tional politics, in which the people have a role, is the process by which new constitutional law is made. It is distinguished from interpreting and enforcing existing constitutional law—tasks ultimately and authoritatively done for us in courts and by judges. Gerald Leonard puts the point nicely in observing how we are inclined today "to see politics as *working within* a constitutional order rather than *working out* that constitutional order."[17]

This modern understanding is, as we shall see, of surprisingly recent vintage. It reflects neither the original conception of constitutionalism nor its course over most of American history. Both in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution. Final interpretive authority rested with "the people themselves," and courts no less than elected representatives were subordinate to their judgments. It is the story of this practice of "popular constitutionalism" that emerges through our study of judicial review. Many, perhaps most, scholars today believe that "popular sovereignty" is and can be expressed only at rare moments, that "the people" are otherwise either absent or present only as an abstraction. Such was the belief of neither our Founding Fathers nor of their children nor of their children's children, and in charting how they constructed an idea of judicial review we will also be charting their efforts to explain and preserve the active sovereignty of the people over the Constitution. And along the way, perhaps, we may find some reasons to reawaken our own seemingly deadened sensibilities in this respect.

1

In Substance, and in Principle, the Same as It Was Heretofore

THE CUSTOMARY CONSTITUTION

* * *

The idea of a "constitution" was not new in 1787 or even in 1776. Americans had a concept of constitutional law and well-developed ideas about the nature of a constitution long before they sat down to write any of their own. From a historian's perspective, this concept reached back at least as far as the struggles between James I and Parliament,[1] though men of the seventeenth and eighteenth centuries liked to speak of an "Ancient Constitution" whose practices had been followed since "time out of mind."[2] Colonial Americans were wedded to the principles of this constitution, intimately familiar with its terms and convinced of its essential rightness and wisdom.[3] The patterns of thought and action formed by this experience naturally shaped their understanding of the task of writing new constitutions after the Revolution and thus provide a necessary starting point in recovering the original Constitution.

"What, But Immemorial Usage"

The word "constitution" had several meanings in the seventeenth and eighteenth centuries, not all of which correspond to modern understandings. According to one usage, a "constitution" was simply the arrangement of

existing laws and practices that, literally, constituted the government; it was neither anterior nor superior to government or ordinary law, making it possible to speak of a law being unconstitutional without it also being illegal.[4] To just the opposite effect, another usage paired the constitution with ordinary law and constitutionality with legality. Writing in 1788, William Paley described the constitution as nothing more than "one principal division, head, section, or title of the code of publick laws."[5] "The terms *constitutional* and *unconstitutional*, mean *legal* and *illegal*," he explained, for constitutional law is "founded in the same authority with the law of the land upon any other subject; and to be ascertained by the same inquiries."

Still a third usage, and the one most pertinent here because acted upon by American revolutionaries, equated the constitution with "fundamental law." Yet the phrase fundamental law itself was not always used consistently.[6] In some instances, fundamental law was used interchangeably with old and valued customs, customs that might or might not be capable of controlling the sovereign. In other instances, it described rules setting forth the procedures for exercising legislative power, such as the requirement that all three estates—King, Lords, and Commons—consent before a bill could become law. Most commonly, however, the term fundamental law was used as a synonym for what we still think of today as constitutional law: a body of immutable principles beyond the reach of any institution of government.

Compounding our confusion over the meaning of fundamental law was its (to modern eyes) muddled relationship with common law, the body of customary rules and principles that governed most ordinary legal affairs in a time before legislatures were active. Fundamental law drew upon and shared many of the abiding principles of the common law. Much fundamental law was, in fact, derived from common law—the right to trial by jury being an obvious and outstanding example. Yet not all common law constituted fundamental law, while much of what was recognized as fundamental law was not derived from the common law. Despite substantial overlap, then, fundamental law formed a conceptually distinct body of principles and customs. Its precise boundaries vis-à-vis the common law may have been hazy, even to writers and speakers of the time, but boundaries nevertheless existed, and participants seemed capable of understanding one another and knowing when someone meant to invoke fundamental law in its strong sense.

More complex than the relationship of fundamental law to common law was that of fundamental law to natural law. That there was a "law of nature" (or, as some in the eighteenth century preferred to have it, a "law of reason") was taken for granted, as was the natural law's transcendence and superiority

to the positive law enacted by human institutions.[7] Statements to this effect were virtual boilerplate in contemporary works of legal and political theory. Even Sir William Blackstone, the great positivist himself, began his *Commentaries* by recognizing a law of nature that "is of course superior in obligation to any other. It is binding all over the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original."[8] Yet the significance of natural law's preeminence was less clear in practice because human law somehow managed always to offer an acceptable solution.[9] As one sixteenth- century judge explained:

> [W]e ought not to think that the founders of our laws were remiss in searching after the law of nature, or that they were ignorant of it. Nor have we any reason, from the laws which they have made, to conceive so low an opinion of them, for their laws argue to the contrary, and shew that they who made them were men of the greatest and most profound judgement, and acquainted as well with the law of nature as with the law of reason, and the law of God also. For there is nothing ordained in our law contrary to nature or reason or the law of God, but our law is agreeable to them all.[10]

Interpretive slippage of this sort was common when it came to fundamental law. For while fundamental and natural law may have been distinct, the generality and openness of their respective contents drained the distinction of its practical significance. Writers could (and did) presume that fundamental law conformed to the law of nature and so could (and did) draw interchangeably on both in making arguments. Fundamental law was, in part, an embodiment or expression of nature and reason in positive law. As one anonymous seventeenth-century pamphleteer put it, fundamental law was "a settling of the laws of nature and common equity (by common consent) in such a form of polity and government as that they may be administered among us with honour and safety."[11]

The eighteenth-century constitutional law tradition thus blended arguments from natural law with arguments from morality, from custom, and from common and statutory law in ways that blurred distinctions a modern lawyer assumes must be sharply articulated.[12] Nagging concern for precision about hierarchies and sources of law emerged later to become a hallmark of nineteenth- and twentieth-century legal thinking. Lawyers in the eighteenth century were aware of these distinctions, but in a manner that was seldom

formulated with exactitude because a sharing and concordance of principles made it unnecessary to emphasize purely conceptual differences. So while the borders may have been murky, still they existed, and a positive notion of fundamental law provided the hub around which constitutional argument was organized. Both before and after the Revolution, in short, American Whigs believed there existed a fundamental or constitutional law whose terms "mark[ed] out and fix[ed] the chief lines and boundaries between the authority of rulers, and the liberties and privileges of the people."[13]

What were the characteristics or properties of this law? First and foremost, it rested on consent: the consent of the governed. The British constitution embodied a contract between the people and their rulers, whereby the people conferred certain powers, reserved certain privileges, and generally laid out the terms on which they agreed to be governed.[14] This agreement was "the very essence of . . . Jurisdiction," for authority to govern could be derived only through a "Compact" whose commencement "carried with it . . . the Consent of all Parties."[15] It was, necessarily, an agreement by implication, for no identifiable act marked the formal commencement of constitutional government. But this in no way diminished its popular basis, which rested on prescription. "However the historical fact may be of a social contract," explained Richard Wooddeson in 1792,

> government ought to be, and is generally *considered* as founded on consent, tacit or express, on a real, or *quasi*, compact. This theory is a material basis of political rights; and as a theoretical point is not difficult to be maintained. For what gives any legislature a right to act, where no express consent can be shewn? what, but immemorial usage? and what is the intrinsic force of immemorial usage, in establishing this fundamental or any other law, but that it is evidence of common acquiescence and consent?[16]

Wooddeson's invocation of "immemorial usage" is important for another reason, as it points to a second significant aspect of English constitutionalism. Rather than being located in a single text or identified with a particular enactment, the content and authority of the British constitution derived from principles long-enshrined in English legal culture and practice. We can, in other words, describe the body of fundamental law that in the eyes of eighteenth-century Englishmen formed their constitution as a *customary* constitution.

We should be careful in using the term "customary," for as we have already seen, sources of constitutional authority were not confined to custom. The convention of referring to England's constitution as "unwritten" is, in this sense, anachronistic, and it reflects a distinctly modern need to distinguish our own neatly written texts. Custom and practice were, of course, central sources of authority for fundamental law in the seventeenth and eighteenth centuries. But so, too, were a variety of written materials—including Magna Carta; the Bible; key statutes like the Declaration of Rights of 1689 and Act of Settlement of 1701; prominent treatises, particularly those by Vattel, Pufendorf, and Grotius; and certain philosophical works, of which John Locke's were probably the most important.[17]

These textual sources were not themselves fundamental law, any more than were the principles of natural law regularly cited for support by disputants. The constitution consisted of immutable principles of English liberty that were derived from "custom immemorial," a bounded and very real canon whose roots were said to be lost in the distant Saxon past. Subsequent enactments, later developed practices, learned treatises, and arguments drawn from natural law were all useful in helping to illuminate, translate, and make sense of these ancient principles. Constitutional polemicists employed these diverse sources to articulate and apply the enduring precepts of fundamental law, often claiming implausible gothic roots for practices in a way that maddened both contemporary and subsequent historians.[18] But, then, as John Reid has convincingly demonstrated, the lawyers, politicians, and pamphleteers who invoked the principles of the British constitution were not doing history.[19] They were employing a methodology that lawyers today typically associate with the common law: constructing arguments based on analogy, principle, and what Reid calls "forensic history" (which is to say law office history, which is to say not history at all). Fundamental law was distinct from common law, inasmuch as its rules, its principles, and its sources were different, albeit with some overlap. Methodologically, however, the fundamental law and the common law were siblings. This is what we mean by calling the British constitution a form of customary law. It was, as Reid urges, not a fixed or identifiable program, but rather "a constitutional apparatus of forensic advocacy to propagate anew traditional forms of restraint upon the current sovereign."[20] Put more simply, the customary constitution was a framework for argument, in which historical accuracy was less important than analogical persuasiveness in maintaining over time an established balance between liberty and power despite new or changed circumstances.

Like other forms of customary law, the content of this constitution was uncertain and open-ended. Indeed, the requirements of fundamental law were considerably less clear even than those of the common law, which after the fifteenth century had become centralized in the royal courts, and thus rested less on societal custom and practice than on formal judicial precedent and the opinion of legal professionals.[21] No similar development took place with respect to fundamental law, and courts had no special role in settling disputes over the meaning of the constitution.[22] Between its diverse sources, fluid nature, and the absence of any centralized forum for resolving conflict, fundamental law tended to be "whatever could be plausibly argued and forcibly maintained."[23] Yet this in no way reduced its status or significance. "Fundamental law contemplated unresolved controversy over contending legitimate interpretations, and unlike ordinary law did not need authoritative resolution of this controversy in order to maintain its efficacy. In the absence of authoritative determination of fundamental law's meaning, challenged governmental action stood, debate continued, and constitutional principles retained all their vitality."[24]

It did not follow that nothing was fixed. On the contrary, there was consensus about a great deal of fundamental law, particularly in the eighteenth century, after its most controversial features (the scope of the Crown's prerogative and the relationship between church and state) had been stabilized in the Glorious Revolution and its aftermath. These settled principles included both the existence of certain inalienable rights, such as the right to a jury or to petition the government, and matters of procedure and the exercise of executive or legislative power, such as the requirement that Parliament consent to legislation. Constitutional disputes might arise respecting the precise meaning or application of these principles in particular contexts, but there was general agreement as to their existence and even as to their application in a fairly broad range of circumstances.

The British constitution was, again like other forms of customary law, simultaneously immutable and evolving, unchanging yet always different. If this sounds paradoxical, think of Coke's timeless aphorism "out of the old Fields must spring and grow the new Corn."[25] Better still is Matthew Hale's famous analogy to the Argonauts: "As the Argonauts Ship was the same when it returned home, as it was when it went out, tho' in that long Voyage it had successive Amendments, and scarce came back with any of its former Materials."[26] Details, applications, even institutions might change, but the fundamental law itself remained constant and retained its essential substance as a bulwark protecting liberty from power. This capacity to improve without

changing was regularly singled out as one of the British constitution's cardinal virtues. Speaking at the end of the eighteenth century, legal scholar John Reeves observed:

> That our Constitution is not precisely the same that it was in the Reign of Ja[mes] I, I am the last man to deny; because it is one of the strongest persuasions I have, about its excellence, that it is capable of, and is continually receiving, improvements, either by the accession of new benefits, or by the attainment of new securities to protect original rights. Many of these have accrued since the time of James I. There was the Petition of Right, which rather secured old Rights than gave new ones; the abolition of the star Chamber was a new benefit; the Habeas Corpus Act was a new benefit; the Bill of Rights was rather a new security to old Rights. . . . All these, without enumerating others, were improvements in the Constitution, and nothing can be clearer, than that the Constitution is not now, in all its circumstances, though it is in substance, and in principle, the same as it was heretofore.[27]

Change in the customary constitution occurred chiefly through two mechanisms, corresponding to the two principles on which its authority rested, consent and prescription. Consistent with Whig theories of the contractual basis of fundamental law, the constitution could be altered by clear, convulsive expressions of popular will. The theoretical basis for this sort of change had been worked out during the exclusion crisis of 1678–81[28] and put to the test in the Revolution of 1688—which in the eighteenth century epitomized the potential for constitutional change through popular action. Later historians have belittled virtually every claim made for the Glorious Revolution: that it reflected popular will, that it brought about sweeping reform, indeed, that it "settled" much of anything at all. But men and women of the time did not doubt the significance of what had been accomplished.[29] As they saw it, the people of England had summoned a convention, removed one monarch from the throne, replaced him with another (actually two others), drafted a Declaration of Rights, and settled the succession on a Protestant line. Extend one's view a few years more, and this same people had provided for elections every three years, ensured that the legislature would meet annually, made the judiciary independent, and ejected placemen from Parliament.

Nor was the significance of these developments lost in the colonies. Americans, too, had suffered under Stuart oppression, and upheaval in the mother country triggered simultaneous rebellions in New England, New

York, and Maryland.[30] The colonists believed themselves equal participants in a revolutionary moment, and they interpreted the Revolution of 1688 as confirming their entitlement to the same rights and liberties as their countrymen across the Atlantic.[31] Their efforts to mimic the Glorious Revolution in the New World nevertheless produced mixed results. The Dominion of New England disappeared, and new governments were established (or old governments reestablished) both there and in New York and Maryland. But the efforts of various colonial legislatures to enact further measures imitating those adopted by Parliament were quashed in England. Remarkably, this seemed neither to dampen American enthusiasm for the Glorious Revolution nor to upset the colonists' belief that 1688 represented a triumph of Whig ideals on both sides of the Atlantic. The colonies continued to press for change and gradually achieved most of their goals in practice, if not formally enacted law.[32] Later, Americans would learn that they and the English had derived very different lessons from the Glorious Revolution, but no one on either side of the Atlantic (no Whig, at least) ever doubted that it had significantly, and legitimately, altered the content of fundamental law.

The second method of constitutional change—modification by prescription—was more common. Precisely because the British constitution was rooted in custom, it could be amended by usage: by the inauguration of new practices that, once they had achieved a degree of acceptance, could be cited as "precedents." Preserving the customary constitution called for vigilance, as everything was potentially up for grabs. By "such tacit agreement as this of prescription," explained Cambridge legal theorist Thomas Rutherforth in the mid-1750s, "[l]aws may be repealed, customs may be established into laws, civil constitutions of government may be altered, subjects may enlarge their privileges, governors may extend their prerogative."[33] Nothing was fixed, nothing permanently settled. "[W]hatever constitution . . . might appear from former usage to have been established in any civil society," Rutherforth continued, "a different or contrary usage, after it obtains, will afford the same evidence, that the governors and the people have mutually agreed to change the constitution." This principle may look familiar: courts today frequently give weight to established practices. But appearances can be misleading, for the eighteenth-century understanding was different and stronger, with each instance of acquiescence to a formerly unconstitutional practice carrying weight roughly akin to that accorded lower court judicial precedent today.

By way of illustration, consider the debate of the 1760s between the American colonists and imperial authorities over the significance of Britain's navigation laws. Parliament had enacted a great many such laws to regulate

colonial trade in the century before the Revolution; some had been ignored, but there were at least ten to fifteen that had not—more than enough to sustain a constitutional argument under prevailing standards.[34] Given American acquiescence to these laws, Massachusetts Attorney General (and loyalist) Jonathan Sewall argued, Britain's authority to exercise legislative jurisdiction over the colonies could no longer be challenged. Its claim was both old and established, having been "made, openly and expressly, before the grant of the charter [in 1691], and [having] ever since been uniformly exercised by them, and acknowledged by us."[35]

This was not an argument to be lightly dismissed. Whig leaders responded by trying to distinguish the navigation laws in ways that would confine the effect of the precedent. John Adams argued that the first navigation act "was not executed as an act of parliament, but as a law of the colony, to which the king agreed."[36] By reenacting the law on its own, the Massachusetts assembly had deprived Parliament of a precedent supporting its authority to legislate without assent from the colonial legislature. Of course, Adams's response failed to answer the many subsequently enacted laws, not to mention the needs of other colonies whose legislatures had acceded to the English law. A better answer—from the American viewpoint, at least—was offered by John Dickinson in his famous *Letters from a Farmer in Pennsylvania*. According to Dickinson, the navigation laws "were all intended solely as regulations of trade," not for raising revenue or regulating internal colonial affairs.[37] They established Parliament's authority to enact a comprehensive scheme of imperial trade regulation, which the colonists were prepared to accept, but they could not be cited as precedent for anything more. Certainly they could not sustain either a power to tax for revenue without consent or a power to legislate colonial affairs generally.

Anxiety about allowing precedent to become established was a pervasive feature of eighteenth-century constitutional practice, which helps to explain the extravagant reactions of American dissidents even to Parliament's most modest interventions. The Townsend Acts imposed very light duties on glass, paper, paints, and tea, but colonial leaders understood that Parliament's real objective was to generate a precedent supporting its claim to bind the colonies by internal legislation. Hence, voters in one Rhode Island town charged the British with acting for "the express purpose" of introducing "arbitrary power and slavery,"[38] while the Connecticut Assembly protested the "manner in and by which" the Acts were made, alleging not only that they "most undeniably deprive[d] the Colonists of their essential rights as Englishmen," but also that, if left unopposed, the legislation threatened to "strip them of all

that is good and valuable in life."[39] When Lord North offered to repeal three of the Acts, leaving only the impost on tea, colonial agents scoffed "this will signify nothing."[40] As the Virginia House of Burgesses explained in its petition to the king, Americans could not accept even the tax upon tea because it was still being retained "for the avowed purpose of establishing a precedent against us."[41]

A still better illustration of the role of precedent is the American response to the Tea Act of 1773, which actually reduced the price of tea, but in a way that implied Parliament's power to impose duties for the purpose of raising revenue and so compelled colonial rebels to destroy the tea rather than permit it to be landed. Under existing trade rules, tea was deemed "imported" once it had arrived in a colonial port. If the tea were not offloaded within twenty days, it would be seized by customs officials who would retain a portion to satisfy import duties. Once in harbor, moreover, a ship bearing tea could not leave without obtaining a pass from Crown officials and could not return to England without violating laws against colonial re-exportation. This put the colonists in a bind. If a ship bearing tea had entered a colonial port, it would not be permitted to leave without offloading its cargo. If the ship did offload, a duty would be paid. If it did not, customs officials would seize the tea and, once again, a duty would be paid. Either way, London would get its precedent. It might be a flawed precedent, but from the Americans' perspective, even a tarnished precedent was to be avoided. Most colonies sidestepped the dilemma by warning pilots to anchor their ships outside the legal limits of the harbor. But the captain of the *Dartmouth* ignored this advice and led several ships into Boston harbor anyway, leading to the Boston Tea Party. The Whigs of Boston had not wanted to destroy the tea, and they negotiated frantically to find another solution. But time ran out, and on the nineteenth day after the ships reached Boston—the day before its cargo would become forfeit and entered in customs house records—they concluded that they had no choice but to destroy the goods.[42]

"And Adjudge Such Act to be Void"

Consent and prescription were devices for changing the constitution. But what about its day-to-day enforcement? How, or rather, by whom was this customary constitution, with its varied sources and uncertain terms, interpreted and enforced? Conventional wisdom long held that the British constitution rested on and recognized the supremacy of Parliament. But the doc-

trine of legislative supremacy began to gain momentum only in the second decade of the eighteenth century, after Parliament extended its term from three to seven years in the Septennial Act of 1716.[43] Parliamentary supremacy was not fully established even in England before the nineteenth century, and it never achieved acceptance in the American colonies.[44] Yet the concept of a constitution existed and was taken seriously and debated on both sides of the Atlantic throughout the seventeenth and eighteenth centuries. The unceasing struggles between Crown and Parliament were *constitutional* struggles; they were, moreover, struggles about what the constitution required or commanded, not about which institution could "make" it. The existence of extant fundamental or constitutional law binding on the whole government, in other words, was taken for granted by all involved, with no sense whatever that its creation or interpretation was an exclusively legislative prerogative.

Nor did the customary constitution contain anything even remotely like the modern concept of judicial review, which is to say a practice of regularly submitting constitutional disputes to judges for resolution in the context of ordinary litigation. Indeed, it is doubtful that the customary constitution made room for any form of judicial review of legislation at all.

This last point requires a bit more explanation given Sir Edward Coke's famously enigmatic opinion in *Dr. Bonham's Case*, which some historians and legal scholars have credited with inventing a doctrine akin to our modern practice. Thomas Bonham sued leading members of the Royal College of Physicians in London for having fined and imprisoned him without legal authority. In the course of upholding Bonham's action, the newly appointed Chief Justice Coke wrote in 1610: "And it appears in our books, that in many cases, the common law will controul acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such act to be void."[45]

The amount of ink spilled by many of our greatest legal scholars in the effort to make sense of this little passage is nothing short of astonishing—though not so astonishing, perhaps, as the fact that we are still less than completely sure what Coke meant to say. The prevailing understanding today, first proposed by Samuel Thorne in 1938, is that Coke was making a straightforward point based on "ordinary common law rules of statutory interpretation," to wit, that a court could (and should) refuse to follow a statute absurd on its face.[46] Although this might at first seem an unobvious reading of Coke's language, other historians have shown how Thorne's reading is consistent with the issues in the case and the overall structure of Coke's

opinion, as well as with Coke's other writings and the broader intellectual context of early seventeenth-century political thought.[47] That said, there remain many excellent scholars who continue to believe that Coke meant to establish the authority of the courts and the common law over Parliament and legislation.

We need not rehash these arguments here, for what Coke thought he was saying matters less than how he came to be understood, and here the evidence points strongly toward Thorne's statutory reading. *Dr. Bonham's Case* was never an especially important precedent. It made sporadic appearances during the controversies surrounding the English Civil War, where it proved useful to royalists defending the king's prerogative because it supported their claim that Parliament's powers were limited.[48] It also showed up as dictum in one or two judicial decisions.[49] But after the Glorious Revolution and Acts of Settlement, *Dr. Bonham's Case* largely disappeared from the courts. The opinion was still read by those who studied Coke, of course, and Coke's language was included essentially verbatim in various eighteenth-century treatises and digests.[50] But for lawyers who may have thought to use it in court, *Dr. Bonham's Case* appears to have come through only as a doctrine of statutory interpretation. That, at least, is how Blackstone restated the holding in the first volume of his *Commentaries*. Indeed, Blackstone sought to narrow Coke's position still further by limiting it to statutes that were "impossible to be performed" or to "collateral consequences" of other laws if these consequences were not clearly spelled out in the statute's language and were "manifestly contradictory to common sense."[51]

Some scholars respond that, whatever the case may have been in England, things in America were different. Whether rightly or wrongly, they say, the American colonists did read *Dr. Bonham's Case* as authority for "a judicially enforceable higher law," and Coke's argument was the immediate source and direct forerunner of judicial review.[52] In fact, there is little basis for this belief.

To begin with, the only known seventeenth-century case on this side of the Atlantic to discuss Coke's doctrine rather clearly reflects the statutory interpretation view. The issue in *Giddings v. Browne*, decided in 1657, was whether the Ipswich Town Meeting could vote a gift of a hundred pounds to build a house for a minister. Magistrate Symonds ruled that the town had exceeded its authority under colonial law. Noting that the statute on which the town relied would be inconsistent with fundamental law (by authorizing a confiscation of property) were it construed to permit the gift, Symonds stated: "I conceive that it is an extreme dishonour cast upon the [colonial legislature], to make such a construction of their positive laws as doth infringe the fundamentall law of mine and thine; for it must needs be void, if it should indeed be necessarily construed against the right or liberty of the subject. But the law in its true sense is good."[53] Later in the opinion, Symonds added "a little about interpretation of lawes and of rules to be attended therein"—his first rule being "that where a law is such as that, by wresting, a man may give such an interpretation as will overthrow it, when it might be construed to be good; this is a corrupt interpretation. So holy scripture may be wrested."[54] The analogy to Scripture is revealing. Obviously, no one could "overthrow" the Bible, much less find it void; the argument was that a construction that created such tension must be wrong.

Indeed, practically the only evidence ever cited to prove that Coke's statement "became a rallying cry for Americans"[55] is James Otis's argument in the *Writs of Assistance Case*. Known also as *Petition of Lechmere* or *Paxton v. Gray*, the case was never formally reported and comes to us mainly through notes taken by John Adams and Josiah Quincy, who were in the courtroom to hear the arguments. In 1760 customs officials asked the Massachusetts Superior Court to issue general writs of assistance permitting them to command help from ordinary citizens in carrying out searches or seizures without individualized grounds for suspicion or any other cause. Unsure whether issuing such writs would be proper, the court set the matter down for argument. The question turned on whether there existed any source of authority for a colonial court, and in particular, for the Superior Court, to issue a general writ of assistance.

Jeremiah Gridley, arguing for the Crown, maintained that the power to issue such writs could be inferred as a matter of general principles from the "necessity" of the case, relying secondarily and for additional support on § 5(2) of the Act of Frauds of 1662.[56] Otis contested both grounds. With respect to the former, he charged that general writs were contrary to fundamental principles of law and not supported by precedent. Turning to Gridley's statutory argument, Otis asserted, as recorded by John Adams: "As to Acts of Parliament. an Act against the Constitution is void: an Act against natural Equity is void: and if an Act of Parliament should be made, in the very Words of this Petition, it would be void. The Executive Courts must pass such Acts into disuse . . . Reason of the Com" Law to control an Act of Parliament."[57]

Was Otis calling for judicial review or was he making a more conventional argument to construe a statute narrowly? Commentators who champion the former view frequently rely on a much later description of the case

provided by Adams.[58] In letters written to William Tudor in 1817–18, the aged ex-President re-created the circumstances surrounding the case while breathlessly proclaiming that "the child Independence was born" the day Otis challenged the writs.[59] But it is hard to swallow Adams's report, written some fifty-six years after the fact, regarding the importance of Otis's speech to the American cause—particularly since, as other historians have noted, Otis's now-famous oratory received scant attention at the time.[60] It seems clear that Adams was using his correspondence with Tudor (who was collecting material for a biography of Otis) to indulge in a bit of late-life romanticizing: seeking to secure the place in history he thought due his old companion, his native state, and, of course, himself.[61] More damning for our purposes, Adams pursued this goal by "mak[ing] fairly free with literal fact" and "put[ting] into Otis's mouth as eloquent and impressive a discourse as could be thought up"—going so far as to depict Otis making arguments not yet imagined in 1761 and thus leading the chief historian of the *Writs of Assistance Case* to dismiss these letters as "all but valueless" in revealing what happened.[62]

Nor do Adams's contemporaneous notes provide more or better support for the conclusion that Otis argued for judicial review, as opposed to urging that the statute could be narrowly construed. Adams records Otis essentially restating the Cokean position that an act against fundamental or natural law would be void and that the common law would therefore "control" it. But why should we infer from this that Otis was arguing anything other than statutory interpretation? We have already seen how this narrower understanding of Coke was the most plausible one in the seventeenth and early eighteenth centuries, and we have no reason to believe this had changed by 1761. Why assume that a reading accessible to Coke's contemporaries and to us was not similarly accessible to Americans in the middle of the eighteenth century? Where, after all, did Blackstone get it from? Or the Massachusetts court that decided *Giddings v. Browne*? If the statutory reading seems a stretch to us today—or, to put it differently, if the judicial review reading seems more natural—could this not be because our own familiarity with judicial review makes it so? And would not the opposite have been true for Otis? Would not the narrower reading have been more natural?

There is, moreover, an additional reason for thinking that Otis, like Blackstone only a few years later, probably relied on Coke as authority for reading the statute narrowly: namely, Otis did not need to push Coke's authority farther than this because the "less sweeping" understanding of Coke "suited [his] purpose exactly."[63] The statute on which Gridley relied for the court's

authority to issue a general writ, § 5(2) of the Act of Frauds, provided that "it shall be lawful to or for any Person or Persons authorized by Writ of Assistance under the Seal of his Majesty's Court of Exchequer, to take a Constable, Headborough or other Publick Officer inhabiting near unto the Place, and in the Day-time to enter, and go into any House." The statute refers only to a "Writ of Assistance," without specifying whether the writ can be general or must be specific. This ambiguity opened the way for Otis to argue that, since allowing general writs would contravene fundamental law, the court should construe the statute narrowly to require specific grounds. Indeed, this precise position had been taken in a recently published article in the *London Magazine* that was known to everyone in the case and on which Otis relied heavily in preparing his argument.[64]

If we put the *Writs of Assistance Case* aside, or even if we do not, the most telling fact is how *little* evidence supports the idea that Coke or *Dr. Bonham* were important to Americans in developing the principle of judicial review. There are, to be sure, one or two other suggestive references to the case—a baffling passage in a pamphlet authored by James Otis in 1764,[65] and an argument made by George Mason in an obscure 1772 case.[66] But whatever one makes of these, much more impressive is how seldom Coke's authority was invoked in connection with judicial review.[67] This is particularly striking in the 1780s, when the matter was first openly argued and debated.[68] The bottom line seems to be that even if there could have been an understanding of Coke that might theoretically have provided a foundation for judicial review, in fact Coke's writings were not important in its development—apparently because this was not how the case was understood. Instead, the concept of judicial review sprang from other intellectual and political sources: sources that were themselves not judicial in nature.

The same point is true for the assorted principles of hierarchical review that already existed in colonial America. English legal practice had for centuries recognized an idea of superior and inferior law according to which courts would enforce superior laws over inferior ones, such as statutes over municipal by-laws and charters over statutes. Some commentators have assumed that these forms of review were or would have been precedent for a principle like judicial review, apparently because they assume that a constitution would have been treated as nothing more than another, albeit higher form of ordinary law—an assumption that we shall see below is misplaced. Certainly the general notion that superior forms of law trump inferior ones had a part in the concept of judicial review that substantially emerged, but it is misleading to describe these antecedent practices as a nascent or immature

form of constitutional review, which is why the were not invoked by anyone to explain or justify it.

Reconciling the existence in the eighteenth century of a constitution that was "law" with the absence of any notion that judges had a special role in determining its meaning has proved difficult for modern minds to grasp. In our world, there is law and there is politics, with nothing much in between. For us, the Constitution is a subset of law, and law is something presumptively and primarily, even if not exclusively, within the province of courts. How, then, could the customary constitution have been "law" and yet not a matter for judges routinely and specially to address? This seeming paradox has led some historians to dismiss the idea that eighteenth-century fundamental law really was law, as opposed to "ethics" or "a kind of moral inhibition or conscience existing in the minds of legislators and others."[69]

To say this, however, is to misunderstand the language and conceptual framework of eighteenth-century legal thought. Constitutional or fundamental law subsisted as an independent modality, distinct from both politics and from the ordinary law interpreted and enforced by courts. It was a special category of law. It possessed critical attributes of ordinary law: its obligations were meant to be binding, for example, and its content was not a matter of mere will or policy but reflected rules whose meaning was determined by argument based on precedent, analogy, and principle.[70] Yet constitutional law also purported to govern the sovereign itself, thus generating controversies that were inherently matters for resolution in a political domain.[71] Modern discourse has so thoroughly conflated the meaning of "constitution" with "law" and of "law" with "courts" that we no longer possess the language to describe a distinct category of this sort; the best way to capture its essence today may thus be (as one leading historian has done) to call it "political-legal."[72]

"Accountable to the Community"

Which still leaves the question: if neither judges nor legislators were responsible for interpreting and enforcing fundamental law, who was? The people themselves. Legislative power, it was said, is always "accountable to the *Community*," whose members could judge whether lawmakers had acted consistently with "the *Fundamental Rule of society*" and withhold support from measures that "Breach the *Constitution*."[73] John Dickinson expressed the basic assumption in his *Letters from a Farmer in Pennsylvania*: "Ought

not the PEOPLE therefore to watch? to observe facts? to search into causes? to investigate designs? And have they not a right of JUDGING from the evidence before them, on no slighter points than their *liberty* and *happiness*?"[74]

This was not mere pabulum; nor was it a Lockean appeal to nature after a dissolution of government. It was, rather, the invocation of a specific set of legal remedies by which "the people"—conceived as a collective body capable of independent action—were empowered to enforce the constitution against errant rulers.[75] The community itself had both a right and a responsibility to act when the ordinary legal process failed, and unconstitutional laws could be resisted by community members who continued to profess loyalty to the government and to follow its other laws.

Means of correction and forms of resistance were well established and highly structured. First and foremost, was the right to vote,[76] though this was seldom discussed prior to American independence, because even in England most controversies involved the Crown, and because citizens in the colonies did not vote for Parliament and had to resort to other mechanisms. Next in importance, though perhaps not effectiveness, was the right to petition, together with what became its corollary, the newly emerging right of assembly.[77] Publicly denouncing unconstitutional acts, explaining why they were unconstitutional, and requesting or demanding that authorities retract them were rights of considerable significance in the eighteenth century—truly fundamental, because necessary to explain, defend, and secure other rights.[78] How else, urged one 1760s pamphleteer, can authorities learn "the *real* and the *universal* sense of the people"?[79] The first phase of American resistance to the Stamp Act consisted of petitions beseeching Parliament to reject the offending legislation. It was only after Parliament ignored these petitions—worse, after it failed even to consider them—that Americans turned to more aggressive forms of resistance.[80] The right of petition (transformed by the Revolution from the humble request of a subject into a citizen's right to remonstrate) nevertheless remained an important device for the public to express its views on constitutional issues, offering government officials an opportunity to measure popular opinion and, if necessary, to change their course of action. Anti-Federalists pressed for an amendment guaranteeing the privilege,[81] which was duly incorporated into the First Amendment, and petitioning remained a prominent feature of American politics throughout the early decades of the Republic.[82]

If petitioning and pamphleteering failed to elicit a repeal, more assertive forms of resistance were available, invoked in many instances only after a formal public notice had been issued and a public meeting held.[83] The pro-

cess of governing in the eighteenth century was necessarily a local affair, and the instruments and institutions of local government were in the hands of the community. Law enforcement was practically impossible if community sympathies were strongly on the side of an alleged lawbreaker.[84] Professional police forces did not yet exist, and in most communities there was only a county sheriff and a handful of local magistrates. The ability to arrest lawbreakers depended on institutions like the "hue and cry" or, if greater force was needed, the *posse comitatus* or the militia. Even if an arrest could be made without such assistance, friends and neighbors might intervene and demand that the prisoner be released. The townspeople of Lanesborough, Massachusetts, for example, freed prisoners confined for resisting the Stamp Act and warned the sheriff against trying to apprehend anyone else. Attorney Joseph Hawley defended their action in a local newspaper, insisting that the sheriff "should have been resisted in his said exercise of arbitrary and unjust force."[85]

If a defendant could be brought to trial, successful prosecution still depended on the willingness of a grand jury to indict and a civil or criminal petit jury to find guilt. Conversely, these same juries could become a potent weapon with which to frustrate any local official foolish enough to enforce laws the community deemed unconstitutional. In 1769 a Suffolk County grand jury indicted General Thomas Gage, Governor Francis Bernard, the commissioners of the customs, and the collector and comptroller of the port of Boston "for writing certain letters to the secretary of state, and other [of] the king's ministers, and therein slandering the inhabitants of the town of Boston, and of the province of Massachusetts Bay."[86] The indictment came to naught because the prosecutor refused to proceed on instructions from London, but the same grand jury was more effective in other cases. In one instance, just as John Hancock was about to be tried and most likely convicted in a (juryless) vice-admiralty court, the Suffolk County grand jury indicted the prosecution's sole witness, who promptly fled the county, forcing the Crown prosecutor to drop the case.[87]

If, for some reason, control of local institutions was still not sufficient to bring about a change in the law, even more coercive means of popular opposition were available. Americans protested each round of British taxation by boycotting English goods; by 1768, America's Whig leadership was running a highly integrated intercolonial scheme of nonimportation agreements.[88] Imperial authorities searched in vain for arguments to declare these illegal. Even Thomas Hutchinson, the staunchly royalist governor of Massachusetts,

at one point conceded that "[t]he Combinations against importing . . . are Subversive of government, and yet are justifiable as legal."[89]

And then there was the mob, or "crowd," as historians have relabeled it to capture its rediscovered respectability. Mobbing was an accepted, if not exactly admired, form of political action—common in England and on the Continent as well as in America.[90]

Crowd action represented a direct expression of popular sovereignty, justified as a last resort in the writings of Grotius, Pufendorf, and Locke, not to mention by long tradition.[91] Indeed, custom and ancient practice were more responsible than philosophy for shaping and legitimating crowd activity. The practice of "skimmington" or "charivari"—in which local townsfolk, typically in rural areas, enforced codes of law and morality by publicly humiliating offenders to the accompaniment of catcalls, beating drums, and clanging pots and pans—had deep roots in England and Europe.[92] Transplanted to the colonies through immigration, these rituals were absorbed and politicized by urban communities in the second half of the eighteenth century, becoming critical elements of colonial opposition to imperial policy.[93]

Whether enforcing morality or law, eighteenth-century Whig mobs were generally conservative: organized to uphold community values against indifferent or ineffective public officials and illegal or unconstitutional government action. They consisted not of criminals or gangs or drunks and other riff-raff, but of what contemporaries referred to as the "middling sorts"—shopkeepers, artisans, farmers, and laborers—sometimes led by one of their own, but often led by local gentry.[94] These mobs demonstrated a "remarkable single-mindedness and discriminating purposefulness" in selecting their targets and in taking care not to inflict collateral damage.[95] After the Boston Tea Party, an "Impartial Observer" reported that no cargo other than tea had been disturbed and boasted that "such attention to private property was observed that a small padlock belonging to the Captain of one of the Ships being broke, another was procured and sent to him."[96] Mob action followed implicit, customary rules about how much violence was appropriate and which targets were permissible, making it possible for contemporaries to distinguish constitutional mob action from a simple riot.[97] The crowd observed these rules with surprising (though obviously not perfect) faithfulness, and the blame for injuries or death, when these occurred, typically lay with constituted authorities.[98] Such consequences were rare in colonial and Revolutionary America, however, for imperial government was so weak that Crown officials usually could do little more than stand helplessly by.[99]

Bear in mind that these popular remedies were neither mutually exclusive nor necessarily invoked in a particular order. Opposition tended to begin nonviolently, with protests in the newspapers or organized conventions and petitions, and to become violent only if no redress was forthcoming. But this was not always true. Americans protested Parliament's abuses by simultaneously petitioning, mobbing, interfering with regular law enforcement, and running a nonimportation scheme. In American eyes, an unconstitutional law was void, "*a mere nullity.*"[100] Public officials who sought to enforce such laws were themselves outlaws who "ought to be deemed no better than a highwayman, and should be proceeded against in due course of law."[101] Resistance through any or all of these means was thus a "political-legal" duty, enjoined on everyone in the community concerned with maintaining liberty against arbitrary power.[102]

Note, too, that while fundamental law was not part of the ordinary business or responsibility of courts, it did sometimes find its way into judicial proceedings. Though constitutional challenges were infrequent, certain aspects of the constitution, such as the role of juries or of habeas corpus, dealt directly with courts and the judicial process, and action by the executive might be reviewed as well. But courts also occasionally confronted broader questions of fundamental law in relation to litigation. This happened in two ways, both suggested above. First, *Dr. Bonham's Case* had survived as a rule of statutory interpretation, albeit modified somewhat in Blackstone's hands. Infrequently employed, it nevertheless permitted judges to take fundamental law into account and to construe a statute narrowly if it conflicted with established principles, at least as to "collateral consequences" that were not spelled out clearly in the text. This is how James Duane used *Dr. Bonham* in *Rutgers v. Waddington*,[103] and the South Carolina court did something similar in *Ham v. McLaws*.[104]

Second, lawyers argued fundamental law to juries, which rendered verdicts based on their own interpretation and understanding of the constitution.[105] This was consistent with the broad power of the eighteenth-century jury to find law as well as fact and to decide every aspect of a case.[106] Judges might instruct juries, but it was, in the words of John Adams, "not only [every juror's] right but his Duty in that Case to find the Verdict according to his own best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court."[107] Placing juries in this dominant position, Adams explained, introduced "a mixture of popular power" into the execution of the law and was thus an important protection of liberty.[108] This was particularly true when it came to fundamental law, for the jury was "the

Voice of the People,"[109] the community personified to render judgment in a particular case. Who better to ensure that fundamental law was respected? "The great Principles of the Constitution, are intimately known, they are sensibly felt by every Briton," Adams gushed, "it is scarcely extravagant to say, they are drawn in and imbibed with Nurse's Milk and first air."[110] Juries thus played an important role shaping or reshaping constitutional law, as happened, for example, in the famous trial of John Peter Zenger. Charged with seditious libel, Zenger argued that the nature of a publication as libelous was a jury question and that truthful statements could not be libelous—both arguments contrary to existing English precedent. The jury's subsequent verdict in Zenger's favor went against the court's instructions and was quickly incorporated into the Americans' understanding of fundamental law, becoming "staple elements of the colonial legal challenge."[111]

Popular Constitutionalism, circa 1765

The jury's power to address issues of fundamental law—along with voting, mobbing, petitioning, and the rest—reflects and manifests the overarching theme of the customary constitution, which was its essential character as what we might call "popular law." Fundamental law was different from ordinary law, or what we typically think of today as ordinary law, both in its conceptual underpinnings and in actual operation. It was law created by the people to regulate and restrain the government, as opposed to ordinary law, which is law enacted by the government to regulate and restrain the people. This inversion, in turn, inverted what today we take to be the usual assignment of authority to interpret and enforce. Government officials are our authoritative interpreters of ordinary law. We have indirect control over what laws the government promulgates by virtue of our ability to elect and remove most lawmakers. But once a law has been enacted, ordinary citizens assume a subordinate position relative to government officials in ascertaining its meaning and imposing sanctions. We must still decide what we think a law requires or commands—that is, we must still interpret the law to determine what obligations it enjoins. But our interpretations are mere projections, efforts to comply that lack formal legal significance or effect. If challenged, these interpretations are submitted to designated public officials (administrators, prosecutors, judges, and the like) who decide if we are right or wrong and arrange an appropriate punishment if the answer is wrong. When it comes to ordinary law, in other words, the government regulates us.

This relationship was, in effect, reversed when it came to fundamental law. "A *Constitution*," wrote Judge William Nelson of Virginia in the 1790s, "is to the *governors*, or rather to the departments of *government*, what a *law* is to individuals."[112] The object of fundamental law was to regulate public officials, who were thus in the position of ordinary citizens with respect to it and required to do their best to ascertain its meaning while going about the daily business of governing. But their interpretations were not authoritative. They were now the projections, subject to direct supervision and correction by the superior authority of "the people"—conceived in this context, it should be remembered, as a collective body capable of independent action and expression. It was this inversion of interpretive authority, this turning upside-down of the structure of legal interpretation that accounted for the various features of fundamental law described above: its uncertain content, its fluid modes of revision, and its varied popular enforcement mechanisms.

What emerges is a constitutional system that was self-consciously legal in nature, but in a manner foreign to modern sensibilities about the makeup of legality. For us, legality is crucially (though, of course, not solely) a matter of authority. We expect to find a rule of recognition that assigns someone the power to resolve controversies with a degree of certainty and finality: so at the end of the day we have something we can point to and say "yes, *that* is the law." Eighteenth-century constitutionalism was less concerned with quick, clear resolutions. Its notion of legality was less rigid and more diffuse—more willing to tolerate ongoing controversy over competing plausible interpretations of the constitution, more willing to ascribe authority to an idea as unfocused as "the people." It was, as Christine Desan has recently observed, a system "in which many actors participated in determining law," and in which processes we think of today as only and necessarily "political" were understood by participants "to produce *legality* as opposed to acts of will, power, or grace."[113]

This system of constitutionalism rested and relied on a culture in which public officials, community leaders, and ordinary citizens believed in a distinction between law and politics, shared a set of conventions about how to argue within each domain, and took seriously the role difference thus produced. Desan names this "the public faith" and describes it as a "commitment that bound members of a political community together," a commitment ultimately perpetuated and enforced in the public sphere through continued participation (or not) in the life of the community.[114] John Reid, who has done the most to help us recover this system's formal structure and language, refers to it as "Whig law"—a set of understandings and conventions about

rights and liberty that, as we have seen, yielded a framework for argument rather than a fixed program of identifiable outcomes.[115]

What is most critical is understanding that participants in this culture took seriously the distinction between fundamental law and mere politics and responded to different arguments in each setting, giving the community at large a credible interpretive voice when it came to the constitution. Problems of fundamental law—what we would call questions of constitutional interpretation—were thought of as "legal" problems, but also as problems that could be authoritatively settled only by "the people" expressing themselves through the popular devices described above. Constitutional law in such a setting might sometimes be hard to identify, but this uncertainty seems not to have troubled anyone overmuch. Ultimately, the constitution was, as Reid argues, "whatever could be plausibly argued and forcibly maintained."[116]

To modern ears, it undoubtedly sounds paradoxical to speak of a system of law in which the law is nothing more than that which can be "plausibly argued and forcibly maintained." What kind of legal system is that, particularly coming from a people celebrated for its supposed commitment to "an empire of laws and not men"?[117] It is this tension that presumably lies behind the judgment of so many historians to disregard the insistence of eighteenth-century writers that this was law and to demote their constitution to the status of ethics or morality.

Yet this popular constitutionalism may be less foreign than it seems at first. Legal philosophers have long recognized, as lawyers and judges already knew instinctively, that determining the content and meaning of a functioning constitution—any constitution—inevitably presents problems of uncertainty.[118] And while such problems were potentially or theoretically widespread given the diverse sources of eighteenth-century constitutional law, in practice everything was hardly open or uncertain. On the contrary, as noted above, there was consensus on a wide range of issues. The customary constitution was, in this sense, neither better nor worse, neither more nor less settled, than other bodies of customary law whose status as law has seldom been questioned.

The real difference, it seems, is less the content of the customary constitution or the extent to which it was unsettled than the notion that constitutional interpretation and enforcement were left to the community. Most modern legal scholars and political commentators assume that leaving questions of constitutional law to the community as ultimate decision maker would destabilize a legal order. They might even be right, but this is an empirical rather than a theoretical claim. Those who make such an assump-

tion presumably base it on the world with which they are familiar, our world, in which a constitutional system like that of seventeenth- and eighteenth-century Great Britain may seem almost fanciful. Yet this order existed and worked tolerably well for more than a century and a half before the American Revolution occurred. In saying this, we need not follow Burke by ignoring the bloody years of the Civil War and Interregnum. But one is hard put to point to another system, even in the modern era, that has worked longer or better, which is why the British constitution was so widely admired among enlightened eighteenth-century Europeans. And our own Civil War stands as a reminder of the need to avoid smugness.

A question nags: how did they do it? Certainly the modern assumption makes intuitive sense, and not only to us today. In *Federalist 49*, James Madison cautioned against "a frequent reference of constitutional questions, to the decision of the whole society," because he worried that such appeals could "deprive the government of that veneration . . . without which perhaps the wisest and freest governments would not possess the requisite stability."[119] We will see in the next chapter how America's Founders, including Madison, dealt with problems of constitutional interpretation and enforcement (though, without looking too far ahead, we can say that it was not by embracing a modern doctrine of judicial review). In the meantime, one wonders how the customary constitution lasted as long as it did.

Developing a complete answer to this question is a topic beyond the scope of the present inquiry. For our purposes, what matters most is that this system *did* last and that it provided the context within which American constitutionalism developed after the Revolution. A few, fairly obvious factors should be acknowledged, however, for they are relevant to what comes later.

First, opportunities for constitutional conflict were limited. The scope of the eighteenth-century British constitution was narrow, at least in comparison to modern constitutions. Its terms were spare (though not necessarily uncomplicated), and the space it purported to occupy was relatively uncrowded—again, by comparison to what came later. The main points of contention, the relationship of Crown to Parliament and of church to state, had been settled in compromises that were widely accepted. Plus, demands on government were modest, further reducing the number of controversies likely to arise. According to Whig theory, the main task of a representative assembly was defensive: checking arbitrary action by the Crown, rather than governing through legislation.[120] For most of the eighteenth century, Parliament did not do that much, especially at home.[121] What laws it passed were typically instigated by individual petitions seeking redress of a particular

grievance or permission to undertake some local activity, meaning that "[t]he great mass of legislation was personal and local in scope, largely consisting of enclosure bills, turnpike and canal bills, and naturalization bills."[122] This inactivity was more pronounced and lasted longer in the colonies than in the mother country.[123] At the time of the American Revolution, the notion that lawmaking should be the chief activity of a representative assembly was just beginning to find acceptance.[124]

Second, social and political deference (not to mention economic dependence) of the masses to a relatively homogeneous elite helped to keep the number of disputes down; this same deference and dependence also worked to ensure that, when problems arose, things did not spin too far out of control.[125] We must be careful not to overstate either the extent of deference or the degree to which the ruling elite was homogeneous, for this was an exceedingly complex system.[126] Members of the laboring classes were hardly automatons, particularly in the colonies.[127] Officeholding may have been "securely in the hands of upper-class groups,"[128] but the conventions that secured their dominance rested on cultural and ideological understandings that limited as well as empowered.[129] There were, moreover, schisms and divisions within the aristocratic classes that controlled politics and government—divisions manifested in such ways as the persistence of Whig and Tory factions, the rise of competition for office, and the emergence of a radical critique bewailing constitutional "corruption" and decline.[130] Still, radicalism remained at the fringes, and the ruling aristocracy was generally effective when it came to protecting its broadly shared interests in keeping conflict to tolerable levels.[131]

Mainly, however, the customary constitution worked because people believed in it: because they accepted its premises and were willing to live up to the roles it assigned them. This was not an act of free will or self-conscious choice—no more, anyway, than our own belief in a very different kind of constitution was freely chosen. The customary constitution made sense to people in the eighteenth century. It made sense because it fit the world they had inherited and the world they experienced. It would not have occurred to them to question whether such a system was possible because it was all around them and because its very existence shaped their understanding of the possibilities. Edmund Morgan made essentially this point in *Inventing the People*:

> Government requires make believe. Make believe that the king is divine, make believe that he can do no wrong or make believe that the

voice of the people is the voice of God. Make believe that the people *have* a voice or make believe that the representatives of the people *are* the people. Make believe that governors are the servants of the people. Make believe that all men are equal or make believe that they are not.

The political world of make-believe mingles with the real world in strange ways, for the make-believe world may often mold the real one. In order to be viable, in order to serve its purpose, whatever that purpose may be, a fiction must bear some resemblance to fact. If it strays too far from fact, the willing suspension of disbelief collapses. And conversely it may collapse if facts stray too far from the fiction.[132]

Morgan's model is a familiar pragmatist one. The social world is constructed of and by a web of beliefs and practices. We choose our practices in light of beliefs about whether the practices are good or bad, yet we understand the content and meaning of these same beliefs only as refracted through the practices they purport to explain. The process is one of moving constantly back and forth, resolving whatever tensions we uncover on a piecemeal basis. As Don Herzog explains, "[w]e confront anomalies within our beliefs, within our practices, and most important in the relationships between the two. And our goal is always to make the broader web of beliefs and practices as coherent as we can."[133]

What may seem anomalous to us, however, did not seem so to people in eighteenth-century England and America. To them, belief in a customary constitution that limited the government and was enforced by the people themselves made sense. This belief was neither fact nor fiction. It was an interpretation: a strategy to explain the world they experienced, but one that, at the same time, helped shape that world. It was not until something about their practices or their beliefs, or both, had changed that they would have any reason to doubt.

2

A Rule Obligatory upon Every Department

THE ORIGINS OF JUDICIAL REVIEW

* * *

The foregoing description of eighteenth-century constitutionalism is misleading in one respect: it privileges a version embraced by American Whigs. Their understanding was at one time close to that held by Whigs in England, but Englishmen and Americans faced different problems and had to address their problems in different institutional settings. Not surprisingly, they came over time to see the customary constitution through different lenses.[1] The concept of fundamental law in the mother country and in the colonies diverged, evolving gradually in England into the system of legislative sovereignty so famously celebrated by Blackstone.[2] This development was by no means unheeded or unopposed, and pockets of resistance could be found even in London well into the nineteenth century.[3] But holdouts were few in number, and by the middle of the eighteenth century the orthodox view in England located sovereignty in Parliament rather than in the people out-of-doors. And with this development, the tradition of constitutionalism described earlier began to lose its grip, particularly the idea of "legal" resistance to unconstitutional legislative measures. This is why many in England were genuinely puzzled, and not merely angered, by the rebellion in America.[4]

Americans Whigs never accepted the idea of parliamentary sovereignty. For them, the Glorious Revolution was both a reaffirmation of popular

sovereignty and a confirmation of the continuing viability of the customary constitution as a check on government.[5] The colonists were informed about events across the Atlantic, but conveniently inattentive to their potential significance. They managed, through impressively persistent and clever political maneuvering, to keep both king and Parliament at bay and so to avoid any major confrontations until the early 1760s.[6] By then, six decades of nearly continuous war had strained even the powerful British finance system, and Britain needed money.[7] Parliament cracked down on smuggling and tried to force the colonies to bear a reasonable share of the expenses of empire.[8] Americans awoke, startled and anxious, to discover that they could no longer ignore their differences with Britain. Within a decade, and much to their own amazement, they found themselves declaring independence.

"In Order to Support Its Fundamental, Constitutional Law"

We need note only two things about the controversies leading up to 1776. First, the period 1763–76 consisted of a series of disagreements about the meaning and proper interpretation of the customary constitution.[9] This does not mean that the Revolution was caused by these disagreements. An event this wrenching—one that shredded lifelong community bonds, that forced colonials to reconstitute their identities, to abandon their Britishness and become "Americans"—plainly had multiple and complex causes: social, cultural, economic, and political, as well as legal. But the triggering events in the eyes of the Americans themselves consisted of Great Britain's persistent and repeated efforts to deprive them of what they viewed as their constitutional rights. Writing in 1824, an aged Thomas Jefferson romantically credited the American Revolution to the laws of nature. "We had no occasion," he mused, "to search into musty records, to hunt up royal parchments, or to investigate the laws and institutions of a semi-barbarous ancestry."[10] Yet the influential *Summary View of the Rights of British America* that Jefferson penned in 1774 did precisely that, and it reads just like a lawyer's and a historian's brief asserting the legal and constitutional rights of Americans.[11] This is equally if not more true of the more famous Declaration that Jefferson authored two years later. John Reid rightly brands the claim that American independence was based on natural law "one of the most widely repeated errors of American history":

> Anyone giving a reasonable reading to the entire Declaration of Independence, not just to the rhetorical preamble where "nature and nature's

> God" are mentioned, will readily see that document accused the King of Great Britain of violating only the legal and constitutional rights of American colonists. It did not, in a single instance, accuse George III of violating a natural right. In fact, natural law was never cited by an official colonial governmental body to identify a right claimed, except rights that were also claimed as constitutional rights. Natural law simply was not a significant part of the American whig constitutional case; certainly not nearly as important as some twentieth-century writers have assumed.[12]

The colonists made their case and presented their grievances in legal and constitutional terms right up to and including the moment they declared independence, seeing themselves always as defenders of ancient liberties and the British constitution from the malefic scheming of corrupt imperial authorities. America became an independent nation, James Varnum observed a few years later, only "in order to support its fundamental, constitutional law, against the encroachments of Great Britain."[13] This matters, because it tells us what to look for in examining the constitutions Americans created after the Revolution. It was a rebellion in defense of a concept of constitutionalism, a concept Americans did not suddenly decide to abandon or repudiate upon achieving independence.

A second point to note about the Revolution is that American opposition to England was not only defended and justified in terms of the British constitution: it was also waged on such terms. What Americans did, as well as how they explained their actions, offers a detailed portrait of the eighteenth-century customary constitution in action. A crucial check was missing, inasmuch as Americans had no actual or even virtual representation in Parliament and so could not use elections or instructions to affect imperial policy.[14] Lacking the ability to change law peaceably from within, Americans resorted to the full array of alternatives—peaceable and otherwise—for combating unconstitutional government action. They were successful for a time, too. The Stamp Act was repealed, and Britain's every other effort to tax or regulate was either similarly withdrawn or effectively disabled by local opposition.

Unfortunately, because London viewed American resistance as illegitimate and illegal, it kept raising the stakes—culminating eventually in the Coercive Acts (or, as Americans called them, the Intolerable Acts), which led the colonies to invoke their ultimate right of revolution. Yet the Declaration of Independence was less a failure of constitutional process than evidence of

genuinely irreconcilable differences: differences so little understood by the combatants on either side that their repeated efforts to bridge the gap only succeeded in making it wider. For our purposes, in any event, we need simply to observe that Americans saw themselves as having conducted a struggle to preserve constitutional rule through the use of constitutional forms of opposition.

We might also note that no one, at any time, seems ever to have considered bringing these constitutional disputes before a judge to have them settled—a point so obvious one would be embarrassed to mention it, but for the need to underscore the absence of anything resembling modern judicial review before the Declaration of Independence. Constitutional issues did crop up in a few court proceedings, usually as arguments to a jury.[15] Such arguments were an accepted feature of the customary constitution, an appeal to "the Voice of the People" and so an instance of the same "political-legal" opposition to unconstitutional laws as that engaged in by Whig mobs or by merchants enforcing nonimportation agreements.

In at least one instance, moreover, the call for resistance in the courtroom extended beyond jurors to include the judges as well. Most of the documents that required stamps under the Stamp Act were for use in legal proceedings. Whig mobs could (and did) ensure that stamped paper was unavailable, but the efficacy of their action would be blunted if the courts responded by shutting down, since this could be interpreted as signaling the judiciary's acceptance of the Act's constitutionality. "A suspense from business implies a tacit acquaintance [i.e., recognition] of the law," worried Charles Carroll of Carrollton, "or at least the right of the power of imposing such laws upon us."[16] Opposition leaders therefore urged judges to join their protest instead, by remaining open and conducting business without stamped paper.[17] Because the Stamp Act is "utterly void, and of no binding Force upon us," the Whigs of Boston reasoned, "therefore in a legal sense we know Nothing of it."[18] It followed that "therefore [the judges] should pay no Regard to it."[19] Similar entreaties were made throughout the colonies.[20]

The argument met with only limited success,[21] mainly because lawyers and judges feared that "if the Parliament of England should determine to force the Act down our Throats, they would immediately set Prosecutions on foot against the principal civil-officers who had ventured to risque the Penalties."[22] But lack of success in persuading judges to embrace civil disobedience and risk punishment at this early stage is less significant than what the argument portended for the future. For here we see the beginnings of something that would subsequently evolve into a first approximation of judicial review:

an argument that judges, *no less* than anyone else, should resist unconstitutional laws. This obligation did not arise from any special competence the judges possessed as judges, and it certainly was not based on the notion that constitutional law was ordinary law subject to judicial control. It was, rather, simply another instance of the right of every citizen to refuse to recognize the validity of unconstitutional laws—a "political-legal" duty and responsibility rather than a strictly legal one.

"The People Themselves . . . Can Alone Declare Its True Meaning"

Many things started to change after the colonies declared their independence. With respect to constitutional law, the most important turn was, of course, the drafting of new constitutions in the states. This was a legal as well as a practical necessity because, by proclaiming independence, Americans had abrogated their existing constitutions—not just the imperial constitution that governed relations with England, but also each individual colony's internal constitution, which was embodied in a charter granted by the Crown.[23]

Some Americans had begun to question the continued authority of royal government even before July 4. "The Continuing to Swear Allegiance to the power that is Cutting our throats is Certainly absurd," offered Caesar Rodney of Delaware.[24] In making American independence official, however, the Continental Congress left no doubt that every trace of imperial authority was to be effaced. On May 15, 1776, the delegates smoothed the way for their more famous declaration of July 4 with a resolution recommending the establishment of new state governments. The preamble declared that it was "necessary that the exercise of every kind of authority under the said crown should be totally suppressed, and all the powers of government, exerted under the authority of the people of the colonies."[25] The initial reason for preparing written constitutions was thus to fill a gap created by having renounced allegiance to the Crown.

It followed that the main order of business was to replace what had been abolished by reestablishing the basic structures needed to govern: new legislatures, new executives, and new judiciaries. A few states added Declarations of Rights, while others embedded rights in the text, the more clearly to establish and expand upon the fundamental liberties that Great Britain had tried to deny them.[26] At the level of structuring institutions, radical experiments were tried in "new-modeling" state government—mostly things that

had been well-mooted in the Revolutionary and pre-Revolutionary pamphlet literature but never before tried in practice. The new states were all to be republican, of course; there would be no kings or nobles in the United States. The executive power was drastically limited, with most authority transferred to the popularly elected lower houses of the legislature (the body that, at the time, was thought most trustworthy in safeguarding liberty). Pennsylvania, followed for a short time by Georgia and Vermont, went so far as to eliminate an upper house altogether, establishing unicameral legislatures subject to frequent election. Other innovations were also tried, varying from state to state, but including such measures as a broadened suffrage, explicit guarantees of the right to instruct, required rotation in office, and a formal process for revising the constitution.

These were, beyond doubt, momentous changes. The various experiments in institutional form, not to mention ongoing debates about such issues as how to adopt and change a written constitution, testify to how earnestly Americans in this period wrestled with basic problems of constitutional formation and meaning. Historians disagree about how quickly they came to a robust and mature understanding of what it meant to create a written constitution, but all agree that the change thus produced in their thinking was profound.[27]

At the same time, and equally important though too often ignored, is what did *not* change. The men who crafted new state constitutions were building on an existing heritage: a theory and practice of constitutionalism many of whose fundamental premises were undisturbed. Far from being overturned, these premises continued to be taken for granted. Americans did not for the first time abruptly realize the benefits of having a constitution in 1776, nor did they write constitutions out of some newly discovered desire to have written charters or a sudden appreciation of the advantages of a central text. New constitutions were needed in the states to replace those parts of the old ones that had been abrogated, to substitute new institutions for institutions that no longer worked or did not fit republican ideals. But the texts were situated within an established constitutional tradition, and they took their place alongside existing practices and understandings, many of which remained viable.[28]

For this reason, Connecticut and Rhode Island concluded that they did not even need new constitutions, because their existing charters already provided for the popular election of statewide officers. Lacking any necessity to replace royal officials or fabricate new institutions, these former colonies needed only to establish that their existing governments rested on the consent of the people and not the authority of the Crown. This was achieved in Connecticut by means of an ordinary statute confirming that the charter was still in effect, while Rhode Island resolved to substitute the name of the state for that of the king on official documents.[29] That accomplished, the traditional constitutional practice was simply continued in both states, and not until well into the nineteenth century did either replace its charter.

Evidence abounds of the ongoing vitality of the customary constitution after the Declaration of Independence and drafting of new state constitutions. The most obvious indication of the viability of its substantive principles is, ironically, the lawyers' arguments and judges' opinions in some of the earliest cases purporting to exercise judicial review (to which we will return below). In the 1780 case of *Holmes v. Walton*, the New Jersey Supreme Court relied on seventeenth-century sources and traditions respecting the "Laws of the Land" in refusing to apply a state statute that required loyalists whose property had been seized to challenge the seizure before a six-person jury.[30] And in *Trevett v. Weeden*, James Varnum cited Norman precedent in urging the court to accept jurisdiction to decide whether a statute denying trial by jury altogether violated the state's constitution.[31] Responding to a claim that Rhode Island did not have a constitution, Varnum snarled, "Constitution!—We have none:—Who dares to say that?—None but a British emissary, or a traitor to his country."[32] Varnum cited a 1663 colonial statute providing for trial by jury and explained: "This act . . . was not creative of a new law, but declaratory of the rights of all the people, as derived through the Charter from their progenitors, time out of mind. It exhibited the most valuable part of their political constitution, and formed a sacred stipulation that it should never be violated."[33]

Additional examples abound. A series of South Carolina cases turned on Magna Carta, including one in 1792 that invalidated a land grant under its authority.[34] Oliver Ellsworth opposed a prohibition on ex post facto laws in the Federal Convention because "there was no lawyer, no civilian who would not say that ex post facto laws were void of themselves. It cannot be necessary to prohibit them."[35] James Wilson went a step further, saying that to include such a prohibition would "bring reflexions on the Constitution—and proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so."[36] As William Treanor has shown, reasoning of this sort—extratextual and based on custom and tradition—was a pervasive feature of constitutional argument in the 1780s and 1790s.[37] Other scholars have traced the use of such reasoning well beyond that into the nineteenth century.[38]

Failure to appreciate the persistence of the customary constitution after the Revolution has led modern scholars to misunderstand or misinterpret important events of the Founding era. Consider the now-famous debate between Justices Chase and Iredell in the 1798 case of *Calder v. Bull*.[39] The Connecticut legislature had set aside a probate decree in Bull's favor and ordered a new trial. A unanimous Supreme Court rebuffed Bull's argument that this act violated the Ex Post Facto Clause of the Federal Constitution, which the Court said was limited to criminal legislation. In the course of his opinion, Justice Chase observed in dictum: "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."[40]

Agreeing with Chase on the outcome of the case, Justice Iredell nevertheless repudiated his colleague's account of judicial authority. Some "speculative jurists" may have reasoned that "a legislative act against natural justice must, in itself, be void," Iredell conceded, but it did not follow that "any Court of Justice would possess a power to declare it so."[41] Because "[t]he ideas of natural justice are regulated by no fixed standard" and "the ablest and the purest men have differed upon the subject," judges could have no basis for preferring their understanding of its "abstract principles" to those of the Legislature. Judicial review was limited to written constitutions, which "define with precision the objects of the legislative power" and "restrain its exercise within marked and settled boundaries."[42]

Modern scholars have frequently wondered about Chase's seeming embrace of natural law as an independent ground for judicial invalidation of legislation, finding Iredell's text-bound positivism more familiar and comforting. Some simply refuse to believe that Chase departed from the modern tenet that constitutional principles must be derived, either directly or indirectly, exclusively from the text. John Hart Ely worked zealously to bring Chase into the fold, insisting that Chase recognized "no judicially enforceable notion of natural law other than what the terms of the Constitution provide"; Chase's reference to "great first principles," Ely concluded, meant no more than principles "embodied in our Constitution."[43] Other scholars think Ely's interpretation forced, unperturbed to find that Chase was measuring Connecticut's law against natural justice as well as the Constitution.[44]

As we saw in chapter 1, however, while few lawyers in the eighteenth century doubted either the existence of natural law or the importance of nature as a source of rights, these rights were rarely conceived as having

positive authority independent of their incorporation into fundamental law.[45] Arguments based on natural law were part of a centuries-old constitutional tradition that presumed a concordance between principles of the customary constitution and those of natural law, enabling legal actors to draw interchangeably on both. The arguments thus remained grounded in a kind of positive law, albeit one based on custom, prescription, and implicit popular consent. This, in fact, was Chase's position, for he said, after elaborating with examples of laws contrary to "great first principles":

> It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The *genius*, the *nature*, and the *spirit*, of our State Governments, amount to a prohibition of *such acts of legislation*; and *the general principles of law and reason* forbid them. . . . To maintain that our Federal, or State, Legislature possesses *such powers*, if they had not been *expressly* restrained; would, in my opinion, be a *political heresy*, altogether inadmissible in our *free republican governments*.[46]

This distinction between fundamental and natural law may seem overly fine to modern sensibilities, particularly as contemporary actors felt so little compunction to emphasize it. The point, however, is not to apologize for eighteenth-century constitutionalism so much as to identify its features and show how these help us to understand better the basis of Chase's position. Chase's argument fit squarely within the customary constitutional tradition, and his opinion evidences its persistence after the Revolution and the adoption of written texts.

Iredell's response should similarly be understood through this lens. For Iredell does not deny that laws against "great first principles" are void; he denies only that such laws can be declared so by courts. The newfangled practice of judicial enforceability, in Iredell's view, is a product of (and so limited to) written constitutions—a point to which we will return later.

The decision to include the Ninth Amendment in the Bill of Rights can also be explained by the continued vitality of principles derived from the customary constitution. Modern commentators are often baffled by this amendment, which too many mistakenly conclude was meant to preserve some ill-defined body of natural rights.[47] Once again, however, natural law was a source of enforceable positive rights only in conjunction with and through incorporation into the customary constitution. Rights under this constitution were drawn from a variety of sources, moreover, of which natural

law was only one, and not necessarily the most important one at that.[48] The most logical reading of the Ninth Amendment's reference to "other" rights "retained by the people," then, is to rights already or potentially secured within the customary constitutional tradition.[49]

Of greater interest than these legal arguments is the persistence of the customary constitution's methods of popular enforcement—evidence that constitutions continued to be seen in their traditional light, as a form of popular and not ordinary law. In his 1791 "Lectures on Law," for example, James Wilson described how the most powerful force in government, the legislative power, was controlled in the American system:

> The effects of its extravagancies may be prevented, sometimes by the executive, sometimes by the judicial authority of the governments; sometimes even by a private citizen, and, at all times, by the superintending power of the people at large. . . . [T]his general position may be hazarded—That whoever would be obliged to obey a constitutional law, is justified in refusing to obey an unconstitutional act of the legislature—and that, when a question, even of this delicate nature, occurs, every one who is called to act, has a right to judge: he must, it is true, abide by the consequences of a wrong judgment.[50]

Numerous instances of popular enforcement could be cited (for politics in the 1780s and 1790s was often an unruly affair),[51] but the point is sufficiently illustrated by an example involving the Virginia judiciary. In 1788 the state legislature enacted a law requiring judges of the court of appeals to sit on a newly created district court. The judges concluded that this amounted to a constitutionally prohibited diminution in their salary. They refused to appoint clerks (making it effectively impossible to transact business) and issued "The Respectful Remonstrance of the Court of Appeals," drafted by Chancellor Edmund Pendleton.[52] Formally addressed to the General Assembly, it was in reality written for the benefit of the public. The Remonstrance laid out the judges' concerns about the law and appealed to state legislators to rectify their error. Failing that, the judges concluded:

> They see no other alternative for a decision between the legislature and judiciary than an appeal to the people, whose servants both are, and for whose sakes both were created, and who may exercise their original and supreme power whensoever they think proper. To that tribunal, therefore, the court, in that case, commit themselves, conscious of perfect integrity in their intentions, however they may have been mistaken in their judgment.[53]

The legislature responded by suspending the challenged act and passing a new court reorganization law designed to meet the judges' objections.[54]

The content of the Remonstrance (not to mention its mere existence) embodies and perfectly reflects the basic structure of popular constitutionalism described earlier—particularly the inversion of interpretive authority that distinguished constitutional law from ordinary law. The legislature and the judiciary are, the remonstrants say, the people's "servants." As such, acting with proper intentions and exercising their best judgment, they must try to comply with the constitution. If conflicts arise, however, it is "the people" who constitute the authoritative "tribunal" to whom such conflicts must be submitted. And make no mistake: this was neither empty rhetoric nor a veiled threat of revolution. It was the invocation of a very real, very available legal remedy, albeit one not to be called upon lightly.

This view of the people's role in constitutional law pervaded political and legal debate throughout the 1780s, and it remained the dominant understanding until well into the nineteenth century. It is this conception, for example, that lay behind Jefferson's proposal, in his 1783 draft of a constitution for Virginia, to permit the calling of a convention whenever "[a]ny two of the three branches of government concur[] in opinion . . . that a convention is necessary for altering this constitution, *or correcting breaches of it.*"[55] Jefferson hoped by this means to formalize the people's role in supervising constitutional law while at the same time bringing some regularity to the process.

Madison went out of his way to criticize his friend's proposal in *Federalist 49–50*, and we should take a moment to examine Madison's argument, if for no other reason than it was among the most elaborate statements on popular constitutionalism of the Founding era.[56] In these oft-quoted essays, Madison surprisingly argued against popular participation in interpreting and enforcing a constitution: a position that resonates with scholars today, who tend to be skeptical of robust democratic participation, especially when it comes to matters of fundamental law. Yet it would be wrong to read Madison as repudiating or disavowing popular constitutionalism. Quite the contrary, as a careful reading makes clear, Madison—like Jefferson, like everyone else at the time—took the principle for granted. His quarrel was not with the idea of popular constitutionalism, but with how best to make it operational.

Consistent with views expressed throughout his lifetime, Jefferson wanted popular politics to be the first and major line of defense in securing consti-

tutional limits. Madison disagreed, and he offered three pragmatic objections by way of explanation. First, as we saw in chapter 1, he worried that a too-frequent appeal to the people would "deprive the government of that veneration, which time bestows on every thing, and without which perhaps the wisest and freest government would not possess the requisite stability." Second, he said, "[t]he danger of disturbing the public tranquility by interesting too strongly the public passions, is a still more serious objection against a frequent reference of constitutional questions, to the decision of the whole society." But "the greatest objection of all," according to Madison, was that the people could not be trusted because they would invariably side with the legislature in any conflict:

> The members of the legislative department . . . are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship and of acquaintance, embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people. With these advantages, it can hardly be supposed that the adverse party would have an equal chance for a favorable issue.[57]

It is worth noting that these arguments were penned in February of 1788, when Madison's anxiety about popular politics and elected legislatures was at its peak. Having recently completed three frustrating years in the Virginia assembly, Madison was thoroughly disgusted with politics as it was then being practiced in his state.[58] His correspondence from these years bristles with contempt for legislators who lack "liberality or light" and barely suppressed fury at "those who mask a secret aversion to any reform under a zeal for such a one as they know will be rejected."[59] It was at this moment, still angry and bruised by his lack of success as a state legislator, that Madison led the movement to adopt a national constitution. The point deserves mention because scholars have too seldom appreciated that Madison's feelings about republican politics in the years immediately following this unhappy experience were uncharacteristically pessimistic. Madison never wholly abandoned his fear of unbridled populism or legislative aggrandizement, but his alarm diminished in intensity over time—especially after he saw what someone like Alexander Hamilton could do with executive power if left unchecked by the people.[60]

Yet even in 1788, when the perilousness of popular politics loomed largest in Madison's eyes, he recognized that constitutional disputes could not

ultimately be resolved "without an appeal to the people themselves, who, as grantors of the commission, can alone declare its true meaning and enforce its observance."[61] This was not inconsistent with Madison's simultaneous rejection of Jefferson's proposal, which Madison regarded as unworkable. He felt that Jefferson failed adequately to appreciate just how ticklish constant unmediated appeals to the people could become. The trick, as Madison saw it, was to devise a system that would reduce the need for such appeals—a problem he thought could be solved at the national level (he went on to explain in *Federalist 51*) by institutional design, that is, "by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[62] This meant, in particular, such things as extensive size, bicameralism, an executive veto, and federalism.[63] Through such means, Madison reasoned, ambition could be made to counteract ambition, most constitutional usurpations could be checked at their inception, and resort to the people would be necessary only on "certain great and extraordinary occasions."[64]

Madison was typical of Federalist leaders in this respect. The men who led the campaign for a new Constitution were not fans of the people out-of-doors; they preferred a more sedate style of politics, safely controlled by gentlemen like themselves.[65] Signs of popular unrest, of which Shays's Rebellion was only the most famous example, made them nervous. Their hope, and the impetus behind their reform effort, was to devise institutional solutions that could discourage these frequent popular interventions by "refining" them or otherwise rendering them unnecessary.

Yet that is a far cry from being anti-democratic. "A dependence on the people is no doubt the primary controul on the government," Madison wrote in *Federalist 51*.[66] Structural innovations were just "auxiliary precautions," contingent devices to forestall conflict, not an abandonment of the more basic commitment to popular constitutionalism. Certainly the Father of the Constitution never wavered in his belief that final authority to resolve disagreements over its meaning must always rest exclusively with the people. As he reiterated in 1789, during the debate over the President's removal power:

> There is not one government on the face of the earth, so far as I recollect, there is not one in the United States, in which provision is made for a particular authority to determine the limits of the constitutional division of power between the branches of the government. In all systems there are points which must be adjusted by the departments themselves, to which no one of them is competent. If it cannot be

> determined in this way, there is no resource left but the will of the community, to be collected in some mode to be provided by the constitution, or one dictated by the necessity of the case.[67]

Christopher Wolfe observes, rightly it seems, that Madison meant the amendment process when he referred to a "mode . . . provided by the constitution," and elections, impeachments, and other forms of political action when he referred to a mode "dictated by the necessity of the case."[68]

Recall, too, that Madison was not wholly allergic to popular appeals even in 1788. *Federalist 49–50* dealt only with "keeping the several departments of power within their constitutional limits"[69]—that is, with separation of powers within the federal government. As we have seen, Madison worried that appealing to the people in this context would fail because the community would too often back the legislature, encouraging it to draw ever more power into its "impetuous vortex."[70] In sharp contrast, Madison embraced the potential for appealing to the people when it came to keeping the new federal government from swallowing the states. In the context of federalism, Madison no longer feared that conventional forms of popular constitutionalism might work against the Constitution's design, because—as he explained in *Federalist 45–46*—"the first and most natural attachment of the people will be to the governments of their respective states," thus according states complete security from any risk of federal overreaching.[71]

Countless other examples can be cited similarly attesting to the persistence of popular constitutionalism in the early Republic. The people's interpretive authority—their active control over the meaning and enforcement of their constitutions—is what James Wilson had in mind in 1787, when he exulted that "the people possess, over our constitutions, control in *act*, as well as in right."[72] It is what John Randolph meant when he insisted, in 1802, that while the branches may try to check one another, the people control the constitution through elections, "the true check; every other check is at variance with the principle, that a free people are capable of self-government."[73] "[A]n appeal . . . through the elections," Randolph explained, ensured that constitutional limits on power were interpreted by "the nation, to whom alone, and not a few privileged individuals, it belongs to decide, in the last resort, on the Constitution."[74] It is what President James Madison was referring to in 1815, when he declined to veto the bill establishing a Second Bank of the United States on constitutional grounds, because—though his own views of its unconstitutionality remained unaltered—the matter was "precluded . . . by repeated

recognitions under varied circumstances of the validity of such an institution in the acts of the legislative, executive, and judicial branches of the Government, accompanied by indications . . . of a concurrence of the general will of the nation."[75] And it is why, in 1819, Thomas Jefferson could, without being the least bit ironic, describe his own election two decades earlier as "the revolution of 1800."[76] The great controversies of the 1790s had been *constitutional* controversies: the power to incorporate a bank or encourage manufactures, the question of neutrality, the proper handling of the Whiskey Rebellion, the Jay Treaty, the Alien and Sedition Acts, the election deadlock—these all raised or were entangled in constitutional questions. The issues before the country in these years were *constitutional* issues: strict versus broad construction, federal versus state power, the existence or not of federal common law, the meaning of freedom of the press. The escalating party struggles of the 1790s were, in Jefferson's eyes, an extended national referendum on whose views of the Constitution were correct, a referendum that reached its climax in the fiercely contested election of 1800. The people's unequivocal choice in that election had been for Republican principles and the Republican Constitution. Jefferson was thus being both literal and sincere in calling the rejection of Federalism:

> [A]s real a revolution in the principles of our government as that of 1776 was in its form; not effected indeed by the sword, as that, but by the rational and peaceable instrument of reform, the suffrage of the people. The nation declared its will by dismissing functionaries of one principle, and electing those of another, in the two branches, executive and legislative, submitted to their election.[77]

Popular Constitutionalism, circa 1786

The continued vitality of these traditional constitutional understandings and practices—particularly the understanding of constitutions as popular rather than ordinary law—is hardly surprising. Firmly rooted beliefs and deep-seated background assumptions seldom change quickly. Certainly they never do so unless something specifically forces those who share them to undertake a reexamination. If anything, however, the opposite was true of the American Revolution: its whole point had been, in a sense, to affirm the principles of popular sovereignty and the customary constitution. Nevertheless, the practicalities of reestablishing government after independence inevitably

produced changes and exerted pressure on existing understandings and practices of fundamental law. Four factors, in particular, were significant in this respect, and from these emerged the first concept of something recognizable as true judicial review.

First, with independence came responsibility to govern. Suddenly, and for the first time, Americans had to handle for themselves all those matters that were formerly dealt with by Great Britain. This was obvious at the national level, where inexperienced officers of a new and uncertain federal government had to manage and finance a war, deal with foreign affairs and interstate disputes, and find solutions to a variety of other thorny problems.[78] But it was equally true in the states, which similarly found themselves forced to address numerous matters that had formerly been handled by imperial authorities. Plus, the Revolution changed the demands that were made of government, as modern conceptions of public power replaced older notions of monarchical government. Gordon Wood explains:

> From the outset the new republican states thus tended to view with suspicion the traditional monarchical practice of enlisting private wealth and energy for public purposes by issuing corporate privileges and licenses to private persons. . . . Consequently, the republican state governments sought to assert their newly enhanced public power in direct and unprecedented ways—doing for themselves what they had earlier commissioned private persons to do. They carved out exclusively public spheres of action and responsibility where none had existed before. They now drew up plans for replacing everything from trade and commerce to roads and waterworks and helped to create a science of political economy for Americans. And they formed their own public organizations with paid professional staffs supported by tax money, not private labor.[79]

It was precisely this rage for reform that Madison lamented in his memo on the *Vices of the Political System of the United States*, complaining of a "luxuriancy of legislation" that had, in a few short years, "filled as many pages as the century which preceded it."[80] Madison's explanation for the phenomenon—that state legislatures were too responsive to the whims of majorities—simply underscores the point: with independence, and for better or worse, America's legislatures found themselves doing far more than ever before.

Second, the new constitutions were written. Contrary to a common misperception among present-day constitutional lawyers, putting a constitution into writing was not thought to alter its fundamental character.[81] As we have already seen, customary constitutional law regularly drew on written sources, while lawyers and statesmen continued to rely on customary sources even after formal texts had been drafted.[82] The chief effect of writing constitutional principles down, as the Founding generation saw it, was to give these principles a degree of explicitness and clarity that was new. Recall that, while there was consensus about many principles of the customary constitution, it necessarily suffered the debility of uncertainty that inheres in all forms of customary law. "But, with us," boasted St. George Tucker in *Kamper v. Hawkins*, "the constitution is not an 'ideal thing,' but a real existence: it can be 'produced in a visible form:' its principles can be ascertained from the living letter, not from obscure reasonings or deductions only."[83] William Paterson made the same point in his charge to the jury in *Vanhorne's Lessee v. Dorrance*:

> It is difficult to say what the Constitution of *England* is; because, not being reduced to written certainty and precision, it lies entirely at the mercy of the Parliament: It bends to every governmental exigency; it varies and is blown about by every breeze of legislative humor or political caprice. . . . Besides, in *England* there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In *America* the case is widely different: Every State in the Union has its constitution reduced to written exactitude and precision.[84]

Paterson was, of course, exaggerating in both directions. The customary constitution was unambiguous in many respects, while two centuries of wrestling with written texts has made their imprecision abundantly clear. There was, nevertheless, a difference in degree that mattered, and by reducing their constitutions to writing, Americans made that much more immediately, easily useable.

One by-product of the new explicitness and clarity associated with written constitutions was the decision to create formal provisions for amending them.[85] A distinction between "making" and "interpreting" fundamental law already existed under the customary constitution, part of an intellectual tradition stretching back to the ancients that had been carried forward in the work of such figures as Machiavelli, Locke, Montesquieu, and Rousseau.[86] Yet the distinction had little practical significance. The foundational principles of the Ancient Constitution were thought to be immutable; improve-

ments and alterations were possible only in their instantiation and application. Correction along these lines, in the meantime, occurred mainly through prescription and the accretion of precedent—a process of gradual evolution that was seen more as adaptation to changing circumstances than the making of new law. Abrupt revisions were unusual, happening mostly during violent upheavals like the Glorious Revolution, and even these were justified on grounds of protecting or restoring ancient liberties. In short, circumstances and fortuity had deflected the need to worry much about any conceptual distinction between interpreting existing law and making new law.

Reducing constitutions to writing put new pressure on the distinction by making the terms of fundamental law specific and more easily demonstrable, and thus narrowing the space for "improvements" that were not undeniably alterations.[87] The difficulty, moreover, was not just that written constitutions were more certain and precise, but also that the new American constitutions hazarded numerous innovations. This made it virtually certain, as Elbridge Gerry was to note during the debates over framing a new Federal Constitution, that "periodical revision" would be necessary because of "[t]he novelty & difficulty of the experiment."[88]

One could have left such problems to be handled by the people at large, as they always had been; Charles Pinckney said during the same debate as Gerry that he "doubted the propriety or necessity" of a formal amendment mechanism.[89] But most Americans associated precipitous changes in fundamental law with violence and revolution, and many immediately perceived the benefits of creating a regular process to alter established law peacefully—a process that, as the townsfolk of Lexington put it in objecting to its absence from an early draft of the Massachusetts constitution, "might give Satisfaction to the People; and be an happy Means, under Providence, of preventing popular Commotions, Mobs, Bloodshed and Civil War."[90] George Mason made the case succinctly in supporting an amendment provision at the Federal Convention: "The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular, and Constitutional way than to trust to chance and violence."[91]

Lawyers and scholars today generally misunderstand the part these amendment provisions originally played in a constitutional scheme. We imagine "the people" only as lawmakers—constitutional legislators for a day, as it were—but nothing more. Ratification makes a constitution "law," but also turns the constitution over to government agents (mainly judges) who assume responsibility for its interpretation and enforcement. The people

retain authority to correct mistakes or change courses, but only by again exercising their original power to make law. That power might exist even without a formal mechanism for amendment, though such provisions are useful in a constitution because they make the people's authority explicit and establish known procedures for its exercise. Either way, this revisionary, lawmaking power is seen as the sole means of direct popular control of constitutional law.

Eighteenth-century Americans had a less cramped image of popular constitutionalism. They took for granted the people's responsibility not only for making, but also for interpreting and enforcing their constitutions—a background norm so widely shared and deeply ingrained that specific expression in the constitution was unnecessary. Constitutional provisions for amendment made sense within this framework to deal with a new problem created by having embarked on a course of constitutional experimentation in written form. Anticipating a need for frequent revision of clearly established constitutional rules, the drafters of the new constitutions deemed it expedient to provide an easier, more orderly mechanism for changing them. This was intended not to limit, but rather to respect and preserve popular authority over constitutions, while simultaneously reducing the prospect of political unrest.

Striking a proper balance among these various concerns was no simple task. Many participants worried that the amendment process could stir up more trouble than it prevented if it were made too easy. Gently chiding Jefferson for his harebrained proposal to have the laws and constitutions expire every nineteen years, Madison reiterated his arguments from *Federalist 49* while adding a warning about the danger of "engender[ing] pernicious factions that might not otherwise come into existence."[92] Different compromises with respect to the ease or difficulty of making amendments were reflected in the various approaches taken in different states and in the Federal Constitution.[93] But in every case, choices were imagined and ultimately made against a background of unmediated popular intervention, which provided the implicit baseline for measuring legitimacy.

By the same token, adopting formal procedures to change fundamental law in no way altered the people's role when it came to conventional problems of constitutional interpretation. As we have seen earlier (and will see again), if a constitution was unclear, government officials were expected to do their best to ascertain and follow its requirements, subject to popular oversight and review expressed by a range of "political-legal" means. A separate problem arose when a constitution was clear—either because its text was

unmistakable or because an ambiguity had been resolved through a course of popular reactions—but what was once clearly mandated no longer seemed desirable. Relying on traditional popular means to overturn entrenched rules or reform established institutions was difficult at best, often inviting violence and civil unrest. So Americans chose instead to address this problem by creating, in Mason's words, "an easy, regular and Constitutional way" to make such changes. The amendment device could also be used to cure ambiguities, but this was neither its motivation nor its main purpose. The possibility of amendment was thus situated in a political and intellectual framework in which interpretive authority remained where it had always been, with the people at large.

The synergy between these first two changes—more active government, on the one hand, and more explicit constitutions, on the other—produced yet a third. There were now many more opportunities for constitutional conflict: more problems to address, more questions that might arise, more disputes likely to become manifest. A number of additional factors exacerbated this state of affairs. It was a revolutionary time whose radical overtones did not fade quickly; institutions throughout the society were being overturned, sharpening an incipient class conflict as well as the ordinary tussle of competing interests.[94] It was, moreover, a time of economic hardship and dislocation,[95] with the inevitable concomitant pressures to stretch the law to provide relief. Then there was the matter of loyalists and others who had backed the wrong side, as Americans proved no more capable than anyone else at keeping bitter memories and vindictive urges from overwhelming ordinary legal process, giving in to what Alexander Hamilton despairingly called a "popular phrenzy" of punitive legislation.[96] Lastly, as already noted, the new constitutions contained numerous innovations—institutions and ideas whose very novelty left their operation uncertain. In some instances, such as relations between the state and federal governments, Americans knew they were in uncharted waters. In others, such as separation of powers, they did not discover how little they understood until they attempted to implement what they had written.

The fourth and most important change produced by the Revolution was the new nation's explicit, emphatic embrace of popular sovereignty. This was not a new idea, for Americans believed it had always been a feature of their constitutions. But this belief was not put to the test until the Revolutionary crisis of 1763–1776, from which popular sovereignty emerged more clearly defined as the central principle of American constitutionalism—producing that initial rage for republicanism documented by Gordon Wood in *The*

Creation of the American Republic.[97] The concept of popular sovereignty predated 1776 by more than a century, but in American hands, and through the crucible of the American Revolution, it acquired a concreteness and importance that was wholly new and wholly different. Gerald Stourzh elaborates:

> The rise of the constitution as the *paramount law*, reigning supreme and therefore invalidating, if procedurally possible, any law of a lower level in the hierarchy of legal norms, including "ordinary" legislator-made law, is *the* great innovation and achievement of American eighteenth-century constitutionalism. Awareness of *this* innovation, not of constitutions reduced to written documents, was what evoked the proud commentary of eighteenth-century Americans such as Tom Paine, James Iredell, and James Madison.[98]

As it emerged, moreover, the principle of popular sovereignty was subtly transformed. Its movement from wings to center stage gave the principle an immediate serviceableness that it had not previously possessed. No longer just a background norm or explanation of original authority, the idea of popular sovereignty was right there on the surface, an immanent, impendent force to be dealt with.

While Stourzh is right, moreover, that putting constitutions into writing was not seen as a profound innovation, the process of doing so nevertheless gave a powerful boost to the new awareness of popular sovereignty. Reducing constitutions to writing may have begun as a matter of practical necessity, but it did not end that way. The work itself infused "the people" with an immediacy and tangibleness that penetrated beyond the conscious, beyond the intellectual, to invigorate the affective side of the Revolution. "You and I, my dear friend, have been sent into life at a time when the greatest lawgivers of antiquity would have wished to live," marveled John Adams:

> How few of the human race have ever enjoyed an opportunity of making an election of government, more than of air, soil, or climate, for themselves or their children! When, before the present epocha, had three millions of people full power and a fair opportunity to form and establish the wisest and happiest government that human wisdom can contrive?[99]

Similar expressions of euphoria and awe were ubiquitous as men threw themselves into the work of writing new constitutions.[100]

This heightened awareness of popular sovereignty—the sense of "the people" as a palpable, active entity making conscious choices—transformed certain implicit understandings about the nature of a constitution. The customary constitution was popular law, but of a fundamentally conservative cast. Its defining tropes were all about antiquity, settled practice, and custom established since "time out of mind." It changed constantly, but changes were seen (and more importantly, were felt) primarily in terms of preservation: responses to events undertaken in order to maintain an ancient, unchanging balance between liberty and power. Infused with Revolutionary fervor, the new American understanding of constitutionalism was active, reformist, optimistic, and progressive. In short, the customary constitution metamorphosed into something that could, for the first time, truly be called a popular constitution.

The new provisions for amendment were perhaps the clearest and most obvious manifestation of the new attitude.[101] Haunted by the specter of "corruption" of the British constitution, Whig writers in the colonial period had directed all their energies toward preservation—toward restoring (as Jefferson once described it) "that happy system of our ancestors, the wisest and most perfect ever yet devised by the wit of man, as it stood before the 8th century."[102] Now, Americans looked eagerly forward, toward the future, instead of backward—trusting in their abilities to adjust and adapt and improve. One function of amendment remained to protect the purity of the constitution, and no one doubted that a "frequent recurrence to fundamental principles" was "absolutely necessary to preserve the blessings of liberty."[103] But the old preservationist mood was rapidly supplanted by a buoyant new willingness to experiment, of which the ease of making amendments was an integral part. Fear not the possibility of mistakes, urged the drafters of Massachusetts's 1780 constitution, for we can make repairs at a later date in whatever manner "Experience, that best Instructor, shall then point out to be expedient or necessary."[104]

The new possibility of amendment was just one reflection of the changing temper of the time. A sense of popular empowerment was pervasive, as Americans confidently decided that they could fashion their own constitution and government and control their own destinies.[105] Madison hit this note perfectly in rebuking opponents of the Federal Constitution for dreading its novelty:

> But why is the experiment of an extended republic to be rejected merely because it may comprise what is new? Is it not the glory of the people of America, that whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience? . . . Happily for America, happily we trust for the whole human race, [the Revolutionary generation] pursued a new and more noble course. They accomplished a revolution which has no parallel in the annals of human society: They reared the fabrics of governments which have no model on the face of the globe. They formed the design of a great confederacy, which it is incumbent on their successors to improve and perpetuate.[106]

With so much in flux, complications were inevitable. Constrained as they were by the exigencies of war with England, and lacking useful precedents other than the problematic example of 1688, it took Americans a few years to work out a theory of the proper way to ratify a constitution and make it supreme, paramount law.[107] In most states, new constitutions were adopted by ordinary legislative means, without either direct submission to the people or a special convention called solely for the purpose of creating fundamental law.[108] The actual status of some of these first state constitutions thus remained ambiguous, with authorities as esteemed as John Adams and Thomas Jefferson suggesting that theirs could be altered by ordinary legislation.[109] More commonly, factors like those discussed above—revenge against loyalists, economic hardship, and the like—induced state legislators to ignore clear commands of their constitutions without bothering to make any fancy claims of authority to do so. Either way, blatantly unconstitutional laws became a too-common feature of politics in the 1780s. James Madison placed the "numerous" state violations of the Articles of Confederation at the top of his list of "Vices," and he complained to Jefferson of "[r]epeated" transgressions of bills of rights committed "by overbearing majorities in every State."[110] Alarm at just this sort of development provided one of the chief motivations for Federalist leaders in 1787.[111]

"Being Judges for the Benefit of the Whole People"

This combination of factors—more active government, more explicit constitutions, more constitutional conflict and arguably unconstitutional laws, and, above all, a heightened sense of popular sovereignty—could be interpreted in

different ways, and it pulled people in different directions as they confronted the new experience of managing a constitutional republic. The resulting tensions shaped the first concept of judicial review.

To many, respect for popular sovereignty demanded that judges enforce duly enacted laws and leave constitutional questions to be settled elsewhere. No one doubted that a properly ratified constitution was, as Edmund Pendleton observed, "a rule obligatory upon every department, not to be departed from on any occasion."[112] It did not follow, however, that the judiciary could therefore invoke the constitution's authority against another department. No one of the branches was meant to be superior to any other, unless it were the legislature, and when it came to constitutional law, all were meant to be subordinate to the people. Just as it is not your place to punish me for violating ordinary law, so too in a regime of popular constitutionalism it was not the judiciary's responsibility to enforce the constitution against the legislature. It was the people's responsibility: a responsibility they discharged mainly through elections, but also, if necessary, by other, extralegal means. For courts to interfere, to presume to judge the actions of a coordinate branch, was to meddle in affairs that were none of their business. Worse, it was to imply, as Judge William Nelson characterized the argument in *Kamper v. Hawkins*, "that the judiciary . . . claims a superiority over the legislature" on matters peculiarly within the legislative arena, which encompassed decisions respecting the constitutionality of legislation as well as its necessity.[113] This is what was meant when people said, as St. George Tucker put it in the same case, that "the constitution of a state is a rule to the *legislature only*."[114]

We need to be clear on this argument, which is critical if we are to understand the setting in which judicial review eventually emerged. In suggesting that the constitutionality of legislation was not a matter for judicial cognizance, no one was saying that the authoritative interpreter of the constitution was the legislature rather than the judiciary. That would have been inconsistent with the whole framework of popular constitutionalism because it would have assumed that final interpretive authority rested with one or another of these public agencies. In fact, neither branch was authoritative because interpretive authority remained with the people. Of course, public officials still had to interpret the constitution in going about their business, since they were the regulated entities (again, just as we must interpret ordinary law in going about our business). But underlying the argument described by Nelson and Tucker was an assumption that the people's restrictions on which laws could be enacted were directed to the lawmaking branch, and not to the other

branches. It was the legislature's delegated responsibility to decide whether a proposed law was constitutionally authorized, subject to oversight by the people. Courts simply had nothing to do with it, and they were acting as interlopers if they tried to second-guess the legislature's decision. It would be as if the people had hired two agents to perform distinct tasks and one agent kept interfering with the other agent's job, insisting that it knew better.

Judging by the public response to early decisions exploring judicial review, this was the position of most Americans prior to the 1790s.[115] Their reactions are hardly surprising given the premises of popular constitutionalism and the lack of any previous experience with, or practice of, judicial monitoring of fundamental law. To be sure, some of those who rejected judicial review were uncomfortable having to rely so heavily on traditional "political-legal" means of enforcing constitutional limits. These might have worked during the colonial era, when issues of fundamental law arose only rarely, and they remained essential for combating profound, pervasive usurpations, like those that led to the Revolutions of 1688 and 1776. But could these traditional devices control the numerous smaller unconstitutional measures that seemed daily to issue from state legislatures? Could they be relied upon to prevent laws that were supported by a majority of the community, such as paper-money laws or legislation confiscating the property of loyalists? Richard Dobbs Spaight fervidly rejected judicial nullification as "absurd, and contrary to the practice of all the world," but he acknowledged that some kind of better check might be "absolutely necessary to our well-being."[116] He just could not think of one; "the only one that I know of," he confessed, "is the annual election."[117]

Others were more imaginative. Many of the structural changes adopted by state constitution writers were at least partly about constitutional control—not just annual elections, but also rotation in office, the right to instruct, bicameralism, and the like. Still other innovations were developed specifically and exclusively with the problem of preventing unconstitutional action in mind. We have already considered Jefferson's proposal to "correct breaches" of the constitution by allowing any two branches to call a convention of the people. The anonymous author of *Four Letters on Interesting Subjects* thought that "preserving a Constitution" could easily be accomplished by electing at some fixed interval "a *Provincial Jury* . . . to enquire if any inroads have been made in the Constitution [with] power to remove them"[118]—a proposal adopted in slightly modified form by Pennsylvania and Vermont, both of which provided for a "council of censors" to review the state of the constitution every seven years and recommend changes to the people.[119] The drafters

of the New York constitution came up with the idea of a delaying veto, a sort of preemptive strike on potentially unconstitutional laws. New bills were submitted to a "council to revise" that consisted of the governor, chancellor, and high court judges and was empowered to investigate proposed legislation for its constitutionality; the council's veto could be overridden only by a two-thirds majority in both houses of the legislature.[120] Madison heartily approved this measure, which he urged at one time or another (though never successfully) on Kentucky,[121] Virginia,[122] and the Federal Convention.[123] He later devised the most imaginative solution of the period, deciding that still more and better protection could be provided simply by enlarging the sphere of the republic. The legislature of an extensive territory, Madison reasoned (though, once again, he failed to persuade others), would be less likely to enact unconstitutional laws and could be entrusted with a veto over the laws of the states.[124]

Not everyone agreed that judicial enforcement of a constitution was improper, however. Interpreting the same events and circumstances differently, a few people reasoned that respect for popular sovereignty actually *required* judicial review. If the constitution was supreme, fundamental law, then legislative acts contravening its terms were ultra vires and void: not law at all. Judges before whom such acts were brought could not just ignore this fact. The principle of popular sovereignty demanded that they treat such laws as the nullities they were. Here was a truly novel idea, albeit one with trace roots in existing practices of enforcing superior laws over inferior ones. For unlike the Americans' other innovations, which they had expressly incorporated in the texts of their constitutions and which had long been part of Whig political tradition, no one before had proposed relying on courts for general constitutional enforcement.

The most thoughtful presentation of this new principle, which began making sporadic appearances in the early 1780s,[125] was penned by future Supreme Court Justice James Iredell in 1786. Iredell was, at the time, representing a client whose property had been confiscated without a jury in a case still pending before the North Carolina courts. Writing pseudonymously as "An Elector," Iredell published a newspaper essay in which he argued in favor of judicial authority to declare an unconstitutional law void; the court was evidently persuaded, for it ruled in his favor when it heard the case a year later.[126]

Iredell began his argument with a proposition that even he conceded no one was denying: that the state's constitution was "the *fundamental* law, and unalterable by the legislature, which derives all its power from it."[127] Writing

for rhetorical effect, he reminded readers of "the extreme anxiety in which all of us were agitated in forming the constitution," having been "sickened and disgusted for years with the high and almost impious language from Great Britain" respecting Parliament's supreme authority over the people. But things were otherwise in North Carolina, where the legislature could act only as permitted by the constitution, "for we have as much agreed to be governed by the Turkish Divan as by our own General Assembly, otherwise than on the express terms prescribed."[128] That established, Iredell moved on to what he called "[t]he great argument":

> [T]hat though the Assembly have not a *right* to violate the constitution, yet if they *in fact* do so, the only remedy is, either by a humble petition that the law may be repealed, or a universal resistance of the people. But that in the mean time, their act, whatever it is, is to be obeyed as a law [by the judges]; for the judicial power is not to presume to question the power of an act of Assembly.[129]

Iredell "not unconfidently" rejected these remedies as insufficient.[130] The "remedy by petition" presupposed "that the electors hold their rights by the *favor of their representatives*," a claim so insulting the "mere stating of this is surely sufficient to excite any man's indignation." Popular resistance, on the other hand, was a proper remedy, but undesirable and deficient as an exclusive one. "We well know how difficult it is to excite the resistance of a whole people," which is why resort to such measures must be considered a "dreadful expedient" and a "calamitous contingency." Besides, since widespread popular resistance could be expected only where there was "*universal oppression*," many unconstitutional acts would go unredressed. "A thousand injuries may be suffered, and many hundreds ruined, before this can be brought about." In the meantime, individuals and minorities would suffer, and the only safe citizens would be those who managed always to stay in the majority, whom Iredell contemptuously dismissed as "sycophants that will for ever sacrifice reason, conscience, and duty, to the preservation of a temporary popular favor."

Having proved the inadequacy of these conventional remedies, Iredell argued that judicial review followed naturally from the supposition that the constitution expressed the sovereignty of the people:

> For that reason, an act of Assembly, inconsistent with the constitution, is *void*, and cannot be obeyed, without disobeying the superior law to

> which we were previously and irrevocably bound. The judges, therefore, must take care at their peril, that every act of Assembly they presume to enforce is warranted by the constitution, since if it is not, they act without lawful authority. This is not a usurped or a discretionary power, but one inevitably resulting from the constitution of their office, they being judges *for the benefit of the whole people,* not *mere servants of the Assembly.*[131]

A number of observations are appropriate at this point. First, a word of caution: the whole idea of judicial review was new, and however obvious it may seem to us, only a small number encountered and understood the arguments purporting to justify it. No more than a handful of cases arose prior to 1787 in which a question of judicial power to declare legislation unconstitutional was clearly presented, and courts ducked the issue in most of these.[132] Regularly published reports did not yet exist,[133] and what was known about the cases came mostly from sketchy newspaper accounts or from letters and pamphlets written by lawyers who had sought judicial protection for their clients. The handful of men who were pondering judicial review had not yet worked out the theory's kinks, as they themselves well knew. This was part of the reason Edmund Pendleton chose not to address the matter in *Commonwealth v. Caton,* explaining that "how far this court . . . shall have power to declare the nullity of a law passed in its forms by the legislative power . . . is indeed a deep, important, and I will add, a tremendous question, the decision of which might involve consequences to which gentlemen may not have extended their ideas."[134]

This uncertainty about the precise terms of judicial review is found not only in the 1780s, but for a number of additional decades to come. Judicial review was a moving target, one small piece in a much larger transformation of the role of the judiciary in American life.[135] There was, at every moment, a range of views both as to its propriety and its justifications. Movement was in the direction of increasing acceptance, fairly rapidly so after 1790, but accurately describing just *what* was being accepted is complicated by the diversity of ideas about fundamentals.

That said, Iredell's 1786 essay is useful because it was the clearest and best-reasoned presentation of the initial justification for judicial review and because, in most respects, it reflected basic assumptions that were shared by most proponents. Chief among these were the assumptions of popular constitutionalism: the same assumptions made by those who rejected judicial review. The constitution was fundamental law (that is, law made by the people to regulate their rulers) and so not like ordinary law at all. Iredell never suggested, or even hinted, that courts should exercise judicial review because they possessed some special competence for the task or because interpreting and enforcing laws is what courts do. Rather, he argued that courts *must* exercise judicial review because they are the people's agents *too.* To ignore the unconstitutionality of a law presented in the course of litigation would be to violate their agency. Hence, they must "take care at their peril" to enforce only constitutional laws or they themselves would be lawbreakers, acting "without lawful authority." Rather than overstepping its bounds or intruding on legislative turf, a court that refused to enforce an unconstitutional law was following the people's command—acting within the scope of responsibilities delegated by the people to the judiciary, which encompassed adjudication.

Nor was this all, for judicial review offered significant pragmatic benefits as well. By exercising review, judges could act on behalf of the people, supplying a peaceful remedy that substituted for the "dreadful expedient" of popular resistance and offered relief in circumstances where it might not otherwise be available.[136] James Varnum likewise emphasized this last point in his argument to the court in *Trevett v. Weeden*:

> But as the Legislative is the supreme power in government, who is to judge whether they have violated the constitutional rights of the people?—I answer . . . . the people themselves will judge, as the only resort in the last stages of oppression. But when [legislators] proceed no further than merely to enact what they may call laws, and refer those to the Judiciary Courts for determination, then, (in discharge of the great trust reposed in them, and to prevent the horrors of a civil war, as in the present case) the Judges can, and we trust your Honours will, decide upon them.[137]

Judicial review, in other words, was not an act of ordinary legal interpretation. It was a political—perhaps we should say a "political-legal"—act of resistance. Gordon Wood rightly describes it as "akin perhaps to the interposition of the states that Jefferson and Madison suggested in the Kentucky and Virginia Resolutions of 1798."[138] Even closer to the point is the resistance to the Stamp Act sought by rebel leaders in 1765, when they urged courts to remain open and carry on business without stamped paper.[139] In refusing to enforce unconstitutional laws, judges were exercising the people's authority to resist, providing a supplemental remedy for ultra vires legislative acts that averted the need to mobilize popular opposition.

Early proponents of judicial review were quite self-conscious in recognizing the awful nature of what they were doing: "awful" in the eighteeth-century sense of something full of awe. Edmund Randolph initially rejected judicial review when he considered the issue for the first time while preparing to argue for the state in *Commonwealth v. Caton*. Randolph changed his mind as he worked through the issues,[140] but recognizing the extraordinary nature of what he was proposing, stepped out of his role as state attorney general and ascribed the position favoring judicial review to himself alone.[141] He said:

> Do I tremble at the decision of my own mind, that a law against the constitution may be declared void? or do I dread the resentment of the court, when I bear testimony against their competency to pronounce the invalidity of the law?
>
> No! The revolution has given me a coat of mail for my defense, while I adhere to its principles. That bench too is reared on the revolution, and will arrogate no undue power.
>
> I hold then, that every law against the constitution may be declared void.[142]

George Wythe, who sat as a judge in the same case, was still more candid, melodramatically proclaiming that, if ever a branch of the legislature should overstep its constitutional boundaries:

> I shall not hesitate, sitting in this place, to say, to the general court, *Fiat justitia, ruat coelum*; and, to the usurping branch of the legislature, you attempt worse than a vain thing; for, although, you cannot succeed, you set an example, which may convulse society to its centre. Nay more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds, prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further.[143]

The clash between these opposing views of judicial review shaped the doctrine as it emerged. Those who rejected judicial nullification were plainly in the ascendant, as their position more closely conformed to conventional

wisdom and expectations. Judicial review was, in the context of the times, such a radical departure from experience that even proponents regarded its possibility with what Gordon Wood describes as "a sense of awe and wonder."[144] "Most Americans," he says, "even those deeply concerned with the legislative abuses of the 1780s, were too fully aware of the modern positivist conception of law (made famous by Blackstone in his *Commentaries of the Laws of England*), too deeply committed to consent as the basis of law, and from their colonial experience too apprehensive of the possible arbitrariness and uncertainties of judicial discretion to permit judges to set aside laws made by the elected representatives of the people."[145] Hence, James Monroe can be found informing Madison as late as 1788 that the Virginia legislature avoided discussing the issue "as calculated to create heats & animosities that will produce harm."[146]

Advocates of judicial power were thus cautious in formulating the limits of the principle. "In all doubtful cases . . . the Act ought to be supported," James Iredell conceded in a letter justifying his position to an incensed Richard Dobbs Spaight, "it should be unconstitutional beyond dispute before it is pronounced such."[147] This limiting principle instantly became an article of faith among the supporters of judicial review, accompanying virtually every statement of the doctrine. We should understand it, moreover, as grounded in something other than simple defensiveness. The principle that laws should be declared void only if "unconstitutional beyond dispute" was a logical corollary given the rationale for judicial action. Judges might be justified in acting as the people's proxy, to avert reliance on dangerous and undependable forms of popular resistance. But they remained mere agents, acting in a manner they presumed their principal had commanded. Such presumptuousness could not be indulged lightly, but should await conditions of near certainty because the principal was capable of acting on its own and retained primary responsibility for doing so.

"Such Power in Courts would be Destructive of Liberty"

Even thus confined, early efforts to exercise judicial review drew stinging rebukes. *Rutgers v. Waddington* involved a statute that precluded defendants in trespass actions from pleading in justification that their use of plaintiff's property was authorized by military order of the occupying British forces. Representing the defendant, Alexander Hamilton urged first that the statute

was inconsistent with the law of nations, which he maintained was incorporated into the New York constitution; and second that it violated the Treaty of Paris, which Hamilton said was binding national law. Following a suggestion in Hamilton's brief,[148] the court sidestepped the problem, finding it unnecessary to rule on the validity of the Trespass Act because the statute did not explicitly say that it revoked the law of nations or should apply if inconsistent with the treaty. James Duane's rambling opinion for the court is pure Blackstone, the heart of his analysis lifted straight from the great British jurist's *Commentaries*:

> The supremacy of the Legislature need not be called into question; if they think fit *positively* to enact a law, there is no power which can controul them. When the main object of such a law is clearly expressed, and the intention manifest, the Judges are not at liberty, altho' it appears to them to be *unreasonable*, to reject it: for this were to set the *judicial* above the legislative, which would be subversive of all government.
>
> But when a law is expressed in *general words*, and some *collateral matter*, which happens to arise from these words is *unreasonable*, there the Judges are in decency to conclude that the consequences were not foreseen by the Legislature; and therefore they are at liberty to expound the statute by *equity*, and only *quoud hoc* to disregard it.
>
> When the judicial make these distinctions, they do not controul the Legislature; they endeavor to give their *intention* it's proper effect. [149]

Notwithstanding Duane's jurisprudential conservatism, merely exercising this aggressive form of statutory interpretation elicited outrage. The state legislature adopted a resolution denouncing the opinion as "in its tendency subversive of all law and good order, and lead[ing] directly to anarchy and confusion,"[150] which was apparently just enough to blunt a subsequent effort to impeach the judges as well. Shortly thereafter, *The New York Packet and the American Advertiser* printed an open letter from a committee of nine prominent citizens. Occupying nearly four full columns, the letter accused the court of exercising "a power to set aside an act of the state," and warned:

> That there should be a power vested in courts of judicature whereby they might controul the supreme Legislative power we think is absurd in itself. Such power in courts would be destructive of liberty, and remove all security of property. The design of courts of justice in our

> government, from the very nature of their institutions, is to declare laws, not to alter them.
>
> Whenever they depart from this design of their institution, they confound legislative and judicial powers.[151]

The same reactions followed the refusal of the New Hampshire courts in several cases to enforce a law eliminating trial by jury in cases for sums of less than ten pounds:[152] local newspapers published editorials condemning the decisions, and the legislature received petitions demanding that the judges be impeached. A motion to impeach was entertained but narrowly defeated. Instead, state legislators adopted a resolution affirming the law's constitutionality (by a vote of 44 to 14).[153] Six months later, and in the face of continuing pressure, the legislature entertained a motion to impeach that was narrowly defeated, after which they decided to repeal the troublesome law.[154] This initiated a tug of war between the branches in which the legislature continued to insist on its prerogatives despite the judiciary's protests; it took nearly thirty-five years, until 1818–19, before judicial review was firmly established in New Hampshire.[155]

The case that lay behind James Iredell's essay, *Bayard v. Singleton*,[156] provoked a similar outcry in North Carolina. In May 1786, Bayard brought an action to recover property confiscated by state authorities in 1777. A year before Bayard's suit had been commenced, the North Carolina legislature enacted a provision requiring the state's courts to dismiss actions by loyalists seeking to recover property taken during the war. When judges hearing Bayard's case failed promptly to grant the defendant's motion to dismiss under this law, they were ordered to appear before the legislature. A committee that included two future delegates to the Federal Convention (William Davie, who was representing Bayard, and Richard Dobbs Spaight) found the judges guilty of the facts charged against them, though they did not recommend any formal sanction.[157]

Expecting this none-too-subtle legislative message to produce a more agreeable outcome the second time around, the defendant renewed his motion to dismiss. The judges struggled to avoid ruling, trying by various means to persuade the parties to settle.[158] Their efforts failed, and in May 1787, "after every reasonable endeavour had been used in vain for avoiding a disagreeable difference between the Legislature, and the judicial powers"—and just as the Federal Convention was getting under way—the court "with much apparent reluctance, but with great deliberation and firmness" denied the defendant's motion on constitutional grounds.[159] Its action incited

violent protest throughout the state and provoked the legislature to deny the judges a pay increase, though the controversy died down after a sympathetic jury promptly returned a verdict for the defendant.[160]

And then there was *Trevett v. Weeden*. James Varnum argued to the court that Rhode Island's law requiring merchants to accept paper money at face value was unconstitutional because it could be enforced in civil trials without a jury; the court appeared to avoid the issue by dismissing for lack of jurisdiction instead.[161] Although the judges had neither declared the law unconstitutional nor even stated forthrightly that they had the power to do so, the governor convened a special session of the legislature, which summoned the court to explain its actions. At first, the judges refused to answer, boldly asserting that they were "accountable only to God and [their] own consciences."[162] After further prodding, they tried to placate the irate legislators by explaining how they had not actually declared the law unconstitutional. The assembly nevertheless formally recorded its dissatisfaction and entertained a motion to dismiss the entire bench. The judges petitioned for an additional hearing, accompanied by a written memorial "disclaim[ing] and totally disavow[ing] any the least power or authority, or the appearance thereof, to contravene or controul the constitutional laws of the State."[163] This ambiguous declaration appeased the assembly just long enough for the judges to keep their seats until the next election, at which time all but one were turned out of office.[164]

Similar reactions were recorded throughout the 1780s whenever and wherever a court considered exercising review, with the possible exception of Virginia.[165] The issue arose early in that state, in the 1782 case of *Commonwealth v. Caton*.[166] Three prisoners condemned to death for treason petitioned the House of Delegates for a pardon. The House granted their petition, but the Senate demurred. Under the Treason Act, both houses had to approve a pardon, whereas the state constitution appeared to vest this power in either the governor or the House of Delegates. Lawyers for the defendants asked the court to declare the statute void and grant their pardon under the House resolution. The case achieved a degree of notoriety in the state, with letters and newspaper accounts anticipating and debating what was soon being referred to as "[t]he great constitutional question."[167] Ultimately, the Virginia court, too, avoided having to decide by interpreting the state constitution to permit the act. A number of the court's members nevertheless opined on their power to set aside unconstitutional legislation, with one (Peter Lyons) firmly opposed, two (George Wythe and James Mercer) just as firmly in

favor, and five others undecided or unwilling to address a question that was not necessary to decide the merits.[168]

Unlike in other states, no public outcry followed. William Treanor reports that "[t]here is no record of popular criticism of the two judges who asserted that the judiciary had the power to invalidate statues. There was no move in the Senate against them. Moreover, the Senate joined the House in providing the three prisoners the relief they had sought from the outset."[169] Treanor attributes this to the unique structure of Virginia politics, whose controlling elite looked more favorably on lawyers and lawyering than in other states. But while this may have been sufficient to dampen public displays of opposition, it did not mean there was none—as indicated by Monroe's report to Madison that state legislators avoided discussing the issue because it made people too angry.[170] In any event, the Virginia experience was unique, and, elsewhere, talk of judicial review predictably embroiled courts in controversy.

The status of judicial review on the eve of the Federal Convention was thus uncertain at best. It was not even clear just what the argument was. There had been few cases, and no court had yet published an opinion affirmatively explaining, much less defending, judicial authority to nullify legislation. Although one or two courts had actually refused to enforce a law on constitutional grounds, most had avoided the issue. The extra-judicial literature was barely more informative. There was James Iredell's written justification, which made arguments similar to those advanced by James Varnum in *Trevett v. Weeden*. Both men's views had been published, but neither publication circulated widely. Certainly there is nothing to suggest that theirs was a dominant view, even among those who might have looked favorably on judicial intervention.

A number of scholars have suggested that the doctrine of judicial review that emerged in the 1780s was limited to laws regulating courts and judicial process.[171] They rely mainly on the fact that four of the six well-known Revolutionary era cases involved the right to trial by jury,[172] while one other (*Rutgers v. Waddington*) technically concerned a pleading rule. Certain statements made at the time appear to support this narrow understanding of the doctrine. Elbridge Gerry observed at the Federal Convention that judges had "a sufficient check agst. encroachments on their own department by their exposition of the laws which involved a power of deciding on their Constitutionality,"[173] while James Wilson wanted a Council of Revision because, even assuming judicial review, "[t]he Judiciary ought to have an opportunity of remonstrating agst projected encroachments on the people as well as on

themselves."[174] Against the background of the actual decisions, such statements make it seem plausible to assume the existence of a "middle" position confining review to laws directly regulating courts.[175]

Yet on closer inspection, it seems unlikely that anyone at the time was thinking in these terms. Most of the cases may have involved questions that would today be classified under the rubric of adjudicatory process, but not all of them. *Commonwealth v. Caton* concerned the right to a pardon, which is a nonjudicial right, and the defendant's actual challenge in *Rutgers v. Waddington* was to the legislature's power to eliminate a substantive justification for his conduct. Given the small number of cases involved, these are telling exceptions.

Even the jury cases provide little support for the notion that judicial review was restricted to laws regulating courts. Today, we think of the jury mainly as a procedural device, but the eighteenth-century view was more complex. Juries existed first and foremost to protect the people from the government, *including* courts. Laws restricting the right to a jury were seen not as legislative encroachments on judicial power, but rather as governmental efforts to "destroy the Power of the People."[176] One might just as well deprive citizens of the right to vote as deprive them of trial by jury, John Adams explained, for both rights equally prevented "Arbitrary Government" by requiring "the Concurrence of the Voice of the People."[177] Where the franchise constituted "the Part which the People are by the Constitution appointed to take, in the passing and Execution of Laws," juries played a homologous role in the administration of justice: "As the Constitution requires, that, the popular Branch of the Legislature, should have an absolute Check so as to put a peremptory Negative upon every Act of the Government, it requires that the common People should have as compleat a Controul, as decisive a Negative, in every Judgment of a Court of Judicature."[178] All of which is not to deny that juries were part of the judicial process. But because juries were so much more, one cannot infer anything about the scope of judicial review from the fact that many of the early cases were concerned with them.

Read in context, even the remarks quoted above from Elbridge Gerry and James Wilson do not support a view of judicial review as limited to laws regulating courts and process. Consider Wilson's discussion of the Council of Revision. The first thing one notices is that others in the same discussion described judicial review in broader terms, yet did not seem to understand themselves (and were not understood by others) to be making a different point.[179] The same is true of statements Wilson himself made after the Convention, which likewise refer to judicial review with no hint that it is limited

to laws regulating judicial process.[180] It is possible, of course, that Wilson changed his mind during the course of the discussions in Philadelphia and that he was persuaded to embrace a broader understanding of judicial review. It seems more likely, however, that he was saying the same thing both times. To describe judicial review in terms of departmental self-defense was an eighteenth-century phrasing that meant nothing more or different than judicial power to consider the constitutionality of laws generally.

Recall that the dispute over judicial review revolved mainly around questions of agency and delegated authority. Those who opposed the practice believed that constitutional limits were a direction from the people to the legislature alone; if the legislature overstepped its bounds, that was a matter for the people themselves to address. By investigating the constitutionality of a statute, courts were meddling in legislative affairs. On the other side, some sophisticated legal thinkers had concluded that constitutional limits *became* a judicial matter whenever a potentially unconstitutional law was relied on in litigation. They pointed out that the constitution delegated responsibility for adjudication to the judiciary, which was acting within its proper arena when enforcing constitutional limits in the context of adjudication—which was, indeed, required to enforce constitutional limits in that context. For the legislature to expect, much less to require, a court to ignore constitutional limits was tantamount to forcing judges to act illegally, thereby corrupting the process of adjudication. This is what Wilson and Gerry meant when referring to judicial review in terms of encroachments on the judiciary: protecting adjudication from legislative corruption through the medium of unconstitutional laws. But their concern encompassed any unconstitutional law, without regard for its subject matter—which is why no court at any time ever drew the suggested distinction or implied that judicial review was applicable to less than the full panoply of constitutional measures.

In saying all this, we must be careful not to lose sight of how seldom the issue came up in the years before the Federal Convention. Obsessive attention to the minutiae of judicial review in the early 1780s can easily mislead. An argument to assign courts a role in enforcing the constitution may have been in the air, but it was hardly one that had achieved widespread notice or approbation so far as the general public was concerned or that could be called established. Our intensive focus on the question is an artifact of what judicial review subsequently became and of our natural curiosity, as a result, to understand its origins. In trying to get a sense of the historical context, however, it is important not to exaggerate the significance of what was, in fact, insignificant to the vast majority of Americans. For most, including

most politicians and public leaders, the focus remained on traditional popular means of enforcing the constitution, the major change being a new emphasis on elections. Judicial review was either something they had never heard of or thought about, or, at most, a barely audible note in the background that had not, as yet, attracted their attention in a serious way.

3

The Power under the Constitution Will Always Be in the People

THE MAKING OF THE CONSTITUTION

* * *

"The Supreme Law of the Respective States"

The delegates to the Federal Convention brought this whole range of attitudes and ideas with them to Philadelphia. During the course of the deliberations, a number of delegates assumed or openly supported a power of judicial review.[1] A few just as openly opposed it—the most forthright statement to this effect coming from John Francis Mercer, whose brother James had been one of the judges to affirm the power in *Caton*.[2] Still others admitted to being uncertain,[3] while most of the delegates had probably not given the matter much thought. Of course, only a minority of the delegates, no more than ten out of fifty-five, are recorded as having expressed any sentiments at all. Further complicating matters, there was no comprehensive or direct discussion of judicial review at any point in the proceedings, only a series of comments made during debates on other topics. Nevertheless, the record we have does support a few conclusions.

First, the Framers clearly opted for judicial review as a device to control state law. Preventing "[e]ncroachments of the States on the [federal] authority"[4] was a matter of paramount importance to constitutional reformers in the 1780s. "Examples of this are numerous," Madison recorded in his *Vices* memorandum, "and repetitions may be foreseen in almost every case where

any favorite object of a State shall present a temptation."[5] Madison wanted to handle the problem by giving Congress a negative over state laws "in all cases whatsoever"[6]—an overambitious solution that the other Virginia delegates were willing to incorporate into their initial proposal to the Convention only in the watered-down form of a negative over "all laws passed by the several states, contravening in the opinion of the National Legislature the articles of Union."[7]

Even this, as it turned out, was too much for the Convention's small-state delegates, who countered in the New Jersey Plan with a proposal to make the laws and treaties of the United States "the supreme law of the respective States" and to provide that "the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding."[8] Here, as Jack Rakove has convincingly argued, lie the seeds of judicial review as a formal element of the Federal Constitution.[9] For the Convention eventually compromised by spurning New Jersey's weak scheme in favor of the nationalist Virginia Plan, but with a strengthened supremacy clause that replaced Madison's legislative negative and that could be enforced by state and national courts.[10]

The critical discussion took place on July 17, the day after Madison's and the other nationalists' bitter defeat on the issue of proportional representation in the Senate (the so-called Great Compromise). The proposal for a negative on state laws had previously been considered on June 8, with a slew of delegates offering reasons why it was a bad idea.[11] This time, too, the debate began with a number of speeches opposing a legislative veto—including one by Roger Sherman, who for the first time suggested that it was "unnecessary, as the Courts of the States would not consider as valid any law contravening the Authority of the Union."[12] Madison countered that reliance could not be placed on the judiciary. Any check that operated only after laws were enacted would come too late because these laws could "accomplish their injurious objects before they can be repealed by the Genl Legislre. or be set aside by the National Tribunals" and because "Confidence can <not> be put in the State Tribunals as guardians of the National authority and interests."[13] At that point, Gouverneur Morris—usually one of Madison's staunch allies, but fiercely opposed to the negative—reentered the debate. Although he had spoken against a congressional veto just moments before,[14] he had not thought to make this point about judicial review. Morris jumped at Sherman's argument, stating that he was "more & more opposed to the negative" and that "[a] law that ought to be negatived will be set aside in the Judiciary departmt."[15] After some further discussion,

the negative was voted down 7–3. Immediately thereafter, Luther Martin moved to incorporate into the Constitution the proposed supremacy clause from the defeated New Jersey Plan, and this was agreed to unanimously without further discussion.

Martin's decision to move this amendment after the negative had already been defeated is exceedingly curious. If, as Sherman and Morris had suggested, a legislative veto was unnecessary because judicial review was already implicit, why move after the negative had been voted down to add a provision explicitly ordering state judges to treat federal law as supreme? And why do so if you are Luther Martin and interested mostly in keeping any limits on state power as weak as possible?

Two reasons seem likely, both related to Martin's desire to ensure that the legislative veto was dead once and for all. First, some delegates were presumably willing to vote against Madison's negative only if they had assurances of an alternative check, even one generally regarded as weaker than the negative.[16] Some of these delegates, moreover, surely shared Madison's concern that state courts would not be eager to uphold national authority against the authority of their own legislatures; hence, the proposed clause "bound" state judges to give federal law priority. Second, adding the Supremacy Clause made explicit the authority to do something that might or might not have been implicit without it. Sherman, Morris, and a few others may have been confident that courts would exercise judicial review, but not everyone was so certain—and with good reason, given the novelty of the idea and the spotty record in the states. By adding the Supremacy Clause, Martin removed all doubts, again allaying the fears of others who wanted guarantees of an effective alternative. An express command for judges to prefer federal to state law answered the leading objection to judicial review, which was that judges had not been authorized by the people to make such decisions. From this point on, then, the delegates assumed the existence of judicial review over state laws in their deliberations.[17]

No similar decision was made to endorse judicial review of federal legislation. For some participants, it may have been the case that no decision was necessary. As we have seen, a few of the delegates believed that courts should exercise review, presumably for reasons like those offered by Iredell,[18] and they could also have assumed that courts would in fact do so. Yet whatever one's views on the former point, even the most sanguine proponent of a judicial check presumably would have recognized the uncertain status of the practice. This is why it made sense to include the Supremacy Clause as a way to ensure judicial review of state laws. No similar proposal was made, or even

suggested, when it came to review of federal legislation, a failure made all the more striking by the fact that the Supremacy Clause had been added.

While this silence may seem puzzling at first, the Convention's inaction is intelligible in context. The device offered in the Virginia Plan to address concerns about federal legislation was a Council of Revision, which would have joined federal judges with the executive to review and possibly veto proposed laws (subject to being overridden by a supermajority in Congress).[19] The idea ran into trouble from the start, chiefly in the form of objections that it "involved an improper mixture of powers,"[20] and that judges would be biased in applying a law if they had "participated in its formation."[21] Elbridge Gerry suggested giving the revisionary power instead to the national executive alone, and it was in this connection that he made his comment about courts having "a sufficient check agst. encroachments on their own department by the exposition of the laws, which involved a power of deciding on their Constitutionality."[22] Despite protests from the likes of Wilson and Madison, who worried that the executive would be too weak to wield an effective veto without additional support, a purely executive check was approved by a substantial margin.[23]

The question of judicial involvement in the veto process was raised again on July 21, as the Convention was completing its formulation of general principles. James Wilson moved to reconsider the decision to limit the veto to the executive. Conceding that the proposition "had been made before, and failed," Wilson explained that he was nevertheless "so confirmed by reflection in the opinion of its utility, that he thought it incumbent on him to make another effort." A Council of Revision was needed, according to Wilson, because:

> [t]he Judiciary ought to have an opportunity of remonstrating agst projected encroachments on the people as well as on themselves. It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature.[24]

The proposed Council was again defeated, this time after a somewhat fuller exchange in which a variety of arguments were offered for and against the idea.[25] During the course of the discussion, two other delegates came back to Wilson's point about judicial review. Opposing the Council, Luther Martin reiterated the objection that, because "the Constitutionality of laws . . . will come before the Judges in their proper official character," putting them on a Council of Revision would give them "a double negative."[26] Responding to Martin, George Mason repeated Wilson's rejoinder that, in their official character: "[The judges] could impede in one case only, the operation of laws. They could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course."[27] No one else is recorded as speaking to the issue, which was dropped without resolution. And since Wilson's motion was rejected, while no other motion was made pertaining to the role of judges, we are left uncertain what role, if any, judicial review was expected to play when it came to federal legislation.

On further reflection, this silence is less inexplicable than it may seem at first. Judicial review was not the question before the Convention. The question was how best to prevent the enactment of unwise and unconstitutional federal legislative measures. The answer was an executive veto. (And not just a veto, either. Additional checks on the risk of bad legislation included federalism, bicameralism, and the likelihood that "the best men in the Community would be comprised in the two branches of [Congress].")[28] Some delegates were afraid that the executive might be too weak, but a solid majority felt otherwise and were concerned not to involve judges in the lawmaking process. That settled, there was simply no need to say or do anything more.

In the course of discussing the veto, a few of the delegates had expressed the belief or hope that courts would also exercise judicial review. But unlike the question of federal supremacy over state laws, there was no need to decide what role the judiciary should play when it came to federal legislation. Some delegates might have favored judicial review, others might have opposed it, but most were now satisfied that they had already done what was needed to make the Constitution work.[29] Disagreements about the desirability or not of an additional judicial check were irrelevant and moot.

One might well ask why none of the proponents of judicial review thought to make a motion to add this power as well. Since no one did, we can only guess as to their reasons. One thing is certain, though: it was not because

everyone, or even a majority, agreed that the power was necessarily implicit and so nothing needed to be said. An assumption that judicial review is somehow natural or that it automatically inheres in the judicial power would not be made until the nation had considerably more experience with the practice than was true in 1787. As with other checks, judicial review of federal legislation would have been separately discussed and expressly incorporated into the text had the delegates contemplated using it to enforce the Constitution—as they had done, for example, with respect to federal supremacy over state law. Why did no one seek something similar when it came to the constitutionality of federal legislation? It could be that even those who recognized the possibility of judicial review were not yet imagining a substantial or powerful enough check to make this worthwhile. Or they might have believed that any effort to add such a provision would fail, presumably defeated by a combination of delegates opposed to judicial review and delegates who did not want to invite needless controversy in getting the new Constitution ratified. Whatever the explanation, the power of courts to review federal legislation was left unaddressed.[30]

The Dog That Didn't Bark—and the One That Did

Thoughts expressed by the Framers behind closed doors in Philadelphia are ultimately of less interest than the public debate that took place over ratification. After all, this is what elevated the Constitution to the status of law of the land. "As the instrument came from [the Convention]," Madison was to observe a decade later, "it was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions."[31] Understandings expressed during the discussions about whether to ratify, gathered from what was published in newspapers and pamphlets as well as from what was said in the state conventions, are what matter most.[32] Not surprisingly, the evidence from this quarter suggests that Americans did not suddenly discover the miracle that is judicial review.

In fact, the substance of the ratification debate was precisely what the experience of the 1780s should have led one to expect. A handful of participants saw a role for judicial review, though few of them imagined it as a powerful or important device and none seemed anxious to emphasize it. Others were opposed to the notion of judicial review, citing its possibility as one of the proposed Constitution's liabilities. The vast majority of participants were

still thinking in terms of popular constitutionalism and so focused on traditional popular and political means of enforcing the new charter. The notion of judicial review seems never to have crossed their minds.

It is striking, for example, that only a single exchange on judicial review can be described as anything other than cursory, that between Brutus and Publius in the New York press. The Anti-Federalist Brutus sparked the dispute by devoting three essays in the *New York Journal* to showing how "nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial."[33] Blending the fallacious with the prophetic, Brutus charged that, by conferring jurisdiction on the Supreme Court to decide cases in "equity" as well as law, the Framers had authorized the Justices to expound the Constitution "not only according to the natural and ob[vious] meaning of the words, but also according to the spirit and intention of it."[34] Add to that the Court's independent status and the finality of its judgments, which meant that "[t]he power of this court is in many cases superior to that of the legislature," together with the bias a national body must be expected to hold in favor of the federal government, and one could reliably predict that the Supreme Court would "extend the limits of the general government gradually, and by insensible degrees."[35]

Alexander Hamilton answered for Publius in the now-famous *Federalist 78*.[36] Hamilton's essay is usually presented as staking out a thoroughly modern position on judicial review. In fact, Hamilton was refuting Brutus's suggestion that the Constitution conferred sweeping power on the courts by instead defending the more limited power that had begun to find acceptance in a few corners during the 1780s. Hamilton's argument thus followed (and in most respects parroted) that of Iredell point for point. The chief difference, as Sylvia Snowiss has noted, was "in tone and emphasis," as Hamilton "dropped Iredell's argumentativeness."[37]

Although Hamilton portrayed the case for judicial review as obvious and uncontroversial, he also presented it in uncommonly strong language for the time. He said at one point, for example, that constitutional limits could "be preserved in practice *no other way* than through the medium of the courts of justice"; and he dismissed a suggestion that Congress could be the constitutional judge of its own power by urging that "[i]t is far more rational to suppose that the courts were *designed* to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[38] Yet while comments such as these appear to assign courts an important role, nothing Hamilton said was incompatible with the accepted premises of popular constitutionalism,

which, as Iredell and others had already argued, made room for courts to act as the people's agent in checking legislative mistakes or abuses.

Hamilton appears to have edged closer toward sounding a modern note of judicial preeminence in observing that the "independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men . . . sometimes disseminate among the people themselves."[39] That the people could alter or abolish their fundamental charter, Hamilton explained, in no way supported allowing their representatives to violate it "whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing constitution." Unless and until properly amended, a constitution is "binding upon [the people] 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."[40] Judges had a duty to resist invasions of the constitution, in other words, even if these had been "instigated by the major voice of the community."

Once again Hamilton's reasoning was consistent with the theory and practice of popular constitutionalism. Everyone agreed that a constitution was binding, just as everyone agreed that legislators could not ignore or depart from one. Most people (meaning not just Federalists but also a great many Anti-Federalists) had learned from experience to fear what elected legislatures might do when overcome by "momentary inclinations" of the sort Hamilton mentioned. But rather than abandon republicanism or qualify popular constitutionalism, their solution was to slow politics down, to force greater deliberation by complicating the lawmaking process with a system of checks and balances along the lines sketched out by Madison in *Federalist 51*. The whole point was to preserve popular control of constitutional government by finding (in Madison's words) "a Republican remedy for the diseases most incident to Republican Government."[41]

Federalist 78 attempts to integrate courts into this process—a position that would emerge more clearly and find widespread support in the 1790s as "departmentalism." Judicial review was yet one more device with which to force popular reconsideration of possibly unconstitutional measures. It could be called into play in the relatively rare instances in which such measures got past both Houses of Congress and the Executive, but judicial interpretations were no more final and binding on the people than those of these other branches. Final interpretive authority always and necessarily remained in the community. Hence, Hamilton emphasized how the "dangerous innovations" that might be produced by transient majorities and that could be checked by

judicial review "speedily give place to better information and more deliberate reflection."[42]

Could Hamilton have been staking out a still more extreme position, defending an idea of judicial supremacy that assigned courts the final word on constitutional interpretation while confining "the people's" role to amendment? Anything is possible, though this would have been an exceedingly impolitic position for the politically savvy and strategically-minded Publius to have taken. The most conservative wing of the Federalist party would eventually find its way to this position, but it would take until at least the mid-1790s and require additional provocation from the French Revolution and the rise of an opposition party in the United States. Perhaps Hamilton was out ahead of everyone else in this respect. Certainly it would not have been the first time (or the last). If so, however, Hamilton was indeed all alone, for no one else defended judicial review with an argument along these lines.

Whatever Hamilton's position, we can be fairly confident that it had no influence on ratification. This is because hardly anybody saw either *Federalist 78* or Brutus's essays during the campaign. Brutus was well regarded among a small circle of the most intellectual participants in ratification, but he was not widely circulated or read. Of Brutus's three essays on judicial review, two were not reprinted anywhere—not even in New York—while the third was reprinted only twice.[43] Publius's audience was hardly larger, the canonical status of *The Federalist* most definitely being a post-ratification phenomenon.[44] This is particularly true of *Federalist 78*, which was not included in the original newspaper series and first saw the light of day only upon publication of the second volume of *The Federalist* at the end of May 1788—too late to influence any ratifying convention except (possibly) that of New York, where the question of judicial review never came up.[45]

No one else discussed the nature, importance, or role of judicial review in anywhere near the same depth as Brutus and Hamilton. Indeed, only a handful of other Federalists mentioned the power at all.[46] In most instances, their references were too fleeting or obscure to attract attention. Fabius, for example, sought to quell fears of federal overreaching by showing that the Framers took "the strongest cautions against excesses":

> In the *senate* the *sovereignties* of the several states will be *equally* represented; in *the house of representatives*, the *people* of the whole union will be *equally represented*, and in the *president*, and the federal independent *judges*, so much concerned in the execution of the laws,

> and in the determination of their constitutionality, the *sovereignties* of the several states and *the people* of the whole union, will be *conjointly* represented.[47]

In one or two instances, the reference to judicial review was more pointed and substantive, though in no case was it developed at length or presented as anything more than one among numerous safeguards. The most elaborate presentation of this sort came from James Wilson in one of his less celebrated speeches at the Pennsylvania Ratifying Convention. Wilson responded to Anti-Federal charges that the federal government would swallow the states by citing the protections afforded by separation of powers, bicameralism, the structure of the Senate, and the power of election. In the midst of this rebuttal, he added:

> I say, under this Constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department. This I hope, sir, to explain clearly and satisfactorily. I had occasion, on a former day, to state that the power of the Constitution was paramount to the power of the legislature, acting under that Constitution. For it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual *mode*, notwithstanding that transgression; but when it comes to be discussed before the judges—when they consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void.[48]

A few other speakers made the same claim, albeit less emphatically than Wilson. Rapidly ticking off responses to the many objections raised against the Constitution by Patrick Henry at the Virginia Ratifying Convention, John Marshall came to what he characterized as Henry's claim that "the Government of the United States [has] power to make laws on every subject." Not so, retorted Marshall, for federal lawmakers cannot go beyond their delegated powers. "If they were to make a law not warranted by any of the powers enumerated," Marshall continued, "it would be considered by the Judges as an infringement of the Constitution which they are to guard:—They would not consider such a law as coming under their jurisdiction.—They would declare it void."[49] Statements to the same effect were made by John Stevens, writing as "Americanus"; by Oliver Ellsworth in the Connecticut Ratifying Convention; and by Samuel Adams at the Massachusetts Convention.[50] In addition,

William Davie argued to the North Carolina Convention that federal courts would be able to prevent states from violating the specific prohibitions of Article I, section 10.[51]

We thus find a smattering of references to judicial review from some fifteen or so speakers (of whom one-third were Virginians, where judicial review had achieved the greatest acceptance). This, in itself, is not surprising. Given the national scope of the debate, it would have been unnatural had there not been at least a few references to the developing principle of review. What is extraordinary—particularly given the weight so many modern champions of judicial review place on the so-called original meaning—is that this paltry collection of citations exhausts the discussion.

Few issues in American history have engrossed public attention like the debate about whether to adopt the Constitution. For more than nine months, from the middle of September, 1787, until at least the following July, the public was "wholly employed in considering and animadverting upon the form of Government proposed by the late convention."[52] Writing to a friend overseas, one observer described how the Convention's handiwork "has put us all in an uproar:—Our public papers are full of attacks and justifications of the new system: And if you go into private companies, you hear scarcely anything else."[53] Yet in all the flood of pamphlets and essays and editorials that streamed from the presses, and in all the voluminous records of debate in the state ratifying conventions, there is no more than this handful of references to judicial review.

It is not as if the question of enforcing constitutional limits was not discussed. On the contrary, Anti-Federalists were convinced that the Constitution's restrictions would be porous and ephemeral, an indictment they pressed throughout the campaign. And because virtually every Anti-Federalist offered this threat as one of the best reasons to reject the Constitution (the absence of a Bill of Rights being the other), practically every Federalist was forced to refute the claim by showing how the Constitution would be enforced.

But how did Federalists think this would happen, if not by judicial review? By now, the answer should be obvious: politics, the kind of politics that we have seen defined popular constitutionalism throughout the seventeenth and eighteenth centuries. When Anti-Federalists insisted that Congress would disregard its limits, Federalists invariably responded that any effort to do so would run smack into opposition from the people. Let Congress try to misuse its powers, they said time and again, and federal lawmakers would find themselves facing formidable popular resistance—via elections, juries,

popular outcries, or, in the unlikely event that all these failed, by more violent forms of opposition.

Arguments along this line dominated all others in both pervasiveness and emphasis.[54] Scarcely any Federalist responding to charges of federal overreaching failed to make a point about popular control, and other arguments (such as references to the Constitution's structure) were offered as subsidiary elements of this more fundamental reply. Even those sympathetic to judicial review emphasized politics as the primary, essential, and indispensable safeguard. Drawing on his experience in state government, Edmund Pendleton acknowledged to the Virginia Ratifying Convention that some constitutional violations had occurred in the state, adding:

> An instance has been mentioned already, where [constitutional rules] have not been attended to. . . . My brethren in that department (*the judicial*) felt great uneasiness in their minds, to violate the Constitution by such a law. They have prevented the operation of some unconstitutional acts. Notwithstanding those violations, I rely upon the principles of the Government—that it will produce its own reform, by the responsibility resulting from frequent elections.—We are finally safe while we preserve the representative character.[55]

John Steele of North Carolina likewise mentioned judicial review in conjunction with, and as a subordinate adjunct, to the more basic and fundamental popular check:

> If the Congress make laws inconsistent with the Constitution, independent judges will not uphold them, nor will the people obey them. A universal resistance will ensue. In some countries, the arbitrary disposition of rulers may enable them to overturn the liberties of the people; but in a country like this, where every man is his own master, and where almost every man is a freeholder, and has the right of election, the violation of a constitution will not be passively permitted.[56]

The vast majority of speakers relied on the same logic without tying their arguments to or even mentioning courts. The national government will not violate the Constitution, a New Jersey correspondent wrote, because "[e]very two years the people may change their Representatives if they please; and they certainly would please to change those who would act with so much baseness and treachery."[57] An exasperated George Washington complained

to his nephew Bushrod (a future Justice of the Supreme Court) about the stubborn unwillingness of Anti-Federalists to face this axiomatic point:

> The power under the Constitution will always be in the People. It is entrusted for certain defined purposes, and for a certain limited period, to representatives of their own chusing; and whenever it is executed contrary to their Interest, or not agreeable to their wishes, their Servants can, and undoubtedly will be, recalled.—It is agreed on all hands that no government can be well administered without powers—yet the instant these are delegated, altho' those who are entrusted with the administration are no more than the creatures of the people, act as it were but for a day, and are amenable for every false step they take, they are, from the moment they receive it, set down as tyrants—their natures, one would conceive from this, immediately changed—and that they have no other disposition but to oppress.[58]

Particularly with a proper scheme of separation of powers in place, the basic republican nature of American society would provide its own security from abuse. "[I]f we cannot entrust [the necessary powers of government] in the hands of our own citizens," wrote Publicola, "persons of our own choice, and whom we may remove at stated, and short periods, we must be contented to live without any effective government."[59] Comments along these lines were legion.[60]

By way of illustration, we may consider the debate over federalism, or, as it was framed at the time, over "consolidation," viz, whether the Constitution was calculated to annihilate state sovereignty and "ultimately to make the states one consolidated government."[61] The issue is worth special consideration not only because of its present-day importance but also because it was "the main substantive issue" for both sides at the time, a question raised and argued at every turn and in every forum.[62]

As with every other issue, the debate about federalism focused almost exclusively on popular and political checks. Quite a few Federalists emphasized the politics built into constitutional structure, arguing that state sovereignty was safe because "the general government depends on the state legislatures for its very existence"[63]—an argument familiar to lawyers today from Herbert Wechsler's famous essay on "the political safeguards of federalism."[64] In contrast to his perfunctory treatment of judicial review, James Wilson developed this argument at length in the Pennsylvania Ratifying Convention.[65] The inference that state governments are threatened was

"rather unnatural," Wilson noted dryly, inasmuch as no government would endanger that "upon the very existence of which its own existence depends." Pointing to the House of Representatives, Wilson argued that the Framers had taken care to ensure that "even the popular branch of the general government cannot exist unless the governments of the states continue in existence" by leaving control over "the important subject of giving suffrage" in the hands of state legislators. As for the Senate, Wilson remarked sardonically, "[i]n the system before you, . . . those tyrants that are to devour the legislatures of the states, are to be chosen by the state legislatures themselves. Need anything more be said on this subject?" The Electoral College was similarly arranged to protect states, by requiring that the President be chosen "by electors appointed in the different states, in such manner as the [state] legislature shall direct."

Wilson's long speech is but one example among many, as speaker after speaker made the same points in response to Anti-Federal charges that state sovereignty was threatened—all without mentioning courts or judges or judicial review.[66] Note, too, that while many Federalists followed Wilson in describing an array of devices that guaranteed states a voice in the national government, most appreciated that the Senate had been particularly designed with this concern in mind. A considerable number thus singled out the upper chamber to highlight its role in safeguarding the interests of state governments.[67]

Yet here, too, the reliance on structure turns out on closer inspection to be nothing more than an application of a less formal but more basic popular check.[68] With respect to federalism, moreover, the argument from popular enforcement was further refined in recognition of the special role state politicians could play by drawing on their inherent political strength to rouse public support against unconstitutional federal measures. As Edmund Randolph explained to the Virginia Ratifying Convention, if Congress "attempt . . . an usurpation, the influence of the State Governments, will stop it in the bud of hope. I know this Government will be cautiously watched. The smallest assumption of power will be sounded in alarm to the people, and followed by bold and active opposition."[69]

Publius developed this line of reasoning at length. Using *The Federalist* to gauge the perceptions of other participants in the Founding can be problematic, and it is often misleading to rely too heavily on this one source. On almost every issue, Publius's reasoning was more complex, his logic more novel and striking, than that of anyone else. In some instances, Madison's and Hamilton's arguments were simply over the heads of other Federalists.[70]

But not when it came to federalism. On this issue, what Publius had to say was no different from what every other Federalist was saying; it was simply more cogently articulated.

References to federalism are pervasive in *The Federalist*, but Publius's principal discussion of the topic is in a series of eight essays, numbers 39–46, all written by Madison.[71] Madison began his investigation by showing in *Federalist 39* how the design of the new system was neither "national" nor "federal" (in the eighteenth-century sense, which today we would call confederal), but was rather "a composition of both."[72] Five essays followed in which Madison recounted the reasons for bestowing each of the powers conferred on the national government. Finally, in *Federalist 45*, Madison reached the critical question: whether, assuming "no one of the powers transferred to the federal Government is unnecessary or improper, . . . the whole mass of them will be dangerous to the portion of authority left in the several states."[73] Madison's answer, in this essay and the next one, epitomizes basic Federalist convictions and illuminates how the Founders imagined this new system of federalism would work.[74]

The main reason states were safe in the new system, Madison conjectured, was simple. They would always have the political wherewithal easily to defeat the national government in any test of wills:

> The State Governments will have the advantage of the federal Government, whether we compare them in respect to the immediate dependence of the one or the other; to the weight of personal influence which each side will possess; to the powers respectively vested in them; to the predilection and probable support of the people; to the disposition and faculty of resisting and frustrating the measures of each other.[75]

In *Federalist 46*, Madison made explicit what is here only implicit—that because efforts by either side to extend its reach would depend on the ability of officials at each level to gain popular support, the Constitution's allocation of authority was controlled by the people themselves:

> Notwithstanding the different modes in which [the state and federal governments] are appointed, we must consider both of them, as substantially dependent on the great body of the citizens of the United States. . . . The Foederal and State Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes. The adversaries of the Constitu-

tion seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrouled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone; and that it will not depend merely on the comparative ambition or address of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expence of the other. Truth no less than decency requires, that the event in every case, should be supposed to depend on the sentiments and sanction of their common constituents.[76]

With this fundamental postulate established, Madison dedicated the remainder of the two essays to demonstrating the states' greater capacity to protect themselves through appeals to the "common superior." No mention was made of courts or judicial review, and only a single paragraph was spent describing the states' role in the composition of the federal government.[77] Instead, Madison devoted almost the entirety of both essays to cataloguing the states' political advantages "with regard to the predilection and support of the people."[78]

These advantages are, he said, considerable. To begin with, the states will employ many more officials than the federal government, and the relationships these state officials form with their constituents will give them substantial influence in the event of a contest with the federal government.[79] Adding to this influence is the different nature of the powers exercised by the respective governments. It was in this connection that Madison made his oft-quoted remark about how "[t]he powers delegated by the proposed Constitution to the Federal Government, are few and defined" while those that remain to the states "are numerous and indefinite."[80] His point was less to appease anxieties about whether the federal government was already too powerful than it was to establish the basis for his claim that "the first and most natural attachment of the people will be to the governments of their respective States."[81] Because the limited powers delegated to the national government would "be exercised principally on external objects" and were likely to be important only "in times of war and danger," the operations of the federal government would rarely touch the lives of most citizens.[82] "The powers reserved to the several States," in contrast, "will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the inter-

nal order, improvement, and prosperity of the State."[83] And because state officials would thus be responsible for "all the more domestic, and personal interests of the people,"[84] it would be

> [w]ith the affairs of [the state governments that] the people will be more familiarly and minutely conversant. And with the members of these, will a greater proportion of the people have ties of personal acquaintence and friendship, and of family and party attachments; on the side of these therefore the popular bias, may well be expected most strongly to incline.[85]

Given these advantages, it was fatuous to say that the states had anything to fear from Congress. But suppose that Congress were to overreach, Madison queried, suppose it were to stretch its powers "beyond the due limits."[86] The states "would still have the advantage in the means of defeating such encroachments."[87] The greater sympathy of the people for their state governments, in conjunction with the superior capacity of state officials to rally support, would ensure that Congress failed:

> [S]hould an unwarranted measure of the Foederal Government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people, their repugnance and perhaps refusal to co-operate with the officers of the Union, the frowns of the executive magistracy of the State, the embarrassments created by legislative devices, which would often be added on such occasions, would oppose in any State difficulties not to be despised; would form in a large State very serious impediments, and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the Foederal Government would hardly be willing to encounter.[88]

Nor did measures such as these exhaust the states' political resources in combating federal usurpation, for state officials could coordinate their efforts to force Congress to repeal the offending legislation:

> But ambitious encroachments of the Foederal Government . . . would not excite the opposition of a single State or of a few States only. They would be signals of a general alarm. Every Government would espouse

> the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combination in short would result from an apprehension of the foederal, as was produced by the dread of a foreign yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case, as was made in the other.[89]

In truth, Madison was quick to add, matters never would reach the extreme of armed conflict because, unlike in the showdown with Britain, the two contending sides were controlled by the same master: the people of the United States. The suggestion of military confrontation was a "visionary supposition," not to be taken seriously. "[W]hat would be the contest in the case we are supposing?" Madison wondered, "Who would be the parties? A few representatives of the people, would be opposed to the people themselves; or rather one set of representatives would be contending against thirteen sets of representatives, with the whole body of their common constituents on the side of the latter."[90]

Of course, the results of such a clash, should it somehow occur, could never be in doubt. As "[t]hose who are best acquainted with the late successful resistance of this country against the British arms" would attest, the states and their multitudinous militia would easily prevail.[91] But fretting about this sort of nonsense was pointless, a waste of time. The states had nothing to fear because the regulation and control of political power at both levels of government is in the people's hands. The point was decisive:

> Either the mode in which the Foederal Government is to be constructed will render it sufficiently dependent on the people, or it will not. On the first supposition, it will be restrained by that dependence from forming schemes obnoxious to their constituents. On the other supposition it will not possess the confidence of the people, and its schemes of usurpation will be easily defeated by the State Governments; who will be supported by the people.[92]

Closely tracking the argument of his co-author Madison, Alexander Hamilton likewise reminded the New York Ratifying Convention why "the natural strength and resources of state governments . . . will ever give them an important superiority over the general government":

> If we compare the nature of their different powers, or the means of popular influence which each possesses, we shall find the advantage entirely on the side of the states. This consideration, important as it is, seems to have been little attended to. . . . Whenever, therefore, Congress shall mediate any infringement of the state constitutions, the great body of the people will naturally take part with their domestic representatives. Can the general government withstand such a united opposition? Will the people suffer themselves to be stripped of their privileges? Will they suffer their legislatures to be reduced to a shadow and a name? The idea is shocking to common sense.[93]

The result, Hamilton said, and many, many Federalists reiterated, was "a complicated, irresistible check, which must ever support the existence and importance of the state governments."[94]

That the Founders expected constitutional limits to be enforced through politics and by the people rather than in courts is hardly surprising. Their history, their political theory, and their actual experience all taught that popular pressure was the only sure way to bring an unruly authority to heel. We should not forget that the Founding took place against the background of the Glorious Revolution and the American Revolution, not the civil rights movement. The colonial experience resisting king and Parliament served as the model from which the Founders constructed their theories, and the Revolution itself, beginning with the Stamp Act protests, provided their blueprint for opposing a government that exceeded its constitutional authority. This is why courts and judicial review were so rarely featured during ratification: members of the Founding generation had a different paradigm in mind. The idea of depending on judges to stop a legislature that abused its power never even occurred to the vast majority of participants in the debates.

* * *

Given that most of the Framers and Founders were not thinking about judicial review, it may not be clear at the end of the day just what the few who had thought about it expected to happen. We should keep in mind, however, that even those who wanted or expected courts to review legislation were thinking about the courts' role in a world of popular constitutionalism. If judicial enforcement was implicit in the Constitution, it was not because the Constitution was the kind of law that courts were normally responsible for overseeing or because it was a kind of law that judges were uniquely

qualified to interpret and enforce. The Constitution was still fundamental law, made by the people to govern the governors. If judicial review was to occur, it would be on the terms described by men like Iredell and Varnum: as a "political-legal" act, a substitute for popular resistance, required by the people's command to ignore laws that were ultra vires—though only when the unconstitutionality of a law was clear beyond dispute.

4

Courts, as Well as Other Departments, Are Bound by That Instrument

ACCEPTING JUDICIAL REVIEW

★ ★ ★

The United States experienced a run of dizzying economic growth in the 1790s. Propelled by war in Europe, demand for American produce and raw materials skyrocketed.[1] Profiting as well from Alexander Hamilton's brilliant stewardship of the Treasury Department, not to mention the advantage accruing to the United States as possessor of the world's largest neutral fleet, the value of domestic exports more than tripled, while the value of re-exports increased by fiftyfold and earnings from the carrier trades quadrupled. New wealth seeped into every sector of the economy and every region of the country as demand for skilled and unskilled labor mushroomed and wages soared.[2]

All the more remarkable in the face of this unparalleled good fortune, the 1790s were also a time of "vicious party warfare" and "almost hysterical fear."[3] Federalists delivered precisely the kind of good government they had promised during the ratification campaign, yet domestic political conflict achieved a level of ferocity exceeded only by the Civil War in its paranoid and frenzied overtones. Reassessing these years in 1813, Thomas Jefferson and John Adams disagreed about which side bore the greater blame, but concurred that "terror" and "terrorism" were apt descriptions of what had transpired.[4]

The source of all this turmoil lay in an escalating series of political and constitutional crises, as men who had collaborated for nearly two decades