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Original Understanding and the Whether, Why, and How of Judicial Review

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For more than one hundred years, legal scholars have endlessly and heatedly debated whether judicial review of federal legislation was part of the original understanding of the Constitution. The stakes of the debate are high. If judicial review was part of the original understanding, then there is a strong argument that the practice is grounded in the majority's will, just as the Founders' Constitution is. But if it is not—if, as Alexander Bickel[1] and others have claimed, judicial review was a sleight-of-hand creation of Chief Justice Marshall in *Marbury v. Madison*[2]—then judicial review is either counter-majoritarian or else must find its popular grounding somewhere other than in the ratification of the Constitution by "We the People."

Yet, despite the prominence and the significance of the academic debate about whether judicial review was part of the original understanding, the answer to the controversy is surprisingly clear: contrary to the Bickelian point of view, judicial review was not created in *Marbury*. While there is a strong argument that the Constitution's text contemplates judicial review of federal legislation—and it seems clear that the Supremacy Clause assumes that the federal judiciary has the power to review state legislation—the critical evidence concerning the acceptance of judicial review involves judicial practice. In the years before *Marbury*, exercises of judicial review were surprisingly common and generated surprisingly little controversy in either the courts or the political arena. As I have written recently, there were thirty-one cases between ratification and *Marbury* in which state and federal courts invalidated statutes,

1. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); *see also* Alexander Bickel, http://en.wikipedia.org/wiki/Alexander_Bickel (last visited Dec. 21, 2006).

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

a number far greater than previously realized.[3] Similarly, Maeva Marcus has shown that, in the first Congresses, Congressmen repeatedly took the position that the courts would review statutes for constitutionality.[4] While acceptance of judicial review was not universal, it is striking—given the prevalence of the view that judicial review was created in *Marbury*—that the power was exercised so frequently and that the opposition to the exercise of that power was so limited.

Thus, the difficult questions about the origins of judicial review are not *whether* it was part of the original understanding, but *why* it won such general acceptance and *how* the power was to be exercised. Professor Mary Bilder's superb article, *The Corporate Origins of Judicial Review*,[5] explicitly highlights these questions and will unquestionably stand as a landmark contribution to the literature of judicial review because of its contributions to these two areas.

The *why* debate is one that has perplexed historians; Professor Bilder casts important new light on the issue by focusing on a body of practice—corporate law and, more specifically, Privy Council decisions—minimized by other scholars. The *how* debate—which, in asking how courts exercised judicial review, involves exploring the original scope of judicial review—is one that has more consequence for contemporary commentators because it addresses the question of when, according to the original understanding, courts should invalidate statutes. Professor Bilder's claims with respect to the *how* question are perhaps too modest. Her thesis actually has consequences of fundamental importance because it buttresses a structuralist understanding of judicial review.

As a matter of British constitutional theory, judicial review was not established at the time of the American Revolution. While there are a handful of seventeenth-century cases that some scholars have argued established the principle of judicial review,[6] these cases can also be plausibly read as involving statutory interpretation and the judicial determination not to enforce problematic statutes in the absence of clear expressions of legislative purpose. Even if these cases are best understood as involving exercises of judicial review, it does not follow that judicial review was accepted at the time of the American Revolution. These cases preceded both the Glorious Revolution and the rise to dominance of the Blackstonian view of parliamentary supremacy. Rather than

3. William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455 (2005).

4. *See* 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).

5. Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006).

6. *See, e.g.*, Dr. Bonham's Case, (1610) 77 Eng. Rep. 638, 652 (C.P.).

reflecting the standard constitutional theory of 1776, they evidence an approach that had been long abandoned.

If British *constitutional* theory in 1776 did not embrace judicial review, why did American courts come to exercise the power, and why did that exercise generate such little dispute? Professor Bilder argues that the answer lies in well-established principles of British *corporate* law. She traces to the thirteenth century the legal doctrine that corporations—including municipalities, which were corporate entities—possessed a limited, delegated authority and that exercises of this authority that exceeded that limited delegation were void.

In the seventeenth century, this doctrine was naturally extended to those British colonies that possessed corporate charters. Because of similar circumstances, it was also extended to Crown grants to individual proprietors. Thus, the Privy Council during the colonial era used the doctrine of "repugnancy" established in the corporate context to invalidate colonial statutes and court decisions that were "repugnant" to the laws of England.

Modern analysts readily recognize the theoretical differences between Privy Council review of colonial legislation for consistency with the imperial legal regime and the exercise of judicial review of legislative acts for their constitutionality. Professor Bilder argues, however, that the practice of review of legislation for repugnancy with a superior body of law was so well established that, after the American Revolution, courts came to assume almost reflexively the power that the Privy Council had once exercised.

Professor Bilder thus places at the center of our understanding of the origins of judicial review imperial practices that I and others previously thought were of limited significance because of the vast conceptual difference between Privy Council review and judicial review. In arguing for the relevance of earlier forms of review, her critical move is to contend that perceived continuity of practice, rather than logic, led courts to embrace judicial review and that the same perceived continuity accounts for the absence of popular challenge to judicial assertions of this power. Judicial review looked like something Americans were familiar with. Only with the passage of time, as Americans started to work through the implications of the doctrine of separation of powers, did challenges to the legitimacy of judicial review emerge. But late-eighteenth-century Americans failed to grasp the problem.

Because she finds the acceptance of judicial review to be reflexive, rather than based on a coherent theoretical understanding, Professor Bilder argues that her history casts little light on the question of when judicial review became standard practice. She writes, "The simultaneous ambiguity and certainty of the phrase 'repugnant to the Constitution' meant that judges did not initially have to confront whether they were engaged in what we would call narrow or

broad constructions of the Constitution. Early cases may—or may not—support both expansive and restrictive approaches to review."[7]

I think Professor Bilder's conclusion is too modest. Her explanation of the corporate origins of judicial review dovetails with my recent argument against the dominant scholarly view—espoused most prominently by Dean Larry Kramer[8]—that early exercises of judicial review were limited to statutes that were clearly unconstitutional. I argue, instead, that the thirty-one cases of judicial review prior to *Marbury* reflected a structural approach.

In the pre-*Marbury* period, federal courts repeatedly invalidated statutes that affected the judicial role—such as by altering jurisdiction—or the role of juries, and they did so even when there were plausible constitutional arguments in favor of the statutes. Similarly, federal courts repeatedly invalidated state statutes that were arguably constitutional; in most cases, the invalidated statutes implicated national power. Finally, in two cases, state courts struck down state statutes for violating the Federal Constitution. These three categories account for *all* instances in which the federal courts invalidated a statute prior to *Marbury*.

This early American case law reflects a boundary protection approach to judicial review. Courts in the founding era reviewed legislation that implicated the powers of those not involved in its adoption: juries, courts, and, in the case of state legislation, the national government. They did not engage in meaningful substantive review—rather, they were concerned with protecting the basic relationships of constitutional governance. Yet, despite the evidence of this strong pattern throughout a large body of case law, I did not find any writer from the period who recognized it or provided a theoretical justification for it.

Professor Bilder's work does not focus on the nature of the early judicial review cases in this country and thus she concludes that the early history of judicial review does not illuminate the question of when judicial review was exercised. Nonetheless, by placing the early cases in the context of British corporate law and Privy Council decisions, her article is more important than she recognizes in illuminating why judicial review was structuralist and why the advocates of judicial review did not offer a theoretical explanation for their approach.

Privy Council review was, at its core, concerned with boundaries: the imperial government's purpose in conducting such review was to ensure that

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7. Bilder, *supra* note 5, at 512.

8. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 92, 99, 102-03 (2004); Larry D. Kramer, *The Supreme Court 2000 Term: Foreword: We the Court*, 115 HARV. L. REV. 4, 79 (2001).

colonial governments did not overstep their bounds. Judicial review in the early republic involved a similar function: ensuring that legislators did not legislate in ways that undercut the power of other government entities. Whereas Professor Bilder finds that the "repugnancy" standard applied by the courts of this country as they exercised judicial review was so open-ended as to make the "when" question unanswerable, the historical practice actually fits a definite pattern analogous to the conception of repugnancy review employed by the Privy Council.

As I conducted my research, one question I asked myself is why early writers on judicial review did not explain or justify the structural approach to judicial review so evident in the case law. Professor Bilder's approach suggests an answer: early Americans perceived judicial review by the federal courts as the application of a pre-existing practice of review for boundary protection in a new context. They therefore did not apprehend a need to offer an elaborate justification for a practice to which they were accustomed. In short, Professor Bilder's work significantly clarifies why judicial review won such easy acceptance, and—to an extent that even she fails to appreciate—helps explain why judicial review was exercised in some cases and not others.

William Michael Treanor is Dean of Fordham Law School. He began his work on the history of judicial review with The Case of the Prisoners and the Origins of Judicial Review.[9] *His most recent works include Eldred* and *Lochner*: Copyright Term Extension and Intellectual Property as Constitutional Property *(co-authored with Paul Schwartz)*[10] *and* Judicial Review Before *Marbury*,[11] *a study of the early American judicial review case law.*

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9. William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491 (1994).

10. Paul M. Schwartz & William Michael Treanor, Eldred *and* Lochner*: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331 (2003).

11. Treanor, *supra* note 3.