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Law and Judicial Duty

Philip Hamburger*

Introduction

Two hundred years ago, in *Marbury v. Madison*, Chief Justice Marshall delivered an opinion that has come to dominate modern discussions of constitutional law.1 Faced with a conflict between an act of Congress and the U.S. Constitution, he explained what today is known as “judicial review.”

Marshall described judicial review in terms of a particular type of “superior law” and a particular type of “judicial duty.” Rather than speak generally about the hierarchy within law, he focused on “written constitutions.” He declared that the U.S. Constitution is “a superior, paramount law” and that if “the constitution is superior to any ordinary act of the legislature; the constitution, and no such ordinary act, must govern the case to which they both apply.”2 So too, he explained the duty of judges not generally, but by reference to the judicial role in deciding cases: “If two laws conflict with each other, the courts must decide on the operation of each . . . The court must decide which of these conflicting rules governs the case. This is of the very essence of judicial duty.”3

On account of Marshall’s concern with written constitutions and the resolution of cases, judicial review has long seemed to concern this kind of superior law and this particular role of the judiciary. Marshall’s arguments, however, built upon earlier and broader assumptions about law and judicial duty. Today, when commentators begin with *Marbury* in 1803, they are apt to miss these more general ideas. Although they understand that judges review acts in cases with respect to specific superior laws, they have not pursued the historical implications of more general assumptions about the hierarchical character of law and the duty of judges to decide in accord with law. It therefore is necessary to reexamine the early evidence. This evidence suggests that judicial review developed not merely on the basis of ideas about a single type of superior law or the role of judges in the narrow circumstances of deciding cases, but amid broader assumptions about law and judicial duty—about the general relationship between different layers of law and the general duty of judges to decide in accord with law.

The early evidence of judicial review is relatively plentiful. It is often said to be meager—to consist of only a handful of rather dubious cases. Yet it actually survives in considerable quantity from England and its colonies.

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2 *Id.* at 177–78.
3 *Id.* at 178.
and from the American states. The depth of the evidence is such that only portions of it can be presented in this brief essay, which is a tentative, preliminary publication of arguments that will be developed in greater detail later. Nonetheless, enough can be examined here to observe that judicial review was rather different than usually assumed.

Three basic conclusions emerge. First, as already suggested, judicial review developed largely before 1776 in the context of general assumptions about law and judicial duty—about the hierarchical character of law and the duty of judges to decide in accord with law. Second, as a consequence, what has come to be called "judicial review" was a much broader phenomenon than commentators on its history have recognized. Third, because judicial review rested on general assumptions about law and about judicial duty—assumptions that seemed to preexist constitutions—neither the superior status of American constitutions nor the power of courts to review acts under them ordinarily required constitutional or other authorization.

These conclusions call into question the conventional understanding that judicial review had rather late, American, and judicial origins. The U.S. Constitution directly authorizes only a very limited type of judicial review—that occurring when state court judges are "bound" by federal law notwithstanding "contrary" state law. On account of the Constitution's authorization of this small portion of judicial review in state courts, the conventional assumption is that state and especially federal judges had to establish their own authority to review acts, most prominently in 1803 when Chief Justice Marshall gave his opinion in Marbury v. Madison.

4 The Supremacy Clause states:
That this Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to be Contrary notwithstanding.
U.S. Const. art. VI, cl. 2.

5 For example, Learned Hand protests:
It was not a lawless act to import into the Constitution such a grant of power. On the contrary, in construing written documents it has always been thought proper to engrat upon the text such provisions as are necessary to prevent the failure of the undertaking. That is no doubt a dangerous liberty, not lightly to be resorted to; but it was justified in this instance, for the need was compelling.

Learned Hand, The Bill of Rights: The Oliver Wendell Holmes Lectures, 1958, at 29 (1958). Professor Alexander Bickel writes that "the power of judicial review ... cannot be found" in the Constitution and that "the institution of the judiciary needed to be summoned up out of the constitutional vapors, shaped, and maintained; ... If any social process can be said to have been 'done' at a given time and by a given act, it is Marshall's achievement. The time was 1803; the act was the decision in the case of Marbury v. Madison." Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 1 (2d ed. Yale Univ. Press 1986) (1962). As Professor Leonard W. Levy explains: "The problem of legitimacy begins, of course, with the fact that the framers neglected to specify that the Supreme Court was empowered to exercise judicial review. If they intended the Court to have the power, why did they not provide for it?" Leonard W. Levy, Judicial Review, History, and Democracy: An Introduction, in Judicial Review and the Supreme Court 1, 2 (Leonard W. Levy ed., 1967). "Nor is it possible to show that judicial review was a normal function of the courts at the time of the Constitutional Convention. Indeed, the evidence goes the other way." Id. He concludes about intent: "The charge of usurpation most certainly cannot be proved; it is without merit.
The accuracy of this familiar history matters for more than historical reasons. Most concretely, it matters for the authority and the character of judicial review. If the received account is understood to suggest that the judges invented a power for themselves that their constitutions did not directly give them, then the conventional history has the effect of raising questions about the legitimacy and scope of the judicial power to review acts. More generally, the conventional history leaves uncertain how judicial review should be understood within the long trajectory by which Anglo-American governmental institutions have increasingly come to be subject to law. The conventional history could be understood to imply, paradoxically, that the most prominent means of ensuring governmental conformity to constitutions evolved only because one branch of government was willing to go beyond its constitutional authority. In this respect, judicial review seems not to fit within the larger development by which human beings and their institutions came to be regulated by law. For these two reasons—first, the authority and extent of the judicial power of review and, second, the development of the rule of law—it seems important to understand the accuracy of the conventional account and to consider the implications of the early evidence.

A. The Conventional History

In the conventional account of judicial review, general assumptions about law and judicial duty get lost amid the focus on particular superior laws and the familiar role of judges in deciding cases. For example, it is widely recognized that early Americans perceived some particular laws as superior to others. Constitutions were usually considered superior to legislation; moreover, natural law seemed superior to all human laws—whether constitutions or mere statutes. Yet the focus of the conventional history on the preeminence of these particular superior laws has distracted attention from the ways in which judicial review under constitutions was understood by early Americans in the context of broader, generic assumptions about the hierarchical relationship among laws. Similarly, it is well understood that judges need to decide conflicts between superior and inferior laws in the course of resolving cases, but this emphasis on cases has diverted scholars from the broader duty of judges to decide in accord with law. As a result, the specifically American phenomena—American constitutions and judicial review of legislation under these—have been deprived of the more general conceptions of law and judicial duty of which they were but a part.

The difficulty is that the legitimacy of judicial review in terms of the original intent cannot be proved either." Id. Thus, "[l]ong acquiescence by the people and their representatives has legitimized judicial review," and "[j]udicial review, in fact, exists by the tacit consent of the governed." Id. at 12. In the words of Professor Eugene D. Rostow, "[t]he power and duty of the Supreme Court to declare statutes or executive action unconstitutional in appropriate cases is part of the living constitution." Eugene V. Rostow, The Democratic Character of Judicial Review, in Judicial Review and the Supreme Court 74, 77 (Leonard W. Levy ed., 1967). Professor Jack Rakove puts it in slightly different terms: "The supremacy clause . . . provided more of an incentive than a mandate, even if the framers hoped that incentive would evolve into a norm of judicial behavior." Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 175 (Vintage Books 1997) (1996); see also, e.g., Sylvia Snowiss, Judicial Review and the Law of the Constitution, at viii, 1 (1990).
Taken out of this context, judicial review tends to seem late, largely judicial, and peculiarly American. Many precursors to judicial review are familiar, including *Bonham's Case* in England and the Privy Council's enforcement of English law in the colonies. In the absence, however, of general conceptions of judicial duty and hierarchy within law, the early versions of judicial review do not seem directly connected to the judicial review conducted under American constitutions. At best, they seem only analogous. Accordingly, the post-1776, American judicial review seems to have been a bold innovation—a dramatic contribution to law and politics by the inhabitants of the new world. Especially if it is understood as a review of the legislation of sovereign states, it apparently must have been a distinctively American invention.

Judicial review, moreover, seems to have been created by American judges. Clearly, no American constitution, state or federal, generally authorized it. The assumption that federal judges would review federal legislation under the U.S. Constitution can probably be discerned in this document, as has been explored by Bradford R. Clark and others, and certainly assumptions about judicial review became explicit in the framing and ratifying debates. Strikingly, however, the U.S. Constitution directly authorizes only a very narrow type of judicial review by state judges. Any broader judicial review therefore appears to have been not merely a very late development but also a largely judicial one—the usual explanation being that Justice Marshall established judicial review only at the beginning of the nineteenth century in *Marbury v. Madison*.

Of course, some commentators identify earlier American origins and thus offer variations on the conventional history. One such approach is to emphasize the 1787 debates about the framing of the U.S. Constitution. Yet the evidence that the framers assumed judicial review in their discussions makes it all the more puzzling that they authorized only a very confined type of it in their Constitution. One scholar suggests that the framers created judicial review through their reliance on state court judges to enforce federal law against the states. From this perspective, what began as the framers' solution to the problem of federalism was later developed by the judges into a more complete judicial review. If, however, judicial review was a product of concerns about federalism, it is curious that the Constitution failed to specify that federal judges were bound to review state acts under federal law. Even

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more incompatible with the federalism thesis is that the framers discussed the review of federal law under the U.S. Constitution by federal judges, and that state courts had already reviewed state law under state constitutions. For these reasons, the federalism explanation seems so narrow as to miss the larger development of judicial review.

Another approach has been to point to the state cases during the 1780s. This approach, however, is usually accompanied by caveats about the paucity of evidence. An influential explanation of the apparently minimal evidence of early state cases proposes that judicial review developed only during the 1780s because this was when Americans came to have respect for their judges and came to view constitutions as ordinary law—the sort of law that was subject to ordinary adjudication in the courts. Yet it will be seen that traditional conceptions of judicial office and oaths mattered more than shifting public opinion about judges, and that judges did not have to wait until the 1780s or even the eighteenth century to understand that they could (indeed, had to) decide questions of constitutional law. More broadly, it is revealing that none of the approaches that focus on the 1780s fully deprive judicial review of its development in the judiciary or its post-Revolutionary, American origins.

Pushing the beginnings of judicial review back to England, some commentators look to natural law—what Edward S. Corwin calls “higher law.” There is much to be said for considering judicial review in the context of superior law, but not necessarily only one type of superior law, let alone merely natural law. Nor is this approach more persuasive on account of its dependence on Bonham’s Case in 1610, which is assumed to have authorized judicial review of acts of Parliament under natural law. Allegedly, Bon-
ham’s Case was an English precedent for judicial review, upon which later colonial and state courts in America more successfully established a review of statutes. To be sure, some colonial lawyers cited Bonham’s Case in the 1760s in their constitutional arguments against Writs of Assistance and the Stamp Act. Moreover, Bonham’s Case stimulated Americans to contemplate the review of legislation. Yet to the extent Bonham’s Case hinted at a judicial power to declare acts of Parliament void (whether under natural law or common law), it quickly came into disrepute, and when American lawyers learned from Blackstone’s Commentaries how little it was regarded, they largely abandoned it as a precedent. Although the natural law approach looks to England and beyond, its dependence on the mid-eighteenth century colonial decisions that cited Bonham’s Case reveals the degree to which it has much in common with the approaches that look for origins in later American cases. In particular, the natural law approach reinforces the impression that at least in its practical manifestations, judicial review was primarily an American phenomenon established largely by the courts—perhaps in nascent ways


15 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 91, 156–57 (Garland Publ’g 1978) (1765). As Julius Goebel pointed out four decades ago, “[t]he almost instant prestige that attached to the Commentaries led to the abandonment of Dr. Bonham’s Case in the war of pamphlets, speeches, and resolves.” 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 284 (Julius Goebel, Jr. ed., 1964); see also M. H. SMITH, THE WRITS OF ASSISTANCE CASE 485 (1978) (quoting “Candidus”). For example, when Otis, in 1765, wrote his Vindication of the British Colonies, he abandoned his position based on Bonham’s Case and followed Blackstone in acknowledging that courts could not review acts of Parliament. James Otis, A Vindication of the British Colonies, in 1 PAMPHLETS OF THE AMERICAN REVOLUTION, 1750–1776, at 545, 547–50 (Bernard Bailyn ed., 1965). Even as lawyers lost confidence in Bonham’s Case, law students continued optimistically to summarize Bonham’s Case, in their student notebooks, and some juries remained sympathetic, as suggested by the Chief Justice’s instructions to the grand jury at the Suffolk County court house in 1769: “We, Gentlemen, who are to execute the Law, are not to enquire into the Reason and Policy of it, or whether it is constitutional or not . . . .” JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, at 307 (1865).

In a 1772 Virginia case, George Mason argued from Bonham’s Case, but he did so only because he had very limited options. Robin v. Hardway (Va. General Ct. 1772), reprinted in Thomas Jefferson, Reports of Cases Determined in the General Court of Virginia, From 1730, to 1740; and From 1768, to 1772, at 114, 123 (1829). He represented descendants of Indian women who had been brought into Virginia by traders between 1682 and 1748 and sold by them as slaves under a statute of 1682. On behalf of only some of the slaves, Mason argued that the 1682 act had been repealed by subsequent legislation, most clearly by Virginia’s 1705 codification of its slave laws. Id. This was an inadequate position for descendants of individuals sold prior to 1705, and he therefore also argued on the basis of Bonham’s Case that the 1682 act was “originally void, because contrary to natural right and justice.” Id. Not surprisingly, rather than free all of the slaves under the Bonham’s Case theory, the General Court more modestly held for only some of them on the ground that the 1682 act had been repealed. Id. Incidentally, Mason could have argued that the 1682 Virginia act (not unlike corporate by-laws) was a subordinate law and thus void if contrary to law or reason. Obviously, however, this was not an argument that in the aftermath of the Parson’s Cause was likely to appeal to either Mason or the judges.
by English courts and more substantially by colonial and state courts, but most clearly the federal courts after 1787.\textsuperscript{16}

All of these versions of the conventional history of judicial review leave unanswered questions. Whether they locate the origins of judicial review in 1803, 1787, the early 1780s, or the eternity of natural law, these accounts suggest that judges developed their own judicial power, and that judicial review began largely as an exercise of judicial discretion.\textsuperscript{17} It consequently is difficult to avoid wondering whether the judges lifted themselves up by their own bootstraps and created for themselves an elevated role that their constitutions had not given them. More generally, if the judges thus established judicial review under their constitutions only by acting without authority under their constitutions, then it is unclear how judicial review should be understood as part of the development of the rule of law. In both ways, the conventional history of judicial review raises questions more troubling than it solves.

\section*{B. The Evidence}

The conventional history—whether the \textit{Marbury} version or an earlier variant—is plausible only because much of the relevant historical evidence about judicial review has been largely forgotten. Observing that the English did not have a judicial review of statutes, and that the U.S. Constitution gives no direct, general authorization to judges to review acts for their constitutionality, scholars have looked for state and colonial cases prior to 1787, and finding little evidence, they have concluded that judicial review must have been created in 1803 by Chief Justice Marshall and the Supreme Court. As Edward S. Corwin observes, "[t]he capital difficulty consists in the paucity of the evidence."\textsuperscript{18}

In fact, the evidence is substantial. This brief essay is only part of a larger project: a systematic study of early constitutional decisions. The goal of the larger endeavor is to reconstruct a set of reports of state constitutional decisions from the fifteen years following Independence—this being a period during which state decisions were not regularly published. Some of the state court decisions from 1776 to 1791 are known to specialists but perhaps not in sufficient detail; other decisions are utterly unfamiliar. To put this evidence in context, the project will also examine a range of English decisions (albeit without reproducing the relevant records and reports, many of which have long been in print). These English decisions are not unfamiliar, but their place in the development of judicial review needs to be more fully recognized. Together, the reevaluation of this English evidence and the publication of the early American evidence offers an opportunity to rethink the history of judicial review.

\footnotesize{\textsuperscript{16} For a recent study that emphasizes \textit{Marbury} in this manner, see generally WILLIAM E. NELSON, \textit{MARBURY v. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW} (2000).


\textsuperscript{18} Edward S. Corwin, \textit{What Kind of Judicial Review did the Framers Have in Mind?}, in \textit{CORWIN'S CONSTITUTION: ESSAYS AND INSIGHTS OF EDWARD S. CORWIN} 71 (Kenneth D. Crews ed., 1986).}
One reason much of the early evidence has not been examined or sufficiently understood is that modern commentators have adopted too narrow a conception of judicial review and the relevant decisions. The English decisions seem beside the point because judicial review is associated with America, its written constitutions, and their constraints on legislative power. Similarly, the evidence of early state decisions seems sparse, partly because a modern, "whiggish" conception of judicial review renders many of the early state decisions almost irrelevant. For example, if understood as prototypically a review of legislation, judicial review does not include or only marginally includes state decisions that reviewed acts other than those of legislatures—for example, executive or judicial acts. If judicial review is analyzed as something judges do primarily on account of their obligation to decide cases, then nonadjudicatory state decisions are beyond its scope or of only secondary importance. If decisions are evaluated as legal precedents rather than historical evidence, then nonadjudicatory decisions are irrelevant and state decisions, especially those by inferior courts, seem less than fully significant. In these ways, not merely the evidence but more fundamentally the very concept of judicial review tends to be understood too narrowly.

Accentuating this constricted vision, some commentators view claims about early decisions with deep suspicion. Eager to distance themselves from celebratory and apparently unprofessional accounts of early state cases, these scholars examine early decisions with an intensity of doubt that has the effect of disparaging the authenticity of even well-documented instances of judicial review. This skeptical attitude and its effect in impoverishing approaches to the evidence can be succinctly illustrated by an article that was called *The Cases of the Judges: Fact or Fiction*—as if the very existence of the decision were in doubt.

A more balanced approach should be possible. If one examines the early manuscript and printed evidence, and if one does not begin with artificially narrow conceptions of judicial review, the relevant decisions are numerous, and the evidence (although, of course, incomplete) is more than adequate.

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20 Margaret V. Nelson, *The Cases of the Judges: Fact or Fiction*, 31 Va. L. Rev. 243 (1944); see also, e.g., Boudin, *supra* note 19, at 215 (correctly questioning Brattle but misunderstanding Holmes, as explained in *infra* note 92); 2 Crosskey, *supra* note 19, at 943–75.
I. The Hierarchy of Law and the Duty of Judges to Decide in Accord with Law

Long before Americans drafted their constitutions, judicial review developed in the context of assumptions about the hierarchy of law and the duty of judges to decide in accord with law. Consequently, in the 1770s and 1780s, American judges were already familiar with what today is called "judicial review," including review under constitutional law.

Today, many Americans assume that law rests on contingent foundations—that below law there are turtles all the way down. In contrast, early English and American lawyers typically took for granted that there was law all the way up to its divine source. They assumed a hierarchy of law and that below the highest law, all law necessarily was subject to some superior law. In addition, English and American judges felt obliged by their office and their oaths to decide in accord with law. On these two broad foundations—law and judicial duty—judges came to engage in judicial review.21

A. Hierarchical Assumptions

According to theory, law existed in a hierarchy, and within the hierarchy, there seemed to be a generic relationship between superior and inferior laws. If contrary to a superior law, an inferior law was void. Indeed, it was not really lawful.

Since classical and early Christian times, it had been suggested that acts were lawful only if they conformed to superior law. This conception of the lawfulness of acts was profoundly appealing, and through the writings of Gratian, Aquinas, and a wide range of other medieval scholars, it became a pervasive element of European thought. In the Middle Ages, notions about a hierarchy of law could not have been entirely unfamiliar to English lawyers, and in the sixteenth and seventeenth centuries, such ideas were a central element in their education, most prominently through their study of Christopher St. German's Doctor and Student. In this dialogue, written in the 1520s and 1530s, St. German imagined a conversation between a doctor of divinity and a student of the common law.

St. German's Doctor explained a version of the conventional medieval hierarchy of law. There were four laws: the "lawe eternall," the "lawe of nature" (what English lawyers called the "lawe of reason"), the "lawe of god" (in other words, scripture or revelation), and the "lawe of man."22 The first of these, the law eternal "is well called the fyrste/ for it was byfore all

21 Of course, even in the context of this understanding of law and judicial duty, a legal system might preclude the judges from deciding the lawfulness of an act and thus in effect might allocate such decisions to another body. For example, as will be seen, the status of Parliament as the highest court in the realm left inferior courts without any right to review acts of Parliament. Whereas Common Pleas and King's Bench regularly reviewed local customs and corporate and even royal acts, they could not review acts of the nation's legislature. This limitation on judicial power did not survive in America, however, largely because of the express constitutions and the separation of powers assumed in American states.

22 ST. GERMAN'S DOCTOR AND STUDENT 7 (T.F.T. Plucknett & J.L. Barton eds., 1974) [hereinafter ST. GERMAN'S]. In all quotations from St. German, the orthography is modernized.
other lawes. And all other lawes be deryvyed of it."\textsuperscript{23} In contrast to this eternal law, the others were the “thre maner of wayes almyghte god maketh this lawe eternall knowne to his creatures reasonable."\textsuperscript{24} This hierarchy of three laws known to mankind—natural, revealed, and human—thus exemplified the eternal law, and this was of particular significance for human law. As the Doctor explained, “in temporall lawes no thynge is ryghtwyse ne lawful/ but that the people have deryvyed to them out of the lawe eternall.”\textsuperscript{25}

If the law eternal could be best known from the laws of nature and revelation, the concrete question for English lawyers was whether their human laws violated these. With respect to revelation, the Doctor held that “every mannes law must be consonant to the lawe of god. And therfore the lawes of prynces/ the commaundementes of prelates/ the statutes of commynaltes/ ne yet the ordynaunce of the Churche is not ryghtwyse nor oblygatorye/ but it be consonant to the lawe of god.”\textsuperscript{26} Of more immediate concern was “[t]he lawe of nature . . . whiche is also called the lawe of reason.”\textsuperscript{27} This law, being derived from the eternal law, was unchangeable, and therefore human laws could not violate it: “[I]t is never chaungeable by no dyversytie of place ne tyme . . . And therfore agaynst this lawe prescripcyon statute nor custome may not prevayle/ and yf any be brought in agaynst it they be no prescripçons statutes nor customes/ but thyngis voyd & agaynst iustyce.”\textsuperscript{28}

Thus, a superior law determined whether an inferior law was lawful. If there was a conflict, the inferior law was void. Put in terms of obligation, if human laws did not violate any superior law and thus exemplified eternal law, they were binding in conscience. As the Doctor explained, “lawes of man not contrary to the lawe of god/ nor to the lawe of reason muste be observyed in the lawe of the soule/ and he that dyspyseth them dyspyseth god & resysteth god.”\textsuperscript{29} The Doctor similarly observed of an act of Parliament that “for as moche as the statute is not against the law of god nor agaynst the lawe of reason it muste be observyed by all them that be subgiettes unto that lawe.”\textsuperscript{30} In this way, the hierarchy inherent in law explained the legitimacy of human law and the obligation to obey it and yet also hinted that there were at least moral limitations on the exercise of human power.

Such ideas persisted and even flourished with various modifications during subsequent centuries in England. Most tangible among the changes was that the English increasingly dropped eternal law out of their hierarchy, thus leaving three general layers of law—natural, divine, and human. Adopting this abbreviated hierarchy, Blackstone wrote that the “law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and

\textsuperscript{23} Id. at 9–11.
\textsuperscript{24} Id. at 12–13.
\textsuperscript{25} Id. at 11. This was drawn from St. Augustine.
\textsuperscript{26} Id. at 29.
\textsuperscript{27} Id. at 13.
\textsuperscript{28} Id. at 15. Generalizing, he added: “And al other lawes aswel the lawes of god/ as to the actis of men as other be grounded therupon.” Id.
\textsuperscript{29} Id. at 29.
\textsuperscript{30} Id. at 159. He was referring to the Statute of Westminster II (1285).
at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediate or immediately, from this original." Thus, the only laws superior to human law were natural and divine law: "Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these."32

For some modern commentators, such ideas inspire thoughts about the possibility that judges reviewed legislation against natural law. This possibility was familiar at least in theory from medieval writers—for example Aquinas and St. German—but at the same time, it does not seem to have been viewed by them with much favor. Aquinas carefully qualified any such implications with concerns about undermining law more generally, and he appears to have assumed that conflicts between human law and natural or divine law would ordinarily be worked out through a sort of charitable interpretation or the application of equity—although even this might not regularly be desirable.33 Similarly, centuries later, as Charles Grey observes, St. German seems to have avoided any direct statement that judges should hold statutes void, and instead, as Richard Helmholz notes, he typically suggested the legitimacy of English custom.34 Indeed, the portion of St. German's book that cautiously focused on acts of Parliament was omitted from the editions published after 1531.35 Although in conscience—the court internal to an individual—natural law and divine law were understood to be the measure of the lawfulness of a government's legislation, such laws did not ordinarily require judgment to this effect in its courts.36

Whereas medieval philosophers acknowledged the possibility that judges would have to review government legislation under natural law but left little room for it in practice, more modern philosophers closed off even the theoretical justification for such review. During the late Middle Ages and espe-

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31 1 BLACKSTONE, supra note 15, at 41.
32 Id. at 42. Earlier, Giles Jacob wrote:
    In ancient Authors, the several grounds of the law of England are said to be these. . . . The Law of Reason, which . . . is termed the first rule, that all things must be ruled by. . . . The Law of God; and therefore it has been formerly inquired in divers courts, . . . if any general custom were contrary to the law of God, or any Statute was made directly against it. . . . The general Customs, from time immemorial used throughout all the land, which have been ever approved by the king and all his subjects, as being neither against the Law of God nor the law of reason; and which are properly the common law.

GILES JACOB, A LAW GRAMMAR, OR RUDIMENTS OF THE LAW 5 (William Crofts ed., 8th ed. 1840) (1744). To these, Jacob added, in a hodgepodge, law maxims, particular customs, and statutes. Id. at 5–6.


35 ST. GERMAN'S, supra note 22, at xv.

36 For a prominent discussion of conscience, see 2 AQUINAS, supra note 33, at 1019–20 (Pt. I–II, Q. 96, Art. 4).
cially afterward, as natural law writers increasingly became concerned about the authority of bodies to make law and adjudicate it, they focused on the authority of the people. In this version of the natural law tradition, in the seventeenth and eighteenth centuries, English and American theorists elaborated ideas about the equal freedom of individuals in the state of nature and on this basis concluded that government could legitimately be created only by the consent of the people. If government therefore was an agent of the people, then only the people had the authority to determine that their government had violated natural or divine law. Through such reasoning, natural law itself seemed to suggest that this sort of decision about natural law could not be in the hands of the judges. As a result, even more clearly than under medieval natural law, the judges were expected to confine their use of natural law to other tasks, such as charitable interpretation or the ascertaining of customary law.\footnote{Some historians conflate judicial review with other types of decision. For example, William Nelson cites \textit{Rutgers, Bayard, and Ham v. M'Claws} as cases in which “courts effectively invalidated three . . . acts”—thus blurring one case of judicial review with two of interpretation and apparently doing so knowingly, as if the distinction did not really matter. Nelson, \textit{supra} note 10, at 1166, 1172. Similarly, Nelson describes \textit{Trevett} as a case “holding Rhode Island’s issuance of paper money unconstitutional,” whereas in fact, the judges with good reason simply said they lacked jurisdiction. \textit{Id.} at 1173. Similarly, see Nelson, \textit{supra} note 16, at 36–37; Snowiss, \textit{supra} note 5, at 19–22; Kramer, \textit{supra} note 11, at 10, 19, 33 n.115; Lambert, \textit{supra} note 10, at 51, 53; Prakash & Yoo, \textit{supra} note 8, at 933 & n.171, 936.}

Thus, there had long been strong assumptions about the hierarchical relationship between different levels of law. Accustomed to thinking about law within a hierarchy, and to understanding this hierarchy as the primary source of legal obligation, English lawyers could not help but be aware that a superior law determined the lawfulness of an inferior law and thus might render it unlawful and therefore void. Of course, with the development of modern natural law theory, it seemed increasingly clear that judges could give effect to natural and divine law only in limited circumstances—those in which the judges did not appear to threaten the judgment of the people. It was, however, the conceptual structure of laws in a hierarchy rather than any one type or level of law that is significant for the history of judicial review.

\section{B. Judicial Review in England and Its Colonies}

The hierarchical conception of law had implications for judicial review that can be observed through much of Europe, but for understanding American judicial review, it is particularly important to focus on England. On the basis of their general ideas about the effect of a superior law on an inferior law, English judges regularly reviewed various acts and customs under particular superior laws. Among theorists, the layers existed primarily at levels as general as natural law, divine law, and human law. More elaborate layers, however, existed within human law, and judges therefore had ample opportunity to review human laws under other human laws and sometimes even under natural law.

For example, English courts since the Middle Ages had reviewed laws that were subordinate to the law of the realm, especially local customs and
corporate by-laws. The king's courts were the common law courts, and they therefore looked to natural and divine law not to review common law, but to ascertain it. In contrast, they were in a position to review subordinate laws, such as local customs and corporate by-laws, which were declared or enacted by various lesser bodies or courts. In reviewing these subordinate laws, the king's courts adhered to a pattern more broadly evident in European law. For example, as Richard Helmholz points out, in the ius commune, custom "had to be consistent with both divine and natural law," and "it was required to pass a test of rationality."38 Somewhat similarly, in England, the king's courts reviewed subordinate customs and acts against English law and reason. By the seventeenth century, it was a commonplace that the statutes of corporate bodies were miniature versions of the legislation of states.39 Both local custom and corporate acts, however, were subordinate to the law of the land, and accordingly the judges regularly reviewed these lesser laws against English law and reason.40

Judges also reviewed corporate charters against English law and reason and, moreover, reviewed corporate by-laws against corporate charters. Charters established the framework for the governance of corporations and thus were thought of as constitutions. More significant, they on the one hand were inferior to English law and reason and, on the other hand, were superior to the by-laws enacted under them. Consequently, judges could review charters under English law and, for most purposes, could review a corporation's by-laws not only under English law and reason but also under the corporation's charter.41

In contrast to their review of these various subordinate acts and laws, English courts could not review acts of Parliament. This is often said to have been a consequence of the modern political supremacy of Parliament. Yet long before Parliament acquired political preeminence, its decisions stood above the reach of King's Bench and Common Pleas. Just as a manor court was the body entrusted with decisions about the custom of the manor, so Parliament was the communal body or court entrusted with decisions about the custom of the realm—whether in declaring this custom or altering it. Moreover, as noted by J. W. Gough, Parliament was the highest of English courts—what some called the "supreme court"—and its acts therefore could not be reviewed by other courts.42 From this perspective, Common Pleas and

38 Helmholz, supra note 34, at 132.
41 For the review of charters, see Jacob Corré, The Argument, Decision, and Reports of Darcy v. Allen, 45 Emory L.J. 1261 (1996). Incidentally, the analogy between state constitutions and corporate and colonial charters should not be considered in some narrow sense the primary source of judicial review in the American states. The charters were understood to be analogous to state constitutions, but judicial review was a more general phenomenon, which followed from broader conceptions of law and judicial duty. These ideas had implications for a range of different types of judicial review, of which the review under charters and the review under state constitutions were only two examples.
42 For example, Matthew Hale wrote that "the parliament, that hath a double jurisdiction,
King's Bench were "inferior courts," whose judges had to defer to the acts of the "high court of Parliament."

Hence, the audacity of Coke's attempt to use Bonham's Case to extend judicial review to acts of Parliament.\textsuperscript{43} English lawyers had sometimes hinted that if judges did not adopt an interpretation of a statute in accord with what was reasonable or just, the statute would be void—at least, presumably, in conscience—this being a justification for charitable interpretation in accord with the presumed intent of those who made the statute rather than a claim that judges really could declare statutes void.\textsuperscript{44} Coke hinted in his 1611 report of Bonham's Case that courts should take this explanatory supposition literally and that "the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void." Coke thereby revealed how at a time of growing Parliamentary power, Englishmen were beginning to feel the need for a judicial review of acts of Parliament.\textsuperscript{45} Yet Coke's fantasy about a judicial review of acts of Parliament departed radically from traditional conceptions of Parliament as the highest English court and as the court entrusted with the power to declare or alter the custom of the realm. Therefore both before and after Bonham's Case, judges typically confined their notions about statutes being void to arguments about interpretation. Indeed, as it became clear that Parliament was the institution that would resist ambitious claims of royal power, Bonham's Case and any judicial review of acts of Parliament seemed to miss the broader development of English constitutional law. Recognizing both Parliament's power and its status as a court, Coke himself eventually wrote in his Fourth Institute that "the power and jurisdiction of the parliament, for making of laws in proceeding by bill, it is so transcendant and absolute, as it cannot be confined either for causes or persons within any bounds."\textsuperscript{46}

The traditional common law obstacles to inferior court review of the acts of the high court of Parliament took on heightened significance in the late

\textsuperscript{43} See Bonham's Case, 77 Eng. Rep. 646, 652 (K.B. 1610).

\textsuperscript{44} See Gray, supra note 34, at 52; Plucknett, supra note 14, at 44–45 (1927); S. E. Thorne, Dr. Bonham's Case, in S. E. THORNE, ESSAYS IN ENGLISH LEGAL HISTORY 269, 274–75 (1985); D.E.C. Yale, Index in Propria Causa: An Historical Excursion, 33 CAMBRIDGE L.J. 80, 83 n.21 (1974).

\textsuperscript{45} Bonham's Case, 77 Eng. Rep. at 652. For the distinction between what Coke said in court and what he wrote in his report, see Gray, supra note 34, at 36.

\textsuperscript{46} Coke, supra note 39, at 36.
seventeenth century on account of the development of modern natural law theory. The modern conception of natural law emphasized the power of the people and thereby limited the power of the judges to determine that their government or its legislation did not conform to natural law. Well aware of this theory, Chief Justice John Holt distinguished between corporate by-laws and acts of Parliament, especially with respect to natural law. Echoing earlier decisions, Holt in 1702 declared that the acts of corporations were subject to review against English law and reason because they were not the acts of a body with sovereign power—because they were “perform[ed] with that sub-

ordination to the government of the kingdom or state of which they are member[s].” As a result, “all their acts . . . or by-laws are subject to the review of the kings courts, which [acts] are so far valid as they are agreeable to law and right reason, and if contrary to either they are ipso facto void.” This was “the review of the kings courts.” Yet whereas the act of a corpora-

tion “binds sub modo if just and reasonable,” “an act of Parliament . . . binds absolutely without any dispute to be made of its justice or equity.” In saying this, Holt did not suggest that Parliament somehow stood above natural law or its dictates of reason, justice, and equity. On the contrary, natural law applied to Parliament, but only the people could call Parliament to account, and thus in England enforcement would ultimately depend upon revolution rather than judicial review. In Holt’s paraphrase of Locke, if Parliament were to “make a man judge in his own cause,. . . it is repugnant to law [that is, natural law], and if a man should be allowed by act of Parliament to do what should seem good in his own eyes, the government [would be] dissolved and the man or those who have that liberty are returned to a state of nature.”

Although inferior courts could not review the acts of the highest court in the realm, they regularly reviewed other governmental acts—judicial acts and even acts of the Crown. In case after case the courts examined judicial and royal acts for their conformity to English law and reason, including what were increasingly understood to be the constitutional requirements of English law. This constitutional review cannot be fully examined here, but some revealing evidence from a single year, 1610, should suffice to illustrate it.

In that year in the Case of Proclamations, the judges reviewed one of the most prominent types of royal acts. During the early seventeenth century, King James I strained his power to issue proclamations by regularly using them to create new criminal offences, and in 1610 when the House of Commons protested this attempt to make law without their approval, James consulted Chief Justice Coke about the extent of the royal power. Coke sought

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48 City of London v. Wood (1702) (Holt, C.J.) (as reported by Holt in British Library, Add. Ms. 34,125, at fol. 84r), as quoted in Hamburger, supra note 47, at 2140.
49 City of London v. Wood (1702) (Holt, C.J.) (as reported by Holt in British Library, Add. Ms. 34,125, fol. 68r), as quoted in Hamburger, supra note 47, at 2139.
50 City of London v. Wood (1702) (Holt, C.J.) (as reported by Holt in British Library, Add. Ms. 34,125, fol. 89r), as quoted in Hamburger, supra note 47, at 2132.
to "have conference with my brethren the Judges . . . and then to make an
advised answer according to law and reason," but being pressed by the Lord
Chancellor, Coke gave an impromptu advisory opinion that "the King cannot
change any part of the common law, nor create any offence by his procla-
mination, which was not an offence before, without Parliament." Later, he and
his fellow judges more formally resolved that "the King by his proclamation
cannot create any offence which was not an offence before," and Coke noted
in his report that "we do find divers precedents of proclamations which are
utterly against law and reason, and for that void." Later in the century, on
the basis of this decision and the traditions underlying it, Matthew Hale sum-
marized that "by the constitution of this realm the supreme power of the king
is limited and qualified that it cannot make a law or impose a charge but by
the consent both of lords and commons assembled in parliament."

In the year 1610, moreover, Attorney General Francis Bacon summarized the remedies available for royal acts that were grievances to the people. As he explained during a speech in Parliament:

This king's acts that grieve the subject are either against law, and so void; or according to strictness of law, and yet grievous. And according to these several natures of grievance, there be several reme-
dies. Be they against law? Overthrow them by judgment. Be they too straight and extreme, though legal? Propound them in parliament.

He reminded his listeners that the judges had not "want[ed] fortitude" or otherwise shied away from examining any act that might seem "too high a point to question by law before the judges." On the contrary, "where the king's acts have been indeed against the law, the course of law hath run, and the judges have worthily done their duty"—a conclusion he demonstrated by listing some decisions. These included protests in which royal acts were "dis-
allowed by the judges." In addition, there were cases in which such acts were
"overthrown by judgment."

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52 Id. at 1352-53.
53 Id. at 1353-54.
54 HALE, supra note 42, at 141.
55 Argument of Francis Bacon in Parliament (1610), in 2 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 396 (T. B. Howell ed., William S. Hein & Co. 2000) (1809) [hereinafter A COMPLETE COLLECTION OF STATE TRIALS]. Bacon made these observations as part of his defense of the judges who had upheld the king's right of impositions in the Case of Impositions.

This case turned in part on the question whether ordinary courts could examine what might seem "too high a point." As Bacon's speech suggests, however, doubts about the capacity of ordinary courts to discuss highly important constitutional issues came from what may be an unexpected direction—from opponents of the Crown who feared that the judges would rule against them and who hoped instead to prevail in Parliament. In the Case of Impositions, the Crown's lawyers argued that the king's prerogative rights were personal in him and thus left him to be judge as to whether he should exercise them, but these advocates of an expansive preroga-
tive insisted that the judges of the ordinary courts should hear the challenges to the king's pre-
rogative and uphold his rights under law. Case of Impositions (1606), in 2 A COMPLETE COLLECTION OF STATE TRIALS, supra, at 396, 487. In contrast, it was an opponent of a broad prerogative, Yelverton, who offered the argument that ordinary courts lacked the capacity to decide the case. Yelverton sought to advance the position that "the king of England cannot take
The review of domestic acts was eventually extended to the review of colonial legislation. Being familiar with the review of governmental acts and subordinate customs and by-laws, the Privy Council and some colonial courts reviewed colonial statutes for violations of reason and especially English law. It was a matter of common law that corporate acts and local custom could not violate reason or English law, but as a precaution, at least the legal side of this requirement was specified in colonial and domestic charters. Eventually, late in the seventeenth century, when some colonies had made it evident that they did not consider themselves fully subordinate to England, Parliament enacted that colonial laws “repugnant” to English laws “so far as they do relate to the said Plantations” were “illegal, null and void.” In the circumstances, the Privy Council and the colonial courts occasionally considered the legality of colonial legislation under reason, English law, and colonial charters, and in several instances held colonial acts unlawful. Although some commentators imply that these courts invented judicial review, the English evidence suggests that the Privy Council and the colonial courts simply followed a practice familiar from the review of various domestic acts—including the acts of the Crown and most closely, the acts of corporations. Whether in England or its colonies, judicial review was not a novelty.

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his subjects goods, without their consent.” Id. at 483–84. Fearing with good reason that the Crown would prevail in the courts, he suggested “that cases of this nature . . . have ever been taken to be of that extraordinary consequence, in point of common right of the whole kingdom, that the state would never trust any of the courts of ordinary justice with the deciding of them; but assumed the cognizance of them unto the high court of parliament, as the fittest place to decide matters so much concerning the whole body of the kingdom.” Id. at 487. Yet as so often in the past, the court did not hesitate to exercise jurisdiction. Of course, Yeverlton could not cite any plausible precedents for his suggestion that some matters were so extraordinary as to lie beyond the cognizance of “ordinary” courts, and his examples were merely instances in which courts had acted, and Parliament then acted to reverse the decisions or the policies arising from the decisions. Id. at 488. Subsequently, as in Bacon’s speech, the Crown went out of its way to emphasize that ordinary courts regularly examined matters of high consequence and, indeed, were obliged to do so.

56 In Norris v. Staps, it was said that the laws of corporate bodies “must ever be subject to the general law of the realm as subordinate to it. And therefore though there be no proviso for that purpose, the law supplies it.” Norris v. Staps, 80 Eng. Rep. 357, 358 (C.P. 1616). Noting the superfluity of the provisions in English corporate charters that required conformity to English law, William Sheppard observed: “The Clause of addition, that they may not make Ordinances repugnant to the Lawes, &c. is idle, and to no purpose. For the Law doth understand that, and it is included, and such By-laws made by a Corporation, are void by the very Common-Law.” WILLIAM SHEPHEARD, OF CORPORATIONS, FRATERNITIES, AND GUILDS 82 (Garland Publ’g 1978) (1659).

57 Act for Preventing Frauds, and Regulating Abuses in the Plantation Trade, 1696, 7 & 8 Will. 3, c. 22, § 9; see SMITH, supra note 6, at 526. The focus on the review of colonial legislation against law may have reflected changing assumptions about the review for conformity to reason. Although discussion of the review of local custom and corporate by-laws regularly specified that these were to be tested against both law and reason, discussion of the review of government acts and colonial acts sometimes omitted to mention reason.

58 For the suggestions about the novelty of the review of colonial acts, see, e.g., SMITH, supra note 6, at 523; McGovney, supra note 14, at 8, 40–41.
C. Judicial Review in the American States

After 1776, American judges continued the practice of evaluating acts for their lawfulness. What changed in America was not the invention of judicial review (which had been commonplace since at least the Middle Ages), nor even judicial review under a constitution (which was understood from at least the seventeenth century), nor even judicial review of legislation (which was familiar from the review of corporate and colonial acts). Instead, what was new in America was review under express constitutions and especially the review of the legislation of sovereign states. Otherwise, however, there was much continuity—most generally in the old assumption that an act could not lawfully violate a superior law and that judges were obliged by their office and their oaths to decide in accord with law.

American judges did not have to create judicial review. Indeed, they did not typically employ a concept of judicial review. As already observed, an English judge at the beginning of the century had said that the acts of a corporation were “subject to the review of the kings courts,” but this was not the concept with which judges typically analyzed their decisions. Instead, they understood that they had a duty to decide in accord with law and that American constitutions were laws superior to the acts of government. In particular, like many Englishmen before them, they assumed that under natural law, government could be lawfully established only with the consent of the people, whose constitution therefore authorized and limited all executive, legislative, and judicial power. A constitution thus was superior to any statute, and the judges felt bound by their office and their oaths to decide in accord with this law above all other human laws. In the same manner as their English counterparts who held acts contrary to English law, including its constitutional requirements, American judges felt an obligation to decide in accord with their state constitutions.

At the same time, more emphatically than their medieval predecessors, eighteenth-century commentators tended to assume that natural law itself precluded judicial decisions declaring that governmental legislation violated natural law or “reason.” Although American courts continued to review corporate by-laws against law and reason, they hesitated to decide that the acts of government were void for being contrary to reason. According to modern natural law theory, the people were judges as to whether their government violated natural law. The judges therefore had reason to rely upon natural law in ways that did not seem to challenge this allocation of power—for example, they looked to natural law to justify human law, to interpret it, and to help reveal common law custom. In contrast to natural law, however, state

59 City of London v. Wood (1702) (Holt, C.J.) (as reported by Holt in British Library, Add. Ms. 34,125, fol. 84r), as quoted in Hamburger, supra note 47, at 2140.
60 For the popularization of ideas about the power of the people in early eighteenth-century England, see Hamburger, supra note 47, at 2100-11.
61 Incidentally, it may be thought that Bowman v. Middleton calls into doubt the argument in the text here, for it sometimes is cited as evidence that judicial review of state statutes could include a review under natural law. Bowman v. Middleton, 1 S.C.L. (1 Bay) 254, 254-55 (1792); see, e.g., Snowiss, supra note 5, at 23. The case, however, concerned a colonial act, and this distinguishes it from the review of state statutes. In this 1792 case, the South Carolina Court of


constitutions were human laws, which consequently were susceptible of judicial adjudication. Thus under natural law, judges could ordinarily decide whether government acts violated superior human law but could not decide whether they violated natural law.

The effect of a superior law on the judicial treatment of an inferior law was so basic an assumption that it rarely required discussion, and therefore the men who argued for judicial review felt the need to explain, instead, the superiority of their state constitutions. Indeed, the constitutional review of judicial and executive acts was so familiar that American advocates of judicial review apparently thought it necessary to explain the superiority of their constitutions only in decisions reviewing legislative acts. In the Prisoners' Case in 1782 in Virginia, a commentator emphasized the principle of "the superiority of the constitution over all acts of the legislature," and Justice Mercer said that "[t]he Court must Declare the Constitution Superior to the Act." In 1786, James Iredell argued for judicial review in Bayard v. Singleton by observing:

It will not be denied, I suppose, that the constitution is a law of the State, as well as an act of Assembly, with this difference only, that it is the fundamental law, and unalterable by the legislature, which derives all its power from it. . . . An act of Assembly cannot repeal the constitution, or any part of it. For that reason, an act of Assembly, inconsistent with the constitution, is void, and cannot be obeyed, without disobeying the superior law to which we were previously and irrevocably bound.

Similarly, in 1788 in the first of the Cases of the Judges, the Virginia Court of Appeals described its opinion as "declaring the supremacy of the constitution." As in Marbury v. Madison, what needed discussion was not that su-

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Common Pleas decided title to land that two early grants had given to different persons. Although one acquired title under a grant in 1677 and the other only in 1701, the South Carolina legislature in 1712 passed a statute confirming the title of the second grantee, and the plaintiffs now claimed title under this colonial act. Understanding that it was evaluating a colonial enactment, the state court held:

[T]he 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 compensation, or even a trial by the jury of the country, to determine the right in question. That the act was, therefore, ipso facto, void.

Bowman, 1 S.C.L. (1 Bay) at 254-55. Like other colonial statutes contrary to reason or English law, it was void, and "no length of time could give it validity, being originally founded on erroneous principles." Id. Another such instance was the Symsbury Case, 1 Kirby 444, 447 (Conn. 1785), which similarly concerned the act of a colonial legislature.


64 Cases of the Judges, 4 Va. (1 Call) 142 (1788); see also Trefren v. Cate, certified by
perior acts rendered contrary inferior acts void, but that American constitutions were superior to legislation—and even this was hardly news.

Of course, there was nothing special about the word "superior." When Americans discussed the hierarchy of law, they typically spoke of a law being "superior" to another—a locution Marshall would follow in 1803—but they sometimes used other words. Most notably, the U.S. Constitution referred to "the supreme Law of the Land" and thus indicated that such law was superior to all other laws of the land. This locution carefully identified the highest human law while leaving open the possibility of yet higher law, such as divine and natural law.

Among the acts many state judges felt obliged to review were legislative acts. It is typically assumed that American judges developed judicial review. Yet English judges had reviewed executive and judicial acts under England's customary constitution, and therefore what most substantially changed in America and requires explanation was that courts could now review legislative acts.

Ideas about the judicial review of legislation were very old, but in England hopes for such review were stymied by both legal doctrine and broader constitutional developments. The review of legislation had been familiar from medieval theory and in a more practical way from the review of the legislative acts of subordinate bodies, such as corporations and colonies. The logic of law and judicial duty also extended to the legislative acts of bodies with sovereign power, such as Parliament, and therefore the suggestion in Bonham's Case about a review of acts of Parliament never entirely lost its appeal. Nonetheless, traditional English doctrine about Parliament's status as a court frustrated English hopes for a judicial review of acts of Parliament. In addition, as the English in the seventeenth century came to understand that Parliament was the only effective institutional barrier to the crown, they typically reconciled themselves to its power and its freedom from judicial review. Especially after 1688, they could not question the authority of Parliament without questioning the Revolutionary Settlement, and they therefore tended to put aside their remaining attachment to Bonham's Case.65

In contrast, Americans could not be content with Parliamentary power. Americans inherited the doctrinal obstacles to judicial review of Parliamentary acts, but they felt oppressed by Parliament as well as the Crown, and they therefore voiced the power of the people not so much through Parliament as against it. Accordingly, at the same time that they generally opposed judicial review of their colonial enactments, they increasingly took a more open attitude toward the review of acts of Parliament. In the 1760s they even revived the doctrine in Bonham's Case, and in at least one decision, an American court declared the Stamp Act unconstitutional. As already observed, however, Blackstone's account of the realities of English doctrine intruded on these hopes, and being unable to experiment further with judicial

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review, Americans eventually had no choice but to rely on revolution to protect their rights.

Once Americans had declared their independence and adopted state constitutions, they could begin to rely on judicial review to constrain the legislative power of sovereign states, for the judges no longer faced the old doctrinal obstacles. Already in the colonies judges had been able (although typically disinclined) to review American legislation, but they had been unable to review the acts of the body with sovereign power, Parliament. Now the states were sovereign, and their acts were equivalent to acts of Parliament. Yet being free of English doctrine about the highest court in the realm, the judges could review such acts. Of course, the injustice and oppression of state legislatures provoked interest in judicial review and encouraged Americans to recognize its importance as a barrier to legislative and popular power. The need for judicial obstacles to popular tyranny, however, had been familiar already in England, and an appreciation of this function of the review of legislation had a greater effect in stimulating political support for this review than in shaping its development or legal parameters. More significant for the development and scope of such review were the old assumptions about judicial duty amid a hierarchy of laws and the recent independence of Americans from the doctrinal obstacles that had prevented the review of legislation in England. Already under the English constitution, the old assumptions about judicial duty and the effect of a superior law clearly applied at least in theory to Parliamentary legislation, and the logic of these assumptions had not been extended so far only because Parliament was the highest court—a court that had the power to declare the custom of the realm and to which other courts had to defer. Once American constitutions removed these doctrinal obstacles, the only question was, not whether judges should invent judicial review, but rather why the familiar logic of law and judicial duty, which already applied to executive and judicial acts, should not now apply to the legislation of the states.

The English doctrinal obstacles to judicial review of legislation were absent in most American states for two reasons. First, American constitutions were express acts of the people. As soon as the 1780s, Americans defended judicial review from legislative criticism with the argument that it was required by the written character of American constitutions—a defense that appealed to popular sentiments by associating judicial review with a rejection of England's unwritten constitution and by suggesting that England did not even have a constitution. Yet judicial review had occurred under England's customary constitution, and the mere fact that most American constitutions were written does not by itself explain why American judges reviewed legislation. Instead, what mattered for the review of legislation was that such constitutions were the express acts of the people—the writing in each instance being a valuable but merely incidental feature of the underlying act. England's constitution was customary and had only the tacit consent of the people, and the court of Parliament accordingly enjoyed a power to declare English constitutional law. In almost all American states, however, the people expressly enacted their constitutions, and state assemblies therefore could not declare constitutional law as if they were Parliaments. Of course, legisla-
tures could express their opinions about the proper interpretation of their constitutions, but once the people had expressly stipulated a constitution, a legislature could not expect to exercise a Parliamentary authority to declare by its judgments or enactments what was or was not constitutional.

The second reason American judges no longer encountered doctrinal barriers to their review of legislation was the separation of powers. It has been recognized that this separation made a difference. To understand exactly why it mattered, however, it is necessary to recall that Parliament was the highest court of the realm and that ordinary, “inferior” courts therefore could not question its judgments or acts. In contrast, America’s written constitutions established separate judicial and legislative powers, and accordingly the ordinary courts could not defer to the decisions of any higher, legislative court. Although some American legislatures continued to be known as their state’s “General Court” and still enjoyed some judicial power or at least the power to interfere in judicial proceedings, almost all were thought to have at least a conceptual separation from the judiciary. The separation of powers was familiar from natural law theory. The separation of judicial and legislative powers seemed especially important because if a judge legislated, he would become judge in his own case and thus a model of the injustice and arbitrary power that returned men to the state of nature. Therefore, in all but one or two states (in which constitutions were inexplicit, and judicial and legislative power was not separated), judges had reason to believe that they could not defer to legislative decisions about the requirements of the local

66 For a discussion of separation of powers, see Prakash & Yoo, supra note 8, at 891, 931.
67 For the separation of powers, see id. at 931. For the natural law theory underlying this separation, see Hamburger, supra note 47, at 2132–36, 2153. Professor Gordon Wood believes that “[a]lthough Americans in 1776 may have talked of the separation of executive, legislative, and judicial powers . . . they meant only to isolate the executive from the other two departments and to prevent the chief magistrates from tampering with the assemblies and the judges.” Wood, Judicial Review, supra note 11, at 155. As pointed out, however, by Saikrishna Prakash and John Yoo, Wood’s conclusions have been questioned. Prakash & Yoo, supra note 8, at 931. Undoubtedly, Americans often violated their principles, but this not to say that failed to mean what they said about separation of powers, including the separation of judicial and legislative power. Certainly, some Americans were quite emphatic that the separation of powers included a separation of legislative and judicial power. In Virginia, for example, the Bill of Rights stated that “the legislative and executive powers of the State should be separate and distinct from the judiciary.” VA. CONST. of 1776, BILL OF RIGHTS, § 5. Two years later, a Virginian drew upon the usual sources to observe in his commonplace book that

[t]here is not any liberty, if the power of Judging be not separated from the legislative & executive powers, were it formed into the legislative, the life & liberty of the people would be exposed to arbitrary control, for the Judge would then be the legislator, were it joined to the executive power, the Judges might behave with all the violence of an oppressor.

George Gilmer, Commonplace Book, 123 (before May 1778), Virginia Historical Society, Mss 5:5, G4213:1. Further in north, in Massachusetts, the constitution also specified the separation of legislative power from the other two, including the judicial, and in 1787 at the Constitutional Convention, Caleb Strong of Massachusetts noted the value Americans placed on this sort of separation. After urging “that the power of making ought to be kept distinct from that of expounding, the laws,” he observed that “[n]o maxim was better established.” Notes of James Madison on the Federal Convention (July 21, 1787), in The Records of the Federal Convention of 1787, at 73, 75 (Max Farrand ed., 1966); see also Mass. Const., Declaration of Rights, art. XXX.
constitution. Unlike English judges in relation to Parliament, they had no choice but to decide the constitutionality of legislative acts for themselves.\textsuperscript{68}

In short, American legislatures lacked Parliament’s status as a court. In England, courts reviewed executive and judicial acts but not acts of Parliament, because Parliament was the communal court with the power to decide what was in accord with the custom of the realm and because it was the highest court—the supreme court—to which “inferior courts” had to defer. In America, however, most constitutions were no longer customary, and the concept of separation of powers deprived legislatures of at least their theoretical status as the highest courts. Thus, in most states, the logic that judicial review extended to legislation now was unimpeded by conceptions of legislatures as courts. Judges therefore could not easily avoid the task of reviewing legislation.

Inevitably, there was occasional dissent as to whether American constitutions were superior to statutes and whether judges should decide the constitutionality of statutes. Yet the judicial review of legislation did not always provoke a confrontation with legislatures. Such legislative criticism as developed, moreover, tended to come from the lower houses, and in some prominent cases it was defeated within the legislative branch. If constitutions were superior, then it was difficult to avoid judicial review under these documents, and although some judges had doubts about the review of legislative acts, their opinions clearly did not predominate. Not only did judges tend to accept their duty to review legislation, but also they adhered to their decisions. Even when the courts that reviewed legislation encountered opposition, they never altered their decisions once they had reached them.

D. Judicial Duty

The judges reviewed acts and customs under superior law not merely because of the conflict between different levels of law, but because the judges understood themselves to be under a duty to decide in accord with law. Some scholars have wondered how judges could have felt bound by a superior law if they were not themselves the objects of the law. Yet there is little reason for puzzlement. All persons subject to a law were bound to obey it. In addition, however, even when deciding whether other persons or bodies had contravened a law, the judges had a duty—on account of their office and their oaths—to make decisions that accorded with law.

The duty of judges not merely to act lawfully themselves, but to decide in conformity with law, stemmed largely from their office and to some extent from their oaths. For example, in 1591, when all of the judges protested that the king’s councillors could not commit or detain subjects in prison “against the laws of the realm,” they added that “for remedy” of these imprisonments,
the judges were “almost daily called upon to minister justice according to law, wherunto we are bound by our office and our oath.”\(^{69}\) Rather than a duty to act under law themselves, this was a duty to decide in accord with law in all of their decisions, whether concerning their own acts or more typically the acts of others.

There were layers to the judges’ obligation to perform this duty. To some extent, the obligation, like the duty, followed from the office, but unlike the duty, the obligation arose principally from the oath by which judges qualified for their office.\(^{70}\) More remotely, to the extent their office was defined by law and their oaths were imposed by law, the judges could be considered legally obliged to decide in accord with law, and therefore judicial review could be described in terms of the judges’ own legal duties. Most generally, to the extent judges had a duty to decide in accord with law, they were thereby bound by law, and presumably it was in this sense that the Supremacy Clause of the U.S. Constitution recited that state court judges were “bound” by federal law. Judges, however, typically were too cautious simply to say that in making their decisions, they were bound by law—perhaps because they hesitated to describe their duties in a manner that might seem to suggest that a judge’s error amounted to a violation of law.

Separate from the question of how judges were to decide constitutional issues was the question of when they were obliged to decide them. Over the centuries, English and American judges would identify various explanations as to why they felt obliged to reach constitutional decisions—for example, their duty as judges to decide cases, their duty as judges (and more generally as citizens) to avoid even acquiescing in a violation of a constitution, and

\(^{69}\) Declaration of Judges on Unlawful Imprisonments (June 9, 1591), in 5 W.S. Holdsworth, A History of English Law 495 (1927); see also 3 A Complete Collection of State Trials, supra note 55, at 76-77 (quoting from notebook kept by Lord Chief Justice Anderson).

\(^{70}\) For example, the judges of Newbern Superior Court in Bayard mentioned their obligations and duty:

[T]he Judges observed, that the obligation of their oaths, and the duty of their office, required them in that situation, to give their opinion on that important and momentous subject; and that notwithstanding the great reluctance they might feel against involving themselves in a dispute with the Legislature of the State, yet no object of concern or respect could come in competition or authorize them to dispense with the duty they owed the public, in consequence of the trust they were invested with under the solemnity of their oaths.

Bayard v. Singleton, VA. INDEP. CHRON., July 4, 1787, at 3; see also 1 N.C. (Mart.) 42, 44 (1787).

That oaths created an obligation to conform to a duty more substantially defined by a judges’ office is evident from the often limited content of the oaths. In Massachusetts, for example, the Constitution required all officers to take the same basic oaths, including that “I will faithfully and impartially discharge and perform all the duties incumbent on me as ____ : according to the best of my abilities and understanding, agreeably to the rules and regulations of the constitution, and the laws of this commonwealth.” MASS. CONST. pt. II, ch. VI, art. I. In addition, the laws establishing the courts contained relevant language. Most concretely, one statute required the Supreme Judicial Court “in all such actions real, personal, and mixed, to give such judgment and award such execution as the common rules of justice and laws of this Commonwealth shall direct.” An Act Establishing a Supreme Judicial Court Within the Commonwealth (1782), reprinted in The Perpetual Laws of the Commonwealth of Massachusetts 125 (1788).
their duty as judges to protect constitutional rights. As will be seen, however, judges sometimes reviewed acts for their constitutionality in situations in which they were not strictly required to do so.71

The law established in a constitution had weaker implications for judicial declarations than for judicial decisions. In particular, although judges felt obliged to decide in accord with their constitution, they did not always feel obliged to declare contrary legislative or other acts unconstitutional, unlawful, or void. To be sure, judges sometimes felt bound to make such declarations in their opinions (and sometimes even in their court records), for only in such ways could they justify their decisions—let alone state what the law was and apprise the other branches about the limits on their power. Yet to satisfy the underlying requirement of deciding in accord with law, judges did not necessarily have to declare what was or was not constitutional. Instead, the constitutionality of an act typically was only one step in the course of a judge’s reasoning. This can be illustrated by the series of New Hampshire cases in which justices of the peace exercised small claims jurisdiction under the state's so-called “Ten Pound Act.” When such cases initially arose, the judges declared the act unconstitutional and even had the clerk enter their declarations in their records.72 In later cases—decided after the judges' view had become widely known—the judges did not make such broad declarations in their records. Instead, to the extent they gave any explanation at all in their records, they simply stated that the decisions of the justices below were unconstitutional or irregular.73 In these later cases, the judges could reach their opinions only by assuming that the statute was unconstitutional, and thus even if silently and on the basis of precedent, they had to reach a conclusion about the constitutionality of the act. They clearly, however, felt no obligation to repeat their declarations that the statute was unconstitutional.

Incidentally, when judges in a case enunciated their interpretation of a constitution, their views were authoritative beyond any particular decision only because of the authority of their opinions. To the extent necessary for a decision, a judge’s opinion in a case had authority because in cases, the resolution of legal controversies was committed to the judges. Even when not deciding cases, their opinions traditionally carried some weight—although much less in the eighteenth century than in earlier periods. In both cases and other types of decisions, however, judicial opinions were not beyond challenge, and the judges understood that in the last resort (as explained by the

71 For some examples, see text infra at notes 76 & 80.
72 For details, see text at infra notes 102 & 104.
73 For cases with statements about the conduct of the justices below, see Duty v. Kelly, in New Hampshire State Archives, Rockingham County Inferior Court, Minute Book (of New Entries), Aug. term 1786, Case No. 50 (“this Action is quash’d. for want of regularity”); Davis v. Young, in New Hampshire State Archives, Rockingham County Inferior Court, Minute Book, Nov. term, 1786, New Entries, Case No. 9 (proceedings quashed because “no Justice of the peace can take cognizance thereof according to the Constitution of this State”); Gilman v. Butler, in Strafford County Clerk's Office, Strafford County Court Order Book of Judgments & Levies 1786-1790, 303 (June 1787) (action dismissed because “the Justice could not by the law of this State, nor the Constitution hold for the Cognizance of the original Plea”).

These cases were identified by Lambert, supra note 10, at 45-47. It is difficult, however, to understand why he states that the later cases declared the statute unconstitutional. Id. at 46–47.
judges of the Virginia Court of Appeals in 1788) they had "no other alternative for a decision between the Legislature and judiciary than an Appeal to the People, whose Servants both are, and for whose sakes both were created, and who may exercise their Original and supreme power, whenever they think proper." It therefore was "[t]o that tribunal" that the Court of Appeals "commit[ed] themselves, conscious of perfect integrity in their intentions, however they may have been mistaken in their Judgment." Yet most courts understood that they could not appeal to the people in the same way or as successfully as more popular branches of government, and they therefore typically appealed to the people simply by doing their duty.

The evidence from England and America suggests, not that state courts invented judicial review, but rather that they reviewed acts under familiar principles. What changed in America was that judges now were free and even obliged to review legislative acts. Again and again, scholars have seized upon one or another early state court case to announce that it helped to establish judicial review, and undoubtedly such cases contributed to the acceptance of judicial review of legislation. The evidence, however, reveals more substantially that American judges, like earlier, English judges, reviewed acts on the basis of their assumptions about the hierarchical character of law and about the duty of judges to decide in accord with law. For centuries, judges had reviewed executive and judicial acts under English law—not least, under English constitutional law—and judges had even reviewed the legislative acts of subordinate bodies. Accordingly, after most American states adopted express constitutions that separated judicial and legislative power, what would have been remarkable is if the judges had not reviewed legislative acts.

II. The Breadth of Judicial Review

The breadth of the assumptions underlying judicial review is intimated by the breadth and variety of the early state court decisions. Far more than any particular judicial opinion, this range of the decisions gives the state evidence its strength and indicates the latitude of the assumptions on which judicial review rested.

To be sure, it is well known that judicial review can be understood broadly. Yet in the conventional historical account, several features of judicial review tend to be portrayed very narrowly. First, judicial review is often reduced to cases. Cases seem particularly important because the judges who are thought to have invented judicial review presumably must have done so through "precedents"; because only the federal courts (which decide cases and controversies) could have fully established judicial review; and because Chief Justice Marshall in Marbury v. Madison happened to be deciding a case and therefore wrote that "if both the law and the constitution apply to a particular case, . . . the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." Second, the

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75 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).
history of judicial review is frequently discussed almost exclusively in terms of the review of legislation—probably because under a republican form of government, the review of this sort of act is peculiarly important as a limitation on majorities and their legislative power. Third, the authority of judicial review is assumed to rest on decisions by superior courts. If judicial review was created by the courts, and if therefore precedent mattered, only the decision of a superior court—indeed, the U.S. Supreme Court—is likely to have established the authority of judicial review.

As will be seen, however, judicial review was not confined to cases, legislation, or superior courts. The review of acts under state constitutions included a review of all sorts of acts in all kinds of decisions by all sorts of courts, and this breadth of judicial review confirms the breadth of the assumptions underlying it. In particular, it confirms the suggestion in Part I that judicial review developed within assumptions about law and judicial duty—about the hierarchical character of law and the duty of judges to decide in accord with law.

A. Different Types of Decisions

Early state courts reviewed acts both in cases and in nonadjudicatory decisions. Traditional histories of judicial review focus on cases and treat most nonadjudicatory decisions about constitutions as incomplete instances of judicial review and thus irrelevant. This narrow conception of the decisions that matter is based on the assumption that in the absence of authority in the U.S. Constitution, a "precedent" was necessary to establish judicial review. As also already noted, the jurisdiction of federal courts and Marshall’s opinion in Marbury seem to corroborate that if American courts created judicial review, they must have done so in their cases. None of this, however, diminishes the value of the nonadjudicatory decisions as historical evidence of judicial review. Precisely because these decisions were not adjudications, they provide a corrective to current assumptions, for they show that state court judges understood what they were doing more broadly than can be explained in terms of the adjudicatory function of courts.

Nonadjudicatory decisions are familiar from two groups of early "cases." One consists of the so-called Cases of the Judges—in fact, a remonstrance by the Virginia Court of Appeals in 1788 and the resignation and protest of its judges in 1789.76 The other centers on Hayburn's Case—a nonadjudicatory decision in 1792 by the U.S. Circuit Court for the district of Pennsylvania, which was accompanied by an oral opinion and a letter to George Washington from the judges reciting the reasons for their decision.77 Associated with Hayburn's Case was a decision by the U.S. Circuit Court for the district of New York and a letter to George Washington by two judges in the North Carolina district.78 Rather than cases, these all involved protests against legislative acts—in all, five protests against three statutes. Four of these deci-

76 Cases of the Judges, 4 Va. (1 Call) 135 (1788).
77 Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).
sions were entered in the records of the courts, and these were therefore acts of the courts rather than merely of the judges. Each of the five, however, reviewed the constitutionality of legislation and required the judges individually or as a court to reach a decision about the law.79

Although these “cases” seem unusual and therefore are not ordinarily treated as fully relevant to the history of judicial review, there were other such nonadjudicatory decisions, particularly in Virginia. For example, in 1785, the Fairfax County Court reviewed an act of the executive. In July 1784, the governor and his council had decided to regularize the appointment of the county court magistracy by soliciting from each county a list of the current magistrates and information as to whether or not they were still active. On this basis, the governor in October issued new county court commissions in which dead or otherwise departed or inactive justices were omitted. Of greater constitutional significance, however, the new commission in each county listed justices already serving under earlier commissions, and it thus required existing justices to take their oaths again under the new commission. In early 1785, when the Fairfax County Court was sent one of these new commissions, the justices unanimously refused to receive it. In a resolution transcribed in their records and transmitted to the governor, the justices protested that under the new commission, they were “constituted & appointed de novo” and consequently were “required to take the oaths of qualification over again, notwithstanding they had before taken them under the Commonwealth and several of the Justices have been for many years acting Majistrates by virtue of former commissions for the County.” Not least of the court’s reasons for its refusal was that a de novo commission could be used as a means of “turning any man out of his office of a civil Majistrate as prejudice, malice or caprice might dictate without a hearing or without cause of complaint against him.” As the justices explained, “the constituting and appointing the former acting Justices de novo necessarily implies the power of vacating the former Commissioners.” Consequently, the new commission threatened a justice’s seniority and even his office: “[T]he Justices, derive their office entirely from the last [commission] and consequently that by issuing a new Commission and misplacing any man in it he would lose his rank and might be degraded from the first to the last Justice in the County or by leaving out any Justices name he would thence forward be deprived of his office both of which it is notorious were frequently practised under the former government.” On the basis of these assumptions and the separation of powers provision in the state’s bill of rights, the Court concluded that “it is conceived that the exercise of such a power is altogether illegal giving to the Executive department of the State an undue and dangerous influence over the Courts of Justice directly contrary to the declaration of rights and to the fundamental principles of our free government.”80

79 Obviously, the word “decision” is not used here in the narrow sense of a court’s decision of a case or controversy.
80 Fairfax County Archives, Fairfax County Court, Order Book 1783-1788, at 115 (Mar. 22, 1785); VA. CONST. of 1776, BILL OF RIGHTS, § 5. For those interested in Marbury, it may be worth noting that this Fairfax controversy was only one of a range of decisions that arose from disputes about the commissions of justices of the peace. Unlike in Marbury, here the commis-
sion was delivered, but the appointees refused to qualify under it and thus continued to act under their old commissions.

Incidentally, this decision and the *Cases of the Judges* (among other decisions) call into question the view taken by Robert Lowry Clinton that judges could review acts only when this was necessary for them to avoid directly violating the constitution themselves—"only when to allow such acts to stand would violate constitutional restrictions on judicial power." ROBERT LOWRY CLINTON, MARBURY V. MADISON AND JUDICIAL REVIEW 1 (1989). In various decisions, however, including the ones from Virginia discussed here, no executive or legislative act required the judges to violate the Virginia Constitution, and the judges took their decisions merely to avoid acquiescing in executive or legislative violations of law.

To save scholars the trouble of copying the relevant pages of the order book, and more important, to save the order book from repeated copying by scholars, the full text of the decision is printed here:

A new Commission of the Peace for this County signed by the Honourable Benjamin Harrison, Esquire late Governor of this Commonwealth being this day presented and read whereby the Justices of the County are constituted & appointed de novo and consequently are required to take the oaths of qualification over again, notwithstanding they had before taken them under the Commonwealth and several of the Justices have been for many years acting Majistrates by virtue of former commissions for the County; the Court unanimously refuse to receive, and do protest against the same for the following reasons. Because such a Commission would occasion an unnecessary multiplication and repetition of Oaths rendering them common and familiar and thereby corrupting the morals of the people, and weakening the most sacred bands of society, and one of the best securities both for publick duties and private property. Because such a Commission would afford a dangerous precedent and tend to renew in this Commonwealth One of the many abuses and arbitrary practices of the late Monarchical government here, yielding to the Secretary an unnecessary fee and to the Governor & council an unjust and oppressive power of insulting and turning any man out of his office of a civil Magistrate as prejudice, malice or caprice might dictate without a hearing or without cause of complaint against him; for the constituting and appointing the former acting Justices de novo necessarily implies the power of vacating the former Commissions, that the Justices, derive their office entirely from the last and consequently that by issuing a new Commission and misplacing any man in it he would lose his rank and might be degraded from the first to the last Justice in the County or by leaving out any Justices name he would thence forward be deprived of his office both of which it is notorious were frequently practised under the former government. Because it is conceived that the exercise of such a power is altogether illegal giving to the Executive department of the State an undue and dangerous influence over the Courts of Justice directly contrary to the declaration of rights and to the fundamental principles of our free government: And altho' this Court hath no cause to believe that the present commission was issued for any such evil purposes yet we should think we were deficient in the duty we owe to our Country and posterity if we suffered ourselves to become accessory to establishing a precedent, evidently tending to introduce them and by renewing the oppressive maxims and practices of the government from which we have so lately been reserved by force of arms to sap the foundations of that liberty which has been purchased at the expense of so much blood and treasure.

Ordered that the Clerk of this Court Transmit a Copy of this protest to the Executive.

Charles Broadwater
Charles Alexander
George Gilpin

Alexander Henderson
David Stuart
William Page
John Gibson

Fairfax County Archives, Fairfax County Court, Order Book 1783-1788, at 114–16 (Mar. 22, 1785).
In another Fairfax decision, the County Court decided it could not constitutionally adopt a motion that had been brought before it, and it thereby revealed how the implications of law and judicial duty were not confined to decisions that merely reviewed the acts of other bodies. The county courthouse in Alexandria had long been in disrepair, and traditionally the county courts had raised levies for the construction and repair of their buildings. George Mason, however, and other Anti-Federalists in Fairfax worried that Alexandrians exerted too much influence in the Fairfax court, and Mason and his allies felt this all the more strongly after Alexandrians largely supported ratification of the U.S. Constitution—a decision that would soon lead to the transfer of Alexandria to the new federal district. Accordingly, George Mason and other Anti-Federalists refused to support repair of the existing courthouse. In particular, in January 1789, when a motion was made in the county court for raising a levy on tobacco for the repair of the structure or construction of a new one, Mason led the court to adopt a resolution that “the Court had no legal authority to levy on the inhabitants of the County any money or Tobacco for any purpose whatever”—most of the gentlemen being “of opinion that power was taken from the County Courts by the bill of rights of this Commonwealth.” Indeed, the version of the resolution sent to the governor emphasized that “the power of levying by the Courts was destroyed by an express article in the bill of rights of this Commonwealth”—perhaps the separation of powers provision but more probably the Sixth, “that . . . men, . . . cannot be taxed or deprived of their property for public uses, without their own consent.” The Fairfax County Court decision stimulated worries not only about county court actions but also about the constitutionality of all sorts of legislative acts authorizing particular county levies, for “[i]n at least fifty instances since the revolution, it has been recognized by the legislature, and particular acts passed, prescribing it as a duty on the county magistrates.” Thus, although the court had focused on the unconsti-

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81 The statutes of Virginia had authorized and required county courts to levy on tobacco for various particular purposes (albeit not the repair of the Fairfax courthouse) and had recognized a general power of county courts to make levies (but without specifically authorizing it).

82 For some aspects of the politics, see Nan Netherton et al., Fairfax County, Virginia: A History 132–33 (1978).

83 The Order Book states:

On a motion for levying Tobacco to erect a new Courthouse or repair the present one, it was objected that the Court had no legal authority to levy on the inhabitants of the County any money or Tobacco for any purpose whatever, and the question being put whether they were vested with that power, or not, George Mason, Charles Broadwater, Martin Cockburn, Richard Chichester, David Arell, Charles Little, William Payne, Charles Alexander, Roger West, William Lyles, William Herbert, and Thomas Gunnell Gentlemen were of opinion that power was taken from the County Courts by the bill of rights of this Commonwealth, and Robert Adam, George Gilpin, John Moss, David Stuart, James Wren. Richard Conway, John Fitzgerald, William Brown, Benjamin Dulany, and John Potts Gentlemen were of a contrary opinion.

Fairfax County Archives, Fairfax County Court Order Book 1788–1792, pt. 1, at 84–85 (Jan. 20, 1789).

84 Copy of resolution sent to Clerk of the Council, in Library of Virginia, Governor Beverley Randolph Papers, Box 58 (Jan. 28, 1789); Va. Const. of 1776, Bill of Rights, § 5.

85 From a Correspondent (Alexandria, Jan. 22), The Va. Herald and Fredericksburg
stitutionality of its own power, its reasoning had a broader effect: "The decision of the court was, that these laws being all contrary to an express article of the bill of rights, and constitution, ought not to be acted on," and "[i]f this decision be well founded, the evil cannot be remedied by the legislature," and "[t]he proper remedy cannot be applied but by a convention."86 A month after the initial decision, however—when Mason and most of his allies were absent—the court "reconsidered their power in laying levies for the use of the County," and a majority now "were of opinion that they had a right to levy."87

Judges could review acts for their constitutionality even when the court on which they sat did not reach a decision. As already observed in connection with Hayburn's Case, judges sometimes protested against an act individually rather than as a court. Among the decisions by judges acting in their individual judicial capacity were their advisory opinions. For example in Massachusetts, the 1780 constitution stipulated that: "Each branch of the legislature, as well as the governor and council, shall have the authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions."88 Beginning shortly afterward, the houses of the legislature repeatedly requested such opinions on constitutional questions. Some opinions concerned the structure of the government, such as the right of the legislature to fill vacancies in the governor's council or the legal effect of a bill not signed by the governor.89 One opinion even concerned the constitutionality of a proposed bill under the privileges and immunities clause of the Articles of Confederation. (According to the judges, this clause protected all naturalized persons, regardless of the class or denomination of aliens to which they had belonged, regardless of when they were naturalized, and regardless of the state by which they were naturalized. The judges further suggested that the clause guaranteed naturalized persons all the privileges and immunities of free citizens in the several states, including the state in which they were naturalized.)90 Like the Fairfax

86 From a Correspondent (Alexandria, Jan. 22), supra note 85.
87 Fairfax County Archives, Fairfax County Order Book 1788–1792, pt. 1, at 88 (Feb. 17, 1789).
88 Mass. Const. of 1780, ch. III, art. II.
89 Opinion of Justices of Supreme Judicial Court That the Legislature Has a Constitutional Right to Fill Vacancies in the Council Whenever They Occur (Nov. 1784), in Massachusetts State Archives, Senate Documents, 1784, No. 177, Box 6; Opinion of the Justices of the Supreme Judicial Court Relative to Approval of Bills and Resolves (March 1791), in Massachusetts State Archives, Senate Documents, Misc. 1791, No. 1372, Box 36.

The advisory opinions on structural questions (together with some of the other decisions, such as the 1785 Fairfax protest) leave little room for the conclusion of some modern commentators that judicial review of such matters was beyond the contemplation of the framers.
90 Opinion of the Justices of the Supreme Judicial Court on an Article of the Confederation (June 22, 1785), in Massachusetts State Archives, Senate Documents, Rejected Bills, 1785, No. 344, Box 11. The judges conceded, however, that nothing in the Articles of Confederation prevented a state from naturalizing aliens of only one class or denomination, and that a state could naturalize an alien subject to particular disabilities, as long as it did so expressively. This opinion suggests that the review of state legislation under a constitution of the United States
County Court's 1789 decision concerning the motion to levy on tobacco, these advisory opinions reviewed proposed acts rather than completed acts. Unlike this Fairfax decision, however, these advisory opinions concerned the acts of another body, they were given outside of court, and they were written at different levels of abstraction—some directly stating that a proposed resolve or act would be unconstitutional, and some simply generalizing about what a constitution required. These opinions thus further reveal the wide range of circumstances in which judges understood themselves to be bound to decide in accord with their constitutions.

These examples (and others) show that judges had a tradition of nonadjudicatory constitutional decisions and that judges understood their constitutional decisions more broadly than merely as a review of the acts of other bodies or as a feature of the judiciary's obligation to decide cases. Certainly, the judges reviewed the acts of other bodies, but they also made decisions that did not clearly fit within a narrow conception of review. Certainly, in a case, a judge might feel an additional obligation to reach a decision about an act and to make the decision in accord with law. Yet judges apparently felt obliged to review acts in a wide range of their decisions, including when they were not deciding cases. Thus rather than merely a matter of reviewing acts or deciding cases and controversies, what is today called "judicial review" seems to have rested upon broader and more basic principles.

B. Different Types of Acts Reviewed

State courts reviewed all sorts of acts. In the conventional history, judicial review is depicted as exclusively or at least primarily a review of legislative acts and a limitation on majority power. Already in the 1780s, some judges perceived their review of legislation as a means of constraining majority abuses of representative government. This was, however, a prominent benefit or function of judicial review rather than what defined its scope, for state courts reviewed the constitutionality of all sorts of acts—not merely legislative acts but also executive and judicial acts.

Repeatedly in the 1780s, courts held legislation unconstitutional. As already observed, historians often adopt a skeptical attitude toward these decisions, but their scholarly distrust may go too far, for the documentation is extensive. Although the full evidence cannot be published here, some decisions that held statutes unconstitutional can at least be listed. For example, in 1780 in *Holmes v. Walton*, the New Jersey Supreme Court almost certainly held a confiscation act to have violated the state's constitutional guarantee of

91 Indeed, the nonadjudicatory decisions suggest that the phrase "judicial review" needs to be used with caution. Although courts reviewed the acts of other bodies, courts also decided the constitutionality of their own proposed acts. Judges, moreover, gave their advisory opinions in very abstract terms. These decisions may not all seem to fit under the rubric of "review," and this should not be a surprise, for judges understood themselves to be deciding in accord with law, and they did not worry whether what they were doing constituted "judicial review." Accordingly, even if "judicial review" remains a convenient phrase, it probably ought to be employed with care—as a casual label rather than a description.
In a series of cases in 1786 and 1787 in New Hampshire—recently located by Richard M. Lambert—the Rockingham County Inferior Court and the Strafford County Inferior Court held a small claims statute (the so-called “Ten Pound Act”) contrary to the state constitution’s jury provision. Similarly in 1787, again on the basis of a state jury clause, the Newbern Superior Court in Bayard v. Singleton held unconstitutional a North Carolina statute related to the litigation of confiscated property. In the so-called Cases of the Judges, the Virginia Court of Appeals held two acts unconstitutional—the first in 1788 for having the effect of diminishing judicial compensation and thus threatening the independency and tenure of the judges, and the second in 1789 for more bluntly threatening their independence and tenure. Thus, state courts clearly reviewed legislative acts.


Louis Boudin and William Crosskey question whether the court reached the constitutional issue, but their doubts arise from misunderstandings. Boudin asks why earlier and later New Jersey statutes specifying six man juries were not considered unconstitutional and concludes that this reveals that the Holmes decision did not rest on a constitutional issue. Boudin, supra note 19, at 200–01. In fact, these statutory six-person juries in New Jersey were only for “small causes”—those below the jurisdiction of the common law courts and heard by justices of the peace. The range of small claims that did not reach the jurisdiction of the common law and that thus could not be the basis of a right to a jury was up to 40 shillings in England and various slightly higher sums in some American states. Many of the confiscation cases in New Jersey (including the claim of Elisha Walton for over £29,000) could not plausibly be viewed as below the common law jurisdiction within which individuals were understood to have a right to a jury. Accordingly, Boudin’s doubts concerning the case are entirely misplaced.

More generally, Louis Boudin and William Crosskey doubt whether the confiscation statute actually authorized a six-person jury and on this basis suggest that the court merely rejected a mistaken interpretation and application of the statute by the justice of the peace. In support of this, Boudin and Crosskey accurately point out the defendant merely argued that the trial violated the constitution and stated nothing about the statute. Id. at 192, 195; 2 Crosskey, supra note 19, at 950. This, however, is hardly enlightening as to what the statute was widely understood to require. For example, the legislative response to the case reveals that the legislature assumed its statute had authorized six-person juries. See, e.g., Report of Committee on Bill to Supplement Confiscation Acts (Dec. 24, 1779), in VOTES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY 101–02 (1780).

Incidentally, Boudin goes so far as to say: “Nor is there any indication anywhere, either among the[ ] papers or in the docket of the Supreme Court . . . indicating that an opinion was ever written.” Boudin, supra note 19, at 192. This is a curiously phrased statement. It was standard practice to deliver opinions orally, and of course, the file papers and docket say nothing about the judges’ opinions. The court’s record book in this case, however, in contrast to the docket, is unusually clear that the judges delivered opinions:

This Cause having been argued several Terms past and the Court having taken time to consider of the same, and being now ready to deliver their Opinions gave the Same, Seriatim for the plaintiffs in Certiorari And on Motion of Boudinot for these Plffs, Judgm. is order’d for the Plff. and that the Judgment of the Justice in the Court below be revers’d and said Plaintiffs be restored to all Things &c Nisi &c.

N.J. State Archives, Supreme Court Minutes, Book 60 (Burlington/Trenton), Apr. 1775–May 1782, No. 15, at 343–44.

93 See generally Lambert, supra note 10.

94 Bayard v. Singleton, 1 N.C. (Mart.) 42 (1787), reprinted in VA. INDEP. CHRON., July 4, 1787, at 3, No. 50.

95 Cases of the Judges, 8 Va. (4 Call) 135 (1788 & 1789).
No less revealing than this review of legislation is that state courts also reviewed executive and judicial acts. The review of an executive act has already been seen in the 1785 Fairfax County protest against a de novo commission. The review of a judicial act can be left for elaboration elsewhere, but it should be noted that a court's constitutional evaluation of a motion brought before it has already been observed in the 1789 Fairfax County decision against a levy on tobacco. If judicial review rested on assumptions about law, and no one was above the law, then the acts of each of the different branches of government were vulnerable.

The range of the different types of acts reviewed by courts calls into doubt whether the judges defined their power to decide constitutional questions in terms of this power's most prominent function—that of limiting a majority's legislative power. Some Americans clearly understood that the judges would be peculiarly important in America on account of this function, but the judges reviewed a wide variety of acts—legislative, executive, and judicial—and they thus seem to have understood what they were doing more broadly.

C. Different Types of Courts

The entire range of courts, from the top to the bottom, engaged in judicial review, and like the different types of decisions and acts reviewed, this variety of courts confirms the breadth of judicial review and its foundations in assumptions about law and judicial duty. The conventional history assumes that supreme courts played an essential role, for if judicial review was not authorized by constitutions and, instead, was developed by judges, it could have been fully established and legitimized only by supreme courts—at least state supreme courts and more probably the U.S. Supreme Court. Indeed, if judicial review was largely a judicial creation rather than a constitutional requirement, then judges could not have instituted it merely by deciding in accord with law but must have exercised a sort of political power against legislatures—a power that could have been enjoyed only by judges of the highest courts. The evidence, however, calls into doubt this emphasis on supreme courts, for it reveals that state inferior courts also decided constitutional issues.

Inferior courts repeatedly reviewed acts for their constitutionality. In a series of cases in 1786 and 1787, as has been noted, the Rockingham County Inferior Court of Common Pleas and the Strafford County Inferior Court held New Hampshire's Ten Pound Act unconstitutional.96 Not merely in these courts (which were technically known as "Inferior Courts") but also in county courts (which were still more inferior) acts were reviewed. Particularly in nonadjudicatory decisions in Virginia, county courts challenged the constitutionality of executive acts.

Constitutional questions even were raised before mere justices of the peace, as can be illustrated by New Hampshire's Ten Pound Cases. The right to a jury had long been understood as a right available in all proceedings at common law—the civil jurisdiction of the common law courts being tradition-

96 See generally Lambert, supra note 10.
ally defined to include actions brought for more than forty shillings. The changing economy, however, and the expense and delays of the common law courts prompted some colonial legislatures to create small claims jurisdictions—in particular, to allow justices of the peace, sitting without a jury, to hear claims above the traditional jurisdictional minimum for common law courts. In November 1785, the New Hampshire legislature adopted such a statute, which increased the small claims jurisdiction of justices of the peace to ten pounds. 97 Amid a growing debt crisis, the legislators were almost unanimous, and only one legislator, William Plumer, "entered [a] protest, singly and alone, against the bill for the recovery of small debts in an expeditious way and manner; principally on the ground that it was unconstitutional." 98 Although many men had claimed that the expanded jurisdiction of the justices was a necessary convenience, Plumer was soon joined by others, such as the newspaper commentator who declared: "The question . . . is that of right not of utility." 99 Article 20 of the New Hampshire Bill of Rights stated that "[i]n all controversies concerning property, and in all suits between two or more persons, except in cases in which it has been heretofore otherwise used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred." 100 Accordingly, when defendants were brought before justices of the peace for claims above forty shillings, their lawyers sometimes relied upon this article to challenge the jurisdiction of the justices.

For example, in March 1786, in *James McGregor v. Joshua Furber*, the defendant's lawyer pleaded that the justice of the peace "ought not to take cognizance of this action" because the plaintiff's claim was for more than forty shillings and the Bill of Rights had "guaranteed a continuance of trial by jury in all cases where trials by jury had been practiced." The plaintiff's attorney countered by pleading the Ten Pound Act and arguing that the statute did not violate the Constitution: "neither does the s\textsuperscript{d} constitution say that in causes triable of more than 40/- value that the party shall have a right to trial by jury in the first instance, nor does the law restrain the party aggrieved from appealing to the Inferior Court where he may have the same cause tried by a jury in as full & ample a manner as if it had originated at an Inferior Court: wherefore the s\textsuperscript{d} James prays the s\textsuperscript{d} Justice to overrule the plea of the jurisdiction of this court & compel the said Joshua to plea[d] to the merits." 101 The justice in this case ruled for the plaintiff, which is not entirely surprising, for justices had a financial interest in their jurisdiction and apparently had sought its expansion. When, however, the case was appealed, the

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101 William Plumer's Book of Pleadings 34, *microformed* in William Plumer Papers, Reel 19; see also McGregor v. Furber, certified by Justice John Neal to Rockingham County Inferior Court, in New Hampshire State Archives, Rockingham County Superior Court, Record No. 9320. Plumer's copy follows at least the form of the original pleadings more closely than the record certified by Neal, but the difference between the two versions are minor.
Rockingham Inferior Court of Common Pleas decided for the defendant and against the statute:

On motion, it Appearing to the Court that the Act of the Legislature impowering a Justice to hear & Determine Civil Actions of More than Forty Shillings is Manifestly Contrary to the Constitution of this State & this Action being Originally Commenced before a Justice for more than forty Shillings. It is Therefore Considered by the Court that the Original Pl' James McGregore take nothing by his Writ & that the Original Def'. Joshua Furber Recover Against the said James Mc.Gregore his Costs Taxed at £3???10??8[.]

The Inferior Court held the statute unconstitutional; but no less significant, the defendant’s lawyer and apparently the Inferior Court expected the justice of the peace to have done so.

In another of the Ten Pound Cases, Treferren v. Cate, the defendant’s lawyer—the same as in McGregor—ever more boldly raised the constitutional issue before the justice of the peace. The lawyer emphasized that the Ten Pound Act violated the constitution and thus was not law. To this he added that the courts (including a mere justice’s court) served as a barrier between legislative power and the liberty of the people:

1st. that the Constitution of this State is the source from whence all Legislative Power flows —

2d. That the Legislative of course cannot exercise a Power which is not deriv’d from the constitution —

3d. that every attempt of the Legislature to exercise a Power not deriv’d from the Constitution is a Tyranical usurpation of an Authority never delegated to them and an infringement of the Constitution and no Law —

4th. That the Constitution has not vested the Legislature with Power to enable Justices to try causes of more than forty shillings Value consequently the aforesaid Statute is an Arbitrary & unwarrantable usurpation and cannot have the force of Law —

5th. because the first buddings of Tyranny ought to be carefully watched by the Judicial Courts of this State which are the constitutional barriers between the Power of the Legislature and the liberty of the People and ought early to be blasted before they increase to A size that may involve the People in the dark shades of slavery.

As in the McGregor case, the justice held for the plaintiff, and subsequently the Rockingham County Inferior Court overturned the justice’s decision on the ground that “the Act of the Legislature impowering a Justice to hear and

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102 New Hampshire State Archives, Rockingham County Inferior Court, Minute Book (of New Entries), May term 1786, Case No. 51. This was the best known of the Ten Pound Cases. This and the others, which have remained more obscure, are identified in Lambert, supra note 10, at 34.

103 Treferren v. Cate, certified by Justice Joseph Parsons to Rockingham County Inferior Court May term 1786, in New Hampshire State Archives, Rockingham County Superior Court, Record No. 9347. Lambert identified this case. See supra note 64.
Determine Civil Actions of more than Forty Shillings is Manifestly contrary to the Constitution of this State." 104 From the perspective of the Inferior Court, not only inferior courts but also mere justices of the peace had a duty to adhere to the constitution.

Even when only a superior court engaged in judicial review, the justification for judicial review by superior courts was understood to imply the same power in county courts. Thus, in North Carolina in 1786 when the Newbern Superior Court in *Bayard v. Singleton* was considering the constitutionality of a state statute, those sympathetic to the legislation apparently protested that if the Superior Court held the statute unconstitutional, mere county courts would necessarily also have such a power. The assumptions underlying judicial review, however, left no reason to escape this conclusion. As James Iredell wrote, "But it is said, if the judges have this power, so have the county courts. I admit it. The county courts, in the exercise of equal judicial power, must have equal authority." 105

Far more than any supreme or other superior court cases, the inferior court decisions reveal how judges understood their review of acts. With occasional exceptions, the justices of the peace who sat on county courts and even the judges on other, slightly more elevated inferior courts were of quite local or otherwise limited political importance. Accordingly, not merely these courts but also their judges were in a sense, inferior. Yet whether in Virginia or New Hampshire, substantial numbers of such courts adhered to their state constitutions (as they understood them), even in the face of contrary executive and legislative acts. It is improbable that these courts and the sort of men who sat on them heroically created judicial review without having authority or that they otherwise understood themselves to enjoy a freedom to create their most significant constitutional power. On the contrary, the inferior court decisions strongly suggest that judges who engaged in judicial review understood themselves to be acting under their duty to decide in accord with law. If these inferior courts—even mere county courts—reviewed the acts of governors and legislators, they must have felt obliged to do so.

The inferior court decisions indicate in addition that judicial review developed on the basis of assumptions that had cultural depth—that were widely understood and easily accessible. Curiously, judicial review occurred at approximately the same time across the continent, without the sort of wide-ranging newspaper and pamphlet debate that surrounded so many other issues. 106 In this context, county and other inferior courts reviewed acts

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104 New Hampshire State Archives, Rockingham County Inferior Court, Minute Book (of New Entries), May term 1786, Case No. 113.
105 James Iredell, *To the Public* (1786), supra note 63.
106 On a few occasions, public debate about judicial review went beyond the substantive constitutional questions to reach issues concerning the role of the judges. No less interesting, however, is what Americans often apparently did not bother to say. Although much of the debate about judicial review occurred in oral discussions among lawyers and judges, and although written arguments in many instances have been lost, it is also clear that inferior court decisions and even some of the higher court cases occurred with less public debate about the role of the courts than may be expected. A prominent example is *Bayard v. Singleton*, in 1787, in which a North Carolina Superior Court held a state statute unconstitutional under the state
for their constitutionality, although many of the men who sat on these courts were not lawyers.\(^{107}\) Apparently, judicial review—even review of legislation—was something that very ordinary men and very inferior courts could do without first reading about it in contemporary publications. None of this could have happened, unless judicial review rested on assumptions that were relatively commonplace and accessible.

Thus, the decisions of inferior courts are more revealing than has been supposed. It will be recalled that Chief Justice Marshall wrote about superior law: The constitution is “a superior, paramount law,” and if “the constitution is superior to any ordinary act of the legislature; the constitution . . . must govern the case to which they both apply.”\(^{108}\) This was true, but it applied to all kinds of acts, in all sorts of decisions, by all kinds of courts. That even inferior courts during the 1780s reviewed legislation and other acts, in both cases and nonadjudicatory decisions, shows that not merely the U.S. Supreme Court in 1803 and the framers in 1787 but also the most ordinary of judges were already familiar with the old assumptions about the effect of a superior law and the duty to decide in accord with law. Only because they understood these assumptions and understood themselves to be bound by them could inferior court judges, even county court judges, review legislative and executive acts.

III. The Omission of Any General Authorization for Judicial Review in American Constitutions

Being presuppositions about law rather than legal doctrines, the hierarchy of law and the judicial duty to decide in accord with law did not need to be mentioned in constitutions—indeed, they were not ordinarily appropriate there. Many commentators assume that judicial review was a judicial innovation because it was not generally authorized in the U.S. Constitution. Yet judicial review was not authorized in the state constitutions either, and this did not stop the state courts, like the federal courts, from reviewing acts. Nor should this be unexpected. The obligation of human law had to be derived, it was thought, from law of a higher level, which in the case of constitutions, was natural law.\(^{109}\) Although not enforceable in a court (unless adopted in constitution’s jury clause. Afterwards, James Iredell disputed with Richard Dobbs Spaight whether the court had such a power, and in a conciliatory conclusion to one of his letters, Iredell remarked: “I believe many think as you do upon this subject, though I have not heard much said about it, and I only speak on the general question, independent of an application to any case whatever. Most of the lawyers, I believe, are of my opinion in regard to that.” Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), in 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL, supra note 63, at 174, 175–76.


\(^{109}\) Corwin and some other scholars observe that “judicial review was rested by the framers of the Constitution upon certain general principles which in their estimation made specific provision for it unnecessary,” but the scholars who take this position seem to assume principles different than the general assumptions examined here about the superior law and its effects on inferior acts. CORWIN, supra note 19, at 17. For a discussion of other scholars, see Levy, supra note 5, at 8.
human law), natural law was the highest of laws and the source of authority for human beings in making their constitutions, which in turn authorized governments to make statutes and other legal acts. This hierarchical descent of authority and obligation could be taken for granted, and accordingly, there usually was no reason for either a constitution or a statute to specify that it was binding or obligatory or that one was superior to the other.

Americans rarely even debated whether a constitution should contain a clause declaring it superior to other human law. One of the few moments in which Americans are known to have entertained such a suggestion occurred in 1788, during the formation of the Kentucky Constitution. A “Farmer” wrote to the Kentucky Gazette inviting gentlemen to share their opinions on several matters, including: “Ought not the Constitution to have a clause declaring itself superior and permanent to any Law or act of Assembly that shall be made contrary to it.”110 It is suggestive of how little interest the idea aroused that a response came only six months later—from a “Cornplanter.” Unable to resist the opportunity to adopt a patronizing tone, the “Cornplanter” explained that he assumed the “Farmer” meant to ask whether the constitution should describe itself as superior and paramount. He then wrote:

To this I answer, in the affirmative else whence the use of a Constitution which is or ought to be, not only superior to, But the basis of both law and Government. The Constitution of a State is not only the guide of its Legislature but the sacred immutable compact between the people and those whom, for their greater security and happiness, they appoint to legislate and govern. It is the touchstone of Law, a barrier against innovation and tyranny; nor can law be binding that is repugnant to it.111

Many and perhaps most Americans would have agreed that a constitution was superior to legislation.112 Yet they did not typically expect that a constitution therefore ought to have “a clause declaring itself superior.” Precisely because the hierarchy of law was a widely understood presupposition about law, there was no need to specify it in a constitution.

Such an assumption had to be mentioned only when this was necessary to clarify the relationship between different bodies of law. For example,

110 A Farmer, Letter to Printer, KY. GAZETTE, Feb. 2, 1788.
111 Cornplanter, Letter to Mr. Printer, KY. GAZETTE, July 12, 1788. In fact, the Farmer’s phrasing was not as inaposite as the “Cornplanter” assumed, and it was the latter who revealed his ignorance. Nonetheless, the conception adopted by the “Cornplanter” was the more modern approach. In Marbury, for example, Chief Justice Marshall described the U.S. Constitution as “a superior, paramount law.” Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
112 In contrast, Jefferson emphasized that the Virginia Constitution was not binding as a constitution because it had been adopted by the Virginia legislature, which therefore felt unconstrained by this document. Courts in Virginia, however, regularly reviewed acts under the constitution. Similarly, Massachusetts courts reviewed acts under their constitution, notwithstanding its inadequate ratification by the towns. Whereas legislative bodies adopted acts under procedures defined with precision by constitutions, the people (at least initially) adopted constitutions under procedures implied by natural law. It therefore should be no surprise that the courts conceived the requirements for ratification of a constitution to be less formal than those for approval of a legislative act.
when the New Jersey Constitution declared that preexisting common law and statute law would remain in force, it prudently added: "until they shall be altered by a future law of the Legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this Charter."\(^{113}\)

The need to clarify the relation between different systems of law was most prominently evident in the Supremacy Clause of the U.S. Constitution. Within a system—state or federal—there typically was no reason to specify the order of supremacy among the different types of law, because this was too obvious for words. For example, the Supremacy Clause of the U.S. Constitution did not have to designate the relative supremacy of treaties, statutes, and the Constitution. Between the federal and the state systems, however, the priority might seem unclear. Both the U.S. Constitution and the state constitutions drew their authority from the people, who were widely understood to have adopted their constitutions in conformity with their duties and powers under natural law. Accordingly, the framers had reason to worry whether the federal Constitution or a state constitution (let alone a subsequent state constitution) would be superior in the event of any conflict.\(^{114}\) The Supremacy Clause therefore had to state that the Constitution, laws, and treaties of United States "shall be the supreme Law of the Land."\(^{115}\)

Lest there be any doubt as to what the supremacy of federal law meant for the judges of the other systems of law, the Supremacy Clause added: "and the Judges in every State shall be bound thereby. . . ."\(^{116}\) As observed in Massachusetts, judges had already evaluated state legislation under the Articles of Confederation (at least when asked to do so by their legislature), but they might not ordinarily recognize this as their duty, and therefore the Supremacy Clause emphasized that the judges in the states were bound by the U.S. Constitution and other federal law. There was no need, however, to explain that the judges established under a constitution were bound to decide in accord with the constitution and the laws adopted under it. In the U.S. Constitution, as in the state constitutions, this could be taken for granted.

Conclusion

The history of judicial review often seems to be part of a latter-day American creation story, in which the people of the New World created their nation, their institutions, and in a sense, even themselves. In this gratifying account of various beginnings, judicial review was another type of self-generation, in which, however, the judges rather than the people as a whole declared their own power. It is a pleasant story, but whether it has support in the evidence is dubious.

The evidence from both England and America reveals a very different history of judicial review. On the basis of their duty to decide in accord with law and their assumptions about the hierarchical character of law, judges had long reviewed government acts. Although English judges could not review

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\(^{113}\) N.J. Const. of 1776, art. XXII.

\(^{114}\) Clark, supra note 7, at 91–92, 101, 103 n.70, 106.

\(^{115}\) U.S. Const. art. VI.

\(^{116}\) Id.
the acts of the highest court, Parliament, they regularly reviewed the acts of other courts and the Crown. American judges also reviewed government acts, and on account of their express constitutions and their separation of powers, they could and even had to review legislation. Their constitutional decision-making was remarkably broad: it did not always involve review; it included nonadjudicatory decisions as well as cases; it examined the acts of all branches of government; it was done by not only supreme courts but also inferior courts. This breadth of "judicial review"—especially the review by inferior courts—suggests the breadth of the assumptions upon which it rested. These assumptions, moreover, were at a very different level than constitutional law and therefore did not belong in constitutions but instead could usually be left unstated, both in England and in America. Apparently, therefore, what is known today as "judicial review" was not a late development, was not established by the state or federal judiciaries, was not as clearly created as inherited, was not peculiarly American or narrowly a product of written constitutions, and far from being understood by judges as a matter of judicial discretion, it was conceived by them to be part of their duty to decide in accord with law. Judicial review thus may have been the exact opposite of what is often assumed.

The early evidence therefore is revealing. At the very least, it suggests much about the historical authority and character of judicial review. More generally, the evidence indicates how judicial review can be understood as part of the broader development of the rule of law. Rather than a paradoxical departure from the rule of law, in which American judges went beyond law in order to ensure adherence to it, judicial review came into existence on the basis of two deeply held assumptions about law and judicial duty: the hierarchical character of law and the duty of judges to decide in accord with law.
Panel One

Judicial Review Before John Marshall

Judicial Review Before Marbury
Renée Lettow Lerner
45

Judicial Review Before John Marshall
Matthew P. Harrington
51

Is the Supreme Court a Political Institution?
Maeva Marcus
95

Arthur E. Wilmarth, Jr.
113