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Popular Sovereignty, Judicial Supremacy,
and the American Revolution: Why the
Judiciary Cannot Be the Final Arbiter of
Constitutions

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Abstract

Key to understanding the connection between popular sovereignty and judicial review is the historical development of the theory of sovereignty in England and America. 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 providing the basis for the American doctrine of judicial review and shows that these English cases were simply exercises in statutory construction and cannot be classified as precursors to American judicial review. The final section examines the development of judicial review in American state courts both prior to and after ratification of the United States Constitution. This section also examines *Marbury v. Madison* in the context of these early state court decisions and concludes that Chief Justice Marshall never contemplated setting up 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 executive and the legislature.

Popular Sovereignty, Judicial Supremacy, and the American Revolution: Why the Judiciary Cannot Be the Final Arbiter of Constitutions

By William J. Watkins, Jr.

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, executive, nor 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. 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, I show, not only differs from the doctrine of judicial supremacy later embraced by the modern Supreme Court in decisions like *Cooper v. 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

¹ Judicial review is the "[p]ower of courts to review decisions of another department or level of government." *Black's Law Dictionary* 593 (6th ed. 1991).

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").

sovereignty as the cardinal principle of American constitutionalism. Section Three studies English precedent often cited as providing the basis for the American doctrine of judicial review and shows that these English cases were simply exercises in statutory construction and cannot be classified as precursors to American judicial review. The final section examines the development of judicial review in American state courts both prior to and after ratification of the United States Constitution. This 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 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 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 government functionaries, 4) imposing taxes, 5) granting pardons, 6) coining

³See Black's Law Dictionary 971 (6th ed. 1991) (describing sovereignty as "[t]he supreme, absolute, and uncontrollable power by which any independent state is governed").

⁴The 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).

⁵Jeffrey Goldsworthy, *The Sovereignty of Parliament* 17 (1999).

⁶Bodin, *supra* note 4, at 4.

⁷*Id.* at 46.

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 (monarchy), a few elite (aristocracy), or the entire people (democracy).¹⁰ But the tenor of his work is geared to 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 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 differed on its location. The Stuarts claimed that sovereignty resided in the king’s royal person whereas Parliament contended that the king working in conjunction with Parliament was sovereign. The king especially agreed with Bodin’s description of the prince as God’s lieutenant on earth and the 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 Theory of Divine Right

⁸*Id.* at 58-59.

⁹*Id.* at 104.

¹⁰*Id.* at 89.

¹¹*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 differences 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 (1986). See also Stanlis, *supra*, at 251-54.

¹²Bodin, *supra* note 4, at 39.

¹³*Id.* at 46.

Elizabeth I ruled England from her succession to the throne in 1558 until her death in 1603.¹⁴ Unlike her father Henry VIII who ruled by fear, Elizabeth was popular with her people and used this devotion to impose her will.¹⁵ Her long reign is rightly associated with masterful statecraft, exploration, imperial expansion, and myriad literary and cultural achievements. Because she had no children, her cousin James Stuart of Scotland was proclaimed James I of England shortly after her death.¹⁶ While James was no match for Elizabeth in the realm of statecraft, he was much experienced in the art of kingship. Having ruled Scotland for 18 years before succession to the English throne, James did not begin his reign as a novice monarch. Unfortunately, this experience and his admiration of Elizabeth's wealth could not persuade James to embrace his predecessor's Tudor ideals of efficiency in government. Instead, he saw royal offices as primarily a means of rewarding supporters.¹⁷ His entourage dwarfed that of Elizabeth and caused many to take note of the extravagance at court.¹⁸

Philosophically, James was a monarch cut from the Bodin mold.¹⁹ Although ignorant of England and its system of government, James was well versed in the divine right of kings²⁰ and expected total obedience from his subjects.²¹ He saw the realm as one great chain of being²² 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.²³

The English clergy were instrumental in helping James spread this message to the people. Considering that under the Act of Supremacy in 1534²⁴ the King was the head of the Church in England, such propaganda from the pulpit is not surprising.²⁵ 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, Because God hath planted him above all men, and hath given no man authority to punish Him; God alone will take vengeance on his

¹⁴ For the reign of Elizabeth, see generally Wallace MacCaffrey, *Elizabeth I* (1993).

¹⁵ *Id.* at 445.

¹⁶ 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 S. Churchill, *A History of the English Speaking Peoples: The New World 147-63* (1956) [hereinafter Churchill, *New World*].

¹⁷ See Lacey Baldwin Smith, *This Realm of England* 205 (1983) [hereinafter Smith, *This Realm*].

¹⁸ *Id.*

¹⁹ For the influence of Bodin on James I, see Harold Berman, *The Origins of Historical Jurisprudence*, 103 *Yale L.J.* 1651, 1167-72 (1994).

²⁰ See J.P. Sommerville, *Politics and Ideology in England, 1603-1640*, at 9 (New York: Longman Group, 1986) (discussing divine right of kings).

²¹ 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 19, at 1673.

²² 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).

²³ Joyce Lee Malcolm, *Introduction to 1 The Struggle for Sovereignty: Seventeenth Century Political Tracts* xxxv-xxxvi (Joyce Lee Malcolm, ed., 1999).

²⁴ R.R. Palmer & Joel Colton, *A History of the Modern World* 79 (1978).

²⁵ Sommerville has gone so far as to describe the church as "the king's ministry of propaganda." Sommerville, *supra* note 20, at 10.

sinnes.”²⁶ Goodwin recognized that a monarch could be cruel to his people. 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 Kingdomes, & 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.²⁷

Roger Maynwaring further advised the people that suffering would make them “martyars,” whereas civil disobedience would make them “traitors” in the eyes of God and subject to eternal damnation.²⁸

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.²⁹ 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,”³⁰ Parliament had much control over the purse strings and ordinary legislation. As early as the fourteenth century, English kings had agreed that no tallage or aid would be levied without the consent of the freeman of the realm.³¹ Hence, actual practice differed somewhat from royalist theory.

In contrast to the royalists, parliamentarians emphasized the doctrine of king-in-parliament. “[F]or 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.”³² 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.”³³ In other words, the Lords and Commons were the king’s partners in governance of the realm.

²⁶William Goodwin, *A Sermon Preached Before the Kings Most Excellent Maiestie at Woodstoke* (1614), *reprinted in* 1 Malcolm, *supra* note 23, at 38 (emphasis omitted).

²⁷*Id.* at 41-42 (emphasis omitted).

²⁸Roger Maynwaring, *Religion and Alegiance* (1627), *reprinted in* 1 Malcolm, *supra* note 23, 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), *reprinted in* *The Stuart Constitution 1603-1688: Documents and Commentary* 12 (J.P. Kenyon, ed., 1986).

²⁹Sir Dudley Carleton, *Speech to the House of Commons* (1626), *reprinted in* Kenyon, *supra* note 28, at 45.

³⁰The Earl of Salisbury, *Speech to Parliament* (1610), *reprinted in* Kenyon, *supra* note 28, at 11.

³¹Donald W. Hanson, *From Kingdom to Commonwealth* 156 (1970).

³²James Whitelocke, *Speech on Impositions* (1610), *reprinted in* Kenyon, *supra* note 28, p. 61.

³³Goldsworthy, *supra* note 5, at 96.

C. The Development of Parliament

Parliament did not originate as the powerful institution described by Whitelocke. It developed over time from the principle that the great magnates of the realm owed the king a duty of counsel and consent.³⁴ Of course, since time immemorial kings solicited the advice of the great barons of the realm.³⁵ For example, in 1086 William the Conqueror held a colloquy with his magnates before launching the Domesday survey of the wealth of his vassals.³⁶ Christmas, Easter, and Whitsunday conveniently provided three yearly opportunities for the king and his barons to feast and discuss the pressing issues of the day.³⁷ In addition to providing advice on political and administrative issues, the assemblies of barons also performed judicial functions in that they advised the king's court on judgments to be rendered.³⁸

By the 1230s, the word "parliament" was used to denote a special meeting of the king's council.³⁹ But more formal organized parliaments did not begin until 1258.⁴⁰ In that year, Henry III was in an impecunious position. He had attempted to purchase the Sicilian crown for his son Edmund. In exchange for the crown, Henry agreed to provide the pope with an army and to serve as surety for papal debts.⁴¹ Before coming to the financial aid of the king, the magnates demanded reform of the government—reforms placing much power in the barons' hands. Seeing no way out, the king agreed to institute changes known today as the Provisions of Oxford. The main reform crafted by the baronial and royal parties was a council of fifteen chosen to advise and assist the king. This council would be elected by two persons from the royal camp and two from the barons' camp, which was described as "the community of the realm."⁴² In addition, Parliament was scheduled to meet three times per year.⁴³ Hence, we see the "community of the realm" choosing the king's advisors and the community's representatives⁴⁴ meeting thrice each year in Parliament.

Although the power of the barons waxed and waned in the years after the Provisions of Oxford, Parliament would remain a key English institution from 1258 forward. By the middle of the next century, representatives of certain towns and counties began to participate in Parliament.⁴⁵ The increasing need for the "commons" can be traced to England's involvement in the Hundred Years' War beginning in 1337 and the army's constant need for supplies. With the tax burden growing, the king required the consent of not just the magnates, but also the burgesses

³⁴*Id.* at 24.

³⁵William Blackstone, 1 Commentaries *143 ("But it is certain that long before the introduction of the Norman language into England, all matters of importance were debated and settled in the great councils of the realm.").

³⁶1 Winston S. Churchill, *A History of the English Speaking Peoples: The Birth of Britain 173-74 & 274* (1956) [hereinafter Churchill, *Birth of Britain*].

³⁷George O. Sayles, *The King's Parliament of England* 21 (1974).

³⁸*Id.* at 26.

³⁹*Id.* at 40.

⁴⁰*Id.* at 48.

⁴¹Churchill, *Birth of Britain*, *supra* note 29, at 270-71.

⁴²Maurice Powicke, *The Thirteenth Century 1216-1307*, at 145-46 (1962).

⁴³Sayles, *supra* note 37, at 48.

⁴⁴Members of parliament were representatives of the entire kingdom, not one particular area. See S.B. Chrimes, *English Constitutional Ideas in the Fifteenth Century* 131 (1966).

⁴⁵Goldsworthy, *supra* note 5, at 29. According to Hanson, "from 1327 onwards [the commons] were always summoned to parliament." Hanson, *supra* note 31, at 168.

and knights.⁴⁶ As Parliament became more representative, we see a commensurate decline in its judicial functions.⁴⁷ According to Jeffrey Goldsworthy, “[a]fter 1327, [Parliament’s] judicial functions began to diminish in importance, and political business assumed greater prominence.”⁴⁸ A relatively new feature of this political business was the origination of legislation from the petitions of the Commons.⁴⁹ While this practice was significant, these petitions were freely amended by the king and barons for years to come.⁵⁰

The brief discussion above is not to imply that some sort of constitutional monarchy developed in the Middle Ages. Often kings eschewed calling a parliament and instead summoned great councils of barons to assist in governance.⁵¹ For example, from 1485 to 1509 Henry VII called only seven parliaments—a far cry from the three times per year mandated by the Provisions of Oxford.⁵² In addition, via the royal prerogative the king had the “power to dispense with any legislative provision.”⁵³ Real power remained with the Crown, but Parliament’s influence continued to grow.

D. The Coming of Civil War

Unlike in earlier ages, 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.⁵⁴ Desperately short of funds, James frightened many 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.⁵⁵ 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 so 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

⁴⁶Hanson, *supra* note 31, at 168-69. See also Norman F. Cantor, *The English: A History of Politics and Society to 1760*, at 231 (1967).

⁴⁷Thomas G. Barnes, *Introduction to Coke’s “Commentary on Littleton,”* in *Law, Liberty, and Parliament: Selected Essays on the Writings of Sir Edward Coke* 1, 17 (Alan D. Boyer, ed., 2004).

⁴⁸Goldsworthy, *supra* note 5, at 39. See also William A. Morris, *Introduction to The English Government at Work 1327-1336*, at 27 (James F. Willard & William A. Morris, eds., 1940) (“Parliament was more often an agency to suggest means of obtaining justice than a court to give judgment.”).

⁴⁹Sayles, *supra* note 37, at 115.

⁵⁰Hanson, *supra* note 31, at 184.

⁵¹Sayles, *supra* note 37, at 132-33.

⁵²*Id.* at 134.

⁵³*Id.* at 116.

⁵⁴See Barry Coward, *The Stuart Age* 110 (1994).

⁵⁵*Id.* at 152.

prerogative powers to raise revenue.⁵⁶

Extra-parliamentary revenue aside, matters of religion also fostered an attitude of distrust between Charles and Parliament. Charles married the Catholic, French princess Henrietta Maria, and he was somewhat lax in enforcement of restrictions against Catholics. English Protestants saw a popish fifth column infiltrating the king's court. So incensed was Parliament over these developments that many in the Commons sought to make "capital enemies" out of those who encouraged the king to levy taxes not authorized by Parliament or who sought to advance the cause of Catholicism in the realm.⁵⁷

Relations between king and Parliament eventually reached the point where Charles decided to go it alone. On March 10, 1629, he dissolved Parliament and did not call another Parliament until 1640. The King gave myriad reasons for dissolving Parliament, but central to the decision was Parliament's alleged attempts "to extend their privileges" at the expense of the royal prerogative.⁵⁸ In order to survive financially, Charles implemented a policy of retrenchment and resorted to even more extra-parliamentary revenues.⁵⁹

Charles's attempt to rule without Parliament ended when he faced a war with the Scots. After almost eleven years of personal rule, war forced the king to summon a parliament. Charles expected that the dangers of a Scottish army were so obvious to all Englishmen that he would receive a generous grant of revenue from Parliament. Instead, he was greeted with calls for reform of the government.⁶⁰ Angered by the grievances presented, Charles disbanded Parliament within a few days. On August 20, 1640, the Scottish army crossed the Tweed and soon took Newcastle. With no money to mount resistance, Charles agreed to a truce with the Scots whereby he promised to pay them £850 per day while they occupied England. Faced with this exaction, Charles saw no other alternative but to summon another parliament.

Once Charles summoned the "Long Parliament," government reform was again the focal point. "[There is] a design to alter the kingdom in both religion and government," warned parliamentarian John Pym. "This is the highest of treason, this blows up by piecemeal, and almost goeth through [to] their ends."⁶¹ The alterations Pym spoke of were a growing Catholic influence at court and the eleven years of rule by royal prerogative. To address the concerns, Parliament passed several legislative acts. The most important of these was the Triennial Act of 1641, which provided that a parliament would be summoned at least every three years even without royal sanction. Parliament also declared illegal all non-parliamentary taxation, ending the king's use of fiscal feudalism. Having the upper hand, the Long Parliament declared that the king could not unilaterally dissolve it. Faced with a hostile army in the north, the king acquiesced to parliamentary demands.

⁵⁶The 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. See Smith, *This Realm*, *supra* note 17, at 217-22.

⁵⁷Protestation of the Commons (1629), *reprinted in* Kenyon, *supra* note 28, at 71.

⁵⁸Charles I, His Majesty's Declaration to all his Loving Subjects, of the Causes which moved him to Dissolve the last Parliament (1629), *reprinted in* Kenyon, *supra* note 28, at 72.

⁵⁹Churchill, *New World*, *supra* note 16, at 194-95. The most important of these revenues was ship money, a tax traditionally levied by the king on coastal towns for naval defense. For a general discussion of ship money, see Smith, *This Realm*, *supra* note 17, at 225.

⁶⁰John Pym, *Speech on Grievances* (1640), *reprinted in* Kenyon, *supra* note 28, at 183-89.

⁶¹John Pym, *Speech* (1640), *reprinted in* Kenyon, *supra* note 28, at 189.

Parliament, however, sought to push much further than this. In June 1642, Parliament demanded the power to appoint the king's advisors and other great officers of state.⁶² They also demanded control of the army.⁶³ Control of the army was an especially important issue at the time because of a widespread rebellion by Irish Catholics. Protestant parliamentarians did not trust the king to quell the rebellion; therefore, they demanded control of the country's military forces. 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."⁶⁴ He further insisted that under the laws of the realm "the government . . . is [en]trusted to the king."⁶⁵ Within a few short months the English Civil War would begin.

E. 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 communistic state.⁶⁶ More conservative elements favored establishment of some sort of limited monarchy. Others argued that a new government should be grounded in republican principles.

As part of its political agenda and in response to calls that it disband, the NMA demanded that "unjust and corrupt" parliamentarians be purged, future parliaments be for a fixed duration, and the people be permitted to freely petition Parliament.⁶⁷ The NMA eventually purged the Long Parliament of its more conservative members, leaving but a "Rump Parliament." The Rump promptly declared that all power originated in the people, the House of Commons exercised supreme power, and acts of the Commons, with or without consent of a king or Lords, were law.⁶⁸ The Rump's assertions about the power of the people were grandiloquent, but only served to empower the Rump and its military masters with ultimate power.⁶⁹ Before long, Oliver Cromwell and his musketeers expelled members of the Rump and declared Cromwell the lord protector of England.

Although unsuccessful, there was a sizeable movement that advocated revolutionary

⁶²The Nineteen Propositions (1642), *reprinted in* Kenyon, *supra* note 28, at 223.

⁶³The Militia Ordinance (1642), *reprinted in* Kenyon, *supra* note 28, at 219.

⁶⁴Charles I, The king's Answer to the Nineteen Propositions (1642), *reprinted in* Kenyon, *supra* note 28, at 18.

⁶⁵*Id.*

⁶⁶Churchill, *New World*, *supra* note 16, 286-87.

⁶⁷From a Representation of the Army (1647), *reprinted in*, Puritanism and Liberty: Being the Army Debates (1647-9) from the Clarke Manuscripts with Supplementary Documents 403-09 (A.S.P. Woodhouse, ed., 1965).

⁶⁸Commons' Resolutions (1649), *reprinted in* Kenyon, *supra* note 28, at 292.

⁶⁹*See* Edmund S. Morgan, *Inventing the People* 78-79 (1988) [hereinafter Morgan, *Inventing the People*].

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, there arose claims 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.⁷⁰

A group within the NMA known as "the Levellers,"⁷¹ 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."⁷² And if ever the people's agents exceeded the delegated powers, all power "returneth from whence it came, even to the hands of the [people]."⁷³

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 foreign states; and generally to whatsoever is not expressly or impliedly reserved by the represented themselves.⁷⁴

There then followed a reservation of rights that prohibited the representatives from doing such things as interfering with religion or conscripting citizens.⁷⁵ 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.

But the England of the late 1640s and early 1650s was not amenable to such a heterodox document as the Agreement of the People. The Interregnum had been a disorderly and tumultuous episode; more voices demanded a return to economic and political stability. After Cromwell's death in 1658, England was desperately in need of leadership. General George

⁷⁰*Id.* at 82.

⁷¹ 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 (1959).

⁷² John Lilburne, *The Free-man's Freedom Vindicated* (1646), *reprinted in* Woodhouse, *supra* note 67, at 317.

⁷³ Richard Overton, *An Appeal from the Commons to the Free People* (1647), *reprinted in* Woodhouse, *supra* note 67, at 327.

⁷⁴ *An Agreement of the People*, *reprinted in* Woodhouse, *supra* note 67, at 444.

⁷⁵*Id.*

Monk in 1660 marched on London and restored the excluded members of the Rump. Parliament convened, dissolved itself, and ordered a general election. On the advice of Monk, Charles II issued the Declaration of Breda. He promised a full pardon to all, payment of amounts owing the army, and confirmation of sales of land concluded since the war began in 1642.⁷⁶ Based on the promises made at Breda, the new Parliament (or convention as it was called) invited the son of the murdered king to return to England.

F. Restoration and Triumph of Parliament

The Stuart restoration settled very little. Extensive time abroad had made Charles II more French than English. Danger also lurked because the king was a secret Catholic in a land where fear of popish plots remained strong.⁷⁷ Making matters worse, Charles embarked on a pro-French foreign policy and signed the secret Treaty of Dover with Louis XIV whereby Charles agreed to announce his Catholic faith at a convenient time and Louis promised Charles a pension and troops to make England safe for Catholicism.⁷⁸ Moreover, Parliament worried that the money it did grant the king was wasted by Charles in paying for his numerous mistresses and bastard children. It was well known that the king preferred to spend his time on the pleasures of the flesh rather than the affairs of state. Concerns also abounded that the Charles's successor would be openly Catholic inasmuch as James, Duke of York and heir to the throne, had refused to take the Anglican sacrament.⁷⁹

Claims that supreme authority resided in the king survived the execution of Charles I and were again trotted out after the Restoration. 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.⁸⁰ Parliament, in Brydall's words, was “only Consultative or Preparative” in the making of law.⁸¹ 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, is but upon sufferance, in the presence of their Sovereign His Majesty.”⁸²

Despite such broad claims regarding the king's powers, when James II assumed the throne in 1685 the political situation was manageable—especially since James had no offspring and thus the people anticipated that a Protestant would succeed him. This quickly changed when James refused to be a quiet Catholic and his wife unexpectedly gave birth. James also used his prerogative powers to dispense with penal laws for Catholics and dissenters, appointed Catholics to key positions in the army and other offices, and began a purge of municipal officials.⁸³ Using the courts to challenge local charters and to prosecute his most virulent anti-Catholic subjects for

⁷⁶Charles II, The Declaration of Breda (1660), *reprinted in* Kenyon, *supra* note 28, at 331.

⁷⁷Richard Ollard, *The Image of the King: Charles I and Charles II* 103 (1979).

⁷⁸*Id.* at 153; *see also* Smith, *This Realm*, *supra* note 17, at 289.

⁷⁹Ollard, *supra* note 77, at 103-04.

⁸⁰John Brydall, *The Absurdity Of that New devised State-Principle*, *reprinted in* 2 Malcolm, *supra* note 23, at 787.

⁸¹*Id.* (emphasis omitted).

⁸²Anonymous, *The Arraignment of Co-Ordinate Power*, *reprinted in* 2 Malcolm, *supra* note 23, at 800.

⁸³Smith, *This Realm*, *supra* note 17, at 300-01.

treason, James began to assert control over local government.⁸⁴ If successful at controlling local government, the king could then influence parliamentary elections and pack the legislative body with his supporters. Such a course of conduct led James's Protestant magnates to invite William of Orange and Mary to deliver the realm from Catholic absolutism.

With the nation's embrace of William, James tossed the Great Seal into the Thames and fled to 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.⁸⁵ 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.⁸⁶ 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. But in reality the Glorious Revolution marked the beginning of parliamentary sovereignty in the Bodin mold. With the monarch unable to raise significant revenues without parliamentary consent, Parliament effectively assumed control 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 sum, 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 course steered by the Stuarts 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 some voices argued for popular sovereignty to replace divine right theory. Under 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 did not readily embrace popular sovereignty, it would not be long until thirteen English colonies would.

II Sovereignty and the American Revolution

In the decades prior to the American Revolution, the principle of parliamentary

⁸⁴ John Miller, *The Glorious Revolution* 3 (1983).

⁸⁵ J.R. Jones, *The Revolution of 1688 in England* 316 (1972).

⁸⁶ *The Bill of Rights (1689)*, reprinted in *From Magna Carta to the Constitution* 39 (David L. Brooks, ed., 1993).

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, whom sit by themselves in another.”⁸⁷ 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 was clear that the “crown cannot begin of itself any alteration in the present established law.”⁸⁸

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

It hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all profittable denominations, ecclesiastical, or temporal, civil military, maritime, or criminal: this being the place where *absolute despotic power*, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms.⁸⁹

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. . . .”⁹⁰ Once Parliament takes an action regarding the constitution or a lesser matter, “no authority upon earth can undo” it.⁹¹

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.”⁹² Parliament was not an agent or trustee of the people and thus subject to their sanction—it was sovereign.⁹³ Blackstone

⁸⁷William Blackstone, 1 *Commentaries* *149.

⁸⁸*Id.* at 150; *see also id.* at 151 (“Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by themselves, would have done. . . .”).

⁸⁹*Id.* at 156 (emphasis added).

⁹⁰*Id.*

⁹¹*Id.*

⁹²*Id.* at 157.

⁹³A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 9 (Liberty Fund 1982) (1882); *see also* John V. Jeziarski, *James Wilson and Blackstone on the Nature and Location of Sovereignty* 32 *J. Hist. Ideas* 95, 103

specifically took 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."⁹⁴ Blackstone derided Locke's logic as "theory" and alien to the British constitution as it had actually developed.⁹⁵ 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."⁹⁶

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 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."⁹⁷ 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.⁹⁸ With this increase in population came 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.⁹⁹ Taking colonial exports into account, the mother county enjoyed a £500,000 trade surplus with the colonies.¹⁰⁰

Although profitability is 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 on enterprising individuals. Britain's imperial structure was dilapidated and inefficient—certainly incapable of hindering the growing colonies.¹⁰¹ This neglect of colonial matters left Americans with a strong sense of self-sufficiency and self-government.¹⁰² 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

(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.").

⁹⁴John Locke, *Second Treatise of Government* 77-78 (C.B. Macpherson, ed., Hackett Publishing Co. 1980) (1690) (emphasis omitted).

⁹⁵William Blackstone, 1 *Commentaries* *157.

⁹⁶*Id.*

⁹⁷Martin Howard, Jr., *A Letter From a Gentleman at Halifax (1765)*, reprinted in *Tracts of the American Revolution* 67 (Merrill Jensen, ed., Bobs-Merrill Co. 1967) [hereinafter Jensen, Tracts].

⁹⁸See Gordon S. Wood, *The American Revolution* 6 (2002) [hereinafter Wood, *American Revolution*].

⁹⁹*Id.* at 13.

¹⁰⁰*Id.* at 15.

¹⁰¹*Id.* at 5.

¹⁰²Samuel Elliot Morison, *The Oxford History of the American People* 181 (1965).

more centralized, European monarchy.¹⁰³ 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 resort to the British Parliament or the representative assemblies of the various colonies.¹⁰⁴

This hands-off approach to the colonies changed with the conclusion of the Seven Years' War in 1763. The victorious British forces acquired vast new territories from France and Spain in North America. 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.¹⁰⁵ Considering that the empire's peacetime budget was about £8 million, the debt was staggering.¹⁰⁶ 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.¹⁰⁷

The raising of 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.¹⁰⁸ Taxation in Britain had reached upwards of thirty percent of landowners' incomes before the Seven Years' War.¹⁰⁹ 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.¹¹⁰ Hence, Britons of all classes and parties believed it was time for the colonists to pay something towards their own defense.¹¹¹

C. Imperial Restructuring

The first revenue generating measure passed by Parliament was the Sugar Act of 1764.¹¹² The stated purpose of the Act in its preamble was "defraying the expences of defending, protecting, and securing" the North American colonies.¹¹³ The Sugar Act lowered the duties on foreign molasses, but increased the duties on various luxury items such as linen, silk, and wine.¹¹⁴ The increased duties were ill-timed because the North American colonies were

¹⁰³Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States 1607-1788*, at 63 (1986).

¹⁰⁴*Id.* at 64.

¹⁰⁵Wood, *American Revolution*, *supra* note 98, at 17.

¹⁰⁶*Id.*

¹⁰⁷*Id.* at 18.

¹⁰⁸W.E. Woodward, *A New American History* 126-27 (1938).

¹⁰⁹*Id.* at 126.

¹¹⁰Paul Johnson, *A History of the American People* 132 (1997).

¹¹¹*Id.*

¹¹²The Sugar Act (1764), *reprinted in* *Prologue to Revolution: Sources and Documents on the Stamp Act Crisis, 1764-1766*, at 4-8 (Edmund S. Morgan, ed., 1959) [hereinafter Morgan, Sources].

¹¹³*Id.* at 4.

¹¹⁴*Id.* at 5.

experiencing a post-war economic downturn.¹¹⁵ A flurry of protests followed as the colonists realized that the Sugar Act would be but the first of many other parliamentary intrusions on their independent existence.

The next intervention was the infamous Stamp Act of 1765.¹¹⁶ It was the first direct, internal tax to be levied on the North American colonies by Parliament.¹¹⁷ 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.¹¹⁸ Colonials regarded it with almost universal odium.

The colonists believed that Stamp Act, if accepted, would create a precedent harmful to American liberties. The importance of precedent or custom was key 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 were 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.¹¹⁹ 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 tea so it could not be seized by the customs officials and the duty technically "paid" to form the basis of a precedent.¹²⁰ With this background, one can better 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:

¹¹⁵Wood, *American Revolution*, *supra* note 98, at 27.

¹¹⁶The Stamp Act, (1765)1765, *reprinted in* Morgan, *Sources*, *supra* note 112, at 35-43.

¹¹⁷Morison, *supra* note 102, at 185.

¹¹⁸Morgan, *Sources*, *supra* note 112, at 35-43.

¹¹⁹*See generally*, Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 9-34 (2004).

¹²⁰*Id.* at 18.

his 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.¹²¹

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.”¹²² Considering the challenges of travel and communications in the eighteenth century, this was a strong argument. Parliament was attempting to enact comprehensive, one-size-fits-all tax on colonies as different as South Carolina and Massachusetts when 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 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.”¹²³ 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.¹²⁴

Keying 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 distinguished from ordinary legislation.¹²⁵ Because one cannot gift something if one does not have a claim to it, taxation was closely tied to representation.¹²⁶ 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 always considered as a free Gift

¹²¹The Maryland Resolves (1765), *reprinted in* Morgan, Sources, *supra* note 112, at 53.

¹²²The Resolutions as Printed in *The Journal of the House of Burgesses* (1765), *reprinted in* Morgan, Sources, *supra* note 112, at 48.

¹²³*Id.*

¹²⁴John Phillip Reid, *Constitutional History of the American Revolution: The Authority to Tax* 239-40 (1987).

¹²⁵Morgan, *Inventing the People*, *supra* note 69, at 239-40; 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* Jensen, Tracts, *supra* note 97, at 95-96.

¹²⁶Daniel 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* Jensen, Tracts, *supra* note 97, at 95-96; Reid, *supra* note 124, at 87; Morgan, *Inventing the People*, *supra* note 69, at 239-40.

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.¹²⁷

Because the colonists, via the franchise, had authorized no 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.”¹²⁸ The colonists reasoning on this point was sound, and many Britons, including William Pitt, agreed that Parliament could not tax the colonies.¹²⁹

Of course, the colonists’ protests went far beyond respectful resolves and petitions. Rioters took to the streets and burned sheets of stamps.¹³⁰ Tax collectors became pariahs and some were forced to take refuge with British troops.¹³¹ Fearing for their lives and lacking faith in British protection, many of the stamp agents simply resigned.¹³² Organized extra-legal groups known as “Sons of Liberty” sprang up across the colonies.¹³³ These organizations persuaded lawyers, judges, and merchants to carry on their business without using the detested stamps.¹³⁴ They also carried out a successful campaign to boycott certain British goods.¹³⁵

The boycott proved so effective that by 1766 London merchants petitioned Parliament for the repeal of the Stamp Act.¹³⁶ 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

¹²⁷The Connecticut Resolves (1765), *reprinted in* Morgan, Sources, *supra* note 112, at 55.

¹²⁸The Examination of Dr. Benjamin Franklin (1766), *reprinted in* Morgan, Sources, *supra* note 112, at 144.

¹²⁹The Role of William Pitt, *reprinted in* Morgan, Sources, *supra* note 112, at 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 110, at 133-34.

¹³⁰Johnson, *supra* note 110, at 133.

¹³¹*Id.*

¹³²Gordon Wood, *A Note on Mobs*, 23 *Wm. & Mary Q.* 635, 635 (1966).

¹³³Wood, *American Revolution*, *supra* note 98, at 29-30. For a general discussion of mob activity in colonial America, see Edward Countryman, *The American Revolution* 74-104 (1985).

¹³⁴Wood, *American Revolution*, *supra* note 98, at 30.

¹³⁵*Id.*

¹³⁶The Petition of the London Merchants to the House of Commons (1766), *reprinted in* Morgan, Sources, *supra* note 112, at 130.

manufactures, and exercise every power whatsoever, except that of taking money out of their pockets without their consent.¹³⁷

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 of the crown of *Great Britain*, in all cases whatsoever.”¹³⁸ 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 redouble the intellectual efforts in examining 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.¹³⁹ 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.¹⁴⁰ 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”¹⁴¹ and that Parliament’s power was “uncontroulable, but by themselves, and we must obey.”¹⁴² At the same time, Otis argued the power of Parliament was limited by “judgment, righteousness, and truth” under a natural law formulation prohibiting Parliament from being “absolute and arbitrary.”¹⁴³ Aside from being contradictory, Otis’s proposed 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.¹⁴⁴ 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 comprised of distinct provinces “there must exist a power somewhere to preside, and preserve the connection in due order.”¹⁴⁵ If the issue concerned the empire as a whole such as the

¹³⁷The Role of William Pitt, *reprinted in* Morgan, Sources, *supra* note 112, at 141.

¹³⁸The Declaratory Act (1766), *reprinted in* 27 The Statutes at Large 19-20 (Danby Pickering, ed., 1767).

¹³⁹Bernard Bailyn, The Ideological Origins of the American Revolution 204 (1967).

¹⁴⁰James Otis, The Rights of the British Colonies Asserted and Proved (1764), *reprinted in* Jensen, Tracts, *supra* note 97, at 19.

¹⁴¹*Id.* at 22.

¹⁴²*Id.* at 29.

¹⁴³*Id.* at 32.

¹⁴⁴Bailyn, *supra* note 139, at 209.

¹⁴⁵John Dickinson, Letters From a Farmer in Pennsylvania to the Inhabitants of these British Colonies (1768), *reprinted in* Jensen, Tracts, *supra* note 97, at 133.

regulation of trade among the members, Dickinson opined that the power must rest with Parliament.¹⁴⁶ Direct taxation, however, was an internal matter and therefore outside of Parliament's power.¹⁴⁷ 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."¹⁴⁸ But for matters affecting only one part of the empire, Hopkins pointed to the "peculiar privileges" of the different provinces as the ultimate authority.¹⁴⁹

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."¹⁵⁰

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."¹⁵¹

Perhaps the best statement of the colonists' rejection of parliamentary supremacy is Thomas Jefferson's *A Summary View of the Rights of British America*.¹⁵² According to Jefferson's version of history, the colonists left the Mother Country and only continued the 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."¹⁵³ 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."¹⁵⁴

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 which were the cause of

¹⁴⁶*See id.*

¹⁴⁷*See id.*

¹⁴⁸Stephen Hopkins, *The Rights of the Colonies Examined* (1764), *reprinted in* Jensen, *Tracts*, *supra* note 97, at 49.

¹⁴⁹*Id.*

¹⁵⁰The Examination of Dr. Benjamin Franklin (1766), *reprinted in* Morgan, *Sources*, *supra* note 112, at 146.

¹⁵¹William Hicks, *The Nature and Extent of Parliamentary Power Considered* (1768), *reprinted in* Jensen, *Tracts*, *supra* note 97, at 183-84.

¹⁵²Thomas Jefferson, *A Summary View of the Rights of British America* (1774), *reprinted in* Jensen, *Tracts*, *supra* note 97, at 256. For an excellent discussion of the Summary View, see David N. Mayer, *The Constitutional Thought of Thomas Jefferson* 28-37 (1994).

¹⁵³Thomas Jefferson, *A Summary View of the Rights of British America* (1774), *reprinted in* Jensen, *Tracts*, *supra* note 97, at 260.

¹⁵⁴*Id.* at 263.

“discontents and jealousies among us.”¹⁵⁵ Without intercession of the king, “fraternal love and harmony through the whole empire” would be impossible.¹⁵⁶

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 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 a 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 continental assembly that he described as “a British and American legislature” that would “regulat[e] the administration of the general affairs of America.”¹⁵⁷ In theory, this legislature would be “an inferior and distinct branch of the British legislature” although it would handle all continental matters.¹⁵⁸ Each colony would “retain its present constitution, and all powers of regulating and governing its own internal police, in all cases what[so]ever.”¹⁵⁹ In recognition of the king’s authority, he was to appoint a president general to execute the laws passed by the new legislature.¹⁶⁰

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”¹⁶¹ 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.”¹⁶² 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 formerly 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.”¹⁶³

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

¹⁵⁵*Id.* at 268.

¹⁵⁶*Id.* at 276.

¹⁵⁷Joseph Galloway, A Plan of a proposed Union between Great Britain and the Colonies (1774) *reprinted in* Colonial Origins of the American Constitution 392 (Donald S. Lutz, ed., 1998).

¹⁵⁸*Id.* at 393.

¹⁵⁹*Id.* at 392.

¹⁶⁰*Id.*

¹⁶¹The Declaration of Independence para. 3 (U.S. 1776).

¹⁶²*Id.* para. 16.

¹⁶³*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. See Mayer, *supra* note 152, 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 para. 33 (U.S. 1776).

of the Revolution, “[t]he legislative power was maintained to be as complete in each American Parliament, as in the British Parliament.”¹⁶⁴ 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.¹⁶⁵

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.¹⁶⁶

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.”¹⁶⁷ 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.

¹⁶⁴James Madison, “Mr. Madison’s Report” to the Virginia Assembly, *reprinted 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.”).

¹⁶⁵Proclamation of the General Court (1776), *reprinted in* *The Popular Sources of Political Authority* 65 (Oscar & Mary Handlin, eds., 1966).

¹⁶⁶*See* 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 and inferior power.
- 4th. Whatever is constituted and ordained by the principal supreme power can not be altered, suspended or abrogated by an other power, but by 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), *reprinted in* 1 *The Founders’ Constitution* 56 (Philip B. Kurland and Ralph Lerner, eds., 1987).

¹⁶⁷1 Kurland & Lerner, *supra* note 166, at 6.

Issues of sovereignty, however, arose again with the Constitution of 1787. After compromise, study, and debate, the Framers created a system in which the people of each state delegated power to two governmental sovereigns: the state and national governments. “The Federal and State Governments are in fact but different agents and trustees of the people,” Madison wrote in *Federalist* No. 46, “instituted with different powers, and designated for different purposes.”¹⁶⁸ 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.”¹⁶⁹

In other words, 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 distinction argued for 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 position recognizing the federal nature of the British Empire, was pushed forward by British agents of imperial reorganization, and was eventually returned to its initial federal position by the American colonists via insurrection.

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 his Appendix A to the first volume of the *Commentaries*, Tucker made clear that British concept of sovereignty did not survive the American Revolution. Tucker described the people as possessing “indefinite and unlimited power.”¹⁷⁰ If a mere legislature exceeded a grant of power found in a constitution, Tucker stated that the resulting statute offended “against a greater power from whom all authority, among us, is derived” and that the offending act should be opposed.¹⁷¹ With such annotations, Tucker attempted to render Blackstone useable for American lawyers brought up in the republican tradition.

¹⁶⁸*Federalist* No. 46, at 237 (James Madison) (Gary Wills, ed., 1982).

¹⁶⁹*Federalist* No. 45, at 236 (James Madison) (Gary Wills, ed., 1982).

¹⁷⁰St. George Tucker, On Sovereignty and Legislature, *reprinted in* View of the Constitution with Selected Writings 20 (Clyde N. Wilson, ed., 1999).

¹⁷¹*Id.* at 19.

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 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.¹⁷² 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.”¹⁷³ 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.”¹⁷⁴ 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 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 James I’s reign, and a leader in Parliament during the reign of Charles I.¹⁷⁵ A brilliant thinker, Coke is credited with outlining the principles that have become modern law.¹⁷⁶ Although ahead of his time, it is a mistake to view Coke’s efforts out of context and 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.¹⁷⁷ A writ of prohibition was a process whereby high court judges could stay the proceedings of inferior courts.¹⁷⁸ 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.¹⁷⁹ Thus, judges were eager to hear numerous cases and especially those involving real property, which promised the most lucrative fees.¹⁸⁰

¹⁷²See Kenyon, *supra* note 28, at 75; Berman, *supra* note 19, at 1674.

¹⁷³James I, Speech to the judges in Star Chamber (1616), *reprinted in* Kenyon, *supra* note 28, at 84.

¹⁷⁴*Id.* at 85.

¹⁷⁵Berman, *supra* note 19, at 1674.

¹⁷⁶See generally, John Underwood Lewis, Sir Edward Coke (1552-1634): His Theory of “Artificial Reason” as a Context for Modern Basic Legal Theory, in Boyer, *supra* note 47, at 107, 107.

¹⁷⁷*Prohibitions del Roy* (1607), *reprinted in* Kenyon, *supra* note 28, at 80.

¹⁷⁸W.J. Jones, The Crown and the Courts in England, 1603-1625, in Boyer, *supra* note 47, at 282, 290.

¹⁷⁹J.P. Kenyon, The Judiciary, in Kenyon, *supra* note 28, at 74.

¹⁸⁰*Id.* at 75.

The case of *Prohibitions del Roy* concerned the issue of payment of tithes over which the Ecclesiastical courts claimed jurisdiction.¹⁸¹ The Archbishop of Canterbury complained to James about Coke's use of the writ of prohibition in tithe 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 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 determine them himself."¹⁸² 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.¹⁸³ Coke further observed that the king lacked the requisite learning in the law to serve as a judge outside the House of Lords.¹⁸⁴ 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).¹⁸⁵ James took umbrage at the remark, reportedly flying into a rage and threatening to strike Coke.¹⁸⁶ Fearing the king's wrath, Coke fell to his knees and begged James for forgiveness.¹⁸⁷

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.¹⁸⁸ This was a "promotion" in status but adversely affected Coke's financial position because the litigation in King's Bench brought in lesser fees.¹⁸⁹ At King's Bench, Coke continued to anger James by refusing to postpone certain hearings so the king could "consult" with his judges.¹⁹⁰ Eventually, the king ended Coke's judicial career by dismissing him from King's Bench.¹⁹¹ Coke was 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 dismissal from, King's Bench. Judges were agents of the Crown; they were not an independent branch of government meant to limit royal authority.¹⁹² 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.

¹⁸¹*Prohibitions del Roy* (1607), reprinted in Kenyon, *supra* note 28, at 80.

¹⁸²*Id.*

¹⁸³*Id.*

¹⁸⁴*Id.* at 81.

¹⁸⁵*Id.*

¹⁸⁶Alan D. Boyer, *Introduction to Boyer, supra* note 47, at ix.

¹⁸⁷*Id.*

¹⁸⁸*Id.*

¹⁸⁹Thomas G. Barnes, *Introduction to Coke's "Commentary on Littleton,"* in Boyer, *supra* note 47, at 1,15.

¹⁹⁰*Id.*

¹⁹¹*Id.*

¹⁹²W.J. Jones, *The Crown and the Courts in England, 1603-1625,* in Boyer, *supra* note 47, at 282, 283 (noting that "[n]otions that the king was 'opposed' by judges or common lawyers lack credibility").

In support of this, scholars cite¹⁹³ to Coke's opinion in *Dr. Bonham's Case*¹⁹⁴ 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."¹⁹⁵ 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 Parliament,¹⁹⁶ 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.¹⁹⁷ The president and censors of the college were permitted to retain half of the money they received for fines imposed.¹⁹⁸ As a royal creation, the college was closely tied to the monarchy and its power often increased and diminished along with the monarch's.¹⁹⁹ After a period of dormancy, the college began to exercise its prosecutorial and judicial powers in the late 1500s and early 1600s.²⁰⁰

In 1605, Dr. Bonham attempted to join the college, but the membership rejected him.²⁰¹ Despite a warning from the college, Bonham continued to practice medicine in London.²⁰² 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.²⁰³ 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.²⁰⁴ Following this advice, the college sued Dr. Bonham in King's Bench seeking £60 in fines for illicit practice.²⁰⁵ Tellingly, the attorney general rather than the college's attorney handled the case.²⁰⁶ Bonham filed his own suit in Common Pleas seeking £100 for false imprisonment.²⁰⁷

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.²⁰⁸ One year later, Coke ruled in favor of Dr. Bonham and ordered him released. Coke detested anti-competitive monopolies such

¹⁹³ See, e.g., John V. Orth, *Did Sir Edward Coke Mean What He Said?*, 16 Const. Comment. 33 (1999).

¹⁹⁴ 8 Co. Rep.107a (1610).

¹⁹⁵ *Id.* at 114a.

¹⁹⁶ Harold J. Cook, *Against Common Right and Reason: The College of Physicians v. Dr. Thomas Bonham*, in Boyer, *supra* note 47, at 127, 130.

¹⁹⁷ 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).

¹⁹⁸ J.W. Gough, *Fundamental Law in English Constitutional History* 33 (1961).

¹⁹⁹ Harold J. Cook, *Against Common Right and Reason: The College of Physicians v. Dr. Thomas Bonham*, in Boyer, *supra* note 47, at 127, 131.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 134-35.

²⁰² *Id.* at 135.

²⁰³ *Id.*

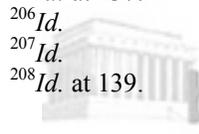
²⁰⁴ *Id.* at 136.

²⁰⁵ *Id.* at 137.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 139.



as that possessed by the College.²⁰⁹ 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.²¹⁰ 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."²¹¹ 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 absurd result).²¹² 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 the 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 leaves no doubt whether it was the intent of the legislature to do so.²¹³

Such an interpretation of *Dr. Bonham's Case* also makes sense in light of Coke's championing 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.²¹⁴ In the 1620s Coke also angered the king when he chaired Parliament's Committee of Grievances that investigated grants of monopoly and patents such as that possessed by the Royal College in *Dr.*

²⁰⁹See Elizabeth Read Foster, *The Procedure of the House of Commons Against Patents and Monopolies, 1621-1624*, in Boyer, *supra* note 47, at 302, 302-27.

²¹⁰Harold J. Cook, *Against Common Right and Reason: The College of Physicians v. Dr. Thomas Bonham*, in Boyer, *supra* note 47, at 127, 142.

²¹¹*Dr. Bonham's Case*, 8 Co. Rep. at 114a.

²¹²See Gough, *supra* note 198, at 40.

²¹³William Blackstone, 1 Commentaries *91.

²¹⁴The Petition of Right (1628), *reprinted* in Kenyon, *supra* note 28, at 68.

Bonham's Case.²¹⁵ 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.”²¹⁶

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 and augmented 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.”²¹⁷

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 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.”²¹⁸

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.²¹⁹ 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

²¹⁵Elizabeth Read Foster, *The Procedure of the House of Commons Against Patents and Monopolies, 1621-1624*, in Boyer, *supra* note 47, at 302, 312.

²¹⁶Sir 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).

²¹⁷Harold J. Cook, *Against Common Right and Reason: The College of Physicians v. Dr. Thomas Bonham*, in Boyer, *supra* note 47, at 127, 146.

²¹⁸The Declaration of Independence para. 12 (U.S. 1776).

²¹⁹Gordon S. Wood, *Creation of the American Republic 1776-1787*, at 157 (1969) [hereinafter Wood, *Creation*].

for their opposition to British policy.²²⁰

To remedy these abuses, early American constitutions reduced the power of the executive branch and increased that of the legislature—the one branch of government most closely connected with the people.²²¹ 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).²²² 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.²²³ In only four states did the executive enjoy the power of appointment—the remaining nine lodged the power in the legislature.²²⁴ 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.²²⁵ 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.²²⁶ 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 controversies.²²⁷ 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.²²⁸ 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."²²⁹ 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.²³⁰

²²⁰*Id.*

²²¹*Id.* at 155.

²²²*Id.*

²²³Jackson Turner Main, *The Sovereign States, 1775-1783*, at 188-89 (1973).

²²⁴*Id.* at 192.

²²⁵*Id.* at 193.

²²⁶Willi Paul Adams, *The First American Constitutions* 267 (1980).

²²⁷M.J.C. Vile, *Constitutionalism and the Separation of Powers* 23 (2d ed. 1998).

²²⁸*Id.* at 151.

²²⁹Thomas Jefferson, *Notes on the State Virginia* 120 (William Peden, ed., W.W. Norton & Co., 1982) [hereinafter *Jefferson, Notes*]. Even Blackstone in the 1760s recognized the three branches as distinct and counseled for a general separation. *See* William Blackstone, 1 *Commentaries* *259-60.

²³⁰Massachusetts Constitution (1780), *reprinted in* 1 Kurland & Lerner, *supra* note 167, at 13-14.

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 judicial²³¹), 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, term limits, frequent elections, and juries.²³² 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.”²³³ 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.²³⁴ Juries in pre-revolutionary America possessed virtually unlimited power to determine both law and fact.²³⁵ Judges were often relegated to deciding pretrial motions and other ministerial matters.²³⁶ 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.²³⁷ Decisions of the superior courts could be appealed to special juries, not a supreme court.²³⁸ 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.

Similarly, the people did not trust judges to rule on the constitutionality of legislation.²³⁹ 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

²³¹ 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) [hereinafter Nelson, *Origins*].

²³² Adams, *supra* note 226, at 269-70;

²³³ Wood, *Creation*, *supra* note 219, 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.”) [hereinafter Amar, *America’s Constitution*].

²³⁴ Forrest McDonald, *Novus Ordo Seclorum* 85 & 289 (1985).

²³⁵ William E. Nelson, *Americanization of Common Law* 28-29 (1975) [hereinafter Nelson, *Americanization*]; 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”).

²³⁶ Nelson, *Americanization*, *supra* note 235, at 28-29.

²³⁷ Main, *supra* note 223, at 171-72.

²³⁸ *Id.*

²³⁹ McDonald, *supra* note 234, 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, *America’s Constitution*, *supra* note 233, 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”)

people.²⁴⁰ Based on a vote of two-thirds of the censors, a state constitutional convention could be summoned to correct constitutional abuses or mistakes.²⁴¹ Popular control of the judiciary was also evident in states requiring judges to stand for reelection,²⁴² 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.²⁴³

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, consists on main preservative of the public liberty.”²⁴⁴ 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.”²⁴⁵ On the motion of Gouverneur Morris, the delegates struck the language prohibiting the increase in salaries.²⁴⁶ Benjamin Franklin observed that the possibility of inflation or increased judicial duties counseled in favor of the authority to increase the pay of judges.²⁴⁷ The motion passed with only Virginia and North Carolina voting against it.²⁴⁸ 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.”²⁴⁹

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

²⁴⁰McDonald, *supra* note 234, at 153.

²⁴¹*Id.*

²⁴²*Id.*

²⁴³*Id.*

²⁴⁴William Blackstone, 1 Commentaries *259.

²⁴⁵James Madison, Notes of the Debates in the Federal Convention of 1787, at 32 (W.W. Norton & Co. 1966) (1840).

²⁴⁶*Id.* at 317-18.

²⁴⁷*Id.* at 318.

²⁴⁸*Id.*

²⁴⁹*Id.* at 32.

Constitution. This was done too with general approbation.”²⁵⁰

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.²⁵¹ To protect the rights of the people, he preferred to rely “on the Representatives of the people as the guardians of their Rights & interests.”²⁵² 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.”²⁵³

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.”²⁵⁴ 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.²⁵⁵ Judicial self-defense, like Gerry’s statements about the judicial department, also hint 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.”²⁵⁶ 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.”²⁵⁷ He also observed that when ruling from the bench judges “could impede in one case only, the operation of law.”²⁵⁸ Sitting on the council, judges could have a say on every unjust law and effect 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 to have an opportunity of remonstrating against projected encroachments on the

²⁵⁰*Id.* at 61.

²⁵¹*Id.* at 338.

²⁵²*Id.*

²⁵³*Id.* at 340.

²⁵⁴*Id.* at 61.

²⁵⁵*Id.* at 79.

²⁵⁶*Id.* at 338.

²⁵⁷*Id.* at 81.

²⁵⁸*Id.* at 341.

people as well as themselves.”²⁵⁹ 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.”²⁶⁰ 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.²⁶¹

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 delegates offering opinions on the matter seemed to have contemplated a form judicial review.²⁶² 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 their constitutional prerogatives rather than striking all sorts of legislative 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.²⁶³ A court should not negative 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.”²⁶⁴ 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.”²⁶⁵ Charles Pinckney of South Carolina wanted to broaden the veto power to all state laws that Congress believed to be improper.²⁶⁶ Madison seconded the motion, noting that such a veto was “absolutely necessary to a perfect system.”²⁶⁷ Madison feared that without a legislative veto “the only remedy will lie in an appeal to coercion.”²⁶⁸ Gerry and others opposed this measure, observing that a national government with such a power

²⁵⁹*Id.* at 336.

²⁶⁰*Id.* at 337.

²⁶¹*Id.*

²⁶²McDonald, *supra* note 234, at 254.

²⁶³ Sylvia Snowiss, *Judicial Review and the Law of the Constitution* 60 (1990).

²⁶⁴Madison, *supra* note 245, at 31.

²⁶⁵*Id.* at 44.

²⁶⁶*Id.* at 88.

²⁶⁷*Id.*

²⁶⁸*Id.*

“may enslave the States.”²⁶⁹ Gouverneur Morris feared that the proposed negative “would disgust all the States.”²⁷⁰ Morris believed that the proposal was also unnecessary because an unconstitutional law would “be set aside in the Judiciary department.”²⁷¹ 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.²⁷²

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.”²⁷³ This excluded juries from the supremacy clause and made clear that the clause applied to national as well as state judges.²⁷⁴ The committee made other revisions including changing “supreme law of the respective states” to “supreme law of the land.”²⁷⁵ Without question, the supremacy clause contemplated federal and state judges reviewing the constitutionality of legislative enactments because they were bound by “the supreme law of the land.” The Constitution required them to exercise judgment on just 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.²⁷⁶ Hamilton viewed the people as the ultimate sovereigns who would be expressing their will by adopting the Constitution.²⁷⁷ The people’s Constitution would thus be superior to statutory law.²⁷⁸ If Congress could pass a law outside of its delegated powers, Hamilton reasoned, this would “affirm that the deputy is greater than his principal.”²⁷⁹

Hamilton focused on the fact that the proposed Constitution placed written limits on government power, something unknown under the British constitution.²⁸⁰ These limitations, he

²⁶⁹*Id.* at 89.

²⁷⁰*Id.* at 305.

²⁷¹*Id.*

²⁷²*Id.* at 305-06 (internal quotation marks omitted).

²⁷³*Id.* at 390.

²⁷⁴McDonald, *supra* note 234, at 255.

²⁷⁵Madison, *supra* note 245, at 626.

²⁷⁶The *Federalist* No. 78, at 395 (Alexander Hamilton) (Gary Wills, ed., 1982).

²⁷⁷*Id.*

²⁷⁸*Id.*

²⁷⁹*Id.*

²⁸⁰*Id.* at 394.

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.”²⁸¹ To Hamilton, courts served as an “intermediate body between the people and the legislature . . . to keep the latter within in the limits assigned to their authority.”²⁸² This judicial power did not place the judiciary above the legislature, Hamilton averred, but rather put the people above both.²⁸³

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 in America, most agreed that the people 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 and the arguments 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 examination of early state case law in which a court, or a judge of the court, discussed the doctrine of judicial review or exercised judicial review.²⁸⁴ These cases provide needed background to the famous *Marbury* decision and place the decision and its reasoning in proper historical context.

1. *Commonwealth v. Caton*, 8 Va. (4 Call) 5 (1782)²⁸⁵

Caton dealt with a pardon granted to three loyalists by the Virginia House of Delegates.²⁸⁶ Under Virginia’s Treason Act of 1776, the power of pardon in such cases was

²⁸¹ *Id.*

²⁸² *Id.* at 395.

²⁸³ *Id.*

²⁸⁴ Not included in this discussion are opinions that offered little or no analysis for their actions. For a comprehensive discussion of early state exercises of judicial review, see William Michael Treanor, *Judicial Review in State Courts Before Marbury* (1999) (unpublished manuscript on file with the author). The reason for so few decisions likely rests with the fact that very few judges actually wrote opinion in the 1780s and because juries typically exercised the power to strike a law. See Ritz, *supra* note 235, at 30 & 36.

²⁸⁵ For the ease of the reader, pinpoint citations will be to the Westlaw citation: 1782 WL 5 (Va. Nov. 1782).

²⁸⁶ *Id.* at *1.

transferred from the executive to the legislature.²⁸⁷ In *Caton*, the house granted the pardon for the prisoners and referred the matter to the senate for concurrence. The senate, however, thought the prisoners unworthy of clemency and voted to deny a pardon.²⁸⁸

The prisoners filed a petition arguing that although the Treason Act referred to “the general assembly,” the Virginia Constitution in certain cases vested the power to pardon in the house and that this was in fact such a case.²⁸⁹ Because the state constitution must control the issuance of a pardon, the prisoners argued that the Treason Act was void.²⁹⁰ The attorney general countered that the provisions of the state constitution did not run counter to the Treason Act; as a validly enacted statute the Treason Act controlled and the putative pardon was invalid because the upper house had failed to concur.²⁹¹

Judge George Wythe, who would later be a delegate to the Philadelphia Convention, began by noting that it was his duty to protect the senate and the community against usurpations from the house.²⁹² In dealing with the other branches, Wythe promised to inform them that “here is the limit of your authority; and, hither, shall you go, but no further.”²⁹³ 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.²⁹⁴ Because this was not an impeachment case, the house’s pardon of the loyalists was insufficient.

Writing separately, 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.”²⁹⁵ Pendleton believed that the separation of powers found in the Virginia Constitution required each branch of government to stay within its delegated powers.²⁹⁶ For Pendleton, this separation of powers brought into question judicial review, and 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 the laws.²⁹⁷

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.* at *2.

²⁹⁰ *Id.*

²⁹¹ *Id.* at *1.

²⁹² *Id.* at *2.

²⁹³ *Id.*

²⁹⁴ *Id.* at *4.

²⁹⁵ *Id.* at *7.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

Pendleton ultimately agreed with Wythe's interpretation of the constitution and Treason Act. Hence, he found that the pardon was invalid.²⁹⁸ This view carried the day by a vote of six judges to two.²⁹⁹

Although *Caton* does not provide a great deal of analysis and any statement on the power of courts to strike an act of the legislature is dicta, the Pendleton and Wythe opinions are 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 under the British constitution. He also thought it his duty as a judge to protect both the people and the other branches of government from encroachments. While Wythe obviously rejected the British doctrine that only the legislature can interpret the constitution, he did not discuss the scope of judicial review.

In contrast to Wythe's opinion, Pendleton approached judicial review much more cautiously. Pendleton recognized that the court was entering uncharted waters and understood that when declaring a statute unconstitutional a court was arguably taking on a legislative function in violation of the Virginia constitution. Although not ruling judicial review out of bounds, he preferred to save the issue for the proper case or controversy.

2. *Rutgers v. Waddington* (1784)³⁰⁰

Rutgers involved a challenge to a New York statute known as the Trespass Act.³⁰¹ Its purpose was to assist property owners who had fled New York during the Revolution because of the British occupation.³⁰² In essence, the statute authorized the owners, whose property had been confiscated and used by the British, to file trespass actions for compensation.³⁰³ The Trespass Act specifically prohibited the pleading of military orders as a defense to suit.³⁰⁴

In 1776, Elizabeth Rutgers fled New York and her brew house located on Maiden Lane.³⁰⁵ Her abandoned property was confiscated for the use of the army by the British commissary and given to Benjamin Waddington and Evelyn Pierrepont.³⁰⁶ They enjoyed the rent-free use of the property until May 1, 1780, when the British commander decreed that they pay £150 per year to the Vestry for the Poor.³⁰⁷ On June 20, 1783, the British commander ordered them to pay rent to Rutgers's agent retroactive to May 1, 1783.³⁰⁸ In the winter of 1783 a fire broke out and destroyed the brewery.³⁰⁹ Pursuant to the Trespass Act, Rutgers brought suit

²⁹⁸ *Id.* at * 9.

²⁹⁹ Edmund Pendleton, Account of "The Case of the Prisoners," in 2 *The Letters and Papers of Edmund Pendleton 1734-1803*, at 426 (David John Mays, ed., 1967).

³⁰⁰ This is an unreported decision. However, the various briefs and opinions are found in: 1 *The Law Practice of Alexander Hamilton* (Julius Goebel, Jr., ed., 1964).

³⁰¹ *Id.* at 289.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.* at 296.

³⁰⁵ *Id.* at 289.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 290.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

for £8000 back rent.

Alexander Hamilton represented Waddington and Pierrepont. He argued that the Trespass Act was inconsistent with settled principles of the law of nations (i.e., a conqueror has the right to use property under the conqueror's control) which had been incorporated into the New York Constitution, and that the Act was violative of provisions of the Treaty of Paris waiving private damages "in consequence of or in any wise relating to the war."³¹⁰ In briefing the issues, Hamilton cited to *Dr. Bonham's Case*, arguing that "[a] statute against Law and reason especially if a private statute is void."³¹¹ In later briefs, Hamilton argued that the result would be the same even if "the legislature intended the results of the Act."³¹² Hence, it appears Hamilton rejected Blackstone's explanation of *Dr. Bonham's Case* as a mere exercise of the cannons of statutory interpretation whereby a statute contradicting established legal principles is narrowly construed so the result is not absurd.

Judge James Duane issued a carefully crafted opinion holding that the Trespass Act should not be interpreted to interfere with the law of nations. In essence, he split the baby by holding that the law of nations served as a defense when considering orders of the British commander, but not officials of the British commissary.³¹³ 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). He rejected the treaty argument in toto.³¹⁴

Regarding judicial review, 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 challenge legislative supremacy:

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 them. When the main object of such a law is clearly expressed, and the intention manifest, the judges are not at liberty, altho' it appears *unreasonable*, to reject it: for this were to set the *judicial* above the legislative, which would be subversive of all government.³¹⁵

Like Blackstone, Judge Duane observed that judges could resort to equity in expounding a statute when it is clear that absurd consequences were not foreseen by the legislature.³¹⁶ This, however, effectuated the intent of the legislature and did not result in judicial ascendancy.³¹⁷ Armed with the cannons of statutory construction, Judge Duane ruled that the legislature could not have intended to repeal the law of nations with the Trespass Act; therefore, orders of the British commander provided a defense.

³¹⁰ *Id.* at 299.

³¹¹ *Id.* at 357.

³¹² *Id.* at 382.

³¹³ *Id.* at 393-419.

³¹⁴ *Id.*

³¹⁵ *Id.* at 415.

³¹⁶ *Id.*

³¹⁷ *Id.*

Judge Duane's exercised some legal gymnastics to reach this result. He also likely faced political pressure as evidenced by an open letter in the *New York Packet and American Advertiser*. In this letter published after the *Rutgers* decision, Melancton Smith and other influential New Yorkers noted that a power in the courts to control the legislature would be "absurd in itself."³¹⁸ The job of the courts, the letter lectured, was "to declare the laws, not to alter them."³¹⁹ If courts struck an act of the legislature, they violated principles of separation of powers and endangered the liberties of the people.³²⁰ In addition to Smith and his followers, Duane's efforts at statutory construction also earned him a rebuke from the legislature and the threat of impeachment—the legislature did not agree that the words of the statute yielded an absurd result.³²¹

The threats and stinging criticism of Duane's opinion, however, seem misplaced because he did not strike down a statute nor did he claim such a power. The *Rutgers* opinion was true to Blackstone and American respect for the legislative branch; Judge Duane did not accept Hamilton's theory of judicial review. Judge's Duane statutory construction did defeat the purpose of full compensation for patriots and thus started a political firestorm. This firestorm 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)³²²

Trevett arose out of legislation passed by the Rhode Island General Assembly authorizing the issuance of paper money.³²³ To compel acceptance of the paper, the General Assembly passed a Forcing Act that levied fines on persons refusing to accept paper and persons contributing to the depreciation of the paper currency's value.³²⁴ Violators could be tried without a jury in special court and had no right to appeal.³²⁵ Weeden violated the paper money statute when he refused to accept paper currency from John Trevett.³²⁶ 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, 1786.³²⁷

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.³²⁸ Weeden specifically argued that the court could strike the law as unconstitutional because "the Legislature derives all its authority from the constitution—has no power of making

³¹⁸ *Id.* at 314.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ Kramer, *supra* note 119, at 66.

³²² This is an unpublished case—accounts appeared only in newspapers and pamphlets of the time. The best written account of the case is Patrick T. Conley, *The Constitutional Significance of Trevett v. Weeden* (1786) (1976).

³²³ *Id.* at 3.

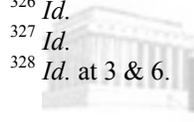
³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.* at 3 & 6.



laws but in subordination to it—cannot infringe or violate it.”³²⁹ The Court ultimately dismissed the complaint against Weeden because the action was not brought in a special court as commanded by statute.³³⁰ In so holding, the court observed that the “complaint does not come under cognizance of the Justices here present, and . . . it is hereby dismissed.”³³¹

The General Assembly, however, interpreted the court’s decision otherwise 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.”³³² Judges David Howell, Joseph Hazard, and Thomas Tillinghast appeared to explain their decision.³³³ In his speech, Judge Howell denied that the court struck the statute as unconstitutional, but nonetheless stated that it was his personal opinion that it was unconstitutional.³³⁴ Even with this clarification, the legislature considered dismissing the judges from office but eventually relented.³³⁵ The legislature did not forget Judge Howell’s speech favoring judicial review and 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.³³⁶

Although the Rhode Island judges did not exercise the power of judicial review, counsel for Weeden urged the court to exercise such a power. Had the case been brought in the proper court, Judge Howell indicated that he believed that the statute in question was unconstitutional. The legislature showed its adherence to principles of legislative supremacy when it demanded that the judges appear to defend their rulings and later when it dismissed four of the five judges even though they had not exercised judicial review. Rhode Island, like New York with the *Rutgers* case, was not prepared to accept expansion of the judiciary’s power.

4. *Bayard v. Singleton*, 1 N.C. (Mart) 5 (1787)³³⁷

Bayard dealt with title to property that had been confiscated in the Revolutionary War.³³⁸ By statute, the North Carolina legislature directed that claims to such 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.³³⁹ The defendant produced a proper affidavit and asked that the suit be dismissed.³⁴⁰ The plaintiff countered that the statute deprived him of his constitutional right to a jury trial and therefore it was void.³⁴¹

The judges expressed reluctance to dispute the wisdom of the legislature, but felt

³²⁹ *Id.* at 7.

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.* at 8.

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.* at 9.

³³⁶ *Id.*

³³⁷ For the ease of the reader, pinpoint citations will be to the Westlaw citation: 1787 WL 6 (N.C. Nov. 1787).

³³⁸ *Id.* at *1.

³³⁹ *Id.*

³⁴⁰ *Id.* at *2.

³⁴¹ *Id.*

compelled to examine the validity of the statute because of the solemnity of their oaths.³⁴² The court began by noting that every citizen had a right to a trial by jury in cases of disputed title to property.³⁴³ If the legislature could take away this fundamental right, the court observed, then they also had the authority to transform the character of state government from republican to monarchical.³⁴⁴ The judiciary, being “bound to take notice of [the constitution] as much as of any other law,” could not permit such a result.³⁴⁵ Accordingly, the court ordered that the case should be tried by a jury because the act of the legislature was without effect.³⁴⁶

Undoubtedly, the *Bayard* court exercised judicial review over an act of the legislature. The *Bayard* decision cannot be characterized as an act of statutory construction in the tradition of *Dr. Bonham’s Case*. Recognizing that the legislature was not the ultimate sovereign of the state, the court specifically noted that it could “take notice” of the constitution. In other words, the constitution was not exclusively in the orbit of the legislative branch as in Great Britain. 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*, 1 S.C.L. (1 Bay) 93 (1789).³⁴⁷

In late 1788, a family of British settlers left the Bay of Honduras for South Carolina.³⁴⁸ Prior to leaving Honduras, the settlers researched South Carolina law to determine whether they could safely bring their seven slaves into the state.³⁴⁹ 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.³⁵⁰ The statute also provided that the forfeited slaves would be given to the person reporting the illegal entry into the state.³⁵¹

Upon the settlers’ entry into South Carolina, a revenue officer brought suit under the statute to claim the forfeited slaves.³⁵² The settlers challenged the statute’s constitutionality, citing to *Dr. Bonham’s Case* and arguing that the inequitable result could never have been contemplated by the legislature.³⁵³ They had not intentionally violated the statute and could not have learned of its passage while in transit.³⁵⁴ 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.”³⁵⁵

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.* at *3.

³⁴⁶ *Id.*

³⁴⁷ For the ease of the reader, pinpoint citations will be to the Westlaw citation: 1789 WL 140 (S.C. Oct. 30, 1789).

³⁴⁸ *Id.* at *1.

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.* at *2.

³⁵⁴ *Id.*

³⁵⁵ *Id.*

In a one-paragraph opinion, the court agreed with the settlers.³⁵⁶ “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.*”³⁵⁷ 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.³⁵⁸

Broadly reading the opinion, one could argue that the court struck the statute as applied to the settlers and thus 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 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*, 1 S.C.L. (1 Bay) 252 (1792).³⁵⁹

Bowman concerned a 1712 act of the South Carolina General Assembly transferring a freehold from one holder and his heirs to another.³⁶⁰ 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.³⁶¹

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. Because there was no citation to the case or discussion of *Dr. Bonham’s Case*, we can only speculate about 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.

³⁵⁶ *Id.* at *3.

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ For the ease of the reader, pinpoint citations will be to the Westlaw citation: 1792 WL 207 (S.C. May 1792).

³⁶⁰ *Id.* at *1.

³⁶¹ *Id.*

7. *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20 (1793)³⁶²

Kamper 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.³⁶³ Prior to the statute in question, such jurisdiction was reserved for the state chancery court.³⁶⁴ The statute was challenged on grounds that it circumvented constitutional provisions requiring judges be appointed by the joint ballot of both houses of legislature followed by an executive commission for good behavior.³⁶⁵ 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 legislature “derive their *existence* from the Constitution.”³⁶⁶ It thus followed that the legislature cannot alter the document—such power, in Judge Nelson’s view, resided in the people of Virginia.³⁶⁷ He candidly admitted that some Virginians believed that the judiciary assumed the power of the legislature or placed itself above the legislature when exercising judicial review.³⁶⁸ 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.³⁶⁹ But, if the courts were presented with actual cases or controversies between litigants, the courts were bound to rule.³⁷⁰ This review of legislation, Judge Nelson asserted, was no “novelty.”³⁷¹ 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.”³⁷² 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.³⁷³

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.³⁷⁴ 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 it being against the spirit of the Constitution.”³⁷⁵ On further reflection, Judge Roane noted, he had changed his opinion: “I now think that the judiciary may and ought not only 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 fundamental principles thereof.”³⁷⁶ In other words, the judiciary should strike laws violating

³⁶² For the ease of the reader, pinpoint citations will be to the Westlaw citation: 1793 WL 248 (Va. Nov. 16, 1793).

³⁶³ *Id.* at *2.

³⁶⁴ *Id.*

³⁶⁵ *Id.* at *5.

³⁶⁶ *Id.* at *4.

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *See id.*

³⁷¹ *Id.* at *5.

³⁷² *Id.*

³⁷³ *Id.* at *6.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.*

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.³⁷⁷ It naturally followed that the legislature could not alter the constitution’s procedure for appointing judges by a mere statute.³⁷⁸ 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.”³⁷⁹ 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.³⁸⁰ He then recounted some history of the Revolution and turned to founding principles. Prior to the Revolution, Judge Henry observed, Americans were “taught that Parliament was *omnipotent*, and their powers beyond control.”³⁸¹ With the Virginia Constitution, this legislative power was limited because the constitution was “founded on the authority of the people.”³⁸² Turning to the statute, Judge Henry could not reconcile it with the constitutional provisions for judicial appointments. To uphold the statute, he observed, “would be a solecism in government—establishing the will of the legislature, servants of the people, to control the will of their masters.” Such an outcome could not be permitted.

Judge Tyler was the fourth judge to deliver an opinion in *Kemper*. Like his colleagues, he led off with fundamentals. He observed that the Constitution was a “great contract of the people” and was thus “paramount law.”³⁸³ 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.³⁸⁴ 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.”³⁸⁵ He reminded his colleagues that Parliament’s claim of supreme power was “an abominable insult upon the honour and good sense of our country.”³⁸⁶ In post-revolutionary Virginia, only “the God of Heaven and our constitution” could claim true omnipotence.³⁸⁷ Based upon these principles, Judge Tyler declared it his duty to rule upon the constitutionality of statutes that were presented in cases and controversies.³⁸⁸ 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 good.”³⁸⁹ 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.

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.* at *7.

³⁸⁰ *Id.* at *10.

³⁸¹ *Id.* at *11.

³⁸² *Id.* at *12.

³⁸³ *Id.* at *15.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.* at *16.

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.*



The last opinion was delivered by Judge St. George Tucker. In determining the source of ultimate power, Tucker looked to the people and described them as possessing “*sovereign, unlimited, and unlimitable* authority.”³⁹⁰ Governments possessed only that authority delegated by the people, Tucker noted, which was in sharp contrast to the British theory of legislative omnipotence.³⁹¹ With the source of power established, Tucker declared that Virginia “legislators derive their power from the constitution”; therefore, “they can[not] change it[] without destroying the foundation of their authority.” 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.”³⁹² 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.”³⁹³ 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 body.”³⁹⁴ But would not such a power place the judiciary above the legislative? According to Tucker, no. It only means that the people are superior to both branches and thus the judges must follow the instructions of the people as found in fundamental law.³⁹⁵ In following the people’s Constitution, Tucker agreed with his four colleagues and struck the statute expanding equity jurisdiction as a violation of Virginia’s fundamental law.

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 this 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.”³⁹⁶ 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.

Although all *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. 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. These disagreements aside, both judges concurred that courts should strike a legislative act when it is contrary to the constitution.

³⁹⁰ *Id.* at *21.

³⁹¹ *Id.* at *22.

³⁹² *Id.* at *23.

³⁹³ *Id.* at *24.

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.* at *16.

8. *State v. _____*, 2 N.C. (1 Hayw.) 28 (1794)³⁹⁷

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.³⁹⁸ 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."³⁹⁹ The law of the land, according to Judge Williams, required that the receivers be accorded an opportunity to be heard before a jury of their peers.⁴⁰⁰ The attorney general objected that the state bill of rights did not restrict the legislature, but was directed to foreign powers that might claim a right to interfere with North Carolina's internal government.⁴⁰¹

Holding the bill of rights restricted the legislature, Judge Williams rejected the attorney general's argument.⁴⁰² 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."⁴⁰³ When the legislature exceeds its authority, its "acts are no more binding than the acts of any other assembled body."⁴⁰⁴ If he did not undertake his "duty to resist an unconstitutional act," the people's liberties would be jeopardized and the constitution overthrown.⁴⁰⁵ Refusing to accept defeat, the attorney general asked a two-judge panel to reconsider the Judge Williams's ruling.⁴⁰⁶ Without revealing their reasoning, the panel held that the attorney general could proceed with default judgments.⁴⁰⁷

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 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.

9. *Lindsay v. Commissioners*, 2 S.C.L (2 Bay) 38 (1796)⁴⁰⁸

Lindsay dealt with the power eminent domain. The South Carolina General Assembly enacted a statute permitting the Charleston City Council to take property to build a new street.⁴⁰⁹

³⁹⁷ For the ease of the reader, pinpoint citations will be to the Westlaw citation: 1794 WL 87 (N.C. Mar. 1794).

³⁹⁸ *Id.* at *1.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* at *2.

⁴⁰² *Id.* at *1.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* at *3.

⁴⁰⁷ *Id.*

⁴⁰⁸ For the ease of the reader, pinpoint citations will be to the Westlaw citation: 1796 WL 546 (S.C. Oct. 1796).

⁴⁰⁹ *Id.* at *1.

The statute did not provide that the owners be paid just compensation.⁴¹⁰ 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.”⁴¹¹ 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.”⁴¹²

The court split evenly over this issue. 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.⁴¹³ Justices Burke and Waites disagreed, ruling that the owners were entitled to just compensation to be ascertained by a jury of their peers.⁴¹⁴ Waites’s opinion is the most notable of the three for his discussion of judicial review.

Waites stated that “it was painful for him to be obliged to question the exercise of legislative power, but he was sworn to support the constitution.”⁴¹⁵ Permitting the legislature to violate the constitution, Justice Waites noted, subjected the people to mere “legislative will.”⁴¹⁶ 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.”⁴¹⁷ This judicial role provides an “independent security” for the rights of the citizenry.

Anticipating objections to his opinion, Justice Waites denied that his opinion advocated “judicial supremacy.”⁴¹⁸ If an act is held void, Justice Waites 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.⁴¹⁹

Although the split in the court prevented an exercise of judicial review, Justice Waites’s opinion shares much in common with the *Kamper* opinions. Justice Waites denied legislative supremacy and instead appealed to the people’s ultimate sovereignty. The courts, to Justice Waites, were protectors of the people’s liberties. 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 Waites would have struck it down.

10. *Respublica v. Duquet*, 2 Yeates 493 (Pa. 1799)⁴²⁰

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.⁴²¹ In 1796, the City passed

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at *2 (emphasis omitted).

⁴¹² *Id.*

⁴¹³ *Id.* at *11.

⁴¹⁴ *Id.* at 12.

⁴¹⁵ *Id.* at *13.

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ For the ease of the reader, pinpoint citations will be to the Westlaw citation: 1799 WL 240 (Pa. 1799)

⁴²¹ *Id.* at *1.

an ordinance pursuant to the state statute.⁴²² 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.⁴²³

After the case was removed to the state supreme court, Duquet challenged the statute as unconstitutional.⁴²⁴ 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.⁴²⁵ Only the attorney general as a representative of the sovereign people, Duquet argued, could prosecute "general public offenders."⁴²⁶

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.⁴²⁷ 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."⁴²⁸ Although the statute in question was constitutional, the court made clear that in the appropriate case it would not "shrink from the task of saying such a law is void."⁴²⁹

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.

12. *Whittington v. Polk*, 1 H. & J. 236 (Md. 1802).⁴³⁰

Whittington dealt with a statute reorganizing the Maryland judiciary.⁴³¹ The statute, among other things, removed William Whittington as the chief justice of the county courts and replaced him with William Polk.⁴³² Whittington challenged the statute as unconstitutional because he held his office during good behavior.⁴³³

As typical of other courts reviewing legislative acts, the *Whittington* court began its opinion noting that the people were the source of all power and that they had delegated to government only certain powers.⁴³⁴ It followed that the legislature could not be the judge of its own powers because that would "establish a despotism."⁴³⁵ The court observed that the people

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.* at *2.

⁴²⁶ *Id.*

⁴²⁷ *Id.* at *7.

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ For the ease of the reader, pinpoint citations will be to the Westlaw citation: 1802 WL 349 (Md. Apr. 1802)

⁴³¹ *Id.* at *1.

⁴³² *Id.* at *1.

⁴³³ *Id.* at *1.

⁴³⁴ *Id.* at *4.

⁴³⁵ *Id.*

could not police the boundaries of power because they could only be heard during elections.⁴³⁶ But under the constitution, the judiciary was the “barrier” established to “resist the oppression” of constitutional infringements.⁴³⁷ It thus fell to the courts “to determine whether an act of the legislature . . . is made pursuant to” the constitution.⁴³⁸ 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.⁴³⁹ According to the court, “the judges are liable to be removed from office, on conviction of misbehaviour, in a court of law.”⁴⁴⁰

Dealing with the statute in question, the court held that justices of the county courts served during the pleasure of the governor and could be removed at any time.⁴⁴¹ The constitution’s good behavior provision applied only to the court of appeals, general court, and admiralty court.⁴⁴² Consequently, Whittington had not been unconstitutionally deprived of his office.

Noteworthy in the *Whittington* case is 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. The court candidly admitted that the judicial branch, like the other branches, could usurp constitutional power. To remedy this, the court saw impeachment as a real threat if the judge’s abused their power of constitutional interpretation. Through impeachment the people’s representatives could remove an offending judge and restore legislative power.

13. *State v. Parkhurst*, 9 N.J.L. 427 (1802).⁴⁴³

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.⁴⁴⁴ Aaron Ogden was the clerk of the Essex County Court of Common Pleas and was later elected to the United States Senate.⁴⁴⁵ The clerkship was deemed vacated and Jabez Parkhurst accepted the position.⁴⁴⁶ Ogden challenged that constitutionality of the statute, arguing that under the state constitution clerks served a five-year term unless impeached.⁴⁴⁷ 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.⁴⁴⁸

The state supreme court ruled in favor of Ogden, but its written opinion has not

⁴³⁶ *Id.*

⁴³⁷ *Id.* at *5.

⁴³⁸ *Id.* at *5.

⁴³⁹ *Id.* at *6.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* at *8.

⁴⁴² *Id.* at *8.

⁴⁴³ For the ease of the reader, the pinpoint citation will be to the Westlaw citation: 1802 WL 1 (N.J. 1802).

⁴⁴⁴ *Id.* at *4.

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.* at *12.

⁴⁴⁸ *Id.*

survived.⁴⁴⁹ 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 a surrender of the first.⁴⁵⁰ 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.”⁴⁵¹

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.”⁴⁵² Describing the people as “supreme in power,” Chief Justice Kirkpatrick observed that they had delegated to the state legislature only certain defined powers.⁴⁵³ To hold that the legislature could alter the constitution at will would be, in Chief Justice Kirkpatrick’s words, “a perfect absurdity” by “making the creature greater than the creator.”⁴⁵⁴ 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.⁴⁵⁵

In sum, in the state cases prior to *Marbury*, 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 judicial power was considered a branch of the executive department and this view was accepted by some American thinkers. After 1776, the states curtailed executive power and transferred most of this power to the legislature. This, coupled with long-standing principles of British constitutionalism dictated that the legislature should be the most powerful branch of government. Only as principles of popular sovereignty gained wider acceptance and understanding did Americans become more comfortable with judicial power. The reaction to the *Rutgers* decision and the *Trevett* decision 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 (e.g., *Kamper* 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 (e.g., *Parkhurst*) prohibited the courts from turning a blind eye toward legislative usurpation.

⁴⁴⁹ *Id.* at *3.

⁴⁵⁰ *Id.* at *13.

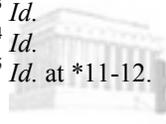
⁴⁵¹ *Id.* at *10.

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.* at *11-12.



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 *Parkhurst* opinion suggested that he could be impeached. Judicial activism, according to Chief Justice Kirkpatrick, constituted grounds for removal.

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, has the final say on a constitution's meaning. It was a big enough step and early on very controversial 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*⁴⁵⁶ in 1803, it was not trailblazing.⁴⁵⁷ As shown above, state courts had discussed the doctrine of judicial review and exercised judicial review since the early 1780s. 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. This popular interpretation cannot stand up under even moderate scrutiny.

The background to *Marbury* is well known. In the 1800 elections, John Adams and his Federalist Party lost control of the White House and Congress. In the late 1790s, via the Alien and Sedition Acts, the Federalists had made it a crime to criticize the national government and gave President Adams the power to deport foreigners based on the president's reasonable suspicion that the foreigner had a secret design against the government.⁴⁵⁸ Outraged at such illiberal measures, the people gave the Republicans a 24-seat majority in the House of Representatives and elected Thomas Jefferson to the presidency.⁴⁵⁹ Desiring to place as many Federalists in office before turning over power to Jefferson and his Republican Party, the lame duck Congress passed the Judiciary Act of 1801 during the chill of February.⁴⁶⁰ Among other

⁴⁵⁶ 5 U.S. (1 Cranch) 137 (1803).

⁴⁵⁷ 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 a 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” Concept of Judicial Review*, 42 *Duke L.J.* 279, 324 (1993).

⁴⁵⁸ The Alien and Sedition Acts are discussed in William J. Watkins, Jr., *Reclaiming the American Revolution* 30-42 (2004).

⁴⁵⁹ *Id.* at 79.

⁴⁶⁰ Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* 15 (1971).

things, the Act created new circuit courts staffed by 16 judges as well as justices of the peace for the District of Columbia.⁴⁶¹

William Marbury had been appointed by President Adams, confirmed by the Senate, but failed to receive his commission before Jefferson assumed office.⁴⁶² 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 as justice of the peace.⁴⁶³ 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.⁴⁶⁴

Regarding the first inquiry, the Court held that Marbury did have a right to the commission. Marbury had been nominated by President Adams, confirmed by the Senate, and his commission had been sealed by the secretary of state.⁴⁶⁵ By this process he had a vested right because there was no other solemnity required by law.⁴⁶⁶ With the process having proceeded so far, the executive's power over the appointment terminated.⁴⁶⁷ President Jefferson, according to the Court, improperly interfered with the process when he instructed Secretary of State Madison to hold the sealed commission.

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.⁴⁶⁸ "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."⁴⁶⁹ If this were not true, the federal government would cease being a government of laws, and the executive would enjoy greater power than the king of Great Britain.⁴⁷⁰ Because 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.⁴⁷¹

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 1789.⁴⁷² 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."⁴⁷³ In all other cases,

⁴⁶¹ *Id.*; see also Nelson, *Origins*, *supra* note 233, at 57.

⁴⁶² 5 U.S. (1 Cranch) at 155.

⁴⁶³ *Id.* at 154.

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.* at 159.

⁴⁶⁶ *Id.* at 162.

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.* at 165-66.

⁴⁶⁹ *Id.* at 166.

⁴⁷⁰ *Id.* at 163.

⁴⁷¹ *Id.* at 168.

⁴⁷² *Id.* at 173; see also Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80.

⁴⁷³ U.S. Const. art. III, § 2.

the Court has appellate jurisdiction subject to congressional regulation.⁴⁷⁴ Because Article Three mentions nothing about issuing writs of mandamus as part of the Court's original jurisdiction, the Court had to consider whether a mere act of Congress could alter original jurisdiction to permit issuance of the writ in cases falling within original, rather than appellate, jurisdiction.⁴⁷⁵

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 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."⁴⁷⁶ Recognizing the people as ultimate sovereigns, the Court described the people as having "original and supreme will."⁴⁷⁷ Exercising this supreme power, the people created three departments of government with limited and defined powers.⁴⁷⁸ So "that those limits may not be mistaken, or forgotten, the constitution is written."⁴⁷⁹ Again recognizing the majesty of the people, the Court averred that "the constitution controls any legislative act repugnant to it."⁴⁸⁰ The Court specifically denied that Congress could alter the people's Constitution by a mere ordinary act of legislation.⁴⁸¹ From this discussion of ultimate sovereignty, it naturally followed "that and act of the legislature, repugnant to the constitution, is void."⁴⁸²

If the Constitution is paramount, then must the courts simply follow the direction of the legislature and give effect to their enactments? Such a proposition, according to the Court, was "an absurdity too gross to be insisted on."⁴⁸³ "[O]f necessity," the Court continued, the judiciary must "expound and interpret" the law.⁴⁸⁴ Often courts are faced with conflicting statutes and they "must decide on the operation of each" to decide the case or controversy presented.⁴⁸⁵ Hence, the Court declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is."⁴⁸⁶ With sovereignty no longer vested in the legislative body, "courts are to regard the constitution" when performing their judicial duties.⁴⁸⁷ To do otherwise would "controvert the very foundation of all written constitutions" and give the people's agent (i.e., Congress) a power greater than the principal.⁴⁸⁸ It would give the legislature "a practical

⁴⁷⁴ *Id.*

⁴⁷⁵ Arguably, the mention of mandamus in the Judiciary Act did not add to the Supreme Court's original jurisdiction. See Amar, *America's Constitution*, *supra* note 233, 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").

⁴⁷⁶ 5 U.S. (1 Cranch) at 176.

⁴⁷⁷ *Id.*

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.* at 177.

⁴⁸¹ *Id.*

⁴⁸² *Id.*

⁴⁸³ *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.* at 178.

⁴⁸⁶ *Id.* at 177.

⁴⁸⁷ *Id.* at 178. At another point, the Court says that when adjudicating an issue, the Constitution must be "looked into." *Id.* at 179.

⁴⁸⁸ *Id.* at 178.

and real omnipotence.”⁴⁸⁹

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.⁴⁹⁰ The clearest example given 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.”⁴⁹¹ What if Congress decreed that “one witness, or a confession *out of court*, sufficient for conviction, must the constitutional principle yield to the legislative act?”⁴⁹² To give effect to such an enactment, the Court concluded, would be a violation of the judges’ oath.⁴⁹³ Although Congress violated its oath if it attempted to alter the law of treason by mere statute, nothing required judges to join in the violation.⁴⁹⁴ Hence, Congress’s attempt to alter original jurisdiction by statute failed and the Court refused to issue the writ of mandamus.

Marbury, then, 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; reached the same result, although in *Kemper* we are treated to five separate opinions and more in-depth reasoning on what was a novel issue at the time; and put the judiciary on par with the legislative branch. But neither *Kemper* nor *Marbury* declared the court greater than the legislature.

Such an understanding is borne out by contemporary reaction to the *Marbury* opinion. Although Jefferson’s Republicans and Marshall’s Federalists believed themselves to be in a battle for the survival of republicanism in America,⁴⁹⁵ the Republican newspapers expressed little hostility toward the opinion.⁴⁹⁶ James Madison, the defendant in the case, paid even less attention the decision or its ramifications. Madison put not a single comment in writing about the decision.⁴⁹⁷ Jefferson’s objections to the opinion were grounded in Marshall’s criticism of Jefferson’s decision to deny *Marbury* his right to the commission (issues one and two discussed in the opinion).⁴⁹⁸ The Republicans’ failure to criticize the Court’s discussion of judicial review

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.* at 179.

⁴⁹¹ U.S. Const. art. III, § 3.

⁴⁹² 5 U.S. (1 Cranch) at 179.

⁴⁹³ *Id.*

⁴⁹⁴ *Id.*

⁴⁹⁵ See generally, Watkins, *supra* note 458, at 79-82.

⁴⁹⁶ Ellis, *supra* note 460, at 66.

⁴⁹⁷ Jack N. Rakove, *The Legacy of Chief Justice John Marshall: Judicial Power in the Constitutional Theory of James Madison*, 43 Wm & Mary L. Rev. 1513, 1513 (2002).

⁴⁹⁸ Letter from Thomas Jefferson to William Johnson (June 12, 1823), in 12 *The Works of Thomas Jefferson* 259 (Paul Leicester Ford, ed., 1910); see also Haskins & Johnson, *supra* note 457, at 193 (noting that the first portions of the *Marbury* opinion were more important to the Court than the judicial review section). As Charles F. Hobson, the editor of *The Papers of John Marshall*, 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, *America’s Constitution*, *supra* note 233, at 215.

is a strong indicator that there was little or no disagreement on this third point of the opinion.⁴⁹⁹

We must remember that Jefferson was a champion of the people and principles of popular sovereignty that denied the legislature the exclusive right to interpret or modify the Constitution.⁵⁰⁰ Similar to the reasoning of so many state judges on the subject, Jefferson believed all three branches of government could interpret the Constitution.

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 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.⁵⁰¹ Alluding to principles of separation of powers, Jefferson observed that both branches "are equally independent in the sphere of action assigned to them."⁵⁰² 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."⁵⁰³ Likewise, "the Executive, believing the law to be unconstitutional, was bound to remit the execution of it."⁵⁰⁴ 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 are not, not only for themselves in their own sphere of action, but for the Legislature & Executive also, in their spheres, would make the judiciary a despotic branch.⁵⁰⁵

Jefferson realized that the co-ordinate branches would occasionally disagree on matters of constitutional interpretation. Rather than any one branch having the power to decide for the others, he envisioned the people acting through the ballot box or in convention making the final decision. 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 its own reintegration by a change of persons exercising the functions of those departments."⁵⁰⁶ 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."⁵⁰⁷

⁴⁹⁹ *But see* Haskins & Johnson, *supra* note 457, at 195-96.

⁵⁰⁰ Letter from Thomas Jefferson to William Johnson (June 12, 1823) in 12 Ford, *supra* note 498, at 259.

⁵⁰¹ Letter from Thomas Jefferson to Abigail Adams (September 11, 1804) in 1 The Adams-Jefferson Letters 279 (Lester J. Cappon, ed., 1959).

⁵⁰² *Id.*

⁵⁰³ *Id.*

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.*

⁵⁰⁶ Thomas Jefferson, Draft of First Annual Message to Congress, December 8, 1801 LC.

⁵⁰⁷ Letter from Thomas Jefferson to Spencer Roane (September 6, 1819), in 12 Ford, *supra* note 498, at 136.

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.⁵⁰⁸ Forty years later, Jefferson continued to believe that the people acting in convention were the final arbiters of the constitution.⁵⁰⁹

Because the High Court's *Marbury* opinion did not run afoul of Jefferson's departmentalist theory nor call into doubt the sovereignty of the people, the decision was not a threat. *Marbury* simply announced departmentalist doctrine: the Court as well as the other branches possess the power to interpret the Constitution. Without the historical context of the development of the doctrine of sovereignty, its importance to our Revolution, and its part in the early formation of judicial review in the 1780s, modern Americans have difficulty in understanding *Marbury* and its modest holding. After all, for decades American lawyers have been told that the *Marbury* Court declared itself the final authority on the Constitution. 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, law courts, nor people could override the actions of Parliament.

⁵⁰⁸ Jefferson, Notes, *supra* note 229, at 221.

⁵⁰⁹ Letter from Thomas Jefferson to William Johnson (June 12, 1823), in 12 Ford, *supra* note 498, at 259.

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 (e.g., representatives, governors, and judges) often exercise great power, this power is derived from the people and is 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 our 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.⁵¹⁰ Impeachment, as suggested by Chief Justice Kirkpatrick, 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.

⁵¹⁰ 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").