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The Fundamental and Natural Law ‘Repugnant Review’ Origins of Judicial Review: A Synergy of early English Corporate Law with Notions of Fundamental and Natural Law

Lawrence Joseph Perrone

I. INTRODUCTION

The Constitution does not explicitly authorize judicial review. This lack of authorization has resulted in centuries of debates over the origins of judicial review. Many discussions of judicial review begin with *Marbury v. Madison* whereas others begin their analysis pre-*Marbury*. Numerous pre-*Marbury* scholars trace the origins to sixteenth and seventeenth century England. Any discussion of the “origins” of judicial review that ignores the early English sixteenth and seventeenth-century practices and precedents is incomplete.

This article has two purposes. The first purpose is to outline and summarize the various understandings of the origins of judicial review. The second purpose is to set forth the proposition that the origins of judicial review did not arise from the pen of John Marshall in *Marbury v. Madison*, but rather took root in two ways: one in practice and one in thought. “First, the early English courts in *practice* routinely reviewed corporate by-laws for repugnancy to the laws of England.”¹ Second, these *repugnant reviews* were grounded in the *thought* that principles of natural law control human law. This article will argue that both this early practice and mode of thought influenced early colonial views pertaining to judicial review.

If viewed parsimoniously, early English corporate practice of repugnancy review, plus review for consistency with natural law, plus early American colonial courts reviewing legislative or executive acts for repugnancy with notions of natural law, equals: early English court influence on judicial review in pre-*Marbury* America.

Many scholars, perhaps in an attempt to say something new about judicial review, advocate for different understandings of its origins without acknowledging one very critical concept: that historical practices

1. Mary S. Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 504 (2006).

grounded in longevity are equally influential to historical modes of thought. “Specifically, judicial review scholars have failed to recognize the importance of English corporate practices stemming from the late sixteenth century which demonstrate an early acceptance of the practice known today as judicial review.”² The English courts’ review of corporate practices in England, reviewing corporate by-laws and executive ordinances for *repugnancy* to the laws of England, likely gave the Founders groundwork for drafting the Constitution and its implicit inclusion of judicial review.³ However, those who advocate for the corporate origins of judicial review fail to assign due importance to the historical mode of thought that attached to such corporate reviews—that these reviews were likely premised on natural law.⁴

The position advocated in this article stems from two different approaches of historical analysis placed alongside one another: (1) the fact that English courts reviewed corporate practices of English corporations for repugnancy,⁵ and (2) the relationship between England and its colonies during England’s imperialistic rulings.⁶ These approaches, in light of the evidence that natural law prevailed in the minds of men on both sides of the Atlantic, will hopefully illuminate a different way of looking at the origins of judicial review. This view of the origin of judicial review seeks to combine and expound on two minority views of early constitutional law. First, that Lord Coke in the classic 1610 *Bonham’s Case* decision reviewed an act of government for consistency with natural law as opposed to applying a strict statutory interpretation. Second, that this exercise, later to be known as judicial review, was rooted in early English corporate practice. The practice of early English courts reviewing corporate practices for repugnancy with natural law has striking similarities to the language used in early American courts reviewing their own governmental actions for

2. *Id.* Bilder not only does not ignore this, rather, she is primarily responsible for this view. However, the primary difference between Bilder’s view and my own is that I advocate for the primacy of fundamental and natural law as an influential factor in judicial review—that review for consistency with fundamental and natural law was the bulwark of the origins of judicial review, and its occurrence in the corporate practice arena was merely incidental. Bilder argues the opposite—that corporate practice review was the foundation of judicial review, not fundamental principles of natural law. In my view, the practice and mode of thought (natural law) attached to one another and, thus, cannot be intellectually or historically divorced.

3. *Id.* at 535.

4. *Id.* at 508.

5. *Id.* All views and factual assertions concerning reviewing corporate practices for repugnancy were obtained from Bilder’s 2006 article.

6. *Id.* at 507 (“This article adopts a different stance by abandoning an intent-focused inquiry.”).

consistency with natural and fundamental law—in the form of written constitutions.⁷

Some disclaimers need be made before delving into the historical accounts. First, my thesis is limited insofar as it is a synthesis of two minority points of view: (1) that the English courts' practice of reviewing Acts of Parliament was in the form of corporate by-laws and ordinances authorized by Parliament and (2) that courts applying these *repugnant reviews* asked whether the by-law or ordinance was consistent with natural law. Both, in turn, influenced early American thought. By connecting these two modes of analysis, a bridge of inferential logic may paint a new picture superimposed on an already familiar landscape.

Part I of this article provides general background information on the original understandings of judicial review. This section will first outline varying theories advocated by scholars and academics alike. However, the main thrust of Part I, though many dispute or ignore its relevance, is to emphasize the importance of my starting point: *Bonham's Case*. Part II of this article describes the early instances when English courts reviewed corporate practices and by-laws for repugnancy. These instances were so well understood that early American constitutional theory assumed the existence of some sort of judicial review based on the fact that English courts engaged in repugnant reviews.⁸ Part III sets forth the intent-based inquiry of early American constitutional thought linking the early English courts' use of the word *repugnant* to instances of use in colonial America. Part IV revisits these *repugnant reviews* and demonstrates how the string of inferences, through the use of the word *repugnancy*, ultimately commands the conclusion that the Founders were influenced by these early repugnant reviews, both by corporate practice and review for consistency with natural law. This conclusion is strengthened by the fact that the word *repugnant*, whether used in England or colonial America, was simultaneously associated with both natural law and the courts' review of corporate practices.

7. See Mathew P. Harrington, *Judicial Review Before John Marshall*, 72 GEO. WASH. L. REV. 51, 68 (2003) ("After all, before a court could definitively declare that a statute violated fundamental law, it had to be able to point to some body of law which might be regarded as fundamental. In England, this was nearly impossible because there was no universally agreed-upon formulation of those customs or rules which might be considered fundamental to English liberties.").

8. Bilder, *supra* note 1, at 565 ("The courts' ability to void repugnant legislation was simply assumed because of past corporate and colonial practices that limited legislation by the laws of the nation.").

II. REVIEWING JUDICIAL REVIEW

Most discussions concerning judicial review begin and end with *Marbury v. Madison*. Did John Marshall invent judicial review, or was the concept originally understood pre-*Marbury*?

One of the dominant views is that of Stanford Law Dean and preeminent constitutional scholar Larry Kramer; he argues that judicial review was originally (pre-*Marbury*) accepted as a judicial power but rarely exercised unless statutes clearly violated the Constitution.⁹ Dean of Fordham Law School, William Treanor, has written extensively on judicial review and disputes Kramer's position, contending that judicial review before *Marbury* was a common practice that was not restricted to cases of clear constitutional violations.¹⁰ The difference, he argues, is that courts would merely allocate differing standards of review dependent upon the subject matter of the litigation.¹¹

Conversely, another view is that the Framers never intended for congressional legislation to be reviewed by courts; thus, *Marbury v. Madison* was a sharp departure of the original understanding of courts' roles.¹² Constitutional historian and Professor of Law at Vanderbilt University Suzanna Sherry, among others, has argued for an elaborate original understanding of judicial review where statutes were examined to determine whether they either violated natural law or were inconsistent with the written constitution.¹³

Scholars have argued that judicial review was present "in the thoughts of the patriots, the words of the Founders and the actions of the states."¹⁴ Others explain that judicial review, at least partially, resulted from early discontent with legislative supremacy ending in impulsive and excessive legislation.¹⁵ Kramer has argued that the Constitution never

9. Larry D. Kramer, *The Supreme Court 2000 Term: Foreword: We the Court*, 115 HARV. L. REV. 4, 73-4 (2001); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

10. William M. Treanor, *Judicial Review before Marbury*, 58 STAN. L. REV. 455, 457-8 (2005).

11. *Id.* at 458.

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

13. Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987); Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988); Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113 (2003).

14. Anthony V. Baker, "So Extraordinary, So Unprecedented an Authority": *A Conceptual Reconsideration of the Singular Doctrine of Judicial Review*, 39 DUQ. L. REV. 729, 734 (2001).

15. Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1054-6 (1997).

authorized judicial review,¹⁶ whereas University of San Diego School of Law Professor Siakrishna Prakash and University of California, Berkeley Professor John Yoo's well-received article argues that both the text and structure of the Constitution clearly intended to authorize judicial review.¹⁷ Constitutional law and theory expert and Harvard Law School Professor Mark Tushnet has advocated for the complete abrogation of judicial review.¹⁸ These scholars, and the many others who have discussed judicial review, start their analyses in many different places. One of the only appropriate beginning points for a complete analysis of judicial review is at *Bonham's Case*—specifically, the question whether Coke's infamous statement from that case influenced early American constitutional theory.

In *Dr. Bonham's Case*, the College of Physicians imprisoned Dr. Bonham for practicing medicine without a license after repeated attempts to prevent him from doing so.¹⁹ Dr. Bonham argued the college's incorporation did not authorize imprisonment. In front of Chief Justice Coke, Dr. Bonham's claim for false imprisonment was accepted, and Coke's famous statement flowed from pen into history:

And it appears in our books, that in many cases, the common law will controul [sic] 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 [sic] it, and adjudge such Act to be void²⁰

The essence of Coke's statement was that letters patent—the corporate charter given to the College of Physicians from Parliament—was in part void because the charter made the College both judge and jury in imprisoning Dr. Bonham. In doing so, Coke seems to have been appealing to some form of fundamental or natural law.²¹ Allowing a corporation to be judge and jury in the case of imprisoning its professionals is against principles of natural law because the phrase

16. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 234–35 (2000).

17. Saikrishna Prakash & John Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 982 (2003).

18. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 99–102, 154 (Princeton 1999).

19. *Dr. Bonham's Case*, 77 Eng. Rep. 638 (1610), available at <http://plaza.ufl.edu/edale/Dr%20Bonham's%20Case.htm> (English modernized in website).

20. *Id.*

21. Raoul Berger, *Doctor Bonham's Case: Statutory Construction of Constitutional Theory?*, 117 U. PA. L. REV. 521, 533 (1969).

“against reason” “was the familiar reference to the immutable law of nature.”²² If notions of natural law were present, Dr. Bonham’s Case is an example of a court, subordinate to almighty Parliament, invalidating Parliamentary actions by reviewing it for consistency with principles of natural law.

The prevailing and entirely reasonable argument is that Coke’s statement was not intended to limit the supremacy of Parliament, but was rather merely an exercise in statutory interpretation.²³ Under this view, Coke’s statutory construction lent nothing to judicial review as understood by John Marshall or today’s courts. The late Raoul Berger, professor of law at Harvard, took a position to the contrary: judicial review “did not require acceptance of such later concepts as separation of powers and the like to declare judicially what was generally accepted: a ‘positive’ law that violated the law of nature was ‘no law.’”²⁴

The determination of whether Coke’s statement influenced colonial American constitutional theory has centered on the debate of statutory construction or constitutional interpretation, that is, whether Coke’s position was that fundamental and/or natural law principles constrained Parliament, or whether his arguments were merely a routine exercise in statutory interpretation. But a discussion centered solely on this debate is incomplete.

A more complete view is that Coke’s statement likely influenced early American thought because he intended to constrain acts of Parliament “against common right and reason” insofar as it related to common early English corporate practice.²⁵ The exercise of reviewing corporate charters and letters patent for validity was common practice in

22. *Id.*

23. *Id.* at 525 (citing L. Wroth & H. Zobel, *Editorial Note* in 2 J. ADAMS, LEGAL PAPERS 118 (L. Wroth & H. Zobel eds., 1965)). Berger’s article argues the opposite point, but uses the previous source as a counterargument to his position that Coke’s statement was not mere statutory construction. Berger argues it was an exercise in constitutional, fundamental, or natural law review wherein Coke set forth the proposition that even almighty Parliament is constrained by “common right and reason.”

24. *Id.* at 545.

25. Bilder, *supra* note 1, at 532 (citing Dr. Bonham’s Case, 77 Eng. Rep. 646, 652 (1610)). Throughout this paper, I rely heavily upon Mary Bilder’s recent Yale Law Journal both for its views and well-developed research materials. Many primary and secondary sources have been pulled from her well-crafted article. I also borrow the organization of Bilder’s article at times. For example, the first portion of her article delves into the history of *repugnancy* in legal discourse. So, too, does this paper focus on a repugnant review insofar as it relates to the corporate origins portion of this paper. While I borrow her views for most of the corporate practice arguments and sources, she argues English corporate law eventually became a “transatlantic constitution binding American colonial law by a similar standard of not being repugnant to the laws of England.” *Id.* at 504. My position is that Bilder is correct insofar that corporate practices influenced or catalyzed this type of review, but is incorrect in discounting the importance fundamental principles of natural law played in influencing colonial courts; perhaps, more so than the corporate practice itself.

Coke's day.²⁶ These corporate practices focused on one determination: whether the corporate charter was *repugnant* to the laws of England. Thus, not only did judicial review likely have its origins in a natural law repugnant review, but also its origins incidentally were grounded in corporate practice.²⁷

III. A REPUGNANT REVIEW

The great Lord Ellsmore once inquired, "If the words of a statute be contraryant or *repugnant*, what is there then to be said?"²⁸ Coke invalidated laws that were "against common right and reason, or *repugnant*"²⁹ to the laws of England. Likewise, whether Marshall was correct or not, he was clear: "[i]t is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act."³⁰ In fact, the word *repugnant* is used six times in *Marbury*.³¹

Are these uses of the word *repugnant* coincidental? It seems that the two most important decisions in history pertaining to the original understanding of judicial review both use the same terminology when a court reviews a legislative act.³² While scholars dispute the influence of *Bonham's Case* on discussions of judicial review, no one seems to deny that *Marbury* officially set down the principle in American law. Some have said that *Marbury* invented judicial review, whereas the vast majority of scholars argue that *Marbury* merely codified a preexisting principle—that federal and state courts may review legislative or executive acts for constitutionality. Regardless of the credence one lends to *Bonham's Case* or *Marbury v. Madison*, a look into *repugnant* reviews by early English courts compels the conclusion that judicial review had a long history beginning in England, and was primarily used when courts

26. *Id.* at 532.

27. *See generally id.*

28. S.E. Thorne, *Dr. Bonham's Case*, 1938 LAW Q. REV. 543, 549, reprinted in S.E. THORNE, *ESSAYS IN ENGLISH LEGAL HISTORY* 269, 275 (Hambledon Press 1985) (emphasis added).

29. *Bonham's Case*, 77 Eng. Rep. 638 (1610).

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

31. *Id.*

32. *See* Noah Feldman, *The Voidness of Repugnant Statutes: Another Look at the Meaning of Marbury*, 148 PROC. AM. PHIL. SOC'Y 27, 31 (2004). Feldman notes that both words, repugnant and contraryant, appear in *Bonham's Case* and in *Marbury v. Madison*. Feldman assumes that the word *repugnant* was rare in legal discourse and Bilder's article rebukes this assumption, demonstrating persuasively that English courts commonly used *repugnant* in corporate cases and thereafter colonial courts followed in using *repugnant*. *See* Bilder, *supra* note 1, at 513–15.

reviewed corporate by-laws and ordinances for *repugnancy* to fundamental principles of natural law.³³

To start a corporation in sixteenth-century England, none other than Chief Justice Coke “summed up the medieval rules and laid down the modern rule.”³⁴ Coke, in the *Case of Sutton’s Hospital*, outlined four ways in which to lawfully incorporate. “Lawful authority of incorporation” was only proper by royal charter, an act of Parliament, prescription, or by the common law.³⁵ State sanction was thus required for incorporation. However, according to the English legal historian William Holdsworth, an Act of Parliament can “of course do anything; so that it can give a corporation power which, without such a sanction, would infringe the principles of the common law”³⁶ This statement seems inconsistent with Coke’s view that an Act of Parliament repugnant to common right or reason is “utterly void.”³⁷ But this type of repugnant review seems to be a longstanding English corporate practice.

As a matter of fact, Holdsworth even recognized that corporate by-laws were susceptible to being questioned before the king’s courts.³⁸ Courts addressed constitutional limits on corporate by-laws, ordinances, and authority in at least six cases *preceding* *Bonham’s Case*.³⁹ The cases in which early English courts reviewed corporate by-laws for validity preceding *Bonham’s Case* are as follows: *Chamberlain of London’s Case* (1590), *Doggerell v. Pokes* (1595), *Babv. Clerk* (1595), *Wilford v. Masham* (1595), *Clark’s Case*, and *Davenant Hurdis* (1599).⁴⁰ An independent review of several of these cases confirms what Mary Bilder has already concluded: corporate by-laws were routinely reviewed for repugnancy.⁴¹

33. This conclusion could accurately be characterized as a synthesis between Mary Bilder’s thesis (*see supra* note 1) and Raoul Berger’s position (*see supra* note 21).

34. William Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 Yale L.J. 382, 382, n.4 (1922).

35. *Case of Sutton’s Hospital*, (1613 K.B) to Co. Reb. 1a, 29b.

36. Holdsworth, *supra* note 34, at 384.

37. *Bonham’s Case*, 77 Eng. Rep. 638.

38. 9 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 45–71 (1926).

39. Bilder, *supra* note 1, at 526. Bilder conducted an in-depth review of English corporate law and its relation to judicial review.

40. *Id.* Bilder is responsible for finding these cases. However, particular cases were pulled for an independent review.

41. After reviewing primary and secondary sources from both English and American Scholars, it is still not entirely clear whether English courts conducting reviews of corporate ordinances were applying constitutional law, mere statutory construction, or applying fundamental principles of natural law. However, it is most likely that these early English courts were reviewing the corporate by-laws for consistency with natural law. It was the prevailing view in seventeenth-century England that natural law principles were transcendent and superior “to the positive law enacted by human institutions.” KRAMER, THE PEOPLE THEMSELVES, *supra* note 9, at 11 (citing CHARLES GROVE HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 21 (1914)).

For example, in the *Chamberlain of London's Case*, the King's Court upheld a corporate ordinance, but Coke exclaimed that "ordinances, constitutions, or by-laws" that "are contrary or repugnant to the laws or statutes of the realm are void and of no effect."⁴² If by this early statement Coke meant notions of natural law could void Parliament, then this is evidence that a court could invalidate an act of Parliament.

Moreover, in *Clark's Case* (1596), Clark was imprisoned under an incorporated town's charter, and this imprisonment was found contrary to the Magna Carta.⁴³ In *Davenant v. Hurdis* (1599), the court stated that a corporation could only make ordinances that were "not contrary to the laws and constitutions of the king, nor in prejudice to the majority of citizens of London."⁴⁴ These instances of review by a court suggest that early English courts had some power of judicial review by reviewing an Act of Parliament for repugnancy. This exercise of power by a court was not readily known as judicial review because judicial review "initially had no name because it was not an intellectual invention."⁴⁵

These cases and corporate practices, alongside the well-founded conclusion that early English courts could determine whether legislative and executive acts were repugnant to natural law, set the stage for early colonial influence. Even Holdsworth acknowledged that "no human law which was contrary to these universal laws [of 'nature or reason'] was valid."⁴⁶

American legal and constitutional history Professor Mary Bilder's contribution to the preceding views and historical accounts is undeniably invaluable. But before delving into early American case law and debate, clarity again demands illumination of the difference between her view and this article. Bilder claims that these corporate practice reviews, which also extensively occurred in the colonies, created a "transatlantic constitution binding American colonial law."⁴⁷ Bilder rebuffs the theory that the English practice of applying a repugnancy test based on natural law played a significant role in the origin of judicial review.⁴⁸ Her premise is sound, but the more complete view is that the courts' review for repugnancy to the laws of England and England's unwritten

42. 77 Eng. Rep. 151 (1590).

43. 77 Eng. Rep. 152 (1596).

44. 72 Eng. Rep. 769 (1599); Moore Rep. 576–91, 672.

45. Bilder, *supra* note 1, at 509.

46. 4 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 280 (3d ed. 1945).

47. Bilder, *supra* note 1, at 504.

48. *Id.* at 555 ("Seventeenth-century statements about fundamental law did not create the practice [referring to judicial review]." This entirely disregards the substance of the statement in *Bonham's Case*).

constitution cannot be divorced from court review based on natural law. Hence, judicial review's origins stem both from corporate- and natural-law reviews.

The primary reason why courts could review these types of acts from a superior body without controversy is that courts were at times applying natural law—a law higher than human law.⁴⁹ Therefore, the dispositive difference between the English system of judicial review and the American model is that both the State and Federal Constitutions codified many of the fundamental and natural law principles.⁵⁰ Early colonial thought suggests that judicial review stemmed from some sort of repugnant review.⁵¹

IV. EARLY AMERICAN THOUGHT

This section will analyze colonial case law and historical debates to suggest that some form of judicial review was accepted pre-*Marbury* and that this form likely stemmed from the fact that Colonial courts, as part of their analyses, often determined if legislative and executive acts were repugnant to principles of fundamental and natural law codified in written constitutions. The concrete nature of written constitutions probably catalyzed a more robust form of judicial review than that found in sixteenth- and seventeenth-century England.

First, this section will discuss two unquestionable examples of pre-*Marbury* cases that establish that judicial review was present before John Marshall penned *Marbury*. Second, this section will discuss how both of these cases use the word *repugnancy* in describing judicial review. Third, after establishing that early colonial courts used some form of judicial review, choosing to use the word *repugnancy* in doing so, subsections (C) and (D) will provide other examples of the use of the word *repugnant* in early colonial corporate practices and during the Constitutional Convention debates.

49. Berger, *supra* note 21.

50. *Id.* Another relevant difference is the general distrust of government evident in the structural makeup of our political system. I would presume this is common among countries that ratify constitutions post-revolution, gaining their independence from another imperial nation. This could be another explanation for the robustness of our model of judicial review as compared to that of England's. However, discussion on this point is outside the scope of this paper.

51. Bilder, *supra* note 1.

A. *The First Case: The Case of the Prisoners*

In the *Case of the Prisoners*,⁵² John Caton, James Lamb, and Joshua Hopkins were convicted of treason for aiding the British during the revolutionary war and ultimately sentenced to death on June 15, 1782, by the Virginia General Court.⁵³ Caton, Lamb, and Hopkins petitioned the Virginia House of Delegates for a pardon. The House voted in favor of the pardon, but the Senate voted against it.⁵⁴

Virginia's Treason Act stated that both houses must agree to allow a pardon.⁵⁵ However, Virginia's state constitution seemed only to require the consent of the House, which the three prisoners had already obtained. In October, 1782, the prisoners argued in front of the Virginia General Court that the statute violated the state constitution; thus, the pardon was effective. Attorney General Edmond Randolph argued the opposite, requesting an order of execution. The General Court ultimately refused to decide the issue, determining that the issue should be presented to Virginia's highest court, the Virginia Court of Appeals.⁵⁶

Sitting on the Virginia Court of Appeals were Edmund Pendleton, George Wythe, John Blair, Paul Carrington, Bartholomew Dandridge, Peter Lyons, James Mercer, and Richard Cary.⁵⁷ One of the questions presented to the court was whether a court could declare "an Act of the Legislature void because it was *repugnant* to the Constitution, without exercising the Power of Legislation, from which they are restrained by the same Constitution?"⁵⁸

Attorney General Edmund Randolph apparently advocated that the court *did* have the power to declare a statute unconstitutional; however, his precise position was that the statute and the constitution were consistent. Under his interpretation the court could avoid declaring the

52. William M. Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491, 494 (1994). Treanor obtained Edmund Randolph's and St. George Tucker's handwritten notes from this time period and scrupulously examined both sets. In his article, he also outlines numerous primary sources. All factual assertions in the discussion of the *Case of Prisoners* have been drawn from his article. It is of course extremely relevant to discussions of judicial review before *Marbury v. Madison* since "as a member of the Federal Constitutional Convention, Randolph proposed the Virginia Plan—the principal source for the Federal Constitution—and he subsequently was the first United States Attorney General, and, later, Thomas Jefferson's successor as Secretary of State." *Id.* at 494.

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

54. 2 EDMUND PENDLETON, *THE LETTERS AND PAPERS OF EDMUND PENDLETON, 1734–1803* 417 (David Mays ed. 1967).

55. See Traenor, *supra* note 52, at 502.

56. *Id.* at 502–3.

57. *Caton*, 8 Va. (4 Call) at n.5.

58. See PENDLETON, *supra* note 54, at 417 (emphasis added).

statute void and an order for execution would be proper.⁵⁹ The three prisoners responded⁶⁰ to Randolph's arguments: "[t]he act of assembly was contrary to the plain declaration of the constitution; and therefore void."⁶¹

After hearing Randolph and the three prisoners' arguments, the court heard from amicus advocates including well known lawyer and revolutionary St. George Tucker.⁶² Tucker also advocated for judicial review, although his justification was premised on separation of powers principles both in theory (Montesquieu) and in substance (the Virginia Constitution).⁶³

On November 2, 1782, the Virginia Court of Appeals handed down its decision by way of eight seriatim opinions.⁶⁴ Comparing the records of the Reporter, Daniel Call, with Chancellor Pendleton's notes, conflicting versions of the rationale emerge.⁶⁵ Call's records suggest that all eight judges accepted Randolph's statutory construction argument; however, seven of them agreed in dicta that the court could declare a statute unconstitutional.⁶⁶

On the other hand, Pendleton's notes may indicate that at least two of the judges sided wholeheartedly with the prisoners.⁶⁷ Justice Mercer seemed to hold the statute unconstitutional while Justice Dandridge ruled for the prisoners in that the statute and constitution provided independent ways for obtaining a pardon and the prisoners did receive a valid pardon under the constitution. Only Justice Lyons specifically rejected judicial review, while the five others held the Treason Act constitutional. Most notably, Justice Wythe advocated that if the court were to find, or "prove that an Anti-constitutional Act of the Legislature would be void . . . this Court must in Judgment declare it so, or not decide according to the Law of the land."⁶⁸

This case is arguably the best evidence of the origins of judicial review in pre-*Marbury* America, especially due to the prominence of

59. Treanor, *supra* note 52, at 507. "Randolph declared himself in favor of judicial review in a fashion that was both dramatic and that conveyed the difficulty that he felt in adopting this position." *Id.* at 512.

60. *Id.* n.107. There is apparently a dispute as to who actually argued on behalf of the prisoners. It may have been one Samuel Hardy or Andrew Ronald. *See id.*

61. Caton, 8 Va. (4 Call) at 7.

62. Treanor, *supra* note 52, at 520. Tucker would later become both a state and federal court judge and a professor at William and Mary as George Wythe's successor. *Id.*

63. *Id.* at 522–25.

64. *Id.* at 529–30.

65. *Id.*

66. *Id.*

67. *Id.* at 530.

68. *See* PENDLETON, *supra* note 54, at 426–27 (summarizing each judges' respective view).

such figures involved as Madison, Tucker, Randolph, Pendleton, and Wythe.⁶⁹ The presence of judicial review in this case is practically undeniable. Whether notions of fundamental or natural law were present is a closer question. It is likely that both natural law and fundamental law were involved in the judges' review of the Treason Act's alleged repugnancy: natural law in the judges' reasoning, and fundamental law codified in the Virginia Constitution.

Vanhorne's Lessee is another prime example of judicial review taking root in the new republic. *Vanhorne's Lessee v. Dorance* involved a property dispute between the defendant John Dorance and the plaintiff Thomas Van Horne.⁷⁰ The uncontested facts of the case were as follows: William and Thomas Penn presented to the court "a Deed from the Six [Native American] Nations" along with a map of the land and proper survey.⁷¹ Subsequently William and Thomas Penn granted to Thomas Vanhorne a lease, for a term of seven years, of lot No. 38 containing one hundred acres.⁷² Another lease was executed from the Penns to Thomas Vanhorne for lot No. 20.⁷³ Thomas Vanhorne then leased lot No. 20 to Cornelius Vanhorne.⁷⁴ It was then found in evidence that one John Dorance was in possession of lot No. 20, and he claimed that the deed he received from Native Americans was valid under Pennsylvania's Quieting and Confirming Act.⁷⁵

Justice William Patterson addressed the question presented whether the confirming act was constitutional "or, in other words, whether the Legislature had authority to make that act."⁷⁶ Justice Patterson analyzed the case comparing the power of a court to review legislative acts in England and in the new republic. Patterson acknowledged that the primary difference between English and American review was that England's constitution was unwritten. The general position in England was that Parliament could not be questioned by the judicial department, but "[w]hatever may be the case in other countries, yet in this there can be no doubt, that every act of the legislature, *repugnant* to the constitution, is absolutely void."⁷⁷

69. Treanor, *supra* note 52, at 496. Madison, though not participating in the trial, was "intimately familiar with the case." *Id.* at 496.

70. 2 U.S. (2 Dall.) 304, 304 (1795).

71. *Id.* at 304–05.

72. *Id.* at 305.

73. *Id.*

74. *Id.*

75. *Id.* at 305–07.

76. *Id.* at 307.

77. *Id.* at 308 (emphasis added).

Patterson ultimately found the Confirming Act unconstitutional and judicial review began to take root. Both *Vanhorne's Lessee* and the *Case of Prisoners* demonstrate pre-*Marbury* judicial review. In addition, both cases used the corporate-derived “repugnancy review” to review legislative actions for constitutionality.

B. Colonial Corporate Practice

Around the time of *Dr. Bonham's Case*, early colonials were arriving and settling in America. The authority to govern certain geographic areas was granted to the colonists by the Crown by way of letters patent.⁷⁸ These early grants formed domestic corporations in colonial America.⁷⁹

Letters patent contained a requirement that corporate by-laws not be repugnant or contrary to English law.⁸⁰ For example, Virginia's 1611 charter imposed that laws “be not contrary.”⁸¹ Likewise, the 1620 New England charter, the 1629 Massachusetts Bay charter, the 1662 Connecticut charter, and the 1663 Rhode Island charter all contained similar language requiring that corporate by-laws not be repugnant to the law of England.⁸²

Subsequently, the Privy Council “reviewed over 8500 colonial acts from colonial legislatures and around 250 appeals from colonial courts that had themselves struggled over the relationship between colonial law and the laws of England.”⁸³ If nothing else, the sheer quantity of reviews establishes the reasonable and defensible inference that the practice of reviewing English corporate laws for repugnancy to the laws of England made its way to the colonies and was a pervasive practice.⁸⁴

78. MARY S. BILDER, ENGLISH SETTLEMENT AND LOCAL GOVERNANCE, IN THE CAMBRIDGE HISTORY OF LAW IN AMERICA 65 (Christopher L. Tomlins & Michael Grossberg eds., 2007).

79. Bilder, *supra* note 1, at 535 (“Initial settlements in Virginia and Massachusetts Bay, among others, were structured as corporations. The use of the corporate form is not surprising given the overlap between members of London companies and colonial ventures.”).

80. *Id.* at 536.

81. *Id.* (citing The Third Charter of Virginia (1611–1612), reprinted in 7 FEDERAL AND STATE CONSTITUTIONS 3802, 3806 (Francis Newton Thorpe ed., 1909)).

82. *Id.* at 536–37 & nn. 179–83.

83. *Id.* at 538.

84. *Id.* at 538–41. See also 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 159 (Boston, Hilliard, Gray & Co. 1833) (stating that colonial “assemblies had the power of making local laws and ordinances, not repugnant to the laws of England, but as near as may be agreeable thereto, subject to the ratification and disapproval of the crown.”).

C. The Early Debates of Judicial Review

Now that the link between early English practice and early colonial practice has been established, a review of early colonial debates may shed light on whether these practices influenced early colonial thought.

Discussions of judicial review most commonly occurred during the 1787 Constitutional Convention when debates centered on the Council of Revision.⁸⁵ During the debates, Massachusetts's Rufus King held the position that federal judges should not have power to declare laws invalid in the Council of Revision because they already had the power to "stop the operation of such as shall appear *repugnant* to the constitution."⁸⁶

Pennsylvania's James Wilson disagreed with Rufus King, contending that a judge *did* have the power to hold a law unconstitutional, but that this power "did not go far enough."⁸⁷ James Madison himself stated that "a law violating a constitution established by the people themselves, would be considered by the Judges as null & void."⁸⁸

Seven years after the ratification of the Constitution in 1791, Supreme Court Justice Chase, in referring to reviews of legislative acts for consistency with natural law, stated:

There are certain *vital* principles in our *free Republican governments*, which will determine and over-rule an apparent and flagrant abuse of legislative power An act of the Legislature (for I cannot call it a *law*) contrary to the *great first principles* of the *social compact*, cannot be considered a *rightful exercise* of legislative authority.⁸⁹

Justice Chase's embrace of natural law⁹⁰ principles despite the existence of a written constitution demonstrates the pervasiveness of the concept that constitutions, whether written or unwritten, and legislatures, whether

85. Shawn Gunnarson, Comment, *Using History to Reshape the Discussion of Judicial Review*, 1994 BYU L. REV. 151, 162 (1994) (emphasis added). The Council of Revision was a political entity considered and ultimately rejected at the Constitutional Convention. Its purpose was to review acts passed by Congress and either veto or approve them. *Id.* at 151.

86. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 109 (Max Farrand ed., rev. ed. 1966).

87. See Gunnarson, *supra* note 85, at 164, n.80.

88. *Id.* at 168, n.111.

89. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (emphasis added).

90. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 46–47 (1994) (concluding that Justice Chase endorsed natural law review). *But see* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 210–11 (1980).

omnipotent (e.g., Parliament) or coordinate, are constrained by natural law.

V. A REPUGNANT REVIEW, REVISITED—NATURAL LAW CONTROLS

Cases such as *Bonham's Case*, *Clark's Case*, and *Chamberlain of London's Case* establish that early English courts likely reviewed Acts of Parliament through their grants of corporate powers for *repugnancy* with fundamental principles of natural law.⁹¹ Coke's words "against common right and reason" carry with them notions of both natural and fundamental law.⁹² Coke concluded that a legislative act allowing a corporation to be both judge and jury was repugnant to natural law, or in other words, "common right and reason."⁹³ "The law of nature . . . is also called the law of reason' and . . . English lawyers were accustomed to say that if anything 'be prohibited by the law nature . . . it is against reason.'"⁹⁴ It is reasonable to assume that a seventeenth-century lawyer may presume that the phrase *against reason* was interchangeable with "against the law of nature."⁹⁵

The frequency with which corporate judicial reviews for repugnancy employed an "against reason" analysis indicates that natural law was an inherent part of corporate review. This suggestion is strengthened by the fact that the laws being reviewed had been authorized by Parliament, which was empowered to make any kind of law it wanted. While the practice of reviewing legislative or royal acts for repugnancy occurred in the corporate context, concepts of natural law invalidated these laws.⁹⁶

91. This case's argument is contrary to that of those who argue that *Bonham's Case* was mere statutory construction and to those who hold the position that because England has an unwritten constitution, English cases are irrelevant to the discussion of judicial review.

92. Berger, *supra* note 21.

93. *Id.*

94. *Id.* at 529 (citing ST. GERMAIN, DOCTOR AND STUDENT, ch. 2 at 5, ch. 5 at 12 (W. Muchall ed., 1886)).

95. *Id.*

96. The best way to understand judicial review is that the early American cases, debates, and statements were influenced by a longstanding practice of English courts reviewing corporate charters for *repugnancy*. This is Bilder's view. While ideas and theories frequently present themselves in the historical context, practices and traditions of certain institutions inherently have more resilience. Coke's court commonly reviewed corporate charters provided by Parliament for repugnancy. Whether this was statutory construction or constitutional review is relevant as a condition precedent to corporate practice influence. If only statutory construction, *Bonham's Case* would likely be less influential to American courts dealing with statutes. But if Chief Justice Coke did in fact have fundamental principles of natural law in mind when he stated that an act of Parliament may be held void if repugnant to "common right and reason," then this provides a sturdy basis for early American influence in two senses. First, it is a pure instance of a court addressing a superior portion of government. Second, it establishes that even the omnipotent Parliament is controlled by some higher principle—natural law.

Therefore, the word *repugnant* is properly associated with *both* natural law *and* corporate practice.

But what seems undeniable is that Coke held the steadfast position that “common right and reason” was the determination of constitutionality and that only judges had the skill and wisdom to make these decisions.⁹⁷ “No human law which was contrary to these universal laws [of ‘nature or reason’] was valid.”⁹⁸ This is not to say that parliamentary supremacy⁹⁹ was not in full tilt. Coke did not espouse the position that he as Chief Justice of the Court of Common Pleas was the final word.¹⁰⁰ Rather, his view holding judges in the highest regard can be reconciled with notions of parliamentary supremacy since, “himself half medievalist, [Coke] still regarded Parliament as a court: the High Court of Parliament, last appeal above King’s Bench.”¹⁰¹ It was the routine practice of reviewing corporate charters for consistency (the opposite of *repugnancy*) with notions of natural law that influenced Coke’s placement of the “wisdom of the judges . . . above the wisdom of the legislature, and sealed his faith with the witness of his career.”¹⁰² According to Boyer, “Coke formulated the principle of judicial review, and his defense of this proposition provided the paradigm of the independent judge.”¹⁰³

The link to American judicial review, even disregarding corporate practices or the use of the word *repugnant*, is the fact that early state constitutions and ultimately our Federal Constitution codified many natural law principles and “[s]uddenly the fundamental law and the first principles¹⁰⁴ that Englishmen had referred to for generations had a degree of explicitness and reality that they never before quite had.”¹⁰⁵

97. JAMES R. STONER, JR., *COMMON LAW AND LIBERAL THEORY—COKE, HOBBS, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM* (U. Kan. Press, 1992) (citing SIR EDWARD COKE, *FIRST INSTITUTES* 97b (“For reason is the life of the Law, nay the Common Law it selfe is nothing else but reason, which is to be understood of an artificall perfection of reason gotten by long studie, obseruation and experience and not every mans naturall reason, for *nemo nascitur artifex* [no one is born skillful] [sic.]”)).

98. HOLDSWORTH, *supra* note 46, at 280.

99. For a full review of parliamentary supremacy, see George Winterton, *The British Grundnorm: Parliamentary Supremacy Re-examined*, 92 *LAW Q. REV.* 591 (1976).

100. CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE* (Atlantic-Little 1957).

101. *Id.*

102. Allen Dillard Boyer, “*Understanding, Authority, and Will*”: *Sir Edward Coke and the Elizabethan Origins of Judicial Review*, 39 *B.C. L. REV.* 43, 45 (1997).

103. *Id.*

104. *See, e.g.*, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798).

105. 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, 795 (1999) (citing Letter from James Iredell to Richard Spraight (Aug. 26, 1787), in 2 GRIFFITH J. MCREE, *LIFE AND CORRESPONDENCE OF JAMES IREDELL* 172, 174 (1857)).

Parliament's granting of charters in England paralleled those colonial charters bestowed upon American colonies, as Gordon Wood has written, the state constitutions "were still identified in the minds of many with their old colonial charters, as contracts between magistrates and people, defining and delimiting the power and rights of each."¹⁰⁶ By codifying notions of natural and fundamental law (that is, reducing to writing the principles used by English courts to review Acts of Parliament for repugnancy), concreteness and explicitness now defined the government's relationship with the people.¹⁰⁷

What is even more important is not what Coke meant but how his famous statement was understood in colonial America. As has been nicely put, "a seventeenth-century lawyer and a later Colonial might well have understood—as, in fact, they did—Coke to mean *simpliciter* that no Act of Parliament could contravene 'fundamental' law."¹⁰⁸ And from a more general historical perspective, "[a]lmost all eighteenth-century Englishmen on both sides of the Atlantic had recognized something called fundamental law as a guide to the moral rightness and constitutionality or ordinary law and politics."¹⁰⁹ Blackstone himself, despite his strict adherence to Parliamentary Sovereignty, believed that natural law could control an Act of Parliament.¹¹⁰

Perhaps the best colonial example of natural or fundamental law at issue is James Otis's argument in the *Writs of Assistance Case* (1761) that the issuance of general warrants was illegal and therefore ought to be outlawed¹¹¹. Delivering one of the most famous arguments in legal history,¹¹² Otis cited Coke's famous statement in *Bonham's Case* arguing

106. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, 271 (1969).

107. Harrington, *supra* note 7, at 69 ("The act of reducing fundamental law to writing had the effect of making explicit what in England was only an imaginary or hypothetical relationship between the people and their government.").

108. Berger, *supra* note 21, at 528.

109. Wood, *supra* note 105, at 794.

110. *Id.* (citing J.W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY*, 206–14 (1985)).

111. James Otis, Speech on the Writs of Assistance (1761), in 1 JOHN WESLEY HALL, JR., *SEARCH AND SEIZURE* 7, n.35 (2d ed. 1991).

112. *Id.*

I will to my dying day oppose with all the powers and faculties God has given me all such instruments of slavery, on the one hand, and villainy, on the other, as this writ of assistance is.

It appears to me the worst instrument of arbitrary power, the most destructive of English liberty and the *fundamental principles* of law, that was ever found in English lawbook.

....

that general warrants were “against common right and reason.”¹¹³ Therefore, Otis’s statement is great evidence that colonials understood both Coke’s statement to involve notions of natural law and judicial review. Otis was attempting to persuade the judiciary to review the act of the executive in executing general warrants, though his argument proved unsuccessful.

Otis’s statements seem to draw on both notions of natural and fundamental law—that is, both God-given rights and inherent reason to prohibit general warrants. Again, this is 1761, twenty-six years before the Constitutional Convention.

VI. CONCLUSION

Examining the origins of judicial review, to some, may seem a futile exercise. Regardless of whether we ever come to an accurate understanding of its origins, judicial review is unquestionably here to stay (whether it was intended or not). But the benefit of these historically driven analyses is that the present will soon be gone and historical accounts may inform our future constitutional doctrines. It was true then, and it is true today, that “a page of history is worth a volume of logic.”¹¹⁴

If the Supreme Court were to find fifty years from now that the current form of judicial review is too expansive and inconsistent with the Founders’ intent, how far would the Court roll back judicial review? Originalist inquiries are important to anticipate these issues and are equally important in other areas of constitutional law. For example, one hotly debated constitutional principle is the exclusionary rule. The Supreme Court adopted the exclusionary rule in federal courts in 1914.¹¹⁵ This rule was extended to the states in *Mapp v. Ohio*, almost five decades later.¹¹⁶ Portions of the current debate center on whether the

... [T]he writ prayed for in this petition, being general, is illegal. It is a power that places the liberty of every man in the hands of every petty officer.

... A man’s house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Customhouse officers may enter our houses when they please; we are commanded to permit their entry. . . . Bare suspicion without oath is sufficient.

... Every man prompted by revenge, ill humor, or wantonness to inspect the inside of his neighbor’s house may get a writ of assistance.

Id. (emphasis added).

113. *Id.*

114. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

115. *Weeks v. United States*, 232 U.S. 383 (1914).

116. 367 U.S. 643 (1961).

exclusionary rule is constitutionally required, or whether it may be replaced with a more effective remedy.

Exemplifying the role of Originalist debate, Timothy Lynch argues that separations of powers principles justify the exclusionary rule and that it is constitutionally required.¹¹⁷ On the other hand, Akhil Amar argues that the exclusionary rule may be replaced with 42 U.S.C. § 1983, which he argues suits as an available remedy to defendants that have had their civil rights violated.¹¹⁸ Many others have proposed alternative means for replacing the exclusionary rule and, thus, implicitly advocate that the Constitution does not require the rule's existence. But if the Supreme Court were ever to test the exclusionary rule's existence, historical accounts of the Founders' and colonials' practices and thoughts would surely be relevant to question.

Applying these originalist inquiries to the judicial review debate, suppose Professors' Prakash and Yoo are correct that both the text and structure (separation of powers) principles clearly authorized judicial review.¹¹⁹ If so, this would certainly bolster Timothy Lynch's argument that the exclusionary rule, though not mentioned in the Fourth Amendment, is required and justified by separation of power principles. By extension, the judiciary *must* exclude evidence to perform a "check" on the executive.¹²⁰ The history of the origins of the exclusionary rule, like the origins of judicial review, may become of utmost importance in future discussions pertaining to its legitimacy.

In addition, recall at the end of Part IV of this article the example of James Otis citing Coke's famous statement in *Bonham's Case* during the *Writs of Assistance Case*.¹²¹ Otis' ultimate goal, presumably, was to exclude the evidence obtained by the execution of a general warrant and, in turn, his client would go free. Any in-depth analysis of the *Writs of Assistance Case* relates to both judicial review and the exclusionary rule. Also recall that case occurred in 1761, twenty-six years before the Constitutional Convention. A further understanding of the origins of judicial review fills in historical gaps in many areas of constitutional law and theory, evidenced by the cross-section of the exclusionary rule and judicial review some two hundred and forty-seven years ago. Examining the history and origins of judicial review may unearth facts, inferences,

117. Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J.L. & PUB. POL'Y 711 (2000).

118. Akhil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 813 (1994).

119. Prakash & Yoo, *supra* note 17, at 894-927.

120. Lynch, *supra* note 117, at 715.

121. Otis, *supra* note 111.

or other accounts that are relevant not only to judicial review, but to other constitutional doctrines as well.

A historical analysis of early English, colonial, and American practices and thoughts demonstrates that judicial review stemmed from corporate practices being reviewed for consistency with principles of fundamental and natural law. When our constitutions—state and federal—were reduced to writing, codifying certain fundamental and natural law notions, judicial review took root in a more concrete form, because courts were dealing with a concrete document.

If “a page of history is worth a volume of logic,” hopefully this alternative historical view will alter the way some of the pages of history are viewed and, thus, revise a section in the volume of logic.