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The Early Anti-majoritarian Rationale for Judicial Review

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EARLY IN HIS CAREER, MORTON HORWITZ PRODUCED A NOTABLE HISTORY of the problem of the tyranny of the majority in American thought.[1] Even Horwitz, however, failed to recognize just how large a role this issue played in the early development of judicial review.

The development of judicial review has perplexed historians for a very long time. Tome upon tome has been produced in an effort to sort this history out. Several details, however, are by now well established. The most important of these is that "despite the statements in *Bonham's case* and in several other decisions, no English court ever [actually] declared null and void an act of Parliament by judicial review."[2] By the eighteenth century, English judges had long been barred from holding acts of Parliament, the supreme legislative body in England, unlawful.[3] At the time of the American Revolution, consequently, no direct precedent existed in Anglo-American jurisprudence that would have authorized a common-law court to declare the acts of a supreme legislative body null and void by judicial review.

There were, however, numerous English practices and ideas out of which such a doctrine could be fashioned. English common-law judges had often struck down the customs and acts of subordinate jurisdictions, as well as the bylaws of corporations that exceeded the authority conferred upon them by their charters.[4] Exercising a similar authority, the English Privy Council had repeatedly disallowed statutes enacted by "limited and dependent" American colonial governments upon administrative review. Acting in its judicial capacity, the Privy Council had also possessed the authority to declare the statutes of subordinate colonial jurisdictions

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null and void upon judicial review, though the council seems actually to have done so on only a single occasion.[5]

While England possessed a rich constitutional heritage out of which a practice and theory of judicial review of the supreme legislative authority in a state could be developed, at the time Americans declared their independence in 1776, this had not been done. The first generation of state constitutions were written and adopted apparently without any notion that statutes enacted by legislatures, now the supreme legislative authority in the newly sovereign states, could be subject to declarations of nullity by the judiciary. Unlike the Federal Convention of 1787, where the delegates repeatedly discussed judicial review, there is no mention of judicial review in any of the deliberations of the state constitutional conventions of the 1770s. And there is not the slightest hint that judicial review was being authorized in the text of any state constitution adopted during this period, despite the fact that Americans clearly understood they were comprehensively refashioning, from the ground up, the constitutional arrangements under which their governments would operate.

What emerged from the state constitutional deliberations of the 1770s was a particular model of constitutional order. The framers of early state constitutions were determined to eliminate the explicit forms of review to which American colonial legislatures had been subject. Given that there was no established constitutional tradition that would have subjected statutes enacted by the supreme legislative body in a state to review and nullification by the judiciary at this time, these constitutions instituted a system of government that was based on the idea that, like Parliament, the acts of the supreme legislative body in the states were final. Unlike many Englishmen, however, Americans did not view their legislatures as sovereign. They took seriously, at this revolutionary moment, the idea that "the sovereign people" could actively interpret and enforce the constitutional limitations they had imposed on their legislatures, primarily through frequent (annual) elections, an old Whig idea. Only in this way, it was widely believed, could the people both protect their rights against legislative encroachments and maintain their plenary power to enact through their representatives the laws by which they would be governed. In this system, legislatures supervised by the people at frequent elections would have the final word as to what the law of the land was to be.

When, in the 1780s, a few courts began to declare acts of state legislatures unconstitutional and null and void, and other courts began to discuss the possibility of doing so, this development introduced a fundamental change into the existing constitutional system, in effect taking from legislatures as supervised by the people, and giving to judges, under certain circumstances, the final word as to what the law of the land was to be. Because the evidence surrounding these early cases is fragmentary, it is not possible to say with complete certainty precisely what moved the judges to refashion English constitutional traditions in this way. In recent years, two distinguished historians have offered two different accounts.

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In his groundbreaking book, *The People Themselves*, Larry Kramer captures the ad hoc improvisational quality of the process through which judicial review first emerged. He argues that the judges began to view it as their duty to declare null and void statutes they believed to be clearly in conflict with constitutions, engaging in a type of courageous act of political/legal disobedience, urged on in many cases by the lawyers appearing before them.[6] More recently, Philip Hamburger, in his monumental *Law and Judicial Duty*, argues that judicial review appeared rather straightforwardly when American judges began to apply to a new set of constitutional conditions an old common-law ideal of judicial duty.[7]

I do not propose to intervene directly in this debate. In the following pages, rather, I discuss the circumstances that gave rise to a critique of the constitutional system that had arisen at the time of the Revolution, a critique that identified popular majorities as a critical problem for republics, and that fueled the development and consolidation of the doctrine and practice of judicial review as a remedy for this problem. We must begin, however, by taking a closer look at the core principles of the constitutional system that prevailed before the appearance of judicial review.

THE REJECTION OF REVIEW AT THE REVOLUTION

Following the Revolution, Americans set about eliminating from their frames of government the "negatives" to which their colonial legislatures had been subject. By the middle of the eighteenth century the British government had required every American colony[8] to transmit its statutes to the English Board of Trade for review.[9] Upon review, the Board of Trade would recommend to the Privy Council that a colonial law be either allowed or disallowed, depending upon whether the board found the statute to be repugnant to English law or inconsistent with English policies. A disallowance operated as a repeal of the statute. Submission of colonial statutes and review by the Board of Trade and Privy Council were common occurrences: "8,563 acts [were] submitted by the continental colonies, 469 or 5.5% were disallowed or declared null and void by orders in council."[10] At one stroke, the Declaration of Independence eliminated the imperial power to review and strike down laws passed by American legislatures.

But Americans did not stop there. In their first constitutions they also stripped their governors of the power to veto laws passed by their legislatures, a power that governors had previously possessed in most colonies.[11] "The Americans' emasculation of their governors lay at the heart of their constitutional reforms of 1776."[12] In his autobiography, Thomas Jefferson wrote that upon leaving Congress in 1776 after it adopted the Declaration of Independence, he returned home with a determination to completely revise Virginia's code of laws. "[N]ow that we had no negatives of Councils, Governors & Kings to

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restrain us from doing right, [our code of laws] should be corrected, in all its parts, with a single eye to reason & the good of those for whose government it was framed."[13]

From the beginning, however, there were those who felt deeply uncomfortable with the idea of genuinely popular government and troubled by the notion that popularly elected legislatures should be left unchecked.[14] For the most part, their response during the early years was to work to maintain "internal" checks on popular government, bicameral legislatures, property-owning requirements to vote and hold public office, viva voce voting, and the like. But in two states, New York (1777) and Massachusetts (1780), conservative Whigs went further; they attempted to restore to the governor an absolute veto over legislation.[15] In both states their efforts failed: both constitutional conventions voted to reject absolute gubernatorial vetoes in favor of suspensive vetoes that could be overridden by a two-thirds vote of the legislature.[16] Hence, in every state written constitutions created governments that gave the people's representatives the final word as to what the laws of the state were to be.

Americans did not believe, however, that in constructing their governments in this fashion they were making their legislatures sovereign, or rendering their constitutions hortatory. On the contrary, they understood their constitutions to impose real, enforceable limitations on legislatures. But under the prevailing constitutional system, these limitations were to be enforced directly by the people, principally through frequent elections. The work of legislatures would be reviewed by the people, and if the people judged that a legislature had enacted laws that exceeded its constitutional authority, as the people interpreted that authority, they would dismiss the legislators from office at the next election, replacing them with men who would repeal the offending legislation.[17]

This constitutional system was based on the idea that the people should possess the plenary power (through their representatives) to make the laws by which they would be governed; at the same time, they should retain the power to protect themselves against legislative encroachments on their rights. Frequent (annual) elections were the principal key to both.

EARLY JUDICIAL REVIEW AS ABSOLUTE VETO

Judicial review introduced a revolutionary new principle into these existing frames of government by taking from legislatures as supervised by the people at frequent elections and giving to judges, who served in many states for life, the final word, under certain circumstances, as to what the law of the land was to be (at least in normal politics). We should be clear about what the judges and advocates of judicial review were and were not claiming during the 1780s. Larry Kramer is probably correct that those who advocated judicial review at that time were not

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claiming, in most cases, the exclusive authority to render definitive interpretations of constitutions in every setting—were not claiming judicial supremacy. Most of those who advocated judicial review appear only to have been claiming that judges had a duty not to enforce unconstitutional legislation when that legislation was brought before them in the course of litigation. For the most part, they do not seem to have been claiming that legislatures did not also possess the authority to judge the constitutionality of laws. Early judicial review was addressed primarily to one paradigmatic situation: passage of a law by a legislature, followed by recourse to the judiciary to enforce it.

Why, given the apparent modesty of this claim, did even its most forceful advocates refer to judicial review as "alarming"[18] and "dangerous"?[19] The answer quite simply is that all parties understood that the refusal of the judges to enforce a law duly passed by a legislature would render that law a nullity. Legislatures might possess the authority to judge the constitutionality of laws, but if judges were entitled to render an independent judgment and to refuse to enforce a law they considered unconstitutional, the effect of their judgment would be to turn the law into a dead letter, as it would now be unenforceable. It was in this sense, above all, that their judgments would be final, and that they would wield in effect a type of absolute veto over laws passed by the people's representatives. James Madison, writing in 1788, captured the essential quality of the early practice. He observed that in "[t]he State Constitutions & indeed in the Fed[eral] one also, no provision is made for the case of a disagreement in expounding them: and as the Courts are generally *the last in making [the] decision, it results to them by refusing or not refusing to execute a law, to stamp it with its final character.* This makes the Judiciary Dep[artment] *paramount in fact* to the legislature, which was never intended and can never be proper."[20]

JUDICIAL REVIEW AND THE PROBLEM OF THE TYRANNY OF THE MAJORITY

Why had it come to seem necessary in certain circles to introduce an absolute veto into the constitutional system? In what respects had the prevailing model of constitutional order proved to be flawed? Why did some see it as necessary to take from popularly elected legislatures, as supervised by the people, the power to render final judgments on all occasions as to what the law of the land was to be? After less than a decade of experience with popular governments, in which perhaps for the first time in history a large percentage of the people were entitled to participate,[21] traditional elite suspicions of the common people, which had been responsible for many of the constitutional conflicts of the 1770s,[22] came to be recast as a sophisticated critique of the existing constitutional system, propelled by the sometimes intemperate actions of state legislatures. The treatment by

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state legislatures of two groups in particular, Loyalists and creditors, played an especially important role in fueling the development of this critique of the existing constitutional system and in adding urgency to the movement for judicial review.

According to the emerging analysis, it was not actually legislatures that were the source of the most intractable aspect of the problem. Frequent elections, the main remedy under the existing system, might serve perfectly well to prevent legislatures from encroaching on the rights of the people—when taken as a whole. But the internecine conflicts of the period had revealed that the people were not the unitary body they had often been viewed as. Society was better described as consisting of numerous competing factions: patriots and Loyalists, the wealthy and the poor, creditors and debtors, the propertied and the propertyless, and so forth. And popular government had made it possible for a faction consisting of a majority of the people to take control of a legislature and to pass laws that encroached on the rights of other individuals or minority groups. Frequent elections were useless for combating this evil. This analysis had a distinct class tilt. Under a relatively broad suffrage, the danger was always greater that majorities would be drawn from the lower reaches of society than from the upper.

If the fundamental problem was not legislatures per se, but legislatures acting at the behest of a majority of the people, it touched the very foundations of the system of government. American republics were founded on the principle that the people were sovereign, that they possessed the plenary power, acting through their legislatures, to make the laws by which they would be governed. To take from legislatures, under certain circumstances, the final word as to what the laws of the state were to be, in order to constrain the plenary power of the people (acting through their legislatures) to make the law, required the advocates of judicial review to develop a new model of constitutional order. The principal early theorists of judicial review were more than up to the challenge. The new vision of constitutional order that they promoted located the permanent will of the people in their written constitutions. In this form, the people's will was to be enforced by the judges against legislatures, even when those bodies were acting to give effect to the will of the people expressed at a recent election. This formulation invoked the will of the sovereign people embodied in their constitutions, and enforced by the judges, to impose limitations on the will of the people embodied in their legislatures, at once offering a remedy for the problem of the tyranny of majorities while preserving, even if at one remove, the sovereignty of the people as the foundation of republican government. Hence, it could now be said of judicial review that in refusing to give effect to unconstitutional laws, the judges were enforcing (rather than thwarting) the will of the people against legislatures that had exceeded the limitations laid down for them by the people in their constitutions.

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ALEXANDER HAMILTON, JAMES IREDELL, AND THE EARLY FORMULATION OF A NEW CONCEPTION OF CONSTITUTIONAL ORDER

In "The Federalist No. 78" (1788), Hamilton famously defended the independence of the judiciary under the proposed new constitution. If the constitution did not give the judges complete independence, he argued, it would "require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, *where legislative invasions of it [are] instigated by the major voice of the community.*"[23]

Hamilton regarded judicial review as a means of binding the people themselves in republican governments. He laid out his thinking at length in "The Federalist No. 78."

> This independence of the judges is equally requisite to guard the Constitution and *the rights of individuals from* the effects of *those ill humors* which the arts of designing men, or the influence of particular conjunctures, *sometimes disseminate among the people themselves,* and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, *and serious oppressions of the minor party in the community.* Though I trust the friends of the proposed constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness; *yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution would, on that account, be justifiable in a violation of those provisions; or that courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act.*[24]

Hamilton set up the will of an abstract people embodied in their constitutions, as interpreted and enforced by the judges, as a superior supervising authority with the power to declare null and void the limited and inferior will of the people as embodied in their legislatures, chosen at a recent election.[25] This was a formulation that simultaneously preserved the sovereignty of the abstract people but overturned an older, less desirable (from the point of view of conservative Whigs) tradition of constitutional order that conferred supervision of legislatures and interpretation of constitutions, understood as legal/political social compacts,[26] on the people acting at frequent elections. The people would still retain the final, final judgment under this new model, but only insofar as they undertook formally to alter their now-fixed constitutions. Until they proceeded to do

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so, the will of the people, as irreversibly interpreted by the courts, would be frozen, binding even the people themselves.

Hamilton had presented a version of this model of constitutional order well before 1788—in fact as early as 1784, when he was provoked into formulating his ideas by the anti-Loyalist legislation that the New York legislature began to pass during 1783 and 1784 as the war with Britain was winding down and finally brought to an end.

In January 1784, New York's Council of Revision vetoed "An act declaratory of the alienism of the persons therein described,"[27] a bill the legislature had passed to deprive suspected Loyalists, who were defined as those who had remained in New York City during the British occupation, of a number of basic rights by declaring them to have forfeited their citizenship. Ultimately, in February, the legislature fell short in its efforts to override the Council of Revision's veto, but in the meantime Alexander Hamilton had written his first "Letter from Phocion" condemning the legislature's actions.[28] The legislature, however, persisted and in March a bill was introduced to strip suspected Loyalists, focused again on those who had remained in New York City, of the right to vote. The "act to Preserve the Freedom and Independence of this State" passed the legislature on May 3, 1784, but was vetoed by the Council of Revision on May 12, 1784.[29] This time, however, the legislature was successful in overriding the council's veto, and the bill became law on May 13. This was undoubtedly one of those instances that Hamilton mentioned at the Federal Convention when a suspensive veto overridable by a two-thirds vote of both houses of the legislature had proved "ineffectual where [the legislature was pursuing] a popular object."[30] While "An act to Preserve the Freedom and Independence of this State" was still wending its way through the legislature, Hamilton published his "Second Letter from Phocion" (April 1784), in which he presented the idea that constitutions firmly bound the people themselves.

> Among the extravagancies with which these prolific times abound, *we hear it often said that the constitution being the creature of the people, their sense with respect to any measure, if it even stand in opposition to the constitution, will sanctify and make it right.*
>
> Happily, for us, in this country, the position is not to be controverted; that the *constitution is the creature of the people; but it does not follow that they are not bound by it, while they suffer it to continue in force; nor does it follow, that the legislature, which is, on the other hand, a creature of the constitution, can depart from it, on any presumption of the contrary sense of the people.*
>
> The constitution is the compact made between the society at large and each individual. The society therefore, cannot without breach of faith and injustice, refuse to any individual, a single advantage which he derives under that compact. . . . If the community have good reasons for abrogating the old compact, and establishing a new one, it undoubtedly has a right to do it; *but until the compact is dissolved with the same solemnity and certainty with which it was made, the society, as well as individuals, are bound by it.*

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> *All the authority of the legislature is delegated to them under the constitution; their rights and powers are there defined; if they exceed them, 'tis a treasonable usurpation upon the power and majesty of the people. . . . The sense of the people, if urged in justification of the measure, must be considered as a mere pretext; for that sense cannot appear to them in a form so explicit and authoritative, as the constitution under which they act; and if it could appear with equal authenticity, it could only bind, when it had been preceded by a declared change in the form of government.*[31]

To bring this vision of constitutional order to life required a method to enforce the will of the people embodied in constitutions against the will of the people embodied in legislatures. Just a few months after publishing his second letter from Phocion, Hamilton argued to the Mayor's Court in the case of *Rutgers v. Waddington* that the court should refuse to enforce the Trespass Act, yet another piece of anti-Loyalist legislation that the New York legislature had enacted a year earlier, on the ground (among others) that the act conflicted with higher law.[32]

Alexander Hamilton was one of the two great early theorists of judicial review who wrote during the 1780s; the other was James Iredell. Iredell had never been a great fan of the common people. Like many elite members of American society during this period, he viewed the common people with a combination of fear, contempt, and distrust.[33] In a letter written to Pierce Butler of South Carolina in 1784, Iredell conveyed a good sense of his attitude. "I have long learnt to despise," he wrote, "that sort of popularity which is to be gained by flattering the passions of the multitude."[34] In North Carolina, where Iredell resided, members of the gentry had come to believe that the legislature, acting under the influence of a greedy, vindictive majority of the people, had carried its program of confiscating the lands of British Loyalists beyond justifiable limits.

For Iredell, the issue had become quite personal years earlier. Following the outbreak of war, the North Carolina legislature had required all residents living abroad to return to North Carolina within a time certain or have their lands confiscated.[35] The extensive landholdings of Henry Eustace McCulloh (49,150 acres), a cousin of Iredell's who had helped Iredell secure his first post in America, were confiscated when McCulloh failed to return to North Carolina by the deadline.[36] In 1779 Iredell drew up a petition asking the legislature to reverse its decision and traveled to the capital to present the petition personally. He attended the legislature for weeks, performing "a necessary office of friendship," hoping to find just the right moment to submit his appeal. "I have not yet had the courage," he wrote to his wife, "to present my memorial. I have been two or three times on the eve of doing it, but unexpected and threatening circumstances have deterred me. I have some faint hopes of the suspension of the evil day by a general law, but hold myself prepared for a different event . . . [given that] such a great quantity of land [lay] in the opposite scale."[37] In the end, Iredell's petition was rejected, reinforcing, no doubt, his hostile feelings toward popular legislatures and driving home the importance of finding a means to protect minority rights from them.

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In 1786, a lawsuit was commenced that provided Iredell with the opportunity to develop his ideas about judicial review. The suit had been initiated by a family that had had their land confiscated during the Revolution. They sought to recover the land from the person who had purchased it from the state.[38] The defendant moved to dismiss the action, invoking a recent act of the legislature that required courts to dismiss such suits when the defendant could produce a deed from a commissioner of forfeited estates.[39] The North Carolina Constitution appeared to require a jury trial to settle all "controversies at law respecting property,"[40] but the statute under which the motion had been made would have eliminated jury trials in these kinds of confiscation cases.

In May 1786 the court adjourned to consider the defendant's motion. It would not finally rule on the question until a year later. In the meantime, in August 1786 Iredell published "To the Public," an elaborate argument showing that the judges possessed the legitimate authority to refuse to enforce an unconstitutional law.[41] In December, the judges were hauled before the legislature to answer for a number of alleged transgressions, including the refusal to decide the confiscation case of the previous May under the clear language of a duly enacted statute.[42] After an extensive investigation, however, the legislature decided, by a divided vote, that no grounds existed for proceeding further against the judges.[43] In May 1787, perhaps emboldened by Iredell's argument of the previous August and the legislature's failure to take action against them, they overruled the defendant's motion to dismiss on the ground that the statute was unconstitutional in denying plaintiffs a trial by jury.[44]

In August 1787, following the court's decision, Iredell laid out his thinking about judicial review in a long letter to his friend Richard Spaight. Judicial review was absolutely necessary, Iredell argued, because it was not possible to address the problem of the tyranny of majorities in any other way; frequent elections were of absolutely no use in dealing with this deeply problematic issue. "In a republican Government . . . *individual liberty* is a matter of the utmost moment, as, if there be no check upon the public passions, it is in the greatest danger. *The majority having the rule in their own hands, may take care of themselves; but in what condition are the minority, if the power of the other is without limit?*"[45]

He went on to say that the provisions of written constitutions not only restrained legislatures; they restrained the people themselves as they sought to act through their legislatures, at least until the people proceeded formally to change their constitution. The constitution "should be a system of authority, *not depending on the casual whim or accidental ideas of a majority either in or out of doors for the time being; but to remain in force until by a similar appointment of deputies specially appointed for the same important purpose; and alterations should be with equal solemnity and deliberation made. And this, I apprehend, must be the necessary consequence, since surely equal authority is required to repeal as to enact.*"[46]

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Elections were completely useless for the purpose of enforcing constitutional limitations against popular majorities. “I conceive *the remedy by a new election to be of very little consequence,* because this *would only secure the views of a majority;* whereas every citizen in my opinion should have a *surer pledge for his constitutional rights than the wisdom and activity of any occasional majority of his fellow-citizens,* who, if their own rights are unmolested, may care very little for his.”[47]

Only enforcement of constitutional provisions by the judiciary could serve the purpose of constraining popular majorities of the people when they sought to act through their legislatures.

DEFENSE OF THE ESTABLISHED CONSTITUTIONAL ORDER

When the judges began to refuse to enforce laws that had been duly enacted by state legislatures during the 1780s, their conduct provoked a reaction among those who recognized that judicial review would fundamentally alter the existing system of constitutional government. The strongest response came from state legislatures. In four of the six cases in which courts actually acted prior to the Federal Convention (New York, Rhode Island, New Hampshire, and North Carolina), either the judges were summoned to appear before the legislature or motions were made in the legislature to dismiss the judges from office for their conduct.[48]

The issues posed by judicial review, however, were technical, and as a consequence, there seems to have been only limited public debate about the judges' actions. But there is evidence that people did recognize that judicial review would introduce a qualitative change into the existing constitutional system.

In his opinion in *Rutgers v. Waddington* (1784), Mayor James Duane refused to go the entire distance with Alexander Hamilton, disavowing the principle that courts possessed the authority to control legislatures. But Duane did refuse to fully apply the Trespass Act, declaring that the act had not explicitly repealed the Law of Nations, which he proceeded to apply to the facts of the case, ignoring as he did so the clear language of the statute.[49] Opponents of the decision treated the refusal fully to apply the act as a case of judicial review and denounced it as deeply violative of the principles of republican self-government under which the people, acting through their legislatures, made the laws by which they were to be governed.

In an effort to prevent Duane's decision from becoming constitutional precedent, they published an appeal “To the PEOPLE of the STATE of NEW YORK.”

> We are addressing an enlightened people, who are awake to every thing that may affect their dearly attained freedom; who know that the consequences which would flow from the establishment of such a power [in the judges] would be of the most serious and pernicious kind, *rendering abortive the first and great privilege of freemen, the privilege of making their own laws by*

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> *their representatives. For if the power of abrogating or altering them may be assumed by our courts, and submitted to by the people, then, as far as liberty, and the security of property are concerned, they become as useless as other opinions which are not precedents, and from which judges may vary.*

And they urged the people "to join us in a watchfulness against every attempt that may be used, either violently and suddenly, or gently and imperceptibly, *to effect a revolution in the spirit and genius of our government.*"[50]

The New York legislature also reacted strongly to the decision. On November 2, 1784, the Assembly passed a resolution condemning the decision as rendering legislatures useless. A motion to have the Council of Appointment remove Duane from office, however, was voted down. But the legislature did take significant steps to try to ensure that the decision would not lead to a transformation in the foundational premises of their government. The Assembly moved to "institute" a Court for the Correction of Errors, which the Constitution of 1777 had authorized, but which the legislature had not acted to establish until that moment. This court would serve as the court of final appeal in the state, but its importance for the legislature at this juncture was that it would be a court of final appeal on which one house of the legislature, the Senate, would sit, guaranteeing that the legislature (or at least its upper house) would participate in final judgments as to what the law of the state was to be.[51]

In their appeal to "the PEOPLE of the STATE of NEW YORK," the signers made clear that they understood the important role the new court would play in preserving the constitutional authority of the legislature as supervised by the people at elections. The signers declared that they would appeal the decision in *Rutgers v. Waddington* to the New York Supreme Court and, if necessary, beyond that to the Court for the Correction of Errors, "one part of which," they helpfully reminded their readers, "the Senate constitute." "Preparatory to such an event, we exhort you to be cautious in your future choice of members [of the Senate], that none be elected but those on whom, from long and certain experience you can rely . . . [to] protect us against *judicial tyranny. . . .*"[52]

The North Carolinian Richard Dobbs Spaight, no radical himself, wrote, outraged, to his friend James Iredell on learning of the North Carolina Supreme Court's decision in *Bayard v. Singleton*. Viewed from the perspective of the existing constitutional system, judicial review presented itself as a totally unsanctioned grab for despotic power by the judiciary that overturned the fundamental principle upon which republican governments had rested until then. Judicial review would strip the people of the plenary power to govern themselves through laws made by their elected representatives, transferring the final judgment on the laws to a few individuals who held their offices for life. Not only could the court not "find any thing in the Constitution," Spaight wrote, "either directly or impliedly, that will support them, or give them any color of right to exercise that authority," but "it would have been *absurd, and contrary to the practice of all the world,* had

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the Constitution vested such powers in them, as they would have operated as *an absolute negative on the proceedings of the Legislature,* which no judiciary ought ever to possess: *and the State, instead of being governed by the representatives in general Assembly, would be subject to the will of three individuals,* who united in their own persons the legislative and judiciary powers. . . . *If they possessed the power, what check or control would there be to their proceedings? . . . [N]one that I know of.*"[53]

THE ROLE OF CUSTOMARY CONSTITUTIONALISM

The conflict in the 1780s over judicial review and the constitutional vision upon which it rested differed from the constitutional conflicts that had been fought out in the 1770s. The fate of judicial review was not going to be decided by votes in state constitutional conventions. It was going to be settled under an older set of understandings about constitutional conflict and its resolution. Even as Americans committed their constitutions to writing, their ways of thinking about constitutional arrangements continued to be deeply influenced by the conventions of British customary constitutionalism, which contemplated that constitutions might be modified or amended by usage. A new practice that had achieved a degree of acceptance also attained a measure of constitutional legitimacy. Acquiescence in the face of a constitutional innovation might produce a "precedent of history." Under these widely accepted norms about constitutional conflict, "whatever could be plausibly argued and forcibly maintained" might establish a binding precedent and afford evidence that the governors and the people had mutually agreed to new constitutional terms.[54] As Zephaniah Swift put it in 1795, "[f]or there is no particular mode pointed out, by which the assent of the people to any particular form of government, is to be obtained. *It may be expressed by delegates chosen for that purpose, to meet in convention, or it may be implied by a tacit acquiescence, and approbation*."[55]

The conflict over judicial review in the 1780s and its provisional acceptance as a legitimate exercise of constitutional authority were governed by norms that had defined the terms of constitutional conflict in the Anglo-American world for generations, and that, despite the introduction of written constitutions, continued to shape the thinking of Americans after the Revolution. The 1784 appeal "To the PEOPLE of the STATE of NEW YORK" itself stands as testimony to the continuing power of these understandings in American life.

What mattered in this form of constitutional conflict was that the arguments made to demonstrate the legitimacy of judicial review should win over a sufficient number of members of the political class so that it could be said that the practice had gained popular acceptance. Perhaps even more important was that the judges should be seen to hold unwaveringly to their position, and that opponents of the

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practice should be viewed as having acquiesced in the judges' actions. The script called for the new practice to be "plausibly argued and forcibly maintained" if it was to achieve acceptance as a modification of a constitution through usage. The "plausible arguments" were supplied by men like Hamilton and Iredell. The "forcibly maintained" requirement of the script was supplied by the failure of legislatures to take effective steps to prevent the judges from wielding their power.

The very character of the judges' actions, however, left legislatures with few options. The judges' power derived principally from their refusal to act. Legislatures could and did repass laws that judges had found to be unconstitutional, sometimes asserting legislative authority to interpret constitutions by expressly declaring the same law to be constitutional.[56] But these actions only served to expose the impotence of legislatures, so long as judges continued to refuse to enforce a law. The only real recourse a legislature had was to remove a judge from office when he refused to enforce a statute as unconstitutional.[57] If the legislature failed to take such action, the judges would inevitably be seen to have "forcibly maintained" their position, and in a sense, legislatures would be viewed as having acquiesced in the practice, establishing a binding constitutional precedent. In four of the six cases in which judges refused to enforce a law prior to the Federal Convention, members of the legislature summoned the judges to appear before them and/or sought to have them removed from office.[58] Though substantial support for removing the judges existed in every legislature in which a resolution was introduced, in the end, advocates of removal never succeeded in convincing a legislative majority to adopt such a radical course of action.

Judicial review developed during the 1780s entirely apart from constitutional conventions; its provisional establishment as a constitutional doctrine was governed by a set of norms that gave a decided advantage to a small, powerful group, dominated by the bench and bar, who argued forcefully and unwaveringly for this revolutionary doctrine and practice. Brought into being in this way, judicial review gave men who had felt deep anxiety about popular government what they had not been able to secure from any state constitutional convention: a type of absolute veto over laws passed by popularly elected legislatures.

COMING FULL CIRCLE: THE REJECTION OF THE MODEL OF THE BRITISH EMPIRE AT THE FEDERAL CONVENTION AND THE EMBRACE OF JUDICIAL REVIEW

Edmund Randolph opened the Federal Convention with a speech that began by identifying the principal defects of the existing confederation government and ended by offering what has become known as the Virginia Plan as a remedy. Just before introducing the details of the plan, however, he described the deeper problem the delegates had gathered together to address.

> Our chief danger arises from the democratic parts of our constitutions. It is a maxim which I hold incontrovertible that the powers of government exercised by the people swallows up the other branches. None of the constitutions have provided sufficient checks against the democracy. The feeble Senate of Virginia is a phantom. Maryland has a more powerful senate, but the late distractions in that State [paper money], have discovered that is not powerful enough. The check established in the constitutions of New York and Massachusetts is yet a stronger barrier against democracy, but they all seem insufficient.[59]

James Madison, a principal drafter of the Virginia Plan, had a more sophisticated view of the difficulties the delegates faced. The central problem of republican government, according to Madison, was the problem of unjust laws passed at the behest of popular majorities. "All civilized Societies would be divided into different Sects, Factions, & interests, as they happened to consist of rich & poor, debtors & creditors, the landed, the manufacturing, the commercial interests, the inhabitants of this district, or that district. . . . *In all cases where a majority are united by a common interest or passion, the rights of the minority are in danger. What motives are to restrain them?*"[60]

Exactly as he would later propose in "The Federalist No. 10," Madison advised expanding the geographic extent of government to address this problem.

> What has been the source of those unjust laws complained of among ourselves? Has it not been the real or supposed interest of the major number? . . . The lesson we are to draw from the whole is that where a majority are united by a common sentiment and have an opportunity, the rights of the minor party become insecure. In a Republican Govt. the Majority if united have always an opportunity. The only remedy is to enlarge the sphere, & thereby divide the community into so great a number of interests & parties. . . .[61]

This remedy might serve well enough to produce a responsible national legislature, but what was to be done about the problem of popular majorities in the states, where the sphere of government had not been enlarged? For this problem, the example of the British Empire presented itself to Madison as a solution. The Virginia Plan called for the creation of a general government that would possess a comprehensive absolute veto over laws passed by state legislatures. The "responsible" national legislature would be given power "*to negative all laws passed by the several States contravening in the opinion of the National Legislature the articles of Union. . . .*"[62] The plan also called for establishing a national Council of Revision, modeled on New York's, which would exercise a suspensive veto over legislation passed by the national legislature.

The suspensive veto to be wielded by a Council of Revision over congressional acts survived convention deliberations transformed into the veto now wielded by the president alone. But the absolute veto, to be exercised by the national legislature over laws originating in the states, was more controversial and Madison was forced to defend the proposal repeatedly. In recommending the creation of an overarching government that would possess a power to review and negative laws

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emanating from the lesser jurisdictions of the states, Madison seems clearly to have had in mind restoring, in some fashion, the constitutional arrangements that had been swept away at the Revolution. On several occasions he defended the proposed absolute veto by referring explicitly to the example of the British Empire.

> A power of negativing the improper laws of the States is at once the most mild & certain means of preserving the harmony of the system. Its utility is sufficiently displayed in the British System. Nothing could maintain the harmony & subordination of the various parts of the empire, but the prerogative by which the Crown stifles in the birth every Act of every part tending to discord or encroachment. It is true the prerogative is sometimes misapplied thro' ignorance or a partiality to one particular part of ye. Empire: but we have not the same reason to fear such misapplications in our System.[63]

At this stage in his political evolution, Madison seems to have imagined that the proposed federal government would operate as a sovereign possessing the power to review and strike down laws passed by the limited and dependent governments of the states, in exactly the same way the British government had operated as a sovereign possessing the power to review and strike down laws passed by the limited and dependent American colonies. "There is a gradation of power in all societies, from the lowest corporation to the highest sovereign. The states never possessed the essential rights of sovereignty. These were always vested in congress. . . . The states, at present, are only great corporations, having the power of making by-laws, and these are effectual only if they are not contradictory to the general confederation. The states ought to be placed under the control of the general government—at least as much so as they formerly were under the king and British parliament."[64]

Madison pressed the delegates for weeks to accept this proposal, but on every occasion they voted the idea down. The constitution, of course, would have to be ratified by at least nine states, and most delegates were, for reasons ranging from political prudence to personal conviction, opposed to explicitly incorporating into the new constitution a comprehensive absolute veto over state laws. No constitutional convention, state or federal, ever finally voted to establish this kind of absolute veto. The delegates began instead to back into what they believed to be a more modest, politically palatable remedy for the problem of unjust laws passed by the states at the behest of popular majorities.

In the course of their debates about whether they should explicitly include a veto over state legislation, a number of delegates began to advert to the fact that state judges had at times declared laws unconstitutional and null and void. In the convention this practice was always referred to as if it were taking place off stage, an exercise of authority that did not require the approval of a convention, but in which the judges simply engaged. The practice was discussed in this way regardless of whether a delegate believed it to be legitimate or illegitimate. A typical reference to judicial review took the following form: "Mr. Sherman thought [the veto

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by the national legislature] unnecessary, as the Courts of the States would not consider as valid any law contravening the Authority of the Union."[65]

When the convention rejected Madison's proposal for an explicit absolute congressional veto over state laws, and with it the constitutional theory upon which it rested, the delegates began to gravitate toward the idea of relying on judicial review, and the very different constitutional theory upon which it rested, as the principal means for dealing with the problem of popular majorities in the states. They would write into the constitution a list of specific prohibitions on state power (ultimately embodied in Article I, Section 10) that they had distilled from their recent experience of intemperate state legislation and would rely on the judges in the states to refuse to enforce laws that violated these prohibitions whenever they came before them in the course of litigation.

For the majority of delegates this approach had distinct advantages. It would allow them to avoid the political firestorm that would inevitably erupt were an explicit, comprehensive, and absolute veto over state legislation written into the constitution. The constitution would simply make use of a type of veto that the judges had developed independently. The supremacy clause[66] assumed the existence of judicial review rather than creating or explicitly authorizing it; it sought to make use of a doctrine and practice that the judges had already put in place. The supremacy clause did not say anything very explicit about judicial review because judicial review was not founded upon the clause. The core of the judges' claim was that their authority inhered in the judicial office,[67] that they were simply doing what judges did whenever they confronted conflicting laws in the course of deciding a dispute. If they could not reconcile the laws, they would give effect to one at the expense of another, following some well-established canon of construction.[68] The supremacy clause did little more than impose a constitutionally mandated rule of construction on state judges. By making use of judicial review in this way, however, the Federal Convention threw its weight behind the customary practice, beginning to transform it into a central pillar of a form of constitutional government that would now include a type of absolute veto over legislation that no constitutional convention had been willing explicitly to authorize.

Writing toward the end of his life, James Madison still defended his proposal for a national legislative veto over state laws and, in a slightly air-brushed version, described how it came to be rejected and how instead the convention settled on judicial annulment as the principal check on popular government in the states.

> The obvious necessity of a controul on the laws of the States, so far as they might violate the Constn. & laws of the U.S. left no option but as to the mode. The modes presenting themselves, were 1. a Veto on the passage of the State laws. 2. A Congressional repeal of them, 3. A Judicial annulment of them. The first tho extensively favord, at the outset, was found on discussion, liable to insuperable objections, arising from the extent of the Country, and the multiplicity of State laws. The second was not free from such as gave a preference to the third as now provided by the Constitution.[69]

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After passage of the Judiciary Act of 1789 and the creation of a federal judiciary (and with the state precedents of the 1780s in hand), judicial review, in both the state and federal courts, began to be turned into a formidable instrument for checking the power of popular majorities.

NOTES

1. See Morton J. Horwitz, "The Problem of the Tyranny of the Majority in American Thought" (PhD diss., Harvard University, 1964).
2. Joseph H. Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950), 570–71.
3. Philip Hamburger, *Law and Judicial Duty* (Cambridge, Mass.: Harvard University Press, 2008), 237.
4. Mary Sarah Bilder, "The Corporate Origins of Judicial Review," *Yale Law Journal* 116 (2006): 502–66; Hamburger, *Law*, 179–88.
5. Smith, *Appeals*, 537–51, 577.
6. Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004), 38–39.
7. Hamburger, *Law*, 395–407.
8. With the exception of Connecticut and Rhode Island.
9. Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* (New York: Columbia University, 1915), 21–22, 31–34, 36–37, 97–103.
10. Ibid., 221. This form of administrative Privy Council review of colonial statutes was distinct from the much rarer Privy Council judicial review of colonial laws. In its judicial capacity, the Privy Council only heard a small number of appeals from colonial courts in which colonial statutes were challenged and only declared a colonial statute null and void through judicial review on a single occasion (*Winthrop v. Lechmere*). Smith, *Appeals* , 537–51, 577.
11. For a detailed description of this constitutional "Restructuring of Power," see Gordon Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill: Published for the Institute of Early American History and Culture at Williamsburg by the University of North Carolina Press, 1969), 127–61.
12. Ibid., 149.
13. *The Autobiography of Thomas Jefferson, 1743–1790* (1821; Philadelphia: University of Pennsylvania Press, 2005), 66–67.
14. Wood, *The Creation,* 205; see also Marc Kruman, *Between Authority and Liberty: State Constitution Making in Revolutionary America* (Chapel Hill: University of North Carolina Press, 1997), 134.
15. For New York, see *Journals of the Provincial Congress, Provincial Convention, Committee of Safety and Council of Safety of the State of New York, 1775–1776–1777* (Albany, N.Y.: T. Weed, 1842), 1:834, 836; Bernard Mason, *The Road to Independence: The Revolutionary Movement in New York, 1773–1777* (Lexington: University of Kentucky Press, 1966), 243 n. 92. For Massachusetts, see "The Report of A Constitution or Form of Government for the Commonwealth of Massachusetts," in *The Works of John Adams, Second President, of the United States* (Boston: Little, Brown, 1851), 4:231; *Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay: From the commencement of their first session, September 1, 1779, to the close of their last session, June 16, 1780* (Boston: Dutton and Wentworth, 1832), 126, 133.

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16. See journals of the New York and Massachusetts constitutional conventions cited above; the New York Constitution of 1777 in Francis Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies, Now or Heretofore Forming the United States of America* (1909; Buffalo, N.Y.: William S. Hein, 1993), 5:2628–29; and the Massachusetts Constitution of 1780 in Thorpe, *The Federal and State Constitutions,* 3:1893–94.

17. Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Knopf, 1996), 304.

18. James Iredell to Richard Spaight, Aug. 26, 1787, in Griffith McRee, *Life and Correspondence of James Iredell: One of the Associate Justices of the Supreme Court of the United States* (1857; New York: Peter Smith, 1949), 2:176.

19. Jared Sparks, *The Life of Gouverneur Morris* (Boston: Gray & Bowen, 1832), 3:438–39.

20. *The Writings of James Madison,* ed. Gaillard Hunt (New York: G. P. Putnam's Sons, 1904), 5:294 (emphasis added). Elbridge Gerry expressed a similar view during the same period. "The judges are expositors of the Constitution and the acts of Congress. Our exposition, therefore, would be subject to their revisal. . . . [T]he judiciary may disagree with us and undo what all our efforts have labored to accomplish. A law is a nullity unless it can be carried into execution: in this case our law will be suspended." Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Washington, D.C., 1836), 4:405.

21. By one estimate 60 to 90 percent of the adult male population was entitled to vote by the end of the Revolutionary era. Robert Dinkin, *Voting in Revolutionary America: A Study of Elections in the Original Thirteen States, 1776–1789* (Westport, Conn.: Greenwood Press, 1982), 39. By contrast it has been estimated that only 15 to 20 percent of English male heads of household were entitled to vote at this time. Peter H. Lindert, *Growing Public: Social Spending and Economic Growth since the Eighteenth Century* (New York: Cambridge University Press, 2004), 72.

22. During the 1770s, elite suspicions of the common people gave rise to numerous conflicts as states set about drafting their constitutions. Typically, conservative Whigs argued that new state constitutions should retain bicameral legislatures and substantial property-owning requirements to vote and to hold public office, while more radical Whigs often argued for unicameral legislatures, an expansion of the suffrage, and the elimination of property-owning requirements to hold public office.

23. "The Federalist No. 78," *Federalist Papers,* ed. Clinton Rossiter (New York: Penguin, 1999), 438 (emphasis added).

24. Ibid., 437–38 (emphasis added).

25. James Iredell offered a similar though less fully developed account of legislatures as limited creatures of constitutions formed by the citizens, who through "express provisions for the personal liberty of each citizen . . . chose to reserve as . . . unalienated right[s], and not to leave at the mercy of any Assembly whatever." Iredell to Spaight, Aug. 26, 1787, in McRee, *Iredell,* 2:173. The general idea that constitutions represented a kind of power of attorney or deed of trust, drawn up by the people to parcel out their sovereign authority to the various branches of government, seems to have been commonplace at the time. See, for example, Chancellor Pendleton's comments on the case of *Commonwealth v. Caton* in *The Letters and Papers of Edmund Pendleton, 1734–1803*, ed. David Mays (Charlottesville: University Press of Virginia for the Virginia Historical Society, 1967), 2:422. But only Hamilton and Iredell during these years seem to have worked out the full implications of this idea for judicial review.

26. "The fact of the matter is that the establishment of judicial review gave the constitution the character of law. . . ." Edward S. Corwin, "The Establishment of Judicial Review I," *Michigan Law Review* 9 (1910): 110.

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27. Alfred B. Street, *The Council of Revision of the State of New York; Its History, a History of the Courts with Which Its Members Were Connected; Biographical Sketches of Its Members; and Its Vetoes* (Albany, N.Y.: William Gould, 1859), 246.

28. *The Papers of Alexander Hamilton,* ed. Harold C. Syrett (New York: Columbia University Press, 1962), 3:483–84.

29. Street, *Council of Revision,* 254.

30. Max Farrand, *The Records of the Federal Convention of 1787* (New Haven, Conn.: Yale University Press, c. 1911, 1937, 1966), 2:585.

31. "Second Letter from Phocion," in *The Papers of Alexander Hamilton,* 3:550–51 (emphasis added). It should be pointed out that the New York Constitution of 1777 did not include an amendment process. Like Gouverneur Morris twenty years later, Hamilton evidently believed that he was writing in an effort to save the people from themselves.

> The world has its eye upon America. The noble struggle we have made in the cause of liberty has occasioned a kind of revolution in human sentiment. . . . If the consequences prove, that we really have asserted the cause of human happiness, what may not be expected from so illustrious an example? . . . *But if experience, in this instance, verifies the lesson long taught by the enemies of liberty; that the bulk of mankind are not fit to govern themselves, that they must have a master, and were only made for the rein and the spur: We shall then see the final triumph of despotism over liberty.*" (Ibid., 557; emphasis added)

32. Richard B. Morris, ed., *Select Cases of the Mayor's Court of New York City, 1674–1784* (Washington, D.C.: American Historical Association, 1935), 2:302.

33. Iredell, for example, had written in 1774 that the suffrage must be restricted to property owners, "otherwise the lowest and most ignorant of mankind must associate in this important business with those who it is presumed, from their property and other circumstances, are free from influence, and have some knowledge of the great consequences of their trust." McRee, *Iredell,* 1:210. He had also condemned crowd action (the people out of doors) with bitter sarcasm (see "Creed of a Rioter," 1776, in McRee, *Iredell,* 1:335–36) and had rejected the notion that petitioning represented a viable popular constitutional remedy. "To the Public," 1786, in McRee, *Iredell,* 2:147.

34. Iredell to Pierce Butler, March 14, 1784, in McRee, *Iredell,* 2:93.

35. McRee, *Iredell,* 1:411–12.

36. Willis Whichard, *Justice James Iredell* (Durham, N.C.: Carolina Academic Press, 2000), xiv, 8.

37. "My Dear Hannah," Jan. 26, 1779, in McRee, *Iredell*, 1:415–16.

38. *Bayard v. Singleton*, 1 N.C. (Mart.) 42 (1787).

39. Id. at 43.

40. "Declaration of Rights, Art. XIV, the North Carolina Constitution of 1776," in Thorpe, *Constitutions,* 5:2788.

41. McRee, *Iredell,* 2:145–49.

42. Walter Clark, ed., *The State Records of North Carolina* (1900; Wilmington, N.C.: Broadfoot, 1994), 18:42, 136–43, 194–95, 212–17, 360–62, 428–29, 461, 477–83.

43. Ibid.

44. *Bayard v. Singleton*, 1 N.C. (Mart.) 42 (1787), 44–45.

45. Iredell to Spaight, Aug. 26, 1787, in McRee, *Iredell,* 2:173 (emphasis added to final sentence).

46. Ibid., 174–75 (emphasis added).

47. Ibid.

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48. In New York, *Rutgers v. Waddington* (Mayor's Court, 1784), in *Journal of the Assembly of the State of New York* (Oct.–Nov. 1784), Nov. 2, 1784, 32–33, Early American Imprints, First Series, no. 18649); in Rhode Island, *Trevett v. Weeden* (R.I., 1786), in Peleg Chandler, *American Criminal Trials* (Boston: T. H. Carter, 1844), 2:269–350 ("The Rhode Island Judges"); in New Hampshire, *Ten Pound Act cases* (N.H., 1786), in Albert Stillman Batchellor, *Early State Papers of New Hampshire* (Concord, N.H.: Ira C. Evans, 1892), 21:72–83 ("Journal of the House of Representatives," June 26–28, 1787), and Richard Lambert, "Ten Pound Act Cases," in *New Hampshire Bar Association Journal* 41, no. 1 (2002): 37–55; in North Carolina, *Bayard v. Singleton* (1 N.C. (Mart.) 42 (1787), in Clark, *The State Records of North Carolina*, 18:42, 136–43, 194–95, 212–17, 360–62, 428–29, 461, 477–83. There were only two other cases in which courts arguably refused to enforce legislation prior to the Federal Convention: the *Symsbury Case,* Kirby (Conn.) 444 (1785); and *Holmes v. Walton* (N.J., 1780).

49. *Trespass Act,* Chap. 31, 6th sess., March 17, 1783.

50. "To the PEOPLE of the STATE of NEW YORK," *New York Packet and the American Advertiser,* Nov. 4, 1784 (emphasis added).

51. *Journal of the Assembly of the State of New York* (Oct.-Nov.–1784), Nov. 2, 1784, 32–33, Early American Imprints, First Series, no. 18649. Within weeks the Senate had joined the Assembly in passing a bill to "institute" a Court for the Trial of Impeachments and Correction of Errors, and on November 23 the Council of Revision approved the bill. See *Journal of the Assembly* (Oct.–Nov., 1784), 32, 34, 50, 59, 60, 69, 70.

52. "To the PEOPLE" (emphasis added).

53. Spaight to Iredell, Aug. 12, 1787, in McRee, *Iredell,* 2:169 (emphasis added).

54. Kramer, *The People Themselves,* 14, quoting John Phillip Reid, "In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution," *New York University Law Review* 49 (1976): 1087; Reid, *Constitutional History of the American Revolution,* abridged ed. (Madison: University of Wisconsin Press, 1995), 11–13.

55. Zephaniah Swift, *A System of the Laws of the State of Connecticut* (1795; New York: Arno Press, 1972), 1:58 (emphasis added).

56. In a variation on this theme, the Virginia House of Delegates resolved that the treason statute at issue in *Commonwealth v. Caton* was unconstitutional, contrary to the holding of the Virginia Court of Appeal. *Journal of the House of Delegates of the Commonwealth of Virginia* (Nov. 19, 1782), 24. See also the legislative resolution that the New Hampshire Ten Pound Act was constitutional, contrary to the decision of a superior court. Batchellor, *Early State Papers,* 20:759 (Dec. 25, 1786).

57. Except for states in which the upper house of the legislature sat on the court of final appeal, as in New York, Connecticut, and New Jersey.

58. See above n. 48.

59. Farrand, *Records,* 1:26–27. Randolph's diagnosis would be repeated by a number of other delegates during the course of the convention.

60. Ibid., 1:135 (emphasis added).

61. Ibid., 1:135–36.

62. Ibid., 1:21 (emphasis added).

63. Ibid., 2:28.

64. Ibid., 1:471. For a separate report of Madison's speech that differs in some details, see ibid., 1:463–64. See also ibid., 3:522–23 and 516 for Madison's later attempt to explain his position. Madison evidently felt that his proposal substituted for "the distant, the independent & irresponsible authority of a King which had rendered the [negative] justly odious, an elective and responsible authority within ourselves" (i.e., Congress). Ibid., 3:523.

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65. Ibid., 2:27. See similarly framed remarks by Luther Martin approving of judicial review in ibid., 2:76, and by John Mercer and John Dickenson opposing the practice in ibid., 2:298, 99.

66. U.S. Const. Art. VI.

67. Philip Hamburger, in his recently published *Law and Judicial Duty*, has filled in the gaps of this story in astonishing detail, showing that an old common-law ideal of judicial duty (assumed by most participants) probably underlay the judges' claim that it was their implicit obligation, deriving from their office, to declare laws in conflict with constitutions null and void, and that it was not necessary for written constitutions to confer that authority, explicitly or implicitly; see especially chaps. 18 and 19.

68. See Gerald Leonard, "Iredell Reclaimed: Farewell to Snowiss's History of Judicial Review," *Chicago-Kent Law Review* 81, no. 3 (2006): 867–82. See also Iredell's letter to Spaight, Aug. 26, 1787, in McRee, *Iredell,* 2:172–76, and Hamilton, "The Federalist No. 78."

69. Farrand, *Records,* 3:516 (Madison letter to N. P. Trist, Dec. 1831).