

## JUDICIAL REVIEW BEFORE *MARBURY*

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*While scholars have long probed the original understanding of judicial review and the early judicial review case law, this Article presents a study of the judicial review case law in the United States before Marbury v. Madison that is dramatically more complete than prior work and that challenges previous scholarship on the original understanding of judicial review on the two most critical dimensions: how well judicial review was established at the time of the Founding and when it was exercised. Where prior work argues that judicial review was rarely exercised before Marbury (or that it was created in Marbury), this Article shows that it was far more common than previously recognized: there are more than six times as many cases from the early Republic as the leading historical account found. This Article further shows that all the cases in which statutes were invalidated fell into one of three categories: courts invalidated statutes affecting the powers of courts or juries, even when the legislation could plausibly be squared with constitutional text and prior practice; state courts*

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*invalidated state statutes for inconsistency with the Federal Constitution; and federal courts invalidated state statutes—again, even when they could plausibly be defended as constitutional. Scholars have missed this structural pattern, and the dominant view has been that only clearly unconstitutional statutes were invalidated. This Article shows, instead, that the early case law reflects a structural approach to judicial review in which the level of scrutiny was closely linked to the nature of the challenged statute, and that courts aggressively protected their power, the power of juries, and the power of the national government.*

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## INTRODUCTION

One of the most significant questions for originalists—perhaps *the* most significant question—is: What was the original understanding of judicial review? Scholars and jurists have sharply disagreed on the answer. Opinions range from the claim that judicial review was not part of the original

understanding at all<sup>1</sup> to the contention that the original conception of judicial review was so expansive that courts had the power to invalidate statutes on broad natural law grounds.<sup>2</sup> The Supreme Court has claimed originalist sanction for the view that it is “the ultimate expositor of the constitutional text,”<sup>3</sup> and in the past decade has struck down a string of congressional statutes on originalist grounds.<sup>4</sup> The dominant scholarly view—presented most compellingly by Larry Kramer in his Foreword to the *Harvard Law Review*’s analysis of the Supreme Court’s 2000 Term<sup>5</sup> and his recent book, *The People Themselves*<sup>6</sup>—is dramatically at odds with this approach and holds that, while judicial review was part of the original understanding, it was rarely exercised, and only clearly unconstitutional statutes were struck down.

This Article presents the most complete historical account of the richest source of evidence on the original understanding: the case law before *Marbury*.<sup>7</sup> It specifically focuses on the cases in which at least one judge found a statute unconstitutional.<sup>8</sup> Far more than any previous work, this Article, rather than accepting at face value judicial assertions that only clearly unconstitutional statutes or statutes violative of natural law were being invalidated, carefully probes judicial reasoning and its application to statutory and constitutional text. This historical analysis leads to a view of judicial review in the founding era that is sharply different from all the varying schools of thought, both with respect to the frequency of judicial review and with respect to when it was exercised, and thus this Article supports a reconceptualization of the original understanding.

This Article shows, first, that judicial review was dramatically better established in the years before *Marbury* than previously recognized. While there has been a range of opinions about early judicial review, none of the modern commentators has grasped how common it was for courts to invalidate statutes. The most influential modern account asserts that there were five such decisions in state and federal courts in the critical period between the Constitution and *Marbury*.<sup>9</sup> In contrast, this Article discusses thirty-one cases

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1. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 1 (1962).

2. See Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

3. *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).

4. See *infra* text accompanying notes 32-34.

5. Larry D. Kramer, *The Supreme Court 2000 Term: Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

6. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

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

8. I hope to explore in a subsequent article the pre-*Marbury* cases in which constitutional challenges failed.

9. SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 37, 60 (1990).

in which a statute was invalidated and seven more in which, although the statute was upheld, one judge concluded that the statute was unconstitutional. The sheer number of these decisions not only belies the notion that the institution of judicial review was created by Chief Justice Marshall in *Marbury*, it also reflects widespread acceptance and application of the doctrine. Moreover, the fact that judicial review was exercised so frequently indicates that courts were not as reluctant to invalidate statutes as Kramer contends. At one level, then, this study provides some support for the modern Court's expansive view of its powers pursuant to the original understanding—a view that the Court has claimed but that no previous historical study has previously supported.

Second, as it focuses on the statutes challenged in these cases and the constitutional texts at stake, this Article contends that the early practice reflects a structural and process-based approach to judicial review. With the exception of two instances in which a state court found a state statute unconstitutional because it violated the Federal Contract Clause,<sup>10</sup> exercises of judicial review were of two types. First, when legislation affected coordinate constitutional departments that were not part of the political process that had produced the legislation—either juries or courts—courts repeatedly invalidated that legislation. They did so even when there was no obvious inconsistency between the legislation and constitutional text. Of the twenty-one cases in this category, there were colorable arguments in favor of the statutes in eighteen. Second, federal courts closely scrutinized state legislation for its constitutionality; in most cases in which a statute was struck down, the statute either ran afoul of the Federal Constitution or implicated a sphere of federal power (such as the ability to confer citizenship, regulate foreign commerce, or resolve boundary disputes between states). In seven of the eight cases in which a federal court invalidated a state statute, there were plausible grounds for supporting the rejected statute's constitutionality.

In contrast, I have found *no* case outside these categories in which a statute was invalidated. There is little evidence that anyone thought that judicial review was only appropriate in the categories of cases I have outlined. Rather, the difference is that the standard of review was different outside of these categories.

Thus, analysis of the early case law indicates that both Kramer's approach and the Court's approach miss the original understanding in ways of profound importance for modern originalist jurisprudence. Where Kramer describes a consistent pattern of deference, this Article shows that the standard of review varied with subject matter and that, in the two categories of cases described above, courts were not deferential and could apply an expansive conception of judicial review. Indeed, in twenty-five of the twenty-nine cases in these two

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10. For discussion of these cases (the names of which have not been preserved), see *infra* notes 216-18 and accompanying text.

categories, there were plausible grounds supporting the invalidated statute. When the category of state court invalidation of state statutes on federal constitutional grounds is added so that all cases are represented, one finds that in twenty-four of the thirty-one cases in which statutes were invalidated, there were plausible arguments in favor of the statute.<sup>11</sup> In short, the case law is dramatically at odds with the view that only clearly unconstitutional statutes were invalidated.

In contrast, the Supreme Court's expansive view of its power to invalidate legislation that is at odds with its conception of the original understanding misses the fact that early courts were—except in the limited categories of cases described above—strikingly deferential and overturned no statutes outside these limited categories. In addition, the early case law is almost a mirror image of modern case law. In the leading modern cases, the Supreme Court has acted expansively in striking down congressional legislation on federalism grounds. Early practice was the opposite. While these early federal court cases have been largely overlooked, they show that, in the period covered here, exercises of judicial review served to keep state legislatures, rather than Congress, in check. In contrast, in *Hylton v. United States*,<sup>12</sup> the one Supreme Court case involving a substantive challenge to an assertion of congressional authority, the Court unanimously upheld the statute in the face of a strong textualist challenge.

Part I of this Article establishes the background for the presentation of the early case law. It discusses the competing views on the original understanding of judicial review. It also discusses the two sources of evidence on the original understanding other than the post-1776 case law: judicial precedent before the American Revolution and the (remarkably few) early statements about judicial review that occurred outside of the context of litigation (such as Alexander Hamilton's *Federalist* 78<sup>13</sup>). This Part explains why the post-1776 case law provides the critical evidence on original understanding.

Part II looks at the revolutionary-era case law. It examines the seven cases from this period that can arguably be considered judicial review cases. The next three Parts analyze the case law from the early Republic. Part III brings together the state cases in which courts invalidated statutes. Part IV looks at the lower federal court cases. Part V studies *Hylton* and the other relevant Supreme Court case law before *Marbury*.

Part VI then draws on the previous analysis in two ways. First, it argues that the pre-*Marbury* case law powerfully illuminates *Marbury*. The prevalence of pre-*Marbury* exercises of judicial review helps explain why the assertion of judicial review in *Marbury* provoked little controversy, a fact that previous

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11. Obviously, all are not in agreement with my assessment of when there were plausible arguments in favor of the statutes—however, the crucial factor is the general pattern, which I think is clear enough.

12. 3 U.S. (3 Dall.) 171 (1796).

13. THE FEDERALIST NO. 78 (Alexander Hamilton) (Garry Wills ed., 1982).

scholars have often found surprising. It also makes Chief Justice Marshall's often-criticized reasoning in the case understandable: what appears to be a puzzling, unconvincing, and uniquely aggressive exercise of judicial review was fully consistent with prior judicial decisions in which courts had invalidated statutes that trespassed on judicial authority and autonomy. Second, Part VI seeks to articulate the approach to judicial review underlying the case law. There is a dearth of writings from this era on when judicial review should be exercised, and there was certainly some support for the view that judicial review should only be exercised in cases of clear unconstitutionality. Nonetheless, the case law discussed in this Article principally reflects an approach to judicial review that, rather than being limited to cases of clear unconstitutionality, embodies a sensitivity to concerns of process and structure. The early decisions reflect the view that courts should look closely at legislation when it implicated the powers of governmental entities that had not participated in its enactment: courts thus looked closely at legislation adopted by the political branches that arguably trespassed on the powers of juries and judges, and federal courts looked closely at state legislation that implicated the powers of Congress or the decisions made by "We the People" in adopting the Federal Constitution. Judicial review therefore reflected the conception that courts had to protect the preconditions for, to use Hamilton's term, "a limited Constitution"<sup>14</sup> by protecting the autonomy and power of governmental entities not involved in the adoption of the statute under review. This Article does not argue for the application of this approach in modern case law. Indeed, this Article does not assume that modern jurisprudence should be originalist. The purpose of this Article is to uncover what the original understanding was as revealed in the richest source: the early case law. It leaves to further discussion the question of what consequences should follow from recognition of the original understanding.

## I. BACKGROUND

The Constitution does not explicitly give federal courts the power of judicial review.<sup>15</sup> In the late nineteenth century, in the context of a heated political debate about whether courts were exercising the power of judicial review too aggressively, scholars began to debate when the power to review statutes had first emerged and, to the extent that that power had been part of the original conception of the Constitution, its scope.<sup>16</sup> That debate continues to

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14. *Id.* at 394.

15. At the same time, there is a strong textualist argument that judicial review is implicit in the Constitution. See Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 894-913 (2003) (presenting the textualist argument).

16. See Davison M. Douglas, *The Rhetorical Uses of Marbury v. Madison: The Emergence of a "Great Case,"* 38 WAKE FOREST L. REV. 375, 386-407 (2003).

this day. This Part examines the dominant scholarly positions, the different types of evidence bearing on the original understanding, and how probative those types of evidence are.

Perhaps the best-known position is that judicial review of congressional legislation was not part of the original understanding and that *Marbury* represented a sharp break with the framers' vision. This view is associated most prominently with Professor Alexander Bickel. In his classic work, *The Most Dangerous Branch*, Bickel declared: "[I]f any social progress 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*."<sup>17</sup>

The dominant scholarly view differs from Bickel's in that it acknowledges the existence of judicial review before *Marbury*, but sees it as limited in scope and as a rarity. Professor Sylvia Snowiss, whose 1990 book *Judicial Review and the Law of the Constitution*<sup>18</sup> is the leading historical study of early judicial review, found only five cases in the period between the start of the Federal Constitutional Convention and *Marbury* in which courts refused to apply statutes because they were unconstitutional.<sup>19</sup> "The absence of active judicial

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17. BICKEL, *supra* note 1, at 1.

18. SNOWISS, *supra* note 9.

19. *See id.* at 37-38 & nn.57-60. According to Snowiss, the five judicial review cases in this period were: *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (1792); *Stidger v. Rogers*, 2 Ky. (Sneed) 52 (1801); *Bowman v. Middleton*, 1 S.C.L. (1 Bay) 252 (1792); and *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20 (1793). She discusses a sixth case in which an equally divided court upheld a statute: *Lindsay v. Commissioners*, 2 S.C.L. (2 Bay) 38 (1796).

While Snowiss's account is the most influential study and has been treated as definitive, her list of cases omits reported opinions previously identified by scholars. In putting together the group of cases discussed in this Article, I began with the secondary literature examining the history of judicial review. Of these secondary sources, I found one particularly helpful. *See* CHARLES GROVE HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* (2d ed. 1932). Perhaps because it is seen as reflecting progressive-era biases, scholars have tended to disregard Haines's work, but, although its roster of cases is incomplete, it is a valuable starting point. *See also* William E. Nelson, Commentary, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. PENN. L. REV. 1166 (1972) (treating briefly the changing case law in a way that is also helpful in identifying cases). Specialized studies of particular aspects of early judicial review drew my attention to opinions not discussed in the larger judicial review literature. For example, through William R. Casto, *James Iredell and the American Origins of Judicial Review*, 27 CONN. L. REV. 329 (1995), I became aware of Iredell's dissent in *United States v. Ravara*, 2 U.S. (2 Dall.) 297, 298 (1793) (Iredell, J., dissenting), an illuminating opinion at odds with Iredell's public writings about the scope of judicial review.

In addition, the broader secondary literature discussing courts in the revolutionary era and the early Republic proved important in identifying relevant cases not discussed in the judicial review literature. For example, David Currie's discussion in his Supreme Court history of *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798), as a possible judicial review case, *see* DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 20-23 (1985), led to the discussion of *Hollingsworth* here. It

review [during this period],” she concludes, “reflected the understanding that this power was confined to the concededly unconstitutional act.”<sup>20</sup> Gordon Wood, the leading historian of the framing, has substantially embraced Snowiss’s approach. Following Snowiss, he has argued that judicial review was first seen as a “quasi-revolutionary process”<sup>21</sup> and that, even as it won acceptance in the 1790s, its champions recognized that it “was not to be exercised in doubtful cases of unconstitutionality”<sup>22</sup> and was to be “invoked only on the rare occasions of flagrant and unequivocal violations of the Constitution.”<sup>23</sup> Other studies echo this view. William Casto, in his study of the early Supreme Court, concludes that the Justices believed that a statute could

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also led to my discussion of the analytically similar cases of *Brailsford v. Georgia* and *Moultrie v. Georgia* (which Currie does not discuss). Neither *Brailsford* nor *Moultrie* led to a published opinion, and they do not appear to have been previously discussed as judicial review cases. See *infra* Part V.B. With respect to my research into the published opinions themselves, one technique that I used should be noted: I benefited significantly from computer-assisted research, a resource unavailable to all but the most recent scholars writing on this topic, and to my knowledge, one not previously exploited. In particular, the search terms “constitutional!” and “unconstitutional!” in the Westlaw database proved helpful, although only a small percentage of the cases produced by searching for these terms were judicial review cases.

In addition to listing only a fairly small percentage of the published opinions, Snowiss’s accounts also wholly fail to recognize the existence of unreported decisions. With respect to identifying these decisions, I found of particular value Charles Warren, *Earliest Cases of Judicial Review of State Legislation by Federal Courts*, 32 YALE L.J. 15, 24-25 (1925), an important work of archival research that has been largely ignored by modern scholars. THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800 (Maeva Marcus ed., 1985-2004) (consisting of seven volumes published from 1985 to 2004) has also been of significance to this project by bringing to light unreported federal court decisions (such as *Brailsford* and *Moultrie*). Timothy A. Lawrie, *Interpretation and Authority: Separation of Powers and the Judiciary’s Battle for Independence in New Hampshire, 1786-1818*, 39 AM. J. LEGAL HIST. 310 (1995), draws on original New Hampshire court records to present evidence of two previously unknown and unreported decisions. See *infra* note 262 (describing these two cases in more detail). A more recently published study of New Hampshire archival records finds evidence of at least six, and as many as eleven, judicial review cases in New Hampshire in 1786 and 1787, only two of which were previously known before the article’s publication. See Richard M. Lambert, *The “Ten Pound Act” Cases and the Origins of Judicial Review in New Hampshire*, 43 N.H. B.J. 37 (2002). Lambert’s and Lawrie’s studies suggest that systematic review of other states’ archives might well bring a significant number of other cases to light. Since *The Documentary History of the Supreme Court* is only concerned with cases that made their way to the Supreme Court, review of federal court archives might also reveal additional judicial review cases. I have not undertaken such a project of archival review, but if such a project is ever undertaken, it might well indicate that exercises of judicial review were even more common than this Article indicates.

20. SNOWISS, *supra* note 9, at 60.

21. Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 WASH. & LEE L. REV. 787, 796 n.41 (1999).

22. *Id.* at 799.

23. *Id.* at 798-99.



be invalidated only if it were “unconstitutional beyond dispute.”<sup>24</sup> In his work on the first hundred years of the Supreme Court, David Currie declares that a “lasting principle[] of construction [was] established before 1801: doubtful cases were to be resolved in favor of constitutionality.”<sup>25</sup> Christopher Wolfe,<sup>26</sup> Robert Clinton,<sup>27</sup> and Michael Klarman<sup>28</sup> have offered similar views of the

24. WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* 222 (1995).

25. CURRIE, *supra* note 19, at 55.

26. See CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* 104 (1986) (“Judicial review was not to be exercised in a ‘doubtful case.’”).

27. See ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 72 (1989) (embracing Currie’s conclusion that federal court case law reflects the view that “‘doubtful cases were to be construed in favor of constitutionality’”) (quoting CURRIE, *supra* note 19, at 55). Clinton argues that some Antifederalists and Republican politicians had a more expansive conception of judicial review and argued that courts should strike down congressional legislation that exceeded national power or implicated state power. See *id.* at 73. Clinton does not, however, argue that this approach was reflected in the case law.

28. In a thoughtful and intriguing article on Chief Justice Marshall, Professor Michael Klarman has briefly suggested that the early conception of judicial review reflected the view that statutes had to be concededly unconstitutional *and* that they had to fall “within the special purview of the judiciary.” Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1120-21 (2001). In other words, both preconditions had to be satisfied before a court could overturn a statute. See also CLINTON, *supra* note 27, at 76 (stating that the early cases and the Federalist view reflected the idea that judicial review was limited to cases “bearing directly upon the exercise of their own functions as courts of law”); J.M. SOSIN, *THE ARISTOCRACY OF THE LONG ROBE: THE ORIGINS OF JUDICIAL REVIEW IN AMERICA* 222 (1989) (“[C]ourts could resist or refuse to apply laws interfering with the constitutional duties of the judges. But this did not mean that courts could go beyond the defense of their own prerogatives.”).

As has been noted, this Article shows that most of the statutes invalidated before *Marbury* were not clearly unconstitutional, and so I disagree with Klarman’s first limitation. In commenting on an earlier draft of this Article, Dean Kramer has indicated that my approach is similar to Klarman’s with respect to the second limitation in that we both believe that “the doctrine of judicial review . . . was limited to laws regulating courts and judicial process.” See KRAMER, *supra* note 6, at 69 & n.171.

A critical difference between our approaches, however, is that Klarman sees a theoretical limitation to judicial review to statutes involving the “special purview of the judiciary,” Klarman, *supra*, at 1120, whereas my argument is that statutes involving courts and juries were subject to a heightened level of scrutiny. Apart from the pattern reflected in the cases, Klarman offers as evidence two comments at the Federal Constitutional Convention—one from Elbridge Gerry and one from James Madison. See *id.* at 1121 n.43. For the quotations, see 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 97-98 (Max Farrand ed., 1911) [hereinafter RECORDS] (Elbridge Gerry) (“[The judiciary] will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality”); *id.* at 430 (James Madison) (suggesting that judicial review should be “limited to cases of a Judiciary Nature”).

Gerry, however, was simply saying that courts will be able to invalidate unconstitutional legislation affecting them; he was not arguing that those are the only types of statutes courts are able to invalidate. In contrast, Madison’s quotation arguably suggests

early case law.

As Snowiss recognizes,<sup>29</sup> her conclusion echoes that reached by James Bradley Thayer in his 1893 *Harvard Law Review* article *The Origin and Scope of American Constitutional Law*,<sup>30</sup> a classic work that provided critical historical justification for the limited conception of judicial review championed by Justices Holmes, Brandeis, and Cardozo, as well as by Judge Hand.<sup>31</sup> Thayer argued that the early view was that a court “can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question.”<sup>32</sup>

In marked contrast, Professor Suzanna Sherry argues that there was an expansive conception of judicial review at the time of the founding. She contends that the original understanding was that statutes would be judged for their consistency with fundamental principles of natural law, as well as for their consistency with the written constitution.<sup>33</sup> A substantial body of scholars has reached the same conclusion.<sup>34</sup>

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that at the time of this speech, he might have thought that judicial review should be limited to statutes affecting the judiciary. Madison, however, in the course of the convention and the following years, took what one of his leading biographers has described as a “bewildering number of positions” on interpretive authority and judicial review. See Ralph L. Ketcham, *James Madison and Judicial Review*, 8 SYRACUSE L. REV. 158, 158-59 (1957). For example, when he introduced the Bill of Rights, Madison espoused an expansive conception of judicial review, observing that “independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights.” James Madison, *Amendments to the Constitution*, in 12 THE PAPERS OF JAMES MADISON 196, 207 (Charles F. Hodson et al. eds., 1979) [hereinafter MADISON PAPERS] (speech to the House of Representatives, June 8, 1789). I have not found other evidence supporting the limited conception of judicial review that Klarman articulates, even in cases in which statutes that did not involve the province of the judiciary were challenged. For discussion of such cases, see *infra* Parts II.D, III.A, IV.A, V.A, and V.C. Finally, as discussed *infra* Parts III.A and IV.A, statutes were struck down which did not involve the powers of courts or of juries.

29. See SNOWISS, *supra* note 9, at 6 n.7.

30. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

31. For discussion of the article’s influence on Justices Holmes, Brandeis, and Frankfurter, see Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71 (1978). Frankfurter notably described Thayer’s article as the most important article ever written in American constitutional law. See HARLAN B. PHILLIPS, FELIX FRANKFURTER REMINISCES: RECORDED IN TALKS WITH DR. HARLAN B. PHILLIPS 299-301 (1960); see also GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 118-19 (1994) (discussing the influence of Thayer on Hand). But see Mark Tushnet, *Thayer’s Target: Judicial Review or Democracy?*, 88 NW. U. L. REV. 9, 9-11 (1993) (noting that Thayer’s conception of constrained judicial review did not apply to review of state statutes for consistency with the Federal Constitution).

32. Thayer, *supra* note 30, at 144.

33. See Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

34. See, e.g., Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988); Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson,*

Recent Supreme Court opinions also reflect an expansive conception of the original understanding of judicial review, although not a natural law conception of judicial review. Appealing to original understanding, the Court has invalidated a string of congressional statutes on federalism grounds.<sup>35</sup> Implicit in these opinions is the idea that fealty to originalism entails not only a particular vision of federalism, but also a commitment to an active conception of judicial review. In other words, when the Court overturns a congressional statute and asserts that it is carrying out the founders' understanding of the Constitution, its opinion reflects both a particular view on how the founders understood the substance of the Constitution and the view that the founders intended that the Court should not defer to congressional constitutional judgments about the substance of the Constitution. This view receives particularly clear expression in *City of Boerne*, in which Justice Kennedy stated:

When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*, 1 Cranch, at 177. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.<sup>36</sup>

“[T]he duty to say what the law is” is thus traced to *Marbury* and means that, when the Court announces its view, that view trumps any inconsistent legislative reading of the Constitution advanced in its wake.

*Morrison* offers an even more expansive view of judicial role:

As we have repeatedly noted, the Framers crafted the federal system of Government so that the people's rights would be secured by the division of power. . . . Departing from their parliamentary past, the Framers adopted a written Constitution that further divided authority at the federal level so that the Constitution's provisions would not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the Legislature's self-restraint. *See, e.g., Marbury v. Madison*, 1 Cranch 137, 176 (1803) (Marshall, C.J.) (“The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written”). It is thus a “permanent and indispensable feature of our constitutional system” that “the federal judiciary is supreme in the exposition of the law of the Constitution.”

No doubt the political branches have a role in interpreting and applying the

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*and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113 (2003).

35. *See, e.g., Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

36. *Boerne*, 521 U.S. at 536.

Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text. . . . “In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. . . . Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury* that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>37</sup>

Judicial supremacy in constitutional interpretation is here portrayed as a central part of the original understanding. The framers established a system of separation of powers, and it is a “permanent and indispensable feature of our constitutional system” that “the federal judiciary is supreme in the exposition of the law of the Constitution.” “[I]t is emphatically the province and duty of the judicial department to say what the law is.” *Marbury* is quoted in ways that make the opinion stand for not simply the proposition that courts must “say what the law is” in order to decide a particular case, but also for the proposition that the judicial reading of the Constitution is *the* correct reading and that the other branches cannot legitimately hold competing constructions. “[T]he judicial department . . . say[s] what the law is” and there is no room for debate by the other branches or by the people.

In his *Harvard Law Review* Foreword, Dean Kramer offers a powerful critique of the originalist underpinnings of the Court’s originalism. Offering the paragraphs I have just quoted from *Morrison* as the crystallization of the Court’s recent jurisprudence, Kramer writes:

Virtually every statement here is wrong. Or, not so much wrong as made without context and grossly oversimplified. This is constitutional history in a funhouse mirror, a warped picture whose features are distorted at precisely those points where it matters most. The Founding generation did not solve the problem of constitutional interpretation and enforcement by delegating it to judges. Their thinking was more complex and, frankly, more imaginative than that. They were too steeped in republicanism to think that the solution to the problem of republican politics was to chop it off at the knees . . . . And no matter how often the Court repeats that it has been the ultimate expositor of the Constitution since *Marbury*, it still will not have been so . . . .

I said at the outset that I would not make an originalist claim, and I do not mean to do so now. The point is not that the Rehnquist Court’s vision of the Constitution is wrong because the Founding generation would have rejected it or because popular constitutionalism has been a vital part of our practice all along, though both things are true. I am not interested (here) in getting into a complex debate about how much normative weight history should carry in law. My present objective is more modest: to denaturalize a set of assumptions that are taken as natural by many, including especially the conservative majority on the Rehnquist Court and its supporters off the Court. Insofar as the Justices have chosen their path in the belief that, in doing so, they are vindicating the Constitution, either as it was originally understood or as it was viewed until recently, they are mistaken. It does not automatically follow that

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37. *Morrison*, 529 U.S. at 616 n.7 (some citations omitted).

they are wrong to enlarge the scope of their authority. But it does follow that they need an explanation and a justification they have yet to provide. Certainly more needs to be done than quoting *Marbury* out of context or offering really bad renditions of the Founding.<sup>38</sup>

Building on previous historical work—and in particular, that of Snowiss—Kramer offers a conception of the original scope of judicial review that is very different than that reflected in Rehnquist Court decisions. Kramer argues that the original understanding was that judicial power was “a power to be employed cautiously, only where the unconstitutionality of a law was clear beyond doubt.”<sup>39</sup>

In his important book *The People Themselves*, Kramer develops his argument about the original understanding with subtlety and sophistication. Kramer argues “[t]hat the Founders expected constitutional limits to be enforced through politics and by the people rather than in courts.”<sup>40</sup> In the debate about the Constitution, the topic of judicial review received little attention. In early practice, it was extremely limited in scope: “It was . . . a power to be employed cautiously, only where the unconstitutionality of a law was clear beyond doubt.”<sup>41</sup> Breaking with other scholars such as Snowiss who stress the constrained quality of early judicial review, Kramer, while seeing early judicial review as sharply constrained, recognizes that “judges did not confine themselves strictly to the text.”<sup>42</sup> Judges also “drew on well-established principles of the customary constitution.”<sup>43</sup> Nonetheless, because the only statutes held unconstitutional were either at odds with clear text or clearly established principles, exercises of judicial review were limited to statutes that were “blatantly unconstitutional.”<sup>44</sup>

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38. Kramer, *supra* note 5, at 162-63 (internal citations omitted).

39. *Id.* at 79. At the same time, Kramer’s vision of early judicial review is less constrained than Snowiss’s vision. Thus, he recognizes that in determining what was unconstitutional beyond a reasonable doubt, judges “were not confined strictly to the text but could draw on well-established principles of the customary constitution as well.” *Id.* Although his overall conclusions are substantially different from mine, in making this argument, Kramer relied in part on an earlier draft of this Article. *See id.* at 39. For discussion of the differences between my views and Kramer’s, see *infra* note 44. For Kramer’s most detailed discussion of Snowiss’s work, see Kramer, *supra* note 5, at 33 n.114.

40. KRAMER, *supra* note 6, at 91.

41. *Id.* at 99; *see also id.* at 92 (“clear beyond dispute”); *id.* at 102 (stating that violations must be “plain and clear”).

42. *Id.* at 99.

43. *Id.*

44. *Id.* at 103. Kramer’s book cites previous drafts of this Article, *see id.* at ix, 41, 69, 279, 291-92, and thus, unlike scholars such as Snowiss, at one level he recognizes the comparative frequency of early exercises of judicial review. At the same time, that recognition takes the form of a brief acknowledgment rather than a significant aspect of the book—Kramer discusses only a handful of the cases from the early Republic—and it is at odds with his basic thesis that “constitutional limits [were] to be enforced through politics and by the people rather than in the courts.” *Id.* at 91. Moreover, Kramer reads the cases differently than I do. Where he argues that the invalidated statutes were at odds with

Thus, the issue is squarely joined: What was the original understanding of judicial review? As Kramer's work indicates, the answer to this question has profound consequences for modern jurisprudence.

As an evidentiary matter, there are three categories of materials potentially bearing on this question: practice prior to the Revolution; contemporaneous statements about judicial review that occurred outside the context of litigation (such as at the Constitutional Convention in Philadelphia); and case law in the period after the start of the Revolution.

Practice before the Revolution, however, ultimately offers limited illumination because the doctrine of judicial review marked a departure from precedent. Arguably, in a handful of cases in the seventeenth and early eighteenth centuries, British courts took the position that they could pronounce void statutes inconsistent with principles of fundamental law.<sup>45</sup> The most prominent of these decisions is Lord Coke's opinion in *Bonham's Case*, in which he observed:

[I]t appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.<sup>46</sup>

Historians and legal scholars have debated whether *Bonham's Case* should be read as a declaration of the power of judicial review or simply as an embodiment of a principle of statutory construction.<sup>47</sup> There is agreement, however, that by the time of the American Revolution, the principle of judicial

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constitutional text or clearly established principles, I argue that the scope of review turned on the category of cases, and that in certain types of cases courts repeatedly acted aggressively, without the support of clear text or well-established principles.

45. In addition to the case law, one body of material should be noted as bearing on the acceptance of judicial review. Private parties in the colonies could appeal cases to the Privy Council and challenge colonial statutes as inconsistent with the laws of England. This practice arguably preconditioned Americans to accept judicial review because colonial legislation was subject to review for its consistency with a higher authority. At the same time, this was not judicial review, since the question was not one of constitutionality but of consistency with English law. For a superb recent study, see MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE 73-90* (2004); the classic work on the topic is JOSEPH HENRY SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* (1950).

46. *Bonham's Case*, (1610) 77 Eng. Rep. 646, 652. Coke's statement was subsequently cited with approval in *Day v. Savage*, (1614) 80 Eng. Rep. 235, 237, and in *City of London v. Wood*, (1701) 88 Eng. Rep. 1592, 1602.

47. Compare, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 177 (1967) (statutory construction), and Samuel E. Thorne, *Dr. Bonham's Case*, 54 *LAW Q. REV.* 543 (1938) (same), with HAINES, *supra* note 19, at 35 ("According to Coke's theory the common law courts were superior in authority to the king and to Parliament."), and WOLFE, *supra* note 26, at 90 ("In the early seventeenth century, during the resistance to the Stuart kings, Sir Edward Coke had attempted to establish the principle of judicially enforced constitutional limits on government.").

review had been decisively rejected in Great Britain.<sup>48</sup> Asserting the doctrine of parliamentary supremacy, Blackstone stated, “[I]f the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, that is vested with authority to control it . . . .”<sup>49</sup> While there was certainly awareness among revolutionary-era American political and legal leaders of Coke’s dicta, those leaders also recognized that, under mid-eighteenth-century British law, Parliament was supreme and no court could overturn its enactments.<sup>50</sup> Thus, for a series of reasons—because it is debatable whether British courts had ever asserted the power to overturn statutes, because the relevant cases involve dicta, and because, whatever the legal rule was in the seventeenth century, the reigning orthodoxy at the time of the American Revolution was parliamentary supremacy—pre-revolutionary precedents are of little help in understanding the contours of judicial review as it developed in this country after the start of the Revolutionary War.

The various statements about judicial review that were made in this country after 1776 are more helpful, but still of limited evidentiary value. To begin with, they are strikingly few in number. There was no focused discussion at the Philadelphia convention of judicial review. It was discussed, but in the context of debate about related issues, principally whether there should be a Council of Revision, a joint executive-judicial body that would have had the

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48. For example, Charles Haines, who sees *Bonham’s Case* as embodying the principle of judicial review, writes, “Whatever effects Coke’s attempt to set up a superior and fundamental law may have had, the Revolution of 1688 marked the abandonment of his doctrine as a practical principle of English politics.” HAINES, *supra* note 19, at 35. Wolfe’s analysis is to the same effect. See WOLFE, *supra* note 26, at 91 (“Coke’s dictum, however, was not ultimately to win out in English constitutional history.”).

49. WILLIAM BLACKSTONE, 1 COMMENTARIES \*91; see also *id.* at \*160 (“[Parliament is] the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms.”).

50. See KRAMER, *supra* note 6, at 20-23. There appear to be only two cases in this country before the Revolution in which *Bonham’s Case* was arguably relied on by a lawyer seeking to invoke the doctrine of judicial review.

It has been contended that James Otis, in the 1761 Writs of Assistance case, urged the Massachusetts Superior Court to invalidate a statute on Cokean grounds. See, e.g., RAOUL BERGER, CONGRESS VS. THE SUPREME COURT 23-28, 349-68 (1969); HAINES, *supra* note 19, at 51-53; Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 689-91 (1999). Closely reading the evidence in the Writs of Assistance case, Kramer convincingly argues that Otis was simply arguing that the statute should be read narrowly. See KRAMER, *supra* note 6, at 21-22.

A better case can be made that George Mason relied on *Bonham’s Case* as support for exercise of judicial review in a 1772 case involving a statute allowing enslavement of Native American women. See *Robin v. Hardaway*, 1 Jeff. 109, 113-14 (Va. 1772) (“All human constitutions which contradict his laws, we are in conscience bound to disobey. Such have been the adjudications of our courts of justice. And cited 8 Co. 118 a. *Bonham’s case.*”). The court, however, decided the case on other grounds, ruling that the challenged statute had been repealed. See *id.* at 123.

power of vetoing legislation.<sup>51</sup> There were some statements expressing opposition to judicial review. John Dickinson “thought no such power ought to exist,”<sup>52</sup> and John Mercer “disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void.”<sup>53</sup> But there were more statements in favor of the power. Because these statements in favor of judicial review are brief and abstract in nature, however, they provide little detail concerning what the scope of the power was understood to be. There are a couple of statements indicating that courts would be able to exercise judicial review to protect their independence. Elbridge Gerry observed that judges “would have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their constitutionality.”<sup>54</sup> James Wilson similarly stated that “Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights.”<sup>55</sup> There are also statements indicating that judicial review did not empower judges to strike down laws with which they disagreed. Wilson opined that “Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect,”<sup>56</sup> and Mason asserted that judges “could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course.”<sup>57</sup> Yet there is not enough data to assess how broadly representative such statements were or to flesh out the speakers’ views as to what grounds were a proper basis for the exercise of the power of judicial review.

There are also a small number of discussions of judicial review that occurred outside of the Philadelphia convention that are much fuller discussions than anything said in the convention. The most notable defenses<sup>58</sup>

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51. The critical discussions were on July 17, 1787, and July 21, 1787. See 2 RECORDS, *supra* note 28, at 21-36, 71-83.

52. *Id.* at 299.

53. *Id.* at 298.

54. 1 RECORDS, *supra* note 28, at 97.

55. 2 RECORDS, *supra* note 28, at 73.

56. *Id.*

57. *Id.* at 78. For other statements in favor of judicial review, see *id.* at 28 (Morris), 76 (Martin), 430 (Madison). For discussion of Madison’s statement, see *supra* note 28.

58. The most thoughtful critique of judicial review was found in the Letters of Brutus. See Brutus XI, in 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION OF THE UNITED STATES 512-17 (John P. Kaminski & Gaspare J. Saladino eds., 1984) [hereinafter DHRC]; Brutus XII, in 16 DHRC, *supra*, at 72-75, 120-22; Brutus XV, in 16 DHRC, *supra*, at 431-35. The extent to which Brutus’s arguments were disseminated is disputed. Compare Kramer, *supra* note 5, at 68 (noting that the limited reprinting of Brutus’s essays suggests contemporary pertinence and importance were limited), with Editorial Note, in 13 DHRC, *supra*, at 411 (stating that the limited reprinting of Brutus “does not adequately illustrate the extent of circulation” since these essays were discussed by newspaper essays in places where reprinting had not occurred). The pseudonymous Brutus may have actually



were those of Alexander Hamilton (in *Federalist* 78 and *Federalist* 81<sup>59</sup>), future Supreme Court Justice James Iredell (in his 1786 letter “To the Public”<sup>60</sup> and his letter to Richard Spaight the following year<sup>61</sup>), and James Wilson (in a speech at the Pennsylvania ratifying convention<sup>62</sup> and the *Lectures on the Law* he delivered in 1790-1791<sup>63</sup>).

Wilson’s speeches focused on making the case for judicial review, not on articulating a theory of when it should be exercised, and are thus not of much value in determining the early scope of judicial review. Iredell, in contrast, set forth a view on which judicial review should be exercised. He wrote Spaight: “In all doubtful cases . . . the Act ought to be supported: it should be unconstitutional beyond dispute before it is pronounced such.”<sup>64</sup> Iredell’s formulation—combined with the use of similar formulations in a number of early judicial decisions—has profoundly shaped the theories of Kramer<sup>65</sup> and Snowiss,<sup>66</sup> both of whom see Iredell as reflecting the consensus view that judicial review was limited to the concededly unconstitutional case. But Iredell’s out-of-court writings do not make clear what “unconstitutional beyond

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been Melancton Smith. *See id.* Smith was a New York politician who had earlier attacked the court’s decision in *Rutgers v. Waddington*, *see infra* note 132, which was arguably one of the first judicial review cases.

59. THE FEDERALIST NOS. 78, 81 (Alexander Hamilton).

60. Letter from James Iredell to the Public (1786), in 1 LIFE AND CORRESPONDENCE OF JAMES IREDELL 145 (Griffith J. McRee ed., 1857).

61. Letter from James Iredell to Richard Spaight (Aug. 26, 1787) [hereinafter Iredell Letter], in 1 LIFE AND CORRESPONDENCE OF JAMES IREDELL, *supra* note 60, at 172.

62. James Wilson, Speech at the Pennsylvania Ratifying Convention, in 2 DHRC, *supra* note 58, at 450-51.

63. JAMES WILSON, *Comparison of the Constitution of the United States, with That of Great Britain*, in 1 THE WORKS OF JAMES WILSON 309, 329-31 (Robert Green McCloskey ed., 1967); *see also id.* at 309 (comparing English and American constitutions). One other early discussion of judicial review should be noted: the future Chancellor James Kent’s lecture on the subject. *See* James Kent, *Introductory Lecture*, reprinted in 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 937 (Charles S. Hyneman & Donald S. Lutz eds., 1983). Kent articulates a strikingly expansive conception of judicial review, highlighting the need to check “the passions of a fierce and vindictive majority” and to preserve “the equal rights of a minor faction.” *Id.* at 941. Kent delivered these lectures at the start of his legal career and they had little influence. Few attended the lectures and the published version found few purchasers. *See* John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 559 n.58 (1993) (“The pamphlets reprinting the lectures bombed on the marketplace as thoroughly as the original lectures.”). I find no reflection of Kent’s broad conception of judicial review in the early case law.

64. Iredell Letter, *supra* note 61, at 175.

65. *See* Kramer, *supra* note 5, at 56 (stating that the Iredell approach “became an article of faith among the supporters of judicial review”); *id.* at 79 (noting that what achieved acceptance in the 1790s was the theory of review formulated by men like Iredell in the 1780s).

66. *See* SNOWISS, *supra* note 9, at 34 (“[T]he judicial power contemplated by both sides was confined to the concededly unconstitutional act . . . . This point was most clearly expressed by James Iredell . . .”).

dispute” would mean in practice. Similarly, the mere fact that others employed similar phrasing does not mean that they actually employed a constrained approach to judicial review. Finally, the fact that Iredell-type language was employed in a number of decisions does not mean that it was representative of a general consensus that review should be highly constrained. Indeed, in a number of opinions discussed here, Iredell repeatedly embraced an aggressive conception of judicial review.<sup>67</sup>

The final major writings on judicial review are Hamilton’s *Federalist 78* and *Federalist 81*. *Federalist 78*, in particular, provides a rich source of evidence on what one major thinker believed the scope of judicial review should be. Nonetheless, its text can be parsed in radically different ways. Snowiss, for example, argues that Hamilton in *Federalist 78* was embracing the position that judges could invalidate only “a concededly unconstitutional act.”<sup>68</sup> Others, however, have seen *Federalist 78* as embodying a broad conception of judicial review. In his classic *The Growth of American Constitutional Law*, for example, Benjamin Wright, quoting freely from *Federalist 78*, describes its “doctrine” as follows:

The courts under this doctrine do not simply declare void instances of “direct violation” of the Constitution. They become the guardians of the “manifest tenor of the Constitution,” the spokesmen for “the intentions of the people,” while the President and Congress are reduced to the position of being always potential enemies of the Constitution and of the reserved rights of the people, and even the people are to be protected against themselves by the judges.<sup>69</sup>

The critical point here is not to argue for a particular reading of *Federalist 78*, but to argue that it can plausibly support a range of readings.

In sum, the body of statements about judicial review occurring outside of the context of litigation—because they are relatively few in number, because of their focus, and because they are not concerned with concrete problems of constitutional construction—is of limited value in assessing the original understanding of judicial review. By far, the richest source of evidence is to be found in the case law and in reactions to that case law. Overwhelmingly, this is where discussion of judicial review is to be found. Of equal importance, the case law involves concrete applications of the doctrine. Whereas statements of general principle can be interpreted differently—as the example of *Federalist 78* illustrates—the cases involve specific instances of construction. The rest of

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67. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 449-50 (1793) (Iredell, J., dissenting) (discussed *infra* note 437 and accompanying text); *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792) (discussed *infra* notes 398-425 and accompanying text); *United States v. Villato*, 2 U.S. (2 Dall.) 370, 373 (C.C.D. Pa. 1797) (Iredell, J.) (discussed *infra* notes 365-77 and accompanying text); *United States v. Ravara*, 2 U.S. (2 Dall.) 297, 298-99 (C.C.D. Pa. 1793) (Iredell, J., dissenting) (discussed *infra* notes 426-33 and accompanying text).

68. SNOWISS, *supra* note 9, at 80.

69. BENJAMIN F. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 25 (1942).

this Article examines that case law, focusing on cases where statutes were invalidated, and shows both that the body of that case law is dramatically larger than previously recognized and that the dominant conception of the scope of judicial review is one that previous scholars have missed.

## II. REVOLUTIONARY-ERA CASE LAW

Since the 1870s, scholars have probed the limited record of revolutionary-era case law to unearth instances in which courts invalidated statutes. More than a century of research has produced seven cases in which there is plausible evidence that a party sought invalidation of a statute. Given the state of the evidence, it is not certain in how many of these cases a statute was actually invalidated. The scholarly conclusions on this score have been dramatically different. It has been argued that all of these cases were true judicial review cases, and it has also been argued that none of them were.<sup>70</sup>

In this Part, I examine these cases. I conclude that at least four of them involved the invalidation of statutes on constitutional grounds. My focus, however, is not principally on whether judicial review was ultimately exercised, but on interpretive approach. This shift in focus is linked to the evidence discussed in this Article of the use of judicial review in the early Republic. If judicial review was, as Snowiss has argued, “unused”<sup>71</sup> in the 1790s, then the revolutionary-era cases are of central importance in determining the original understanding of judicial review. Given the lack of discussion of judicial review in the Constitutional Convention and the failure of the constitutional text to provide explicitly for the power of judicial review, the early cases have been treated as having great weight because they establish the background norms against which the founders acted. In other words, they have been seen as the key to the question whether, by 1787, judicial review was so well established that it can be fairly read into the Constitution.

When it is seen, however, that judicial review was frequently exercised in the years immediately after the Constitution was drafted, the earlier cases are not quite as critical. This practice in the early Republic indicates that, as people applied the Constitution and its state analogues, they repeatedly embraced judicial review. The fact that the power of judicial review was controversial when first asserted in some states before the Constitution was drafted (as indeed it was) and the fact that there were only a limited number of exercises of the power in the revolutionary era become less salient. Original understanding is better evidenced by practice immediately *after* the Constitution was written rather than by practice *before* the Constitution, when the doctrine of judicial review was initially emerging and people were grappling with its implications.

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70. See CLINTON, *supra* note 27, at 54 (summarizing the conclusions of leading commentators).

71. SNOWISS, *supra* note 9, at 63.

Thus, my principal concern here is with interpretive approach. With one exception, all of the cases involved challenges to statutes regulating judicial matters—either the extent of the right to trial by jury or the admissibility of certain evidence. In considering these challenges, courts repeatedly employed a broad conception of judicial review—one not limited to the invalidation of clearly unconstitutional statutes. In contrast, in the one case in which the challenged statute did not involve judicial matters, the statute was upheld because most members of the court adopted a strained (or at least highly legalistic) reading of the state constitution. Thus, these early cases reveal two different approaches. As will be shown in later Parts, this interpretive pattern—a broad approach to judicial review when statutes involved judicial matters and a constrained conception of judicial review when they did not—became even more evident after the Constitution was drafted.

#### A. Jury Trial Cases

*Holmes v. Watson* (1780), the first judicial review case, and the *Ten Pound Act Cases* (1786-1787) both involved constitutional challenges to statutes limiting jury trials. In *Holmes*, the New Jersey Supreme Court invalidated a state statute that authorized the seizure of loyalist property and provided that the trial to determine whether seized property was in fact loyalist property “should be by a jury of six men.”<sup>72</sup> Pursuant to that statute, Elisha Watson, a major in the patriot militia, seized several hundred yards of silk and other goods from John Holmes and Solomon Ketchamere. The jury in the subsequent trial found in Watson’s favor. Before the state supreme court, the defendants’ attorney argued “that the jury who tried the said plaint before the said justice consisted of six men only contrary to the constitution of New Jersey.”<sup>73</sup> The relevant section of the state constitution did not, however, specify a requisite number of jurors. It simply stated “that the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever.”<sup>74</sup> Nonetheless, the appellate court ruled in favor of Watson and Ketchamere, concluding that “this was not a constitutional jury.”<sup>75</sup>

There is no surviving copy of the opinion—it appears the decision was delivered orally<sup>76</sup>—and the principal record of the holding is a brief summary in an 1802 New Jersey Supreme Court decision.<sup>77</sup> Nonetheless, in construing the state constitution’s protection of trial by jury and invalidating the statute,

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72. *State v. Parkhurst*, 9 N.J.L. 427, 444 (1802) (citing statute). While there was no published opinion in *Holmes*, the case was discussed in *Parkhurst*.

73. Austin Scott, *Holmes v. Walton: The New Jersey Precedent*, 4 AM. HIST. REV. 456, 458 (1899) (quoting argument).

74. N.J. CONST. art. XXII (1776).

75. *Parkhurst*, 9 N.J.L. at 444.

76. See Scott, *supra* note 73, at 459.

77. *Parkhurst*, 9 N.J.L. at 444.

the court necessarily went beyond the text of the constitution. The requirement that a jury consist of twelve persons was presumably derived from English common law or colonial-era documents.<sup>78</sup> In particular, foundational documents for the two parts of New Jersey—the West Jersey Concessions and Agreements of 1676 and the East Jersey House of Representatives’ 1699 Declaration of Rights and Privileges—provided that trials shall be by “twelve honest men of the neighborhood” and “by the verdict of twelve men,” respectively. The New Jersey Supreme Court thus apparently construed constitutional text in light of background principles, even though the relevant constitutional provision did not reference those principles and even though the constitution elsewhere explicitly provided that the state legislature could modify or overturn prior common law or statutory law.<sup>79</sup> Significantly, the court was not constitutionalizing prior practice: a colonial statute in place for thirty years at the time of *Watson* provided that in small causes, the jury could consist of six individuals.<sup>80</sup> It was, instead, constitutionalizing a particular conception of a jury trial. Thus, the very first judicial review case involved invalidation of a statute when that result was not clearly mandated by constitutional text or by established practice.

In contrast, New Hampshire’s *Ten-Pound Act Cases* involved a relatively straightforward application of constitutional text, although even in this case the meaning of the text was not derived simply from the four corners of the document. The New Hampshire Bill of Rights, adopted in 1783, provided:

In all controversies concerning property, and in all suits between two or more persons except those in which another practice is and has been customary . . . the parties have a right to a trial by jury. This method of procedure shall be held sacred, unless, in causes arising on the high seas and in cases relating to mariners’ wages, the legislature shall think it necessary hereafter to alter it.<sup>81</sup>

The prior practice in New Hampshire had been to require juries in cases in which more than forty shillings (two pounds) were sought.<sup>82</sup> In 1785, however, the state legislature passed the “Ten-Pound Act,” providing that actions for debt and actions for trespass not involving title to land would be tried before a justice of the peace, without a jury, if the damages sought were less than ten

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78. See Scott, *supra* note 73, at 459.

79. The relevant part of the state constitution pertaining to the common law and previous statutory law provided that they could be altered by new statutory enactments. See N.J. CONST. art. XXI (1776) (“That all the laws of this Province . . . shall be and remain in full force, until altered by the Legislature of this Colony . . . .”); *id.* art. XXII (“That the common law of England, as well as so much of the statute law, as have been heretofore practised in this Colony, shall still remain in force, until they shall be altered by a future law of the Legislature . . . .”).

80. JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT—VOLUME I: ANTECEDENTS AND BEGINNINGS TO 1801, at 124 (1971).

81. N.H. CONST. art. XX (1783).

82. Philip Hamburger, *Law and Judicial Duty*, 72 GEO. WASH. L. REV. 1, 34-35 (2003).

pounds. Contemporaneous newspaper accounts indicate that at least two lower courts in the state held the statute unconstitutional. The *Independent Gazetteer*, for example, reported, “The general court [i.e., the New Hampshire legislature], during their last session, repealed the *ten pound* act, and thereby justified the conduct of the justices of the inferior court, who have uniformly apposed [sic] it as *unconstitutional* and *unjust*.”<sup>83</sup> Here, unlike in *Holmes*, the constitutional provision at issue explicitly referred to background practices—“except those in which another practice is and has been customary.” Given the background practices, the courts could mechanically apply the constitution to overturn the statute: the statute was unconstitutional because ten pounds was greater than two pounds.

The Rhode Island case of *Trevett v. Weeden*<sup>84</sup> also involved a challenge to a statute as at odds with the right to a jury trial, but it differs markedly from the previous three cases because, at the time of the case, Rhode Island did not have a written constitution so there was no text for the court to construe. In 1786, the state legislature had passed statutes imposing a penalty on those who did not accept the state’s paper money as equivalent to gold or silver and providing that actions to recover the penalty should be tried without a jury. When John Weeden “refus[ed] to receive the paper bills of [Rhode Island], in payment for meat sold in market,” John Trevett brought suit to collect the penalty. James Varnum, Weeden’s attorney, advanced several claims reflecting different approaches to judicial review, although the different strands of argument and the line of analysis are at points confused. Drawing on Bacon, Coke, and Blackstone, Varnum made a traditional argument that the statute should be interpreted in a way “consistent with common right or reason.”<sup>85</sup> More importantly, he appealed to both natural law and the “constitution” as the basis for invalidating the statute:

But the Judges, and all others, are bound by the laws of nature in preference to

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83. INDEP. GAZETTEER, July 18, 1787, at 1. A similar account appeared the following day in the *Philadelphia Packet*. See PHILA. PACKET, July 19, 1787, at 1. Of the historians of judicial review, Crosskey is perhaps the most hostile to the claim that judicial review was established in this country before the convening of the Constitutional Convention. Nonetheless, even he concedes that the *Ten-Pound Act Cases* involved exercises of judicial review power. See WILLIAM WINSLOW CROSSKEY, 2 POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 968-69 (1953). A recent article by Richard Lambert, based on his work in New Hampshire archives, indicates that the two cases discussed in New Hampshire newspapers were only part of a significantly larger movement. Lambert’s article indicates that there were at least six, and perhaps as many as eleven, cases in 1786 and 1787 in which New Hampshire courts found the Ten-Pound Act unconstitutional. See Lambert, *supra* note 19, at 40-50. If the cases Lambert found are judicial review cases, then the number of judicial review cases in the revolutionary era would dramatically rise.

84. There is no published official report of *Trevett*. The principal historical source concerning the case is attorney James Varnum’s pamphlet. See James M. Varnum, *The Case, Trevett v. Weeden*, reprinted in BERNARD SCHWARTZ, 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 417 (1971).

85. *Id.* at 425.

any human laws, because they were ordained by God himself anterior to any civil or political institutions. They are bound, in like manner, by the principles of the constitution in preference to any acts of the General Assembly, because they were ordained by the people anterior to and created the powers of the General Assembly.<sup>86</sup>

Varnum dismissed the argument that the state did not have a constitution (“Constitution! We have none: Who dares to say that? None but a British emissary, or a traitor to his country.”<sup>87</sup>) and equated the constitution with the historic rights of the English people. Thus, he noted that, after receiving the colonial charter, the General Assembly in 1663 enacted a statute providing that “no freeman shall be taken or imprisoned, or be deprived of his freehold or liberty, or free customs, or be outlawed, or exiled or otherwise destroyed, nor shall be passed upon, judged or condemned, but by the lawful judgment of his peers, or by the laws of this Colony” and continued:

[t]his act . . . was not creative of a new law, but declaratory of the rights of all the people, as derived from the Charter from their progenitors, time out of mind. It exhibited the most valuable part of their political constitution, and formed a sacred stipulation that it should never be violated.<sup>88</sup>

Most critically, he argued that “[t]he Judiciary have the sole power of judging of those laws [passed by the legislature], and are bound to execute them; but cannot admit any act of the Legislature as law, which is against the constitution.”<sup>89</sup>

Varnum’s argument was published in pamphlet form and, as a result, may well have been the most prominent discussion of judicial review at the time of the Philadelphia Constitutional Convention. It is striking for its nontextualism. That nontextualism is in part present in appeals to natural law (although these are not at the heart of the argument). More basically, Varnum was making an argument about “constitution[al]” interpretation without having a written constitution to appeal to. To the extent that his argument was based on a written document, it was the 1663 Rhode Island statute discussed above—and that statute did not specifically guarantee a jury trial. It provided that a freeman could suffer legal harms only “by the lawful judgment of his peers, or by the laws of this Colony,” and thus could be read as providing that a duly enacted statute could dispense with the individual’s right to a jury trial. Varnum claimed, “The trial by jury, as hath been fully shewn, is a fundamental, a constitutional law.”<sup>90</sup> In fact, he did not make such a showing—he simply asserted the fundamentality of the right. Yet even as his argument is open-ended and nontextual, it is also limited in focus. Varnum’s argument could, in theory, have been framed in terms of interference with property rights or

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86. *Id.* at 424.

87. *Id.* at 421.

88. *Id.*

89. *Id.* at 423.

90. *Id.*

contractual rights. For example, he asks: “Is it consistent with common right or reason, that any man shall be compelled to receive paper, when he hath contracted to receive silver? That for bread he shall receive a stone, or for fish a serpent?”<sup>91</sup> Yet like all but one of the revolutionary-era cases, his argument was cast in terms of process (i.e., the right to a jury trial), rather than substance.

Varnum prevailed, but the grounds of decision were at first unstated. The judges simply announced “that the information was not cognizable before them.”<sup>92</sup> A Providence newspaper reported that, the day after announcing their decision, the judges convened to explain the result. The account is brief, indicating that two of the judges stated that the act was “unconstitutional” without explanation, that one explained it was unconstitutional because penalties were to be assessed “[w]ithout trial by jury,” that one explained he had “voted against taking cognizance,” and that one had not explained his vote.<sup>93</sup> Thus, the actual decision offers little insight about revolutionary-era conceptions of judicial review beyond those reflected in Varnum’s brief.

The aftermath of the case indicates that, at least in Rhode Island in 1786, judicial review was still controversial. After the decision was announced, an angry state legislature summoned the judges and demanded that they explain their actions. The judges’ comments are not illuminating; the most detailed statement comes from Judge Howell, who declared that the judges had simply held the matter not cognizable and refused to explain the judges’ rationale. The legislature thereafter replaced four of the five judges—retaining only the one who, on the day the decision had been explained, offered no basis for his vote.<sup>94</sup>

The final revolutionary-era case in which a statute was challenged on jury trial grounds was *Bayard v. Singleton*,<sup>95</sup> a North Carolina Supreme Court case decided shortly before the Constitutional Convention began its work. The state statute at issue effectively barred loyalists (and those who had purchased or inherited property from them) from legally challenging the state’s seizure of their property. It required state courts to dismiss any suit in which the ownership of property was at stake if the defendant submitted an affidavit that he held the property pursuant to a purchase from the state’s commissioner of forfeited estates.<sup>96</sup> *Bayard* was an action for ejectment in which the defendant filed such a motion. The plaintiffs, whose claim traced back to a British loyalist whose property had been seized by the state, responded by challenging the constitutionality of the statute. The state court clearly sought to avoid

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91. *Id.* at 425.

92. *Id.* at 417.

93. PROVIDENCE GAZETTER & COUNTRY J., Oct. 7, 1786, at 1.

94. See BILDER, *supra* note 45, at 190-91; see also GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 459-60 (1969).

95. 1 N.C. (Mart.) 5, 48 (1787).

96. *Id.*



confronting the question of whether it had the power to invalidate statutes: it initially adjourned the case to the following term and then, upon reconvening, urged the parties to settle.<sup>97</sup> When this effort failed, however, the court observed:

[N]otwithstanding the great reluctance they might feel against involving themselves in a dispute with the Legislature of the State, yet no object of concern or disrespect 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.<sup>98</sup>

The relevant constitutional provision stated “[t]hat in all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.”<sup>99</sup> Implicitly referring to this provision, the court stated, “That by the constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury.”<sup>100</sup> The court then observed that the legislature, being created by the constitution, could not alter its terms: “[I]t was clear, that no act [the legislature] could pass, could by any means repeal or alter the constitution, because if they could do this, they would at the same instant of time, destroy their own existence as a Legislature, and dissolve the government thereby established.”<sup>101</sup> The court concluded that the statute at issue was a nullity because the court’s duty was to follow the law, and the fundamental law of the constitution was superior to a statutory enactment:

[T]he constitution (which the judicial power was bound to take notice of as much as of any other law whatever,) standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must of course, in that instance, stand as abrogated and without any effect.<sup>102</sup>

The case then proceeded to trial. At the end of the trial, the justices of the court instructed the jury that “[t]he law of England, which we have adopted, allows [aliens] to purchase [land], but subjects them to forfeiture immediately”<sup>103</sup> and that the loyalists from whom the plaintiffs traced their claim had no right to the property in question.<sup>104</sup> Thus instructed, the jury

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97. *Id.* at 43-44. After the court initially postponed resolution of the case, the state legislature investigated whether the justices had disregarded one of the legislature’s statutes. Ultimately, no action was taken against them, although a substantial minority of the legislature made it clear that they opposed judicial review. See HAINES, *supra* note 19, at 113.

98. *Bayard*, 1 N.C. (Mart.) at 44.

99. N.C. CONST. art. I, § 25 (1776).

100. *Bayard*, 1 N.C. (Mart.) at 45.

101. *Id.*

102. *Id.*

103. *Id.* at 47.

104. *Id.*

found for the defendant.<sup>105</sup>

Like the New Hampshire cases, *Bayard* involved a straightforward application of constitutional text. The constitution guaranteed a jury trial in suits involving property. The statute denied any trial in a certain category of property cases. Therefore, the statute was unconstitutional. In other words, the case is one involving a “clearly unconstitutional” statute. At the same time, the court does not suggest that only statutes in that category can be properly found unconstitutional. Moreover, the interpretive strategy it outlines—under which the constitution is law which the court “was bound to take notice of as much as of any other law whatever”<sup>106</sup>—by equating constitutional construction with statutory construction seems to suggest that the range of strategies available to a court in interpreting a statute would also be available to it in interpreting a constitution. In other words, the possibility that a constitution could be interpreted to regulate situations not clearly falling within its text is left open.

#### B. *Rutgers v. Waddington*

*Rutgers v. Waddington*, a 1784 case in the Mayor’s Court of New York, involved the Trespass Act, a statute that controlled both permissible pleading and admissibility of evidence.<sup>107</sup> Rutgers, the plaintiff, was the patriot owner of property in New York City, and she brought a trespass action against Waddington. Waddington was a British merchant who had occupied her property from 1778 to 1783, the period during which the British army controlled the city. He had done so during the period from 1778 to 1780 pursuant to authorization from the British Commissary General, a civilian employee of the British Treasury, and from 1780 to 1783 under license from the British Commander in Chief, and he had paid rent to the British government during his occupancy. The statute at issue had been passed by the New York legislature in 1783, and it gave patriots a trespass action against those who had occupied their property in New York when the property was subject to British control. Critically, the statute provided that defendants could not plead in justification a military order permitting their use and that they could not introduce such an order in evidence.

Alexander Hamilton, representing Waddington, advanced two constitutional challenges to the statute. First, he contended that “our [New York] constitution adopts the common law of which the *law of nations is a part*”<sup>108</sup> and that the law of nations vested in the conqueror the right to use

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105. *Id.* at 48.

106. *Id.* at 45.

107. *Rutgers v. Waddington* is not found in any case reporter, but the court’s opinion has been reprinted in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 393 (Julius Goebel, Jr. ed., 1964) [hereinafter HAMILTON LEGAL PAPERS].

108. Alexander Hamilton, Brief of Defendant, *Rutgers v. Waddington* [hereinafter

property under his control.<sup>109</sup> The relevant constitutional provision, article XXXV of the state constitution, provided

that such parts of the common law of England, and of the statute law of England and Great Britain, and of acts of the legislature of the colony of New York . . . shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same.<sup>110</sup>

Hamilton's interpretation reflected the premise that the phrase "common law" was to be read broadly enough to incorporate the law of nations. In developing this point in his brief, Hamilton cited English authorities who had adopted positions consistent with the law of nations in cases involving capture of property, and he then concluded that "the common law . . . adopts the law of nations."<sup>111</sup> His interpretation reflects, as well, the premise that the Trespass Act did not fit within the category, recognized in article XXXV, of the "alterations and provisions as the legislature of this State shall, from time to time, make concerning the same [i.e., the common law]." This premise, it should be added, is a necessary assumption, but was not made in Hamilton's brief.

Second, Hamilton argued at greater length that application of the Trespass Act to bar Waddington's assertion of the authorization he had received from British officials would be a "violation of the Treaty of peace," the Treaty of Paris that had concluded the Revolutionary War.<sup>112</sup> According to Hamilton, "Our [New York's] Sovereignty and Independence began by a FOEDRAL ACT," the Declaration of Independence. The Declaration of Independence was *the* fundamental document, and it reserved the treaty-making power to the United States as a whole: "BY THE DECLARATION OF INDEPENDENCE which is the fundamental constitution of every state, the UNITED STATES assert their power to levy war conclude peace and contract alliances . . ."<sup>113</sup> The state government was called into being by the Declaration of Independence and that government had endorsed it: "[The Declaration of Independence] is acceded to by THE NEW YORK CONVENTION who do not pretend to authenticate the act, but only to give their approbation to it . . ."<sup>114</sup> The Articles of Confederation abridged the Union's powers, but left it with "the full and exclusive powers of WAR PEACE & TREATY."<sup>115</sup>

Having developed the point that the union possessed the treaty-making power, Hamilton argued that a treaty was "a law Paramount to that of any

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Hamilton Brief], reprinted in HAMILTON LEGAL PAPERS, *supra* note 107, at 368.

109. *Id.* at 373.

110. N.Y. CONST. of 1777, art. XXXV.

111. Hamilton Brief, *supra* note 108, at 369.

112. *Id.* at 373.

113. *Id.* at 374.

114. *Id.*

115. *Id.* at 375.

particular state.”<sup>116</sup> His position here rested on a syllogism:

Congress have the exclusive right of war & peace  
 Congress have made a Treaty of peace pursuant to their power  
 A breach of the treaty is a violation of their constitution authority & a breach  
 of the Confederation.<sup>117</sup>

He dismissed the counterargument that the New York legislature, having passed an act approving of the Declaration of Independence, could pass another inconsistent with it. “Foederal authority” was the product of “the original compact.”<sup>118</sup> “It is absurd to say, One of the parties to a contract may at pleasure alter it without the consent of the others . . . .”<sup>119</sup>

In addition to developing the claim that the Treaty was superior to a state statute, Hamilton had two further problems. The first was that the Treaty did not explicitly protect individuals such as Waddington; the relevant treaty provision only explicitly granted a limited amnesty: “Those injuries only are forgiven which are done in relation to the War.”<sup>120</sup> Hamilton contended, however, that the Treaty should be read to implicitly cover Waddington: “The relationship to the war consists in the capture of the City . . . .”<sup>121</sup> Pursuant to that capture, the Commander in Chief had rented Rutgers’s property to Waddington. Even though Waddington had not committed the act of war that had harmed Rutgers, he held the property from the person who had, and thus, Hamilton argued, the immunity of the Commander in Chief had to be extended to him.<sup>122</sup>

The second constitutional argument Hamilton advanced concerned the law that the court was to apply. In other words, even if the Treaty were superior law to the Trespass Act, were state court judges empowered to disregard the Trespass Act, the state statute? Hamilton argued here that, because Congress’s judicial powers were limited to prize causes, state judges were of necessity judges of the United States in other matters, “[a]nd they must take notice of the law of Congress as a part of the law of the land.”<sup>123</sup> The state legislature could not enact controlling law in areas which “the constitution” assigns to the national government, such as the treatment of “foreigners.”<sup>124</sup> The tension between national and state legislation had to be resolved by the court in favor of the nation: “When two laws clash that which relates to the most important concerns ought to prevail.”<sup>125</sup>

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116. *Id.* at 377.

117. *Id.*

118. *Id.* at 379.

119. *Id.*

120. *Id.* at 376.

121. *Id.*

122. *Id.* at 376-77.

123. *Id.* at 380.

124. *Id.*

125. *Id.* at 381 (quoting Cicero). Hamilton’s brief concluded by advancing a

Obviously, Hamilton's reasoning is in a brief, rather than a judicial opinion, and thus represents advocacy rather than a personal (or official) statement of the law. Hamilton's argument merits close analysis, however, because it represents the most sustained analysis of judicial review in any revolutionary-era court document and because, as the author of *Federalist* 78, he played a critical role in articulating the conception and defense of judicial review. Strikingly, Hamilton's contention about the scope of national powers is structural rather than textual. While Hamilton appeals to the Declaration of Independence as the "fundamental constitution of every state," the Declaration of Independence does not present itself as a constitution. Moreover, the text of the Declaration of Independence does not assign the war-making or treaty-making power to the nation. It speaks in plural terms:

That these United Colonies are, and of Right ought to be, FREE AND INDEPENDENT STATES . . . and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.<sup>126</sup>

The text, then, suggests that ultimate responsibility for treaty-making rests with the states.

Hamilton's arguments about the scope of the union's power and about its supremacy are not, however, text-based—he appeals to no specific provision of the document. Rather, they primarily reflect analysis of the necessary incidents of nationhood. He asserts, "Our EXTERNAL SOVEREIGNTY is only known in the UNION. FOREIGN NATIONS only recognize it in the UNION."<sup>127</sup> After observing that "the first act of our government adopts [the Declaration of Independence] as a fundamental law," he concludes this line of analysis: "THESE REFLECTIONS teach us to respect the sovereignty of the Union and to consider its constitutional powers as not controulable by any state!"<sup>128</sup> His reasoning, thus, is based on "reflections" about sovereignty.

Hamilton's analysis of the specific conflict between the Treaty and the Trespass Act is similar to his reasoning about the supremacy of natural law in that it relies on reasoning from general principles. There was no direct conflict between the explicit terms of the statute and the treaty—the former governed private property disputes while the latter barred liability for acts of war—and Hamilton acknowledges this when he notes that an "objection" to which his argument must respond is that "[t]hose injuries only are forgiven which are

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construction argument. His claim was that, while the text of the Trespass Act did not exempt "foreigners" from its coverage, the exemption should be read into the statute: "We must suppose the Legislature wise and honest and ask ourselves what would be their intention in the present case being fully apprised of the merits." *Id.* at 382. As a result, the statute should be read in a way that would make it consistent with the law of nations. *Id.* at 388.

126. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

127. Hamilton Brief, *supra* note 108, at 374.

128. *Id.*

done in relation to the War.”<sup>129</sup> He argues, however, that the phrase “in relation to the War” should be read broadly. The injuries that Waddington inflicted on Rutgers are “in relation to the war” because Waddington was licensed to use Rutgers’s property by the British authorities who had captured New York City.<sup>130</sup> When the rights of a foreign citizen are implicated, the Treaty’s guarantees must be read generously: “Our EXTERNAL sovereignty existing in the Union the property of all the citizens in regard to foreign states belongs to the United States.”<sup>131</sup> Hamilton’s approach here sharply differs from the “clearly unconstitutional” test; he urges that a statute is unconstitutional even though, as his brief makes clear, it is consistent with the explicit terms of the Treaty.<sup>132</sup>

Chief Judge (and Mayor) Duane’s opinion for the Mayor’s Court was, like Varnum’s argument in *Trevett*, contemporaneously published in pamphlet form, and thus was one of the most prominent revolutionary-era discussions of judicial review. The decision is a complicated one, as the court carefully avoided exercising the power of judicial review. Even so, it largely followed Hamilton’s reasoning and, in large part, ruled in favor of his client.

In deciding the case, the Mayor’s Court reached a result based on the law of nations. Applying that law, the court held that the British Commander in Chief had authority to rent properties under his control: the British “had a right to raise contributions; they had a force to collect them, which could not be resisted.”<sup>133</sup> Thus, the defendant, Hamilton’s client, did not owe rent to the plaintiff for 1780 to 1783, the period during which his lease had been approved by the Commander in Chief; this license bore “a *relation to the war*.”<sup>134</sup> But the license from the Commissary General was a “nullity.”<sup>135</sup> According to the pleadings, the Commissary General held “the said brew-house and malt-house . . . for *use of the [British] army*.”<sup>136</sup> Thus, under the law of nations, Waddington owed rent for the earlier period.

The result under the law of nations having been established, the critical question became whether the law of nations should control. Duane here explicitly follows Hamilton’s argument. He invokes the state constitution:

By our excellent constitution, the common law is declared to be part of the law

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129. *Id.* at 376.

130. *Id.*

131. *Id.*

132. The plaintiff’s briefs have not been preserved. The opinion for the court, however, indicates that the plaintiff’s attorney took the position that the legislature had an “uncontrollable power” and that “the courts of justice, in no case ought to exe[r]cise a discretion in the construction of a statute.” See *Rutgers v. Waddington*, reprinted in 1 HAMILTON LEGAL PAPERS, *supra* note 107, at 414 (alteration in original).

133. *Id.* at 399.

134. *Id.*

135. *Id.* at 398.

136. *Id.* (quoting the Commissary General’s pleadings).

of the land; and the *jus gentium* is a branch of the common law. *In republica maxime conservandi sut jura belli*, is an ancient adage. The authorities cited on this point for the Defendant are full and conclusive.<sup>137</sup>

Thus, contrary to plaintiff's claim, New York state is "bound by the *customary and voluntary law of nations*."<sup>138</sup> Like Hamilton, Duane bolsters this conclusion by casting the state in a subordinate role in the federal union. The court observes that "[a]s a nation [the states] must be governed by one common law of nations; for on any other principles how can they act with regard to foreign powers; and how shall foreign powers act towards them?"<sup>139</sup> It concludes:

[T]o abrogate or alter any one of the known laws or usages of nations, by the authority of a single state, must be contrary to the very nature of the confederacy, and the evident intention of the articles, by which it is established, as well as dangerous to the union itself.<sup>140</sup>

Here, then, the court is applying the law of nations to the state for structural reasons, rather than construing a particular constitutional text: that a state cannot depart from the law of nations is in the "nature" of the union itself and the "evident intention" of the Articles of Confederation.

The court then advances a related argument that is grounded in the state constitution and the Declaration of Independence but that understands these documents capaciously:

Our union, as has been properly observed, is known and legalized in our [state] constitution; and adopted as a fundamental law in the first act of our legislature. The foederal compact hath vested Congress with full and exclusive powers to make peace and war. This treaty they have made and ratified, and rendered its obligation perpetual. And we are clearly of opinion, that no state in this union can alter or abridge, in a single point, the foederal articles or the treaty . . . .<sup>141</sup>

The Treaty, this argument suggests, is superior to a state statute—no state "can alter or abridge" the Treaty. While the Treaty did not explicitly absolve private actors such as Waddington from liability, the court again follows Hamilton in finding such a bar on liability as implicit in the Treaty. Relying on civil law scholars, the court concludes that the law of nations dictates "that every treaty of peace implies an amnesty and oblivion of damages and injuries in the war."<sup>142</sup> That the amnesty is merely implicit is thus acknowledged.

The summary thus far represents the bulk of Chief Judge Duane's opinion. This part of the opinion in a fairly explicit way advances the argument that state statutes must yield to the law of nations. Moreover, the court repeatedly adopts

137. *Id.* at 402.

138. *Id.*

139. *Id.* at 405.

140. *Id.* at 406.

141. *Id.* at 413.

142. *Id.* at 411.

expansive understandings of the limits on state legislative authority. It construes the state constitution's provision adopting the common law as making the common law superior to statutory law, when the statute could have been construed as providing that common law would govern until altered by statute. It argues on structural grounds that the law of nations binds the state. It decides that the Treaty of Paris bars liability of private actors, even though there was no provision in the Treaty that established such a bar. Thus, the bulk of the opinion reflects the view that fundamental law is superior to statutory law, and fundamental law is to be broadly understood.

At the very end of the opinion, the court turned to the question of judicial review. Chief Judge Duane observed, "[T]he uncontrollable power of the legislature, and the sanctity of its laws have been earnestly pressed by counsel for the Plaintiff,"<sup>143</sup> and then stated:

The supremacy of the Legislature need not be called into question; if they think fit *positively* to enact a law, there is no power which can controul them. When the main object of such a law is clearly expressed, and the intention manifest, the Judges are not at liberty, altho' it appears to them to be *unreasonable*, to reject it: for this were to set the *judicial* above the legislative, which would be subversive of all government.<sup>144</sup>

This is the critical part of the opinion with respect to whether a court can invalidate a statute; Duane does not elsewhere justify or clarify the principle enunciated in the first sentence. While this paragraph seems to be a straightforward recognition of legislative supremacy—"no power can controul" the legislature—on close reading its actual import is less clear. Having just noted the plaintiff's argument concerning "the uncontrollable power of the legislature, and the sanctity of its laws," Duane only embraces the first part of that position. This hesitation arguably implies rejection of the notion that statutes are sacred—a rejection in line with the earlier statements in the opinion that the legislature is bound by the law of nations. In this light, the statement that "there is no power which can controul them" becomes not a statement of legislative supremacy, but a statement of political reality. The following sentence in the paragraph, then, can be read, not as a rejection of judicial review *per se*, but as a rejection of it in a limited class of cases: judges cannot "reject" a clearly expressed statute simply because it is "unreasonable." The question whether it can be rejected on other grounds is not addressed.

In the remaining pages of the opinion, Duane concludes that the Trespass Act should not be read to produce a result at odds with the law of nations. He quickly advances a series of canons of statutory construction as support for the conclusion that "[t]he repeal of the law of nations, or any interference with it, could not have been in contemplation, in our opinion, when the Legislature passed this statute; and we think ourselves bound to exempt that law from its

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143. *Id.* at 414.

144. *Id.* at 415.



operation.”<sup>145</sup> Thus, in accordance with the law of nations, Rutgers secured damages for the years 1777 to 1780 (when Waddington’s license was from the Commissary General), while Waddington escaped liability for the years 1780 to 1783 (the years when his license was from the Commander in Chief).

Critics of the opinion asserted that “the Mayor’s court have assumed and exercised a power to set aside an act of the state.”<sup>146</sup> Similarly, the New York Assembly passed a resolution attacking the decision and stating, “[I]f a Court instituted for the benefit and government of a corporation may take upon them to dispense with, an act in direct violation of a plain and known law of the state, all other Courts either superior or inferior may do the like.”<sup>147</sup> Nonetheless, it is clear from the way in which Duane framed his opinion that he did not explicitly exercise that power. The opinion does reflect, however, both an expansive and structural approach to the interpretation of fundamental law and the view that statutes are subordinate to that law, even when that law is broadly interpreted. Moreover, even if it did not candidly embrace the power of judicial review, the court “had in effect held nugatory” the statute,<sup>148</sup> and it had done so because of the expansive reading that it had given the fundamental law.

### C. Symsbury Case

In the *Symsbury Case*,<sup>149</sup> the Litchfield County Superior Court in Connecticut refused to give effect to an act of the state assembly that purported to resolve a land dispute.

In 1670, the Governor of Connecticut granted to certain individuals land that would later become the town of Symsbury. In 1686, the Connecticut General Assembly granted to the proprietors of the towns of Hartford and Windsor the lands immediately to the west of Symsbury. In 1727, the proprietors of Hartford and Windsor petitioned the General Assembly for a survey of the boundaries of Symsbury. The General Assembly granted the petition, authorized a survey, and then legislatively adopted the surveyors’ report, which was favorable to the Hartford and Windsor proprietors.<sup>150</sup>

In the *Symsbury Case*, proprietors of the Township of Symsbury brought an action of disseisin against Thomas Bidwell, a person whose property claims traced back to the grant to the proprietors of Hartford and Windsor. The central

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145. *Id.* at 417. For example, he notes that the law of nations is not mentioned in the statute, that it is a subject of too much significance “to have been *intended* to be struck at in *silence*,” and that repeals by implication are disfavored. *See id.*

146. Open Letter from Melancton Smith and Others (Nov. 4, 1784), *reprinted in* 1 HAMILTON LEGAL PAPERS, *supra* note 107, at 313.

147. New York Assembly Resolution, N.Y. ASSEMBLY J., Oct. 4–Nov. 29, 1784, *reprinted in* HAMILTON LEGAL PAPERS, *supra* note 107, at 312.

148. GOEBEL, *supra* note 80, at 137; *see also* Nelson, *supra* note 19, at 1167.

149. 1 Kirby 444 (Conn. Super. Ct. 1785).

150. *Id.* at 445.

question in the case was whether the legislative act affirming the surveyors' report was binding.

Examining the original Symsbury grant, the court determined that it encompassed the land the plaintiffs claimed. Having made this determination, the court observed, "The title is, therefore, in the plaintiffs, if they have not been divested by some act subsequent to the original grant."<sup>151</sup> If the act of the assembly adopting the surveyors' report were valid, the property would belong to the defendants, but the court concluded that the act was legally without consequence:

The act of the General Assembly . . . operated to restrict and limit the western extent of the jurisdiction of the town of Symsbury, but could not legally operate to curtail the land before granted to the proprietors of the town of Symsbury, without their consent; and the grant to Symsbury being prior to the grant made to the towns of Hartford and Windsor, under which the defendant claims, we are of opinion the title of the lands demanded is in the plaintiffs.<sup>152</sup>

The court did not amplify its reasoning beyond this simple statement. Thus, the *Symsbury Case* neither offers an elaborate theoretical basis for why the court decided to exercise the power of judicial review nor provides a defense of judicial review itself. At the same time, the import of the decision is clear: the holding meant that the legislature could not resolve a boundary dispute between rival claimants, as the legislature had sought to do. In other words, although the legislature had concluded that the lands at issue in the case were not within the original Symsbury grant, the court reached a different result and held that the legislative determination was without legal consequence. Thus, the case implicitly reflects the view that dispute resolution concerning competing claims to property was a matter for the courts, not the legislature.

The opinion concludes, "The same point was determined by this court the same way the last year, and on writ of error to the supreme court of errors, the judgment was affirmed; which we conceive hath settled the law in this case."<sup>153</sup> Thus, the decision suggests that there was another early judicial review case, in addition to the *Symsbury Case*, in which a statute was held without legal consequence (presumably the same statute as was at issue in the *Symsbury Case*). The reporter then reproduces the dissent of Judge Huntington in that earlier case. Significantly, even Huntington would not have given the assembly the power to resolve property disputes between rival claimants:

I think it ought to be admitted in the case before us, that the proprietors be of Symsbury could not have their grant taken from them, or curtailed, even by the General Assembly, without their consent; and when the survey was made by *Kimberly*, etc. and approved by the Assembly, the proprietors had their election, either to rely upon the construction of the words of the patent for their title, or to accept of the location, and thereby reduce it to a legal and

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151. *Id.* at 446.

152. *Id.* at 447.

153. *Id.*

practical certainty; they wisely chose the latter, it being material in their favor . . . .<sup>154</sup>

For Judge Huntington, the critical factor was that the parties had accepted the survey approved by the assembly. Granted land could not be taken away “even by the General Assembly.”

The *Symsbury Case* (as well as the unnamed decision mentioned in the opinion) reflects a broad conception of judicial review. The colonial assembly had been engaged in resolution of individual claims—determining boundary lines in a case of conflict. While under modern separation of powers doctrine such a legislative act would be clearly unconstitutional, it was standard practice in the colonial era for legislatures to engage repeatedly in precisely this form of dispute resolution.<sup>155</sup> Reflecting emerging notions of separation of powers, the court in the *Symsbury Case* was applying a new doctrine as it denied the assembly this traditional function. Equally significant, the court did not invoke a constitutional provision to justify its result.<sup>156</sup> The decision is thus one in which the court was employing an expansive approach to judicial review in order to protect a conception of the judicial role that broke from prior practice.

#### D. Case of the Prisoners

Only one revolutionary-era case, Virginia’s *Case of the Prisoners*,<sup>157</sup> involved a challenge to a statute that did not purport to regulate matters within the province of the judiciary (such as the right to a jury trial or what arguments could be heard in court). That case reveals a range of approaches to constitutional interpretation.

The petitioners were three loyalists convicted of treason. The House of Delegates had voted to pardon them; the Senate had refused its concurrence. The question presented was whether the House’s pardon was effective. The state’s Treason Act provided:

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154. Governor Huntington’s Argument in the *Symsbury Case*, 1 Kirby 448, 452 (Conn. Super. Ct. 1785) (quoting Huntington, J., dissent in unpublished decision).

155. For case studies of direct dispute resolution exercised by legislatures, see, for example, Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1495-1503 (1998); Lawrie, *supra* note 19, at 323-25.

156. The Connecticut Royal Charter of 1662 contains no provision that would mandate the result in *Symsbury*. That Charter was in effect at the time that the case was decided and, indeed, Connecticut was not to adopt a new constitution until 1818. See WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 4 (2001).

157. The case was reported in 1827 as *Commonwealth v. Caton*, 8 Va. (4 Call) 5 (1782). I have previously written about the case, using the papers of the participants, which indicate that the published opinion is both incomplete and, at numerous points, erroneous. See William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491 (1994). The discussion here draws on my earlier analysis.

[T]he governour . . . shall in no wise have or exercise a right of granting pardon to any person or persons convicted in manner aforesaid [of treason], but may suspend the execution until the meeting of the general assembly, who shall determine whether such person or persons are proper objects of mercy or not, and order accordingly.<sup>158</sup>

Thus, the statute provided that pardons needed the assent of the General Assembly—both the House of Delegates and the Senate. The relevant clause in the state constitution stated:

[The governor] shall, with the advice of the Council of State, have the power of granting reprieves or pardons, except where the prosecution shall have been carried on by the House of Delegates, or the law shall otherwise particularly direct; in which case, no reprieve or pardon shall be granted, but by resolve of the House of Delegates.<sup>159</sup>

Andrew Ronald, the attorney for the prisoners, argued that this clause meant that if the House sought to pardon, then that pardon was effective. As a result, the Treason Act “was contrary to the plain declaration of the constitution; and therefore void.”<sup>160</sup> He stressed that text, rather than original intent, should be the basis of constitutional interpretation: “[T]he words of the constitution, and not conjectures drawn from the supposed meanings of the framers of it, should give the rule.”<sup>161</sup> At the same time, he proposed a rule of interpretation if the court should find the statute ambiguous: “[T]he construction ought, in favour of life, to incline to the side of mercy.”<sup>162</sup>

Edmund Randolph, the state attorney general, argued that the pardon was insufficient. He accepted the legitimacy of judicial review—a striking concession given the novelty of the practice and the fact that he was defending the statute. He declared that a constitution is a “touchstone” that allows the determination of “how far the people, the fountain of power, have chosen to deposit it in their legislative servants.”<sup>163</sup> At the same time, he made clear that only where there was irreconcilable conflict between a statute and the constitution should a statute be found unconstitutional: “For if [the constitution’s] spirit opposes the exclusion of the Senate, its words must be free from ambiguity and decided, or cannot have the supremacy.”<sup>164</sup> He then advanced saving constructions of the constitution. First, he suggested that the clause could be read as if the phrase “or the law shall otherwise particularly

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158. An Act Declaring What Shall Be Treason, 1776 Va. Acts. Ch. III, reprinted in 9 WILLIAM WALKER HENING, THE STATUTES AT LARGE 168 (1821).

159. VA. CONST. § IX (1776), reprinted in 9 WILLIAM WALKER HENING, THE STATUTES AT LARGE 115-16 (1821).

160. *Caton*, 8 Va. (4 Call) at 7.

161. *Id.*

162. *Id.*

163. Edmund Randolph, Rough Draft of Argument in Respondent v. Lamb (*Case of the Prisoners*), at 11 (original in 91 James Madison Papers, Manuscript Division, Library of Congress, Washington, D.C.) (copy on file with author).

164. *Id.* at 6.

direct” were put in a “parenthesis.” Thus, the House of Delegates alone had the power to pardon in cases which it had prosecuted. In all other instances, the legislature as a whole could determine where to place the pardoning power. Alternately, the clause could be read to provide that the House of Delegates had to approve of a legislative pardon for it to be effective, but that concurrence by the Senate could be statutorily mandated. In a subsequent letter to Madison, Randolph highlighted how far his argument had departed from the plain language of the constitutional text: “I doubt not, that to any but lawyers the construction, by which the two [statute and constitutional provisions] were reconcile[d,] would appear unintelligible.”<sup>165</sup>

Ronald and Randolph were not the only attorneys to argue the case. The presiding judge on the court of appeals, Chancellor Edmund Pendleton, “expressed a Wish that the Gentlemen of the Bar, tho’ not engaged as Counsel, would generally deliver their Sentiments upon the Questions [before the court] . . . .”<sup>166</sup> Three lawyers answered the invitation. While there is no surviving record of what two of the lawyers said, there is a record for the third, St. George Tucker. Tucker’s argument is particularly worthy of scrutiny because of his subsequent eminence as a leading legal thinker. In addition to serving as a law professor at the College of William and Mary and as a federal judge, Tucker became the author of a version of Blackstone’s Commentaries that, in its appendices, extensively analyzed United States constitutional law; because of that treatise, he was “arguably the most important legal scholar of the first half of the nineteenth century.”<sup>167</sup>

Tucker’s initial formulation of the legitimacy of judicial review and its appropriate scope appears to echo Randolph’s argument: “[The constitution] is the touchstone by which every Act of the legislature is to be tried. if [sic] any Act thereof shall be found absolutely [and] *irreconcilably* contradictory to the Constitution, it cannot admit of a Doubt that such act is absolutely null and void.”<sup>168</sup> He continued, however:

I [am not] competent to decide so nice a point as that which this Question [of the statute’s constitutionality] includes. Yet the reasons offered, as I am informed, by an honourable member of the G.C. [General Convention] that it was the Intention of the Constitution to have as few Obstacles as possible in the way to mercy—and some other parts of the constitution by which it

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165. Letter from Edmund Randolph to James Madison (Nov. 8, 1782), *reprinted in* 5 MADISON PAPERS, *supra* note 28, at 262-63. While Randolph was discussing the court’s decision, the court followed his reading.

166. Edmund Pendleton, *Pendleton’s Account of “The Case of the Prisoners,”* in 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON, 1734-1803, at 417 (David John Mays ed., 1967).

167. Paul D. Carrington, *The Revolutionary Idea of University Education*, 31 WM. & MARY L. REV. 527, 540 (1990).

168. St. George Tucker, Notes of Oral Argument in the Case of the Prisoners, at 9 (original in Papers of St. George Tucker, Manuscripts Department, Earl Gregg Swem Library, College of William and Mary, Williamsburg, Virginia) (copy on file with author).

appears that particular exclusive privileges have been reserved to the house of Delegates have induced me to incline to the Opinion that the spirit of our Constitution declares that the power of pardoning in all cases where it is not given to the Executive is vested in the House of Delegates *alone*.<sup>169</sup>

This passage reveals that Tucker's approach to judicial review in fact significantly differed from Randolph's despite the similarity in formulation: in holding the statute unconstitutional, Tucker looked beyond the text of the constitution to its "spirit." The statute is unconstitutional, in other words, because it is inconsistent with the spirit of the constitution, not because it is at odds with its text. It is also worth noting that Tucker relies on framers' intent in a very literal way: he discusses with a framer what he intended. This is not a Scaliaesque reliance on common usage of terms to determine what the constitution meant; it is reliance on subjective and not generally available understandings.

Tucker then elaborated on why the statute was unconstitutional: "[The statute] not only gives powers where the Constitution had tacitly denied them, but renders that [the pardoning power of the House of Delegates] incomplete and inadequate which the Constitution had declared fully sufficient."<sup>170</sup> As before, it is not an express inconsistency between the statute and the constitution that makes the former unconstitutional. Rather, it is the fact that the constitution "tacitly" denied the pardoning power to the Senate.

Tucker's conclusion particularly merits highlighting. "Here then I apprehend," Tucker asserted, "we may trace an absolute Contradiction—For the Law declared that to be insufficient which the Constitution had before declared to be fully sufficient, competent and compleat."<sup>171</sup> This clarifies Tucker's earlier assertion that "if any Act thereof shall be found absolutely and *irreconcilably* contradictory to the Constitution, it cannot admit of a Doubt that such act is absolutely null and void."<sup>172</sup> An "absolute contradiction" is present even when there is no express conflict between statute and constitution. The reason why this merits highlighting is that the central evidence that Thayer advances for his thesis is the repeated statement by courts that statutes should be struck only when they are irreconcilably in conflict with the constitution. But for Tucker, at least, irreconcilable opposition did not mean what Thayer takes it to mean. For Tucker (although not for Randolph), a statute could be unconstitutional because it was at odds with the spirit of the constitution.

Most of the judges' opinions (to the extent that they have been preserved) fail to illuminate the question of how courts are to interpret constitutions.<sup>173</sup> Two judges—James Mercer and Bartholomew Dandridge—ruled in favor of

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169. *Id.* at 11.

170. *Id.* at 12.

171. *Id.*

172. *Id.* at 9.

173. See Pendleton, *supra* note 166, at 426-27 (summarizing the views of each judge).

the prisoners. Mercer found the statute unconstitutional (although no surviving record indicates his reasoning). Dandridge did not address the issue of judicial review, finding (in accordance with an argument advanced by Ronald) that the constitution and the Treason Act set up alternate available mechanisms for pardoning and that the action by the House of Delegates was effective because it was consistent with the pardoning procedure established by the constitution. Of the six judges who ruled against the prisoner, two—Judge Cary and Chief Justice Carrington—upheld the validity of the Treason Act and did not discuss the question of judicial review at all, while a third—Chancellor Blair—reserved the question whether judicial review was legitimate without indicating how he would resolve it. Justice Lyons, in contrast, declared that he was “[a]gainst the Power of the Court to declare an Act of the Legislature void . . . .”<sup>174</sup>

The records of the opinions noted above are slight, essentially limited to stating the result. The only opinions that are at all helpful on the question of constitutional interpretation are those of the two leaders of the bench—Chancellor George Wythe and Chancellor Edmund Pendleton—both of whom ruled against the prisoners.

Wythe announced his unequivocal support for judicial review, stating that an “Anti-constitutional Act of the Legislature would be void; and if so, that this Court must in Judgment declare it so.”<sup>175</sup> Because the *Case of the Prisoners* is the one revolutionary-era judicial review case not involving a statute that affected the province of the judiciary, Wythe’s opinion is particularly significant because it indicates that the courts can review statutes for separation of powers violations more generally. Thus, having observed the importance of “the departments [being] kept within their own spheres,”<sup>176</sup> he celebrated the role of the judiciary in achieving that end:

[W]hen those, who hold the purse and the sword, differing as to the powers which each may exercise, the tribunals, who hold neither, are called upon to declare the law impartially between them. For thus the pretensions of each party are fairly examined, their respective powers ascertained, and the boundaries of authority peaceably established.<sup>177</sup>

Judicial review insured that the legislature did not exceed its constitutionally assigned powers:

I have heard of an english chancellor who said, and it was nobly said, that it was his duty to protect the rights of the subject, against the encroachments of the crown; and that he would do it, at every hazard. But if it was his duty to protect a solitary individual against the rapacity of the sovereign, surely, it is equally mine, to protect one branch of the legislature, and, consequently, the whole community, against the usurpations of the other: and, whenever the

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174. *Id.* at 426.

175. *Id.*

176. *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 7 (1782).

177. *Id.*

proper occasion occurs, I shall feel the duty; and, fearlessly, perform it.<sup>178</sup>

Having made clear that judicial review could properly operate in this context, Wythe then rapidly concluded by embracing the alternative readings of the constitution advanced by Randolph. Wythe explained, “This mode of considering the subject, obviates the objection made by the prisoners’ counsel, relative to the constitutionality of the law concerning treason; for, according to the interpretation just discussed, there is nothing unconstitutional in it.”<sup>179</sup>

Chancellor Pendleton reserved the issue whether a court could exercise judicial review. He observed that the British practice was unclear and noted that Coke had made conflicting statements at different times, at one time “asserting the omnipotence of Parliament” and “giving Courts power of declaring Acts of Parliament void” at another.<sup>180</sup> He added, however, that Virginia’s situation differed from any European precedent because of the presence of a written constitution:

We . . . have happily in our hands the certain record of our Constitution containing the Original Social Compact, wherein the people have made their Government to consist of three great branches, the Legislative, Executive and Judiciary, allotting to each, its proper powers, and declaring that they shall be kept separate and distinct, neither exercising those which belong to another. Like all other declared Powers each has its limits, the Legislative as well as the others, which if they Pass, it would seem their Act would be void, as well as that of an Attorney would be, which was not Warranted by his appointment.<sup>181</sup>

According to Pendleton, then, it appeared that the constitution fixed limits on the legislature’s actions—if the legislature transgressed its limits, “it would seem their act would be void.” At the same time, Pendleton refrained from stating definitively that the legislature operated subject to limits. The critical word is “seem.”

Having suggested that the legislature operated subject to limits, Pendleton stated that he would not resolve in this case whether a court could enforce those limits through the exercise of judicial review:

But how far this Court in which it has been properly said the Judiciary Powers of the State are concentrated, can go in declaring an Act of the Legislature void, because it is repugnant to the Constitution, without exercising the Power of Legislation, from which they are restrained by the same Constitution? is a deep, important, and, I will add, an awful question; from which, however, I will not shrink, if ever it shall become my duty to decide it: at present I am happy in having no occasion to make the decision . . . .<sup>182</sup>

Thayer highlights this passage as “foreshadow[ing] the rule that only clearly

178. *Id.* at 8.

179. *Id.* at 13.

180. Pendleton, *supra* note 166, at 422.

181. *Id.*

182. *Id.*



unconstitutional statutes should be invalidated.”<sup>183</sup> It is, however, not a statement of how courts should interpret the constitution. Pendleton notes that the question of the legitimacy of judicial review is an “awful question” and that judicial review may be illegitimate because it would involve judicial legislation. Pendleton admittedly avoids answering the question, but the passage does not resolve what interpretive strategy a court should employ if in fact the exercise of judicial review is appropriate.

In analyzing the constitutionality of the statute, Pendleton observed that it had been enacted while he was Speaker of the House. While its constitutionality was at that time “[w]armly” debated, he had believed it constitutional and stated, “I have found no reason to alter [that opinion].”<sup>184</sup> The question of constitutionality, he said, “should be decided according to the spirit, and not by the words of the constitution.”<sup>185</sup> For this reason, the Chancellor rejected one of the readings proffered by Randolph—that the constitution could be read to give the legislature the power to assign to the Senate alone the pardoning power in all cases which did not involve impeachments. Because it would sharply diminish the House’s role in pardoning, this reading “does not reach my Idea of the Spirit of the constitution.”<sup>186</sup> But Pendleton embraced the other reading advanced by Randolph. The language in the constitution that non-gubernatorial pardons could not be issued “*but by resolve of the House of Delegates*”<sup>187</sup> meant that these pardons could not be granted “‘without the Consent,’ of the House of Delegates.”<sup>188</sup> The Treason Act was thus constitutional because it made approval by the House of Delegates a necessary (although not sufficient) condition for a pardon. Randolph’s second reading was thus “congenial to the spirit, and not inconsistent with the letter, of the constitution.”<sup>189</sup>

Thayer’s reading of the Pendleton opinion was based on a version published almost half a century after the *Case of the Prisoners*, and that version does not reflect much of what was in Pendleton’s unpublished notes of his opinion. When the opinion is viewed in full, it becomes clear that Pendleton was not adopting the position that courts should defer to plausible legislative judgments concerning constitutionality. Instead, Pendleton as a judge reaches precisely the same conclusion that he did as Speaker: the statute is constitutional. Also, significantly, his analysis of constitutionality is not based simply on text—the constitutionality of the statute “should be decided

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183. Thayer, *supra* note 30, at 140.

184. Pendleton, *supra* note 166, at 425, 426.

185. *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 19 (1782).

186. Pendleton, *supra* note 166, at 424.

187. *Id.* at 417.

188. *Id.* at 425.

189. *Caton*, 8 Va. (4 Call) at 19.

according to the spirit, and not by the words of the constitution.”<sup>190</sup> Randolph’s first argument failed not because it could not be squared with the text, but because it was at odds with the constitution’s spirit. The other approach was adopted because it accorded with the constitution’s spirit. Pendleton’s formulation here is worth noting—the reading is “congenial to the spirit, and not inconsistent with the letter, of the constitution.” The use of the phrase “not inconsistent,” as opposed to the word “consistent,” suggests that Pendleton did not see this as the best reading of the constitution from a purely textualist perspective. But the constitution is to be understood in light of its spirit, and the spirit is a structural concern—the House is not to be cut out of the exercise of the pardoning power.

E. *Conclusion: Different Interpretive Approaches for Different Statutes*

While the revolutionary-era judicial review case law is limited, a survey of that case law reveals a range of interpretive approaches. Significantly, a number of these cases reflect a broad conception of judicial review when the challenged statutes affected the jury trial right or judicial matters, whereas the one challenged statute that did not fall into these categories was upheld, despite a strong tension between the statute and the relevant constitutional provisions.

Some challenged statutes were struck down because they were at odds in a straightforward way with constitutional text. The statutes challenged in New Hampshire’s *Ten Pound Act Cases* and North Carolina’s *Bayard v. Singleton* fall into this category. Andrew Ronald, the attorney for the prisoners, made such an argument in the *Case of the Prisoners*.

In other cases, attorneys and judges employed modes of constitutional analysis that went beyond text and typically drew on structural concerns. The court in *Holmes* appears to have done this, although the opinion has not survived. Alexander Hamilton made structural arguments with great sophistication in *Rutgers*; Chief Judge Duane followed those arguments, although he did not actually hold the statute unconstitutional. In the *Case of the Prisoners*, St. George Tucker, Edmund Randolph, and Chancellor Pendleton all took the position that the constitution should be interpreted in accordance with its “spirit.” (It should be added that, in determining the spirit, Tucker looked to the subjective understanding of a framer as an interpretive guide.) This led them, however, to reach different results. To preserve the statute, Randolph advanced what he, at least privately, appears to have viewed as a saving construction of the constitution. Tucker found the statute unconstitutional. Pendleton found one reading advanced by Randolph at odds with the constitution’s spirit and rejected it but found another congenial with that spirit and embraced it. In the *Symsbury Case* (and the unnamed case that the court cited therein), Connecticut statutes in which the colonial legislature had

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190. *Id.*

resolved private disputes were invalidated, apparently because the court deemed this a judicial function.

Finally, in *Trevett*, attorney James Varnum (and apparently the court) evaluated a statute for its consistency with traditionally protected rights. At the same time, however, this was not a case involving constitutional interpretation, since Rhode Island did not have a constitution.

With the exception of the *Case of the Prisoners*, all of these cases involved statutes that affected judicial matters (such as matters of pleading or evidence) or the right to a jury trial. It should be added that none of the courts or advocates discussed above stated that the power of judicial review was limited to these areas, and in the *Case of the Prisoners*, both Tucker and Judge Mercer thought that the Treason Act was unconstitutional. At the same time, while the body of evidence is limited, it suggests the presence of different interpretive approaches depending on the type of statute at stake.

In this Part, I conclude that in seven cases—the two New Hampshire *Ten Pound Act Cases*, *Bayard*, *Holmes*, *Trevett*, the *Symsbury Case*, and the unnamed case it cites—judicial review was exercised to prevent application of the statute. Of these seven, three—*Bayard* and the two New Hampshire cases—featured situations in which the statute and constitutional text were clearly at odds, but, in the other four cases, they were not. Thus, in four of the seven cases, the conception of judicial review was apparently an expansive one, given the result. By contrast, in the *Case of the Prisoners*, a problematic statute involving the pardon power was upheld, despite its being outside the province of the judiciary.

It should be added that a number of these cases involved issues of great political sensitivity. *Trevett* involved legislation that benefited debtors at the expense of creditors. *Rutgers*, *Bayard*, and *Holmes* all involved anti-loyalist legislation. The *Case of the Prisoners* involved an attempt to pardon loyalists. One might argue that judicial review thus emerges, in part, to protect groups disadvantaged in the political process: the loyalists and creditors. At the same time, such a concern is not apparent on the face of the opinions, and in two of the five cases, the statute was not overturned. The more salient point is one also evidenced in the case law discussed in the next Part: courts exercised judicial review when legislation affected matters falling within the province of the judiciary—affecting either courts or juries—and did so even in cases where the legislation was not clearly unconstitutional.

### III. STATE COURTS IN THE EARLY REPUBLIC

This Part focuses on the twenty-one cases decided in the years between the convening of the Federal Constitutional Convention in 1787 and the issuance of the decision in *Marbury*, in which at least one judge pronounced a statute unconstitutional. In seventeen of these cases, the statute was found invalid. The Part separates the case law into three categories.

The first Part looks at cases involving claims that did not implicate the province of the judiciary, such as challenges on Contract Clause grounds or on the grounds that a statute improperly delegated authority. Two involved challenges brought under the Federal Constitution. In these cases, a state court struck down a state statute on Contract Clause grounds; although the evidence is limited, it appears that the challenged statutes were clearly unconstitutional. In a third case, while the statute was upheld, one judge in dissent would have invalidated it as violative of the state constitution's law of the land clause—despite the fact that, as the majority holding indicates, there were strong arguments supporting the statute. The other cases analyzed in this Part are discussed to illustrate the interpretive stances adopted by the courts; these involve unsuccessful challenges to statutes, and they reflect a stance of judicial deference.

The next Part looks at five cases involving claims that a statute denied the right to a jury trial. There are three cases in which the courts held the statute unconstitutional. In one of these three, there was a colorable claim in support of the statute. In two other cases, the statute was upheld, but one judge concluded that it was unconstitutional, even though there was a colorable argument in support of the statute.

Finally, the Part concludes by looking at cases in which courts examined statutes that affected courts directly, such as by altering their jurisdiction or by ousting court officers, or indirectly, by resolving specific disputes. In twelve instances, the statute was found unconstitutional. (One of these instances involved an advisory opinion, rather than a litigated case.) In two others, while the statute was pronounced valid, one judge believed it unconstitutional. I argue that none of these statutes was clearly unconstitutional.

#### *A. Challenges Not Implicating Judicial Powers or the Right to a Jury Trial*

This Part begins by looking at four cases in which a challenged statute was upheld. (In one, there was a dissent indicating that the statute was unconstitutional.) While this Article is principally concerned with cases in which statutes were invalidated, these cases merit mention because they indicate judicial reluctance to overturn statutes on state constitutional grounds when the statutes did not implicate judicial powers or the right to a jury trial.

Of these four cases, the Pennsylvania Supreme Court's decision in *Respublica v. Duquet*<sup>191</sup> is the only one to discuss the standard to be applied in reviewing a statute's constitutionality. A Philadelphia municipal ordinance made it a criminal offense to build a wooden house in a certain part of the city. After the ordinance's passage, Philip Urban Duquet "did cause to be made, built and erected a certain other wooden mansion house" and was indicted in

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191. 2 Yeates 493 (Pa. 1799).

municipal court.<sup>192</sup> After the case was removed to the Pennsylvania Supreme Court, Duquet defended himself against the charge by arguing that the state statute that authorized the municipal ordinance was unconstitutional. The statute in question had delegated to Philadelphia the power to pass ordinances “as [the municipal government] may judge proper” barring the construction of wooden houses near the Delaware River.<sup>193</sup> Duquet contended that the delegation to a municipality of the power to enact a criminal ordinance and to prosecute alleged wrongdoers in municipal court violated the constitutional provision authorizing indictments for acts “against the peace and dignity of the commonwealth.”<sup>194</sup> “All public prosecutions must emanate from the sovereign people,” he argued. “[T]he attorney general acts as a great state officer against general public offenders.”<sup>195</sup>

The attorney general responded that the defendant had to bear a high burden in order to challenge a statute successfully and that he had failed to meet it:

From whence is it to be inferred, that this law is unconstitutional? Whence arise the doubts, that the legislature have exceeded their authority? The defendant in order to succeed, must make out a clear case; on him lies the *onus probandi*; every legal presumption is in favor of the constitutionality of the acts of the legislature.<sup>196</sup>

The bench interrupted the argument to indicate its full agreement with this contention. The report observes, “*Per cur.* The law clearly is so; we must be satisfied beyond doubt, before we can declare a law void.”<sup>197</sup>

In its opinion, the Court disposed of the argument that the statute was unconstitutional without analysis; it simply asserted that unconstitutionality “must be evident” before a statute can be pronounced invalid:

As to the constitutionality of these laws, a breach of the constitution by the legislature, and the clashing of the law with the constitution, must be evident indeed, before we should think ourselves at liberty to declare a law void and a nullity on that account yet if a violation of the constitution should in any case be made by an act of the legislature, and that violation should unequivocally appear to us, we should think it our duty not to shrink from the task of saying such law is void. We however see no such violation in the present case, and therefore give judgment for the commonwealth.<sup>198</sup>

With respect to the obligation of contracts, the 1801 Kentucky decision *Stidger v. Rogers*<sup>199</sup> appears to reflect a similar reluctance to find a statute

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192. *Id.* (quoting Pennsylvania law enacted on Apr. 18, 1795).

193. *Id.* at 498 (quoting statute and 3 Dall. St. Laws 771 (Pa. 1795)).

194. *Id.* at 495 (quoting PA. CONST. art. V, § 12 (1796)).

195. *Id.*

196. *Id.* at 498.

197. *Id.*

198. *Id.* at 501.

199. 2 Ky. (Sneed) 52 (1801).

unconstitutional. As will be discussed below, the court there found unconstitutional a state statute that violated the right to a jury trial. After discussing the jury trial right, the court added, "It may not be amiss also to mention, that this act *seems* to be unconstitutional; because, by giving fifteen per cent. damages, it impaired the contract, expressed or implied, which was entered into by Stidger and Morton . . . ."200 Even though the act, then, created a damage remedy beyond that established by the contract, the court did not find it an unconstitutional interference with the obligation of contract. Having invalidated the statute on other grounds, the court simply noted an additional potential constitutional problem.

*Ham v. M'Claws*<sup>201</sup> suggests a different—and more strongly counter-majoritarian—conception of the judicial role, although the court did not hold the statute at issue unconstitutional. The M'Claws were slave owners who had lived in Honduras. Before moving to South Carolina, they inquired about the state's laws and learned that no law barred them from bringing slaves into the state. While they were aboard a ship traveling from Honduras to South Carolina, the legislature enacted a new statute barring non-United States citizens from bringing slaves into South Carolina and providing that any slaves brought into the state in violation of the statute would become the property of the individual who informed on the slave owner. Ham, a revenue officer, sued under the statute. The M'Claws argued that the statute should not be given effect because "statutes made against *common right and reason*, are void."<sup>202</sup> They argued, in the alternative, that the statute should be given an "equitable . . . construction."<sup>203</sup>

The court observed:

It is clear, that statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void, as *far as they are calculated to operate against those principles*. In the present instance, we have an act before us, which, were the strict letter of it applied to the present claimants, would be *evidently against common reason*.<sup>204</sup>

Then, however, rather than holding the statute unconstitutional "as applied to the present claimants," the court construed the statute so as not to cover the M'Claws:

[W]e would not do the legislature who passed this act, so much injustice, as to sit here and say that it was their intention to make a forfeiture of property brought in here as this was. We are, therefore, bound to give such a construction to this [act], as will be consistent with justice, and the dictates of

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200. *Id.* (emphasis added).

201. 1 S.C.L. (1 Bay) 93 (Ct. Com. Pl. 1789).

202. *Id.* at 96 (citing Lord Coke's decision in *Bonham's Case*).

203. *Id.* at 97. The state's attorney general, representing Ham, did not address the M'Claws' constitutional argument.

204. *Id.* at 98 (emphasis in original).

natural reason, though contrary to the strict letter of the law . . . .<sup>205</sup>

At one level, *Ham* is notable for the court's invocation of natural law (a natural law concerned with the property rights of the slave owner, not the liberty interest of the person held in bondage). In *Trevett*, Varnum had also appealed to natural law, but that was in a situation in which there was no state constitution to which to appeal, and the jury trial right affected by the statute was a right that had a traditional grounding.<sup>206</sup> Here, in contrast, even with a constitution in place, the court is suggesting that there can be judicial review of statutes based simply on the equities of the situation (as seen by the court). Moreover, it is suggesting that a generally constitutional statute can be invalid in a particular application. At the same time, however, the appeal to common right and reason is dicta. The court's holding is based on its construction of the legislative intent, and its treatment of legislative intent is traditional: there was substantial precedent for construing a statute so as not to cover an unusual fact pattern when the court believed that application would produce inequitable results.<sup>207</sup>

Judge Waties, one of the three judges who decided *Ham*, again used natural law as a basis for judicial review in the 1796 case *Lindsay v. Commissioners*.<sup>208</sup> In that case, however, natural law concerns informed the interpretation of constitutional text, rather than serving as an independent constraint on legislation, and no other judge signed on to Waties's opinion. At issue in *Lindsay* was a South Carolina statute empowering commissioners to lay out a road in Charlestown and determine compensation. When the commissioners, in accordance with traditional practice, awarded no compensation for unimproved lands taken for the road, property owners challenged the authorizing statute on the grounds that it violated the jury trial and the "law of the land" provisions of the state constitution.<sup>209</sup> The next Part will discuss the jury trial claim. Waties was the only judge to find the law of the land claim meritorious. His analysis looked not simply to the words of the clause, but to the clause's purpose: "If the *lex terrae* meant any law which the legislature might pass, then the legislature would be authorized by the constitution, to destroy the right, which the constitution had expressly declared, should for ever be inviolably preserved. This is too absurd a construction to be the true one."<sup>210</sup> He therefore

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205. *Id.*

206. See notes 84-94 and accompanying text (discussing *Trevett v. Weeden*).

207. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 894-902 (1985) (discussing this precedent).

208. 2 S.C.L. (2 Bay) 38 (Ct. App. 1796).

209. *Id.* at 40; see S.C. CONST. art. 9, § 2 (1790) ("No freemen of this State shall be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land . . ."); *id.* at art. 9, § 6 ("The trial by jury . . . shall be forever inviolably preserved.").

210. *Lindsay*, 2 S.C.L. (2 Bay) at 59.

determined that “law of the land” meant “*ancient common law of the land*.”<sup>211</sup> Compensation was, in turn, part of the ancient common law of the land because Blackstone had recognized the compensation requirement and because “the principle of indemnification is deeply founded in natural justice.”<sup>212</sup> Justices Grimke and Bay, who found the state’s arguments compelling, contended that the “law of the land” clause was

not declaratory of any new law, but confirmed all the ancient rights and principles, which had been in use in the state, with the additional security, that no bills of attainder, nor *ex post facto* laws, or laws impairing the obligation of contracts, should ever be passed in the state.<sup>213</sup>

While this interpretation seemed to mirror Waties’s reading, it actually differed sharply. Rather than simply protecting individual rights, for Grimke and Bay, the clause also recognized the state’s rights and privileges. They observed that “the authority of the state, as laid down by eminent civilians and jurists, to appropriate a portion of the soil of every country for public roads and highways, was one of the original rights of sovereignty . . . [and] all private rights were held and enjoyed, subject to this condition.”<sup>214</sup> Thus, the law of the land provision protected the state’s right to seize private property without compensation, not the individual’s right to obtain compensation.<sup>215</sup>

Of the state court cases in the early Republic, I have found only two in which a statute was denied effect even though it did not involve a jury trial right or a judicial matter. Neither was officially reported, and both involved Rhode Island courts finding that a state statute favoring debtors violated the Federal Constitution’s Contract Clause. In 1791, the *Providence Gazette* reported:

An Action at a Special Court having been commenced in the County of Bristol against the Sheriff of the County of Providence, for having received the Paper Money of this State at the Rate of Fifteen for One, agreeably to an Act passed *before the Adoption of the National Constitution*, called the SUBSTITUTE ACT, wherein Judgment was given by the unanimous Opinion of the Court against the Sheriff, on the principle, that, by the Adoption of the Constitution that Act was *virtually repealed* . . . .<sup>216</sup>

In the same year, the Court of Common Pleas in Washington County also held a state statute unconstitutional on the grounds that the terms of debt repayment could not be altered by statute.<sup>217</sup> Although the evidentiary record is thin, it

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211. *Id.*

212. *Id.* at 61.

213. *Id.* at 57.

214. *Id.* at 56.

215. The fourth justice, Burke, held that the statute violated the right to a jury trial and did not reach the “law of the land” question. *See id.* at 58. Since the court was equally divided, the plaintiffs failed to obtain compensation. *See id.* at 62.

216. PROVIDENCE GAZETTE, July 9, 1791, at 1.

217. *See* Warren, *supra* note 19, at 24-25. The *Providence Gazette* reported: “The



appears that the decisions were consistent with the concededly unconstitutional rule. In marked contrast to its actions after *Trevett*, the same state legislature took no action in response to the Bristol County decision. The House refused to receive a petition calling on it to challenge the court's action. The *Gazette* reported, "[I]t must be inferred as the Sense of the Legislature, that the Act before mentioned was superseded by the Adoption of the Constitution, and that it has thereby become *null and void* . . . ."218

The lack of legislative action is significant. Whereas the decision in the revolutionary-era case of *Trevett* produced a sharp outcry, these two state cases from the early Republic did not, suggesting that judicial review had become accepted in the state where it had been most controversial.<sup>219</sup> These two Rhode Island state cases are the only state cases from the early Republic in which a statute that did not involve a matter in the province of the judiciary was struck down. As noted, the statutes were struck down on federal constitutional grounds.

### B. Right to a Jury Trial

There were seven cases from this period in which at least one judge found that a statute violated the right to a jury trial, and in five of these cases the court ruled the statute unconstitutional.

Kentucky courts struck down statutes three times, and in each instance the decision can be seen as an application of the concededly unconstitutional rule. The state's 1799 constitution provided "[t]hat trial by jury should be as heretofore, and the right thereof remain inviolate; and that all laws contrary to that constitution should be void."<sup>220</sup> First, in *Stidger v. Rogers*,<sup>221</sup> the state's supreme court in 1801 found "evidently unconstitutional" a statute enacted shortly after the adoption of the constitution. The court observed that "the act in question was a violation of this clause of the constitution [the jury trial clause], by empowering a court to ascertain the value of property, in a case which, prior to the formation of that constitution, could, in a court of law, only have been ascertained by a jury."<sup>222</sup>

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Court of Common Pleas in the County of Washington at a late Term, gave their unanimous judgment that nothing but silver or gold is a tender to discharge execution." PROVIDENCE GAZETTE, June 25, 1791, at 1.

218. PROVIDENCE GAZETTE, July 9, 1791, at 1 (emphasis in original).

219. The response to the circuit court's decision in *Dickason & Champion v. Casey*, see *infra* notes 320-26 and accompanying text, provides further support for the proposition that judicial review—at least under the Federal Constitution—was winning acceptance in Rhode Island.

220. KY. CONST. of 1792, § 7.

221. 2 Ky. (Sneed) 52 (1801).

222. *Id.*

Second, in *Enderman v. Ashby*,<sup>223</sup> another 1801 case, the court faced a challenge to a statute that barred slaves from engaging in financial transactions “without the consent of their owners.”<sup>224</sup> The act provided that the owners could recover from the individuals who entered into the transactions with the slaves “four times the value of any commodity thus transferred, by the judgment of a justice of the peace, if the sum should be under five pounds.” The court concluded that this provision “does deprive the party of the trial by jury, in a case which, before that time, he was entitled to by law; and consequently, that this clause of the act is contrary to the constitution which was then, and is now, in force.”<sup>225</sup>

Third, in *Gullion v. Bowlmare’s Administrators*,<sup>226</sup> also decided in 1801, the state’s court of appeals followed a similar approach in invalidating a statute that directed an appellate court to enter a judgment against a surety in a supersedeas bond. The court observed that the relevant statutory section “is clearly unconstitutional, inasmuch as thereby the right of trial by jury is taken away in such cases from the surety, which, prior to the date of the constitution, had long been enjoyed.”<sup>227</sup>

In contrast, the fourth case in which a statute was pronounced unconstitutional did not involve a clear application of constitutional text. The 1792 South Carolina case *Bowman v. Middleton*<sup>228</sup> involved a contested title to land. Bowman and his fellow plaintiffs relied in part on a colonial statute from 1712 that had sought to resolve a then-existing controversy about the land’s ownership by confirming title in one of the three groups that claimed it at that time. Middleton countered that “no title could be transferred by this act. That it was against common right and reason, as well as against Magna Charta; therefore, *ipso facto*, void.”<sup>229</sup> His precise grounds for objection are not clear. He stated that the act

wrought a two-fold injury; by depriving [the other claimants at the time of the

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223. 2 Ky. (Sneed) 53 (1801).

224. *Id.*

225. *Id.* The court concluded, however, that the damage award was proper pursuant to another clause of the statute in question, and that that clause was constitutional. *See id.*

In the years before *Marbury*, the Kentucky Court of Appeals confronted one other challenge based on an asserted violation of the right to a jury trial. In *Caldwell v. Commonwealth*, 2 Ky. (Sneed) 129 (1802), the court rejected a claim that the right to a jury trial had been violated, and its approach was identical to that in *Enderman* and *Stidger*. The act authorized the state attorney general “to obtain judgments, by way of *motion*, against all public debtors and officers of every denomination indebted to the public.” *Id.* at 129-30. The court rejected this challenge because the judgment mechanism at issue had been “in force when the constitution was framed.” *Id.* at 129. As discussed *infra* Part III.C, the statute was found unconstitutional on other grounds.

226. 2 Ky. (Sneed) 76 (1801).

227. *Id.*

228. 1 S.C.L. (1 Bay) 252 (Ct. Com. Pl. 1792).

229. *Id.* at 254.

act] of their freeholds, without a trial by jury . . . . [I]n no case, could the legislature of the country interfere with private property, by taking it from one man and giving it to another, to the prejudice of either party, or that of third persons, who might be interested in the event.<sup>230</sup>

Middleton appears to be asserting that the statute violated the right to a jury trial. He also appears to be asserting that the statute violated broader principles that were not explicitly made part of the constitutional text: the statute is “against common right and reason, as well as against Magna Charta; therefore, *ipso facto*, void.”<sup>231</sup>

The court’s decision was brief. Justices Grimke and Bay, the only members of the court participating in the case, held that

the plaintiffs could claim no title under the act in question, as it was against common right, as well as against Magna Charta, to take away the freehold of one man, and vest it in another; and that too, to the prejudice of third persons, without any compensation, or even a trial by the jury of the country, to determine the right in question. That the act was therefore, *ipso facto*, void.<sup>232</sup>

The invocation of Magna Charta and common right resembles the interpretation of the law of the land provision that Justice Waties was to make in *Lindsay*, but the court in *Bowman* did not seek to ground this element of its holding in a constitutional text. This part of the holding that the statute is unconstitutional, then, is not based on constitutional text. More concretely, the court seems to be relying on the state constitution’s jury trial clause. There was, however, a complication here, although it is not noted by the court. The relevant provision of the South Carolina Constitution—“[t]he trial by jury, as heretofore used in this State . . . shall be forever inviolably preserved”<sup>233</sup>—resembles the provision of the Kentucky Constitution discussed above and, like it, is at least arguably backward looking. Thus, the Kentucky Supreme Court, in applying that clause, looked to practices prior to the adoption of the constitution. If a statute was consistent with the pre-constitutional practice, it was upheld; if it was not, it was invalidated. A similar approach here should have caused the statute to be upheld—rather than departing from the background practice, the statute was evidence of the background practice.

Indeed, legislative resolution of private disputes was common during the colonial era,<sup>234</sup> and the practice did not stop with Independence: a number of the statutes discussed in the next Part were post-Independence statutes that sought to resolve disputes between private parties. In this context, the right to a jury trial could be understood as a check on the judiciary, rather than as a check on the legislature. At the very least, then, the South Carolina Supreme Court

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230. *Id.*

231. *Id.* It should be noted that the state constitution did not feature a takings clause, so one potential source of appeal was not available to Middleton.

232. *Id.*

233. S.C. CONST. of 1790, art. IX, § 6.

234. See *supra* Part II.C (discussing the *Symsbury Case*).

was not following the concededly unconstitutional approach in *Bowman*, since the statute was certainly defensible. To the extent that the court was interpreting the jury trial provision, it was giving it a substantive definition of greater breadth than the text itself necessarily mandated.

The decision by the South Carolina Court of Common Pleas and General Sessions of the Peace in *Zylstra v. Charleston*<sup>235</sup> reflects a similar approach to the state constitution's jury trial provision. Zylstra had been convicted in the Charleston Court of Wardens of illegally operating a tallow chandler's shop within the city and was fined 100 pounds. Among his contentions on appeal was the claim that, under the state constitution, a jury trial was required before a penalty of more than twenty pounds could be imposed.

The four judges ruled in Zylstra's favor. While Judge Grimke's decision was based on statutory construction, the other three exercised the power of judicial review. Judge Burke found "utterly void" the municipal ordinance that vested in the Court of Wardens the power to convict Zylstra without a jury:

[F]or the Court of Wardens to hear and determine such a cause, without the intervention of a jury, was what no Court in the state durst presume; it being repugnant to the genius and spirit of our laws, all of which recognise jury trial, which is also guarantied to us expressly by our constitution.<sup>236</sup>

While Judge Burke's opinion treats the case as straightforward, Judge Waties's opinion reveals its complexity in light of the backward-looking focus of South Carolina's jury trial provision. First, the Charleston Court of Wardens predated the state constitution and, as Waties's opinion suggests, the court had imposed penalties without the use of juries.<sup>237</sup> The constitutional text—"the *trial by jury*, as heretofore used in this State . . . shall be forever *inviolably preserved*"<sup>238</sup>—would seem to indicate that prior practices were constitutionally valid, which would suggest that the Court of Wardens, after the constitution, could proceed without juries in precisely the same way as it had before the constitution. Second, the state statute that arguably authorized the municipal ordinance pursuant to which the penalties against Zylstra had been imposed also allowed the Court of Wardens to "exercise the same powers . . . as the Judges of the Courts of Common Pleas or Admiralty"<sup>239</sup>—courts that did not use juries. Again, then, there was precedent for nonjury trials, and the state statute simply extended the practice to a new court.<sup>240</sup>

Waties, however, rejected arguments that practice predating the constitution validated the Charleston Court of Wardens' action, and Judge Bay

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235. 1 S.C.L. (1 Bay) 382 (Ct. Com. Pl. 1794).

236. *Id.*

237. *See id.* at 390.

238. S.C. CONST. of 1790, art. IX, § 6.

239. *Zylstra*, 1 S.C.L. (1 Bay) at 394.

240. The state statute, however, only authorized the Charleston Court of Wardens to hear cases with a value of less than twenty pounds, so in this regard, the court, in imposing a fine of 100 pounds against Zylstra, had exceeded its statutory authorization. *See id.*

followed suit.<sup>241</sup> “[T]he trial by jury is a common law right,” Waties wrote, “not the creature of the constitution, but originating in time immemorial . . . . This right, then, is as much out of the reach of any law, as the property of the citizen . . . .”<sup>242</sup> The contours of the jury trial right under the state constitution thus reflected English common law practice. The fact that the South Carolina legislature, prior to the adoption of the state constitution, had departed from this common law tradition was irrelevant. Burke had deemed unconstitutional a municipal ordinance consistent with practice before the constitution. Waties and Bay considered unconstitutional both that ordinance and the state statute pursuant to which the ordinance was adopted. The scope of the jury trial recognized by Waties, Bay, and Burke reflected a substantive conception of the jury trial right that reflected English common law tradition, rather than state practice, and was thus broader than the constitutional text mandated.

The facts of *Lindsay v. Commissioners*,<sup>243</sup> one of the two cases in which one judge, but not a majority, found a violation of the right to a jury trial, have already been discussed. A South Carolina statute empowered road commissioners to lay out a road in Charleston and to award such compensation as they deemed appropriate. Property owners whose unimproved land had been taken without compensation challenged the statute as violative of the law of the land and jury trial provisions of the state constitution. The state attorney general responded to the jury trial claim by asserting that the state had a sovereign power to seize property for roads and determine without a jury trial whether compensation was due and by arguing that jury trials would create unacceptable administrative inconvenience:

[E]ither the state must possess this high power and authority, as one of the essential prerogatives of sovereignty, or every inconsiderable freeholder in the country could, when interest or caprice urged him to it, thwart and counteract the public in the exercise of this all important authority for the interest of the community.<sup>244</sup>

He appealed, in addition, to background practice, arguing that none of the South Carolina road statutes, dating back to 1686, had provided a jury trial for property owners whose land had been taken.<sup>245</sup>

The two justices who ruled in favor of the state—Grimke and Bay—did not even note the jury trial claim. The same is true of Justice Waties, one of the two justices to favor the property owners. But Justice Burke, the other justice to favor the property owners, appears to have seen a violation of the right to a jury trial. He stated that he “was of opinion that there should be a *fair compensation*

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241. See *id.* at 398 (indicating that Judge Bay, who spoke after Judge Waties, “declared himself of the same opinion”).

242. *Id.* at 394.

243. 2 S.C.L. (2 Bay) 38 (Ct. App. 1796).

244. *Id.* at 44-45.

245. *Id.* at 47-50.

made to the private individual, for the loss he might sustain by it [road-building], to be ascertained by a jury of the country.”<sup>246</sup> Burke provided no basis for this conclusion, but he was not applying the concededly unconstitutional rule. As observed, the South Carolina Constitution’s jury trial right could plausibly be read to ensure only that jury trials would be available in situations in which they had been available prior to the constitution. Burke was reading the clause more broadly than this, finding in it some substantive meaning not based on practice.

Finally, *State v. ---*, a 1794 North Carolina Superior Court case, concerned a state statute that authorized the entry of default judgments against receivers of public money on the motion of the state attorney general. Judge Williams pronounced the statute unconstitutional as violating the law of the land and jury trial provisions of the state constitution.<sup>247</sup> On rehearing, two judges of the court reversed the decision, without explanation.<sup>248</sup> Judge Williams’s opinion reveals that he had a substantive conception of the jury trial right that was not simply determined by past practice and that was not satisfied by the formal involvement of the jury in decisionmaking. The state attorney general offered examples of state statutes that permitted entry of a judgment “though [the defendant] has no actual notice of [the] proceeding, and of course no opportunity to plead in his defence a matter to be submitted to a Jury.”<sup>249</sup> Williams, however, found the statute inconsistent with the jury trial provision of the state constitution because the jury’s role under the statute was purely a nominal one:

[T]hough a jury may be sworn, what will it be upon? It will be upon a default taken against the party who does not appear and plead, because he has no knowledge that any proceedings are intended to be had against him: and so in truth it is not a trial by jury according to the ancient mode . . . . [I]n reality the jury have nothing to determine on—it is a mere form for the sake of which they are to be impaneled—such a trial is a mere farce.<sup>250</sup>

### C. Statutes Affecting Courts

This Part looks at fifteen cases in which at least one judge found unconstitutional a statute that implicated judicial matters; in thirteen of these the statute was in fact found invalid.<sup>251</sup> There were plausible arguments on

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246. *Id.* at 58 (emphasis in original).

247. 2 N.C. (1 Hayw.) 28 (1794). The jury trial provision of the state constitution provided: “That in all controversies at law, respecting property, the ancient mode of trial, by jury, is one of the best securities of the rights of the people, and ought to remain sacred and inviolable.” N.C. CONST. art. XIV (1776).

248. 2 N.C. (1 Hayw.) at 40.

249. *Id.* at 35.

250. *Id.* at 29.

251. In one of the thirteen cases, *Zylstra v. Charleston*, 1 S.C.L. (1 Bay) 382 (Ct. Com.

behalf of all these statutes.

As in the *Symsbury Case*, discussed in Part II.C, most of the cases in this category involved statutes that were, in effect, judicial decisions. In nine cases, the overturned statute had attempted to resolve a dispute in favor of one of the parties or directed a new trial. One of these cases—the South Carolina decision in *Bowman v. Middleton*—has already been discussed. The court there found unconstitutional a 1712 statute declaring that a particular individual owned contested property, observing that

the plaintiffs could claim no title under the act in question, as it was against common right, as well as against Magna Charta, to take away the freehold of one man, and vest it in another; and that too, to the prejudice of third persons, without any compensation, or even a trial by the jury of the country, to determine the right in question. That the act was therefore, *ipso facto*, void.<sup>252</sup>

In *Taylor v. Reading*, the New Jersey Supreme Court reviewed a statute as it “passed . . . upon the petition of the defendants, declaring that in certain cases payments made in continental money should be credited as specie . . . .”<sup>253</sup> The court held the statute “to be an *ex post facto* law, and as such unconstitutional, and in that case inoperative.”<sup>254</sup> The New Jersey Constitution did not have an *ex post facto* clause, which suggests that the court was relying on the Federal Constitution’s clause. The rejected statute was not clearly unconstitutional: in *Calder v. Bull*,<sup>255</sup> the Supreme Court held unanimously that the *Ex Post Facto* Clause did not apply to civil statutes.

In *Austin v. Trustees of the University of Pennsylvania*,<sup>256</sup> the Supreme Court of Pennsylvania was presented with a suit involving title to land, with each party claiming to have acquired the property from the state. In 1784, the state legislature had attempted to resolve the controversy by vesting title in Austin; the following year, the legislature pronounced its prior action unconstitutional and repealed the statute.<sup>257</sup> When the court considered the case in 1793, it ruled in favor of the university, noting (without specifying the grounds) that the 1784 statute was “unconstitutional.”<sup>258</sup>

In *Gilman v. McClary*,<sup>259</sup> the New Hampshire legislature had sought to

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Pl. 1794), two of the four judges found a statute unconstitutional because it permitted a legislative body to exercise judicial powers. The other two judges concurred in the judgment, but did not reach this issue. *See supra* notes 235-42 and *infra* notes 280-83.

252. *Bowman*, 1 S.C.L. (1 Bay) at 254-55.

253. *State v. Parkhurst*, 9 N.J.L. 427, 444 (1802). *Taylor* was not separately reported, but was briefly summarized in *Parkhurst. Id.*

254. *Id.*

255. 3 U.S. (3 Dall.) 386 (1798).

256. 1 Yeates 260 (Pa. 1793).

257. *Id.*

258. *Id.* at 261.

259. *Gilman* is not a reported case, but Professor Walter Dodd collected and published the relevant legislative and judicial documents along with an explanatory note. *See* Walter Dodd, *Gilman v. McClary: A New Hampshire Case of 1791*, 12 AM. HIST. REV. 348 (1907).

overturn a trial court decision. In a suit for money, the New Hampshire Court for Rockingham County ruled in favor of plaintiff Nathaniel Gilman. Elizabeth McClary then appealed to the legislature, which enacted a statute “to restore Elisabeth McClarey [sic] to her Law.”<sup>260</sup> McClary returned to court to effect the statute. The court ruled:

[I]f the act virtually or really reverses the judgment of this Court it is repugnant to the bill of rights and constitution of this State and if the Act does not reverse the said judgment the Court cannot render another judgment in the same case upon appeal while the first judgment remains in full force . . . . It is therefore considered by the Court that the said Act is ineffectual and inadmissible and that the said action be dismissed.<sup>261</sup>

Similarly, in five other unpublished cases from the 1790s, New Hampshire courts declared void state statutes ordering new trials.<sup>262</sup>

Like the *Symsbury Case*, these decisions reflect an evolving notion of separation of powers under which resolution of controversies between particular parties was a matter for the judiciary alone. At the same time, the four state constitutions involved in these cases did not provide a clear textual basis for assigning such decisionmaking to the judiciary alone. Nonetheless, in each case the statute was pronounced unconstitutional.

In a brief, cryptic opinion, the Kentucky Supreme Court in *Caldwell v. Commonwealth*<sup>263</sup> held that part of a state statute that subjected court clerks who were delinquent in paying the money they received to the state “to such fines, penalties, interest, and damages as are imposed by law on delinquent sheriffs, is *unconstitutional*.”<sup>264</sup> The statute was unconstitutional because the statute imposing the payment obligations on clerks had not imposed such sanctions for nonperformance.<sup>265</sup> The court did not cite any constitutional provision as the basis for its holding, indicating that this is another decision in which a court, in a case involving what could be considered the province of the judiciary, invalidated a statute without relying on constitutional text.

260. N.H. SENATE J., Jan. 25, 1791, *quoted in* Dodd, *supra* note 259, at 349.

261. *Gilman v. McClary*, Manuscript Record of the Superior Court for the County of Rockingham (1791), *reprinted in* Dodd, *supra* note 259, at 350.

262. Three of these opinions—*Chickering v. Clark* (1797), *Butterfield v. Morgan* (1797), and *Jeness v. Seavey* (1799)—have not been preserved but are briefly referred to in *Merrill v. Sherburne*, 1 N.H. 199, 216-17 (1818). In a study of separation of powers in early New Hampshire, Timothy Lawrie discusses two additional cases other than those cited in *Merrill*. One is *Jeness v. Seavey*, a 1792 case in which the Rockingham Superior Court held unconstitutional a statute ordering a new trial after the initial set of judicial proceedings had concluded in Seavey’s favor. (The 1799 case *Jeness v. Seavey*, mentioned in *Merrill*, involved a *second* statute ordering a new trial and a *second* decision holding the statute unconstitutional.) The second is a case in which the court of common pleas refused to enforce a statute granting a convicted pig thief a new trial. *See* Lawrie, *supra* note 19, at 323-25.

263. 2 Ky. (Sneed) 129 (1802).

264. *Id.* at 130.

265. *Id.* at 129.



Two other cases involved removal of officers. In both instances, the members of the court disagreed (or at least appear to have disagreed) about the constitutionality of the statute. The New Jersey case of *State v. Parkhurst*<sup>266</sup> was a contest between two men who claimed the position of court clerk. Aaron Ogden had held the position initially, after receiving his commission in 1800. He had then been elected to the United States Senate, without resigning his position as clerk. In 1801, the legislature passed a statute that provided that when an individual holding a state office took a seat in the United States Senate or House of Representatives, he would be deemed to have vacated his state office, and Parkhurst was appointed to succeed Ogden.<sup>267</sup> Ogden asserted that the 1801 statute was an ex post facto law.<sup>268</sup> In the state supreme court, Justice Kirkpatrick asserted that the court had the power to review the constitutionality of statutes,<sup>269</sup> but that there was no need to resolve whether the 1801 statute was unconstitutional. He held that “[c]ertain offices are in their own nature incompatible and inconsistent, and cannot be exercised by the same person at the same time.”<sup>270</sup> Thus, Ogden’s acceptance of his position in the Senate automatically effected his resignation from his clerkship, and there was no need to consider the constitutionality of the statute, since it had no effect.<sup>271</sup>

Kirkpatrick’s two fellow state supreme court justices disagreed with him and ruled in Ogden’s favor.<sup>272</sup> Since only Kirkpatrick’s opinion has survived, it is impossible to say with certainty what grounds the justices relied on in ruling for Ogden. It would appear, however, that they could only have ruled in favor of the senator if they had found the statute of 1801 unconstitutional. Moreover, since the ground on which the statute was asserted to be unconstitutional was that it was an ex post facto law, they presumably invalidated it on that ground. If this is the case, the state supreme court would have, as it had earlier in *Taylor*, invalidated a statute on ex post facto grounds, presumably in reliance on the Federal Constitution. Here, however, the ruling of unconstitutionality (assuming there was such a ruling) did not stand, since the court of errors reversed the state supreme court, although once again the opinion has not been preserved.<sup>273</sup> Nonetheless, the case provides some additional evidence of judges (i.e., the majority of the state supreme court) holding a statute unconstitutional that, *Calder* suggests, could plausibly have been upheld.

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266. 9 N.J.L. 427 (1802).

267. *Id.* at 435.

268. *See id.* at 445-46. The surviving opinion from the case—Justice Kirkpatrick’s opinion in the New Jersey Supreme Court—does not explicitly state that Ogden raised this argument, but it is implicit in Justice Kirkpatrick’s analysis that Ogden made such a claim.

269. *See id.* at 443-45.

270. *Id.* at 445.

271. *Id.* at 445-46.

272. *See id.* at 434 (introductory note to case).

273. *See id.* (letter from Chief Justice Kirkpatrick).

The facts of the North Carolina case *State v. ----*<sup>274</sup> have already been noted. Judge Williams would have invalidated as violative of the law of the land provision of the state constitution (as well as the jury trial provision) a statute that permitted the state attorney general to secure default judgments against receivers of public money, even if the receivers had not received notice of the suit against them. Williams read the phrase “law of the land” expansively, as meaning “according to the course of the common law; which always required the party to be cited, and to have a day in Court upon which he might appear and defend himself.”<sup>275</sup>

In other words, the common law established the law of the land, and the legislature could not overturn it.<sup>276</sup> The state attorney general countered that “law of the land” meant “the whole body of law, composed partly of the common law, partly of customs, partly of the acts of the British Parliament received and enforced here, and partly of the acts passed by our Legislature”<sup>277</sup> and that the legislature had the power to displace any of the other sources of authority.<sup>278</sup> Although they did not explain their reasoning, Judges Ashe and Macay presumably accepted the attorney general’s argument, since they voted in favor of the state.<sup>279</sup>

The facts in *Zylstra v. Charleston*<sup>280</sup> and the jury trial issues raised by the case have already been discussed.<sup>281</sup> *Zylstra* was convicted by the Charleston Court of Wardens for illegally keeping a tallow chandler’s shop within the city limits. In addition to concluding that the state statute and relevant municipal ordinance were unconstitutional because they violated the right to a jury trial, two of the judges—Bay and Waties—also voted in favor of overturning the conviction on the grounds that members of the city council, the legislative authority that enacted the municipal ordinance, sat on the case as judges. Waties observed, “Any one who will consider this at all, must see in it a most unnatural combination of the legislative, the executive, and judicial powers.”<sup>282</sup> (The other two judges on the court did not reach this issue.) Neither Waties nor Bay pointed to constitutional text as the basis of their holding and the Court of Wardens practice seems to have predated the state constitution, so it had historical sanction.<sup>283</sup> Thus, the municipal ordinance was not clearly

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274. 2 N.C. (1 Hayw.) 28 (1794). For a discussion of the facts in *State v. ----*, see *supra* notes 247-50 and accompanying text.

275. *State v. ----*, 2 N.C. (1 Hayw.) at 29.

276. See also *id.* at 33 (argument of state attorney general) (developing this point).

277. *Id.*

278. See *id.* at 31.

279. See *id.* at 40.

280. 1 S.C.L. (1 Bay) 382 (Ct. Com. Pl. 1794).

281. See *supra* notes 235-42.

282. *Zylstra*, 1 S.C.L. (1 Bay) at 396. Judge Bay adopted Judge Waties’s reasoning. See *id.* at 398.

283. See *id.* (Waties, J.).

unconstitutional.

The final opinions in this category are from Virginia: *Cases of the Judges of the Court of Appeals*<sup>284</sup> and *Kemper v. Hawkins*.<sup>285</sup> As historian Charles Grove Haines has observed, “None of the early [judicial review] cases caused more comment or was more widely known” than the *Cases of the Judges*,<sup>286</sup> and the opinions in *Kemper* appeared in book form the year after the case was decided.<sup>287</sup>

The *Cases of the Judges* were not actual cases. Rather, they were a series of judicial responses to state statutes affecting their offices. The first statute was a 1788 statute that had assigned to court of appeals judges the additional obligation to sit on newly established district courts. The state constitutional clause implicated by the statute provided that judges on specifically identified courts should “continue in office during good behaviour” and that they should have “fixed and adequate salaries.”<sup>288</sup>

The report of the case notes that, at the time of its passage, the statute had occasioned significant public debate. Referring to the “good behaviour” clause of the constitution, proponents of the statute made the textual argument that the state constitution protected only tenure of office. They also advanced an originalist argument. They pointed out that the 1779 statute creating the court of appeals had assigned to that court judges of other, already existing courts, without relieving these judges of their original duties. The judges’ “acquiescence [in accepting additional responsibilities] might be considered as a cotemporaneous exposition of the constitution; which formed a precedent not to be resisted.”<sup>289</sup> Critics of the act “contended, that it was contrary to the constitution to impose new duties . . . [and] clearly so, if no additional compensation was made them for it.”<sup>290</sup>

When they next convened, the court of appeals sent the legislature a letter entitled “The respectful remonstrance of the court of appeals.”<sup>291</sup> In that letter, the court “declare[d], that the constitution and the act are in opposition and cannot exist together; and that the former must control the operation of the latter.”<sup>292</sup> The argument that the court advanced was essentially structural, although it drew on constitutional text. The judges observed, “The propriety and necessity of the independence of the judges is evident in reason and the nature of their office; since they are to decide between government and the

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284. 8 Va. (4 Call) 135 (1788).

285. 3 Va. (1 Va. Cas.) 20 (1793).

286. HAINES, *supra* note 19, at 150.

287. *See id.* at 157.

288. VA. CONST. § XII (1776).

289. *Cases of the Judges*, 8 Va. (4 Call.) at 140.

290. *Id.* at 139.

291. *Id.* at 141.

292. *Id.* at 142 (emphasis omitted).

people, as well as between contending citizens . . . .”<sup>293</sup> The constitution recognized this independence, they continued, in two ways. First, “[it] declared that judges should hold their offices during good behavior.”<sup>294</sup> Second, “the constitution gives a principle, not to be departed from, declaring that the salaries shall be adequate and fixed, leaving it to the legislature to judge what would be adequate when they should appoint the duties.”<sup>295</sup> The new statute, by sharply increasing judicial duties without increasing judicial compensation, “appeared so evident an attack upon the independency of the judges, that they thought it inconsistent with a conscientious discharge of their duty to pass it over.”<sup>296</sup> The act, the judges asserted, was “contrary to the spirit of the constitution.”<sup>297</sup> Thus, the court took the position that St. George Tucker had taken in *Case of the Prisoners*: the statute is unconstitutional because it is at odds with the constitution’s “spirit.”

The legislature responded by enacting a statute ousting the judges from the court of appeals (although allowing them to retain their lower court responsibilities). The court of appeals judges signed an order that they “could not be constitutionally deprived” of their responsibilities and resigned, carefully observing that the statute had not stripped them of their duties and that they left the bench of “their mere free will.”<sup>298</sup>

The next controversy arose when the legislature passed a statute assigning general court judges responsibility also to sit as district court judges and giving district courts the power, previously assigned only to the chancery court, to issue injunctions.<sup>299</sup> The relevant constitutional provision stated, “The two Houses of Assembly shall, by joint ballot, appoint Judges of the Supreme Court of Appeals, and General Court, Judges in Chancery, [and] Judges of Admiralty.”<sup>300</sup> The constitutionality of the statute was presented in the case of *Kamper v. Hawkins*. Kamper instituted proceedings in district court and sought an injunction to stay proceedings on a judgment obtained the previous term. The district court “adjourned [the question] to the General Court for novelty

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293. *Id.* at 143 (emphasis omitted).

294. *Id.* (emphasis omitted).

295. *Id.*

296. *Id.* at 145.

297. *Id.* at 146.

298. *Id.* at 149-50. The judges appointed in their stead in 1792 confronted a statute that, in consolidating the Virginia judicial system, arguably reconstituted the court of appeals, although no new appointments were made. The sitting judges then informed the bar that “as they held their offices under the constitution, the new law could not have taken them away, had it even been intended; but . . . that it was not the intention of the legislature to deprive them.” *Id.* at 150-51.

299. *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 21, 66 (1793) (quoting “[an act] reducing into one, the several acts concerning the establishment, jurisdiction, and powers of District Courts”).

300. VA. CONST. § XI (1776).

and difficulty as to the constitutionality of said law.”<sup>301</sup> None of the five judges on the general court suggested that the unconstitutionality of the statute was readily apparent, and they disagreed about how to analyze the question. Nonetheless, all five found the statute unconstitutional.

Judge Roane started his opinion by noting that his initial reaction had been to uphold the statute, stating, “I doubted how far the judiciary were [sic] authorized to refuse to execute a law, on the ground of its being against the spirit of the Constitution.”<sup>302</sup> He continued:

My opinion, on more mature consideration, is changed in this respect, and I now think that the judiciary may and ought not only to refuse to execute a law expressly repugnant to the Constitution; but also one which is, by a plain and natural construction, in opposition to the fundamental principles thereof.

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. . . By fundamental principles I understand, those great principles growing out of the Constitution, by the aid of which, in dubious cases, the Constitution may be explained and preserved inviolate; those land-marks, which it may be necessary to resort to, on account of the impossibility to foresee or provide for cases within the spirit, but without the letter of the Constitution.<sup>303</sup>

The “fundamental principles” of the constitution dictated that the statute was unconstitutional because the statute allowed judges who did not hold office during good behavior (i.e., district court judges other than those who also served on the general court) to exercise power previously limited to tenure-protected judges (i.e., chancery court judges). Roane concluded:

[T]hese dependent tribunals being the creatures of the Legislature itself, will not dare to oppose an unconstitutional law, and the principles I set out upon, viz: that such laws ought to be opposed, would become a dead letter, or in other words, this would pave the way to an uncontrolled power in the Legislature.<sup>304</sup>

Judge St. George Tucker similarly invoked the concept of spirit as an interpretive guide. He began: “I shall first state my own impressions, arising from the text of the constitution, and the spirit of our government . . . .”<sup>305</sup> He classified the district court as a “legislative court” since it was not mandated by the constitution and since the legislature could therefore abolish the court, as well as create it. Invoking the legislature’s earlier actions to oust the members of the court of appeals, he declared, “[T]he judiciary can never be independent, so long as the existence of the office depends upon the will of the ordinary legislature, and not upon a constitutional foundation.”<sup>306</sup> The fact that the constitution provided for the creation of certain courts, whose judges would

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301. *Kemper*, 3 Va. (1 Va. Cas.) at 22.

302. *Id.* at 35.

303. *Id.* at 35-36, 40.

304. *Id.* at 41.

305. *Id.* at 68.

306. *Id.* at 86.

serve during good behavior, meant that the legislature could not create other courts whose judges did not enjoy such tenure: “[S]uch an arrangement must ever render the judiciary the mere creature of the legislative department, which both the constitution and the bill of rights most pointedly appear to have guarded against.”<sup>307</sup>

Judge Nelson employed both textual and structural arguments. The fact that the constitution spoke separately of general court judges and chancery judges “evinced an intention that the judges of the General Court and those in chancery should be distinct persons.”<sup>308</sup> He noted that the constitution required that general court judges who were impeached should be tried in the court of appeals, while judges of the chancery court who were impeached were to be tried in the general court. “My inference,” he concluded, “is that a judge in chancery, and a judge of the General Court, were intended under the Constitution to be distinct individuals.”<sup>309</sup>

Judge Tyler found the impeachment argument elegant, but unconvincing. He declared, “This is too nice a deduction, and is a better argument in favor of an amendment to the Constitution, than of the question under consideration. We cannot supply defects, nor can we reconcile absurdities.”<sup>310</sup> For Tyler, the statute was unconstitutional because the constitution set up only one mechanism for creating chancery judges—a mechanism that gave the judges their commission during good behavior; the statute, in contrast, gave equity powers to those from whom these powers could also be removed by legislative act. Tyler declared that judges given power without adequate protection would lack independence, and, like Judge Tucker, he invoked the history of the court of appeals as exemplifying the legislature’s willingness to undermine judicial decisionmaking:

For how would the rights of individuals stand when brought in contest with the public, or even an influential character, if the judges may be removed from office by the same power who appointed them, to wit: by a statute appointment, as in this case, and by a statute disappointment as was the case in the Court of Appeals.<sup>311</sup>

Finally, Judge Henry declared the statute unconstitutional because the constitution established only one entity with the power to issue injunctions: the court of chancery. He explained, “To exercise this duty [the power to issue injunctions] without the appointment and commission prescribed by the constitution, would be an exercise of a power according to the will of the legislature, who are servants of the people, not only without, but expressly

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307. *Id.* at 92-93.

308. *Id.* at 33.

309. *Id.* at 34.

310. *Id.* at 62.

311. *Id.* at 64.

against the will of the people.”<sup>312</sup> Henry then invoked the example of the court of appeals as exemplifying the danger of relying on the legislature: “If the legislature were authorized to take this step at that time, it surely furnishes all succeeding judges, as they value their reputation and their independence, to see that their appointment be regular, before entering upon the duties of their office, in future.”<sup>313</sup>

The five opinions in the case, then, display a range of analytic approaches, but each reflects an approach to judicial review that goes well beyond literalism. Taken as a group, these opinions evidence structural analysis, reliance on spirit rather than text, and, with the repeated references to the legislature’s earlier retaliation against the court of appeals, invocation of policy concerns.

#### D. Conclusion: Significance of Type of Statute

The state court cases from the early Republic reflect a similar interpretive stance to the previously discussed state court cases from the revolutionary era. The type of statute is of critical significance. The nineteen cases in which statutes were invalidated fall into three categories. In two cases, state statutes were invalidated on Federal Contract Clause grounds. In both, the statute appears to have been clearly unconstitutional. In five cases, state statutes that affected the jury trial right were overturned; in two, there were plausible arguments on behalf of the statute. In eleven cases and one advisory opinion, state statutes affecting judicial matters were overturned. I argue that none of these statutes was clearly unconstitutional.

### IV. CIRCUIT COURT DECISIONS

This Part examines the circuit court decisions invalidating statutes in the years before *Marbury*, most of which have been ignored in the modern judicial review literature. Almost all of the relevant decisions involve state statutes: a total of seven state statutes were held invalid. In six of these seven cases, there was at least a colorable argument for the state statute. Thus, the early federal circuit case law reflects a notably close scrutiny of state statutes, a scrutiny not recognized in the scholarly literature. Moreover, these decisions taken together reflect not simply a close scrutiny of state statutes in general, but a strongly nationalist approach—again, something not recognized previously.

Two cases discussed here concern federal statutes. One is *Hayburn’s Case*,<sup>314</sup> which involved a congressional statute that assigned arguably nonjudicial duties to federal judges. Although the case was rendered moot

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312. *Id.* at 53.

313. *Id.* at 54.

314. 2 U.S. (2 Dall.) 408 (1792).

before the Supreme Court decided it, the circuit court hearing the case concluded that the statute was unconstitutional, and the other two circuit courts, in advisory opinions, had taken the position that the statute was unconstitutional if literally applied. The statute was not, however, clearly unconstitutional, and these various opinions evidence a broad conception of judicial review when a statute affected judicial role and judicial autonomy.<sup>315</sup> The other is *United States v. Ravara*,<sup>316</sup> which involved the question whether the Judiciary Act of 1789 was unconstitutional because it gave concurrent jurisdiction to lower federal courts over cases involving foreign consul. While two judges rejected the claim, Iredell thought the Judiciary Act unconstitutional in this regard,<sup>317</sup> a striking holding for the Justice most often associated with the “clearly unconstitutional approach.”

#### A. Review of State Statutes in Circuit Courts

With the exception of *Vanhorne's Lessee v. Dorrance*,<sup>318</sup> the seven cases discussed here have largely not been discussed in the modern literature on the original understanding of judicial review.<sup>319</sup> The number of these cases and the close level of scrutiny that they typically involve indicate that early federal courts were rigorous in their approach to state statutes in a way that recent scholarship has wholly failed to recognize.

The first cases in which a federal court invalidated a state statute occurred in 1792. One of the decisions was handed down in a case in the Circuit Court for the District of Rhode Island decision *Champion & Dickason v. Casey*. The statute at issue was private legislation obtained by defendant Silas Casey. Casey had petitioned the Rhode Island legislature, asking that collection of the debts he owed be stayed for three years and “that in the meantime he be exempted from all arrests and attachments.”<sup>320</sup> In February 1791, the legislature responded by enacting a resolution stating, “It is voted and resolved

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315. In addition to the cases discussed in this Part, in *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), the circuit court split on the constitutionality of a federal tax statute. When the case went before the Supreme Court, the statute was upheld. *Hylton* is discussed in Part V, *infra*.

316. 2 U.S. (2 Dall.) 297 (C.C.D. Pa. 1793).

317. *Id.* at 298-99.

318. 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795).

319. These cases have been previously discussed in Professor Goebel's history of the early Supreme Court. See GOEBEL, *supra* note 80; see also Warren, *supra* note 19. Nonetheless, despite Goebel's and Warren's work, this body of case law has been almost completely ignored by modern commentators on judicial review. While *Vanhorne's Lessee* is a staple of the literature, it is generally the only circuit court case discussed. Snowiss's work, the leading modern historical account, looks only at *Vanhorne's Lessee*. See, e.g., Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20 (1793); SNOWISS, *supra* note 9, at 56-57, 60; see also SNOWISS, *supra* note 9, at 33, 37, 54-55.

320. Petition of Silas Casey, *quoted in* Warren, *supra* note 19, at 27 n.27.



that the prayer of this petition be and the same is hereby granted.”<sup>321</sup>

British merchants Alexander Champion and Thomas Dickason brought suit in federal court in 1792, seeking to collect debts against Casey and two other Rhode Island merchants. In his plea in response, Casey asserted the legislature’s resolution. Chief Justice Jay and District Court Judge Henry Marchant, the presiding judges, ruled in favor of the plaintiffs. The official record states that “it is considered by the Court that the plea of the Defendant [relying on the statute] is insufficient.”<sup>322</sup> Although the written judgment did not elaborate on the court’s reasoning, contemporaneous newspaper accounts did, and they made clear that the court had decided that the state statute was without legal effect because it was at odds with the Contract Clause of the Federal Constitution.<sup>323</sup>

Strikingly, the opinion appears to have produced no critical response.<sup>324</sup> Indeed, the state assembly resolved that “[i]n conformity to a decision of the Circuit Court, [it] would not grant to any individual an exemption from arrests and attachments for his private debts, for any term of time.”<sup>325</sup> The aftermath of *Dickason*, then, stood in marked contrast to that of *Trevett*, where the Rhode Island legislature had ousted all but one of the members of the court. This difference—and the response to the previously noted Rhode Island state court decisions rejecting the 1789 legal tender law—suggests that by the early 1790s, the principle of judicial review had won general acceptance, even in Rhode Island.

Any analysis of the court’s reasoning necessarily rests on speculation, given the paucity of the record. It appears, however, that the basis for the judgment was a straightforward application of the text of the United States Constitution’s Contract Clause, and thus this is a case in which an invalidated

321. Resolve of Rhode Island Legislature, *quoted in* Warren, *supra* note 19, at 27 n.27.

322. Record in *Champion and Others v. Silas Casey and Others* (Ms. Case Papers, Circuit Court, Mass. Dist.) (on file with author).

323. Thus, the *Boston Columbian Centinel* reported:

The Court also determined in the case of Champion and Dickason against Silas Casey that the Legislature of a State have no right to make a law to exempt an individual from arrests, and his estate from attachments, for his private debts, for any term of time, it being clearly a law impairing the obligation of contracts, and therefore contrary to the Constitution of the United States.

BOSTON COLUMBIAN CENTINEL, June 20, 1792, *quoted in* Warren, *supra* note 19, at 27. The story in the *Providence Gazette* was to the same effect:

The defendant’s counsel pleaded a resolution of the State in bar of the action, by which he was allowed three years to pay his debts and during which he was to be free from arrests on that account. The Judges were unanimously of opinion that, as by the Constitution of the United States, the individual States are prohibited from making laws which shall impair the obligation of contracts, and as the resolution in question, if operative, would impair the obligation of the contract in question, therefore it could not be admitted to bar the action.

PROVIDENCE GAZETTE & COUNTRY J., June 16, 1792, *quoted in* Warren, *supra* note 19, at 27.

324. See Warren, *supra* note 19, at 27-28.

325. PROVIDENCE GAZETTE & COUNTRY J., June 23, 1792, *quoted in* Warren, *supra* note 19, at 28.

statute was clearly unconstitutional.<sup>326</sup>

In the same year, in *Hamilton v. Eaton*,<sup>327</sup> the circuit court held invalid a revolutionary-era North Carolina statute that confiscated loyalist contract claims. Hamilton, a loyalist, claimed that Article IV of the Treaty of Paris had invalidated the statute and revived his contract claim against Eaton. That Article provided, “It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted.”<sup>328</sup>

Eaton responded that the Article was irrelevant. The state statute had required that he pay the amount of his debt to the state treasury. Eaton had done so and, as a result, Hamilton was not a creditor within the meaning of the Treaty, since Eaton’s debt to him had been legally extinguished before the Treaty was ratified. The argument was not frivolous: a very similar claim was raised in *Ware v. Hylton*, which will be discussed in Part V on Supreme Court case law, and Justice Iredell accepted it.<sup>329</sup> Nonetheless, Judge Sitgreaves ignored it, and Justice Ellsworth dismissed the claim as inconsistent with the “design” of Article IV.<sup>330</sup> In other words, both rejected a colorable argument that would have led them to uphold the statute. Both judges also found that the Treaty, when ratified, had invalidated the statute. As justification for this conclusion, Justice Ellsworth analogized the relationship between the Treaty and the statute to the relationship between two statutes enacted at different times: “[T]he maxim [is] . . . the latter abrogates the former.”<sup>331</sup> Thus, the result in the case did not rest on the primacy of the Federal Constitution. Nonetheless, both judges offered the Supremacy Clause as an alternate ground for establishing the superiority of the Treaty to the statute. Justice Ellsworth wrote:

And in 1789 was adopted here the present constitution of the United States, which declared that all treaties made, or which should be made, under the authority of the United States, should be the supreme law of the land, and that

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326. The Contract Clause provides: “No state shall . . . pass any . . . Law impairing the Obligation of Contracts.” U.S. CONST. art. I, § 10, cl. 1. It appears that the circuit court concluded that Casey’s private legislation, by granting him a delay in paying debts that he was contractually obliged to pay, was, to quote the *Columbian Centinel*, “clearly a law impairing the obligation of contracts.” BOSTON COLUMBIAN CENTINEL, June 20, 1792, quoted in Warren, *supra* note 19, at 27. Such a reading of the Clause as prohibiting debtor stay laws was not only the natural reading of the text, it was consistent with the original understanding of the Clause. At the same time, it is also notable that the newspaper accounts suggest that the court relied on only one ground of decision. The court did not, for example, conclude in the alternative that the state legislature, by enacting legislation effectively resolving disputes involving an individual, violated some conception of separation of powers. Rather, the court relied only on the clear textual prohibition.

327. 11 F. Cas. 336 (C.C.D.N.C. 1792).

328. Treaty of Peace, art. IV, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80.

329. See *infra* Part V.C.

330. *Hamilton*, 11 F. Cas. at 340.

331. *Id.*

the judges in every state should be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding. Surely, then, the treaty is now law in this state, and the confiscation act, so far as the treaty interferes with it, is annulled.<sup>332</sup>

To the extent that the very limited record provides illumination, the constitutional prohibition in the third case in which a federal court exercised the power of judicial review to invalidate a statute was not clear. In *Skinner v. May*, an unreported 1794 decision from the Circuit Court for the Massachusetts District, an informer sued to recover a penalty provided for by the Massachusetts Act of 1788 to prevent the slave trade. That statute prohibited Massachusetts residents and citizens from participating in the African slave trade.<sup>333</sup> The plaintiff initially instituted the case in state court. It was then removed to federal district court, where the plaintiff prevailed. On appeal before Justice Cushing and Judge Lowell, the defendants raised two substantive arguments. First, they contended that the Act had been “repealed by the Constitution,” and specifically by Article I, Section 8.<sup>334</sup> Presumably, the reference was to the Foreign Commerce Clause, which provides that “[t]he Congress shall have Power . . . to regulate Commerce with foreign nations . . . .”<sup>335</sup> Second, the defendants argued that Massachusetts did not have the right or authority to make criminal laws that applied to acts of citizens and aliens abroad.<sup>336</sup> The court found for the defendants. According to Professor Goebel, who examined the circuit court’s manuscript record book, “[t]he form of the judgment indicates that it was based upon the constitutional ground advanced.”<sup>337</sup> It thus appears that the statute was invalidated on Foreign Commerce Clause grounds.

If this conclusion is correct, *Skinner* reflects an expansive reading of the Foreign Commerce Clause. The Clause, by its literal terms, is only a grant to Congress of a regulatory power, not a prohibition on state activity. Nonetheless, the circuit court appears to have read into that grant a broad preemptive effect. The state legislation was denied effect even though Congress had not

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332. *Id.*; see also *id.* at 338 (Sitgreaves, J.) (“This is evinced by that plain and strong expression in the constitution of the United States, which declares that 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; anything in the constitution or laws of any state to the contrary notwithstanding.”).

333. An Act to Prevent the Slave Trade, 1788 Mass. Acts 672.

334. Final Record Book, Circuit Court for the Massachusetts District, 1790-99, June Term 1794, quoted in GOEBEL, *supra* note 80, at 590. The Massachusetts statute had been passed in March 1788, after Massachusetts had ratified the United States Constitution, but before the Constitution was ratified by the requisite nine states necessary for it to become effective. See Lance Banning, *Virginia, Sectionalism and the General Good*, in RATIFYING THE CONSTITUTION 261, 286 (Michael Allen Gillespie & Michael Lienesch eds., 1989) (stating that Virginia became the ninth state to ratify on June 25, 1788).

335. U.S. CONST. art. I, § 8, cl. 3.

336. GOEBEL, *supra* note 80, at 590.

337. *Id.*

affirmatively acted to bar states from enacting such legislation. The judgment would appear to rest on the conclusion that the Massachusetts statute was invalid simply because of its effect on foreign commerce. This broad conception of the federal role is particularly remarkable because the state legislation was connected to an area in which states had authority under the Federal Constitution. Before passage of the Constitution, ten states (including Massachusetts) had banned the importation of slaves. During the ratification debates, antislavery proponents of the Constitution, such as Tench Coxe, pressed the claim that the states would retain this authority (even though Congress would not be able to end the slave trade until 1808).<sup>338</sup> The Massachusetts statute seemingly built on this established state power: it prohibited state residents and citizens from engaging abroad in an activity that they could not lawfully pursue in their home state—the importation of slaves.

Perhaps because there was no published decision, *Skinner* appears to have attracted little notice. Indeed, more than a quarter century later, counsel for Ogden in *Gibbons v. Ogden* highlighted the Massachusetts statute denied effect in *Skinner* as an example of a state's permissible exercise of its power over commerce outside of its borders.<sup>339</sup> Nonetheless, the case is significant because it appears to offer an early use of a structural approach in the context of judicial review of state legislation. The only way to make sense of the result is to conclude that Cushing and Lowell believed that, because the African slave trade was foreign commerce, a state could not pass legislation barring its citizens and residents from participating in that trade, even though there was no express constitutional or congressional prohibition barring such legislation.

*Vanhorne's Lessee v. Dorrance*,<sup>340</sup> the next case in which a circuit court struck down a state statute, also reflected an expansive conception of the scope of federal judicial review with respect to state statutes. Unlike the two earlier circuit court cases, *Vanhorne's Lessee* appeared in a published reporter; to be precise, Justice Paterson's jury charge appeared in a published reporter.<sup>341</sup> Moreover, Paterson's discussion of judicial review was not only the most extensive in any of the pre-*Marbury* federal judicial review cases; subsequent citation indicates that it was also the most influential of these opinions.<sup>342</sup>

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338. See "An American" [Tench Coxe], *Virginia's Power Under the Constitution and the Dangers of Failing To Ratify: Advice from a Respectful Countryman*, in 2 THE DEBATE ON THE CONSTITUTION 451, 454 (Bernard Bailyn ed., 1993) (1788); General William Heath, *On Slavery: Speech Before Massachusetts Ratifying Convention*, in 1 *id.* at 915. For further discussion, see James Oakes, "The Compromising Expedient": *Justifying a Proslavery Constitution*, 17 CARDOZO L. REV. 2023, 2047-48 (1996).

339. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 137 (1824).

340. 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795).

341. Dallas's report of the case appeared in 1798; a pamphlet version had appeared in 1796. See GOEBEL, *supra* note 80, at 590 n.177.

342. For example, Justice Chase initially reserved the question whether judicial review of congressional legislation was legitimate. See *Calder v. Bull*, 3 U.S. (3 Dall.) 387, 392 (1798) (Chase, J.); *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (Chase, J.); see

At issue in *Vanhorne's Lessee* were competing Connecticut and Pennsylvania titles to land that had, by the time of the case, been determined to be in Pennsylvania pursuant to an agreement between the two states.<sup>343</sup> Vanhorne's title was traced back to the Penn family; Dorrance's title was initially derived from Connecticut.<sup>344</sup> Because the land was in Pennsylvania, however, the critical question was whether a 1787 Pennsylvania quiet title statute designed to vest property in Luzerne County, Pennsylvania, in Connecticut (rather than Pennsylvania) claimants was constitutional under the Pennsylvania Constitution.<sup>345</sup> The secondary constitutional question was whether the subsequent suspending and repealing acts—statutes that overturned the 1787 statute—violated the Federal Constitution.<sup>346</sup> Justices Paterson and Peters participated in the case and, after a fifteen-day trial, Justice Paterson issued the jury charge. He instructed the jury that the 1787 statute was unconstitutional under the state constitution, that the subsequent statutes did not violate the Federal Constitution, and that the jurors should find for the plaintiff.<sup>347</sup>

In developing the argument for judicial review, Paterson framed the appropriateness of judicial invalidation by offering a series of easy cases, a technique Marshall was to employ in *Marbury*. Paterson contrasted law in the United States and England, observing that “every state in the Union has its

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*also infra* Part V (discussing these cases). When he eventually embraced judicial review in an 1800 grand jury charge, he invoked Paterson's opinion as justification. See Justice Samuel Chase, *Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania* (Apr. 12, 1800), reprinted in 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 408, 412 (Maeva Marcus ed., 1990) [hereinafter DHSC]; see *also id.* at 412 n.5 (noting citation in margin to Justice Paterson). In his opinion in *Marbury*, Chief Justice Marshall drew on Paterson's phrasing in *Vanhorne's Lessee*. Compare *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (concluding that “an act of the legislature, repugnant to the constitution, is void,” that this is a “fundamental” principle, and that “[i]t is not therefore to be lost sight of in the further consideration of this subject”), with *Vanhorne's Lessee*, 2 U.S. (2 Dall.) at 309 (“The constitution is the basis of legislative authority . . . . It is an important principle, which, in the discussion of questions of the present kind, ought never to be lost sight of, that the judiciary in this country is not a subordinate, but co-ordinate, branch of government.”). See also SNOWISS, *supra* note 9, at 112 (noting that the phrase “to be lost sight of” in *Marbury* was “taken directly” from *Vanhorne's Lessee*, and the structure of *Marbury*—with its use of easy cases to illustrate the importance of judicial review before overturning a statute not facially inconsistent with the Constitution—echoes *Vanhorne's Lessee*). When Pennsylvania Chief Justice Gibson wrote his classic attack on judicial review—his dissent in *Eakin v. Raub*, 12 Serg. & Rawle 330, 344 (Pa. 1825) (Gibson, J., dissenting)—he highlighted two cases as the leading defenses of judicial review: *Marbury* and *Vanhorne's Lessee*. See *Eakin*, 12 Serg. & Rawle at 346.

343. See MERRILL JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789, at 335-36 (1950).

344. *Vanhorne's Lessee*, 2 U.S. (2 Dall.) at 304-05.

345. For discussion of the statute, see *id.* at 316-18.

346. *Id.* at 319-20.

347. *Id.* at 304, 320.

constitution reduced to written exactitude and precision.”<sup>348</sup> He then quoted the clauses of the state bill of rights concerning religious establishment, freedom of religion, and election by ballot, and asked: “Could the legislature have annulled these articles, respecting religion, the rights of conscience, and elections by ballot? Surely no.”<sup>349</sup>

The question before him, however, was not easy. It was whether the legislature “had . . . authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation.”<sup>350</sup> Unlike in the hypothetical cases raised by Paterson, the relevant state constitution did not clearly bar such legislative acts. While Pennsylvania had a just compensation provision in its 1790 constitution, the challenged statute had been passed (and repealed) when the 1776 constitution had been in effect, and that constitution had no such provision. Justice Paterson’s charge does not address the implication that the revision suggests that there was no constitutional right to compensation before the later constitution was adopted; indeed, the charge does not even acknowledge the constitutional change with respect to compensation. The constitutional provisions on which he focused were the guarantees of an inherent and inalienable right to property and, to a lesser extent, the jury trial right.

Justice Paterson reads the right to compensation into the constitutional guarantee “[t]hat all men . . . have certain natural, inherent and unalienable rights, amongst which are . . . acquiring, possessing and protecting property . . . .”<sup>351</sup> He stated:

The legislature . . . had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice and moral rectitude; it is incompatible with the comfort, peace and happiness of mankind; it is contrary to the principles of social alliance, in every free government; and lastly, it is contrary both to the letter and spirit of the constitution. In short, it is what every one would think unreasonable and unjust in his own case.<sup>352</sup>

At one level, Paterson is appealing here to the text of the state constitution. He grounds his argument in a specific provision and claims that uncompensated takings are “contrary . . . to the letter . . . of the constitution.” Yet Paterson’s argument is not premised on close reading of the text. He does not, for example, probe the precise nature of the right in “protecting property” or discuss how the challenged legislation violates that right. My point here is not that Justice Paterson could not have made such an argument; it is that he did not. The focus of his methodological approach is different. In the discussion of

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348. *Id.* at 308.

349. *Id.* at 309.

350. *Id.* at 310.

351. PA. DECLARATION OF RIGHTS art. I (1776).

352. *Vanhome’s Lessee*, 2 U.S. (2 Dall.) at 310 (footnote omitted).

the right to compensation, Paterson, having established that the fundamental right to property is embodied in the state constitution, is principally concerned with what the fundamental right is, rather than with its precise embodiment in constitutional text. He appeals to “principles of reason, justice and moral rectitude,” to “the comfort, peace and happiness of mankind,” and “to the principles of social alliance.”<sup>353</sup> Significantly, like Virginia’s judges, he appeals to the constitutional “spirit” as well as the text. Text is a critical factor—Paterson’s argument is premised on the existence of text embodying the particular right—but text is not the focus of the interpretative approach.

Having established that property could be taken only with compensation, Justice Paterson turned to the question of whether the compensation provided under the act was adequate. The act provided that, if it caused individuals to be divested of property that was rightfully theirs, a board of property would award them land of equivalent value.<sup>354</sup> Paterson’s analytic approach here was similar to the one he had adopted with respect to the fundamental question whether the legislature could take without compensation. The relevant constitutional provision was the one guaranteeing a jury trial right: “That in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred.”<sup>355</sup> Paterson did not analyze whether the legislative action was a “controvers[y]” within the meaning of the constitution or whether there was a right to a jury trial, even though the constitution used the word “ought,” rather than the inflexible “shall.” Instead, he again turned to fundamental principles:

The interposition of a jury is . . . a constitutional guard upon property, and a necessary check to legislative authority. It is a barrier between the individual and the legislature, and ought never to be removed; as long as it is preserved, the rights of private property will be in no danger of violation, except in cases of absolute necessity, or great public utility.<sup>356</sup>

Similarly, invoking first principles, Paterson found the act unconstitutional because it permitted compensation in land. Paterson declared, “No just compensation can be made, except in money. Money is a common standard, by comparison with which the value of anything may be ascertained. . . . It is obvious, that if a jury pass upon the subject, or value of the property, their verdict must be in money.”<sup>357</sup>

Having shown the confirming act’s unconstitutionality, Justice Paterson informed the jury that “it is a dead letter, and of no more virtue or avail, than if it never had been made.”<sup>358</sup> He therefore devoted little attention to the

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353. *Id.*

354. *Id.* at 313.

355. PA. DECLARATION OF RIGHTS art. XI (1776). For discussion, see *Vanhorne’s Lessee*, 2 U.S. (2 Dall.) at 310, 312-16.

356. *Id.* at 315.

357. *Id.*

358. *Id.* at 316.

argument that the suspending and repealing acts violated the Federal Constitution.<sup>359</sup>

Paterson's charge, as previously noted, is the most extensive federal court discussion of judicial review before *Marbury* and merits close scrutiny for that reason. It is a case in which the reasoning is premised on the existence of constitutional text—it is not a natural law decision, although it has been read in that fashion<sup>360</sup>—but the constitutional text is understood in the light of first principles, and Justice Paterson's focus is much more on the principles than on the text. Finally, the charge reflects close federal court scrutiny of state statutes, although the factual situation was complex. Paterson and Peters were invalidating a statute that had already been repealed; the fact that the statute was no longer on the books mitigated the challenge to state sovereignty posed by the decision. Moreover, the state statute pronounced unconstitutional was not one that had advanced parochial interests at the expense of outsiders.

Indeed, it accorded with a suggestion made by the commissioners of a federal court during the Articles of Confederation era, which had ruled that the land claimed by Connecticut and Pennsylvania had belonged to Pennsylvania. (Their resolution of the dispute had been ineffective; the disagreement was subsequently resolved by Connecticut and Pennsylvania themselves.<sup>361</sup>) The commissioners had urged, however, that the claims of the individual Connecticut settlers be recognized.<sup>362</sup> Thus, the circuit court was holding

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359. With respect to the former act, he noted that it had been passed in 1788: "This act was passed before the adoption of the constitution of the United States, and therefore, is not affected by it." *Id.* at 319. This part of the charge is conclusory. Justice Paterson did not explain why the Federal Constitution did not operate retroactively on this legislation, although the implication of his statement is that, as a general matter, the Constitution did not operate retroactively.

Because the repealing act had been passed in 1790, Justice Paterson treated it as governed by the Federal Constitution, but he thought the constitutional challenge to this legislation insubstantial. It did not violate the Ex Post Facto Clause because the process of shifting title to the Connecticut settlers was incomplete when the suspending legislation went into effect. Paterson declared, "Other acts were necessary to be performed, but before the performance of them, the law was suspended and then repealed." *Id.* at 319-20. The Contract Clause claim failed because

if the confirming act be a contract between the legislature of Pennsylvania and the Connecticut settlers, it must be regulated by the rules and principles which pervade and govern all cases of contracts; and if so, it is clearly void, because it tends, in its operation and consequences, to defraud the Pennsylvania claimants, who are third persons, of their just rights . . . .

*Id.* at 320.

360. See Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C. L. REV. 421, 490 (1991). The case is not among those discussed by Professor Sherry.

361. See JENSEN, *supra* note 343, at 335-36; GOEBEL, *supra* note 80, at 193.

362. JENSEN, *supra* note 343, at 336; GOEBEL, *supra* note 80, at 193 n.210. Jensen states that the commissioners were acting in their official capacity; Goebel convincingly argues that they were making their recommendation as private citizens.



unconstitutional a Pennsylvania statute that had the consequence of benefiting Connecticut settlers, while discriminating against the state's own settlers. As a result, the decision did not, as a factual matter, undercut a state's exercise of its authority to benefit state citizens.

In his charge, Paterson stated that he hoped the case would be brought before the Supreme Court: "The great points on which the cause turns, are of a legal nature; they are questions of law; and therefore, for the sake of the parties, as well as for my own sake, they ought to put in a train for ultimate adjudication by the supreme court."<sup>363</sup> It may be that Paterson envisioned *Vanhome's Lessee* as a perfect test case from a political vantage point for his philosophy of judicial review: one in which the Supreme Court could exercise strong oversight over state legislation, but in a context in which the actual decision would not undercut state interests. If Paterson had such hopes, they were not realized. The Supreme Court ultimately dismissed the case without issuing an opinion on the merits,<sup>364</sup> but the case was nonetheless important because Paterson's charge became prominent and is a leading example of the strong conception of judicial review of legislation (and state legislation in particular).

Two years after *Vanhome's Lessee*, in *United States v. Villato*,<sup>365</sup> the circuit court again struck down a Pennsylvania state statute. Mr. Villato<sup>366</sup> had been charged with treason against the United States because in 1794, while employed on a French privateer, he had participated in the capture of the John, a United States vessel. In his habeas proceeding, he claimed he could not be prosecuted for treason because he was not a United States citizen.<sup>367</sup> By birth a Spanish citizen, Villato had taken an oath of citizenship in 1793 pursuant to a Pennsylvania naturalization statute, but he claimed that this statute was unconstitutional under the state's 1790 constitution and that he had therefore remained a Spanish citizen.

The published report does not record the prosecution's defense of the statute's constitutionality in any detail—it simply notes that the Government responded to Villato's challenge with the claim that the 1789 statute "was not affected by the establishment of the new state constitution"<sup>368</sup>—but the hurdles

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363. *Vanhome's Lessee*, 2 U.S. (2 Dall.) at 304.

364. The case was docketed in the Supreme Court in August 1796 and then continued five times. In February 1799, the defendant in error moved that the writ of error be nonprossed because the plaintiff in error had not appeared—for reasons that are not clear. That Term, the Court dismissed the case. See 1 DHSC, *supra* note 342, at 296, 306, 308, 309, 314, 316, 508-09.

365. 2 U.S. (2 Dall.) 370 (C.C.D. Pa. 1797).

366. According to the unpublished court records, the defendant's name was "Billato." See GOEBEL, *supra* note 80, at 591 n.179. The published opinions report his name with the spelling used in the text.

367. *Villato*, 2 U.S.(2 Dall.) at 370.

368. *Id.*

Villato confronted in making his constitutional claim are clear from his attorneys' arguments. The challenged statute had been enacted while the Pennsylvania Constitution of 1776 was in effect. That constitution had a provision regulating naturalization, and Villato did not claim that the 1789 statute was unconstitutional when enacted.<sup>369</sup> While the 1790 constitution in effect at the time of the case did not have a naturalization provision, it provided that "all laws of this commonwealth, in force at the time of making [this constitution] . . . and not inconsistent therewith . . . shall continue as if [the constitution] had not been made."<sup>370</sup> Moreover, the circuit court had held two years earlier in *Collett v. Collett*<sup>371</sup>—a case involving a challenge to the 1789 Pennsylvania statute as unconstitutional under the *Federal* Constitution—that the Pennsylvania statute was constitutional because the state and federal government had concurrent naturalization powers.

Against this background, Villato made the argument that, because the 1790 constitution was adopted shortly after Congress had passed a naturalization statute, "the state convention . . . by omitting to prescribe any state mode of naturalization [left] the subject implicitly to the rules which congress had previously prescribed."<sup>372</sup> The defense further argued that the savings provision of the 1790 constitution—which preserved laws "not inconsistent" with that constitution—did not preserve the 1789 statute because the 1789 statute gave new citizens full rights after one year whereas the 1790 state constitution established a two-year residency requirement for the vote and a longer period for those seeking elective office.<sup>373</sup>

While colorable, Villato's arguments were at the same time far from compelling. The tension between statute and state constitution was only—by his own recognition—"implicit," and the same statute had just been upheld against a related federal constitutional challenge. Moreover, whereas he used the different residency requirements of the state constitution and the statute to argue against the latter's constitutionality, in practice the statute had been given a narrowing construction in the wake of the new state constitution, so that the residency requirements under both were the same and the tension resolved.<sup>374</sup>

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369. For the relevant constitutional provision, see PA. CONST. of 1776, § 42. For discussion, see *Villato*, 2 U.S. (2 Dall.) at 372.

370. PA. CONST. of 1790. For discussion, see *Villato*, 2 U.S. (2 Dall.) at 372-73.

371. 2 U.S. (2 Dall.) 294 (C.C.D. Pa. 1792). While the Supreme Court issued a writ of error, the case was not heard because petitioner discontinued the writ. See 6 DHSC, *supra* note 342, at 29.

372. *Villato*, 2 U.S. (2 Dall.) at 371-72.

373. *Id.* at 372.

374. See *id.* at 372-73 ("If, then, the act of assembly is in force, an alien, naturalized under it, having the rights of the old, is in a situation preferable to a natural-born citizen under the accumulative restraints of the new constitution. But a contrary construction has been given whenever the point was directly presented for consideration (which was not the case in *Collet v. Collet*) by the legislature, by our courts, and by the bar."). These sentences from the defense argument indicate that the statute had been given a narrowing

Nonetheless, Judge Peters and Justice Iredell, the two judges considering the case, both ruled in favor of the defendant and treated the case as unproblematic. Judge Peters observed:

The act of assembly is obviously inconsistent with the existing constitution of the state; and therefore, cannot be saved by the general provision of the schedule annexed to it. On that ground only, my opinion is formed; but it is sufficient to authorize a declaration, that the [naturalization] proceeding before the mayor was, *ipso facto*, void; that, the prisoner is not a citizen of the United State; and that, consequently, he must be released from the charge of high treason.<sup>375</sup>

In a slightly lengthier opinion, Justice Iredell first touched on the federal constitutional issue. He stated:

[I]f the question had not previously occurred, I should be disposed to think, that the power of naturalization operated exclusively, as soon as it was exercised by congress. But the circumstances of the case now before the court, render it unnecessary to inquire into the relative jurisdictions of the state and federal governments."<sup>376</sup>

He thus reserves the federal constitutional question, even as he indicates that, if the federal constitutional issue were one of first impression, he would have reached a different result from that reached in *Collett* (though he did not mention the earlier case by name). He then disposed of the state court claim in a sentence:

The only act of naturalization suggested, depends upon the existence or non-existence of a law of Pennsylvania; and it is plain, that upon the abolition of the old constitution of the state, the law became inconsistent with the provisions of the new constitution, and of course, ceased to exist, long before the supposed act of naturalization was performed.<sup>377</sup>

These opinions reflect a similar approach to the question of state constitutional law. They both find it clear that the state statute and the state constitution are inconsistent. Peters finds the inconsistency “obvious[]”; Iredell terms it “plain.” As indicated above, however, any inconsistency between the statute and the constitution is far from apparent. The two opinions then suggest that a statute can be “plain[ly]” unconstitutional even if close legal reasoning is necessary to reveal the unconstitutionality. This point should be highlighted. Contrary to Kramer’s reading—in which “plain[ly]” is treated as synonymous with “blatantly,”<sup>378</sup>—Iredell’s usage—and Peters’ usage of “obvious[]”—was different. “[P]lain” and “obvious[]” connote the best reading of the constitution, rather than a reading in which only a “blatantly” unconstitutional statute is

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“construction” under which foreign-born naturalized citizens were treated the same as United States citizens who had become Pennsylvania residents.

375. *Id.* at 372.

376. *Id.* at 372-73.

377. *Id.* at 373.

378. See KRAMER, *supra* note 6, at 103.

void.

These opinions also reflect an unwillingness to search for a way to preserve a statute—at least when the statute preceded the adoption of the current constitution. As noted, Pennsylvania practice had been to limit the statute in a way that rendered it consistent with the state constitution. The court in *Villato* did not pursue that approach.

Finally, Justice Iredell's dicta regarding the federal constitutional question suggests a lack of deference to state statutes when those statutes implicate national concerns. The relevant constitutional clause simply provided, "The Congress shall have power . . . [t]o establish an uniform Rule of Naturalization . . ." <sup>379</sup> The court in *Collett* had offered textual and structural reasons for not reading this as an exclusive power. <sup>380</sup> Iredell, in contrast, was raising doubts about the Pennsylvania statute's constitutionality under the Federal Constitution, even though the state statute plausibly could be defended (and was supported by governing precedent).

The next circuit court decision to invalidate a state statute came, like *Vanhorne's Lessee*, from Justice Paterson. *Pettibone (ex dem the Selectmen of Manchester)* concerned a 1794 Vermont statute that had expropriated lands previously given to the Society for the Propagation of the Gospel and authorized town selectmen to take glebe lands—earlier set aside for the support of the Church of England—and to lease them to provide funds for teachers. <sup>381</sup> Under the statute, Pettibone had brought an ejectment action against a Reverend Barber. Although the record here is very limited, a local paper stated that Justice Paterson "adjudged" the statute to be unconstitutional. <sup>382</sup> The *Church Review* reported a little more than fifty years later that Paterson was

379. U.S. CONST. art. I, § 8.

380. The circuit court in *Collett v. Collett*, 2 U.S. (2 Dall.) 294 (C.C.D. Pa. 1792), noted:

The objection founded on the word *uniform*, and the arguments *ab. inconvenienti*, have been carried too far. It is, likewise, declared by the Constitution (art. 1. s. 8.) that all duties, imposts and excises shall be *uniform* throughout the United States; and yet, if express words of exclusion had not been inserted, as in a subsequent part of the same article (s. 10.) the individual States would still, undoubtedly, have been at liberty, without the consent of Congress, to lay and collect duties and imposts. Again;—when, it is said, that one State ought not to be privileged to admit obnoxious citizens, to the injury of another, it should be recollected, that the State which communicates the infection, must herself be first infected; and in this, as in all other cases, we may be assured, that the principle of self-preservation will inculcate every reasonable precaution.

*Id.* at 296 (emphasis in original).

381. See Goebel, *supra* note 80, at 591-92.

382. See *id.* (quoting *Farmer's Museum, or Lay Preacher's Gazette*, Apr. 29, 1799 (Walpole, N.H.)). The November 9, 1798, *Philadelphia Aurora* suggested that Paterson left the question of constitutionality to the jury (and apparently criticized him for not having done the same in the *Lyons* case). See 3 DHSC, *supra* note 342, at 236 n.24. As Professor Goebel has pointed out, it seems unlikely that Justice Paterson would have left the matter to the jury, since he treated constitutionality as a question for the court in *Vanhorne*. See GOEBEL, *supra* note 80, at 592 n.186.

reported as having said “that legislatures are not omnipotent. They cannot take this man’s property and give it to that man.”<sup>383</sup>

Although the evidence is not complete enough to say with certainty, it appears—particularly in light of the *Church Review* statement—that Justice Paterson struck down the Vermont statute under the Vermont takings clause. The *Church Review* statement suggests that in *Pettibone*, as in *Vanhorne’s Lessee*, the critical issue in reviewing the constitutionality of the statute was whether a state could constitutionally take property from one person and give it to another. In *Pettibone*, there was a takings clause in the state constitution. Vermont’s takings clause provided that “whenever any particular man’s property is taken for the use of the public, the owner ought to receive an equivalent in money.”<sup>384</sup> Judicial invalidation in *Pettibone* would thus have a clear textual basis, in contrast to *Vanhorne*, where the state constitution had no such clause.

The final pre-*Marbury* circuit court case in which a state statute was held void was the 1802 decision *Ogden v. Witherspoon*.<sup>385</sup> North Carolina had passed three acts governing the statute of limitations for filing contract claims against estates. An act of 1715 provided that claims would be barred if not brought within seven years.<sup>386</sup> An act of 1789 provided that claims would be barred if not brought within two years (or within three years if the creditor was not a North Carolina resident). This second act, however, had a tolling provision, providing that the statute of limitations would not run if the creditor suffered from a disability. It also contained the following clause: “That all laws and parts of laws, that come within the meaning and purview of this act, are hereby declared void, and of no effect.”<sup>387</sup> Finally, in 1799, the legislature enacted a statute providing that “the act of 1715 hath continued and shall continue to be in force.”<sup>388</sup> The issue in the case was whether the 1799 statute violated the North Carolina Constitution’s separation of powers clause by purporting to determine that the 1715 statute had at all times been good law.

Although the facts of the case receive little attention in the report of the opinion, it appears that *Ogden* was a contracts suit between two estates that turned on whether the seven-year statute of limitations in the 1715 act served as an upper limit on the tolling period for disabilities established under the 1789 act. The defendant-debtor appears to have taken the position that the 1799 statute established that the 1715 statute had always remained in effect. As a

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383. GOEBEL, *supra* note 80, at 592 (quoting 4 CHURCH REV. & ECCLESIASTICAL REG. 587 (1852)).

384. VT. CONST. ch. I, art. II (1786). On the origins of the Vermont clause, see William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 701-04 (1985).

385. 18 F. Cas. 618 (C.C.D.N.C. 1802).

386. *Id.*

387. *Id.* (Marshall, C.J.) (quoting 1789 act).

388. *Id.* at 619.

result, the statute of limitations had run on the plaintiff-creditor's claim sometime before 1799 because, despite the fact that the plaintiff-creditor was under a disability, more than seven years had elapsed from the accrual of the cause of action. The plaintiff-creditor appears to have argued that, between 1789 and 1799, the statute of limitations was tolled for those under disabilities and that the claim had not lapsed.<sup>389</sup>

The defendant-debtor's position that the 1715 and 1789 statutes could be read together to establish a seven-year statute of limitations on claims brought by those under disabilities was one that appears to have had substantial force. Not only did the 1799 statute apparently reflect legislative acceptance of that position, but the reporter's note also indicates that some state court judges "held the act of 1715 not to have been repealed by that of 1789."<sup>390</sup> (The note does not indicate whether the state court decision preceded or followed *Ogden*, and *Ogden* makes no mention of the state decision.) Finally, before being appointed to the Supreme Court, Justice Iredell, in his 1791 compilation of North Carolina laws, included the 1715 statute without declaring it to be "repealed or obsolete," which suggests that he believed that it continued to be in force to some extent.<sup>391</sup> Nonetheless, both District Judge Potter and Chief Justice Marshall ruled in favor of the plaintiff-creditor.

Potter's opinion is brief, and it is conclusory on the issue of judicial review. He simply declared, "The act of 1799, declaring the act of 1715 not to have been repealed, and to have continued in force, has not the effect of making that act to have been in force after it was repealed, till re-enacted."<sup>392</sup>

Marshall found that the 1799 statute violated the state's separation of powers clause, which provided "that the legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from each other."<sup>393</sup> This provision had been violated because "the matter decided by [the 1799 statute], namely, whether the act of 1789 be a repeal of the 9th section of 1715, is a judicial matter, and not a legislative one."<sup>394</sup> Marshall thus seems to have been proceeding in the same way as many of the state court

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389. I think that these arguments necessarily underlie the case. The plaintiff-creditor was seeking to have the court invalidate the 1799 statute's declaration that the 1715 statute was at all times in effect. Only a creditor under a disability would prefer the regime established by the 1789 statute to that established by the 1715 (and 1799) statute. It appears that the plaintiff-creditor was a British subject who had been barred from bringing suit under North Carolina law until 1787, and this would have been the relevant disability. *See id.* at 618 (Potter, J.); *id.* at 619 (Marshall, C.J.).

390. *Id.* at 619 (Reporter's Note).

391. *See id.* Chief Justice Marshall notes the argument that inclusion in Justice Iredell's compilation suggests that Iredell believed that statute to be in force. Marshall did not contest the accuracy of this reading of Iredell's position; rather, he simply explained why he thought that the 1789 statute had repealed the 1715 statute. *See id.*

392. *Id.* at 618 (Potter, J.).

393. *Id.* at 619 (Marshall, C.J.) (quoting N.C. DECLARATION OF RIGHTS § 4 (1776)).

394. *Id.*

judges in this period: he determined that a function traditionally engaged in by legislatures was judicial and, relying on open-ended constitutional text, he invalidated it.

Marshall also opined, apparently in dicta, that the 1799 statute “seems . . . to be void for another reason”: it violated the Federal Contract Clause.<sup>395</sup> Observing that the Contract Clause barred state statutes impairing contracts, Marshall asked, “[W]ill it not impair this obligation, if a contract which, at the time of passing the act of 1789, might be recovered on by the creditor, shall by the operation of the act of 1799, be entirely deprived of his remedy?”<sup>396</sup> Except for the fact that he was reaching for a constitutional issue not presented, Marshall was not acting aggressively here. He was simply reading the Contract Clause to mean that a state cannot enact legislation that operates retroactively to bar valid contractual causes of action.<sup>397</sup>

B. *Review of Congressional Statutes Affecting the Judicial Role: Hayburn’s Case and United States v. Ravara*

*Hayburn’s Case*<sup>398</sup> was a landmark in the history of judicial review and was recognized as such at the time. In 1800, when in *Cooper v. Telfair*<sup>399</sup> the Supreme Court was considering a challenge to a state statute on state constitutional grounds, Justice Chase in the course of oral argument observed that “there is no adjudication of the Supreme Court itself upon the point” whether a congressional statute could be held unconstitutional, but also noted, “It is . . . a general opinion, it is expressly admitted by all this bar, and some of the Judges have, individually, in the Circuits, decided, that the Supreme Court can declare an act of congress to be unconstitutional . . . .”<sup>400</sup> He was referring to *Hayburn’s Case*, the first case in which Supreme Court Justices concluded that a congressional statute was unconstitutional.

At issue in *Hayburn’s Case* was the Invalid Pensions Act, adopted in 1792.<sup>401</sup> Under the Act, applicants for pensions were to appear before the

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395. *Id.*

396. *Id.*

397. One final case in which the circuit court reviewed a state statute for constitutionality should be noted. In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), the circuit court determined by a two-to-one vote that a Virginia confiscation statute was not rendered invalid by the Supremacy Clause. The Supreme Court reversed. For discussion, see *infra* Part V.A.

398. 2 U.S. (2 Dall.) 408, 409 (1792).

399. 4 U.S. (4 Dall.) 14 (1800).

400. *Id.* at 19.

401. Invalid Pensions Act, Act of March 23, 1792, ch. 11, 1 Stat. 243-245 (1792). The case is discussed at length and with great insight in an important headnote in the *Documentary History of the Supreme Court*, see 6 DHSC, *supra* note 342, at 33-45, and in Maeva Marcus & Robert Teir, *Hayburn’s Case: A Misinterpretation of Precedent*, 1988 Wis. L. REV. 527.

circuit court. If the circuit court found an individual eligible, it would inform the Secretary of War. The Secretary could then put the person on the pension list. But, if he decided that there was “cause to suspect imposition or mistake,” he could decide not to put the person on the pension list and inform Congress of that action.<sup>402</sup> The statute had implications both for the judicial role and for judicial independence of oversight by the political branches.

Before any claimant came forward, the Circuit Court for New York (Chief Justice Jay, Justice Cushing, and Judge Duane) concluded that, if read literally, the statute was unconstitutional. “[N]either the legislative nor the executive branches,” they observed, “can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner.”<sup>403</sup> The statute assigned to the judiciary such nonjudicial duties because it made their determinations subject to review by the Secretary of War and by Congress. “[B]y the constitution, neither the secretary at war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.”<sup>404</sup> The court, however, adopted a saving construction. The judges concluded that they could sit, in their individual capacity, as commissioners, rather than as judges.<sup>405</sup> They proceeded to consider petitions in this capacity.<sup>406</sup>

Shortly thereafter, the constitutionality of the statute came before a circuit court in an actual case. When William Hayburn filed for a pension in the Circuit Court for the District of Pennsylvania, Justices Wilson and Blair and Judge Peters decided not to consider that application. Although they did not issue an opinion, the judges gave their opinion orally on April 11, 1792.<sup>407</sup> The result promptly produced a debate on the floor of the House. The *General Advertiser*, a Philadelphia newspaper, reported, “This being the first instance, in which a court of justice had declared a law of Congress to be unconstitutional, the novelty of the opinion produced a variety of opinions with respect to the measures to be taken on the occasion.”<sup>408</sup> Some members of the House raised the possibility of impeachment, but no motion to that effect was made.<sup>409</sup> A House committee, which included James Madison, was appointed to report on the matter, but its report was simply a brief statement of facts.<sup>410</sup> In

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402. Invalid Pensions Act § 4; *see also Hayburn’s Case*, 2 U.S. (2 Dall.) at 412.

403. *Hayburn’s Case*, 2 U.S. (2 Dall.) at 410.

404. *Id.*

405. *Id.*

406. *See, e.g.*, 6 DHSC, *supra* note 342, at 373-74 (discussing judges sitting as “commissioners” and considering the petition of Yale Todd).

407. *See* GEN. ADVERTISER, Apr. 13, 1792, *reprinted in* 6 DHSC, *supra* note 342, at 48 (providing Congressman Boudinot’s account of decision to the House).

408. *Id.*

409. NAT’L GAZETTE, Apr. 23, 1792, *reprinted in* 6 DHSC, *supra* note 342, at 56-57.

410. REPORT OF A COMMITTEE OF THE UNITED STATES HOUSE OF REPRESENTATIVES (Apr. 18, 1792), *reprinted in* 6 DHSC, *supra* note 342, at 52.



a private letter to Virginia Governor Henry Lee, Madison wrote of the power of judicial review that “evidence of its existence gives inquietude to those who do not wish congress to be controuled or doubted whilst its proceedings correspond with their views.”<sup>411</sup> While noting the talk of impeachment, Chancellor Pendleton wrote Madison that the decision “seem[s] [to] give Gen. pleasure.”<sup>412</sup>

One week after deciding the case, Justices Wilson and Blair and Judge Peters wrote a letter to President Washington explaining the two grounds for their decision. They wrote:

1. Because the business directed by this Act is not of a judicial nature: it forms no part of the power vested, by the Constitution, in the Courts of the United States: The Circuit Court must, consequently have proceeded *without* constitutional authority.

2. Because, if, upon that business, the Court had proceeded, its *judgments*—for its *opinions* are its *judgments*—might, under the same Act, have been revised an [sic] controuled by the Legislature and by an Officer in the Executive Department. Such revision and controul we deemed radically inconsistent with the Independence of that judicial power, which is vested in the Courts, and, consequently, with that important principle which is so strictly observed by the Constitution of the United States.<sup>413</sup>

To some extent, the reasoning echoes that in the New York Circuit Court’s letter to Washington, but the two grounds—that the Act called on the court to exercise nonjudicial powers and that it impermissibly made the court’s ruling subject to nonjudicial oversight—were analytically linked in the New York Circuit Court’s letter, whereas here they are treated separately. More importantly, the reasoning in the second point echoes that in *Case of the Judges* and *Kemper*. Opinions in those cases had stressed the need for judicial independence as the basis for the result. The same is true here. The court noted, “Independence of [the] judicial power, which is vested in the Courts [is an] . . . important principle which is so strictly observed by the Constitution of the United States.”<sup>414</sup> Thus, the three most extensive decisions invalidating statutes implicating judicial matters all touch on the same theme.

Finally, the Circuit Court for North Carolina (Justice Iredell and Judge Sitgreaves) entered the debate. Like the New York Circuit Court, the North Carolina Circuit Court acted before it had heard a case, sending a letter to President Washington that was, in effect, an advisory opinion.<sup>415</sup> Like the

411. Letter from James Madison to Henry Lee (Apr. 15, 1792), *reprinted in* 6 DHSC, *supra* note 342, at 50.

412. Letter from Edmund Pendleton to James Madison (Apr. 28, 1792) (underlining in original omitted), *reprinted in* 6 DHSC, *supra* note 342, at 58.

413. Letter from James Wilson, John Blair, and Richard Peters to George Washington (Apr. 18, 1792), *reprinted in* 6 DHSC, *supra* note 342, at 53-54.

414. *Id.*

415. See Letter from James Iredell and John Sitgreaves to George Washington (June 8, 1792), *reprinted in* 6 DHSC, *supra* note 342, at 284-88.

Pennsylvania Circuit Court, the North Carolina Circuit Court highlighted the importance of judicial independence as a basis for its decision. It began its analysis: “That the Legislative, Executive, and Judicial Departments are each formed in a separate and independent manner . . . .”<sup>416</sup> The court strongly suggested that the statute violated the Constitution because it purported to authorize courts to exercise a “[p]ower not in its nature Judicial.”<sup>417</sup> It decisively stated that, regardless of “whether the power in question is properly of a Judicial nature,” the statute’s provision that the court’s determinations concerning pensions could be overturned by the Secretary of War or by Congress was “unwarranted by the Constitution.”<sup>418</sup> The court left open the possibility that it might eventually conclude that judges could, in their individual capacity, hear pension claims, thus saving the statute. It was not, however, optimistic: “[W]e confess we have great doubts on this head.”<sup>419</sup>

Hayburn brought his case to the Supreme Court. Before the Court heard the case, five of the six Justices of the Court had taken the position in the letters just quoted that the statute was, on a plain reading, unconstitutional. Shortly thereafter, while riding circuit, Thomas Johnson, the last Justice, refused to consider pension petitions because “this Court cannot constitutionally take Cognizance” of them.<sup>420</sup> Thus, all six Justices were of the view that on a plain reading the statute was unconstitutional. They seem, however, to have been split evenly on whether a saving construction, under which the judges could act in their individual capacity, was possible.<sup>421</sup> It appears that, rather than affirming by an equally divided bench the Pennsylvania Circuit Court’s invalidation of the statute, the Court decided to delay to see if Congress would respond to the constitutional concerns that had been raised and repeal the Invalid Pensions Act.<sup>422</sup> In 1793, Congress repealed the 1792 Act, rendering

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416. *Id.* at 284.

417. *Id.* at 286 (emphasis omitted).

418. *Id.*

419. *Id.* at 286-87. The following year, however, Justice Iredell decided to hear pension claims in his individual capacity. He stood by his initial determination that judges acting as judges “cannot constitutionally exercise the authority in question.” James Iredell, *Reasons for Acting as a Commissioner on the Invalid Act*, (Sept. 26, 1792), *reprinted in* 6 DHSC, *supra* note 342, at 288. Reading the statute as empowering judges to act in their individual capacity was “not an obvious construction.” *Id.* It was warranted, however, because the text could be read in this way and because it should be assumed that Congress acted in a constitutionally permissible fashion. *See id.* at 290-91.

420. Extract from the Minutes of the United States Circuit Court for the District of South Carolina (Oct. 26, 1792), *reprinted in* 6 DHSC, *supra* note 342, at 70.

421. *See* 6 DHSC, *supra* note 342, at 39 (analyzing vote count). Justices Cushing, Jay, and Iredell had heard petitions in their individual capacity. Justices Wilson, Blair, and Thomas had not.

422. This theory is convincingly advanced in *The Documentary History of the Supreme Court of the United States. Id.* When the Court was first presented with *Hayburn’s Case* by Attorney General Randolph, it concluded by an equally divided vote that he could not proceed without explicit direction from the President. For analysis, see Marcus & Teir,

*Hayburn's Case* moot and removing the Court's dilemma.<sup>423</sup>

*supra* note 401, at 534-41.

423. 6 DHSC, *supra* note 342, at 40-41. The Invalid Pensions Act of 1793 sought to address the concerns raised by the circuit courts by providing that the district court judge (presumably acting in his individual capacity) or his designees were to gather evidence and send a list of claimants to the Secretary of War, who would forward a statement of the cases to Congress, who would make the final pension determinations. The 1793 Act, however, also required the Attorney General to seek a determination from the Supreme Court whether the decisions made by judges acting as commissioners were valid. *See id.* This requirement led, in turn, to two cases that are sometimes claimed to be early judicial review cases: *Ex Parte Chandler* and *United States v. Yale Todd*. For the claim that *Ex Parte Chandler* was a judicial review case, see Gordon E. Sherman, *The Case of John Chandler v. The Secretary of War*, 14 YALE L.J. 431 (1904-05) (arguing that *Chandler* involved the exercise of judicial review). For the claim that *Yale Todd* was such a case, see Wilfrid J. Ritz, *United States v. Yale Todd (U.S. 1794)*, 15 WASH. & LEE L. REV. 220 (1958).

It seems clear, however, that *Chandler* did not involve judicial invalidation of a statute. Justice Iredell and Judge Law, sitting as commissioners, had approved John Chandler's pension application, but the Secretary of War had not authorized the pension. In *Ex Parte Chandler*, the veteran sought a mandamus directing the Secretary of War to award him a pension. *See* 6 DHSC, *supra* note 342, at 41-42 (setting forth the case's history). The Supreme Court ruled against him, but the record does not reveal the reasoning. *See* Extract from the Minutes of the Supreme Court (Feb. 14, 1794), reprinted in 6 DHSC, *supra* note 342, at 295. Thus, the reason for the decision is a matter of speculation. As the editors of the *Documentary History of the Supreme Court* point out, however, the fact that the day after its decision in *Ex Parte Chandler*, the Court heard a second test case—*Yale Todd*—suggests that Chandler's claim was likely rejected for reasons peculiar to his case (such as failure of proof of his injuries) rather than because the 1792 Act was deemed invalid. *See* 6 DHSC, *supra* note 342, at 42-43.

The question whether *Yale Todd* was one in which a statute was, in part, held unconstitutional is a tougher one. Todd, unlike Chandler, had been awarded a pension under the 1792 Act. Justices Jay and Cushing, sitting as commissioners, had decided on his behalf, and the Secretary of War had put him on the pension list. *Yale Todd* was thus a suit brought by the United States to recover monies paid to the veteran. The Supreme Court ruled in favor of the United States, but we have no record of its reasoning. *See* Extract from the Minutes of the Supreme Court (Feb. 17, 1794), reprinted in 6 DHSC, *supra* note 342, at 380-81. Thus, Professor Ritz has argued that the Court must have ruled against Todd on the grounds that the 1792 Act was invalid. *See* Ritz, *supra*. It may also have been the case, however, that the Court ruled on the statutory grounds that the 1792 Act did not empower circuit court judges to sit as commissioners. As the *Documentary History* editors note, after *Yale Todd*, Congress and the Attorney General acted to allow petitioners whose claims had been authorized under the 1792 Act by district court judges to receive pensions, but not petitioners whose claims had been authorized by circuit court judges. *See* 6 DHSC, *supra* note 342, at 44-45. They conclude from this that *Yale Todd* was decided on statutory grounds. *See id.* at 44; *see also* *United States v. Ferreira*, 54 U.S. (13 How.) 40, 53 (1851) (Note of Chief Justice Taney, Inserted by Order of the Court) (noting that *Yale Todd* involved statutory construction). This is a possibility, but not a certainty. Before *Yale Todd*, the six Justices had uniformly concluded that circuit judges, sitting as circuit judges, could not review pension claims. Allowing them to sit in their individual capacity had been offered as a saving construction to prevent a holding that the statute was unconstitutional. The decision in *Yale Todd* meant that the Court rejected the saving construction. Taken together, the various decisions on the 1792 Act and *Yale Todd* meant that the 1792 Act was unconstitutional as it applied to circuit judges. The only question is whether the Court in *Yale Todd* drew this connection—in which case it would have held the 1792 Act partially invalid—or refrained from discussing the

*Hayburn's Case* is particularly important for two reasons. First, it shows that in 1792, every Supreme Court Justice was ready to hold a congressional statute invalid. Second, the reasons that the Justices all considered the 1792 Act unconstitutional were broad structural concerns—their conception of the judicial role, their belief that their actions could not be subject to review by the Executive or Congress, their overarching concern with judicial independence—rather than because of clearly expressed textual mandates. Despite the fact that the Justices' view of the statute was uniform, their view of the Constitution was very debatable. For example, while accepting the existence of the power of judicial review, Madison thought that the Justices “may be wrong in the exertion of their power.”<sup>424</sup> Professor Mark Tushnet has persuasively argued that, under modern case law, the statutory scheme set forth in the 1792 Act would pass muster.<sup>425</sup> In sum, in the very first case in which members of the Court grappled with the question whether a congressional statute was unconstitutional, they did not limit themselves to whether the statute was clearly unconstitutional, but considered the question in light of broad principles concerning the judicial role and judicial independence.

*United States v. Ravara*<sup>426</sup> involved the prosecution of a consul from Genoa. In his defense, Ravara challenged the constitutionality of the Judiciary Act's grant of concurrent jurisdiction to lower federal courts in cases involving consul. He claimed that Article III, Section 2 of the Constitution—“In all cases affecting Ambassadors, other public Ministers, and Consuls . . . the Supreme Court shall have original jurisdiction”<sup>427</sup>—conferred exclusive jurisdiction on the Supreme Court, and thus the prosecution against him could not commence in the circuit court.<sup>428</sup> In brief opinions, Justices Wilson and Peters rejected this argument. As Justice Wilson observed, “[A]lthough the Constitution vests in the Supreme Court an original jurisdiction, in cases like the present, it does not preclude the Legislature from exercising the power of vesting a concurrent

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larger question of constitutionality. Given the records that have been discovered, the answer to that question is unknown.

424. Letter from James Madison to Henry Lee (Apr. 15, 1792), *reprinted in* 6 DHSC, *supra* note 342, at 50.

425. Mark Tushnet, *Dual Office Holding and the Constitution: A View from Hayburn's Case*, in *ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789*, at 196, 201 (Maeva Marcus ed., 1992). As Tushnet points out, courts make factual determinations; the Secretary of War's determination that an applicant was on the list because of “imposition or mistake” would not have involved a revision of a determination made by the circuit court; and subsequent Supreme Court case law involving the court of claims indicated that a largely theoretical ability by Congress to deny payment would not defeat justiciability. For the case law, see *Glidden Co. v. Zdanok*, 370 U.S. 530, 570 (1962) (opinion of Harlan, J., announcing the judgment of the Court).

426. 27 F. Cas. 713 (C.C.D. Pa. 1793) (No. 16,122).

427. U.S. CONST. art. III, § 2.

428. See Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81 (noting that the Supreme Court shall have “original, but not exclusive” jurisdiction over cases involving consuls).

jurisdiction, in such inferior Courts, as might by law be established.”<sup>429</sup> But, in an equally brief opinion, Iredell disagreed: “[F]or obvious reasons of public policy, the Constitution intended to vest an exclusive jurisdiction in the Supreme Court, upon all questions relating to the Public Agents of Foreign Nations.”<sup>430</sup>

Iredell’s opinion is striking for two reasons. First, it reflects a notably aggressive exercise of the power of judicial review. It is constitutional orthodoxy that the type of concurrent jurisdiction at issue in *Ravara* is permissible.<sup>431</sup> While the treatment of original jurisdiction in Chief Justice Marshall’s opinion in *Marbury*<sup>432</sup> reflects an approach similar to Iredell’s in *Ravara*, these two opinions are at odds with the subsequent jurisprudence.<sup>433</sup> Thus, once again, the early case law—as evidenced in Iredell’s dissent as well as *Marbury*—evidences an expansive approach to judicial review when legislation affecting the judiciary was under challenge. Second, it is particularly significant that Iredell was the one adopting this approach. Iredell’s nonjudicial writings are a principal source of the concededly unconstitutional test that Snowiss and Kramer see as the touchstone of the early case law.<sup>434</sup> In *Ravara*, however, Iredell did not employ the approach he had previously articulated. Indeed, as we have seen in *Hayburn’s Case*<sup>435</sup> and *Villato*,<sup>436</sup> Iredell took positions that reflected an expansive conception of judicial review. Although the case is not discussed in this Article (since it did not involve a finding of

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429. 27 F. Cas. at 714 (Wilson, J.).

430. *Id.* (Iredell, J., dissenting).

431. See Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court’s Original and Exclusive Jurisdictions over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765, 1796 (2004) (“[T]he Court has long presumed that the Original Jurisdiction Clause contains no constitutional mandate of original jurisdiction exclusive to the Court.”); see also *Ames v. Kansas*, 111 U.S. 449, 469 (1884) (“[W]e are unable to say that it is not within the power of Congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction.”); *Börs v. Preston*, 111 U.S. 252, 260 (1884) (“[W]e concur . . . that as Congress was not expressly prohibited from giving original jurisdiction in cases affecting consuls to the inferior judicial tribunals . . . neither public policy nor convenience would justify the court in implying such prohibition, and, upon such implication pronounce the Act of 1789 to be unconstitutional and void.”).

432. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“If it had been intended to leave it in the discretion of the legislature, to apportion the judicial power between the supreme and inferior courts, according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested.”). On the similarities between *Marbury* and Iredell’s opinion in *Ravara*, see Lee, *supra* note 431, at 1796.

433. See Lee, *supra* note 431, at 1795-97 (discussing case law).

434. See *supra* notes 65-68 and accompanying text.

435. See *supra* notes 415-19 and accompanying text.

436. See *supra* notes 376-77 and accompanying text.

unconstitutionality), Justice Iredell's dissenting opinion in *Chisholm*<sup>437</sup> also reflects an expansive conception of judicial review. The author of the concededly unconstitutional test did not always practice what he preached.<sup>438</sup>

### C. Conclusion: Neglected Evidence of Judicial Review

This Part has analyzed the eight cases in which circuit courts found statutes unconstitutional and one in which one Supreme Court Justice concluded that a statute was unconstitutional.

Most of these statutes involve state laws. This body of case law is one that has largely escaped the attention of modern scholars studying the early conception of judicial review. Of the seven cases in which circuit courts deemed state statutes unconstitutional, only two have figured in an important way in the literature on the original understanding of the scope of judicial review. The relatively high number of state statutes that were invalidated (seven) and the fact that, in six of these cases, the court had available to it a plausible way to save the statute suggest a fairly active scrutiny of state statutes that previous scholars have failed to see.

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437. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 433 (1793) (Iredell, J., dissenting). Early in his opinion, Justice Iredell embraced the doctrine of judicial review:

Upon this [congressional] authority, there is, that I know, but one limit; that is, "that they shall not exceed their authority." If they do, I have no hesitation to say, that any act to that effect would be utterly void, because it would be inconsistent with the constitution, which is a fundamental law paramount to all others, which we are not only bound to consult, but sworn to observe; and therefore, where there is an interference, being superior in obligation to the other, we must unquestionably obey that in preference.

*Id.*; see also CURRIE, *supra* note 19, at 20 (stating that it was "dictum . . . anticipated by ten years the decision in *Marbury v. Madison*"). While Iredell's opinion is grounded in statutory interpretation, he closed by suggesting that, if he had to reach the constitutional question, he would have found that the statute could not constitutionally authorize "a compulsive suit against a State for the recovery of money." See *Chisholm*, 2 U.S. (2 Dall.) at 449 (Iredell, J., dissenting). Justice Iredell continues:

So much, however, has been said on the constitution, that it may not be improper to intimate, that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a State for the recovery of money. I think every word in the constitution may have its full effect without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case), would authorize the deduction of so high a power. This opinion, I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial.

*Id.* at 449-50 (Iredell, J., dissenting). As in *Ravara*, then, Iredell's opinion reflects a more aggressive conception of judicial review than that embraced by his brethren when a statute implicated judicial matters.

438. In an excellent article, Professor Casto suggests that Iredell struggled with this inconsistency and, in recollecting *Ravara* two years after the decision, laid more emphasis on statutory interpretation as the basis of his decision than was evidenced by his published opinion. See William R. Casto, *James Iredell and the American Origins of Judicial Review*, 27 CONN. L. REV. 329, 344-45 (1995). Nonetheless, the aggressive approach to judicial review in Iredell's original opinion in *Ravara* also finds echoes in his dissent in *Chisholm*, 2 U.S. (2 Dall.) at 433 (Iredell, J., dissenting). For more discussion, see *supra* note 437.

Two cases surveyed here involved challenges to federal statutes. At issue in *Hayburn's Case* was the constitutionality of the 1792 Invalid Pensioners Act. The case shows that, by 1792, all the members of the Supreme Court were ready to pronounce a congressional statute unconstitutional, that one circuit court actually reached that result, and that members of the Supreme Court were employing the same broad approach that we have previously seen state courts employ when reviewing legislation affecting judicial matters. *United States v. Ravara* is notable because of the expansive approach to judicial review taken by Justice Iredell, the dissenter, in a case involving a statute establishing jurisdiction.

## V. SUPREME COURT CASE LAW

This Part looks at the early Supreme Court cases in which at least one judge (either in a Supreme Court decision or at the circuit court level) concluded a statute was unconstitutional. While the body of opinions is small, the cases reflect the same basic pattern revealed by the circuit court decisions. This is not surprising, since the Supreme Court Justices rode circuit, and so the circuit decisions are in large part decisions written by Supreme Court Justices. The Court upheld the one substantive congressional statute that it examined, and it did so even though there was a very strong argument that the statute ran afoul of constitutional text. Arguably, in three cases, the Court determined that, in the wake of the Eleventh Amendment, part of the jurisdictional grant of the Judiciary Act of 1789 was unconstitutional, although there was a plausible argument that the statute was constitutional as applied to the cases before the Court. Finally, the Court struck down a state statute that implicated national policy, even though there were plausible arguments in its favor.

### A. National Government Powers

*Hylton v. United States*<sup>439</sup> was, as legal historian Julius Goebel observed, “the first clear-cut challenge of the constitutionality of an Act of Congress to come before the Court.”<sup>440</sup> It was also the only case from the period covered by this Article in which the Court decided whether a substantive congressional statute (as opposed to a congressional statute concerned with jurisdiction) ran afoul of the Constitution. At issue was whether a tax on individual carriages imposed by an act of Congress was constitutional. The immediate significance of the case was great because, as legal historian William Casto has noted, “the

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439. 3 U.S. (3 Dall.) 171 (1796).

440. GOEBEL, *supra* note 80, at 778. For a superb recent study of the case, see Robert P. Frankel, Jr., *Before Marbury: Hylton v. United States and the Origins of Judicial Review*, 28 J. SUP. CT. HIST. 1 (2003).

government's practical ability to raise revenue was at issue."<sup>441</sup> Attorney General William Bradford wrote Alexander Hamilton that the constitutional issue presented by the case was "the greatest one that ever came before that Court."<sup>442</sup> While there was a tension between the statute and the relevant constitutional text, the Court upheld the statute. In reaching that result, the Justices placed primary weight on considerations of policy and structure, rather than on the words of the Constitution, and the decisions reflect deference to congressional will and a nationalist vision of the Constitution.

The legal question was whether a congressional statute imposing a tax on individual carriages violated the constitutional requirements that "direct Taxes shall be apportioned among the several States . . . according to their respective Numbers"<sup>443</sup> and that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration . . . directed to be taken."<sup>444</sup> Because it was not apportioned by state but simply on each carriage, if the carriage tax was a "direct tax," the statute would be unconstitutional.

The case did not admit of an easy answer. "Direct tax"—the critical term at issue in *Hylton*—did not have a clearly defined meaning. At the Constitutional Convention, a perplexed Rufus King "asked what was the precise meaning of *direct* taxation?"<sup>445</sup> Madison, in his notes, informs us, "No one answ[ere]d."<sup>446</sup> When the carriage tax statute was debated in Congress, Madison contended that it was unconstitutional.<sup>447</sup> Hamilton—who argued in support of the statute before the Supreme Court—thought it passed constitutional muster.<sup>448</sup> The circuit court divided on the issue, with Justice Wilson, riding circuit, voting in favor of the statute's constitutionality, while District Judge Griffin thought it unconstitutional.<sup>449</sup> The Supreme Court, however, unanimously upheld the statute, with Justices Iredell, Chase, and Paterson each issuing separate opinions.

The attitude that the Justices took is reflected in the final paragraph of Chase's opinion, where he explicitly reserved the question whether the Supreme Court can invalidate congressional statutes, and he announced that, if a congressional statute is to be invalidated, it can only be "in a very clear

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441. CASTO, *supra* note 24, at 104.

442. Letter from William Bradford to Alexander Hamilton (July 2, 1795), *quoted in* CASTO, *supra* note 24, at 105.

443. U.S. CONST. art I, § 2, cl. 3.

444. *Id.* art I, § 9, cl. 4.

445. 2 RECORDS, *supra* note 28, at 350.

446. *Id.*

447. See CURRIE, *supra* note 19, at 36 n.40 (discussing Madison's arguments in Congress).

448. See Alexander Hamilton's Brief, *reprinted in* 7 DHSC, *supra* note 342, at 456-64.

449. See Letter from Cyrus Griffin to George Washington (May 23, 1796), *reprinted in* 1 DHSC, *supra* note 342, at 849; Editorial note, *in* 7 DHSC, *supra* note 342, at 364 & n.36.



case.”<sup>450</sup> Chase’s reservation of the judicial review issue should not be overemphasized—no other Supreme Court Justice in the years before *Marbury* voiced similar concerns, and, as previously noted, during the 1792 litigation involving the Invalid Pensioners Act, all six Justices then on the Court acted as if they had the power to review the constitutionality of a congressional statute. But Chase’s embrace of a position of deference merits highlighting. This is the first time the “very clear case” formulation appears in a Supreme Court opinion,<sup>451</sup> and *Hylton* is a case in which the Court’s opinions can fairly be described as strongly deferential. As David Currie has written, “In *Hylton*, the Justices relied mostly on unverified tradition and their own conception of sound policy, paying little attention to the Constitution’s words.”<sup>452</sup> My point here is not that *Hylton* was wrongly decided; arguments can certainly be made justifying the result.<sup>453</sup> The opinions, however, reflect result orientation, rather than careful reasoning. The Justices were motivated by a desire to protect a broad scope of congressional authority in the realm of taxation. The Justices’ commitment to a nationalist vision of the Constitution—a vision that is asserted, rather than defended as a matter of law—led them to uphold the statute.

Justice Chase opened his opinion by highlighting the centrality of structural concerns to judicial review of congressional legislation and stressing deference to Congress: “The deliberate decision of the national legislature, (who did not consider a tax on carriages a direct tax, but thought it was within the description of a duty), would determine me, if the case was doubtful, to receive the construction of the legislature . . . .”<sup>454</sup> Judicial review is thus limited in scope and sensitive to constraints on the judicial role.

In stating his conclusion, Chase declared, “I am inclined to think, that a tax on carriages is not a direct tax, within the letter, or meaning, of the constitution.”<sup>455</sup> His reasoning reflected an overarching concern with

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450. Justice Chase wrote:

As I do not think the tax on carriages is a direct tax, it is unnecessary, at this time, for me to determine, whether this court, constitutionally possesses the power to declare an act of congress void, on the ground of its being made contrary to, and in violation of, the constitution; but if the court have such power, I am free to declare, that I will never exercise it, but in a very clear case.

*Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796).

451. CURRIE, *supra* note 19, at 33.

452. *Id.*

453. For a recent, sympathetic account of the opinions in *Hylton*, see Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 20-25 (1999). Professor Ackerman approvingly discusses what he calls the “rule of reason” approach that the Justices took to the question of what constitutes a “direct tax.” *Id.* The editors of the *Documentary History of the Supreme Court* conclude, “The Court’s judgment affirmed that Congress could exercise wide latitude in its method of taxation, unhampered, to a large extent, by the Article I language on direct taxes.” Editorial Note, *in* 7 DHSC, *supra* note 342, at 369.

454. *Hylton*, 3 U.S. (3 Dall.) at 173.

455. *Id.*

protecting the national taxing power. As he writes, “The great object of the constitution was, to give congress a power to lay taxes adequate to the exigencies of government . . . .”<sup>456</sup> That larger end—the grant of the taxing power adequate for the needs of the national government—then shapes the way in which Chase construes the term “direct tax”:

The constitution evidently contemplated no taxes as direct taxes, but only such as congress could lay in proportion to the *census*. The rule of apportionment is only to be adopted in such cases where it can reasonably apply; and the subject taxed, must ever determine the application of the rule.<sup>457</sup>

According to Chase, because direct taxes must be levied in proportion to the census, if it would cause “very great inequality and injustice”<sup>458</sup> to tax some item in that fashion, then a tax on that item cannot be a direct tax. The meaning of the term “direct tax” is established by the constitutional background, not by any independent meaning possessed by the term.<sup>459</sup>

Chase then argued that a carriage tax that required states to pay the national government a share proportionate to the number of their citizens, rather than proportionate to the number of their carriages, would result in “very great inequality and injustice” because it meant that, in states where there were fewer carriages per capita, the individual owning a carriage would have to pay a much heavier tax than an individual in a state with many carriages per capita.<sup>460</sup> A carriage tax could not be a direct tax because that conclusion would lead to inequitable results. Chase declared, “If it is proposed to tax any specific article by the rule of apportionment [among the states], and it would evidently create great inequality and injustice, it is unreasonable to say, that the Constitution intended such tax should be laid by that rule.”<sup>461</sup> In short, because of a structural concern—the principle that citizens of different states must be treated alike—a carriage tax could not be a direct tax because classification of the carriage tax as a direct tax would mean that citizens of different states would be treated differently, and this conclusion led Chase to uphold the statute.

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456. *Id.*

457. *Id.* at 174.

458. *Id.*

459. Chase’s opinion assumes that, in view of the background principle that Congress has the general power to tax, if a certain item cannot equitably be taxed in accordance with the constitutional mandates governing direct taxes, then the logical conclusion is, not that the item cannot be taxed, but that a tax on the item is not a direct tax. His conception of the Constitution thus led him directly away from the states rights position embraced by those who opposed the statute. These opponents recognized that the apportionment rule led to practical problems; they therefore concluded, however, not that the rule had to be interpreted so that it was narrow in scope, but that it served as an important limitation on the federal government’s taxing power. See CASTO, *supra* note 24, at 104. Chase reached the opposite conclusion and narrowly viewed the apportionment rule.

460. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 174 (1796).

461. *Id.*

Justice Iredell's opinion resembled Chase's in its focus on structural concerns, as well as in some of the specific arguments made. Like Chase's opinion, it is only convincing if one accepts the strong nationalist position that it assumes to be correct.

Thus, like Chase, Iredell advances the unconvincing argument that a tax cannot be a direct tax if application of the rule of apportionment—the rule that the Constitution mandates for direct taxes—would cause individuals from different states to be taxed differently.<sup>462</sup> Similarly, Iredell's nationalism leads him to contend that there is a presumption that a tax is not a direct tax. The fact that the “constitution was particularly intended to affect individuals, and not states,”<sup>463</sup> establishes a default rule: taxes are to be uniform “except in particular cases specified.”<sup>464</sup>

Justice Paterson's opinion, in contrast to Iredell's and Chase's, employed textualist and originalist arguments. Indeed, examination of Paterson's opinion highlights the striking absence of attention to text on the part of Iredell and Chase, as Paterson, unlike his brethren, offered a textual argument to support his conclusion. At the same time, Paterson's textual argument is of limited significance, as policy and structural concerns ultimately guided his analysis.

Like his brethren, the starting point of analysis for Paterson was the breadth of the congressional taxing power. He wrote that it was “obviously the intention of the framers of the constitution, that congress should possess full power over every species of taxable property, except exports. The term taxes, is generical, and was made use of, to vest in congress plenary authority in all cases of taxation.”<sup>465</sup> Paterson then offered a series of reasons why “the rule of uniformity”—the principle embodied in the carriage tax statute—was to be preferred to “the rule of apportionment”—the principle argued for by those challenging the statute—in those cases in which constitutional meaning was unclear.<sup>466</sup> First, speaking from his personal experience as a framer, he said that the Direct Tax Clause had been included in the Constitution because the Southern states wanted to bar Congress from taxing slaves and land.<sup>467</sup> Rather than standing for a sensible principle, the Direct Tax Clause was a “work of compromise,”<sup>468</sup> and Paterson attacked its coherence and moral legitimacy: “[I]t is radically wrong; it cannot be supported by any solid reasoning. Why

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462. *See id.* at 181-82. As previously noted, this argument proves too much. Any tax imposed subject to a rule of apportionment will cause individuals from different states to be taxed differently. The approach employed by Chase and Iredell suggests that no tax should be classified as a direct tax, yet the Constitution clearly contemplates direct taxes assessed subject to the rule of apportionment.

463. *Id.* at 182.

464. *Id.*

465. *Id.* at 176.

466. *Id.* at 177-81.

467. *See id.* at 176-79.

468. *Id.* at 178.

should slaves, who are a species of property, be represented more than any other property? The rule, therefore, ought not to be extended by construction."<sup>469</sup> Second, a taxation scheme requiring states to make payments on the basis of their population was a poor way of taxing wealth because "numbers do not afford a just estimate or rule of wealth."<sup>470</sup> He noted that a system that imposed a tax on states on the basis of their population and then required assessment of individuals in the state was "scarcely practicable" for administrative reasons.<sup>471</sup> In contrast, Paterson highlighted the practical virtue of his conclusion that, where possible, the Constitution should be read to permit uniform taxation: "Uniformity is an instant operation on individuals, without the intervention of assessments, or any regard to states, and is at once easy, certain and efficacious."<sup>472</sup>

He then offered a definition of "indirect taxes" under which the carriage tax is an indirect tax (and therefore constitutionally imposed). Paterson wrote, "All taxes on expenses or consumption are indirect taxes,"<sup>473</sup> and he ended the opinion by quoting a passage from Adam Smith's *Wealth of Nations* which conceives of indirect taxes in this way.<sup>474</sup> But this evidence of usage is far from the heart of the opinion. Paterson's central concern is with reading the Constitution so that Congress's power to tax can be effective.

Clearly, the members of the Court were working hard to save both the statute and, more broadly, Congress's ability to raise revenue for the national government. The nationalism of the Federalists who served on the Supreme Court underlies their analysis.<sup>475</sup> It is important to recognize that *Hylton* is only one case. Nonetheless, it is significant evidence concerning the original understanding of judicial review that, in the one early case before the Court involving a challenge to a substantive congressional statute, the Justices unanimously voted in favor of the statute, despite the difficulty involved in squaring the statute with the Constitution's text. *Hylton* is evidence of a strong degree of deference to Congress.

## B. *Judicial Role*

In 1793, in *Chisholm v. Georgia*,<sup>476</sup> the Supreme Court read the Judiciary

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469. *Id.*

470. *Id.*

471. *Id.* at 180.

472. *Id.*

473. *Id.*

474. *Id.* at 180-81.

475. For discussion of the strong Federalist convictions of the members of the Supreme Court in the 1790s, see GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 324 (1991).

476. 2 U.S. (2 Dall.) 419 (1793).

Act of 1789 to permit a citizen of one state to sue another state.<sup>477</sup> Adopted in the wake of *Chisholm*, the Eleventh Amendment provides, “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>478</sup> When the Eleventh Amendment was adopted in 1798,<sup>479</sup> the Supreme Court had on its docket three cases in which states were sued by citizens of another state: *Brailsford v. Georgia*, *Hollingsworth v. Virginia*,<sup>480</sup> and *Moultrie v. Georgia*.<sup>481</sup> Attorneys for Hollingsworth and Moultrie (and, although the record is less clear, apparently for Brailsford as well) argued that their suits should go forward because the Eleventh Amendment did not operate retroactively.<sup>482</sup> The Court, however, dismissed all three cases.

The only published opinion of the three is *Hollingsworth*. Without offering any reasoning, the Court in that case simply declared that “there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens, or subjects, of any foreign state.”<sup>483</sup> While it has been suggested that the Court’s holding was based on its reading of the Judiciary Act, this seems unlikely since, as a matter of statutory construction, the Court in *Chisholm* had read the same language to permit suability and since the published record does not reflect statutory arguments by either counsel or the Court.<sup>484</sup> It appears more likely that the Court in *Hollingsworth* was reading the Eleventh Amendment *retroactively* to invalidate the Judiciary Act to the extent that the Act permitted suits against a state by another state’s citizens.<sup>485</sup>

The minutes from *Moultrie* are even clearer. In dismissing that suit, the Court stated, “[O]n Consideration of the Amendment of the Constitution

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477. While the decision in *Chisholm* is outside the scope of this Article—no Justice found the Judiciary Act unconstitutional—it should be noted that Justice Iredell’s opinion suggests that, if he had reached the issue, he would have concluded that the Act’s jurisdictional grant was unconstitutional. *See id.* at 434-35.

478. U.S. CONST. amend. XI.

479. On the timing of the adoption of the Eleventh Amendment, see 5 DHSC, *supra* note 342, at 604 n.35 (observing that as a technical matter the Eleventh Amendment might have been adopted in 1795, when North Carolina ratified it, but that it was contemporaneously understood as having been ratified in 1798, when President Adams informed Congress of ratification).

480. 3 U.S. (3 Dall.) 378 (1798).

481. *See* 5 DHSC, *supra* note 342, at 604 & n.36 (discussing Supreme Court docket at time of Eleventh Amendment’s adoption).

482. *See id.* at 289 (*Moultrie*); *id.* at 511 (*Moultrie* and *Hollingsworth*); *id.* at 604 n.36 (all three cases).

483. *Hollingsworth*, 3 U.S. (3 Dall.) at 382.

484. *See* CURRIE, *supra* note 19, at 22-23.

485. *See id.* at 23 (suggesting that *Hollingsworth* was the first case in which the Supreme Court held a congressional statute unconstitutional).

respecting Suits against States it has no Jurisdiction of this Cause.”<sup>486</sup> Thus, clearly, the result in *Moultrie* was based on the proposition that the Eleventh Amendment rendered an aspect of the Judiciary Act of 1789 invalid. Presumably, the same was true in *Brailsford*.

It appears, then, that in all three cases the Court exercised the power of judicial review—since a statute was being invalidated because it was inconsistent with the Constitution. It has previously been suggested that *Hollingsworth* was a judicial review case.<sup>487</sup> It appears that no one has previously suggested that *Moultrie* and *Brailsford* were such cases.<sup>488</sup> These cases are, admittedly, not classic judicial review cases. The constitutional amendment is, on one view, almost like a superseding statute because it followed enactment of the relevant statute and was so closely focused on the same subject matter. At the same time, the Supreme Court was deciding that its prerogative was not to enforce the statute in light of the Constitution, rather than leaving the matter to Congress for determination through repeal or revision of the statute.

Thus, the available evidence indicates that there were *three* cases before *Marbury* in which the Supreme Court exercised the power of judicial review over a congressional statute. It should be emphasized that in none of these cases did the Court acknowledge it was exercising this power. At the same time, the fact that the Court behaved in this fashion without anyone apparently commenting on it suggests that, by 1798, judicial exercise of power over statutes was not a matter that excited close scrutiny.

Moreover, there was certainly a plausible argument that the suits could have been allowed to go forward without violating the Constitution. They were permissible under *Chisholm* and had been before the Court at the time the Eleventh Amendment was ratified. The text of the Eleventh Amendment does not clearly speak to whether the Amendment applies to suits already instituted, and, as attorneys in at least two of the cases argued, there was a fair question as to its retroactive application. Nonetheless, the Court’s ruling indicates that it applied the Amendment retroactively to prevent suits that the Judiciary Act would have permitted. The record thus shows that, once again, in a case implicating judicial power, judicial review was applied in a situation in which there was a plausible argument that the statute could constitutionally be

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486. Minutes of the Supreme Court (Feb. 14, 1798), reprinted in 1 DHSC, *supra* note 342, at 305; Drafts Relating to Court Proceedings (Feb. 14, 1798), in 1 DHSC, *supra* note 342, at 482; see also 5 DHSC, *supra* note 342, at 511 (discussing the case).

487. See CURRIE, *supra* note 19, at 22-23.

488. For example, a Lexis-Nexis search found no articles in which one of these cases was mentioned within one hundred words of “judicial review.” The editors of the *Documentary History of the Supreme Court* also do not treat any of these three cases as involving the exercise of judicial review. For the relevant headnotes, see 5 DHSC, *supra* note 342, at 274-90 (*Hollingsworth*); *id.* at 496-514 (*Moultrie*); *id.* at 597-604 (Eleventh Amendment).

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C. *Review of State Statutes: Ware v. Hylton*

In *Ware v. Hylton*,<sup>489</sup> the administrator of the estate of a British subject sued two Virginia citizens to recover on a bond they had entered into before the Revolutionary War. In 1780, one of the defendants had paid part of the amount owed the British subject into Virginia's loan office. Under a Virginia statute of 1777, payment into the loan office by a Virginia debtor "shall discharge him from so much of the said debt" owed to a British subject.<sup>490</sup> Thus, the defendants claimed that the 1777 statute excused them of their original obligation. The plaintiff challenged the validity of the statute when enacted and argued that, even if it had been initially valid, the 1783 Treaty of Paris had revived the obligation because Article IV of the Treaty provided "that creditors on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all bona fide debts heretofore contracted."<sup>491</sup> The plaintiff further argued that—even if the Treaty had not initially revived the debt—it now had that effect because of the Constitution's Supremacy Clause.

The defendants prevailed before a divided circuit court. Justice Iredell and Judge Griffin gave effect to the 1777 Virginia statute, while Justice Jay dissented.<sup>492</sup> The Supreme Court then reversed. Justices Chase, Paterson, Wilson, and Cushing delivered separate opinions, each favoring the British administrator. While Justice Iredell did not vote, since he had participated in the decision below, he made clear that he disagreed with the Court's result by reading his circuit court opinion and observing that he still considered it to be correct.<sup>493</sup>

Justice Cushing's opinion is brief. He did not challenge Virginia's right to enact the statute in the first instance, but concluded that the Treaty "entirely . . . remove[d] . . . this bar . . . ."<sup>494</sup> Cushing ignored the question of whether the

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489. 3 U.S. (3 Dall.) 199 (1796).

490. *Id.* at 200.

491. Treaty of Peace, art. IV, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80, *quoted in Ware*, 3 U.S. (3 Dall.) at 213.

492. On the result below, see 7 DHSC, *supra* note 342, at 211-13.

493. *See Ware*, 3 U.S. (3 Dall.) at 256 n.6. Chief Justice Jay resigned from the Supreme Court before it heard *Ware*.

494. *Id.* at 282 (Cushing, J.). He justified his reading of the Treaty, in part, on plain-meaning grounds: "[T]he plain and obvious meaning of [the Treaty] goes to nullify, *ab initio*, all laws, or the impediments of any law, as far as they might have been designed to impair, or impede, the creditor's right, or remedy, against his original debtor." *Id.* He justified his reading of the Treaty, as well, by an appeal to background principles and presumed intent: The "sense of all Europe [is] that such debts could not be touched by states, without a breach of public faith: and for that, and other reasons, no doubt, this provision was insisted upon, in full latitude, by the British negotiators." *Id.*

Treaty had invalidated the statute during the Confederacy,<sup>495</sup> focusing instead on the effect of the Treaty after ratification of the Constitution. He treated the binding effect of the Treaty under the Constitution as a simple matter. Without elaboration, he invoked the Supremacy Clause as the basis for his holding that a treaty invalidated an inconsistent statute: “[T]he treaty . . . [is] sanctioned as the supreme law, by the constitution of the United States, which nobody pretends to deny to be paramount and controlling to all state laws, and even state constitutions, wheresoever they interfere or disagree.”<sup>496</sup> He added, “[H]ere is a treaty, the supreme law, which overrules all state laws upon the subject, to all intents and purposes . . . .”<sup>497</sup> Without any discussion whether the Court had the power to exercise judicial review over a state statute, Cushing voted to invalidate the statute.

Justice Wilson’s opinion is even briefer than Cushing’s. First, he found the statute without legal effect because, under the law of nations, only a “nation” can confiscate property. Because Congress—“which clearly possessed the right of confiscation, as an incident of the powers of war and peace”—had not authorized Virginia to confiscate property, the state had lacked the power to do so.<sup>498</sup> Second, he stated that, even if the statute were initially valid, “the treaty annuls the confiscation.”<sup>499</sup> The Treaty then trumped the statute because the Treaty was the product of the will of the nation: “The State made the law; the State was a party to the making of the treaty: a law does nothing more than express the will of a nation; and a treaty does the same.”<sup>500</sup>

Wilson made clear that his holding was not based on an interpretation of the Federal Constitution, although he suggested that the statute might have been invalid under the Contract Clause (as well as the two grounds on which he relied).<sup>501</sup> At the same time, Wilson’s first ground reflects an expansive notion of judicial review. His position is that the Court should deny the statute legal effect because it is at odds with the limited role that the law of nations assigns

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495. According to Currie, however, Cushing took the position that “Congress had had authority in 1783 to rescind the state confiscation.” CURRIE, *supra* note 19, at 38. I do not believe this is correct. The section of the opinion on which Currie relies speaks of the Treaty as supreme, and it seems to be referring back to Cushing’s early invocation of the Supremacy Clause.

496. *Ware*, 3 U.S. (3 Dall.) at 284; *see also id.* at 282 (stating that “the treaty having been sanctioned, in all its parts, by the constitution of the United States, as the supreme law of the land”).

497. *Id.* at 282.

498. *Id.* at 281 (Wilson, J.).

499. *Id.* Like Cushing, Wilson thought the inconsistency between the Treaty and the statute was clear: “The fourth article is . . . extended to debts heretofore contracted. It is impossible by any glossary, or argument, to make the words more perspicuous, more conclusive, than by a bare recital.” *Id.*

500. *Id.*

501. *Id.* (“Independent, therefore, of the constitution of the United States (which authoritatively inculcates the obligations of contracts), the treaty is sufficient to remove every impediment founded on the law of Virginia.”).



subnational government entities.

Justice Chase's opinion was the most complete and the lengthiest of the opinions favoring the creditors. Chase began by finding that the Virginia statute had been valid when enacted, and his holding here embodied a strong statement of commitment to popular sovereignty.<sup>502</sup> Nonetheless, Chase determined that the statute did not shield defendants from suit because the Treaty "nullifie[d]" the statute.<sup>503</sup> This determination rested, in part, on his conclusion that the Treaty and statute were at odds. Unlike the other Justices who ruled in favor of the creditors, Chase did not simply treat the contrary view advanced by the debtors as without substance. He indicated that the debtors' reading of Article IV of the Treaty—under which the plaintiffs in the case were not creditors within the meaning of the Treaty because the underlying debts had been extinguished by the Virginia statute—made sense if the Article's words were parsed literally, but he found that that reading must be rejected in view of the larger purpose of the provision and the Treaty. He wrote, "This adhering to the letter, is to destroy the plain meaning of the provision . . ."<sup>504</sup> Chase argued that, under the defendants' reading, Article IV achieved "nothing" since, even in the absence of a treaty, the law of nations would have protected all existing debts. Thus, the only creditors whose rights would have been protected by Article IV were those—like the defendants—whose rights to collect on debts had previously been extinguished by statute.<sup>505</sup> Interestingly, Chase's opinion contrasted "plain meaning" and literal meaning ("adher[ence] to the letter"), and he embraced the former.

Not only did Chase discuss why he believed that the Treaty and the statute were at odds, he also explained why the Treaty trumped the statute, and his reasoning reflected strongly nationalistic views: he reasoned that, because Congress had the power to make treaties, in the exercise of that power it could "annul the laws of any of the states."<sup>506</sup>

While the Constitution did not play a necessary role in Chase's conclusion

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502. Justice Chase wrote, "The legislative power of every nation can only be restrained by its own constitution: and it is the duty of its courts of justice not to question the validity of any law made in pursuance of the constitution." *Id.* at 223 (Chase, J.) Like Justice Wilson, Chase found that the statute was inconsistent with the law of nations. *See id.* at 223-24, 229. But while Wilson had found that the statute was therefore invalid, Chase's commitment to popular sovereignty led him to declare that a properly enacted statute was judicially enforceable, even if it violated international law:

It is admitted, that Virginia could not confiscate private debts without a violation of the modern law of nations, yet if in fact, she has so done, the law is obligatory on all the citizens of Virginia, and on her Courts of Justice; and, in my opinion, on all the Courts of the United States.

*Id.* at 229. Chase also observed that courts would enforce a congressional statute that violated the law of nations. *Id.* at 224.

503. *Id.* at 235.

504. *Id.* at 243.

505. *See id.*

506. *Id.* at 237.

that the Treaty trumped the state statute, it provided further support:

If doubts could exist before the establishment of the present national government, they must be entirely removed by the [Supremacy Clause] . . . It is the declared will of the people of the United States that every treaty made, by the authority of the United States, shall be superior to the constitution and laws of any individual state; and their will alone is to decide.<sup>507</sup>

The text of the Supremacy Clause made clear that it is “[r]etropective,” as well as prospective, in its application, and so the Treaty should be “considered in the same light as if the constitution had been established before the making of the treaty of 1783.”<sup>508</sup>

Chase’s opinion embodies strikingly different attitudes toward the judicial review of state and federal legislation. He is not deferential with respect to the state legislature’s decision. Under his analysis, the Virginia statute was consistent with a literal reading of the Treaty of Paris. Nonetheless, rather than seeking to save the statute by embracing that reading, he adopts a reading of the Treaty that invalidates the statute. Admittedly, the reading of the Treaty Chase advances is the one that he asserts is the natural one. Nonetheless, the critical point is that he had available a plausible reading of the Treaty that would have saved the statute, and he elected not to adopt it.

In contrast, he takes an expansive view of national power. His determination that the power to make treaties carried with it ancillary powers that Congress otherwise did not have is a striking one. David Currie has compared it to the expansive view of the treaty-making power in *Missouri v. Holland*.<sup>509</sup> Consistent with this interpretation of the treaty-making power under the Articles, Chase said that he would vote to invalidate treaties only in a “very clear case,” and he suggested that judicial review of treaties might be impermissible.<sup>510</sup>

Justice Iredell disagreed with the other four members of the Court as far as the appropriate outcome. His analysis proceeded from the conclusion that

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507. *Id.* at 236-37.

508. *Id.* at 237. Chase did not develop this textual argument. Rather, he treated it as so obvious as not to need explanation beyond the underscoring of the word “made” in his quotation of the Clause. *See id.* at 236 (“That 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, anything in the constitution or laws of any state to the contrary notwithstanding.”).

509. CURRIE, *supra* note 19, at 39 n.58; *see Missouri v. Holland*, 252 U.S. 416, 432-35 (1920).

510. *Ware*, 3 U.S. (3 Dall.) at 237. The final opinion for the majority was Justice Paterson’s, which was limited in scope. He did not discuss either the Federal Constitution or judicial review. He explicitly reserved the question whether the Continental Congress alone had the power to confiscate property and thus Virginia lacked authority to enact the statute. *Id.* at 246 (Paterson, J.). He thus concluded that the Treaty “repeals the legislative act of Virginia.” *Id.* at 256. On his reasoning, the Treaty trumps the statute because it was subsequently adopted.

Virginia's confiscation act was valid when first passed. His reasoning on this point was similar to Chase's. The statute was consistent with the state constitution,<sup>511</sup> and that was the only relevant issue for a court determining the statute's initial validity. Iredell thought the statute likely consistent with the law of nations,<sup>512</sup> but, if the statute had violated the law of nations, it was "not for that reason void."<sup>513</sup> Since there was no constitutional bar, the decision whether to transgress international law was one for the legislature. Iredell noted,

It is a discretion no more controllable (as I conceive) by a Court of Justice, than a judicial determination is by them, neither department having any right to encroach on the exclusive province of the other, in order to rectify any error in principle, which it may suppose the other has committed.<sup>514</sup>

At the same time, Iredell dismissed the contention that the Supreme Court's review should be less rigorous than that of a state court reviewing the state's constitution: "I have no conception that this court is in the nature of a foreign jurisdiction. The thing itself would be as improper as it would be odious, in cases where acts of the State have a concurrent jurisdiction with it."<sup>515</sup>

Iredell departed from Chase with respect to the consequences of the Treaty. Iredell contended that Article IV of the Treaty had originally been only recommendatory in nature. (He based this conclusion on the "high authority" of British practice under which treaties were not self-executing and a 1787 letter from Congress.<sup>516</sup>) The Supremacy Clause of the Constitution, however, "by the vigor of its own authority [caused the Treaty] to be executed in fact."<sup>517</sup> While the Supremacy Clause was adopted after the Treaty of Paris, "[t]he provision extends to subsisting as well as to future treaties."<sup>518</sup>

Thus, because of the Supremacy Clause, the precise reach of Article IV of the Treaty of Paris became critical. Here, Iredell accepted the argument that Chase had dismissed: because the defendants had complied with the sequestration statute, they were not the debtors of the plaintiffs at the time of the Treaty, and thus the Treaty did not revive the plaintiffs' rights against them.<sup>519</sup> He acknowledged that the language of Article IV was ambiguous. He argued, however, that if Congress had sought to impose under the Treaty a legal obligation on people, such as the defendants, that required them to pay

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511. *Id.* at 265 (Iredell, J.).

512. *Id.* at 263.

513. *Id.* at 266.

514. *Id.*

515. *Id.*

516. *Id.* at 276.

517. *Id.* at 277.

518. *Id.* While Iredell treated the issue off-handedly, this conclusion has a solid textual basis, since, as previously noted in the discussion of Justice Chase's opinion, the text of the Supremacy Clause supports the view that the Clause extended to treaties previously adopted, as well as those adopted after the ratification of the Constitution. *See supra* note 508.

519. *Ware*, 3 U.S. (3 Dall.) at 278.

their debt twice (once into the loan office and once to the creditor), it would have done so with language “clearly comprehending such cases.”<sup>520</sup>

Three points about *Ware* merit highlighting. First, while this is the first case in which the Supreme Court invalidated a state statute and possibly the first case in which it invalidated a statute of any kind, the power of judicial review was largely assumed. The report of counsel’s argument suggests that they did not raise the issue. (It is worth noting that one of defendants’ two counsel was John Marshall.) Of the Justices, only Chase and Iredell dealt with the issue, and both treated it as unproblematic. As David Currie aptly observes: “The most important constitutional holding of *Ware v. Hylton* was that the federal courts had the power to determine the constitutionality of state laws. This crucial point . . . passed almost unnoticed.”<sup>521</sup>

Second, the opinions reflect different positions on judicial review. Wilson would have invalidated the statute because it was inconsistent with the law of nations. Iredell and Chase did not think the Supreme Court could invalidate the statute on that ground. Chase’s opinion suggests that he was more deferential to federal than to state legislation (and that he considered the propriety of judicial review of federal treaties an open question). Iredell rejected the idea that federal courts should be more deferential to state legislation than state courts.

Finally, while Iredell did not suggest that he was trying to avoid a finding of unconstitutionality, he upheld the statute because he embraced the same argument that Chase rejected. In a recent article, Professor Eskridge has argued that the reasoning of the Court in *Ware* was strained.<sup>522</sup> While this may be too strong, Iredell’s reading of the Treaty is plausible, and it would have preserved the statute; yet no other Justice embraced it, which suggests a lack of deference to state legislatures.

## VI. IMPLICATIONS OF THE CASE LAW

In this Part, the case law is placed in context in two different ways. First, it shows how the pre-*Marbury* case law illuminates *Marbury* because Chief Justice Marshall’s decision reflected prevailing practice. Second, it suggests that the approach to judicial review reflected in the case law manifested a prevailing conception of legislative power as subject to limitations established by the spheres of power of other governmental entities.

### A. *Marbury: Building on a Firmly Established Foundation*

*Marbury* is classically thought of as having established judicial review. As

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520. *Id.* at 280.

521. CURRIE, *supra* note 19, at 39.

522. William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1071 (2001).

Professor William Van Alstyne begins his influential article, *A Critical Guide to Marbury v. Madison*: “[T]he concept of judicial review of the constitutionality of state and federal statutes by the Supreme Court is generally rested upon the epic decision in *Marbury v. Madison*.”<sup>523</sup> As noted at the outset of this Article,<sup>524</sup> the most famous statement of this approach is contained in *The Most Dangerous Branch*, in which Bickel declared: “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*.”<sup>525</sup>

It is not novel to counter this point of view by observing that, before *Marbury*, judicial review had gained wide support.<sup>526</sup> This Article, however, moves the debate about *Marbury*’s significance forward by showing how relatively common the exercise of judicial review was before *Marbury*. The fact that judicial review was exercised much more frequently than previously recognized in the years before *Marbury* helps explain why Marshall’s assertion of the power to exercise judicial review in the case elicited so little comment and also highlights the consistency between *Marbury* and the prior body of case law.

Of course, judicial review had not won universal acceptance by 1803, and in the years after *Marbury*, there was certainly some opposition to the doctrine. In particular, assertions of the power to invalidate statutes provoked controversy in the frontier states of Ohio and Kentucky in the early decades of the nineteenth century,<sup>527</sup> and, in the 1825 case of *Eakin v. Raub*,<sup>528</sup> Chief Justice Gibson in dissent wrote one of the classic critiques of the doctrine.<sup>529</sup>

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523. William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 1.

524. See *supra* note 17 and accompanying text.

525. BICKEL, *supra* note 1, at 1.

526. See, e.g., 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815, at 190 (1981) (“[T]he idea of judicial review was hardly a new one when *Marbury* was decided.”); Klarman, *supra* note 28, at 1113-14 (“*Marbury* cannot have established the power to judicial review, since that power already was widely accepted before the Supreme Court’s ruling.”); James M. O’Fallon, *Marbury*, 44 STAN. L. REV. 219, 227-30 (1992) (claiming that there was a “clear majority” in Congress for judicial review before *Marbury*; describing competing conceptions of judicial review).

527. In Ohio in 1810, judges who had asserted the power to invalidate statutes were impeached, although not convicted, by the legislature. See HAINES, *supra* note 19, at 255-57. In Kentucky, a state court decision in 1821 invalidating a state debtor relief law led to impeachment (and again, acquittal) of the judge and a larger political debate that ultimately led to electoral victory by proponents of judicial review in the elections of 1825 and 1826. See *id.* at 258-59; Theodore W. Ruger, “*A Question Which Convulses a Nation*”: *The Early Republic’s Greatest Debate About the Judicial Review Power*, 117 HARV. L. REV. 826 (2004).

528. 12 Serg. & Rawle 330 (Pa. 1825).

529. See *id.* at 344 (Gibson, C.J., dissenting).

But the isolated nature of these instances serves only to highlight how remarkably quickly judicial review won acceptance. Of the cases surveyed here from the early Republic, none of the judges announced opposition to judicial review, and Justice Chase was notable for even treating it as an open question. Thus, Marshall was building on a firmly established foundation. Indeed, from a personal level, he must have experienced judicial review as long-established, since he came from Virginia, the state in which it was particularly well established by the case law and in which it was repeatedly endorsed during the debate over the Constitution. Moreover, George Wythe, who issued a strong statement in favor of judicial review in the *Case of the Prisoners*, taught Marshall law, and there is some evidence that Marshall was present in the courtroom when the decision in *Case of the Prisoners* was announced in 1782.<sup>530</sup> Thus, for Marshall—and for the nation as a whole—judicial review had become an established part of the legal culture before *Marbury*.

The case law surveyed here also helps us understand Marshall's reasoning in the case. Marshall has been repeatedly criticized for holding that Article III did not allow Congress in the Judiciary Act to confer original jurisdiction on the Court in a case like *Marbury*.<sup>531</sup> *Marbury* was brought as a case of original jurisdiction. Article III gives the Court original jurisdiction in "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party,"<sup>532</sup> and the mandamus action brought by *Marbury* clearly did not fall into any of these categories. Article III further states that in all other cases the Court shall have "appellate Jurisdiction, both as to Law and Fact, with such Exceptions . . . as the Congress shall make."<sup>533</sup> Thus, the question before the Court was whether the Constitution allowed Congress to expand the Court's original jurisdiction to encompass cases that would otherwise be within its appellate jurisdiction. Marshall held that it did not: "If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance."<sup>534</sup>

It has repeatedly been argued that Marshall did not have to reach this result, that the "Exceptions" Clause permitted Congress to create an

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530. Treanor, *supra* note 157, at 568.

531. See, e.g., CURRIE, *supra* note 19, at 68 (Marshall's "reasoning is far from obvious"); KRAMER, *supra* note 6, at 181 ("far from obvious"); Klarman, *supra* note 28, at 122 n.50 ("strained"); Van Alstyne, *supra* note 523, at 32 ("The Court should assume the first Congress knew what it was doing."). Marshall's opinion is also criticized for holding that the Judiciary Act authorized *Marbury* to bring the case in the first instance before the Court. See HAINES, *supra* note 19, at 202; Van Alstyne, *supra* note 523, at 14-16. My focus here, however, is with scholars' critique of Marshall's constitutional interpretation, rather than the critique of his statutory interpretation.

532. U.S. CONST. art. III, § 2, cl. 2.

533. *Id.*

534. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

“[e]xception[]” to appellate jurisdiction by statutorily expanding original jurisdiction<sup>535</sup> or that the grant of original jurisdiction in Article III established a floor, not a ceiling, on original jurisdiction and that Congress had the power to enact statutes that expanded the Court’s original jurisdiction.<sup>536</sup> If *Marbury* is understood as set against a backdrop in which only “clearly unconstitutional” statutes were invalidated, this critique has force, for it makes it look like Marshall was going out of his way to find the statute unconstitutional. But the case law surveyed here shows courts repeatedly striking down similar statutes in order to protect their autonomy from legislative interference. If Congress could expand the Court’s original jurisdiction, it would have the ability to overwhelm the Court’s docket with trials. As discussed, similar concerns about overburdening by the legislature had, for example, animated the Virginia courts in *Cases of the Judges* and *Kemper* and the circuit courts in *Hayburn’s Case*.

In making this point, I am not negating the larger political context shaping the decision, but it is critical to recognize that Marshall—both in asserting the power of judicial review and in reading the Constitution to invalidate a statute that affected the judiciary and was not “clearly unconstitutional”—was acting in accordance with common practice.

#### B. *Understanding the Scope of Judicial Review*

The case law described in this Article reflects a general pattern: courts exercised the power of judicial review to keep legislatures and Congress from overstepping their bounds with respect to the power of other governmental entities. Statutes that affected the judiciary and juries were struck down, even when they were not clearly unconstitutional. Federal courts struck down state statutes, even when they were not clearly unconstitutional, in situations implicating national power. Judicial review thus was not about protecting individual rights or about protecting minorities from majoritarian abuse. Rather, it was about policing the boundaries between governmental entities, and courts viewed their role here expansively.

This Part makes an initial attempt at understanding why this pattern is reflected in the case law. This effort is very preliminary and speculative. As noted in Part I, there is relatively little explicit commentary from this period on the proper scope of judicial review. The case law reveals the results and the larger pattern, but there is little self-conscious discussion of the scope of judicial review. So, the question is whether there is some larger jurisprudential

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535. See, e.g., 2 HASKINS & ROBERTS, *supra* note 526, at 201; Van Alstyne, *supra* note 523, at 31-32. For a textualist defense of Marshall’s reading, see Akhil Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 465-67 (1989).

536. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 41 (1997).

concept that implicitly underlay the case law.

The pathbreaking work of John Phillip Reid concerning the structure of eighteenth-century constitutional thought and the legal arguments for the Revolution suggests an answer. Reid has convincingly contended that, by the time of the American Revolution, British and American constitutional thought had moved in sharply different directions. Breaking with traditional views, British constitutionalist thought—reflected most prominently in Blackstone—had come to embrace parliamentary supremacy as the safeguard for liberty.<sup>537</sup> American thought, in contrast, reflected “the old constitutionalism of custom, prescription and contract.”<sup>538</sup> As they moved toward revolution, Americans saw in British assertions of parliamentary supremacy “the ascendancy of what [the old] constitutionalism had taught . . . Americans to fear most—arbitrary power—and the demise of what that constitutionalism had taught them most to cherish—liberty founded on restraints to power and protected by the rule of law.”<sup>539</sup> The critical precondition for the preservation of American liberty was parliamentary respect for the vested rights of colonies. While Parliament might enact statutes that transgressed these boundaries, such statutes were not, to use the terminology employed by Americans, “law.”<sup>540</sup> Parliamentary disregard of the sphere of colonial power was unacceptable and illegitimate because, if Parliamentary power was not subject to limitation by competing power, it would threaten freedom.

The mindset underlying American arguments at the time of the Revolution can be seen in the approach to judicial review reflected in the later case law discussed here. In the revolutionary-era and the early Republic, courts were acting to protect from legislative intrusion the scope of authority of government actors who were not part of the legislative process—juries, the courts, and, with respect to state legislation, the national government. They were seeking to restrain power by protecting boundaries, much as American revolutionaries had been.

It should be recognized that, at another level, judicial review existed to ensure that legislatures honored the limits to their power established when the people adopted the Constitution. This is, of course, an essential point in Iredell’s and Hamilton’s arguments (and Marshall’s, as well). But the case law suggests that not all limits were enforced with the same vigor. While there was no theoretical limit to what types of cases could be the occasion for an exercise of judicial review, in practice, courts, in exercising that authority, were concerned almost exclusively with ensuring that legislatures did not overstep the boundaries at the expense of other governmental components. The

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537. See 4 JOHN PHILIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF LAW* 43-51, 69-82 (1993).

538. *Id.* at 29.

539. *Id.*

540. See *id.* at 30-33.



underlying concern with promoting the rule of law and liberty by protecting spheres of power echoed the animating concern of the American revolutionaries in the 1770s.

This Article has been concerned with looking at the cases in which at least one judge found a statute unconstitutional, and one consequence of this focus has been to highlight the limits imposed on state governments by Federalist judges.<sup>541</sup> But it should be noted that Republicans, with their pro-state orientation, were taking an approach to judicial review that was, with respect to federalism, the mirror image of the case law—reflecting their belief that the threat to liberty was when Congress, rather than state legislatures, overstepped its bounds. The arguments made by the plaintiff in *Hylton v. United States* are one example. Similarly, Republicans in Congress urged judicial invalidation of the 1791 Bank Bill and the Alien and Sedition Acts because Congress lacked the power to enact the statutes.<sup>542</sup> Defendants in criminal prosecutions under the Alien and Sedition Acts repeatedly (and unsuccessfully) pressed their claims that the congressional statutes were unconstitutional.<sup>543</sup>

Thus, both the Federalists who dominated the judiciary and the Republicans in opposition seem to have shared a common approach to judicial review as most critically concerned with boundary protection. They disagreed on which boundaries most needed protection, but they seem to have shared an

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541. A subsequent article will discuss the pre-*Marbury* cases in which arguments for judicial review were unsuccessful. In addition to the challenges to the Alien and Sedition Acts noted *infra* note 542, the most prominent such cases are the Supreme Court's decisions in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), in which the Court rejected a claim that a Connecticut statute violated the Ex Post Facto Clause, and *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14 (1800), in which the Court rejected a challenge to a Georgia statute that in which the challenger had claimed that the statute violated the state constitution's jury trial and separation of powers provisions. In both cases, the challenges were certainly colorable, which means that, at one level, these cases are worth noting because they indicate that federal courts did not uniformly look searchingly at state statutes. At the same time, my basic point is that federal courts were principally concerned with ensuring that state statutes did not undermine federal authority, and that was not the case with the statutes challenged in either case.

*Calder* is primarily known for Justice Chase's discussion of natural law. See 3 U.S. (3 Dall.) at 388-89 (Chase, J.). As Larry Kramer convincingly shows, this discussion should be narrowly understood. Rather than embracing the view that courts had a broad power to invalidate statutes they deemed at odds with principles of natural justice, Chase's argument was "grounded in a kind of positive law, albeit one based on custom, prescription, and implicit popular consent." Kramer, *supra* note 5, at 43.

542. JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 68 (1956) ("[Republicans] focus[ed] their discussion on this basic constitutional question: Does the federal government . . . have any power to deport alien friends?"); Maeva Marcus, *Judicial Review in the Early Republic, in LAUNCHING THE "EXTENDED REPUBLIC": THE FEDERALIST ERA* 25, 34-35, 48 (Ronald Hoffman & Peter J. Albert eds., 1996) (reporting arguments); see also CURRIE, *supra* note 19, at 73 (noting other statutes that Republican legislators in the 1790s claimed were unconstitutional).

543. See, e.g., SMITH, *supra* note 542, at 232, 279, 379 (discussing cases in which defenses of unconstitutionality were rejected).

underlying approach that reflects the old constitutionalism described by Reid.

To recap, judicial review protected the spheres of power of the judiciary and the jury from legislative interference. In addition, for the Federalists, it ensured that state legislatures did not overstep their bounds in ways that implicated national power, while Republicans invoked it to limit congressional power. Reid's work suggests that, on a deep level, underlying this approach was the view that liberty was preserved through the existence of multiple and competing repositories of power. During the struggle for independence, this philosophy led to a challenge to imperial assertions of authority. In the revolutionary era and the early Republic, the scope of judicial review reflected the same underlying philosophy. Although there was little self-conscious discussion of a larger principle, the pattern of the case law suggests that judicial review, by keeping legislative power from overstepping its bounds with respect to other and competing institutional actors, had the goal of protecting against arbitrary government.

#### CONCLUSION

In an effort to illuminate the original understanding of judicial review in practice, this Article has examined the decisions from the revolutionary era and the early Republic in which at least one judge voted to invalidate a statute or in which the opinions significantly illuminate the early understanding of the legitimacy and scope of judicial review.

Previous scholars studying the early case law have had different views on what interpretive approaches the case law manifests. Under the dominant school of thought, the exercise of judicial review was rare and limited to cases of clear unconstitutionality. It has also been argued, however, that it was commonly thought that statutes could be invalidated for inconsistency with general principles of natural law. Modern Supreme Court case law reflects the view that, under the original understanding, courts, in exercising judicial review, did not defer to legislatures at all. The examination of the case law here leads to conclusions that are inconsistent with all of these approaches.

This study has shown that the exercise of judicial review was dramatically more common than recent scholarship has indicated. There are more than five times as many cases in which a statute was invalidated as indicated in Professor Snowiss's account, the leading modern study. As a result, judicial review was much better established in the years immediately after adoption of the Constitution than has been previously recognized, and it was far from rare.

In addition to showing the relative frequency of assertions of judicial review, the Article has also shown that, beginning in the revolutionary era, judicial invalidation of statutes fell into certain patterns. In fifteen cases involving statutes that affected the right to a jury trial or that implicated judicial concerns (by, for example, altering jurisdiction or resolving private disputes), state courts struck down the statute, even though in thirteen of these cases there

was a plausible argument for the constitutionality of the statute. On the other hand, the case law suggests that state courts were deferential when confronting a statute that did not fall into these categories. Indeed, with the exception of two state cases involving the Contract Clause, I have not found any state case before *Marbury* in which a statute that did not involve the right to a jury trial or some judicial matter was struck down.

Similar patterns emerge from examination of the federal cases, though the body of decisional law here is more limited. In *Hayburn's Case*, which involved a congressional statute that affected judicial activities, five Supreme Court Justices and three district court judges relied on broad structural concerns in determining that the statute was invalid, although there was a plausible argument in favor of the statute. In three cases, the Supreme Court refused to consider claims that the Judiciary Act would have allowed it to consider because the Judiciary Act gave the Eleventh Amendment retroactive effect, even though the Eleventh Amendment does not clearly operate retroactively. In *Hylton*, in which the Court reviewed a substantive congressional statute and did so in a context that had significant implications for the scope of the congressional taxing power, the Court upheld the statute in the face of a strong textual argument that it was unconstitutional. Thus, there is evidence in the federal case law, as in the state case law, of general deference to a coequal legislature's substantive constitutional decisionmaking but close scrutiny of that body's decisionmaking where it affected the judiciary.

The federal case law, however, also involved a category of cases for which there was no state court analogue: federal courts had repeated occasion to review the constitutionality of the acts of a subordinate legislature (i.e., the state legislatures). While the state and federal case law reveals a pattern of deference to the decisions of coequal legislatures, federal courts reviewing state statutes were notably aggressive. There are seven circuit court cases in which state statutes were invalidated, and in six of these cases there was a colorable argument for the statute's validity. Similarly, in *Ware*, in which the Court denied effect to a Virginia statute, only Justice Iredell in dissent embraced a plausible reading of the Treaty of Paris that would have preserved the statute. Overall, the body of federal case law involving the review of state statutes suggests another type of policing of boundaries: federal courts took care to constrain the activities of state governments.

The case law surveyed here illuminates *Marbury*: it shows that judicial review was much better established at the time of *Marbury* than previously recognized and that Marshall's often-criticized constitutional construction was consistent with common practice of invalidating statutes that affected the judiciary.

More fundamentally, the case law also indicates a structural approach to judicial review in which the level of scrutiny was linked to the type of statute involved and in which the courts, in determining when to invalidate statutes, were concerned with policing boundaries, rather than with the modern concerns

of protecting individual liberties or protecting minorities from majoritarian overreaching. This approach is consistent with the constitutional theory earlier reflected in American revolutionaries' legal claims—under which protection of spheres of governmental authority was critical to the rule of law and the protection of individual liberty—which suggests that constitutional theory may have shaped early approaches to the scope of judicial review.