note 87, at 95–96; MORGAN, *supra* note 87, at 239–40; REID, *supra* note 86, at 87.

always considered as a free Gift of the People made by their legal, and elected Representatives, And that we cannot conceive, that the People of great Britain, or their Representatives, have Right, to dispose of our Property.⁸⁹

Because the colonists, via the franchise, had not authorized any member of Parliament to consent to taxation, the Stamp Act was void. It followed that colonial “gifts” to the king could only come from the colonial assemblies. In fact, the colonists through Benjamin Franklin suggested that the king should approach them directly if he desired revenue: “when aids to the Crown are wanted, they are to be asked of the several assemblies, according to the old established usage, who will, as they have always done, grant them freely.”⁹⁰ The colonists’ reasoning on this point was sound, and many Britons, including William Pitt, agreed that Parliament could not tax the colonies.⁹¹

Of course, the colonists’ protests went far beyond respectful resolves and petitions. Rioters took to the streets and burned sheets of stamps.⁹² Tax collectors became pariahs and some were forced to take refuge with British troops.⁹³ Fearing for their lives and lacking faith in British protection, many of the stamp agents simply resigned.⁹⁴ Organized extra-legal groups known as “Sons of Liberty”

89. The Connecticut Resolves (1765), in PROLOGUE TO REVOLUTION, *supra* note 74, at 54, 55.

90. The Examination of Dr. Benjamin Franklin (1766), in PROLOGUE TO REVOLUTION, *supra* note 74, at 143, 144.

91. The Role of William Pitt, in PROLOGUE TO REVOLUTION, *supra* note 74, at 134, 136 (“It is my opinion, that this kingdom has no right to lay taxes upon the colonies. . . . Taxation is no part of the governing or legislative power. The taxes are a voluntary gift and grant of the Commons alone. . . . When, therefore, in this House we give and grant, we give and grant what is our own. But in an American tax, what would we do?”); JOHNSON, *supra* note 72, at 133–34.

92. JOHNSON, *supra* note 72, at 133.

93. *Id.*

94. Gordon Wood, *A Note on Mobs in the American Revolution*, 23 WM. & MARY Q. 635, 635 (1966).

sprang up across the colonies.⁹⁵ These organizations persuaded lawyers, judges, and merchants to carry on their business without using the detested stamps.⁹⁶ They also carried out a successful campaign to boycott certain British goods.⁹⁷

The boycott proved so effective that by 1766 London merchants petitioned Parliament for the repeal of the Stamp Act.⁹⁸ As discussed earlier, the distinguished William Pitt and his followers agreed with the Americans' constitutional complaints regarding taxation and representation. These factors, along with Parliament's desire to end the violence against stamp agents, led to the repeal of the Stamp Act. However, even those members of Parliament who joined with the Americans in seeking a repeal of the Act desired to reaffirm the power and ultimate sovereignty of Parliament. Pitt, in his speech urging repeal, counseled as follows:

At the same time, let the sovereign authority of this country over the colonies, be asserted in as strong terms as can be devised, and be made to extend to every point of legislation whatsoever. That we may bind their trade, confine their manufactures, and exercise every power whatsoever, except that of taking their money out of their pockets without their consent.⁹⁹

This sentiment would give rise to the Declaratory Act of 1766 in which Parliament claimed the power "to make all laws and statutes of sufficient force to bind the colonies and people of *America*, subjects

95. WOOD, *supra* note 60, at 29–30. For a general discussion of mob activity in colonial America, see EDWARD COUNTRYMAN, *THE AMERICAN REVOLUTION* 74–104 (1985).

96. WOOD, *supra* note 60, at 30.

97. *Id.*

98. The Petition of the London Merchants to the House of Commons (1766), in *PROLOGUE TO REVOLUTION*, *supra* note 74, at 130, 130.

99. The Role of William Pitt, *supra* note 91, at 141.

of the crown of *Great Britain*, in all cases whatsoever.”¹⁰⁰ This assertion of authority was not radical. With the Declaratory Act, Parliament was simply acknowledging its place in the constitutional order as established in the Glorious Revolution. The Declaratory Act, however, caused the colonists to accelerate their examination of the doctrine of sovereignty.

D. Rethinking Sovereignty

The American thinkers sought to limit the despotic and absolute power of Parliament. This was an effort to enshrine principles of home rule in the British constitution.¹⁰¹ Early efforts to limit parliamentary power proved clumsy and problematic. For example, in 1764, James Otis published his *Rights of the British Colonies* in which he argued for continued home rule and some form of colonial representation in the British Parliament.¹⁰² But for home rule to mean anything, the power of Parliament had to be limited. In his tract, Otis accepted that Parliament had “an undoubted power and lawful authority to make acts for the general good”¹⁰³ and that Parliament’s power was “uncontroulable, but by themselves, and we must obey.”¹⁰⁴ At the same time, Otis argued the power of Parliament was limited by “truth, equity, and justice” under a natural law formulation that prohibited Parliament from being “absolute and arbitrary.”¹⁰⁵ Aside from being contradictory, Otis’s proposed

100. The Declaratory Act (1766), in 27 THE STATUTES AT LARGE 1920 (Danby Pickering ed., 1767).

101. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 204 (1967).

102. JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED (1764), reprinted in TRACTS OF THE AMERICAN REVOLUTION, *supra* note 59, at 19.

103. *Id.* at 22.

104. *Id.* at 29.

105. *Id.* at 32–33.

limitation on Parliament was tantamount to a repeal of the Glorious Revolution. Britons associated parliamentary sovereignty with British liberty; parliamentary sovereignty *was* English and later British liberty. Otis's unworkable and contradictory theory thus met with few accolades.

Learning from Otis's mistakes, other thinkers chose to distinguish between the power of Parliament and the power of colonial assemblies.¹⁰⁶ They divided the powers of the colonial assemblies and that of Parliament into two distinct spheres. The powers of Parliament were described as external, general, or imperial, while the powers of the assemblies were described as internal or local. For example, John Dickinson writing in 1768 observed that in an empire composed of distinct provinces "there must exist a power somewhere to preside, and preserve the connection in due order."¹⁰⁷ If the issue concerned the empire as a whole, such as the regulation of trade among the members, Dickinson opined that the power must rest with Parliament.¹⁰⁸ Direct taxation, however, was an internal matter and therefore outside of Parliament's power.¹⁰⁹ Stephen Hopkins of Rhode Island agreed with Dickinson on this point and urged his fellow colonists to "patiently submit" to all laws passed by Parliament "for directing and governing all these general matters."¹¹⁰ But for matters affecting only one part of the empire, Hopkins pointed to the

106. BAILY, *supra* note 101, at 209.

107. JOHN DICKINSON, LETTERS FROM A FARMER IN PENNSYLVANIA TO THE INHABITANTS OF THESE BRITISH COLONIES (1768), *reprinted in* TRACTS OF THE AMERICAN REVOLUTION, *supra* note 59, at 127, 133.

108. *Id.*

109. *Id.*

110. STEPHEN HOPKINS, THE RIGHTS OF THE COLONIES EXAMINED (1764), *reprinted in* TRACTS OF THE AMERICAN REVOLUTION, *supra* note 59, at 41, 49.

“peculiar privileges” of the different provinces as the ultimate authority.¹¹¹

The mother country understood that it was but a small step from the concept of divided sovereignty to an argument that Parliament had no sovereign power over the colonies. During questioning of Benjamin Franklin by Parliament, he was specifically asked whether the colonies might not soon voice objections to Parliament’s regulation of external matters. Choosing his words carefully, Franklin responded that while some men had presented that position, the colonists had yet to be persuaded. However, he ominously warned that “in time they may possibly be convinced by these arguments.”¹¹²

As Franklin predicted, it was not long until the colonists rejected the supremacy of Parliament. By the late 1760s, the colonists had already become suspicious of parliamentary sovereignty. In 1768, pamphleteer William Hicks observed that “while the power of the British parliament is acknowledged sovereign and supreme in every respect whatsoever, the liberty of America is no more than a flattering dream, and her privileges delusive shadows.”¹¹³

Perhaps the best statement of the colonists’ rejection of parliamentary supremacy is Thomas Jefferson’s *A Summary View of the Rights of British America*.¹¹⁴ According to Jefferson’s version of history, the colonists left the mother country and only continued the

111. *Id.* at 57.

112. The Examination of Dr. Benjamin Franklin, *supra* note 90, at 146.

113. WILLIAM HICKS, THE NATURE AND EXTENT OF PARLIAMENTARY POWER CONSIDERED (1768), reprinted in TRACTS OF THE AMERICAN REVOLUTION, *supra* note 59, at 164, 183–84.

114. THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (1774), reprinted in TRACTS OF THE AMERICAN REVOLUTION, *supra* note 59, at 256. For an excellent discussion of the Summary View, see DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 28–37 (1994).

union with Great Britain “by submitting themselves to the same common sovereign, who was thereby made the central link connecting the several parts of the empire thus newly multiplied.”¹¹⁵ Hence, the sole connection between the people of Britain and the colonists was George III. To Jefferson, Parliament was a foreign jurisdiction having no say in the affairs of the colonies. Jefferson declared a number of parliamentary enactments “void” on the “true ground . . . that the British parliament has no right to exercise authority over us.”¹¹⁶

Jefferson also offered George III a road map on how to preserve the union between the people of Britain and the North American colonists. Describing the king as “the only mediatory power between the several states of the British Empire,” Jefferson asked George III to approach Parliament to recommend the repeal of unconstitutional acts that were the cause of “discontents and jealousies among us.”¹¹⁷ Without intercession of the king, “fraternal love and harmony through the whole empire” would be impossible.¹¹⁸

In reality, Jefferson’s solution to the dispute between the colonies and mother country was impossible for the British to accept. At the time Jefferson penned his *Summary View*, the balance created by the Glorious Revolution was less than 100 years old. Although in 1774 the balance of power tilted decidedly toward Parliament, the royal prerogative was not yet dead and the king still exercised substantial power under the British constitution. Were the king to accept Jefferson’s view of royal power, the constitutional balance would shift away from Parliament and back toward the king. To a nation

115. JEFFERSON, *supra* note 114, at 260.

116. *Id.* at 263.

117. *Id.* at 268.

118. *Id.* at 276.

wedded to the principles of parliamentary sovereignty and suspicious of attempts to augment royal power, Jefferson's proposal was a constitutional heresy.

During this time, there were formal plans of union drafted in an effort to avoid independence. For example, the loyalist Joseph Galloway proposed a plan that would have united the thirteen colonies within the British Empire. Galloway called for the creation of a continental assembly that he described as "a British and American legislature" that would "regulat[e] the administration of the general affairs of America."¹¹⁹ In theory, this legislature would be "an inferior and distinct branch of the British legislature" although it would handle all continental matters.¹²⁰ Each colony would "retain its present constitution, and powers of regulating and governing its own internal police, in all cases what[so]ever."¹²¹ In recognition of the king's authority, he was to appoint a president general to execute the laws passed by the new legislature.¹²²

With George III unwilling to intercede on behalf of the colonies or to accept proposals for union, the colonies declared independence. Consistent with the colonists' evolving theory of sovereignty, the Declaration of Independence primarily addressed the "history of the present King of Great Britain."¹²³ The Declaration only indirectly addressed Parliament by accusing the king of "combin[ing] with others to subject us to a jurisdiction foreign to our constitution."¹²⁴

119. Joseph Galloway, A Plan of a Proposed Union between Great Britain and the Colonies (1774), in COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION 391, 392 (Donald S. Lutz ed., 1998).

120. *Id.* at 393.

121. *Id.* at 392.

122. *Id.*

123. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).

124. *Id.* para. 16.

By 1776, the colonists had jettisoned Parliament from the constitutional scheme. With the king serving as the only link between the colonists and the British Empire, there was no need to formally address Parliament or declare independence from parliamentary rule. Because of the king's multiple abuses, the colonies were "absolved from all allegiance to the British crown."¹²⁵

The rejection of parliamentary sovereignty and connection with the king left ultimate sovereignty in each state legislature. Years later James Madison would observe that at the time of the Revolution, "[t]he legislative power was maintained to be as complete in each American Parliament, as in the British Parliament."¹²⁶ Of course, some Americans were questioning whether an artificial body such as legislature could possess ultimate sovereignty. According to the General Court of Massachusetts:

It is a maxim, that, in every government, there must exist, somewhere, a supreme, sovereign, absolute, and uncontrollable power; But this power resides, always in the body of the people, and it never was, or can be delegated, to one man, or a few; the great Creator, having never given to men a right to vest others with authority over them, unlimited, either in duration or degree.¹²⁷

125. *Id.* para. 33. In his original draft, Jefferson made reference to breaking political connections with parliament in an effort to accommodate those who thought that parliament still had some power over the colonies. MAYER, *supra* note 114, at 45. The final version simply stated that "all political connection between [the colonists] and the state of Great Britain is, and ought to be, totally dissolved." THE DECLARATION OF INDEPENDENCE, *supra* note 123, at para. 33.

126. James Madison, "Mr. Madison's Report" to the Virginia Assembly, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 562 (Jonathan Elliot ed., 1885); see also Akhil Reed Amar, *Anti-Federalists, The Federalist Papers, and the Big Argument for Union*, 16 HARV. J.L. & PUB. POL'Y 111, 111 (1993) ("The American Revolution, of course, was a revolution that had been fought not simply for freedom, but for localism.").

127. Proclamation of the General Court (1776), in THE POPULAR SOURCES OF POLITICAL AUTHORITY 65 (Oscar Handlin & Mary Handlin eds., 1966).

In other words, the people possess what Bodin or Blackstone would recognize as ultimate sovereignty, while the people's agents (e.g., representatives, governors, and judges) possess what we today call governmental or legislative sovereignty, which is derived from the people and is inferior to the people's ultimate sovereignty.¹²⁸

On the state level, these principles of sovereignty were enshrined in state constitutions and bills of rights. For example, the Virginia Declaration of Rights declared that "all power is vested in, and consequently derived from, the People; that magistrates are their trustees and servants, and at all times amenable to them."¹²⁹ On the continental level, the issue of sovereignty did not pose a problem under the Articles of Confederation because Congress's power did not extend to individuals. For example, Congress could not tax citizens; it could only make requisitions of the state governments.

Issues of sovereignty, however, arose again with the Constitution of 1787. After compromise, study, and debate, the Framers created a

128. LANCE BANNING, *THE SACRED FIRE OF LIBERTY* 443 n.30 (1995). This difference between ultimate sovereignty and legislative sovereignty is clearly expressed in the instruction given by the people of Mecklenburg, North Carolina to their delegates to the provincial Congress:

1st. Political power is of two kinds, one principal and superior, and the other derived and inferior.

2nd. The principal supreme power is possessed by the people at large, the derived and inferior power by the servants which they employ.

3rd. Whatever persons are delegated, chosen, employed and intrusted by the people are their servants and can possess only derived inferior power.

4th. Whatever is constituted and ordained by the principal supreme power can not be altered, suspended or abrogated by any other power, but the same power that ordained may alter, suspend and abrogate its own ordinances.

5th. The rules whereby the inferior power is to be exercised are to be constituted by the principal supreme power, and can be altered, suspended and abrogated by the same and no other.

Instructions to the Delegates From Mecklenburg, North Carolina, to the Provincial Congress at Halifax (1776), in 1 *THE FOUNDERS' CONSTITUTION* 56 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter *Instructions*].

129. *Instructions*, *supra* note 128, at 6.

system in which the people of each state delegated power to two governmental sovereigns: the state and national governments. Madison wrote that “[t]he federal and state governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes.”¹³⁰ By ratifying the Constitution in separate state conventions, the people of each state took a portion of the powers originally delegated to their state governments and transferred this power to the national government. The powers possessed by the state governments, and not affected by the grant to the national government, remained with the state governments.

Using terms familiar to the revolutionary generation, Madison differentiated between the powers of the national and state governments. “The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . .” while those of the latter “will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the state.”¹³¹

Americans established a *de jure* federal union. Such a union had existed *de facto* in the British Empire until the imperial reorganization of the 1760s when Britain attempted to curtail some of the privileges of home rule enjoyed by the colonists. The argued-for distinction between external matters controlled by the empire and internal matters controlled by colonial—now state—assemblies was enshrined into America’s fundamental law. In this sense, the American Revolution was a true revolution. The wheel began in a

130. THE FEDERALIST No. 46, at 239 (James Madison) (Max Beloff ed., 1987).

131. THE FEDERALIST No. 45 (James Madison), *supra* note 130, at 238.

position recognizing the federal nature of the British Empire, was rotated forward by British agents of imperial reorganization, and was eventually returned to its initial federal position by the American colonists via insurrection, thus completing its revolution.

Interestingly, the American understanding of popular sovereignty was eventually enshrined in Blackstone's *Commentaries*—albeit in St. George Tucker's 1803 annotated version of the *Commentaries*. Tucker was the preeminent legal theorist of the early 1800s. His annotated edition of the *Commentaries* was the definitive American legal text used in the first half of the nineteenth century. In Appendix A of the first volume of the *Commentaries*, Tucker made clear that the British concept of sovereignty did not survive the American Revolution. Tucker described the people as possessing “indefinite and unlimited power.”¹³² If a mere legislature exceeded a grant of power found in a constitution, Tucker stated that the resulting statute offended “against that greater power from whom all authority, among us, is derived” and that the offending act should be opposed.¹³³ With such annotations, Tucker attempted to render Blackstone useable for American lawyers brought up in the republican tradition.

III

ROYAL COURTS AND SOVEREIGNTY

Thus far, the development of the theory of sovereignty is primarily characterized as a struggle between the king and Parliament in England, and between king-in-parliament and the colonial assemblies in America (with the “sovereign” people of each

132. ST. GEORGE TUCKER, ON SOVEREIGNTY AND LEGISLATURE, *reprinted in* VIEW OF THE CONSTITUTION OF THE UNITED STATES 18, 20 (Clyde N. Wilson ed., 1999).

133. *Id.* at 19.

state/colony brought into the fray early on in the American Revolution). Noticeably absent from the front lines are courts of law, those institutions that today in America have the final say on the meaning of fundamental law.

In understanding the absence of court power, we must remember that English judges were appointed by the king and served at his pleasure.¹³⁴ If the king disagreed with a decision of a judge, the judge could be dismissed immediately. The king was the font of all justice and the judges were his agents. In the words of James I, “[a]s kings borrow their power from God, so judges from kings; and as kings are to account to God, so judges unto God and kings.”¹³⁵ If the judges were presented with a question concerning the king’s prerogative, James instructed them to “deal not with it till you consult with the king or his Council.”¹³⁶ Lacking independence, the judges were not in a position to interject themselves into disputes between the king and Parliament concerning the locus of ultimate sovereignty.

Of course, some intrepid judges who were sympathetic to parliamentary power did challenge the king on occasion. For example, Sir Edward Coke had several confrontations with James I. Coke was a giant of the common law, with a legal career that spanned three reigns. He served as attorney general for Queen Elizabeth, chief justice of the Court of Common Pleas and later the Court of King’s Bench during the reign of James I, and a leader in Parliament during the reign of Charles I.¹³⁷ A brilliant thinker, Coke is credited

134. J.P. Kenyon, THE STUART CONSTITUTION, *supra* note 24, at 75; Berman, *supra* note 15, at 1674.

135. James I: Speech to the Judges in Star Chamber (1616), *in* THE STUART CONSTITUTION, *supra* note 24, at 84, 84.

136. *Id.* at 85.

137. Berman, *supra* note 15, at 1674.

with outlining the principles that have become modern law.¹³⁸ Although ahead of his time, it is a mistake to view Coke's efforts out of context and thus erroneously credit him with establishing an early form of judicial review.

A. *Prohibitions del Roy*

Perhaps Coke's most celebrated clash with James I occurred during the case entitled *Prohibitions del Roy*, which dealt with use of a writ of prohibition.¹³⁹ A writ of prohibition was a process whereby high court judges could stay the proceedings of inferior courts.¹⁴⁰ The writ was more than an affront to an inferior court's jurisdiction; it also had monetary implications for the judges. Judges depended on fees generated by litigation for their incomes.¹⁴¹ Thus, judges were eager to hear numerous cases and especially those involving real property, which promised the most lucrative fees.¹⁴²

The case of *Prohibitions del Roy* concerned the issue of payment of tithes over which the Ecclesiastical courts claimed jurisdiction.¹⁴³ The Archbishop of Canterbury complained to James about Coke's use of the writ of prohibition in tithes cases, and the king took up the matter with his chief justice. The king averred that he "himself may decide [cases] in his royal person, and that the judges are but the delegates of the king, and that the king may take what causes he shall please to determine from the determination of the judges, and may

138. See generally John Underwood Lewis, *Sir Edward Coke (1552-1634): His Theory of "Artificial Reason" as a Context for Modern Basic Legal Theory*, in LAW, LIBERTY, AND PARLIAMENT 107 (Allen D. Boyer ed., 2004).

139. *Prohibitions del Roy* (1607), in THE STUART CONSTITUTION, *supra* note 24, at 80, 80.

140. W.J. Jones, *The Crown and the Courts in England, 1603-1625*, in LAW, LIBERTY, AND PARLIAMENT, *supra* note 138, at 282, 290.

141. J.P. Kenyon, THE STUART CONSTITUTION, *supra* note 24, at 74.

142. *Id.* at 75.

143. *Prohibitions del Roy* (1607), in THE STUART CONSTITUTION, *supra* note 24, at 80, 80.

determine them himself.”¹⁴⁴ While Coke agreed that the king is always present in court, he denied that a king could actually sit in judgment outside the king’s position as chief justice of the House of Lords.¹⁴⁵ Coke further observed that the king lacked the requisite learning in the law to serve as a judge outside the House of Lords.¹⁴⁶ When the king became angry and asked if Coke meant to put him under law, Coke responded by quoting Bracton “*quod rex non debet esse sub homine, sed sub Deo et lege*” (that the king was under no man, but under God and the law).¹⁴⁷ James took umbrage at the remark, reportedly flying into a rage and threatening to strike Coke.¹⁴⁸ Fearing the king’s wrath, Coke fell to his knees and begged James for forgiveness.¹⁴⁹

Dissatisfied with Coke’s independent streak, James transferred Coke from the office of chief justice of Common Pleas to chief justice of King’s Bench.¹⁵⁰ This was a “promotion” in status but adversely affected Coke’s financial position because the litigation in King’s Bench brought in lesser fees.¹⁵¹ At King’s Bench, Coke continued to anger James by refusing to postpone certain hearings so the king could “consult” with his judges.¹⁵² Eventually, the king ended Coke’s judicial career by dismissing him from King’s Bench.¹⁵³ Coke was

144. *Id.*

145. *Id.*

146. *Id.* at 81.

147. *Id.*

148. Allen D. Boyer, *Introduction to LAW, LIBERTY, AND PARLIAMENT*, *supra* note 138, at vii, ix.

149. *Id.*

150. *Id.*

151. Thomas G. Barnes, *Introduction to Coke’s “Commentary on Littleton,” in LAW, LIBERTY, AND PARLIAMENT*, *supra* note 138, at 1, 15.

152. *Id.*

153. *Id.*

then elected to Parliament where he continued to oppose the king. In 1621, Coke was imprisoned in the Tower of London for his zeal in impeaching state officers.

While there was a boldness to Coke's actions as a judge, this boldness should not be overstated. The courts were hardly a check on the king's power, as evidenced by Coke's prostration before the king and his demotion to, and subsequent dismissal from, King's Bench. Judges were agents of the Crown; they were not an independent branch of government meant to limit royal authority.¹⁵⁴ A system with despotic power residing in a king—by its very nature—must reject the power of courts to review or overturn pronouncements of law.

B. *Dr. Bonham's Case*

Much has also been made of Coke's supposed judicial limitations on Parliament's power. In support of this, scholars cite¹⁵⁵ to Coke's opinion in *Dr. Bonham's Case*¹⁵⁶ in which Coke stated that "when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such act to be void."¹⁵⁷ Taken out of context, this statement sounds much akin to the modern concept of judicial review, with which American lawyers are familiar.

Dr. Bonham's Case arose out of a dispute between Dr. Thomas Bonham and the Royal College of Physicians. Pursuant to a charter granted by Henry VII that was later confirmed by an act of

154. Jones, *supra* note 140, at 282 ("Notions that the king was 'opposed' by judges or common lawyers lack credibility.").

155. See, e.g., John V. Orth, *Did Sir Edward Coke Mean What He Said?*, 16 CONST. COMMENT. 33 (1999).

156. *Dr. Bonham's Case*, (1610) 77 Eng. Rep. 638 (K.B.), 8 Co. Rep.107a.

157. 77 Eng. Rep. at 652, 8 Co. Rep. at 118a.

Parliament,¹⁵⁸ the college was authorized to (1) fine persons practicing medicine in London without a license from the college, (2) govern London's medical community, and (3) fine and imprison those guilty of malpractice.¹⁵⁹ The president and censors of the college were permitted to retain half of the money they received for fines imposed.¹⁶⁰ As a royal creation, the college was closely tied to the monarchy and its power often increased and diminished along with the monarch's.¹⁶¹ After a period of dormancy, the college began to exercise its prosecutorial and judicial powers in the late 1500s and early 1600s.¹⁶²

In 1605, Dr. Bonham attempted to join the college, but the membership rejected him.¹⁶³ Despite a warning from the college, Bonham continued to practice medicine in London.¹⁶⁴ For his intransigence, Bonham was fined and imprisoned. The Court of Common Pleas, over which Coke presided, released him within a week on a writ of habeas corpus.¹⁶⁵ Annoyed at Coke's actions, royal officials and several judges met at Lord Chancellor Ellesmere's home and encouraged the college to sue Bonham in the Court of King's Bench.¹⁶⁶ Following this advice, the college sued Dr. Bonham in

158. Harold J. Cook, *Against Common Right and Reason: The College of Physicians v. Dr. Thomas Bonham*, in *LAW, LIBERTY, AND PARLIAMENT*, *supra* note 138, at 127, 130.

159. Allen Dillard Boyer, "Understanding, Authority, and Will": *Sir Edward Coke and the Elizabethan Origins of Judicial Review*, 39 *B.C. L. Rev.* 43, 82 (1997).

160. J.W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 33 (Oxford Univ. Press, 1955).

161. Cook, *supra* note 158, at 131.

162. *Id.*

163. *Id.* at 134–35.

164. *Id.* at 135.

165. *Id.*

166. *Id.* at 136.

King's Bench seeking £60 in fines for illicit practice.¹⁶⁷ Tellingly, the attorney general, rather than the college's attorney, handled the case.¹⁶⁸ Bonham filed his own suit in Common Pleas seeking £100 for false imprisonment.¹⁶⁹

While the case in Common Pleas was pending, King's Bench ruled in favor of the college and imprisoned Dr. Bonham for his inability to pay the fine.¹⁷⁰ One year later, Coke ruled in favor of Dr. Bonham and ordered him released. Coke detested anti-competitive monopolies such as that possessed by the college.¹⁷¹ Construing the college's royal charter narrowly, Coke ruled that the college could fine a person for illicit practice, but it could only imprison for malpractice.¹⁷² Further, to the extent that the college could be a judge and party to a case via its judicial powers, Coke construed the clause as an absurdity. Right before his famous statement about common right and reason, Coke noted that "censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture."¹⁷³ In other words, he was merely exercising a cannon of statutory interpretation whereby a statute contradicting established legal principles is narrowly construed so the result is not absurd (because Parliament, in its wisdom, could not have intended an

167. *Id.* at 137.

168. *Id.*

169. *Id.*

170. *Id.* at 139.

171. Elizabeth Read Foster, *The Procedure of the House of Commons Against Patents and Monopolies, 1621-1624*, in *LAW, LIBERTY, AND PARLIAMENT*, *supra* note 138, at 302, 302-27.

172. Cook, *supra* note 158, at 142.

173. *Dr. Bonham's Case*, 77 Eng. Rep. at 652, 8 Co. Rep. at 118a.

absurd result).¹⁷⁴ This is exactly how Blackstone read the holding in *Dr. Bonham's Case*:

[A]cts of parliament that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. . . . But where some collateral matter arises out of the general words, and happens to be unreasonable, there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it. Thus, if an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet, if a cause should arise in which he himself is a party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel. But, if we could conceive it possible for the parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.¹⁷⁵

Such an interpretation of *Dr. Bonham's Case* also makes sense in light of Coke's championing of the power of Parliament. For example, Coke was a driving force behind the Petition of Right in 1628, which served as an indictment of the Stuart monarchy and its efforts to rule by royal prerogative. The Petition obligated the king not to tax without the consent of Parliament, not to arbitrarily imprison subjects without a showing of just cause, not to billet soldiers on civilians without their consent, and not to use martial law against civilians.¹⁷⁶ In the 1620s, Coke also angered the king when he chaired Parliament's Committee of Grievances that investigated

174. GOUGH, *supra* note 160, at 40.

175. BLACKSTONE, *supra* note 49, at *91.

176. The Petition of Right (1628), in THE STUART CONSTITUTION, *supra* note 24, at 68, 68.

grants of monopoly and patents such as that possessed by the Royal College in *Dr. Bonham's Case*.¹⁷⁷ Moreover, in his *Institutes*, which was a comprehensive study of English law, Coke described the power of Parliament to pass statutes as “so transcendent and absolute” that “it cannot be confined either for causes or persons within any bounds.”¹⁷⁸

Considering Coke's efforts to limit the monarch's power and to enhance Parliament's power, it is unlikely he sought to give judges the power to strike Parliament's statutes via judicial review in *Dr. Bonham's Case*. Because the judges served at the pleasure of the king and were part of the executive branch, judicial review would have weakened Parliament while augmenting the power of the king. This certainly was not Coke's intention. As Harold Cook has observed, with *Dr. Bonham's Case*, Coke “meant to overturn a royal patent when it seemed unjust rather than to argue for common law jurisdiction over Acts of Parliament.”¹⁷⁹

IV

AMERICAN COURTS AND SOVEREIGNTY

The power of colonial and early American courts followed the pattern set in Britain. Theories of parliamentary/legislative sovereignty ensured that courts remained incapable of limiting the power of the sovereign. The rise of popular sovereignty, however, brought a new function for the courts: the power of judicial review. Over time, judicial review metamorphosed into the judicial supremacy enjoyed by the United States Supreme Court and its state

177. Foster, *supra* note 171, at 312.

178. EDWARD COKE, *Of the High and Most Honourable Court of Parliament*, in 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 1133 (Steve Sheppard ed., 2003).

179. Cook, *supra* note 158, at 146.

court counterparts. The question remains whether judicial supremacy was a natural development stemming from judicial review or whether it represents a much older view of sovereignty.

A. The Judiciary in Early America

Americans recognized the danger presented by a judiciary dependent upon the monarch. In England, the 1701 Act of Settlement had granted English judges tenure during “good behavior”—judges were no longer removable at the whim of the king. The Act of Settlement, however, did not extend to the colonies. Thus, the colonists complained in the Declaration of Independence that the king “has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.”¹⁸⁰

Of course, complaints about abuses from the executive branch extended much further than the judiciary. For example, colonial governors attempted to influence the colonial assemblies by appointing legislators to judicial and other offices and by offering legislators government contracts and other opportunities for personal profit.¹⁸¹ If the legislators were not compliant with the governor’s wishes, the governor could always remove the benefit bestowed. For example, during the Stamp Act crisis, the governor of Massachusetts took away commissions from officers in the state militia who also served in the legislature as punishment for their opposition to British policy.¹⁸²

To remedy these abuses, early American constitutions reduced the power of the executive branch and increased that of the

180. THE DECLARATION OF INDEPENDENCE, *supra* note 123, at para. 12.

181. GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 157 (1969).

182. *Id.*

legislature—the one branch of government most closely connected with the people.¹⁸³ The governors' terms were limited, and many state legislatures began to exercise what had been, and are recognized today, as executive functions (e.g., declaring war or pardoning persons convicted of crimes).¹⁸⁴ In ten of the newly independent states, the executive was appointed by the legislature, and in only two states could the executive serve more than one year.¹⁸⁵ In only four states did the executive enjoy the power of appointment—the remaining nine lodged the power in the legislature.¹⁸⁶ Although today we associate some sort of veto power with the executive branch, in the early constitutions only three states granted the executive this power.¹⁸⁷ Hence, via term limits, legislative control, and reduction in executive functions, the people sought to prevent the abuse they had suffered under royal governors.

The grievances against the king and royal governors did not translate immediately into establishment of the state judiciaries as independent, co-equal branches of government. For example, in South Carolina and New Jersey, the judiciary was not considered as a separate and autonomous branch of government.¹⁸⁸ At first blush, such arrangements seem to violate basic separation-of-powers principles. Today, we recognize three general governmental functions: the making of laws, the execution of laws, and the application/interpretation of the laws as they relate to cases and

183. *Id.* at 155.

184. *Id.*

185. JACKSON TURNER MAIN, *THE SOVEREIGN STATES, 1775–1783*, at 188–89 (1973).

186. *Id.* at 192.

187. *Id.* at 193.

188. WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* 267 (Rita & Robert Kimber trans., Rowman & Littlefield Publishers 2001) (1973).

controversies.¹⁸⁹ As stated above, for many years in England the judicial power was considered a branch of the executive department, and this view was accepted by some American thinkers.¹⁹⁰ However, the trend was to view government power as divided into three separate branches so that, in Jefferson's words, "no person should exercise the powers of more than one of them at the same time."¹⁹¹ The Massachusetts Constitution of 1780 stated the predominant view as follows:

In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.¹⁹²

While to modern Americans such sentiments seem to compel the creation of a separate and distinct judicial branch with the power of judicial review, this was not the understanding at the time of independence. In the rush to weaken the executive branch (which to some colonists would include the judicial),¹⁹³ the Americans realized that the legislature could violate its delegated powers. But to protect themselves from unconstitutional enactments, the people did not look to the courts. Instead, the people believed that the best security would be internal safeguards such as bicameralism, delaying veto,

189. M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 23 (Liberty Fund 1998) (1967).

190. *Id.* at 151.

191. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (William Peden ed., 1982). Even Blackstone in the 1760s recognized the three branches as distinct and counseled for a general separation. See BLACKSTONE, *supra* note 49, at *269.

192. Massachusetts Constitution (1780), in 1 THE FOUNDERS' CONSTITUTION 56, *supra* note 128, at 11, 13–14.

193. As late as the 1780s, courts "were generally considered an undifferentiated segment of the executive branch." WILLIAM E. NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 34 (2000).

term limits, frequent elections, and juries.¹⁹⁴ And while not all of these safeguards appeared in each state constitution, some combination of them did.

Moreover, as pointed out by historian Gordon Wood, “the early constitution-makers had little sense that judicial independence meant independence from the people.”¹⁹⁵ Juries were especially sacrosanct bodies and could not be overridden by a judge, even if the judge believed the jury’s decision was against the greater weight of the evidence.¹⁹⁶ Juries in pre-revolutionary America possessed virtually unlimited power to determine both law and fact.¹⁹⁷ Judges were often relegated to deciding pretrial motions and other ministerial matters.¹⁹⁸ In Georgia, for example, the juries of the county superior courts decided issues of law and fact, turning to judges only when they desired advice.¹⁹⁹ Decisions of the superior courts could be appealed to special juries, not to a supreme court.²⁰⁰ By placing such power in juries, the community could control the content of substantive law. A legislature could pass a statute and a judge could instruct on the common law, but juries possessed the power to veto both.

194. ADAMS, *supra* note 188, at 269–70.

195. WOOD, *supra* note 181, at 161; AKHIL REED AMAR, AMERICA’S CONSTITUTION 234 (2005) (“Juries were, in a sense, the people themselves, tried-and-true embodiments of late-eighteenth-century republican ideology.”).

196. FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 85, 289 (1985).

197. WILLIAM E. NELSON, AMERICANIZATION OF COMMON LAW 28–29 (1975); WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789, at 30 (Wythe Holt & L.H. LaRue eds., 1990). Also noteworthy is the jury charge of Chief Justice John Jay in *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794) (instructing the jury that it had dominion over “the law as well as the fact in controversy”).

198. NELSON, *supra* note 197, at 28–29.

199. MAIN, *supra* note 185, at 171–72.

200. *Id.*

Similarly, the people did not trust judges to rule on the constitutionality of legislation.²⁰¹ Juries implicitly possessed this power, and some states also employed councils of revision to determine whether the legislature had deviated from its delegated powers. In Pennsylvania, the council of censors, which served as a council of revision, was chosen every seven years by the people.²⁰² Based on a vote of two-thirds of the censors, a state constitutional convention could be summoned to correct constitutional abuses or mistakes.²⁰³ Popular control of the judiciary was also evident in states requiring judges to stand for reelection,²⁰⁴ and states that permitted judges to serve for good behavior often gave the legislature control over judicial salaries and provided for simple procedures to remove judges.²⁰⁵

B. The Judiciary at the Philadelphia Convention

By 1787, most Americans agreed that the judiciary should be a separate and independent branch of government; therefore, the delegates to the Philadelphia Convention insisted on an independent judiciary. Blackstone had taught that the “distinct and separate existence of the judicial power, in a particular body of men, nominated indeed, but not removable at pleasure, by the crown,

201. MCDONALD, *supra* note 196, at 85; *see also* Matthew P. Harrington, *Judicial Review Before John Marshall*, 72 GEO. WASH. L. REV. 51, 53 (2003) (“Indeed, the judiciary was held in rather low esteem throughout the colonial period, and thus the idea that judges would ultimately determine the constitutionality of legislation would have been unthinkable.”); AMAR, *supra* note 195, at 207 (noting that aside from Connecticut and Rhode Island where the colonists named their own judges, “only three of the other fifty men who signed the Declaration of Independence held notable positions on the colonial bench”).

202. MCDONALD, *supra* note 196, at 153.

203. *Id.*

204. *Id.*

205. *Id.*

consists one main preservative of the public liberty”²⁰⁶ Accordingly, the ninth resolution of the Virginia Plan called for creation of a national judiciary with judges holding office “during good behavior” and prohibiting increases or diminutions in salary “made so as to affect the persons actually in office at the time of such increase or diminution.”²⁰⁷ On the motion of Gouverneur Morris, the delegates struck the language prohibiting the increase in salaries.²⁰⁸ Benjamin Franklin observed that the possibility of inflation or increased judicial duties counseled in favor of the authority to increase the pay of judges.²⁰⁹ The motion passed with only Virginia and North Carolina voting against it.²¹⁰ Thus, the Framers created a judiciary independent of the other two branches.

Judicial review, a subject of much debate today, was barely mentioned at the Convention. Most of the debate regarding the judiciary centered on who would choose the judges: Congress, the Senate, the president, or some combination thereof. The few references we do have to judicial review are in connection with a proposed council of revision. The eighth resolution of the Virginia Plan recommended that the executive and “a convenient number of the National Judiciary, ought to compose a Council of revision with authority to examine every act of the National Legislature before it shall operate.”²¹¹

After the delegates agreed to a single executive, they turned to the proposed council of revision. Elbridge Gerry objected to the

206. BLACKSTONE, *supra* note 49, at *269.

207. JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787, at 32 (W.W. Norton & Co., 1966) (1840).

208. *Id.* at 317–18.

209. *Id.* at 318.

210. *Id.*

211. *Id.* at 32.

inclusion of the judiciary in the council because “they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality.” Gerry continued by observing that “[i]n some States the Judges had actually set aside laws as being against the Constitution. This was done too with general approbation.”²¹²

Gerry feared that the proposed council of revision would establish judges “as the guardians of the Rights of the people”—a dangerous proposition in his view.²¹³ To protect the rights of the people, he preferred to rely “on the Representatives of the people as the guardians of their Rights & interests.”²¹⁴ Gerry’s rejection of a guardianship role for courts coupled with his earlier comments about a check on encroachments “on their own department” indicate a narrow notion of judicial review. For example, laws limiting rights to jury trial would come within the scope of the judicial department and the judges could presumably rule on the laws’ constitutionality. But it is unclear whether this power of review would be permissible for statutes dealing with other matters, such as laws establishing qualifications for electors. While Gerry’s words indicate a narrow understanding of judicial review, there is not enough evidence to draw a conclusion one way or the other.

Luther Martin echoed Gerry’s broad sentiments that judges—separate and distinct from the council—had the power to rule on the constitutionality of laws, but Martin made no distinction about their own department. “In this character” (as judicial officials), Martin noted, “they will have a negative on the laws.”²¹⁵

212. *Id.* at 61.

213. *Id.* at 338.

214. *Id.*

215. *Id.* at 340.

Rufus King agreed with Gerry's misgivings about composition of the council and cited separation-of-powers concerns. "Judges ought to be able to expound the law as it should come to them," King averred, "free from the bias of having participated in its formation."²¹⁶ Madison countered that participation in the council would "enable the Judiciary Department the better to defend itself against Legislative encroachments," while at the same time shoring up the executive.²¹⁷ Judicial self-defense hints at a narrower understanding of judicial review, with judges exercising this power to defend their constitutional functions.

Madison believed that the additional check in the council was needed because of the "tendency in the Legislature to absorb all power into its vortex."²¹⁸ He also argued that a veto in any branch other than the legislative violated pure separation-of-powers principles, and thus the separation of powers was not a valid objection to the judges' participation in the council. George Mason agreed with Madison, noting that "[t]he Executive power ought to be well secured against Legislative usurpations on it."²¹⁹ He also observed that when ruling from the bench judges "could impede in one case only, the operation of law."²²⁰ Sitting on the council, judges could have a say on every unjust law and affect more than just a single case.

Hugh Williamson of North Carolina supported Madison and Mason on judicial inclusion in the council. Articulating a sweeping understanding of judicial review, he noted that "[t]he judiciary ought

216. *Id.* at 61.

217. *Id.* at 79.

218. *Id.* at 338.

219. *Id.* at 81.

220. *Id.* at 341.

to have an opportunity of remonstrating against projected encroachments on the people as well as themselves.”²²¹ He recognized that in interpreting laws the judges “would have an opportunity of defending their constitutional rights.” But, in his opinion, this was not enough. “Laws may be unjust, may be unwise, may be dangerous, may be destructive[],” Williamson observed, “and yet may not be so unconstitutional as to justify the Judges in refusing to give them effect.”²²² Oliver Ellsworth of Connecticut also spoke in favor of the judicial inclusion, noting that it would give more “firmness to the Executive,” and it would give an additional opportunity for the judiciary to defend itself.²²³

Despite forceful arguments for creating a council of revision composed of judges and the executive, the eighth resolution of the Virginia Plan was defeated. The debate is instructive on the delegates’ views on the judiciary. Without question, the fact that delegates did offer opinions on the matter contemplates a form of judicial review.²²⁴ When deciding an actual case or controversy, they expected the judges to strike unconstitutional laws. The purpose of this power was two-fold: (1) for the judges to defend their constitutional sphere, and (2) for the judges to defend the rights of the people. But defense of the people should not be overstated. For instance, although Gerry applauded judicial review, he made clear that representatives were better defenders of the people’s liberties, and his comments contemplated the judiciary defending its constitutional prerogatives rather than striking all sorts of legislative

221. *Id.* at 336.

222. *Id.* at 337.

223. *Id.*

224. MCDONALD, *supra* note 196, at 254.

enactments. Most likely the idea of frequent elections played into Gerry's thinking here.

In setting boundaries of judicial review, Hugh Williamson articulated what we know as the doubtful case rule,²²⁵ which instructs that a court should not negate an act of the legislature unless the act is a blatant violation of the Constitution. If there is any doubt about the legitimacy of a statute, it should be resolved in favor of the people's representatives by permitting the law to stand. Close calls are not the business of the judiciary. Williamson's remarks indicate that the Framers had some understanding of the threat of "judicial activism" and expected the judiciary to exercise power in modest fashion.

Discussion of judicial review is also found in debates regarding state veto. The sixth resolve of the Virginia Plan gave Congress a veto on "all laws passed by the several States contravening in the opinion of the National Legislature the articles of Union."²²⁶ On the motion of Benjamin Franklin, the delegates added to the end of the clause: "or any treaties subsisting under the authority of the Union."²²⁷ Charles Pinckney of South Carolina wanted to broaden the veto power to all state laws that Congress believed to be improper."²²⁸ Madison seconded the motion, noting that such a veto was "absolutely necessary to a perfect system."²²⁹ Madison feared that without a legislative veto "the only remedy will lie in an appeal to coercion."²³⁰ Gerry and others opposed this measure, observing that

225. SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 60 (1990).

226. MADISON, *supra* note 207, at 31.

227. *Id.* at 44.

228. *Id.* at 88.

229. *Id.*

230. *Id.*

a national government with such a power “may enslave the States.”²³¹ Gouverneur Morris feared that the proposed negative “would disgust all the States.”²³² Morris believed that the proposal was also unnecessary because an unconstitutional law would “be set aside in the Judiciary department.”²³³ Pinckney’s motion ultimately failed by the vote of seven states to three.

Upon the rejection of the proposed negative, Luther Martin of Maryland suggested a supremacy clause:

that the Legislative acts of the U.S. made by virtue & in pursuance of the articles of Union, and all Treaties made & ratified under the authority of the U.S. shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or their Citizens and inhabitants—& that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding.²³⁴

This was clearly meant as an alternative to the negative, and there was very little debate on the clause. The committee of detail changed Martin’s phraseology from “the Judiciaries of the several States” to “the judges in the several States.”²³⁵ This excluded juries from the supremacy clause and made clear that the clause applied to national as well as state judges.²³⁶ The committee made other revisions, including changing “supreme law of the respective states” to “supreme law of the land.”²³⁷ Without question, the supremacy clause contemplated federal and state judges reviewing the

231. *Id.* at 89.

232. *Id.* at 305.

233. *Id.*

234. *Id.* at 305–06 (internal quotation marks omitted).

235. *Id.* at 390.

236. MCDONALD, *supra* note 196, at 255.

237. MADISON, *supra* note 207, at 626.

constitutionality of legislative enactments because the judges were bound by “the supreme law of the land.” The Constitution required them to exercise judgment on what constituted supreme law and thus contemplated judicial review.

After the Philadelphia Convention, Alexander Hamilton in *Federalist* No. 78 offered a defense of the power of judicial review under the proposed Constitution. Hamilton began with the proposition that an act contrary to Congress’s enumerated powers is void.²³⁸ Hamilton viewed the people as the ultimate sovereigns who would be expressing their will by adopting the Constitution.²³⁹ The people’s Constitution would thus be superior to statutory law.²⁴⁰ If Congress could pass a law outside of its delegated powers, Hamilton reasoned, this would show “that the deputy is greater than his principal”²⁴¹

Hamilton focused on the fact that the proposed Constitution placed written limits on government power, something unknown under the British constitution.²⁴² These limitations, he argued, could be preserved only in “the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void.”²⁴³ To Hamilton, courts served as an “intermediate body between the people and the legislature . . . to keep the latter within the limits assigned to their authority.”²⁴⁴ This judicial power did not

238. THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 130, at 398.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at 397.

243. *Id.*

244. *Id.* at 398.

place the judiciary above the legislature, Hamilton averred, but rather put the people above both.²⁴⁵

In sum, the approval of judicial review as expressed by many delegates to the Philadelphia Convention is consistent with the evolution of sovereignty in American thinking. Under the British constitution, Parliament could make or unmake any law as it saw fit. Although courts interpreted parliamentary enactments, a court could not declare an act of Parliament void. By 1787, most persons in America agreed that it was the people who possessed ultimate sovereignty. Hence, the delegates understood that the courts would play a role unknown to the British system. No longer did a particular branch of government hold ultimate power. Certainly the legislative branch predominated, but with a written Constitution all three branches were charged with interpreting the document. Hence, a form of judicial review was a natural outcome of the Revolution and was expected by the Philadelphia delegates.

C. Early Exercises of Judicial Review

The American theory of sovereignty, as well as the debates of the delegates to the Philadelphia Convention, support the idea of judicial review. Debates and theory, however, are no substitute for an examination of actual practice in American courts during these formative years. The decision whether to exercise judicial review ultimately rested with the courts. Early state court decisions are especially instructive on the evolution of the idea of judicial review. These decisions demonstrate how judges struggled with the exercise of judicial review in light of their education and experience with parliamentary sovereignty. Accordingly, what follows is an

245. *Id.*

examination of early state case law in which a court, or a judge of the court, either discussed the doctrine of judicial review or actually exercised judicial review.²⁴⁶ These cases provide needed background to the famous *Marbury v. Madison* decision and place the decision and its reasoning in proper historical context.

1. *Commonwealth v. Caton*²⁴⁷

Caton dealt with a pardon granted to three loyalists by the Virginia House of Delegates.²⁴⁸ Under Virginia's Treason Act of 1776, the power of pardon in such cases was transferred from the executive to the legislature.²⁴⁹ In *Caton*, the house granted the pardon for the loyalists and referred the matter to the senate for concurrence, but the senate thought the prisoners unworthy of clemency and voted to deny a pardon.²⁵⁰

The prisoners filed a petition contending that the drafters of the Treason Act erred in giving the power to pardon to "the general assembly" because the text of the Virginia Constitution explicitly vested the power to pardon in the House of Delegates in certain cases.²⁵¹ The petition further contended that in the face of this inconsistency, the state constitution must control the issuance of a

246. Not included in this discussion are opinions that offered little or no analysis for their actions. The reason for the dearth of such decisions likely rests with the fact that very few judges actually wrote opinions in the 1780s and because juries, not judges, typically exercised the power to strike down a law. See RITZ, *supra* note 197, at 30, 36.

247. 8 Va. (4 Call) 5 (1782). For the ease of the reader, pinpoint citations will be to the Westlaw citation: 1782 WL 5 (Va. Nov., 1782). A firsthand account of the case from a participating judge, including portion of the case's text, is reprinted in EDMUND PENDLETON, *Account of "The Case of the Prisoners,"* in 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON 1734-1803, at 416-27 (David Johnson Mays ed., 1967).

248. *Caton*, 1782 WL 5, at *1.

249. *Id.*

250. *Id.*

251. *Id.*

pardon, thus voiding the Treason Act.²⁵² The attorney general countered that the provisions of the state constitution did not run counter to the Treason Act; thus, as a validly enacted statute, the Treason Act controlled, and the putative pardon was invalid because the upper house had failed to concur as required by the Act.²⁵³

Judge George Wythe, who would later be a delegate to the Philadelphia Convention, began the opinion by noting that it was his duty to protect the senate and the community against usurpations from the house.²⁵⁴ In dealing with the other branches, Wythe saw definitive bounds to the scope of permissible legislative conduct, promising to inform the house that “here is the limit of your authority; and, hither, shall you go, but no further.”²⁵⁵ Wythe ultimately concluded that the state constitution permitted the house to issue pardons without consent of the senate only in cases of impeachment prosecuted by the house.²⁵⁶ Because this was not an impeachment case, the house’s pardon of the loyalists was insufficient.²⁵⁷

Writing separately, the President of the Virginia Supreme Court of Appeals, Judge Edmund Pendleton, remarked that Virginia was different from the countries of Europe because it had a written constitution adopted by its citizens as “their social compact.”²⁵⁸ Pendleton believed that the separation of powers found in the Virginia Constitution required each branch of the government to

252. *Id.*

253. *Id.*

254. *See id.* at *2.

255. *Id.*

256. *See id.* at *4.

257. *Id.* at *4–5.

258. *Id.* at *6.

stay within its delegated powers.²⁵⁹ For Pendleton, this constitutionally mandated separation of powers introduced the concept of judicial review, but he was less cavalier than Judge Wythe in touting the power of the judiciary:

But how far this court, in whom the judiciary powers may be in some sort said to be concentrated, shall have power to declare the nullity of a law passed in its forms by the legislative power, without exercising the power of that branch, contrary to the plain terms of that constitution, is indeed a deep, important, and I will add, tremendous question I am happy in being of opinion there is no occasion to consider it upon this occasion; and still more happy in the hope that the wisdom and prudence of the legislature will prevent the disagreeable necessity of ever deciding it, by suggesting the propriety of making the principles of the constitution the great rule to direct the spirit of their laws.²⁶⁰

Pendleton ultimately agreed with Wythe's interpretation of the constitution and Treason Act, also finding the pardon was invalid.²⁶¹ This view carried the day by a vote of six judges to two.²⁶²

Although *Caton* does not provide a great deal of analysis, and any of its statements on the power of courts to strike an act of the legislature are dicta, the Pendleton and Wythe opinions are nonetheless valuable because of their pioneering nature. Wythe believed that the judiciary had the power to instruct the other two branches on the scope of their powers—something unheard of in the British system. He also thought it his duty as a judge to protect both the people and the other branches of the government from “encroachments.”²⁶³ He emphatically wrote that he would not

259. *Id.* at *7.

260. *Id.*

261. *See id.* at *9.

262. PENDLETON, *supra* note 247, at 426.

263. *Caton*, 1782 WL 5, at *2.

hesitate to chastise a branch of the legislature for overreaching its powers.²⁶⁴ While Wythe obviously rejected the British doctrine that only the legislature can interpret the constitution, he stopped short of discussing the scope of judicial review.

In contrast to Wythe's opinion, Pendleton approached judicial review much more cautiously. Pendleton recognized that Wythe was entering uncharted waters by chastising the legislature. He understood that a court arguably assumed a legislative function when it declared a statute unconstitutional, and such an action was arguably in violation of the Virginia Constitution. Although Pendleton did not rule judicial review out of bounds, he preferred that a court refrain from intervening unless and until the legislature gave the court no other option.²⁶⁵

2. *Rutgers v. Waddington* (1784)²⁶⁶

Rutgers involved a challenge to a New York statute known as the Trespass Act, which was passed as a remedy for property owners whose property had been occupied and/or taken after they fled New York during the American Revolution.²⁶⁷ In essence, the statute authorized the owners to file actions seeking compensation from the British authorities and citizens who had occupied their property during and after the Revolutionary War.²⁶⁸ The Trespass Act

264. *Id.*

265. See PENDLETON, *supra* note 247, at 422–23.

266. *Rutgers v. Waddington* is not found in any case reporter. However, it has been reprinted along with case briefs and other materials in 1 THE LAW AND PRACTICE OF ALEXANDER HAMILTON 282–419 (Julius Goebel, Jr. ed., 1964). The entirety of the decision is reprinted at 392–419.

267. See *id.* at 289–90.

268. See *id.* at 287–89.

specifically prohibited the pleading of military orders as a defense to suit, a prohibition contrary to customary international law.²⁶⁹

In 1776, Elizabeth Rutgers fled her brew house located on Maiden Lane when New York City was captured by the British, and her abandoned property was confiscated for the use of the army by the British commissary and was subsequently given to Benjamin Waddington and Evelyn Pierrepont.²⁷⁰ Waddington and Pierrepont improved the brewery and enjoyed rent-free use of the property for three years, until May 1, 1780, when a British commander decreed that they pay £150 per year to the Vestry for the Poor.²⁷¹ Shortly thereafter, on June 20, 1783, the same British commander ordered them to pay rent to Rutgers's son retroactive to May 1, 1783.²⁷² In the winter of 1783 a fire broke out and destroyed the brewery and its improvements.²⁷³ Pursuant to the Trespass Act, Rutgers brought suit for £8,000 back rent, causing "the greatest excitement" in the city.²⁷⁴

Alexander Hamilton represented Waddington and Pierrepont and argued that the Trespass Act was inconsistent with a settled principle of the law of nations, namely that a conqueror has the right to use property under the conqueror's control.²⁷⁵ This and other principles of international law had been incorporated into the New York Constitution; thus, the Trespass Act violated provisions of the Treaty of Paris by waiving private damages "in consequence of or in any wise relating to the war."²⁷⁶ In briefing the issues for the courts,

269. *Id.* at 296.

270. *Id.* at 289.

271. *Id.* at 290.

272. *See id.* at 290-91.

273. *Id.*

274. *Id.* at 291.

275. *Id.* at 298-99.

276. *Id.* at 299.

Hamilton cited to *Dr. Bonham's Case*, arguing that “[a] statute against Law and reason[,] especially if a private statute[,] is void.”²⁷⁷ In later briefs, Hamilton went further, arguing that the result would be the same even if “the legislature intended the results of the Act.”²⁷⁸ Thus, it appears that Hamilton rejected Blackstone’s explanation of *Dr. Bonham's Case*, considering it a mere exercise in statutory interpretation (narrowly construing a statute that contradicts established legal principles to avoid an absurd result).²⁷⁹

After hearing the case, Judge James Duane issued a carefully crafted opinion which held that the Trespass Act need not and should not be interpreted to interfere with the law of nations.²⁸⁰ In essence, he split the baby by holding that the law of nations served as a defense when it pertained to orders of the British commander, but not when it pertained to orders of officials of the British commissary.²⁸¹ Rutgers could recover damages for the years 1777 to 1780, when the property was held pursuant to the commissary’s orders, but not 1780 forward, when the property was held pursuant to the commander’s orders. In short, the judge rejected the defendant’s treaty argument *in toto*.²⁸²

Most important for our purposes, Judge Duane declined to adopt Hamilton’s broad arguments about the power of courts to strike a legislative enactment as against law and reason. Relying on Blackstone, Judge Duane did not deign to directly challenge legislative supremacy:

277. *Id.* at 357.

278. *Id.* at 382.

279. See discussion *supra* Part III.B.

280. 1 THE LAW AND PRACTICE OF ALEXANDER HAMILTON, *supra* note 266, at 405, 414.

281. See *id.* at 412–13.

282. See *id.*

The supremacy of the Legislative need not be called into question; if they think fit *positively* to enact a law, there is no power which can controul [sic] them. When the main object of such a law is clearly expressed, and the intention manifest, the judges are not at liberty, altho' [sic] it appears *unreasonable*, to reject it: for this were to set the *judicial* above the legislative, which would be subversive of all government.²⁸³

Like Blackstone, Judge Duane observed that judges could resort to equity in expounding a statute when it was clear that the legislature had not foreseen the absurd consequences.²⁸⁴ Such equitable interpretation merely effectuated the intent of the legislature and therefore did not result in judicial ascendancy.²⁸⁵ Armed with the canons of statutory construction, Judge Duane ruled that the legislature could not have intended to repeal the law of nations with the Trespass Act; hence, orders of the British commander did, in fact, provide a defense.²⁸⁶

Judge Duane exercised some legal gymnastics to reach this result, possibly in anticipation of the pending political maelstrom. On the heels of his widely reported decision, an open letter appeared in the *New York Packet and American Advertiser*.²⁸⁷ Melancton Smith and other influential New Yorkers noted that a power in the courts to control the legislature would be “absurd in itself,” for the job of the courts was “to declare the laws, not to alter them.”²⁸⁸ When courts strike down an act of the legislature, the letter continued, they violate principles of separation of powers and endanger the liberties of the

283. *Id.* at 415.

284. *Id.*

285. *Id.*

286. *See id.* at 412–14, 416.

287. *Id.* at 313–14.

288. *Id.* at 314.

people.²⁸⁹ In addition to incurring the ire of Smith and his followers, Duane's efforts at statutory construction also incurred a stern rebuke from the legislature and a threat of impeachment.²⁹⁰

With the benefit of hindsight, the threats and stinging criticism of Duane's opinion seem misplaced: he did not strike down a statute, nor did he claim such a power. His opinion was true to Blackstone's writings and in line with American respect for the legislative branch.²⁹¹ While Judge Duane did not accept Hamilton's theory of judicial review, his method of statutory construction defeated the legislative purpose of full compensation for patriots, and thus started a political firestorm. The public response to his decision revealed much distrust of judicial power and the preference for legislative power. New Yorkers were not yet ready to expand the power of their courts.

3. *Trevett v. Weeden* (1786)²⁹²

Trevett arose out of legislation passed by the Rhode Island General Assembly authorizing the issuance of paper money.²⁹³ To compel acceptance of paper money, the General Assembly passed a Forcing Act that levied fines on persons refusing to accept paper and on persons contributing to the depreciation of the paper currency's value.²⁹⁴ Alleged violators could be tried without a jury in special court and had no right to appeal.²⁹⁵ Weeden violated the paper

289. *Id.*

290. KRAMER, *supra* note 81, at 66–67.

291. See, e.g., 1 THE LAW AND PRACTICE OF ALEXANDER HAMILTON, *supra* note 266, at 414.

292. *Trevett v. Weeden* is an unpublished case—accounts appeared only in newspapers and pamphlets of the time. The best written account of the case is in PATRICK T. CONLEY, THE CONSTITUTIONAL SIGNIFICANCE OF *TREVETT V. WEEDEN* (1786) (1976).

293. *Id.* at 2.

294. *Id.* at 3.

295. *Id.*

money statute when he refused to accept paper currency from John Trevett.²⁹⁶ Rather than apply to a special court, Trevett complained to the superior court of judicature (the highest court in the state), which heard arguments on September 22, 1786.²⁹⁷

Weeden challenged the statutory scheme on three grounds: (1) early expiration of the statute because of a drafting error, (2) denial of appellate rights, and (3) denial of the right to a jury trial.²⁹⁸ Weeden specifically argued that the court could strike the law as unconstitutional, stating that “[t]he Legislature derives all its authority from the constitution—has no power of making laws but in subordination to it—cannot infringe or violate it.”²⁹⁹ Despite this strong language, the Court ultimately dismissed the complaint against Weeden because the action was not brought in a special court as commanded by statute and consequently did “not come under cognizance of the Justices.”³⁰⁰

The General Assembly jumped on the content of the court’s decision and demanded that the judges appear to explain their reasons for declaring “an act of the supreme legislature of this state to be unconstitutional, and so absolutely void.”³⁰¹ Judges David Howell, Joseph Hazard, and Thomas Tillinghast appeared before the Assembly, and each defended his decision.³⁰² Judge Howell, in his bold speech, stated that the court did not rule the statute unconstitutional, but he added that the legislature had no business

296. *Id.*

297. *Id.*

298. *Id.* at 3, 6.

299. *Id.* at 7.

300. *Id.*

301. *Id.* at 8.

302. *Id.*

interfering with the propriety of judicial decisions.³⁰³ If such second guessing was tolerated, “the legislature would become the supreme judiciary—a perversion of power totally subversive of civil liberty.”³⁰⁴ The legislature was not fully comforted by the explanation and considered dismissing the judges from office, but it ultimately relented.³⁰⁵ However, the legislature did not forget Judge Howell’s controversial speech favoring judicial review. At the expiration of the judges’ terms of office the next year, the legislature declined to reelect four of the five involved in the *Trevett* case.³⁰⁶

Although the Rhode Island judges did not actually exercise the power of judicial review in the case, counsel for Weeden urged the court to exercise such a power.³⁰⁷ Had the case been brought in the proper court, though, the outcome might have been different given Judge Howell’s belief that the statute in question was unconstitutional. The conflict between the branches was impossible to ignore; nonetheless, the scales still tilted against the judiciary. The judges stared down the attempt at legislative intimidation, but the legislature responded with a show of force. The Legislature flexed its power by threatening impeachment and dismissing four of the five judges even though the judges had stopped short of asserting judicial review. Rhode Island, like New York in the *Rutgers v. Waddington* case, was not prepared to accept expansion of the judiciary’s power.

303. *Id.*

304. *Id.*

305. *Id.* at 9.

306. *Id.*

307. *See id.* at 7.

4. *Bayard v. Singleton*³⁰⁸

Bayard also pertained to property that had been confiscated in the Revolutionary War.³⁰⁹ By statute, the North Carolina legislature directed that title claims to confiscated property were to be dismissed if the current owner produced an affidavit indicating that the property had been purchased from the commissioner of forfeited estates.³¹⁰ When the plaintiff brought an action to recover a house, wharf, and other property, the defendant produced a proper affidavit and asked that the suit be dismissed.³¹¹ The plaintiff countered that summary dismissal per the statute deprived him of his constitutional right to a jury trial and it was therefore void.³¹²

The judges expressed reluctance to dispute the wisdom of the legislature, but the solemnity of their oaths compelled them to examine the validity of the statute.³¹³ The court began by noting that every citizen had a right to a trial by jury in cases of disputed title to property.³¹⁴ This constitutional requirement put a limit on the extensive powers of the legislative branch. If a legislature had the authority to take away the fundamental right of a jury trial, they would also have the power to transform the character of state government from republican to monarchical.³¹⁵ The judiciary, being “bound to take notice of [the constitution] as much as of any other

308. 1 N.C. (Mart) 5 (1787). For the ease of the reader, pinpoint citations will be to the Westlaw citation: 1787 WL 6 (N.C. Super. Ct. Law & Eq. Nov., 1787).

309. *Id.* at *1.

310. *Id.*

311. *Id.* at *2.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

law,” could not permit such a result.³¹⁶ “Accordingly, the court ordered that the case be tried by a jury . . .” because the act of the legislature was without effect.³¹⁷

Undoubtedly, the *Bayard* court exercised judicial review over an act of the legislature, although it did not call it such. While it cannot be characterized as an act of statutory construction in the tradition of *Dr. Bonham’s Case*, the *Bayard* judges recognized that the legislature was not the ultimate sovereign of the state.³¹⁸ The court specifically noted that it could “take notice” of the constitution, parting ways with the British notion that the constitution was exclusively in the orbit of the legislative branch.³¹⁹ Because a jury trial was fundamental to a system of ordered liberty, the court was required to strike down the offending statute.

5. *Ham v. McClaws*³²⁰

In late 1788, a family of British settlers left the Bay of Honduras for South Carolina.³²¹ Prior to leaving Honduras, the settlers researched South Carolina law to determine whether they could safely bring their seven slaves into the state.³²² The research revealed no prohibition, but during the voyage the state legislature passed a law prohibiting foreigners, on penalty of forfeiture, from importing slaves into South Carolina.³²³ The statute also provided that the

316. *Id.* at *3.

317. *Id.*

318. *See id.*

319. *See id.*

320. 1 S.C.L. (1 Bay) 93 (1789). For the ease of the reader, pinpoint citations will be to the Westlaw citation: 1789 WL 140 (S.C. Ct. Com. Pl. & Gen. Sess. Oct. 30, 1789).

321. *Id.* at *1.

322. *Id.*

323. *Id.*

forfeited slaves would be given to the person reporting the slaves' illegal entry into the state.³²⁴

Upon the settlers' entry into South Carolina, a revenue officer brought suit under the statute to claim the forfeited slaves.³²⁵ The settlers challenged the statute's constitutionality, citing *Dr. Bonham's Case* and arguing that this particular inequitable result could never have been contemplated by the legislature.³²⁶ They had not intentionally violated the statute and could not have learned of its passage while in transit.³²⁷ Hence, the real "intention of the legislature[] must have been to exempt those negroes from forfeiture, who were upon the way, or on the point of arriving in the State, under the sanction of former law, when the latter act passed."³²⁸

In a one-paragraph opinion, the court agreed with the settlers.³²⁹ "It is clear," held the court, "that statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void, as *far as they are calculated to operate against those principles.*"³³⁰ Because the wise and just General Assembly "never had it in their contemplation to make a forfeiture of the negroes in question," the court construed the statute to deny a forfeiture.³³¹

Broadly reading the opinion, one could argue that the court struck down the statute as applied to the settlers, and in doing so

324. *Id.*

325. *Id.*

326. *Id.* at *2.

327. *Id.*

328. *Id.*

329. *Id.* at *3.

330. *Id.*

331. *Id.*

exercised the power of judicial review. More likely, the court simply exercised the rules of statutory construction as Coke did in *Dr. Bonham's Case* and as Judge Duane did with the Trespass Act in *Rutgers*. The court simply did not believe the legislature could have intended the forfeiture under the circumstances presented. Because the *Ham* opinion is so brief, further speculation on the intent of the court is difficult.

6. *Bowman v. Middleton*³³²

Bowman concerned a 1712 act of the South Carolina General Assembly transferring a freehold from one holder and his heirs to another. . . .³³³ The court's reported opinion is very short:

The Court, (present, GRIMKE and BAY, justices) who after a full consideration on the subject were clearly of opinion, that the plaintiffs could claim no title under the act in question, as it was against common right, as well as against Magna Charta, to take away the freehold of one man, and vest it in another; and that too, to the prejudice of third persons, without any compensation, or even a trial by jury of the country to determine the right in question. That the act was therefore, *ipso facto*, void. That no length of time could give it validity, being originally founded on erroneous principles. That the parties however might, if they chose, rely upon a possessory right, if they could establish it.³³⁴

Like the *Ham* opinion before it, the *Bowman* opinion lacks analysis. However, the language used regarding common right and reason is likely taken from *Dr. Bonham's Case*. The South Carolina court apparently interpreted that case as providing supporting authority for its holding. But because there was no citation to *Dr. Bonham's Case*, nor a discussion of it, we can only speculate about

332. 1 S.C.L. (1 Bay) 252 (1792). For the ease of the reader, pinpoint citations will be to the Westlaw citation: 1792 WL 207 (S.C. Ct. Com. Pl. & Gen. Sess. May, 1792).

333. *Id.* at *1.

334. *Id.* at *2.

Justices Grimke's and Bay's understanding of this English precedent. We do not know whether they viewed *Dr. Bonham's Case* as resting on a rule of statutory construction or whether they viewed it as establishing judicial authority over acts of an elected assembly. Because of the brevity of the opinion, *Bowman* raises more questions than answers about early American attitude toward judicial review.

7. *Kemper v. Hawkins*³³⁵

Kemper involved the constitutionality of a Virginia statute giving state general court judges the equitable jurisdiction to grant injunctions and to hear suits commenced by injunction.³³⁶ Prior to the statute in question, such jurisdiction was reserved for the state chancery court.³³⁷ The statute was challenged on grounds that it circumvented constitutional provisions requiring that judges be appointed by the joint ballot of both houses of legislature, followed by an executive commission for good behavior.³³⁸ All five judges who heard the case issued separate opinions on the propriety of judicial review and the validity of the statute.

Judge Nelson began his opinion by observing that the legislative houses "derive their *existence* from the Constitution."³³⁹ It thus followed that the legislature cannot alter the document—such power, in Judge Nelson's view, resided in the people of Virginia.³⁴⁰ He candidly admitted that some Virginians believed that the judiciary assumed the power of the legislature or placed itself above the

335. 3 Va. (1 Va. Cas.) 20 (Va. 1793). For the ease of the reader, pinpoint citations will be to the Westlaw citation: 1793 WL 248 (Va. Gen. Ct. Nov. 16, 1793).

336. *Id.* at *2.

337. *Id.*

338. *Id.* at *8.

339. *Id.* at *4.

340. *Id.*

legislature when exercising judicial review.³⁴¹ In response to this objection, Judge Nelson averred that he did not consider the judiciary to be “champions of the people, or the Constitution, bound to sound the alarm” when the legislature exceeded its powers.³⁴² But, if the courts were presented with actual cases or controversies between litigants, the courts were bound to rule.³⁴³ This review of legislation, Judge Nelson asserted, was no “novelty.”³⁴⁴ He observed that often “one statute is virtually repealed by another, and the judiciary must decide which is the law, or whether both can exist together.”³⁴⁵ After this discussion of judicial review, Judge Nelson held that that statute was unconstitutional because it attempted to overturn constitutional requirements for the appointment of judges.³⁴⁶

Next, Judge Spencer Roane considered the statute. Judge Roane began by observing that the case had originated in his court and that he had referred it to the general court because of the issue’s import.³⁴⁷ He further commented that in the lower court he had “doubted how far the judiciary were authorized to refuse to execute a law, on the ground of its being against the spirit of the Constitution.”³⁴⁸ On further reflection, Judge Roane noted, he had changed his opinion: “I now think that the judiciary may and ought not only to refuse to execute a law expressly repugnant to the Constitution; but also one which is, by a plain and natural construction, in opposition to the

341. *Id.*

342. *Id.*

343. *See id.*

344. *Id.* at *5.

345. *Id.*

346. *Id.* at *6.

347. *Id.*

348. *Id.*

fundamental principles thereof.”³⁴⁹ In other words, the judiciary should strike laws violating express provisions and those violating the spirit of the document. In support of his new opinion, Judge Roane declared that the people were “the only sovereign” power and that the legislature was subordinate to them and the constitution.³⁵⁰ It naturally followed that the legislature could not alter by mere statute the constitution’s procedure for appointing judges.³⁵¹ To hold otherwise would permit the legislature to infringe upon the constitution “and the liberties of the people” would be “wholly at the mercy of the legislature.”³⁵² Having established the principles of judicial review, Judge Roane agreed that the statute was repugnant to the constitution.

Judge Henry began his opinion by observing that the issue before the court was both delicate and important.³⁵³ He then recounted some history of the Revolution and turned to founding principles.³⁵⁴ Prior to the Revolution, Judge Henry observed, Americans were “taught that Parliament was *omnipotent*, and their powers beyond control.”³⁵⁵ With the Virginia Constitution, this legislative power was limited because the constitution was “founded on the authority of the people.”³⁵⁶ Turning to the statute, Judge Henry could not reconcile it with the constitutional provisions for judicial appointments.³⁵⁷ To uphold the statute, he observed, “would be a

349. *Id.*

350. *Id.*

351. *See id.*

352. *Id.* at *7.

353. *Id.* at *10.

354. *See id.*

355. *Id.* at *11.

356. *Id.* at *12.

357. *Id.* at *13.

solecism in government—establishing the will of the legislature, servants of the people, to control the will of their masters.”³⁵⁸ Such an outcome could not be permitted.³⁵⁹

Judge Tyler was the fourth judge to deliver an opinion in *Kemper*.³⁶⁰ Like his colleagues, he led off with fundamentals.³⁶¹ He observed that the Constitution was a “great contract of the people” and was thus “paramount law.”³⁶² He doubted that any branch of government could lawfully ignore the enumerated rights of the people or the plan of government outlined in the constitution.³⁶³ If one branch did choose to violate the Constitution, it should not expect assistance from another branch “to aid in the violation of this sacred letter.”³⁶⁴ He reminded his colleagues that Parliament’s claim of supreme power was “an abominable insult upon the honour and good sense of our country.”³⁶⁵ In post-revolutionary Virginia, only “the God of Heaven and our constitution” could claim true omnipotence.³⁶⁶ Based upon these principles, Judge Tyler declared it his duty to rule upon the constitutionality of statutes that were presented in cases and controversies.³⁶⁷ Recognizing the nature of this power, he noted that the alleged “violation must be plain and clear, or there might be a danger of the judiciary preventing the operation of laws which might be productive of much public

358. *Id.*

359. *Id.* at *14.

360. *Id.*

361. *Id.* at *14–15.

362. *Id.* at *15.

363. *Id.*

364. *Id.*

365. *Id.* at *16.

366. *Id.*

367. *Id.*

good.”³⁶⁸ Upon consideration of the extension of equity jurisdiction, Judge Tyler concurred that the statute circumvented constitutional provisions requiring judges be appointed by the joint ballot of both houses of legislature followed by an executive commission for good behavior.³⁶⁹

The last opinion was delivered by Judge St. George Tucker.³⁷⁰ In determining the source of ultimate power, Tucker looked to the people and described them as possessing “*sovereign, unlimited, and unlimitable* authority.”³⁷¹ Governments possessed only that authority delegated by the people, Tucker noted, which was in sharp contrast to the British theory of legislative omnipotence.³⁷² With the source of power established, Tucker questioned whether the Legislature could change the constitution without destroying the very foundation of their authority.³⁷³ As the body charged with expounding laws, Tucker continued, the judiciary is obligated “to take notice of the constitution, *as the first law of the land*; and that whatsoever is contradictory thereto, is *not* the law of the land.”³⁷⁴ Endorsing judicial power and quoting from *The Federalist Papers*, Tucker described the courts as “an intermediate body between the people and the legislature” designed to “keep the latter within the limits assigned to their authority.”³⁷⁵ In the performance of their duties, courts ascertain the meaning of the constitution “as well as the meaning of any particular act proceeding from the legislative

368. *Id.*

369. *Id.* at *17.

370. *Id.* at *19.

371. *Id.* at *21.

372. *Id.* at *22.

373. *Id.* at *21.

374. *Id.* at *23.

375. *Id.* at *24.

body.”³⁷⁶ But would not such a power place the judiciary above the legislative? According to Tucker, it would not. Such a power only affirms the superiority of the people to both branches. Consequently, the judges must follow the instructions of the people as found in fundamental law.³⁷⁷ In following the people’s constitution, Tucker agreed with his four colleagues and struck down the statute expanding equity jurisdiction as a violation of Virginia’s fundamental law.³⁷⁸

The five opinions present an extraordinary discussion of judicial review and should be read by law students prior to a study of *Marbury*. Writing just ten years after the Treaty of Paris ended the Revolutionary War, the *Kemper* judges all mentioned the doctrine of parliamentary sovereignty and how it had been replaced by popular sovereignty in Virginia. With the demise of legislative omnipotence, courts were required to “take notice” of the constitution when deciding cases and controversies. Constitutional law was no longer reserved for the legislature.

Properly, there is also a respect for the raw power of judicial review. For example, Judge Tyler articulated the doubtful case rule when he declared that the “violation must be plain and clear, or there might be a danger of the judiciary preventing the operation of laws which might be productive of much public good.”³⁷⁹ This is a recognition that the judiciary is also capable of usurpation and that judges must be extremely careful when challenging an act of the people’s representatives.

376. *Id.*

377. *Id.*

378. *Id.* at *26.

379. *Id.* at *16.

Although all the *Kemper* judges endorsed judicial review, we find disagreement on the charge of the courts. Judge Nelson denied that courts were the people's champion and duty bound to sound the alarm when the legislature exceeded its powers.³⁸⁰ Judge Tucker, on the other hand, believed the courts were duty bound to interpose between the people and the legislature to protect the liberties of the former from the latter.³⁸¹ These disagreements aside, both judges concurred that courts should strike a legislative act when it is contrary to the constitution.³⁸²

8. *State v. _____*³⁸³

In 1794, the North Carolina Superior Court examined a state statute permitting the attorney general to obtain a default judgment against receivers of public money.³⁸⁴ Judge Williams *sua sponte* questioned the statute's validity because provisions in the state bill of rights provided that "[n]o freeman ought to be taken, imprisoned or disseised of his freehold, liberties or property . . . but by the law of the land."³⁸⁵ The law of the land, according to Judge Williams, required that the receivers be provided an opportunity to be heard before a jury of their peers.³⁸⁶ The attorney general objected, asserting that the state bill of rights did not restrict the legislature as it was directed only to foreign powers that might claim a right to interfere with North Carolina's internal government.³⁸⁷

380. *Id.* at *4.

381. *Id.* at *22.

382. *Id.* at *5, 23.

383. 2 N.C. (1 Hayw.) 28 (N.C. 1794). For the ease of the reader, pinpoint citations will be to the Westlaw citation: 1794 WL 87 (N.C. Super. Ct. Law & Eq. Mar., 1794).

384. *Id.* at *1.

385. *Id.*

386. *Id.*

387. *Id.* at *2.

Holding that the bill of rights restricted the legislature, Judge Williams rejected the attorney general's argument.³⁸⁸ In defending his authority to void an act of the legislature, Judge Williams noted that the people's representatives were "deputed only to make laws in conformity to the constitution, and within the limits it prescribes."³⁸⁹ When the legislature exceeds its authority, its "acts are no more binding than the acts of any other assembled body."³⁹⁰ If he did not undertake his "duty to resist an unconstitutional act," the people's liberties would be jeopardized and the constitution overthrown.³⁹¹ Refusing to accept defeat, the attorney general asked a two-judge panel to reconsider Judge Williams's ruling.³⁹² Without revealing their reasoning, the panel held that the attorney general could proceed with default judgments.³⁹³

Although the court did not nullify an act of the legislature, the opinion of Judge Williams indicates that such judicial action was not beyond the pale in North Carolina. We find no history lesson on the power of Parliament in his opinion, but we do see an emphasis on the limitation of the legislature's power via a written constitution. Also implicit in Judge Williams's opinion is the notion that the judiciary is the guardian of the people's rights as declared in the people's fundamental law. This combination of factors led him to sanction the power of judicial review, but his decision was effectively overruled by the panel.

388. *Id.* at *1.

389. *Id.*

390. *Id.*

391. *Id.*

392. *Id.* at *3.

393. *Id.*

9. *Lindsay v. Commissioners*³⁹⁴

Lindsay dealt with the power of eminent domain. The South Carolina General Assembly enacted a statute permitting the Charleston City Council to take property to build a new street.³⁹⁵ The statute did not provide that the owners be paid just compensation.³⁹⁶ The owners argued that this lack of compensation violated state constitutional provisions providing that a person could not be “disseised of his freehold . . . but by the judgment of his peers, or by the law of the land.”³⁹⁷ They asked that the judges, “who were the constitutional guardians of the rights of the people, to declare this act as far as it deprives the owners of their freehold estates without compensation, null and void.”³⁹⁸

The court split evenly over this issue.³⁹⁹ Justices Grimke and Bay ruled that the power of eminent domain was vested in the legislature and that there was no requirement that an owner receive compensation for the taking of his property.⁴⁰⁰ Justices Burke and Waties disagreed, ruling that the owners were entitled to just compensation to be ascertained by a jury of their peers.⁴⁰¹ Waties’s opinion is the most notable of the three for his discussion of judicial review.

Waties stated that “it was painful to him to be obliged to question the exercise of any legislative power, but he was sworn to support the

394. 2 S.C.L. (2 Bay) 38 (S.C. 1796). For the ease of the reader, pinpoint citations will be to the Westlaw citation: 1796 WL 546 (S.C. Const. Ct. App. Oct., 1796).

395. *Id.* at *1.

396. *See id.*

397. *Id.* at *2 (emphasis omitted).

398. *Id.*

399. *Id.* at *13.

400. *See id.* at *11.

401. *See id.* at *12.

constitution”⁴⁰² Permitting the legislature to violate the constitution, Justice Waties noted, subjected the people to mere “legislative will.”⁴⁰³ In protection of the people, the court must do its “duty, in giving to the constitution an overruling operation over every act of the legislature which is inconsistent with it”⁴⁰⁴ This judicial role provides an “independent security” for the rights of the citizenry.⁴⁰⁵

Anticipating objections to his opinion, Justice Waties denied that his opinion advocated “judicial supremacy.”⁴⁰⁶ If an act is held void, Justice Waties wrote, “it is not because the judges have any control over the legislative power, but because the act is forbidden by the constitution,” which is the ultimate expression of the people’s will.⁴⁰⁷

Although the split in the court prevented an exercise of judicial review, Justice Waties’s opinion shares much in common with the *Kemper* opinions. Justice Waties denied legislative supremacy and instead appealed to the people’s ultimate sovereignty.⁴⁰⁸ The courts, to Justice Waties, were protectors of the people’s liberties.⁴⁰⁹ The constitution was a limitation on the legislature’s power, and he had no choice but to refer to the constitution when judging the validity of a statute. Because the statute was incongruent with provisions of the constitution, Justice Waties would have struck it down.⁴¹⁰

402. *Id.* at *13.

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

408. *See id.*

409. *See id.*

410. *Id.*

10. *Respublica v. Duquet*⁴¹¹

In 1795, the Pennsylvania legislature delegated to the City of Philadelphia the power to prohibit construction of wooden buildings in certain parts of the city.⁴¹² In 1796, the City passed an ordinance pursuant to the state statute.⁴¹³ Less than a year after the passage of the ordinance, Duquet built a wooden structure in the forbidden area and was indicted in the mayor's court.⁴¹⁴

After the case was removed to the state supreme court, Duquet challenged the statute as unconstitutional.⁴¹⁵ At base, he argued that the constitution prohibited a delegation of power to the extent that a city could institute prosecutions in the mayor's court.⁴¹⁶ Only the State Attorney General as a representative of the sovereign people, Duquet argued, could prosecute "general public offenders."⁴¹⁷

In a short opinion written by Chief Justice Shippen, the Pennsylvania Supreme Court found no impropriety with the city prosecuting offenders in the mayor's court.⁴¹⁸ Regarding judicial review, the court noted that "a breach of the constitution by the legislature, and the clashing of the law with the constitution, must be evident indeed, before we should think ourselves at liberty to declare a law void."⁴¹⁹ Although the statute in question was constitutional,

411. 2 Yeates 493 (Pa. 1799). For the ease of the reader, pinpoint citations will be to the Westlaw citation: 1799 WL 240 (Pa. 1799).

412. *Id.* at *1.

413. *Id.*

414. *Id.*

415. *Id.*

416. *See id.* at *2.

417. *Id.*

418. *Id.* at *7.

419. *Id.*

the court made clear that in the appropriate case it would not “shrink from the task of saying such law is void.”⁴²⁰

The *Duquet* court embraced judicial review, although it did not exercise this power. The court also articulated the doubtful case rule, making clear that it would not strike an act of the legislature except for the most grievous violations of the constitution. In these regards, Pennsylvania seemed in line with its sister states on the subject of judicial review.

11. *Whittington v. Polk*⁴²¹

Whittington dealt with a statute reorganizing the Maryland judiciary.⁴²² The statute, among other things, removed William Whittington as the chief justice of the county courts and replaced him with William Polk.⁴²³ Whittington challenged the statute as unconstitutional because he held his office during good behavior.⁴²⁴

As typical of other courts reviewing legislative acts, the *Whittington* court began its opinion by noting that the people were the source of all power and that the people had delegated to government only certain powers.⁴²⁵ It followed that the legislature could not be the judge of its own powers because that would “establish a despotism.”⁴²⁶ The court observed that the people could not police the boundaries of power because they could only be heard

420. *Id.*

421. 1 H. & J. 236 (Md. 1802). For the ease of the reader, pinpoint citations will be to the Westlaw citation: 1802 WL 349 (Md. Gen. Ct. Apr., 1802).

422. *Id.* at *1.

423. *See id.*

424. *Id.*

425. *Id.* at *4.

426. *Id.*

during elections.⁴²⁷ But under the constitution, the judiciary was the “barrier” established to “resist the oppression” of constitutional infringements.⁴²⁸ It thus fell to the courts “to determine whether an act of the legislature . . . is made pursuant to” the constitution.⁴²⁹ The court admitted that the judiciary might at times fail to properly interpret the constitution, but this was no reason to argue against the exercise of judicial review.⁴³⁰ According to the court, “the judges are liable to be removed from office, on conviction of misbehaviour, in a court of law.”⁴³¹

Dealing with the statute in question, the court held that justices of the county courts served at the pleasure of the governor and could be removed at any time.⁴³² The constitution’s good-behavior provision applied only to the court of appeals, general court, and admiralty court.⁴³³ Consequently, Whittington had not been unconstitutionally deprived of his office.⁴³⁴

Noteworthy in the *Whittington* case is both the unequivocal assertion that the courts are the guardians of the people’s liberties, and the assumption that the ballot box is an insufficient weapon to prevent legislative excesses.⁴³⁵ The court candidly admitted that the judicial branch, like the other branches, could usurp constitutional power.⁴³⁶ To remedy this, the court saw impeachment as a real threat

427. *Id.*

428. *Id.* at *5.

429. *Id.*

430. *Id.* at *6.

431. *Id.*

432. *Id.* at *8.

433. *Id.*

434. *Id.*

435. *Id.* at *4–5.

436. *Id.* at *6.

if the judges abused their power of constitutional interpretation.⁴³⁷ Through impeachment, the people's representatives could remove an offending judge and restore legislative power.⁴³⁸

12. *State v. Parkhurst*⁴³⁹

Parkhurst concerned the constitutionality of a statute providing that when any citizen holding a commission under state law accepted a position as senator or representative in the United States Congress, the commission was deemed vacated.⁴⁴⁰ Aaron Ogden was the clerk of the Essex County Court of Common Pleas and was later elected to the United States Senate.⁴⁴¹ The clerkship was deemed vacated and Jabez Parkhurst accepted the position.⁴⁴² Ogden challenged the constitutionality of the statute, arguing that under the state constitution clerks served a five-year term unless impeached.⁴⁴³ Observing that the term had not expired and he had not been impeached, Ogden argued that a mere legislative enactment could not trump the terms of the constitution.⁴⁴⁴

The State Supreme Court ruled in favor of Ogden, but its written opinion has not survived.⁴⁴⁵ Chief Justice Kirkpatrick issued a separate opinion, which has survived, ruling against Ogden on the grounds that the office of clerk and senator are incompatible under the common law; therefore, acceptance of the second position acts as

437. *Id.*

438. *Id.*

439. 9 N.J.L. 427 (N.J. 1802). For the ease of the reader, the pinpoint citation will be to the Westlaw citation: 1802 WL 1 (N.J. 1802).

440. *Id.* at *4.

441. *Id.* at *1.

442. *Id.* at *2.

443. *Id.* at *12.

444. *See id.*

445. *See id.* at *3.

a surrender of the first.⁴⁴⁶ In dicta, Chief Justice Kirkpatrick addressed the argument of Parkhurst that “the constitution itself is in the hands of the legislature, and may be altered at pleasure” inasmuch as “the legislature are the ultimate judges of the constitution.”⁴⁴⁷

Chief Justice Kirkpatrick began by defining a constitution as “an agreement of the people, in their individual capacities, reduced to writing, establishing and fixing certain principles for the government of themselves.”⁴⁴⁸ Describing the people as “supreme in power,” Chief Justice Kirkpatrick observed that they had delegated to the state legislature only certain defined powers.⁴⁴⁹ To hold that the legislature could alter the constitution would be, in Chief Justice Kirkpatrick’s words, “a perfect absurdity” by “making the creature greater than the creator.”⁴⁵⁰ Based on the nature of the constitution, state and federal case law endorsing judicial review, and his oath to execute his office “agreeably to the constitution,” Chief Justice Kirkpatrick concluded that a court could strike an act of the legislature.⁴⁵¹

In summary, in the state cases prior to *Marbury v. Madison*, we can discern the development of principles that underpin judicial review. Without the context of these early decisions, *Marbury* can easily be misinterpreted. In the early 1780s, judges were reluctant to exercise judicial review as demonstrated by Judge Duane in *Rutgers* and Judge Pendleton in *Caton*. For many years in England, the

446. *Id.* at *13–14.

447. *Id.* at *10.

448. *Id.*

449. *Id.*

450. *Id.*

451. *Id.* at *11–12.

judicial power was considered a branch of the executive department,⁴⁵² and this view was accepted by some American thinkers.⁴⁵³ After 1776, the states curtailed executive power and transferred most of this power to the legislature.⁴⁵⁴ This, coupled with long-standing principles of British constitutionalism, dictated that the legislature should be the most powerful branch of government.⁴⁵⁵ Only as principles of popular sovereignty gained wider acceptance and understanding did Americans become more comfortable with judicial power.⁴⁵⁶ The reactions to the *Rutgers* and *Trevett* decisions are prime examples of the early distrust of judicial power.

When courts began to declare acts of the legislature void, they based their power on popular sovereignty and the people's choice to limit the power of government via a written constitution. Hence, many of the later opinions (such as *Kemper* and *Lindsay*) contain a discussion of the history of the Revolution, the powers claimed by the British Parliament, and the establishment of popular sovereignty in the states. The power of the people formed the basis of the judges' exercise of judicial review. With the legislature no longer the ultimate sovereign and master of the constitution, courts could take notice of the constitution when judging between its terms and the terms of a statute. As a co-equal branch, a court need not bow to legislative power, nor was it obligated to assist the legislature in a constitutional violation. The judges' oath (from *Parkhurst*)

452. See *supra* notes 134–136.

453. See M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 151 (Liberty Fund 1998) (1967).

454. GORDON WOOD, CREATION OF THE AMERICAN REPUBLIC 1176–1787, at 155 (1969).

455. *Id.*

456. This is evident by the series of state judicial review cases cited above.

prohibited the courts from turning a blind eye toward legislative usurpation.

Many courts realized that the power of judicial review could be abused. For this reason, several judges articulated the doubtful case rule. Unless the constitutional violation was clear and unambiguous, a court should not strike the act of a legislature. In doubtful cases, a court should defer to the popular branch. If a judge declined to exercise the doubtful case rule, the *Whittington* opinion suggested that he could be impeached.⁴⁵⁷ Judicial activism, according to the *Whittington* court, constituted grounds for removal.⁴⁵⁸

Because the power of judicial review was based on the court being a co-equal branch of government, none of the pre-*Marbury* cases even hint that courts might be the final arbiter of constitutions. The power to take notice of a constitution does not necessarily lead to the conclusion that courts, or any other branch taking notice of the constitution, have the final say on a constitution's meaning. It was a big enough step, and a very controversial one early on, for the courts to claim equality with the legislature in considering the constitution. A claim of judicial supremacy was thus unthinkable and was never made.

D. And Then Came *Marbury*

When the Supreme Court decided *Marbury v. Madison*⁴⁵⁹ in 1803, it was not trailblazing.⁴⁶⁰ As shown above, state courts had

457. *Whittington v. Polk*, 1799 WL 240, at *6 (Pa. 1799).

458. *Id.*

459. 5 U.S. (1 Cranch) 137 (1803).

460. See 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 190 (1981) ("In short, the idea of judicial review was hardly a new one when *Marbury* was decided. What was new was that the Supreme Court asserted that power, and that it did so for the first time in 1803."); see also David E. Engdahl, *John Marshall's "Jeffersonian"*

discussed the doctrine of judicial review and exercised a modest form of judicial review since the early 1780s.⁴⁶¹ Viewed against the backdrop of these cases, the reasoning of *Marbury* becomes clear: the Supreme Court, just like Congress and the president, can take notice of the Constitution. Viewed contextually, it is difficult to discern how generations of scholars and judges have cited *Marbury* for the proposition that the Supreme Court is the final arbiter of the Constitution—the one branch to which the executive and legislative must defer in matters of constitutional interpretation.⁴⁶² This popular interpretation cannot stand up under even moderate scrutiny.

The background to *Marbury* is well known. In the late 1790s, the Federalist Congress passed the Alien and Sedition Acts, making it a crime to criticize the national government and giving President Adams the power to deport foreigners based on the president's reasonable suspicion that the foreigner had a secret design against the government.⁴⁶³ Outraged at such illiberal measures, the people voted Adams and his Congressional majority out of office, giving the Republicans a 24-seat majority in the House of Representatives and electing Thomas Jefferson to the presidency.⁴⁶⁴ Prior to leaving office, the lame-duck Congress attempted to place as many Federalists in office before turning over power to Jefferson and his Republican Party by passing the Judiciary Act of 1801⁴⁶⁵ during the

Concept of Judicial Review, 42 DUKE L.J. 279, 324 (1993) (noting that at the time of the *Marbury* decision, judicial review was already a "long and well established" practice).

461. See *supra* Part IV.C.

462. See *Baker v. Carr*, 369 U.S. 186, 211 (1962).

463. The Alien and Sedition Acts are discussed in WILLIAM J. WATKINS, JR., RECLAIMING THE AMERICAN REVOLUTION 30–54 (2004).

464. See *id.* at 79.

465. Judiciary Act of 1801, ch. 4, 2 Stat. 89 (repealed 1802).

chill of February.⁴⁶⁶ Among other things, the Act created new circuit courts staffed by 16 judges, as well as justices of the peace for the District of Columbia.⁴⁶⁷

William Marbury was appointed as a justice of the peace by President Adams and was confirmed by the Senate, but he failed to receive his commission before Jefferson assumed office.⁴⁶⁸ Bringing suit within the original jurisdiction of the Supreme Court, Marbury asked for a writ of mandamus ordering Secretary of State James Madison to deliver his commission.⁴⁶⁹ In examining Marbury's claim, the Court framed three issues: (1) whether Marbury had a right to the commission, (2) if such a right existed, whether the law afforded him a remedy, and (3) if a remedy existed, whether the requested mandamus was the proper remedy.⁴⁷⁰

In considering the existence of a remedy, the Court recognized that some executive functions are purely political and thus not the subject of judicial scrutiny.⁴⁷¹ "But where a specific duty is assigned by law, and individual rights depend upon performance of that duty," the Court reasoned, "it seems equally clear that the individual who considers himself injured[] has a right to resort to the laws of his country for a remedy."⁴⁷² Were this not true, the federal government would cease to be a government of laws, and the executive would enjoy greater power than the king of Great Britain.⁴⁷³ Because

466. RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 15 (1971).

467. *Id.*; NELSON, *supra* note 193, at 57.

468. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155 (1803).

469. *Id.* at 153-54.

470. *Id.* at 154.

471. *Id.* at 165-66.

472. *Id.* at 166.

473. *Id.* at 163.

delivery of the sealed commission was not a political act, the Court concluded that Marbury, having been deprived of a vested right, had recourse to the courts to seek redress of his injury.⁴⁷⁴

Finally, the Court turned to the question of whether it could issue a writ of mandamus to Secretary of State Madison commanding him to deliver the sealed commission to Marbury. After a discussion of the nature of the writ, the Court observed that its power to issue writs of mandamus originated in section 13 of the Judiciary Act of 1789.⁴⁷⁵ The Constitution, however, grants the Supreme Court original jurisdiction only “[i]n cases affecting Ambassadors, other public Ministers and Consuls, and those in which a state shall be a Party.”⁴⁷⁶ In all other cases, the Court has appellate jurisdiction subject to congressional regulation.⁴⁷⁷ Because Article Three mentions nothing about issuing writs of mandamus as part of the Court’s original jurisdiction, the Court had to consider whether an act of Congress could alter original jurisdiction to permit issuance of the writ in cases falling within original, rather than appellate, jurisdiction.⁴⁷⁸

As so many state courts had done in the two decades prior to *Marbury*, the Supreme Court turned to the first principle of popular sovereignty: “That the people have an original right to establish, for

474. *Id.* at 168.

475. *Id.* at 173 (stating that, “[t]he act to establish the judicial courts of the United States authorizes the supreme court ‘to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States’”). The “act” to which the Court refers is clearly the Judiciary Act of 1789. *See also* Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80.

476. U.S. CONST. art. III, § 2.

477. *Id.*

478. Arguably, the mention of mandamus in the Judiciary Act did not add to the Supreme Court’s original jurisdiction. *See* AMAR, *supra* note 195, at 232 (noting that section 13 of the Judiciary Act “simply provided that if and when the Court already had jurisdiction (whether original or appellate), the justices would be empowered to issue certain technical writs—in particular, writs of prohibition and mandamus”).

their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.”⁴⁷⁹ Recognizing the people as ultimate sovereigns, the Court described the people as having “original and supreme will.”⁴⁸⁰ Exercising this supreme power, the people created three departments of government with limited and defined powers.⁴⁸¹ So “that those limits may not be mistaken, or forgotten, the constitution is written.”⁴⁸² Again recognizing the majesty of the people, the Court averred that “the constitution controls any legislative act repugnant to it.”⁴⁸³ The Court specifically denied that Congress could alter the people’s Constitution by a mere ordinary act of legislation.⁴⁸⁴ From this discussion of ultimate sovereignty, it naturally followed that “an act of the legislature, repugnant to the constitution, is void.”⁴⁸⁵

If the Constitution is paramount, then must the courts simply follow the direction of the legislature and give effect to its enactments? Such a proposition, according to the Court, was “an absurdity too gross to be insisted on.”⁴⁸⁶ “[O]f necessity,” the Court continued, the judiciary must “expound and interpret” the law.⁴⁸⁷ Often courts are faced with conflicting statutes, and they “must decide on the operation of each” to decide the case or controversy

479. *Marbury*, 5 U.S. (1 Cranch) at 176.

480. *Id.*

481. *See id.*

482. *Id.*

483. *Id.* at 177.

484. *Id.*

485. *Id.*

486. *Id.*

487. *Id.*

presented.⁴⁸⁸ Hence, the Court declared that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”⁴⁸⁹ With sovereignty no longer vested in the legislative body, “courts are to regard the constitution” when performing their judicial duties.⁴⁹⁰ To do otherwise would “subvert the very foundation of all written constitutions” and give the people’s agent, Congress, a power greater than the principal.⁴⁹¹ It would give the legislature “a practical and real omnipotence. . . .”⁴⁹²

The Court then set about giving examples of its duty to refer to the Constitution when adjudicating, specifically discussing conditional prohibitions against bills of attainder, ex post facto laws, and the levying of duties on exported goods.⁴⁹³ The Court’s clearest example dealt with treason. The Constitution provides that “[n]o Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt act, or on confession in open court.”⁴⁹⁴ The Court contemplated the question: what if Congress decreed that “*one* witness, or a confession *out of* court, [was] sufficient for conviction, must the constitutional principle yield to the legislative act?”⁴⁹⁵ To give effect to such an enactment, the Court concluded, would be a violation of the judges’ oath.⁴⁹⁶ Although Congress might violate its oath by attempting to alter the law of treason by mere

488. *Id.* at 177–78.

489. *Id.* at 177.

490. *Id.* at 178. At a later point in the opinion, the Court says that the Constitution must be “looked into” when adjudicating an issue. *Id.* at 179.

491. *Id.* at 178.

492. *Id.*

493. *Id.* at 179.

494. U.S. CONST. art. III, § 3.

495. *Marbury*, 5 U.S. (1 Cranch) at 179 (emphasis added).

496. *Id.* at 179–80.

statute, nothing required judges to join in the violation.⁴⁹⁷ Hence, Congress's attempt to alter original jurisdiction by statute failed and the Court refused to issue the writ of mandamus.⁴⁹⁸

Marbury did not tread on virgin territory when it grounded its authority in the people's will as manifested by the Constitution. In fact, it was simply the federal version of *Kemper*. Both cases examined whether an act of the legislature could expand court jurisdiction in the face of a clear constitutional provision to the contrary. Judges in both cases reached the same result. Although in *Kemper* we are treated to five separate opinions with more in-depth reasoning on what was a novel issue at the time, and the court went so far as to put the judiciary on par with the legislative branch. However, neither *Kemper* nor *Marbury* declared the court greater than the legislature.

Viewed in its proper context, the holding in *Marbury* falls far short of radical. The modesty of *Marbury* is borne out by contemporary reaction to the opinion. Although Jefferson's Republicans and Marshall's Federalists believed themselves to be in a battle for the survival of republicanism in America,⁴⁹⁹ the Republican newspapers expressed little hostility toward the opinion.⁵⁰⁰ James Madison, the defendant in the case, paid even less attention to the decision or its ramifications, failing to write a single word about the decision.⁵⁰¹ Jefferson's objections to the opinion were grounded in Marshall's "extra-judicial" criticism of Jefferson's decision to deny

497. *Id.*

498. *Id.* at 180.

499. *See generally*, WATKINS, *supra* note 463, at 79–82.

500. *See* ELLIS, *supra* note 466, at 66.

501. *See* Jack N. Rakove, *Judicial Power in the Constitutional Theory of James Madison*, 43 WM. & MARY L. REV., 1513, 1513 (2002).

Marbury his right to the commission (issues one and two discussed in the opinion).⁵⁰² The fact that Jefferson and fellow Republicans failed to criticize the Court's discussion of judicial review is a strong indicator that there was little or no disagreement on this third point of the opinion.⁵⁰³

It must be remembered that Jefferson was a champion of the people and the principles of popular sovereignty, which denied the legislature the exclusive right to interpret or modify the Constitution.⁵⁰⁴ His reasoning was similar to the reasoning of the many state judges who had weighed in on the subject: Jefferson believed all three branches of government could interpret the Constitution. Hence, his muted reaction is logical.⁵⁰⁵

Jefferson's theory of constitutional interpretation is best explained in his September 11, 1804 letter to Abigail Adams. In responding to Mrs. Adams's criticism of Jefferson's decision to pardon the men convicted under the Sedition Act, Jefferson averred

502. See Letter from Thomas Jefferson to William Johnson (June 12, 1823), in *THE COMPLETE JEFFERSON*, at 321 (Saul K. Padove ed., 1943); see also HASKINS & JOHNSON, *supra* note 460, at 193 (noting that the first portions of the *Marbury* opinion were "probably more important" to the Court than the judicial review section). As Charles F. Hobson, the editor of *THE PAPERS OF JOHN MARSHALL* (Charles F. Hobson et al. eds., 2002), has noted: "For nearly a century after the decision, *Marbury* was almost always cited in connection with issues of original jurisdiction and mandamus, not as authority to pronounce laws unconstitutional." Charles F. Hobson, *John Marshall, the Mandamus Case, and the Judiciary Crisis, 1801-1805*, 72 *GEO. WASH. L. REV.* 289, 289 (2003). Akhil Amar has also observed that "not until the late twentieth century did the Court begin to describe itself as the 'ultimate interpreter' of the Constitution." AMAR, *supra* note 195, at 215.

503. *But see* HASKINS & JOHNSON, *supra* note 460, at 195-96 (positing that "Jefferson's failure immediately to condemn the *Marbury* opinion should in no way be read as signifying his initial acceptance of its reasoning or to suggest an easing of tensions between the President and the Chief Justice. It may well be that Jefferson remained silent about the opinion at the time it was rendered not only because he had 'won' the case, insofar as the denial of Marbury's commission was concerned, but also because he astutely perceived that raising a controversy over the decision could only harm his primary effort to strengthen the Republican party for the approaching election.").

504. See Letter from Thomas Jefferson to William Johnson, *supra* note 502, at 322.

505. See *infra* text accompany notes 506-516.

that “nothing in the Constitution has given [the judges] a right to decide for the Executive, more than the Executive to decide for them” on the constitutionality of the Sedition Act.⁵⁰⁶ Alluding to principles of separation of powers, Jefferson observed that both branches “are equally independent in the sphere of action assigned to them.”⁵⁰⁷ Although he believed that the Sedition Act was unconstitutional, he conceded that “[t]he judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment, because the power was placed in their hands by the [C]onstitution.”⁵⁰⁸ Likewise, “the Executive, believing the law to be unconstitutional, was bound to remit the execution of it.”⁵⁰⁹ Jefferson summed up his understanding of the Constitution as follows:

That instrument meant that its co-ordinate branches should be checks on each other. But the opinion which gives to judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and executive also in their spheres, would make the judiciary a despotic branch.⁵¹⁰

Jefferson realized that the co-ordinate branches would occasionally disagree on matters of constitutional interpretation, particularly when controlled by different parties.⁵¹¹ Rather than any one branch having the power to decide for the others, he envisioned the people would make the final decision, acting through the ballot box or in convention.⁵¹²

506. Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804) in 1 THE ADAMS-JEFFERSON LETTERS, at 279 (Lester J. Cappon ed., 1959).

507. *Id.*

508. *Id.*

509. *Id.*

510. *Id.*

511. *See id.* at 280.

512. *See id.*

In Jefferson's draft of his first annual message to Congress, he explained his departmentalist theory in a manner similar to his 1804 letter to Mrs. Adams. After discussing his response to the Sedition Act, he stated that the Constitution "has provided for it's [sic] own reintegration by a change of persons exercising the functions of those departments."⁵¹³ To Jefferson, this is exactly what happened in the 1800 election (Revolution of 1800): "the Revolution of 1800 was as real a revolution in the principles of our government as that of 1776 was in its form; not effected indeed by the sword, as that, but by the rational and peaceable instrument of reform, the suffrage of the people."⁵¹⁴

As early as 1783, Jefferson believed that a convention of the people was the proper body to settle disputes of interpretation. In his 1783 draft of a constitution for Virginia, Jefferson provided that any two branches of the government by a two-thirds vote in each branch could summon a constitutional convention for altering or correcting breaches of the constitution.⁵¹⁵ Forty years later, Jefferson continued to believe that the people acting in convention were the final arbiters of the constitution.⁵¹⁶

Because the High Court's *Marbury* opinion neither ran afoul of Jefferson's departmentalist theory nor called into doubt the sovereignty of the people, the decision was not a threat to Jefferson and the Republicans. *Marbury* simply announced the departmentalist doctrine: the Court, as well as the other branches,

513. See DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 270 (1994) (discussing and quoting the draft message).

514. Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819) in 10 *THE WRITINGS OF THOMAS JEFFERSON*, at 140 (Paul Leicester Ford ed., 1910).

515. See JEFFERSON, *supra* note 191, at 221.

516. See Letter from Thomas Jefferson to William Johnson, *supra* note 502, at 322.

possesses the power to interpret the Constitution. Without the historical context, modern Americans do not grasp the evolution of the doctrine of sovereignty, its importance to our Revolution, and the early formation of judicial review in the 1780s. Because it has not been understood in its proper context, *Marbury* has become a decision that stands for something far greater than its modest holding. For decades American lawyers have been told that the *Marbury* Court declared itself the final authority on the Constitution, although, as shown, this is not an accurate description of the *Marbury* decision. Inculcation of this point, coupled with observation of present practice in which the Court is the final say on the Constitution, explains why the importance and meaning of *Marbury* continues to be overstated.

V

CONCLUSION

The divine right of kings, although antedating the Stuarts, will forever be associated with James I and his descendents. As did Bodin in *République*, the Stuarts contended that the king was God's lieutenant on earth and beyond the control of any earthly body. If the king violated natural or positive law, his subjects could only politely remonstrate and take solace that God would punish the king in the afterlife. The king's subjects could not take active measures to protect their rights and liberties.

During the 1600s, Englishmen challenged the king's claim that ultimate sovereignty resided in the monarch's royal person. This was an expensive challenge resulting in the English Civil War and ending with the Glorious Revolution. In the turmoil of the late 1640s, Englishmen debated the first principles of society and some voices argued for principles of popular sovereignty to replace divine right

theory. Under Leveller theory, departments of government were but agents of the people and could only exercise delegated powers with the consent of the people. To put theory into practice, the Levellers created the Agreement of the People, which was a written constitution whereby the people, as ultimate sovereigns, delegated certain powers to their representatives in Parliament. Such a theory was ahead of its time, and a form of it was eventually adopted in the constitutions of independent American states in the 1770s.

Rather than replacing divine right theory with popular sovereignty, the Glorious Revolution of 1688 laid the foundation for parliamentary sovereignty. By the 1760s, it was settled that Parliament, in the words of Blackstone, possessed an “absolute despotic power” that was uncontrollable. Parliament could modify the constitution or the statutes of the realm at will. Neither the king, nor the law courts, nor the people could override the actions of Parliament.

The American colonists challenged parliamentary sovereignty with the Revolution. Originally, the Americans argued that ultimate sovereignty resided in each state legislature. But as the Americans reflected more on the doctrine of sovereignty, they reached conclusions similar to that of the Levellers. Ultimate power could not reside in one person such as the king or an artificial body such as Parliament. Sovereignty resided in the people. Only the people could possess what Bodin or Blackstone would recognize as sovereignty. While the people’s agents (such as, representatives, governors, and judges) often exercise great power, this power is derived from the people and is therefore inferior to the people’s ultimate sovereignty.

The American theory of popular sovereignty had a profound effect on the power of the courts. Under the British system, Parliament was the master of statutory and constitutional law.

Courts did not have the power to compare a parliamentary enactment with the courts' understanding of the constitution. Judicial review did not exist. With the establishment of the people as the sovereign, the three branches of government became co-equal agents of their common master. In performing their constitutional duties, all three branches were bound to interpret the constitution. No one branch was all powerful. Unaccustomed to reviewing acts of legislation, some courts continued to defer to the legislature as if it were still sovereign. By the early 1790s, courts were more comfortable with "taking notice" of the constitution. The much vaunted *Marbury* decision was simply a federal chapter in this story of American judicial review.

Today, *Marbury* is cited for the proposition that the Supreme Court is the final arbiter of the Constitution. This interpretation divorces *Marbury* from its historical roots and grossly overstates the holding of that case. Whereas popular sovereignty provides clear support for the doctrine of judicial review, it provides no support for judicial supremacy. Popular sovereignty explicitly rejected the proposition that a mere branch of government had the final word on fundamental law. Unlike judicial review, judicial supremacy is not an outgrowth of popular sovereignty. Instead, it is a regression to an older theory of sovereignty that existed prior to the American Revolution. Judicial supremacy places the Supreme Court in the position of Parliament. Having the final word in constitutional interpretation, the Court can make or unmake any law as it sees fit. Other than a very difficult amendment process, the people can do nothing to control it.

Judicial supremacy actually poses a greater danger to the people than a system of parliamentary sovereignty. At least members of the House of Commons are subject to popular elections. The Supreme

Court is not subject to this check nor are most of the courts of last resort on the state level.⁵¹⁷ Impeachment, as suggested by the *Whittington* court, is seldom used and provides no real check on judicial authority. To the extent Americans still adhere to popular sovereignty, perhaps they should reconsider Jefferson's proposal found in his 1783 draft of a constitution for Virginia as the proper method for settling conflicts between co-equal branches of government. Such an appeal to the people is consistent with the principles of our Revolution and would restore co-equal status to the three branches of government.

517. See Larry C. Berkson & Seth Andersen, *Judicial Selection in the United States: A Special Report* (American Judicature Society, 1999) (noting that only 21 "states hold elections for judges on courts of last resort").