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The Corporate Origins of Judicial Review

ABSTRACT. This Article argues that the origins of judicial review lie in corporate law. Diverging from standard historical accounts that locate the origins in theories of fundamental law or in the American structure of government, the Article argues that judicial review was the continuation of a longstanding English practice of constraining corporate ordinances by requiring that they be not repugnant to the laws of the nation. This practice of limiting legislation under the standard of repugnancy to the laws of England became applicable to American colonial law. The history of this repugnancy practice explains why the Framers of the Constitution presumed that judges would void legislation repugnant to the Constitution—what is now referred to as judicial review. This history helps to resolve certain debates over the origins of judicial review and also explains why the answer to other controversies over judicial review may not be easily found in the history of the Founding era. The assumption that legislation must not be repugnant to the Constitution produced judicial review, but it did not resolve issues such as departmentalism or judicial supremacy that arose with the continuation of this repugnancy practice after the Constitution.

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INTRODUCTION

This Article traces a new historical account of the origins of judicial review. It argues that judicial review arose from a longstanding English corporate practice under which a corporation's ordinances were reviewed for repugnancy to the laws of England. This English corporation law subsequently became a transatlantic constitution binding American colonial law by a similar standard of not being repugnant to the laws of England. After the Revolution, this practice of bounded legislation slid inexorably into a constitutional practice, as "the Constitution" replaced "the laws of England." With the Constitution understood to embody the supreme authority of the people, the judiciary would void ordinary legislation repugnant to this supreme law. Over a century later, this practice gained a new name: judicial review. The widespread acceptance of this name eventually obscured the degree to which the origins of the practice lay in older practices regarding the delegated nature of corporate and colonial authorities, rather than in a new constitutional theory of judicial power.

Only on rare occasions do we now think now about judicial review in terms of repugnancy. The word mainly appears in quotations of older court opinions. In 2005, Justice John Paul Stevens declared that "[b]ecause the statute itself is not repugnant to the Constitution . . . , the Court does not have the constitutional authority to invalidate it."¹ A recent opinion piece in the *New York Times* on judicial activism described judicial review as "an act 'of great delicacy, and only to be performed where the repugnancy is clear.'"²

Despite the contemporary infrequency of the word, what we think of as "judicial review" was once routinely described in terms of repugnancy. Kent's *Commentaries* used the heading "Laws repugnant to the constitution void" to discuss judicial review.³ In 1889, almost a century of cases involving judicial review appeared in the *U.S. Reports* under the caption "Cases in Which Statutes or Ordinances Have Been Held To Be Repugnant to the Constitution

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1. United States v. Booker, 543 U.S. 220, 283 (2005) (Stevens, J., dissenting) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).
 2. Paul Gewirtz & Chad Golder, *So Who Are the Activists?*, N.Y. TIMES, July 6, 2005, at A19 (quoting *Mayo v. Cooper*, 73 U.S. (6 Wall.) 247, 251 (1867)).
 3. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW, at xvi, *448 (N.Y., O. Halsted 2d ed. 1832).

or Laws of the United States.”⁴ Before judicial review had a name, the practice was understood in terms of review under a repugnancy standard.⁵

Explanations of the origins of judicial review have not paid much attention to the word or to the idea of repugnancy.⁶ In fundamental law accounts, judicial review is legitimized by English constitutional and common law, often *Dr. Bonham's Case* in particular, and codified as constitutional doctrine in *Marbury v. Madison*.⁷ In structuralist accounts, judicial review reflects the unique structures of American politics—for example, the invention of a written constitution, responses to federalism, belief in the people’s or popular

- 4. 131 U.S. app. at ccxxxv (1889).
- 5. Because judicial review originally had no name, different terms have been used to discuss the practice. The concept of judicial duty was used by supporters such as Horace Gray in the mid-nineteenth century. JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772 app. 1, at 521 (Boston, Little, Brown & Co. 1865) (appendix written by Horace Gray, Jr.) (declaring “the principle of American Constitutional Law, that it is the duty of the judiciary to declare unconstitutional statutes void”). By the end of the century, “judicial power,” a term used descriptively in the Constitution and as an early critique, had become a common term. See, e.g., BRINTON COXE, AN ESSAY ON JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION (photo, reprint 2005) (1893); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 172 (2004) (quoting William Jarvis’s 1820 letter to Thomas Jefferson on “judicial power”); Charles B. Elliott, *The Legislatures and the Courts: The Power To Declare Statutes Unconstitutional*, 5 POL. SCI. Q. 224 (1890). In 1909, Edward Corwin discussed “judicial review,” and for the last century this label has been universally adopted. Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 660, 670 (1909).
- 6. For previous discussions, see, for example, ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 2, 22-24 (1989), which briefly discusses repugnancy in arguing that constitutional adjudication is “simply a special case of statutory construction.” For a critique of the judicial review scholarship as often based on the same evidence, see Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329.
- 7. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Dr. Bonham's Case*, (1610) 77 Eng. Rep. 646 (K.B.); *Dr. Bonham's Case*, (1608) 77 Eng. Rep. 638 (C.P.). For such accounts, see, for example, Allen Dillard Boyer, “*Understanding, Authority, and Will*: Sir Edward Coke and the Elizabethan Origins of Judicial Review”, 39 B.C. L. REV. 43 (1997); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Philip Hamburger, *Law and Judicial Duty*, 72 GEO. WASH. L. REV. 1, 12-23 (2003) [hereinafter Hamburger, *Law and Judicial Duty*]; Philip A. Hamburger, *Revolution and Judicial Review: Chief Justice Holt's Opinion in City of London v. Wood*, 94 COLUM. L. REV. 2091 (1994); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987); and Sylvia Snowiss, *From Fundamental Law to the Supreme Law of the Land: A Reinterpretation of the Origins of Judicial Review*, 2 STUD. AM. POL. DEV. 1 (1987). For emphasis on the English heritage, see J.M. SOSIN, *THE ARISTOCRACY OF THE LONG ROBE: THE ORIGINS OF JUDICIAL REVIEW IN AMERICA* (1989).

sovereignty, concerns about state legislative power, ideas about the separation of powers, distinctions of law and politics, the aspirations of an independent national judiciary, or even the post-Civil War power of the federal government.⁸

Even when the word has been noticed, its genealogy has been of little interest. In a 2004 essay, Noah Feldman remarked on the fact that “repugnant” appears in both *Dr. Bonham’s Case* and *Marbury*.⁹ He commented, “I hope you will accept on faith, without demonstration, that the word ‘repugnant’ is a relatively rare word in legal discourse.”¹⁰ “Repugnant,” however, was not always a rare word in legal discourse. The history of its recurrence in both cases provides the crucial clue to the origins of judicial review.

This history resolves three central concerns in the scholarship surrounding the origins of judicial review. These three issues can be phrased as *whether* the Framing generation intended judicial review to be part of the constitutional scheme; *why* the Framing generation presumed that judicial review was to

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8. See, e.g., WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 95-96 (2000) (suggesting a transformation in attitudes toward judicial review over the nineteenth century from a strictly legal perspective to a more political one); CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* (1986) (suggesting a difference between “traditional” and “modern” policymaking judicial review); William R. Casto, *James Iredell and the American Origins of Judicial Review*, 27 CONN. L. REV. 329 (1995) (discussing the people’s sovereignty); Leslie Friedman Goldstein, *Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law*, 48 J. POL. 51 (1986) (discussing popular sovereignty); Matthew P. Harrington, *Judicial Review Before John Marshall*, 72 GEO. WASH. L. REV. 51 (2003) (discussing concerns over state legislative actions); Charles Hobson, *John Marshall: The Formation of a Jurist*, 16 ST. JOHN’S J. LEGAL COMMENT. 315 (2002) (discussing the concept of an independent judiciary); Jack N. Rakove, *Once More into the Judicial Breach*, 72 GEO. WASH. L. REV. 381 (2003) (discussing federalism); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031 (1997) (same); Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787 (1999) (discussing multiple structural changes).
9. Noah Feldman, *The Voidness of Repugnant Statutes: Another Look at the Meaning of Marbury*, 148 PROC. AM. PHIL. SOC’Y 27, 31 (2004); see *Marbury*, 5 U.S. (1 Cranch) at 177 (“Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.”); *Dr. Bonham’s Case*, 77 Eng. Rep. at 646, 652 (“[I]t appears in our books, that in many cases, the common law will . . . controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void . . . ”).
10. Feldman, *supra* note 9, at 31.

exist; and *how* the Framing generation thought judicial review should be practiced.

Whether or not the Framers intended judicial review has been a longstanding debate. In the mid-nineteenth century, lawyers and historians began to investigate the precedents for judicial review. Since then the debate has been endless. William Crosskey famously argued that the Framers never intended judicial review.¹¹ In the last few decades, although opinion has run in favor of some intent for judicial review, scholars have disagreed over the clarity of such intent. Saikrishna Prakash and John Yoo have argued for a clear intent to authorize judicial review,¹² while Larry Kramer has suggested that the practice of judicial review was confused and contested.¹³

This Article adopts a different stance by abandoning an intent-focused inquiry. Judicial review was neither created anew nor caught in a mist of confusion. Supporting scholarship by Maeva Marcus, William Treanor, and others who have demonstrated significant post-Revolutionary comfort with the practice of judicial review,¹⁴ this Article demonstrates that judicial review

- ^{11.} 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1000 (1953); cf. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1, 15 (Yale Univ. Press 2d ed. 1986) (1962) (arguing that although “the Framers of the Constitution specifically, if tacitly, expected that the federal courts would assume [such] a power,” the “power of judicial review, as it is called, does not derive from any explicit constitutional command”).
- ^{12.} See Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 893-94 (2003) [hereinafter Prakash & Yoo, *Origins*]; see also Saikrishna B. Prakash & John C. Yoo, *Questions for the Critics of Judicial Review*, 72 GEO. WASH. L. REV. 354 (2003) [hereinafter Prakash & Yoo, *Questions*] (arguing that the Constitution authorizes judicial review). An earlier article by Prakash and Yoo interestingly adopted language describing the Founders’ intent in terms of “assuming judicial review” and “natural presumption.” See Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1497, 1522 (2001) (arguing that judicial review developed after 1776 and that the Constitution reflects the Founders’ presumption in favor of such judicial review).
- ^{13.} KRAMER, *supra* note 5, at 77-78, 91-92; Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5 (2001) [hereinafter Kramer, *We the Court*]; Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387 (2003).
- ^{14.} See Maeva Marcus, *Judicial Review in the Early Republic*, in LAUNCHING THE “EXTENDED REPUBLIC”: THE FEDERALIST ERA 25 (Ronald Hoffman & Peter J. Albert eds., 1996) (arguing that the Framers and Founders understood that federal judges would exercise judicial review); William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491 (1994) [hereinafter Treanor, *Case of the Prisoners*] (arguing that judicial review was uncontroversial in Virginia prior to *Marbury*); William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005) [hereinafter Treanor, *Judicial Review Before Marbury*] (demonstrating the common practice of judicial review before *Marbury*); see also Scott Douglas Gerber, *Introduction: The Supreme Court Before John*

was initially taken for granted and presumed to exist. Many members of the Framing generation presumed that courts would void legislation that was repugnant or contrary to a constitution.

Why judicial review was taken for granted has also remained a matter of controversy. As Marcus has written, the “mystery lies in why and how” the Founding generation “came to think” that the judiciary possessed this power.¹⁵ Fundamentalist accounts of the origins of judicial review attribute the idea to a belief in a fundamental, higher, or natural law that binds ordinary law—an argument that often relies heavily on *Dr. Bonham’s Case*. Yet as Kramer concluded, there is “little evidence” to support the idea that *Dr. Bonham’s Case* was important to American judicial review.¹⁶ He dismissed alternative colonial precedents, however: “[I]t is misleading to describe these antecedent [colonial and imperial] practices as a nascent or immature form of constitutional review . . .”¹⁷ Others have shared this belief that colonial American practices are largely irrelevant because they were not “constitutional”—i.e., based on a written constitution.¹⁸

This Article argues that the colonial American practice of bounded legislation under a repugnancy standard is causally responsible for the existence of American judicial review. This claim expands on suggestions made most recently by Barbara Black and Philip Hamburger about corporate practices¹⁹ and bolsters contentions long found in the scholarship of the British

Marshall, in SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 1, 11 (Scott Douglas Gerber ed., 1998) (arguing that the Justices understood and advocated judicial review).

15. Marcus, *supra* note 14, at 52.

16. KRAMER, *supra* note 5, at 23.

17. *Id.* at 23–24.

18. See, e.g., P. Allan Dionisopoulos & Paul Peterson, *Rediscovering the American Origins of Judicial Review: A Rebuttal to the Views Stated by Currie and Other Scholars*, 18 J. MARSHALL L. REV. 49, 55–56 (1984) (discussing Privy Council review but ultimately rejecting it as precedent); Treanor, *Judicial Review Before Marbury*, *supra* note 14, at 468 n.45 (commenting that the colonial practice prior to the Constitution was “not judicial review, since the question was not one of constitutionality but of consistency with English law”).

19. See Barbara Aronstein Black, *An Astonishing Political Innovation: The Origins of Judicial Review*, 49 U. PITTS. L. REV. 691, 692–93 (1988); Hamburger, *Law and Judicial Duty*, *supra* note 7, at 17 (“[T]he Privy Council and the colonial courts simply followed a practice familiar from the review of various domestic acts—including . . . most closely, the acts of corporations.”). Hamburger ultimately argued, however, that “broader conceptions of law and judicial duty,” not the review of corporate acts, were “the primary source of judicial review.” Hamburger, *Law and Judicial Duty*, *supra* note 7, at 13 n.41. For an earlier discussion of the possible link between corporate bylaws and judicial review, see Gordon E. Sherman, *The Case of John Chandler v. The Secretary of War*, 14 YALE L.J. 431, 447–50 (1905). In providing a more precise genealogy of the transformation from corporate to constitutional

empire about a possible link between imperial review practices and judicial review.²⁰ The Founding generation presumed a practice of constitutional judicial review as an outgrowth of the experience of constraining corporate and colonial legislation by the laws of the nation. Continuity in the practice of constitutionally constraining legislation resulted in discontinuity in the relationship of legislature and judiciary.

This claim is about past practices, not precedents. Conceptualized as an intellectual precedent, post-Revolutionary judicial review was not the same as colonial and corporate repugnancy review; understood as a practice, it was. Modern constitutional scholars have defined the search for the origins as a search for prior examples of coordinate review because they are most troubled by Supreme Court review of congressional acts—that is, by one branch of government reviewing the acts of another coordinate branch. Such an inquiry asks a question about judicial review based on a belief that the emerging strict theory of separation of powers consistently motivated the decisions of the Framing generation.²¹

Experience, however, rather than logic, explains the history of judicial review. Coordinate judicial review was presumed because of an earlier practice that most frequently involved hierarchical authorities. The new conception of separation of powers was a theoretical critique—and, of course, there were a few who voiced it. Yet interestingly the practice of constraining legislation by a constitutional repugnancy standard was so well accepted that it initially blunted this potential concern. Over the nineteenth century this critique developed strength, until it became hard to think about judicial review in any other way. Nonetheless, the emergence of the critique should not obscure the causal explanation for the practice. Judicial review initially had no name because it was not an intellectual invention.

practices, this Article comports with arguments claiming a “corporate analogy” in the minds of the Framers. See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1432–36 (1987).

- 20. See, e.g., HAROLD D. HAZELTINE, APPEALS FROM COLONIAL COURTS TO THE KING IN COUNCIL, WITH ESPECIAL REFERENCE TO RHODE ISLAND 299–300 (Washington, Gov’t Printing Office 1896) (1894) (suggesting a relationship between imperial practice and “the important doctrine of American jurisprudence which grants to the judiciary the power of setting aside an act of the legislature as being repugnant to the fundamental law of the land”); ELMER BEECHER RUSSELL, THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL 227 (photo. reprint 1981) (1915) (suggesting that the Privy Council practice was “a precedent and a preparation” for “judicial annulment”).
- 21. For discussion of the development of the separation of powers theory in the 1780s, see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 276–77 (1996); and GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 152, 449, 453, 549, 604 (1998).

The shift in focus from a genealogy of judicial power to a history of constrained legislation implicitly emphasizes the importance of understandings of delegated authority in the development of judicial review. This delegation theme places the story of early American judicial review in closer alignment with the accounts of the development of judicial review in other postcolonial nations.²² Throughout the British Empire, the practice of constraining colonial legislatures under a standard of repugnancy arose from “the constitutional relationship between the Imperial Parliament and the subordinate colonial legislatures.”²³ The origins of judicial review in Canada and Australia have been thought to lie in this same imperial practice of a repugnancy standard.²⁴ The longer duration of the imperial relationship in these countries produced different patterns in the practice of judicial review.²⁵

This question of *how* judicial review should be practiced motivates many investigations of its origins.²⁶ This Article claims that because judicial review was a shifting cultural practice, not a new intellectual doctrine, the *how* question cannot be as convincingly answered based on the early history as the *whether* and *why* questions.²⁷ Many authors have pointed to the fact that the Framing generation thought about the practice of judicial review differently

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22. See Loren P. Beth, *The Judicial Committee of the Privy Council and the Development of Judicial Review*, 24 AM. J. COMP. L. 22, 40-41 (1976) (“Judicial review may . . . owe much more to the example set by the Privy Council than to the necessities of federalism.”).
23. D.B. SWINFEN, IMPERIAL CONTROL OF COLONIAL LEGISLATION, 1813-1865: A STUDY OF BRITISH POLICY TOWARDS COLONIAL LEGISLATIVE POWERS 53 (1970); see Loren P. Beth, *The Judicial Committee as Constitutional Court for the British Empire 1833-1971*, 7 GA. J. INT'L & COMP. L. 47 (1977); Loren P. Beth, *The Judicial Committee: Its Development, Organisation and Procedure*, 1975 PUB. L. 219; Beth, *supra* note 22 (discussing appeals from dependencies).
24. See JOHN GOLDRING, THE PRIVY COUNCIL AND THE AUSTRALIAN CONSTITUTION 10-11 (1996); EDWARD McWHINNEY, FEDERAL CONSTITUTION-MAKING FOR A MULTI-NATIONAL WORLD 9-10 (1966); B.L. STRAYER, JUDICIAL REVIEW OF LEGISLATION IN CANADA 6 (1968). But see B. Galligan, *Judicial Review in the Australian Federal System: Its Origin and Function*, 10 FED. L. REV. 367, 368 (1979) (arguing that the origin for Australian judicial review is United States precedent rather than imperial practices). My thanks to Keven Booker for assistance with this point.
25. The Colonial Laws Validity Act attempted to address ambiguities regarding what constituted repugnancy by providing that colonial laws could be declared void “on the ground of repugnancy to the law of England” only if they were repugnant to an act of Parliament. An Act To Remove Doubts as to the Validity of Colonial Laws, 1865, 28 & 29 Vict., c. 63, § 3; see ALEX C. CASTLES, AN AUSTRALIAN LEGAL HISTORY 405-12 (1982); SWINFEN, *supra* note 23, at 167-86.
26. See, e.g., CLINTON, *supra* note 6, at 1; William E. Nelson, *Marbury v. Madison, Democracy, and the Rule of Law*, 71 TENN. L. REV. 217 (2004).
27. See Mary Sarah Bilder, Idea or Practice: A Brief Historiography of Judicial Review 3-13 (Aug. 9, 2006) (unpublished manuscript, on file with author).

than we do today.²⁸ The corporate, colonial, and constitutional repugnancy practice suggests new boundaries with respect to what history can tell us about how the modern practice of judicial review should operate.

This account diminishes support for certain modern claims about the scope of review. The practice presumed by the Founders emphasized the bounded nature of legislation limited by the laws of the nation. This history casts doubt on arguments that general “natural law” was regularly accepted as a legitimate basis for review.²⁹ There are strains of English and American legal thought that relate to a tradition regarding laws of nature (although the degree to which this idea is identical to current “natural law” ideology might be questioned); however, these strains were not perceived as the dominant constraints on legislation. The laws of the realm, the laws of the nation, and the Constitution – not free-floating natural law – limited ordinary legislation.³⁰

This history helps to explain the pattern of post-constitutional judicial review practice.³¹ Courts embraced vertical review (federal review of state courts) relatively early because of its similarity to earlier hierarchical review.³² State courts practiced judicial review of state legislation in states that viewed their constitution, not their legislature, as the supreme authority.³³ Although horizontal federal review was assumed and initially practiced,³⁴ the implications of such review were not well contemplated. The reasons for the

^{28.} See, e.g., KRAMER, *supra* note 5, at 62, 250–51; NELSON, *supra* note 8, at 3.

^{29.} For critical discussions of the natural law claim, see Goldstein, *supra* note 8; and Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of “Unwritten” Individual Rights?*, 69 N.C. L. REV. 421 (1991).

^{30.} Two cases in which the Court referred to fundamental law limits on legislation involved Connecticut and Rhode Island. *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627 (1829); *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). In both states, the original colonial charters operated as new state constitutions. The absence of written and ratified constitutions makes these cases tricky precedents for general constitutional principles.

^{31.} See MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE 193–96 (2004).

^{32.} On the dominance of review of state legislation, see R. Kent Newmyer, *Chief Justice Marshall in the Context of His Times*, 56 WASH. & LEE L. REV. 841, 846–48 (1999).

^{33.} Rhode Island is an exception that supports this point. The state legislature insisted on supremacy, and the state did not write a constitution until 1843; consequently, the state supreme court did not strike down state statutes until the mid-nineteenth century. See BILDER, *supra* note 31, at 279 n.11; see also Theodore W. Ruger, “A Question Which Convulses a Nation”: *The Early Republic’s Greatest Debate About the Judicial Review Power*, 117 HARV. L. REV. 826 (2004) (discussing Kentucky’s experiment in the 1820s of declared legislative supremacy through the evisceration of state judicial review).

^{34.} See Prakash & Yoo, *Origins*, *supra* note 12, at 900–02.

absence of the practice in the nineteenth century deserve more attention. The growing strength of the rhetorics of separation of powers and popular sovereignty, the changing views of the legitimacy of the Constitution as the will of the people, the dominance of admiralty issues on the early Supreme Court docket, and the ways in which litigation and disputes over congressional legislation were framed may have contributed to the apparent disappearance of the issue for decades.

Equally importantly, this account suggests that other modern concerns about judicial review may be hard to resolve by looking to the history of the Founding era. The dominance of the “repugnancy” rubric helps to explain why early judicial review did not articulate a precise standard for review or define the appropriate level of scrutiny. While the commitment to avoiding repugnancies was clearly articulated, the conception of what represented a repugnancy was not. The simultaneous ambiguity and certainty of the phrase “repugnant to the Constitution” meant that judges did not initially have to confront whether they were engaged in what we would call narrow or broad constructions of the Constitution. Early cases may—or may not—support both expansive and restrictive approaches to review.³⁵

Similarly, because judicial review arose out of a prior practice rather than an idea about separation of powers, there may not have been a coherent or accepted understanding of whether the judiciary alone was the ultimate interpreter of the Constitution—the modern issues of judicial supremacy and departmentalism.³⁶ The practice of repugnancy made it easy to assume that the

35. For recent discussion, see Treanor, *Judicial Review Before Marbury*, *supra* note 14, at 557–61, which argues that courts used judicial review to keep legislative power within appropriate institutional boundaries and struck down state statutes affecting the judiciary and juries even when they were not clearly unconstitutional. See also CLINTON, *supra* note 6 (arguing for a narrow original understanding of review); Casto, *supra* note 8 (arguing that judicial review was limited to cases in which the statute was unconstitutional beyond dispute); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (arguing that courts originally were to possess only a limited power of review in unambiguous cases). A related inquiry involves the types of rights that were protected by judicial review. See Nelson, *supra* note 26 (arguing that judicial review was meant to protect not minority rights but rather common rights).

36. For discussion of supremacy and departmental questions in the post-1787 period, see, for example, KRAMER, *supra* note 5; David E. Engdahl, *John Marshall’s “Jeffersonian” Concept of Judicial Review*, 42 DUKE L.J. 279 (1992); Daniel A. Farber, *Judicial Review and Its Alternatives: An American Tale*, 38 WAKE FOREST L. REV. 415 (2003); John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333 (1998); Kramer, *We the Court*, *supra* note 13; Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706 (2003); Jed Handelsman Shugerman, *Marbury and Judicial Deference: The Shadow of Whittington v. Polk and the Maryland Judiciary Battle*, 5 U. PA. J. CONST. L. 58 (2002); Sylvia Snowiss, *The Marbury of 1803 and the Modern Marbury*, 20 CONST.

judiciary would have such power but said far less with respect to other conceivable constitutional arbiters. The belief in a constitutionally constrained legislative power coexisted with an aspiration to separation of powers. After the ratification of the Constitution, as separation of powers became increasingly accepted as the highest constitutional principle, these questions came into focus. While the Founding history can provide a guide to some concerns about judicial review, others we must wrestle with unaided.

I. REPUGNANCY AND CORPORATIONS

This history of judicial review begins with “repugnancy.” Repugnant was a relatively common word in early English law. It appeared in the thirteenth century in Bracton,³⁷ in the fourteenth and fifteenth centuries in the Year Books,³⁸ and in the sixteenth century in the works of Edward Coke.³⁹ The usage of the word did not carry the modern connotation of unpleasantness or repulsiveness. “Repugnant” meant “inconsistent” or “self-contradictory.” It often appeared in conjunction or was used interchangeably with “contrary.”⁴⁰ Lord Ellesmere thus noted, “If the words of a statute be contraryant or repugnant, what is there then to be said?”⁴¹ “Repugnant” frequently described

COMMENT. 231 (2003); and G. Edward White, *The Constitutional Journey of Marbury v. Madison*, 89 VA. L. REV. 1463 (2003).

- 37. 2 HENRY DE BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND 80, 168, 170, 239, 319, 322 (Samuel E. Thorne trans., 1968) (c. 1220-1250).
- 38. A search of David Seipp’s Year Book database in September 2006 produced forty-six cases between 1307 and 1463 in which “repugnant” appeared in the commentary and paraphrase, process and pleading, or language notes sections. David J. Seipp, Legal History: The Year Books, <http://www.bu.edu/law/seipp/> (select “Search Year Books”) (last visited Sept. 3, 2006).
- 39. A search of the *English Reports* in the Justis.com database produced forty-three cases in Coke’s *Reports* matching “repugnant” or “repugnancy.” See also 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND § 213, at 142 (photo. reprint 1979) (London, Societe of Stationers 1628); 2 id. § 334, at 206v; id. § 362, at 224; id. § 384, at 237; id. § 520, at 297.
- 40. See 13 THE OXFORD ENGLISH DICTIONARY 675-76 (2d ed. 1989) (defining “repugnant” as “[c]ontrary or contradictory to, inconsistent or incompatible with”); Y.B. 14 Edw. 2, fol. 29, pl. 60 (1321) (Seipp No. 1321.213ss), reprinted in 86 SELDEN SOCIETY 190 (1969), available at <http://www.bu.edu/phpbin/lawyearbooks/search.php> (search by “Seipp Number” for this and all such references below) (stating that franchises should not be “repugnant ne contrariant”).
- 41. S.E. Thorne, Dr. Bonham’s Case, 1938 LAW Q. REV. 543, 549 [hereinafter Thorne, Dr. Bonham’s Case], reprinted in S.E. THORNE, ESSAYS IN ENGLISH LEGAL HISTORY 269, 275 (Hambledon Press 1985).

a problematic relationship between texts, for example, provisions in statutes, grants, deeds, wills, writs, counts, and judgments. Francis Bacon discussed situations in which there was a “direct contrariety and repugnancy” between two statutes.⁴² “Repugnant” or “contrary” also came to designate the boundaries of proper hierarchical relationship between bodies of law.⁴³ Under Henry VIII, this hierarchical use of “repugnancy” became increasingly prevalent and came to regulate the relationship between English law and ecclesiastical law,⁴⁴ as well as English law and Welsh law.⁴⁵

“Repugnancy” also appeared in the law of corporations. Corporate treatises declared that corporate bylaws could not be repugnant to the laws of the nation. In 1659, the first English treatise on corporations discussed “What Ordinances a Corporation may make.”⁴⁶ Ordinances were not to be “repugnant to the Lawes of the Nation, against the publick and common good of the people within or without the same City.”⁴⁷ The same rule appeared in later

- ^{42.} FRANCIS BACON, *The Maxims of the Law* (c. 1597), in 7 THE WORKS OF FRANCIS BACON 327, 371 (photo. reprint 1996) (James Spedding ed., London, Longmans & Co. new ed. 1879) (maxim 19).
- ^{43.} See Faith Thompson, *Parliamentary Confirmations of the Great Charter*, 38 AM. HIST. REV. 659, 662, 669-70 (1933) (noting that Magna Carta constrained certain statutes with “contrary”).
- ^{44.} See Act of Supremacy Act, 1558, 1 Eliz., c. 1; Canon Law Act, 1549, 3 & 4 Edw. 6, c. 11 (requiring that ecclesiastical laws be not “cont[r]ary to any comon Lawe or Statute of this Realme”); Religion Act, 1540, 32 Hen. 8, c. 26 (forbidding decrees and ordinances “repugnant or contrariant to the lawes and statutes of this Realme”); Ecclesiastical Licenses Act, 1533, 25 Hen. 8, c. 21, § 3; Submission of the Clergy Act, 1533, 25 Hen. 8, c. 19, pmlb., §§ 2, 7; J. Duncan M. Derrett, *Thomas More and the Legislation of the Corporation of London*, 5 GUILDHALL MISCELLANY 175, 175-80 (1963); William Huse Dunham, Jr., *Regal Power and the Rule of Law: A Tudor Paradox*, J. BRIT. STUD., May 1964, at 24, 36.
- ^{45.} See Laws in Wales Act, 1542, 34 & 35 Hen. 8, c. 26, § 26; Laws in Wales Act, 1535, 27 Hen. 8, c. 26 (mentioning offices not “repugnaunt” to this act); P.R. Roberts, *The “Henry VIII Clause”: Delegated Legislation and the Tudor Principality of Wales*, in *LEGAL RECORD AND HISTORICAL REALITY* 37 (Thomas G. Watkin ed., 1989) [hereinafter Roberts, *Henry VIII Clause*]; Peter R. Roberts, *Wales and England After the Tudor “Union”: Crown, Principality, and Parliament, 1543-1624*, in *LAW AND GOVERNMENT UNDER THE TUDORS* 111 (Claire Cross et al. eds., 1988).
- ^{46.} WILLIAM SHEPHEARD, *OF CORPORATIONS, FRATERNITIES, AND GUILDS* 81 (London, H. Twyford, T. Dring, & J. Plate 1659). The word “ordinance” traditionally indicated an enactment or regulation of the Crown rather than Parliament. See S.B. CHRIMES, *ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY* 269-77 (1936); Roberts, *Henry VIII Clause*, *supra* note 45, at 39; see also F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 186-90 (photo. reprint 2001) (1908) (discussing the differences between statutes and ordinances).
- ^{47.} SHEPHEARD, *supra* note 46, at 81-82.

treatises on corporations, with “contrary” at times replacing “repugnant.” In 1712, a corporate treatise stated that it was “usual” to include a clause in a corporate charter that bylaws “be not repugnant to the Laws of the Nation nor against the publick and common Good of the People.”⁴⁸ In 1765, William Blackstone explained that corporations had power to make bylaws “unless contrary to the laws of the land, and then they are void.”⁴⁹ In 1850, James Grant declared that courts could not uphold any bylaw “which is repugnant to, or inconsistent with, the laws of the land.”⁵⁰

A. Corporations and Bylaws

This principle that corporate ordinances or bylaws were bounded by the laws of the nation had a long history arising from understandings of delegated jurisdictions. As late-eighteenth-century commentators noted, a similar rule was found in the Twelve Tables in Roman law.⁵¹ Within English law, under Edward I, such jurisdictions were conceptualized as instances in which the

- 48. LAWS CONCERNING TRADE, AND TRADESMEN 8 (Stafford, Eng., J. Nutt 1712). The author noted that a repugnancy clause was unnecessary because “the Law doth understand that . . . [a]nd such By-Laws made by a Corporation are void by the very Common-Law.” *Id.* at 9.
- 49. 1 WILLIAM BLACKSTONE, COMMENTARIES *476; *see also* 2 STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 109 (London, J. Butterworth 1794) (“If a bye-law be contrary to the general laws of the kingdom, it is void . . . ”).
- 50. JAMES GRANT, A PRACTICAL TREATISE IN THE LAW OF CORPORATIONS 77 (photo. reprint 1993) (1850); *see also* JOSEPH K. ANGELL & SAMUEL AMES, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 183 (photo. reprint 1972) (1832) (“[A]ll by-laws of a corporation, contrary to the constitutional law of the land, must be void.”). The repugnancy principle is similar to, but not the same as, the later ultra vires doctrine. The ultra vires doctrine developed in the mid-nineteenth century and limited a corporation’s activities to the purposes and activities expressed in the charter. *See Reuven S. Avi-Yonah, The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 800 (2005); Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (with Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1302-09 (2001). The British version of judicial review is interestingly often described as ultra vires review. *See, e.g.*, David Jenkins, *From Unwritten to Written: Transformation in the British Common-Law Constitution*, 36 VAND. J. TRANSNAT'L L. 863, 893-905 (2003).
- 51. The Twelve Tables VIII.27 (c. 450 B.C.E.), *in* ANCIENT ROMAN STATUTES 12 (photo. reprint 2003) (Allan Chester Johnson et al. eds. & trans., 1961) (“These guild members shall have the power . . . to make for themselves any rule that they may wish provided that they impair no part of the public law.”); *see also* Decree of the Senate on Guilds of Greek Artists (112 B.C.E.), *in* ANCIENT ROMAN STATUTES, *supra*, at 48, 48-49 (voiding certain guild agreements). For discussion of the Tables, see 1 BLACKSTONE, *supra* note 49, at *476; and 2 JAMES WILSON, *Of Corporations* (1791), *in* THE WORKS OF JAMES WILSON 570, 571 (Robert Green McCloskey ed., 1967) (1804).

King had delegated liberties.⁵² As a matter of history, not all delegated jurisdictions had arisen from actual acts of royal delegation; some had independent origins arising from the Conquest or other ancient practices. Gradually, however, these franchises or privileges came to be understood as “all exercises of the king’s rights by private persons.”⁵³ As Bracton explained, in a “delegated jurisdiction,” the “ordinances and edicts [must] be in accordance with the law and the approved customs and with the common welfare.”⁵⁴ Franchises were thus limited by national law, and failure to comply with the standard could bring a quo warranto suit and possible forfeiture of the franchise.⁵⁵

Corporations were a particular type of delegated jurisdiction within the “King’s exclusive prerogative.”⁵⁶ Most corporations arose when the Crown granted franchises, liberties, rights, powers, privileges, immunities, or property to a group by letters patent. A corporation thus held delegated authority as a body politic.⁵⁷ The specific meaning of “corporation” developed over centuries. The use of the term “corporate” in English law as referring to what we would today call a corporate entity appeared by 1410 in the Year Books.⁵⁸ Formal legal discussions of the capacities of the corporation, however, belonged to the late

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52. DONALD W. SUTHERLAND, *QUO WARRANTO PROCEEDINGS IN THE REIGN OF EDWARD I, 1278-1294*, at 182 (1963).
53. *Id.* at 5.
54. 2 BRACON, *supra* note 37, at 306-07.
55. See SUTHERLAND, *supra* note 52, at 9; *id.* at 179 (discussing interference by the King’s courts if “a franchise was of such a form as to ‘impede common justice’”). On franchise theory, see Helen M. Cam, *The Evolution of the Mediaeval English Franchise*, 32 *SPECULUM* 427 (1957).
56. Janet McLean, *The Transnational Corporation in History: Lessons for Today?*, 79 *IND. L.J.* 363, 364 (2004).
57. See, e.g., SHEPHEARD, *supra* note 46, at title page (including as a subtitle of the treatise “The Learning of the Law touching Bodies-Politique”).
58. Y.B. 11 Hen. 4, fol. 47a, Hil., pl. 21 (1410) (Seipp No. 1410.021) (mentioning “*un University fuit corporate*”); see also Case of Gloucester School (C.P. 1410), in *SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750*, at 613 (J.H. Baker & S.F.C. Milsom eds., 1986) (English version). Earlier cases involving entities that would later be understood as corporate also exist. See, e.g., Y.B. 11 Edw. 3, Lib. Ass., fol. 30a, pl. 9 (1337) (Seipp No. 1337.136ass), cited in ROBERT BROOKE, *LA GRAUNDE ABRIDGEMENT* (London, Richard Tottell 1573); Y.B. 10 Edw. 3, Lib. Ass., fol. 26a, pl. 13 (1336) (Seipp No. 1336.225ass), cited in BROOKE, *supra*. On the early development of the corporation, see 9 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 45-71 (1926); and 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 486-511 (Cambridge Univ. Press 1968) (2d ed. 1898). Anthony Fitzherbert’s abridgment discussed corporations under the heading “Graunt.” See 2 ANTHONY FITZHERBERT, *LA GRAUNDE ABRIDGEMENT* fol. 180 (London, John Rastell & Wynkyn de Worde 1516); 9 HOLDSWORTH, *supra*, at 53 n.3.

sixteenth and early seventeenth centuries when incorporations increased.⁵⁹ In 1573, Robert Brooke's published abridgment summarized cases under the heading "corporations & capacities."⁶⁰ A decade later, *A Discourse of Corporations* listed the types: municipal corporations (cities, boroughs, and towns), ecclesiastical bodies, universities and colleges, guilds and fraternities, and livery and trading companies.⁶¹ In 1628, Edward Coke's *Institutes* discussed the legal modes of establishment: royal letters patent, act of Parliament, or prescription.⁶² In 1659, this legal exploration culminated in William Shepheard's entire treatise on the corporation, a "Body Politick that indureth in perpetuall sucession."⁶³

The authority to issue bylaws was understood as one of the five legal incidents of the corporation.⁶⁴ The precise origins of bylaw authority are somewhat unclear. The roots likely lay in Roman law and early English law.⁶⁵ Martin Weinbaum concluded that in the 1300s, "the privilege of issuing by-laws . . . as an explicit point of a charter . . . remained to be secured for the mass of boroughs."⁶⁶ By the sixteenth century, however, corporations and

59. See ROBERT TITTLER, THE REFORMATION AND THE TOWNS IN ENGLAND: POLITICS AND POLITICAL CULTURE, C. 1540-1640, at 89, 161-62, 240 (1998).
60. 1 BROOKE, *supra* note 58, fols. 188-92.
61. *A Discourse of Corporations* (c. 1587-1589), in 3 TUDOR ECONOMIC DOCUMENTS 265, 273 (R.H. Tawney & Eileen Power eds., 1924); see 1 HENRY ALWORTH MEREWETHER & ARCHIBALD JOHN STEPHENS, THE HISTORY OF THE BOROUGHHS AND MUNICIPAL CORPORATIONS OF THE UNITED KINGDOM, at xxviii-xxix, xxxi (London, Stevens & Sons 1835).
62. 2 COKE, *supra* note 39, § 413, at 250.
63. SHEPHEARD, *supra* note 46, at 1-2.
64. W.S. Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 YALE L.J. 382, 390-91 (1922). The five incidents were perpetual succession, the power to sue and be sued, the power to hold lands, a common seal, and the authority to issue bylaws. MARTIN WEINBAUM, THE INCORPORATION OF BOROUGHHS 18 (1937). The five characteristics seem "firmer in the minds of legal theorists" of later periods than in the minds of "lawyers and government officials in Tudor times." TITTLER, *supra* note 59, at 88. When "corporation" began to imply all five incidents remains vague. Compare MAITLAND, *supra* note 46, at 53-54 (suggesting the fifteenth century), and WEINBAUM, *supra*, at 18 (same), with TITTLER, *supra* note 59, at 87-88 (suggesting the mid-fourteenth century, although there long remained a "disconcerting imprecision to the concept").
65. See ADOLPHUS BALLARD & JAMES TAIT, BRITISH BOROUGH CHARTERS, 1216-1307, at lxxxvii (1923) ("[The] only express charter grant of the right to make bye-laws was made not to a royal borough, but to the mesne borough of Oswestry in 1263."); C.A. COOKE, CORPORATION, TRUST AND COMPANY 69 (1950); The Twelve Tables VIII.27, *supra* note 51, at 12.
66. WEINBAUM, *supra* note 64, at 49; see Y.B. 44 Edw. 3, fol. 18b, Trin., pl. 13 (1370) (Seipp No. 1370.070) (discussing "laws called by-laws"). Richard II's 1390 letters patent to the Merchant Tailors' Company gave power to "make ordinances." Letters Patent of Richard II

bylaw authority were synonymous. The corporation was the “unitinge of a Societie . . . into one bodie by the Prince or Soueraigne, havinge auctoritie to make lawes and ordinances.”⁶⁷

B. Limits on Bylaws

The bylaw authority of boroughs and town corporations appears to have been constrained by national law and the royal prerogative from a relatively early period. Weinbaum described a charter in 1263 in which powers were given to make ordinances and agreements, along with “a clause ‘saving our prerogative.’”⁶⁸ Frederic William Maitland discussed a dispute over a London ordinance in the reign of Edward II prohibiting retail fish sales on the wharf in which the King’s counsel argued that “it is not lawful” for an ordinance to be made “without consulting the king.”⁶⁹ In the fourteenth century, Richard II’s charter to London authorized the city to alter its customs by ordinance if “such ordinance shall be profitable to us and our people and consonant with good faith and reason.”⁷⁰ William Holdsworth declared that even early bylaws “were always liable to be called in question before the king’s courts.”⁷¹ The bylaw authority of the corporation of London was particularly controversial because

(Jul. 30, 1390), in FREDERICK MORRIS FRY & R.T.D. SAYLE, THE CHARTERS OF THE MERCHANT TAYLORS’ COMPANY 13, 14 (1937); see also Letters Patent of Henry IV (Aug. 2, 1408), in FRY & SAYLE, *supra*, at 15, 17; Letters Patent of Henry VI (Feb. 24, 1439), in FRY & SAYLE, *supra*, at 19, 21.

- 67. *A Discourse of Corporations*, *supra* note 61, at 265; see TITTLER, *supra* note 59, at 162-63 (“The right to issue by-laws had long been exercised de facto by many town governments, but incorporation conveyed royal sanction on the practice.”).
- 68. WEINBAUM, *supra* note 64, at 22 (citation omitted); see also 2 BOROUGH CUSTOMS 59 (Mary Bateson ed., Selden Soc’y vol. 21, 1906) (discussing borough customs that referenced “natural reason,” “the laws of England,” “the comon lawe of Kent,” and “jura naturalia”).
- 69. 1 POLLOCK & MAITLAND, *supra* note 58, at 661 (citation omitted). Maitland added, however, that bylaws were almost never condemned and that “we obtain no jurisprudence of by-laws, no established tests for their validity.” *Id.* at 662.
- 70. CAROLINE M. BARRON, LONDON IN THE LATER MIDDLE AGES: GOVERNMENT AND PEOPLE, 1200-1500, at 34 (2004) (quoting THE HISTORICAL CHARTERS AND CONSTITUTIONAL DOCUMENTS OF THE CITY OF LONDON 75 (W. de Gray Birch ed., London, Whiting & Co. rev. ed. 1887)).
- 71. 2 HOLDSWORTH, *supra* note 58, at 391; see also *id.* at 399-400. Holdsworth argued that the principle that a charter could not give the corporation power to violate the common law was established in the Middle Ages. See Holdsworth, *supra* note 64, at 385; see also Lowestoft v. Yarmouth (Ch. 1378), in SELECT CASES BEFORE THE KING’S COUNCIL, 1243-1482, at 60, 61-62, 66-69 (I.S. Leadam & J.F. Baldwin eds., Selden Soc’y vol. 35, 1918) (discussing the charter of Yarmouth and its consistency with statutes).

London long claimed that it arose in part from immemorial custom rather than newly delegated authority from the Crown.⁷²

Incorporated guilds and livery companies, which took their name from the particular livery their members were authorized to wear, also held constrained bylaw authority. By the fifteenth century, twelve great London livery companies held letters patent from the Crown: the mercers, grocers, drapers, fishmongers, goldsmiths, skinners, merchant tailors, haberdashers, salters, ironmongers, vintners, and clothworkers.⁷³ The companies “effectively controlled” London’s economy throughout the sixteenth century⁷⁴—by the middle of which, historian Steve Rappaport estimated, “approximately three-quarters of London’s men were citizens and members of livery companies.”⁷⁵ The companies’ charters permitted them to govern particular trades.⁷⁶ They dominated political power because most important city officials were associated with a company.⁷⁷ In addition, they served as a source of significant financial revenues for city and Crown, and they administered charitable trusts, schools, almshouses, churches, and relief for the poor.⁷⁸

Since the early 1400s, these companies were “bodies corporate and politic” with the power to “make good and reasonable bye-laws and ordinances.”⁷⁹ The ordinances regulated those within and without the company. Companies had the power to pass their own bylaws and were given the power of “search,” the ability to enter and search for illegal goods and to fine the offenders.⁸⁰ For example, the fishmongers had the “oversight and rejection of fish brought to

^{72.} See Derrett, *supra* note 44, at 176-80; see also 1 BLACKSTONE, *supra* note 49, at *74-75; ALEXANDER PULLING, THE LAWS, CUSTOMS, USAGES, AND REGULATIONS OF THE CITY AND PORT OF LONDON 43-50 (2d ed. 1854); cf. Y.B. 21 Edw. 4, fol. 67a, Mich. (2d), pl. 50 (1481) (Seipp No. 1481.118) (reporting a judge’s statement that London’s customs, though confirmed by Parliament, were “bad usage” and not founded on reason); Y.B. 49 Edw. 3, Lib. Ass., fol. 32ob, pl. 8 (1375) (Seipp No. 1375.048ass) (discussing whether London could establish guilds with corporate powers and its power to make “statutes [*estat*]”); Y.B. 49 Edw. 3, fol. 3b, Hil., pl. 7 (1375) (Seipp No. 1375.007) (same).

^{73.} See 1 WILLIAM HERBERT, THE HISTORY OF THE TWELVE GREAT LIVERY COMPANIES OF LONDON, at xiv-xv (Augustus M. Kelley 1968) (1834); GEORGE UNWIN, THE GILDS AND COMPANIES OF LONDON (1908).

^{74.} STEVE RAPPAPORT, WORLDS WITHIN WORLDS: STRUCTURES OF LIFE IN SIXTEENTH-CENTURY LONDON 186 (1989).

^{75.} *Id.* at 53.

^{76.} See BARRON, *supra* note 70, at 199-234; 1 HERBERT, *supra* note 73, at xiv-xv, 28, 106-10.

^{77.} BARRON, *supra* note 70, at 139; RAPPAPORT, *supra* note 74, at 189.

^{78.} See BARRON, *supra* note 70, at 225-26, 232.

^{79.} 1 HERBERT, *supra* note 73, at 102-03.

^{80.} RAPPAPORT, *supra* note 74, at 187.

London.”⁸¹ Companies regulated apprenticeship and forbade the disclosure of trade secrets.⁸² The company courts also heard many disputes arising under their ordinances.⁸³ By the sixteenth century, “[n]early one hundred companies and other types of occupational associations regulated virtually all of London’s crafts and trades . . . , devising and enforcing ordinances which shaped the very nature of men’s work.”⁸⁴

The bylaws and ordinances of these companies had been subject to constraints since the fourteenth century. In 1388, Richard II ordered the Mayor of London to require the guilds and fraternities to deliver copies of their rules and ordinances or else lose their charters.⁸⁵ The returns revealed awareness of bylaw constraints. The Gild of St. Christopher in Norwich barred ordinances in prejudice of the common law. The Peltiers’ Gild stated that ordinances were not to be against the King’s right or “his lawe.” The Carpenters’ Gild stated that ordinances were not to be against the “kyngis right ne the comoun lawe, ne no prejudice don to no maner man.”⁸⁶

In 1437, parliamentary legislation placed an enforceable limit on corporate bylaw authority. A petition to Henry VI had complained that guilds, fraternities, and other “companies incorporate” had made “unlawful and unreasonable ordinances” that diminished the King’s prerogative and resulted in “common damage to the people.” Companies should therefore “make [or] use no ordinance which shall be to the disherison or diminution of the King’s franchises, or of other, nor against the common profit of the people.”⁸⁷ The resulting act limited corporate ordinances and placed greater control in municipal authorities. Company ordinances had to be “first discussed and approved” by the justices of the peace or the governors of cities; if found to be “not lawful or not reasonable,” the ordinances were to be “revoked and

81. 1 HERBERT, *supra* note 73, at 47.

82. *Id.* at 45–46.

83. See *id.* at 201–14.

84. *Id.* at 25–26.

85. W. CAREW HAZLITT, THE LIVERY COMPANIES OF THE CITY OF LONDON 49 (London, Swan Sonnenschein & Co. 1892); see BARRON, *supra* note 70, at 208 (describing the requirement to deliver rules and ordinances for inspection); ENGLISH GILDS 128 (Joshua Toulmin Smith ed., London, N. Trübner & Co. 1870); 1 HERBERT, *supra* note 73, at 28, 36.

86. ENGLISH GILDS, *supra* note 85, at 23, 30, 39.

87. A Restraint of Unlawful Orders Made by Masters of Guilds, Fraternities, and Other Companies, 1437, 15 Hen. 6, c. 6, in 3 THE STATUTES AT LARGE 215, 215–16 (Danby Pickering ed., Cambridge, Joseph Bentham 1762); see 1 HERBERT, *supra* note 73, at 106–07; cf. RAPPAPORT, *supra* note 74, at 184 (noting the obligation to submit ordinances for approval).

repealed” under penalty of the corporation’s losing its authority under the letters patent and forfeiting a fine of £10 per “contrary” ordinance.⁸⁸

For the remainder of the fifteenth century, municipal authorities in London and York reviewed corporate ordinances. In 1439, the London tailors and saddlers had their ordinances reviewed as to “whether they were contrary to the city’s liberties or not.”⁸⁹ In 1462, the court of aldermen told the fishmongers that they could not use their ordinances until they were submitted.⁹⁰ In 1487, company officials were not to “make Ordinances unless they are approved and ratified” by the mayor and aldermen. The companies thus “brought in their Book of Ordinances, which, not being approved of, were cancelled, and the leaves on which they were written, torn out.”⁹¹ By the late fifteenth century, “at least sixteen crafts had their ordinances enrolled in the city’s Letter Book” and approved.⁹²

Under Henry VII, Crown control of company ordinances began to supplant municipal control. The Crown enforced limited bylaw authority through declarations in letters patent and review requirements. The Crown gave initial authority to a company through letters patent, a grant delegating privileges and authority (sometimes referred to colloquially as a charter). Early patents might include a reasonableness requirement;⁹³ later patents began explicitly to limit delegated authority. In 1503, the Merchant Tailors’ new letters patent authorized “statutes and ordinances” with the limitation that such laws be “not contrary to the laws and customs of our Realm of England or in prejudice of the Mayor of the city of London.”⁹⁴

^{88.} 15 Hen. 6, c. 6, in *THE STATUTES AT LARGE*, *supra* note 87, at 216. The original phrase in law French translates as “disloyal and little reasonable.” *Id.*, in *2 STATUTES OF THE REALM* 295, 298-99 (photo. reprint 1993) (London, George Eyre & Andrew Strahan 1816) (describing “*disloialx & meins resonables ordenaunces*”).

^{89.} BARRON, *supra* note 70, at 210.

^{90.} See Helen Miller, *London and Parliament in the Reign of Henry VIII*, 35 *BULL. INST. HIST. RES.* 128, 133 (1962).

^{91.} WILLIAM MEADE WILLIAMS, *ANNALS OF THE WORSHIPFUL COMPANY OF THE FOUNDERS OF THE CITY OF LONDON* 9-10 (London, W.H. Boosey & Co. 1867).

^{92.} BARRON, *supra* note 70, at 211.

^{93.} 2 HERBERT, *supra* note 73, at 157 (reproducing the Goldsmith’s Company’s patent of 1462-1463, granting the power to “make good and reasonable by-laws and ordinances”); see Charter to the Ironmongers’ Company (Mar. 20, 1463), *in id.* at 623, 623 (requiring that ordinances and statutes be “convenable and nede for holsom guydyng, rewle, and governyng” of the freemen).

^{94.} Letters Patent of Henry VII (Jan. 6, 1503), *in FRY & SAYLE*, *supra* note 66, at 33, 39; *see also* Merchant Adventurers Act, 1496, 12 Hen. 7, c. 6 (permitting Englishmen free passage to the Netherlands markets without exaction by the Merchant Adventurers by altering “an

This limit coincided with an act passed in 1504 constraining corporations.⁹⁵ Francis Bacon would later note that the desire was “to restrain the by-laws or ordinances of corporations, which many times were against the prerogative of the King, the common law of the realm, and the liberty of the subject, being fraternities in evil.”⁹⁶ Guilds and fraternities could not make acts or ordinances “in disinheritance or diminution of the prerogative of the King, nor of others, nor against the common profit of the people.”⁹⁷ Ordinances were to be approved by the Chancellor, Treasurer, and Chief Justices or the justices of the assize.⁹⁸

This review by Crown judicial officers was taken seriously. The Fishmongers’ 1509 ordinances recited the Act, explained that the ordinances had been presented and subsequently reformed, and included the final certificate from Crown officers.⁹⁹ Even minor companies had their ordinances approved.¹⁰⁰ By the 1520s, London corporations were having ordinances “riply examynd and perused and diligently correctid.”¹⁰¹ In 1529, the Goldsmiths’ Company stated that its ordinances were “approved and confirmed by the lord chancellor, lord treasurer, and two chief justices, according to the laws and constitutions of the realm.”¹⁰² Review continued into the seventeenth century. The Chancellor and Chief Justices approved the Musicians’ ordinances in 1606 and the Merchant Tailors’ ordinances in 1613.¹⁰³ The Haberdashers’ 1675 ordinances were signed by the Lord Chancellor Finch, Chief Justice of King’s

ordinance and constitution” that was “contrary to all law, reason, charity, right and conscience . . . to the prejudice of all Englishmen” (spelling modernized).

- 95. Ordinances of Corporations Act, 1504, 19 Hen. 7, c. 7 (alternatively called “*De privatis & illicitis statutis non faciendis*”); see JOHN WHEELER, A TREATISE OF COMMERCE 30 (George Burton Hotchkiss ed., 1931) (1601) (noting that until Henry VII, craft guilds were “under the control” of the Mayor of London).
- 96. FRANCIS BACON, *History of Henry VII*, in THE HISTORY OF THE REIGN OF HENRY VII AND SELECTED WORKS 1, 181 (Brian Vickers ed., 1998).
- 97. Ordinances of Corporations Act (spelling modernized).
- 98. See *id.*; HAROLD J. LASKI, THE FOUNDATIONS OF SOVEREIGNTY AND OTHER ESSAYS 207 (1921) (discussing the Act); 1 SELECT CASES BEFORE THE KING’S COUNCIL IN THE STAR CHAMBER, COMMONLY CALLED THE COURT OF STAR CHAMBER, at cli-cliii (I.S. Leadam ed., Selden Soc’y vol. 16, 1903) [hereinafter STAR CHAMBER]; Miller, *supra* note 90, at 138-40 (discussing London’s failed effort to obtain a more liberal “acte concernyng corporacions”).
- 99. 2 HERBERT, *supra* note 73, at 32-33; *see also id.* at 309 (discussing the Skinners’ reformation of ordinances).
- 100. HAZLITT, *supra* note 85, at 136 (discussing the 1508 Shearmen ordinances).
- 101. Miller, *supra* note 90, at 141-42.
- 102. 2 HERBERT, *supra* note 73, at 148-49; *see id.* at 654 (discussing the 1531 Clothworkers’ ordinances).
- 103. HAZLITT, *supra* note 85, at 569; 2 HERBERT, *supra* note 73, at 418.

Bench Matthew Hale, and Chief Justice of Common Pleas Sir Francis North.¹⁰⁴ As late as 1712, a corporate treatise began the chapter on “the Nature and Doctrine of By-Laws” with a discussion of the 1504 Act and its review requirement.¹⁰⁵

The constrained nature of corporate bylaws also arose sporadically in the context of ordinary litigation. Until the late sixteenth century, cases involving corporations arose in Star Chamber, which had “special oversight over the trades and other companies.”¹⁰⁶ A 1507 complaint about price fixing under the Founders Fellowship’s ordinance noted the 1504 Act that limited “statutes or actes.”¹⁰⁷ A 1516 case involved the Artificers’ claim that their “good and reasonable ordinances” had been confirmed by the Crown, yet the Mayor and Aldermen of Newcastle had barred them from free buying and selling.¹⁰⁸ The Chancellor sitting in Exchequer also may have heard such cases. In 1508, a case

^{104.} 2 HERBERT, *supra* note 73, at 539.

^{105.} LAWS CONCERNING TRADE, AND TRADESMEN, *supra* note 48, at 6-7.

^{106.} CORA L. SCOFIELD, A STUDY OF THE COURT OF STAR CHAMBER 50 (1900); *see also id.* at 51-54. Because corporations were delegations of Crown prerogative, the common law courts initially did not hear cases involving ordinances. See MICHAEL STUCKEY, THE HIGH COURT OF STAR CHAMBER 33-34, 51 (1998). The sixteenth-century Star Chamber operated as a judicial body. *See PROCEEDINGS IN THE COURT OF THE STAR CHAMBER IN THE REIGNS OF HENRY VII. AND HENRY VIII.* 15-16 (G. Bradford ed., 1911); SCOFIELD, *supra*, at 26, 42. For cases discussing incorporated towns, see *Bakers of Andover v. Knyght* (Star Chamber 1534), in 2 STAR CHAMBER, *supra* note 98, at 207, 215-16 (Selden Soc’y vol. 25, 1911); and *Hewyt v. London* (Star Chamber 1500), in 1 STAR CHAMBER, *supra* note 98, at 71, 78-79. For the usage of the phrase “not repugnant or contrarye” relating to a proclamation regarding transporting goods to Calais, see *Smythe v. Danckerd* (Star Chamber 1544), in 2 STAR CHAMBER, *supra* note 98, at 277, 281 (Selden Soc’y vol. 25, 1911).

^{107.} *Butlond v. Austen* (Star Chamber 1507), in 1 STAR CHAMBER, *supra* note 98, at 262, 262-71; *see also 1 STAR CHAMBER, supra* note 98, at cliii. The case had first been tried by the City of London. An official of the company allegedly had required other members to sell to him at a fixed price; he justified his actions based on an “acte” of the Company. *See also Excestre v. Stoden* (Star Chamber 1477), in 1 STAR CHAMBER, *supra* note 98, at 1, 2 (presenting a claim that the Master and Wardens of Tailors under color of the King’s letters patent had acted “contrarie to the old libertees customes and laufull vsages” of Exeter).

^{108.} *Newcastle v. Artificers* (Star Chamber 1516), in 2 STAR CHAMBER, *supra* note 98, at 75, 79, 81, 106 (Selden Soc’y vol. 25, 1911) (spelling modernized); *see also 2 STAR CHAMBER, supra* note 98, at xcvi-ci (Selden Soc’y vol. 25, 1911). The exemplification stated that the burgesses and inhabitants of Newcastle had “grievedously and contemptuously offended the king’s grace contrary and against his peace[,] laws[,] and statutes.” *Newcastle*, in 2 STAR CHAMBER, *supra* note 98, at 116 (Selden Soc’y vol. 25, 1911) (spelling modernized). In a case involving Bristol that was heard around 1518, the Mayor stated that the town had “authority & power to make ordinances and rules for the good politic governance” of the town. *Sheriff of Brystowe v. Mayor of Brystowe* (Star Chamber c. 1518), in 2 STAR CHAMBER, *supra* note 98, at 142, 148 (Selden Soc’y vol. 25, 1911) (spelling modernized).

explained that the Founders had “made an Acte contrary to the P’lement” and hoped that the Chancellor would correct “ouer Acts and Rules” so that “the Crafte myte be harmless agenst the Kyng our Soveryng Lord.”¹⁰⁹

The language used to describe this limit slowly changed during the sixteenth century in favor of a consistent limit framed in terms of “repugnancy” to national laws. Similar to early limits described above, statutes approved in 1530 and 1536 regulating apprentices contained language that guilds and fraternities could not make acts or ordinances “in disinheritance or diminution of the prerogative of the King, nor of other, nor against the common profit of the people.”¹¹⁰ The Hospitals for the Poor Act (1597) abandoned such broad language: “rules, statutes, and ordinances” of “bodies politique or corporate” should not be “repugnant or contrary to the laws and statutes of this realm.”¹¹¹

The principle of constrained bylaw authority under this more precise “repugnancy” standard also appeared in the patents of the new trading corporations and the new charters of the livery companies. The 1505 charter of the Merchant Adventurers of Calais had limited the company’s lawmaking power by the requirement that an “Act or Statute” that was “contrary” to the “Crowne, Honor, Dignity Royall or Prerogative or to the deminution of the Commonweale of our Realme” was “of no force or effect.”¹¹² The 1564 charter of the Merchant Adventurers stated the limit as “not hurtful to any [of] the Rights of the Crowne, honour, dignity, Royall . . . prerogative or the [deminution] of the Common Weale of this our Realme or contrary to any [of]

^{109.} WILLIAMS, *supra* note 91, at 13.

^{110.} Apprentices’ Fees Act, 1530, 22 Hen. 8, c. 4; *see also* Apprentices Act, 1536, 28 Hen. 8, c. 5 (employing similar language). These acts were also subject to the same review structure. *See also* Leases by Corporations Act, 1541, 33 Hen. 8, c. 27 (making void acts or orders by a founder of a corporation that permitted a single person to veto a grant authorized by the majority “contrary to the form, order, and course of the common law”).

^{111.} Hospitals for the Poor Act, 1597, 39 Eliz., c. 5; *see* SHEPHEARD, *supra* note 46, at 31 (noting the statute). For later examples, see Hackney Coaches, etc. Act, 1715, 1 Geo., c. 57, which granted commissioners the power to make orders, bylaws and ordinances so long as they did not contain anything “repugnant to the Laws of this Realm”; Stamps Act, 1710, 9 Ann., c. 23, § 16; and Hackney Coaches, etc. Act, 1694, 5 & 6 W. & M., c. 22. *See also* Stourbridge Canal. Act, 1776, 16 Geo. 3, c. 28, § 46; East India Company Act, 1772, 13 Geo. 3, c. 63, § 36; Isle of Man Harbours Act, 1771, 11 Geo. 3, c. 52.

^{112.} Patent of Henry VII to the Merchant Adventurers at Calais (Sept. 28, 1505), *in* GEORGE CAWSTON & A.H. KEANE, THE EARLY CHARTERED COMPANIES (A.D. 1296-1858) app. II, at 249, 252-53 (photo. reprint 2002) (London, E. Arnold 1896). On the London livery companies and the Merchant Adventurers, see E.M. Carus-Wilson, *The Origins and Early Development of the Merchant Adventurers’ Organization in London as Shown in Their Own Mediaeval Records*, 4 ECON. HIST. REV. 147 (1933). *See also* Franklin A. Gevurtz, *The Historical and Political Origins of the Corporate Board of Directors*, 33 HOFSTRA L. REV. 89, 125-26 (2004).

our Lawes & Statutes.”¹¹³ By 1579, the charter of the Eastland Merchants provided that the governor could make such “good statutes lawes constitutcyons and ordinaunces for the good government and rule” of the fellowship as was thought “mete and convenyente” as long as they were “not repugnante or derogatorie to the lawes and statutes of this Realme of Englande” or contrary to any treaty.¹¹⁴ The 1600 Levant Company charter required that “the said laws . . . be reasonable and not contrary or repugnant.”¹¹⁵ The 1607 charter of the Drapers’ Company similarly stated that “laws, statutes, ordinances, constitutions, imprisonments, fines, and amerciaments shall be reasonable, and shall not be contrary or repugnant to the laws, statutes, customs, or rights of our kingdom of England.”¹¹⁶ A contemporary publication of the Worshipful Company of Shipwrights included the Company’s 1612 charter, which contained a repugnancy clause; the Company’s acts and ordinances; and the confirmation by Thomas Ellesmere, Thomas Fleming, and Edward Coke that the ordinances had been

- ^{113.} Charter of Queen Elizabeth (July 18, 1564), *in CAWSTON & KEANE, supra* note 112, app. II, at 254, 268.
- ^{114.} THE ACTS AND ORDINANCES OF THE EASTLAND COMPANY 145 (Maud Sellers ed., 1906).
- ^{115.} Charter to the Levant Company, Patent Rolls, 43 Eliz., pt. v (1600), *in SELECT CHARTERS OF TRADING COMPANIES, A.D. 1530-1707*, at 30, 34 (Cecil T. Carr ed., 1913).
- ^{116.} Of a Grant to Them and Their Successors for the Drapers of the City of London (Jan. 19, 1607), *in 1 HERBERT, supra* note 73, at 485, 490; *see 2 HERBERT, supra* note 73, at 317 (noting that the Skinners’ charter was limited in some respects by reasonableness and repugnancy); Charter to the Men of the Mystery of Fishmongers of the City of London, to Them and Their Successors (Oct. 6, 1559), *in id.* at 116, 117 (noting that the Fishmongers’ letters patent did not give the power to make “any ordinances or statutes in prejudice of us or our people”); Of a Grant to Them and Their Successors for the Mystery of Grocers of London (Apr. 15, 1639), *in 1 HERBERT, supra* note 73, at 368, 372 (providing in the Grocers’ charter that the “laws, statutes, [and] constitutions . . . shall be reasonable, and shall not be contrary nor repugnant to the laws, statutes, customs, or rights of our kingdom of England”); *see also WILLIAMS, supra* note 91, at 23 (describing the 1613 authorization of the Masters and Wardens of the Mystery of the Company of Founders “to make orders and ordenances for the good government of the said Mysterie, so as they be not repugnant to the lawes of the land, nor against the freedom and liberties of this City”); Charter of Maidstone (1603), *in WILLIAM ROBERTS JAMES, THE CHARTERS AND OTHER DOCUMENTS RELATING TO THE KING’S TOWN AND PARISH OF MAIDSTONE IN THE COUNTY OF KENT* 72 (London, Joseph Butterworth & Son 1825) (requiring that “laws, ordinances, constitutions, imprisonments, fines, and amerciaments be reasonable, and not repugnant nor contrary to the laws, statutes, customs or rights of our kingdom of England”).

reviewed and were lawful.¹¹⁷ Repugnancy to the laws of the realm, the kingdom, eventually the nation, had become the standard.

C. Constitutional Limits on Corporate Bylaws

At the end of the sixteenth century, the common law courts began an extensive discussion of the limits on corporate bylaw authority.¹¹⁸ At least six reported cases can be found addressing the issue: *The Chamberlain of London's Case* (1590); *Doggerell v. Pokes* (1595); *Bab v. Clerk* (1595); *Wilford v. Masham* (1595); *Clark's Case* (1596); and *Davenant v. Hurdis* (1599).¹¹⁹ These cases were followed by others, including *Dr. Bonham's Case* (1608).¹²⁰ A clear principle arose from the cases: corporate bylaws could not be repugnant to the "Lawes of the Nation."¹²¹ Although the principle was not explicitly labeled as constitutional, in substance it appeared to be. The granting authority could not authorize a bylaw or charter provision in violation of the limits.¹²²

¹¹⁷. [CHARTER TO SHIPWRIGHTS COMPANY] 21, 44-71 (London, T. Dawson c. 1612), available at <http://eebo.chadwyck.com/search> (search for "Shipwrights Company").

¹¹⁸. Jurisdiction over companies and corporations passed from Star Chamber. On the change in jurisdiction, see Barbara Malament, *The "Economic Liberalism" of Sir Edward Coke*, 76 YALE L.J. 1321, 1340 (1967).

¹¹⁹. *Davenant v. Hurdis*, (1599) 72 Eng. Rep. 769 (K.B.); *Clark's Case*, (1596) 77 Eng. Rep. 152 (C.P.); *Wilford v. Masham*, (1595) 72 Eng. Rep. 657 (K.B.); *Bab v. Clerk*, (1595) 72 Eng. Rep. 663 (K.B.); *Doggerell v. Pokes*, (1595) 72 Eng. Rep. 663 (K.B.); *The Chamberlain of London's Case*, (1590) 77 Eng. Rep. 150 (K.B.). For unpublished cases addressing limits on corporate bylaws, see *Hays v. Harding*, (1656) 145 Eng. Rep. 376, 378 (Exch.).

¹²⁰. (1608) 77 Eng. Rep. 638 (C.P.); see also *Dr. Bonham's Case*, (1610) 77 Eng. Rep. 646 (K.B.).

¹²¹. SHEPHEARD, *supra* note 46, at 82.

¹²². See *Norris v. Staps*, (1616) 80 Eng. Rep. 357, 358 (K.B.) ("And if the King in his letters patent of Incorporation do make ordinances himself . . . yet they are also subject to the same rule of law"); SHEPHEARD, *supra* note 46, at 43 ("There are some things often inserted in these Charters that are unlawfull"); *id.* at 51 ("[T]he Lo. Pro. cannot extend it to prejudice any other man's interest"); *id.* at 68-69, 73, 76-80 (discussing things that could not be done in a charter); *id.* at 84 ("No Clause in the Charter . . . can help or make such an Ordinance good."). The issue of whether Parliament could authorize a violation was not expressly discussed by Shepheard, likely because few charters had been given by Parliament. See SHEPHEARD, *supra* note 46, at 7-8, 105 (discussing Parliament). Later corporate treatises also did not explicitly address the question. One instance, however, in which later treatise writers suggested that Parliament might be capable of authorizing otherwise void bylaws involved the problematic area of ancient customs. On the one hand, a 1712 corporate treatise declared that "all By-Laws . . . made against the Liberty and Freedom of the People . . . are void." LAWS CONCERNING TRADE, AND TRADESMEN, *supra* note 48, at 10. On the other hand, it added that immemorial custom and prescription in London and other corporations might permit a

In 1605, Edward Coke's new volume of *Reports* included five reports under the heading “Cases of By-Laws and Ordinances.”¹²³ Coke's interest in corporations and bylaws was not surprising. He had served as a recorder for Coventry (1585), Norwich (1586), and London (1592),¹²⁴ handling litigation for towns and serving “as the officer principally charged with knowing, interpreting, and applying the law of the land.”¹²⁵ He had a lengthy relationship with the Drapers' Company. He also had represented and investigated other London guilds, towns, and trading corporations. As Chief Justice, he had ratified ordinances for various guilds, including the Merchant Tailors.¹²⁶

Coke's section on bylaws played a crucial role in restating and publicizing constitutional limits on corporate ordinances.¹²⁷ The first case, *The Chamberlain*

corporation to “justify the doing of some Things against common Right.” *Id.* at 12. The only example involved regulating the sale of goods by a foreigner within the city. Cities that had been incorporated within the time of memory could only gain such a privilege by Parliament. *Id.* These customary privileges, however, were limited in scope. *See id.* at 19–20. Because modern constitutional theory thinks about “constitutional” limitations in a precise and technical manner arising from distinctions developed after the creation of written constitutions, it is difficult to conclude whether this limitation was “constitutional” in the modern sense of that term.

¹²³. EDWARD COKE, THE FIFT PART OF THE REPORTS OF SR. EDWARD COKE KNIGHT, THE KINGS ATTORNEY GENERALL fols. 62v-68v (London, Co. of Stationers 1612) (describing “*Cases de Bilawes & ordinances*”); *see* S.E. Thorne, Prof. of Legal History, Harvard Univ., Sir Edward Coke, 1552-1952, Address to the Selden Society (Mar. 17, 1952), *in* S.E. THORNE, SIR EDWARD COKE, 1552-1952, at 3, 10-12 (1957), *reprinted in* ESSAYS IN ENGLISH LEGAL HISTORY, *supra* note 41, at 223, 230-32. The cases were *The Chamberlain of London's Case*, 77 Eng. Rep. at 150; *Clark's Case*, 77 Eng. Rep. at 152; *Jeffrey's Case*, (1589) 77 Eng. Rep. 153 (C.P.), which concerned whether a person who owned land in a parish but lived elsewhere had to pay as a parishioner; *Jeffrey's Case*, (1589) 77 Eng. Rep. 155 (K.B.), on the same topic; and *The Lord Cheyney's Case*, (1591) 77 Eng. Rep. 158 (Ct. Wards), which concerned wills.

¹²⁴. 1 JOHN CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 252 (Jersey City, Fred. D. Linn & Co. 1881) (1849).

¹²⁵. TITTLER, *supra* note 59, at 227.

¹²⁶. *See* ALLEN D. BOYER, SIR EDWARD COKE AND THE ELIZABETHAN AGE 46 (2003); HASTINGS LYON & HERMAN BLOCK, EDWARD COKE: ORACLE OF THE LAW 57-58 (photo. reprint 1992) (1929); STEPHEN D. WHITE, SIR EDWARD COKE AND “THE GRIEVANCES OF THE COMMONWEALTH,” 1621-1628 app. B, at 284-88 (1979).

¹²⁷. Sir Thomas Egerton, Lord Ellesmere, argued that Coke's reports of *Clark's Case*, *Darcy's Case*, *Dr. Bonham's Case*, and the *Tailors of Ipswich's Case* weakened the authority of corporations. *See* LOUIS A. KNAFLA, LAW AND POLITICS IN JACOBEAN ENGLAND: THE TRACTS OF LORD CHANCELLOR ELLESMORE 148-54 (1977); The Lord Chancellor Egertons Observacions upon ye Lord Cooke's Reportes (1615) [hereinafter Ellesmere], *in id.* at 297, 309.

of London's Case (1590), described the “contrary and repugnant” limit.¹²⁸ The case addressed whether London could “make laws and ordinances” that required all cloth sold in London to be brought first to Blackwell-hall and a fee paid. The Chamberlain had sued certain defendants in debt for the penalties. The King’s Bench approved of the ordinance. Coke’s report noted that “[i]t appears by many precedents” that London had been given the power to “make ordinances and constitutions for the good order and government of the citizens, &c. consonant to law and reason.” All “ordinances, constitutions, or by-laws” that “are contrary or repugnant to the laws or statutes of the realm are void and of no effect.”¹²⁹

The principle that corporate bylaws were constrained by the laws of the realm was reinforced and expanded in the brief case that followed. *Clark's Case* (1596) involved one Clark, who was imprisoned under a bylaw of St. Albans, a town incorporated under a Crown patent. The bylaw required that inhabitants be taxed to support the courts and provided that they could be imprisoned for refusing to pay.¹³⁰ The court decided that the ordinance was against chapter 29 of Magna Carta.¹³¹ While a corporate town could impose a “reasonable penalty”—for example, an action of debt or distress—imprisonment violated Magna Carta. Such a bylaw was, in essence, void.¹³²

^{128.} 77 Eng. Rep. at 151. This author has not examined Coke’s original notes of the case.

^{129.} *Id.*

^{130.} *Clark's Case*, (1596) 77 Eng. Rep. 152 (C.P.); see *Langham's Case*, (1642) 82 Eng. Rep. 465, 468 (K.B.) (citing *Clark's Case* for the principle that “a constitution cannot be made by a corporation, who have power to make by-laws upon pain of imprisonment; because it is against the Statute of Magna Charta”); *The Case of the City of London*, (1610) 77 Eng. Rep. 658, 667 (K.B.) (citing *Clark's Case* for the principle that “a constitution cannot be made on pain [of] imprisonment”). Ellesmere criticized the report:

If there were such a judgment it were fitter to have lain silent than to have seen light; for the assessment being in advancement of the general justice of the realm, and the ordinance being in furtherance therof, the Statute of Magna Charta never meant to protect such obstinate persons as should refuse to set forward the erection of the Court of Justice.

Ellesmere, *supra* note 127, at 309 (spelling modernized). Coke later addressed this issue in a 1621 debate over the corporate imprisonment power. See 3 THE SELECTED WRITINGS OF SIR EDWARD COKE 1211 (Steve Sheppard ed., 2003) (quoting a speech given by Coke in Parliament).

^{131.} Chapter 29 of the Magna Carta of 1225—chapter 39 of the 1215 charter—stated: “[N]o free man shall be taken or imprisoned . . . or in any way destroyed . . . except by the lawful judgment of his peers or by the law of the land.” J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 537 (3d ed. 1990).

^{132.} *Clark's Case*, 77 Eng. Rep. at 152.

The bylaw cases not reported by Coke reflect similar constitutional constraints. In *Doggerell v. Pokes* (1595), a London bylaw made the bonds and covenants of an apprentice void if he was the son of an alien; the court concluded that the bylaw could not void the covenant but could only impose a fine.¹³³ *Bab v. Clerk* (1595) involved imprisonment under the bylaw of an incorporated town. Once again, the court found the imprisonment unjustified and the bylaw unlawful.¹³⁴ In *Wilford v. Masham* (1595), a London bylaw barred apothecaries from selling unwholesome drugs on pain of forfeiture; the court concluded in favor of the bylaws and customs.¹³⁵ Bylaws could penalize by fine or debt, but not by imprisonment.

Another case unreported in Coke's 1605 *Reports*, *Davenant v. Hurdis* (1599),¹³⁶ confirmed the principle of limited bylaws; Francis Moore included the case in his reports under the heading "By lawes de Corporations."¹³⁷ The Merchant Tailors had the power to make ordinances "for their good governance" provided they were "not contrary to the laws and constitutions of the king, nor in prejudice to the majority of citizens of London."¹³⁸ The ordinance required Merchant Tailors to use another member of the Merchant Tailors in working half of the cloth, and Davenant refused either to comply or

^{133.} (1595) 72 Eng. Rep. 663 (K.B.) (law French); WILLIAM HUGHES, AN EXACT ABRIDGEMENT IN ENGLISH, OF THE CASES REPORTED BY SR. FRANCIS MORE KT. 118 (London, John Starkey, Thomas Bassett & Samuel Speed 1665) (English version). For an early bylaw case, see *Scarling v. Criett*, (1565) 72 Eng. Rep. 451 (K.B.), which required that the major portion of inhabitants participate in bylaws.

^{134.} *Bab v. Clerk*, (1595) 72 Eng. Rep. 663 (K.B.) (law French); HUGHES, *supra* note 133, at 118 (English version). The court suggested that disenfranchisement would have been permissible. Lawful appears as "loyal" in Francis Moore's report. *Bab*, 72 Eng. Rep. at 663.

^{135.} (1595) 72 Eng. Rep. 657 (K.B.) (law French); HUGHES, *supra* note 133, at 113 (English version).

^{136.} (1599) 72 Eng. Rep. 769 (K.B.).

^{137.} FRANCIS MOORE, CASES COLLECT & REPORT 576 (London, G. Paulet 1688). *Davenant* is usually discussed with respect to monopolies. See, e.g., Malament, *supra* note 118; David Harris Sacks, *The Countervailing of Benefits: Monopoly, Liberty, and Benevolence in Elizabethan England*, in TUDOR POLITICAL CULTURE 272 (Dale Hoak ed., 1995); Donald O. Wagner, *The Common Law and Free Enterprise: An Early Case of Monopoly*, 7 ECON. HIST. REV. 217 (1937); see also Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785, 794-95 (1982); Bernard H. Siegan, *Protecting Economic Liberties*, 6 CHAP. L. REV. 43, 51-54 (2003).

^{138.} *Davenant*, 72 Eng. Rep. at 770 (author's translation). The Merchant Tailors' ordinances had been confirmed by the Treasurer and the two Chief Justices. *Id.* My thanks to David Seipp for assistance with the translation.

to pay the fine. The company sent Hurdis to enter Davenant's house and seize the cloth.¹³⁹

The later English abridger, William Hughes, commented that the "Case was very long and very Learnedly argued."¹⁴⁰ As counsel for Davenant, Coke contended that the ordinance was unreasonable and void. It was a monopoly and "against common right, and against the nature of a bylaw, because a bylaw ought to be made in furtherance of the public good and the better execution of the laws, and not in utter prejudice of subjects or for private gain."¹⁴¹ Coke cited several other cases in which corporate ordinances were judged against the common good or Magna Carta.¹⁴² Defending Hurdis, Moore accepted that bylaws against law and "common equity" were unreasonable; however, he insisted that reasonable customs for particular places should be upheld because the "same reasoning that appoints general laws to govern kingdoms ought to allow particular laws to govern particular societies."¹⁴³ Moore pointed out that regional inheritance customs (borough English and gavelkind) were permitted by reasons of the place and people, although against the common law (which required primogeniture).¹⁴⁴ The court sided with Davenant. The bylaw created a monopoly and was "against law."¹⁴⁵ In a later case, Coke described *Davenant* as demonstrating that the ordinances had to be "consonant to law and reason" and not "against the common law, because it was against the liberty of the subject."¹⁴⁶

139. *Id.* at 769-70.

140. HUGHES, *supra* note 133, at 164.

141. *Davenant*, 72 Eng. Rep. at 771 (author's translation) (stating in the original "*que est encount common droit, & encount le nature dun by-law: car by-law doit estre fait en furtherace del publick bone et le melior execution des leys, et nemy en ouster p[re]judice des subjects ou pur private gain*").

142. *Id.* at 771-72; MOORE, *supra* note 137, at 580.

143. *Davenant*, 72 Eng. Rep. at 773 (author's translation) (stating in the original "*dont ensuist que m[eme] le reason que appoint general leys de governer kingdomes doit allowver particular leys pur governer particular societies*").

144. *Id.* at 776; MOORE, *supra* note 137, at 588. Coke argued that the ordinance was "repugnant"; however, he appeared to be emphasizing inconsistency rather than contrariness. See *Davenant*, 72 Eng. Rep. at 771; MOORE, *supra* note 137, at 578. For a similar argument about divergences based on custom, see *Wardens & Corp. of Weavers in London v. Brown*, (1601) 7 Eng. Rep. 1031 (Q.B.).

145. *Davenant*, 72 Eng. Rep. at 778; MOORE, *supra* note 137, at 591; see also HUGHES, *supra* note 133, at 164 (describing the ordinance as "against the Common Law, because it was against the Liberty of the Subject").

146. The Case of Monopolies, (1602) 77 Eng. Rep. 1260, 1263, 1266 (K.B.) (reporting that the grant by letters patent of an exclusive right to import and sell playing cards was found void as a "monopoly against the common law"). Other reports of the case did not emphasize

In the decade following his published discussion of bylaws, Coke continued to emphasize the legal limitations on corporate ordinances. In this context, he decided *Dr. Bonham's Case* (1608),¹⁴⁷ which made increasingly apparent the constitutional nature of the limit. The College of Physicians had imprisoned Thomas Bonham, a Doctor of Physic from the University of Cambridge, after concluding that he had continued to practice medicine in London despite having not been admitted to the College and having been found “less sufficient and unskilful to administer physic.”¹⁴⁸ The College defended its actions as justified by the charter of incorporation and by statutes confirming the charter and discussing imprisonment.¹⁴⁹ Chief Justice Coke, a Cambridge graduate, disagreed.¹⁵⁰ The College could not imprison Bonham.

The case was thus about corporate authority. Sir Thomas Egerton, Lord Ellesmere, declared as much when he commented that Coke’s report struck “in sunder the Barrs of Governement” of the corporation.¹⁵¹ The decision flowed from *Clark's Case*, although it involved the complication of the confirmatory parliamentary statute instead of simply the original letters patent.¹⁵² Coke was not much more sympathetic to a corporation claiming imprisonment authority under confirmatory parliamentary statute than he was to one claiming such

Davenant. Darcy v. Allin, (1602) 74 Eng. Rep. 1131 (K.B.); Darcy v. Allen, (1602) 72 Eng. Rep. 830 (K.B.). See generally Jacob I. Corré, *The Argument, Decision, and Reports of Darcy v. Allen*, 45 EMORY L.J. 1261 (1996) (discussing *Darcy*); D. Seaborne Davies, *Further Light on the Case of Monopolies*, 48 LAW Q. REV. 394 (1932) (same).

¹⁴⁷. (1608) 77 Eng. Rep. 638 (C.P.); see also *Dr. Bonham's Case*, (1610) 77 Eng. Rep. 646 (K.B.).

¹⁴⁸. *Dr. Bonham's Case*, 77 Eng. Rep. at 642.

¹⁴⁹. The Physicians Act confirmed the original charter of incorporation from Henry VIII. Physicians Act, 1523, 14 & 15 Hen. 8, c. 5. A second act discussed procedures for whenever the College committed persons to imprisonment but interestingly did not appear to newly authorize imprisonment. College of Physicians Act, 1553, 1 Mary, 2d sess., c. 9, § 4; see *Dr. Bonham's Case*, 77 Eng. Rep. at 656 (discussing this point).

¹⁵⁰. 1 GEORGE CLARK, A HISTORY OF THE ROYAL COLLEGE OF PHYSICIANS OF LONDON 212 (1964).

¹⁵¹. Ellesmere, *supra* note 127, at 317. Ellesmere’s more oft-cited comment on *Dr. Bonham's Case* criticized Coke’s statement about the common law as derogating from the power of Parliament. *Id.* at 306-07. Samuel Thorne’s interpretation of the Ellesmere-Coke debate focused on repugnancy, with Ellesmere arguing for “impossibilities or *direct* repugnances,” while Coke contemplated indirect repugnancies, “that is, contradictions not on the statute’s face.” Thorne, *Dr. Bonham's Case*, *supra* note 41, at 552, reprinted in ESSAYS IN ENGLISH LEGAL HISTORY, *supra* note 41, at 278.

¹⁵². See Harold J. Cook, *Against Common Right and Reason: The College of Physicians Versus Dr. Thomas Bonham*, 29 AM. J. LEGAL HIST. 301, 303-04 (1985) (pointing out that the College was “an odd corporation juridically”). Coke’s decision referred to the “Act of 14 H. 8” but focused on the clauses that appeared in the original letters patent reproduced in the preamble to the Act. Physicians Act, pmbl., cl. 13-14; see *Dr. Bonham's Case*, 77 Eng. Rep. at 655-56.

authority pursuant solely to royal letters patent. As Harold Cook wrote, “Coke’s view of the case stemmed from a sense that an injustice had been done in creating a corporation with powers such as the College.”¹⁵³ Although the opinion never confronted the ways in which parliamentary confirmation might alter corporate authority to imprison, Coke’s opinion offered a variety of alternative arguments to reach the same result achieved in his earlier corporate cases.¹⁵⁴ Indeed, his statement that the common law controlled when an act of Parliament was against “common right and reason, or repugnant, or impossible to be performed” was notably similar to the language he had used in his 1605 reports describing limits on corporate ordinances.¹⁵⁵ His inclination to doubt that corporate authority could permit imprisonment reappeared in his observations for the “better direction” of the college in which he emphasized fines over imprisonment.¹⁵⁶

Coke’s decisions continued to uphold national constraints on corporate lawmaking. In 1610, Coke stated that a “constitution” or ordinance “cannot be made on pain o[f] imprisonment”; it had to be on “a reasonable pecuniary pain, or not at all.”¹⁵⁷ In 1612, Coke described the incidents of a corporation as including the power to “make ordinances; that is requisite for the good order and government.”¹⁵⁸ That same year, he declared that a bylaw could not

^{153.} Cook, *supra* note 152, at 319.

^{154.} On Coke’s distinction between imprisonment for unauthorized practice as opposed to malpractice, see *id.* at 316. For the suggestion that the *iudex in propria causa* principle had its origins in “keeping subordinate judges to the proprieties of judicature”—in short, that it involved ideas about the proper scope of delegated authority—see D.C.E. Yale, *Iudex in Propria Causa: An Historical Excursus*, 33 CAMBRIDGE L.J. 80, 83, 95–96 (1974).

^{155.} The similarity between Coke’s approach to limits on corporate ordinances and parliamentary acts appears also in *Rowles v. Mason*, (1612) 123 Eng. Rep. 892, 895 (C.P.), which held that “if there be repugnancy in statute; or unreasonableness in custom, the common law disallows and rejects it, as it appears by *Doctor Bonham’s case*.” See also Thorne, Dr. Bonham’s Case, *supra* note 41, at 549–50, reprinted in ESSAYS IN ENGLISH LEGAL HISTORY, *supra* note 41, at 275–76 (discussing the use of repugnancy in statutory interpretation and in *Rowles*).

^{156.} *Dr. Bonham’s Case*, 77 Eng. Rep. at 657.

^{157.} The Case of the City of London, (1610) 77 Eng. Rep. 658, 667 (K.B.). A later commentator noted that “although the law has been broadly laid down by Sir Edward Coke and other judges, that a bye-law cannot imprison, yet the crown at all periods . . . was in the habit of granting the power in its charters not only to municipal but to trade[] corporations.” GRANT, *supra* note 50, at 86 (footnote omitted).

^{158.} The Case of Sutton’s Hospital, (1612) 77 Eng. Rep. 937, 971 (K.B.) (citation omitted); see also R v. Tooley, (1613) 80 Eng. Rep. 1055 (K.B.) (discussing the custom of London, the common law, and Magna Carta). Shepheard emphasized that the act of Parliament constituting Sutton’s Hospital gave authority to “make Ordinances for Government thereof, not Repugnant to the Lawes in force.” SHEPHEARD, *supra* note 46, at 25.

abridge or restrain the liberty of the subject.¹⁵⁹ In 1614, Coke addressed the consequence of approval under the 1504 corporate review act, an issue that had not previously arisen. He concluded that review under the statute did not insulate the bylaws from judicial review. The ordinances were still to “be affirmed as good, or disaffirmed as unlawful by the law.”¹⁶⁰ The ordinance at issue was “against the common law, and the commonwealth.”¹⁶¹ The courts seemed the ultimate decision-makers of legal corporate authority.

In 1616, over twenty-five years after the courts had begun to describe corporate limits, Chief Justice Hobart affirmed these principles as inherent in the very nature of the English corporation. *Norris v. Staps* (1616) addressed the patent of the Weavers of Newbury.¹⁶² They had power to “make laws and ordinances agreeable to reason, and not in any wise contrary and repugnant to the laws and statutes of the realm.”¹⁶³ Hobart declared that while the “power to make laws” was inherent in incorporations because “the body corporate must have laws as a politick reason to govern it,” the corporation’s laws were also inherently “ever . . . subject to the general law of the realm as subordinate to it.”¹⁶⁴ The principle of corporate limitation thus arose from national law. Hobart noted that if there were “no proviso for that purpose, the law [would] suppl[y] it.” Corporate lawmaking authority was necessarily constrained by the laws of the realm.¹⁶⁵

^{159.} See Gravesend Case, (1612) 123 Eng. Rep. 883, 885 (C.P.) (involving certain bylaws and concluding that the “custom, and the patent are repugnant”); see also James Bagg’s Case, (1615) 77 Eng. Rep. 1271, 1279-80 (K.B.) (addressing disenfranchisement and concluding that the corporation had proceeded without notice or hearing and therefore that the “removal is against justice and right”).

^{160.} The Case of the Tailors, &c. of Ipswich, (1614) 77 Eng. Rep. 1218, 1220 (K.B.).

^{161.} *Id.*

^{162.} (1616) 80 Eng. Rep. 357 (K.B.); see also *Norris v. Staps*, (1616) 123 Eng. Rep. 1060, 1061 (C.P.) (stating that the court did not deliver an opinion as to the “principal point of making such a restraining ordinance”); *Norris & Trussel’s Case*, (1616) 123 Eng. Rep. 657 (C.P.) (concerning a claim that the “constitution was against law”); *In re Weavers of Newbery*, (n.d.) 72 Eng. Rep. 962, 962 (K.B.) (reporting that “le by-law fuit encounter reason”); HUGHES, *supra* note 133, at 260.

^{163.} *Norris*, 123 Eng. Rep. at 1060; see SHEPHEARD, *supra* note 46, at 98-104 (discussing *Norris*). The ordinance required service as an apprentice before serving as a weaver. The Weavers had sought refuge in the review approval given to their ordinances under the 1504 Act. Hobart declared that the ordinance was “absurd” due to its exclusion of apprentices raised in the town. *Norris*, 80 Eng. Rep. at 358.

^{164.} *Norris*, 80 Eng. Rep. at 358.

^{165.} *Id.*

Shepheard's 1659 treatise codified these principles. The section "What Ordinances a Corporation May Make" stated that they were not to be "repugnant to the Lawes of the Nation, against the publick and common good of the people within or without the same City."¹⁶⁶ A suggested form was "to make Lawes, Orders, Ordinances, and Constitutions . . . as to them shall seeme necessary, and convenient (not repugnant to the prerogative of Us or our Successors, or to any of the Statutes, or other [of] the Lawes of *England*)."¹⁶⁷ The clause "they may not make Ordinances repugnant to the Lawes, &c.," however, did not need to be in the charter or act of incorporation; it was "idle, and to no purpose," because "such By-lawes made by a Corporation, are void by the very Common-Law."¹⁶⁸ Case after case demonstrated "unlawfull" and "void" corporate ordinances¹⁶⁹: imprisoning people; requiring the forfeiture of goods; restraining the liberty of trade or the common liberty of the subject; creating justices of the peace or criminal courts; pardoning felons; and enrolling deeds.¹⁷⁰

By the time that English corporations began to settle North America, English law had developed a well-established practice of voiding corporate ordinances that were repugnant to the laws of the nation. The principle of repugnancy was mediated in certain instances by permitting contrary corporate bylaws when they rested on immemorial custom.¹⁷¹ Corporate ordinances were to be reviewed in advance by judges but could be challenged in the courts. "As between the particular privileges of towns and companies and the interests of the whole realm in trade legal opinion went against the exclusive privileges of

^{166.} SHEPHEARD, *supra* note 46, at 82. Shepheard noted that "Custome or Prescription justifie the doing of some things against common Right" in London. *Id.* at 86.

^{167.} THE FORMES AND PRESIDENTS OF CHARTERS; CONCERNING CORPORATIONS. WITH THE CHIEF MATTERS THAT ARE USUALLY CONTAINED IN THEM (London, J. Streeter 1659), reprinted in SHEPHEARD, *supra* note 46, at 131, 147; *see also id.*, reprinted in SHEPHEARD, *supra* note 46, at 178 (reproducing another charter with the phrase "reasonable . . . and not repugnant to the Laws, Liberties, Rights, Customs, and Statutes of *England*").

^{168.} SHEPHEARD, *supra* note 46, at 82. Shepheard stated that bylaws not against the prerogative of the Lord Protector or profit of the people were good "without any . . . Confirmation" under the 1504 Act. *Id.* at 83. Confirmation could not, however, make good certain ordinances that were otherwise void. *See id.* at 83-84.

^{169.} *Id.* at 43, 78-79.

^{170.} *Id.* at 43, 71-73, 78-79, 84. Shepheard treated *Dr. Bonham's Case* as a corporate case, resolving that the College had "no power to punish by Fine and Imprisonment, those who practice without their License, but those practisers who mis-administer Physick"—or, if it did have such power, it had "not pursued it according to the Statute and Patent." *Id.* at 104-05.

^{171.} COOKE, *supra* note 65, at 64.

the corporation.”¹⁷² Repugnancy, together with the principle of limited corporate lawmaking, did not lie in the particular words of a Crown grant but was inherent in the essence of legitimate English government. It was, in short, a constitutional principle.

II. REPUGNANCY, COLONIAL LAW, AND THE CONSTITUTION

This corporate practice became the American practice later known as judicial review. During the colonial period, the limit on corporate bylaws became a limit on colonial legislatures enforced by colonial courts and the Privy Council. Between 1776 and 1787, state constitutions and state judicial practice continued to assume that legislation could not be repugnant to new written constitutions. The Framers of the U.S. Constitution, Federalists and Anti-Federalists, federal judges, and Supreme Court Justices made the same assumption.

A. *The Colonial Constitution and Repugnancy*

English colonization efforts absorbed the idea of constrained corporate bylaws. The Crown delegated governance authority over settlements through letters patent.¹⁷³ The nature of the political entity that would hold the authority changed over the course of early English settlement. Initial settlements in Virginia and Massachusetts Bay, among others, were structured as corporations. The use of the corporate form is not surprising given the overlap between members of London companies and colonial ventures. Indeed, a number of London aldermen and merchants had significant involvement in domestic and foreign trading corporations.¹⁷⁴ Members of the London livery companies and trading companies were major participants in the new North

¹⁷². *Id*; see 3 E. LIPSON, THE ECONOMIC HISTORY OF ENGLAND 348–50 (6th ed. 1956) (describing the courts’ hostility to monopolies and privileges). The 1624 Statute of Monopolies, barring certain grants of monopoly, exempted corporate charters and thus produced an increase in incorporations. See Statute of Monopolies, 1624, 21 Jac., c. 3, §§ 1, 9; ROBERT ASHTON, THE CITY AND THE COURT, 1603–1643, at 118 (1979); COOKE, *supra* note 65, at 55.

¹⁷³. See Mary Sarah Bilder, *English Settlement and Local Governance*, in THE CAMBRIDGE HISTORY OF LAW IN AMERICA (Christopher L. Tomlins & Michael Grossberg eds., forthcoming 2007).

¹⁷⁴. See ASHTON, *supra* note 172, at 34–42; ROBERT BRENNER, MERCHANTS AND REVOLUTION: COMMERCIAL CHANGE, POLITICAL CONFLICT, AND LONDON’S OVERSEAS TRADERS, 1550–1653, at 92–112 (1993) (discussing the company merchants’ relationship to colonial development).

American settlement ventures; Edward Coke, for example, was involved in the Virginia Company.¹⁷⁵

The constraints on settlement governance authority were clarified as domestic corporate bylaw constraints became more apparent in the late sixteenth century. The letters patent given to John Cabot in 1496 and to Bristol merchants in 1501 granted governance authority but contained no explicit limits.¹⁷⁶ By 1569, however, the company formed by Humphrey Gilbert to create English settlements in Munster, Ireland, adopted corporate governance practices and limits. Gilbert requested that the head of his company hold the power to make “laws and ordinances, not contrary to the laws of Ireland.”¹⁷⁷ In later patents in the 1570s to Gilbert and to his half-brother Walter Raleigh, lawmaking authority was constrained by the requirement that it “be as neere as conveniently may, agreeable to the forme of the lawes & pollicy of England.”¹⁷⁸

In the wake of the common law court decisions regarding the repugnancy principle for domestic corporations, letters patent for settlement corporations began to use the terms “contrary” or “repugnant” with regard to the laws of England. The 1611 Virginia charter required that the laws “be not contrary.”¹⁷⁹ The 1620 New England charter conferred the power to make laws “so always as the same be not contrary” and declared that such laws should be “as near as

^{175.} Thorne, *supra* note 123, reprinted in ESSAYS IN ENGLISH LEGAL HISTORY, *supra* note 41, at 225.

^{176.} Letters Patent for Richard Warde, Thomas Asshehurst, John Thomas, João Fernandes, Francisco Fernandes, and João Gonsalves (Mar. 19, 1501), in AMERICA FROM CONCEPT TO DISCOVERY: EARLY EXPLORATION OF NORTH AMERICA 104, 105 (David B. Quinn ed., New Am. World vol. 1, 1979); Letters Patent Granted to John Cabot and His Sons (Mar. 5, 1496), in AMERICA FROM CONCEPT TO DISCOVERY, *supra*, at 94, 95; see also Charter to Sir Walter Raleigh (1584), in 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 53, 55 (photo. reprint 1993) (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS]; Letters Patent to Hugh Elyot, Thomas Asshehurst, João Gonsalves, and Francisco Fernandes (Dec. 9, 1502), in AMERICA FROM CONCEPT TO DISCOVERY, *supra*, at 111, 111.

^{177.} 2 THE VOYAGES AND COLONISING ENTERPRISES OF SIR HUMPHREY GILBERT 493 (David Beers Quinn ed., Hakluyt Soc'y 2d ser. 84, 1940).

^{178.} Letters Patent to Sir Humfrey Gylberte (June 11, 1578), in 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 176, at 49, 51 (1578 Newfoundland patent).

^{179.} The Third Charter of Virginia (1611-1612), in 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 176, at 3802, 3806. Some early grants to individual proprietors stated that the laws were to be “as near as may be” agreeable to the laws of England. See BILDER, *supra* note 31, at 214 n.16 (listing as examples the 1609 Virginia charter, the 1621 Virginia Ordinances, the 1629 Mason Grant, and the 1622 Gorges and Mason grant in Maine); JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 465, 468-69 (1950).

conveniently may be, agreeable.”¹⁸⁰ The 1629 Massachusetts Bay charter stated that the laws must “be not contrarie or repugnant.”¹⁸¹ The 1662 and 1663 corporate charters of Connecticut and Rhode Island included contrary or repugnant limits.¹⁸² The language was not mere verbiage; early New England governments struggled with the degree to which they were bound by English corporate law.¹⁸³

The repugnancy language soon became disengaged from corporate status. It appeared in Crown grants to individual proprietors. The 1629 patent to Robert Heath for Carolina stated that the laws “be consonant to Reason and not repugnant or contrary but (as conveniently as may be done) consonant to the lawes, statutes, customes & rights of our Realme of England.”¹⁸⁴ The 1632 Maryland grant to Lord Baltimore provided that the laws “be consonant to Reason, and be not repugnant or contrary, but (so far as conveniently may be) agreeable.”¹⁸⁵ The 1639 Maine grant to Ferdinando Gorges required laws to be “reasonable and not repugnant or contrary but as neere as may bee agreeable.”¹⁸⁶ The 1664 letters patent from the King to his brother, James, Duke of York, for New York required that the laws not be “contrary” to the laws of England.¹⁸⁷ Most remarkably, even self-authorizing settlements began to absorb the repugnancy rhetoric. In 1641, the Piscataqua River settlers, in

^{180.} The Charter of New England (1620), in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 176, at 1827, 1832, 1833.

^{181.} The Charter of Massachusetts Bay (1629), in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 176, at 1846, 1853; see also *id.* at 1857–58.

^{182.} Charter of Connecticut (1662), in 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 176, at 529, 533; Charter of Rhode Island and Providence Plantations (1663), in 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 176, at 3211, 3215.

^{183.} See, e.g., Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913, 961–64 (1997). Their anxiety over the power to imprison and impose penal measures may have arisen from concern that the reasoning of *Clark’s Case* and *Dr. Bonham’s Case* applied.

^{184.} Sir Robert Heath’s Patent 5 Charles 1st (Oct. 30, 1629), in 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 176, at 69, 71.

^{185.} The Charter of Maryland (1632), in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 176, at 1677, 1680.

^{186.} Grant of the Province of Maine (1639), in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 176, at 1625, 1630.

^{187.} Grant of the Province of Maine (1664), in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 176, at 1637, 1638; see also DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 44 (2005) (discussing the repugnancy clause in the charter).

what would become New Hampshire, bound their own laws by the standard of being “not repugnant” to the laws of England.¹⁸⁸

The repugnancy principle limited colonial law. The 1691 Massachusetts Bay charter required that the laws “be not repugnant or contrary” to the laws of England.¹⁸⁹ By the Revolution, every American colony was similarly bound. The most important English statute affecting the colonies used the limit:

Laws By-lawes Usages or Customes . . . in any of the said Plantations which are in any wise repugnant to the before mentioned Lawes . . . or which are wayes repugnant to this present Act or to any other Law hereafter to bee made . . . soe farr as such Law shall relate to and mention the said Plantations are illegall null and void . . .¹⁹⁰

Under this standard, the third branch of colonial government, the Privy Council, reviewed over 8500 colonial acts from colonial legislatures¹⁹¹ and around 250 appeals from colonial courts¹⁹² that had themselves struggled over the relationship between colonial law and the laws of England.¹⁹³ The thousands of pages of legislation sent from the colonies to England testify to the pervasive reality of this practice.¹⁹⁴ By the end of the seventeenth century, repugnancy to the laws of England as a limit on English corporations had become transformed into a limit on colonial law—what I have called elsewhere

^{188.} The Combination of the Inhabitants upon the Piscataqua River for Government (1641), in 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 176, at 2445, 2445.

^{189.} The Charter of Massachusetts Bay (1691), in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 176, at 1870, 1882; see AN ABSTRACT OF SOME OF THE PRINTED LAWS OF NEW-ENGLAND 1 (n.p. 1689) (criticizing laws that “are either contrary, or not agreeable to the Laws of England”).

^{190.} An Act for Preventing Frauds and Regulating Abuses in the Plantation Trade (Plantation Trade Act), 1695, 7 & 8 Will. 3, c. 22, § 8; see also Royal Exchange and London Assurance Corporation Act, 1719, 6 Geo., c. 18 (“[T]he sole Right and Prerogative of granting Charters of Incorporation (not being such as are repugnant to any Law or Statute of this Realm) doth belong to your Majesty.”).

^{191.} ELMER BEECHER RUSSELL, THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL 221 (photo. reprint 1981) (1915). See generally *id.* at 139-73 (discussing conformity to the laws of England).

^{192.} See SMITH, *supra* note 179, at 667-71. See generally *id.* at 523-653 (discussing appeals). A more precise count of appeals must await completion of Sharon O’Connor’s guide to documentation, *Appeals to the Privy Council Before American Independence*.

^{193.} See BILDER, *supra* note 31, at 91-114 (discussing Rhode Island cases); Bilder, *supra* note 173.

^{194.} See Charles M. Andrews, *List of the Journals and Acts of the Councils and Assemblies of the Thirteen Original Colonies, and the Floridas, in America, Preserved in the Public Record Office, London*, in 1 ANN. REP. AM. HIST. ASS’N FOR THE YEAR 1908 app. D, at 399 (1909).

a “transatlantic constitution.”¹⁹⁵ This constitution structured colonial law by absorbing the repugnancy principle and, in particular, the emphasis on Magna Carta as a meaningful constraint on lawmaking authority. Colonial law also absorbed the corporate argument that ordinances could diverge for reasons of immemorial custom relating to the particular people or place.¹⁹⁶ Awareness of this transformation appears in 1701 in the comment of the anonymous author of *An Essay upon the Government of the English Plantations on the Continent of America*. Did colonial legislatures have the power to pass “Acts or Ordinances in the nature of by-Laws only”?¹⁹⁷ Or, as he asked, were they something more: “[H]ow far [is] the Legislative Authority . . . in the Assemblies of the several Colonies”?¹⁹⁸

Throughout the eighteenth century, on both sides of the Atlantic, lawmakers and legal observers understood the repugnancy limit. A few examples must suffice.¹⁹⁹ Barbados’s Attorney General described the Governor’s commission as requiring that “no laws shall be passed, that are repugnant to the laws of England.”²⁰⁰ In 1729, dissenting Rhode Island judges argued that the practice of interpreting “jointly” to permit descent to heirs was

^{195.} BILDER, *supra* note 31, at 1.

^{196.} On these arguments, see *id.* at 3, 139; and JACK P. GREENE, PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788, at 19-42 (1986). On the Empire’s use of the same language, see SWINFEN, *supra* note 23, at 66-69.

^{197.} AN ESSAY UPON THE GOVERNMENT OF THE ENGLISH PLANTATIONS ON THE CONTINENT OF AMERICA 23 (Louis B. Wright ed., Huntingdon Library 1945) (1701) (asking also whether colonial assemblies could “make Acts of Attainder, Naturalization, for set[t]ling or disposing of Titles to Lands . . . , and other things of the like Nature; and where Necessity requires, make such Acts as best suit the Circumstances and Constitution of the Country, even tho’ in some Particulars, they plainly differ from the Laws of *England*”).

^{198.} *Id.* Additional examples of legislative authority in contrast to bylaw power included the powers of “Illegitimating of Heirs” and “cutting off Intails.” *Id.* at 40. The author also asked whether “they may make Laws disagre[e]able to the Laws of *England*, in such Cases, where the Circumstances of the Places are vastly different, as concerning Plantations, Waste, the Church, &c.” *Id.*

^{199.} For further examples, see GREENE, *supra* note 196, at 19-42.

^{200.} The Opinion of the Attorney-General Rawlin, of Barbadoes, on the Act of Assembly, Creating Paper Money (n.d.), in 2 GEORGE CHALMERS, OPINIONS OF EMINENT LAWYERS, ON VARIOUS POINTS OF ENGLISH JURISPRUDENCE 27, 29 (London, Reed & Hunter 1814); *see also id.* at 30 (criticizing an act for being contrary to Magna Carta, English statutes, and the “maxim, that an act of parliament, that is against common right, or reason, or is repugnant, or impossible, in itself, is void”).

“contrary and repugnant” to the laws of England regarding joint tenancy.²⁰¹ In 1730, the English Attorney General and Solicitor General explained that Connecticut had the power of making bylaws and laws affecting property but that any laws “repugnant to the laws of England” were “absolutely null and void.”²⁰² In 1738, New York’s Lieutenant Governor stated that the “constitution of the Government is such . . . whereby the Governour with the Council and Assembly are empowered to pass laws not repugnant to the laws of England.”²⁰³

In the years preceding the Revolution, awareness of the repugnancy constraint continued. In 1760, the Chief Justice of the South Carolina Court of Common Pleas discussed the meaning of “repugnancy.”²⁰⁴ A member of the Inner Temple wrote that the colonists did have “‘a Right to make Laws . . . provided’ that they were ‘not repugnant to the Laws of their Mother-Country.’”²⁰⁵ James Wilson noted that the King had a “negative on the different legislatures throughout his dominions, so that he can prevent any repugnancy in their different laws.”²⁰⁶

This constitutional limit on colonial law was familiar to the legal commentators of the early nineteenth century. Joseph Story declared that the

²⁰¹ BILDER, *supra* note 31, at 109. Cases in Rhode Island often involved arguments over the colony’s practices or customs rather than the direct repugnancy raised by a particular colonial statute. *See id.* at 110–11.

²⁰² The Opinion of the Attorney and Solicitor-General, Yorke, and Talbot, on the Power of the Assembly of Connecticut To Make Laws (1730), in 1 CHALMERS, *supra* note 200, at 353, 354 (discussing a Connecticut charter). In 1755, Attorney General William Murray stated that there “always is a restriction, that [the colonial laws] shall not be contrary to the laws of England.” The Opinion of the Attorney-General Murray, on the Question, Whether an Assembly Can Impose a Duty on the Importation of Convicts into a Colony (1755), in 1 CHALMERS, *supra* note 200, at 344, 347.

²⁰³ Mr. Clarke’s Answers to Queries of Board of Trade (June 2, 1738), in 6 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK 120 (E.B. O’Callaghan ed., Albany, Weed, Parsons & Co. 1855), quoted in Daniel J. Hulsebosch, *Imperia in Imperio: The Multiple Constitutions of Empire in New York, 1750–1777*, 16 LAW & HIST. REV. 319, 320 (1998).

²⁰⁴ In *Williams v. Executors of Watson* (S.C. Ct. Com. Pl. 1760), South Carolina Chief Justice Michie concluded that a colony act relating to intestate administration was not repugnant to the laws of England, and he suggested that in any case only the Privy Council, not a colonial court, could void a repugnant colonial law. *See* SMITH, *supra* note 179, at 586–91; *see also* Beth, *supra* note 22, at 41–42 (emphasizing that the defendant’s counsel thought the colonial court could exercise judicial review).

²⁰⁵ GREENE, *supra* note 196, at 97 (quoting a pamphlet published in 1766).

²⁰⁶ 2 JAMES WILSON, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament* (1774), in THE WORKS OF JAMES WILSON, *supra* note 51, at 721, 745.

colonial “assemblies had the power of making local laws and ordinances, not repugnant to the laws of England, but as near as may be agreeable thereto, subject to the ratification and disapproval of the crown.”²⁰⁷ Throughout the lengthy 200-page discussion of the “charters, constitutional history, and antebellum jurisprudence of the Colonies,” Story repeatedly noted instances in which lawmaking power had been limited by the word “repugnant.”²⁰⁸ He declared that “all their laws were required to be not repugnant unto, but, as near as might be, agreeable to the laws and statutes of England.”²⁰⁹ The Crown had a “negative” on the laws and a right of revision through appeal.²¹⁰ Story explained that the repugnancy condition was “a limitation upon the legislative power contained in an express clause of all the charters; and could not be transcended without a clear breach of their fundamental conditions.”²¹¹ The colonies had only a delegated, constrained legislative authority.

B. American Constitutions and Repugnancy

The Revolution did not end the use of the repugnancy principle as a limitation upon legislative power. The years leading up to the Revolution had seen an extensive debate over the nature of parliamentary and legislative

^{207.} 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 159, at 144 (Boston, Hilliard, Gray & Co. 1833); see also Thomas Sergeant, *A Brief Sketch of the National Judiciary Powers Exercised in the United States, from the First Settlement of the Colonies to the Time of the Adoption of the Present Federal Constitution*, in PETER S. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 135, 141 (photo. reprint 1993) (Phila., Abraham Small 1824) (describing the “general superintending power by way of appeal” of the Privy Council over the decisions of “colonial tribunals”).

^{208.} 1 STORY, *supra* note 207, at 2; see *id.* § 56, at 40 (Plymouth); *id.* § 71, at 55 (Massachusetts); *id.* § 80, at 67 (New Hampshire); *id.* § 82, at 69 (Maine); *id.* § 96, at 83 (Rhode Island); *id.* § 104, at 93 (Maryland); *id.* § 119, at 108 (New Jersey); *id.* § 122, at 110 (Pennsylvania); *id.* § 143, at 129 (Georgia); *id.* § 164, at 148 (noting the word in the Plantation Trade Act, 1695, 7 & 8 Will. 3, c. 22); *id.* § 181, at 167 (referring to the 1727 Connecticut case of *Winthrop v. Lechmere*); *id.* § 188, at 174 (quoting an address of the Massachusetts General Court in 1761); see also *id.* § 156, at 139 (stating that under the charters, “no laws shall be made, which are repugnant to, but as near as may be conveniently, shall conform to the laws of England”).

^{209.} *Id.* § 163, at 147.

^{210.} *Id.* § 210, at 196 (noting the repugnancy limitation).

^{211.} *Id.* § 163, at 147. Still, he noted that a “very liberal exposition of this clause seems, however, always to have prevailed, and to have been acquiesced in, if not adopted by the crown.” *Id.*

power.²¹² The conclusion to be drawn about legislative power was ambiguous.²¹³ English legal and political thought claimed Parliament was supreme; American legal and political thought attempted to constrain parliamentary power over the colonies.²¹⁴ The idea of legislative supremacy could be supported by the English parliamentary claim and the dominance of the colonial legislatures. The commitment to constrained legislative power received equally strong support from the need to limit Parliament and from the colonial transatlantic constitution.

The post-Revolutionary process of writing state constitutions reinforced the belief that the legislature held delegated constitutional authority. The “constitution” replaced the Crown or Parliament as the delegator of governance authority. As Samuel Adams wrote in 1768, “[T]he Constitution is fixd; & as the supreme Legislative derives its Power & Authority from the Constitution, it cannot overleap the Bounds of it without destroying its own foundation.”²¹⁵ In 1776, an anonymous author argued that the English had no constitution, “their legislative power being unlimited without either condition or controul, except in the single instance of trial by Juries.” A constitution “says to the legislative powers, ‘Thus far shalt thou go, and no farther.’”²¹⁶ In certain new state constitutions, repugnancy served explicitly to constrain state legislation.²¹⁷ In

^{212.} See BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 200-29 (rev. ed. 1992); WOOD, *supra* note 21. For contemporary discussion, see, for example, WILSON, *supra* note 206.

^{213.} For discussion of the relationship between these competing ideas and judicial review, see John Phillip Reid, *Another Origin of Judicial Review: The Constitutional Crisis of 1776 and the Need for a Dernier Judge*, 64 N.Y.U. L. REV. 963 (1989).

^{214.} For contemporary discussions, see, for example, *Paxton's Case* (Mass. 1761), in QUINCY, *supra* note 5, at 51, 55 (argument of James Otis); DANIEL DULANY, CONSIDERATIONS ON THE PROPRIETY OF IMPOSING TAXES IN THE BRITISH COLONIES (Annapolis, 1765), reprinted in 1 PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776, at 598 (Bernard Bailyn ed., 1965) [hereinafter PAMPHLETS]; and JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED (Boston, Edes & Gill 1764), reprinted in 1 PAMPHLETS, *supra*, at 408.

^{215.} The House of Representatives of Mass. to the Speakers of Other Houses of Representatives (Feb. 11, 1768), in 1 WRITINGS OF SAMUEL ADAMS 184, 185 (Harry Alonzo Cushing ed., 1904); see also WOOD, *supra* note 21, at 266-67 (quoting Adams).

^{216.} Letter IV, in FOUR LETTERS ON INTERESTING SUBJECTS (Phila., Steiner & Cist 1776), reprinted in THOMAS PAINE, COMMON SENSE AND OTHER WRITINGS 74, 75 (Gordon Wood ed., 2003) (following A. Owen Aldridge's attribution of the pamphlet to Paine).

^{217.} BILDER, *supra* note 31, at 187. The substitution of “constitution” for the “laws of England” was not new. See Gerald Stourzh, *Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century*, in CONCEPTUAL CHANGE AND THE CONSTITUTION 35, 43 (Terence Ball & J.G.A. Pocock eds., 1988) (quoting seventeenth-century lawyer Roger North to the effect that “constitution” was “more frequently supplanting older expressions such as ‘the laws of this Kingdom, his Majesty’s Laws, [or]

1786, James Iredell summarized the continuation of a practice of limiting legislative power. In reference to the writing of the North Carolina state constitution, he explained, “We were not ignorant of the theory of the necessity of the legislature being absolute in all cases, because it was the great ground of the British pretensions. But this was a mere speculative principle, which men at ease and leisure thought proper to assume.” Because the state constitution rejected such a theory, he declared, “I have therefore no doubt, but that the power of the Assembly is limited and defined by the constitution.”²¹⁸

In a series of well-studied cases, state judges repeatedly affirmed that legislation could not be repugnant to the state constitution, often using the specific language of repugnancy.²¹⁹ In New Jersey in 1780, state court judges found a legislatively authorized six-man jury contrary to the new state constitution.²²⁰ In Virginia in 1782, judges heard arguments that a legislative act pardoning prisoners was “contrary to the plain declaration of the

the Laws of the Land”). On the related issue of reception of the laws of England not “repugnant” to American state common and constitutional law, see generally ELIZABETH GASPAR BROWN, BRITISH STATUTES IN AMERICAN LAW, 1776-1836 (1964).

- 218. An Elector [James Iredell], To The Public (Aug. 17, 1786), in 2 GRIFFITH J. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 145, 146 (N.Y., D. Appleton & Co. 1858); see also James Iredell, Instructions to Chowan County Representatives (Sept. 1783), in 2 THE PAPERS OF JAMES IREDELL 446, 449 (Don Higginbotham ed., 1976) (describing “a Republic where the Law is superior to any or all the Individuals, and the Constitution is superior even to the Legislature, and of which the Judges are the guardians and protectors”).
- 219. Scholarly examination of these cases began in the nineteenth century. See, e.g., QUINCY, *supra* note 5, app. 1, at 529 n.32; Wm. M. Meigs, *The Relation of the Judiciary to the Constitution*, 19 AM. L. REV. 175, 178-83 (1885). For modern discussion, see, for example, RAOUL BERGER, CONGRESS V. THE SUPREME COURT 36-46 (1969); 1 LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY 51-72 (photo. reprint 1993) (1932); CLINTON, *supra* note 6; 2 CROSSKEY, *supra* note 11, at 938-75; JULIUS GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 125-42 (1971); CHARLES GROVE HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY (2d ed. 1932); LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION (1988); SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990); and WOOD, *supra* note 21, at 453-63. This Article does not discuss *The Josiah Philips Case* (Va. Gen. Ct. 1778) because of the absence of significant extant materials. See 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES app. note D, at 293 (photo. reprint 1996) (Phila., William Young Birch & Abraham Small 1803); William Romaine Tyree, *The Case of Josiah Phillips*, 16 VA. L. REG. 648 (1911). Although the reasoning in *Rutgers v. Waddington* (N.Y. 1784) was based on a similar theory of repugnancy, it focused on the relationship of a statute to a treaty or the law of nations. See 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 392-419 (Julius Goebel, Jr. ed., 1964).
- 220. Austin Scott, Holmes vs. Walton: *The New Jersey Precedent*, 4 AM. HIST. REV. 456 (1899) (discussing *Holmes v. Walton* (N.J. 1780)); see N.J. CONST. of 1776, art. 22, in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 176, at 2594, 2598; State v. Parkhurst, 9 N.J.L. (4 Halst.) 427 (1802). Acts in 1775 and 1778 authorized the jury. Scott, *supra*, at 457-58.

constitution; and therefore void.”²²¹ Discussion arose over whether a court could “declare an Act of the Legislature void because it was repugnant” to the constitution.²²² Most of the judges believed “that the court had power to declare” a legislative act “unconstitutional and void.”²²³ In Rhode Island in 1786, attorneys argued that a statute denying a jury trial was “unconstitutional, and repugnant to the Law of the Land.”²²⁴ The legislature could only “make[] laws not repugnant to the constitution”; the judiciary could not execute an act that was “against the constitution.”²²⁵ Judge David Howell justified the court’s refusal to take cognizance of the case as required by the law by describing the law as “repugnant and unconstitutional.”²²⁶ In New Hampshire in 1786, an inferior court heard cases questioning whether an act effectively denying a jury trial was “Against the Express Letter & Spirit of said Constitution & Against the Law of the Land.”²²⁷ The state constitution provided that legislation must not be “repugnant, or contrary to this constitution.”²²⁸ The court concluded that the act was “Manifestly Contrary to the Constitution of this State.”²²⁹ In North Carolina in 1787, an act denying jury trial was allegedly unconstitutional and void. The court considering the act concluded that the constitution was the “fundamental law of the land,” and the act was therefore abrogated.²³⁰

These judges did not *intend* to create judicial review; they simply continued to assume that legislation could not be repugnant to what was now termed a constitution. The colonial limit of repugnancy was being transformed into an American principle of written constitutionalism. Corporations had held delegated bylaw authority from the Crown; colonies had held delegated

^{221.} Commonwealth v. Caton, 8 Va. (4 Call.) 5, 7 (1782).

^{222.} Pendleton’s Account of “The Case of the Prisoners” (*Caton v. Commonwealth*) (Oct. 29, 1782), in 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON, 1734-1803, at 416, 417 (David John Mays ed., Va. Historical Soc’y Documents 8, 1967); see Treanor, *Case of the Prisoners*, *supra* note 14 (discussing the case).

^{223.} *Caton*, 8 Va. (4 Call.) at 20. Pendleton declined to reach the issue.

^{224.} *Providence*, Sept. 30, PROVIDENCE (R.I.) GAZETTE & COUNTRY J., Sept. 30, 1786, at 2; see BILDER, *supra* note 31, at 188-90.

^{225.} JAMES M. VARNUM, THE CASE, TREVETT AGAINST WEEDEN 1, 27 (Providence, John Carter 1787) (recording proceedings in *Trevett v. Weeden* (R.I. 1786)).

^{226.} 2 CROSSKEY, *supra* note 11, at 966 (quoting a 1786 newspaper report).

^{227.} *Ten Pound Act Cases* (N.H. Inferior Ct. Com. Pl. 1786), in Richard M. Lambert, *The “Ten Pound Act” Cases and the Origins of Judicial Review in New Hampshire*, 43 N.H. B.J. 37, 41 (2002).

^{228.} N.H. CONST. of 1784, in 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 176, at 2453, 2458.

^{229.} *Ten Pound Act Cases*, in Lambert, *supra* note 227, at 45.

^{230.} Bayard v. Singleton, 1 N.C. 5, 7, 1 Mart. 48 (Super. Ct. Law & Eq. 1787).

legislative power from the Crown and Parliament. The state legislatures, in turn, held delegated authority from the people.

This understanding explicitly appeared in several of these cases. Rhode Island attorneys argued that the “powers of legislation” are “derived from the people at large” and are therefore “subordinate”;²³¹ legislation was thus constrained by the charter and constitution.²³² A New Hampshire attorney argued that the legislature could not “exercise a Power which is not deriv’d from the constitution” and that the courts were the “constitutional Barriers between the Power of the Legislature and the liberty of the People.”²³³ The report of the North Carolina court stated that the legislature could not repeal or alter the Constitution without “destroy[ing] their own existence as a Legislature.”²³⁴ A practice that had involved delegated legislative power from the Crown slid easily into one now described as arising from delegated legislative power of the people.²³⁵

C. The United States Constitution and Repugnancy

At the national level, repugnancy continued to prove relevant. Under the Articles of Confederation, there was little occasion to consider the implications of “repugnancy” with regard to congressional acts. The Continental Congress, however, used repugnancy to regulate the similar relationship of state statutes to a treaty. Congress was concerned that certain state acts were “repugnant” to the 1783 peace treaty, and in the spring of 1787, it recommended that the states pass legislation providing “such acts and parts of acts repugnant to the treaty of peace . . . shall be and thereby are repealed.” Courts were to “decide and adjudge” according to the act.²³⁶

The proposed revision of the Articles of Confederation raised the relevance of repugnancy to a new government structure. An editorial in a New York

^{231.} VARNUM, *supra* note 225, at 21; *see id.* at 26 (stating that the legislature’s power of making laws “is derived from the constitution, is subordinate to it”).

^{232.} *Id.* at 22–26; *see id.* at 35.

^{233.} Lambert, *supra* note 227, at 44.

^{234.} Bayard, 1 N.C. at 7 (providing a reporter’s account of observations of the Superior Court of Law and Equity).

^{235.} For the argument that this idea of delegation did not give rise to judicial review, see 2 CROSSKEY, *supra* note 11, at 938–75.

^{236.} 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 125 (Worthington C. Ford et al. eds., 1936) (discussing repugnancy resolutions); *see id.* at 177–84 (explaining the rationale for the resolution). In response, states repealed conflicting legislation. *See, e.g., id.* at 303 n.1 (Massachusetts); *id.* at 353 n.1 (Connecticut).

paper in June 1787 argued that the corporate bylaw practice should serve as a model. The "West-Chester Farmer" suggested that the states "should still retain the subordinate power of legislation" under any new government.²³⁷ They should be permitted to make "local ordinances, not repugnant to the laws of the supreme power."²³⁸ They would have the power to make bylaws under constitutions that should provide "that all laws, by laws, usages and customs, repugnant to any law or ordinance made, or to be made, by the supreme power, shall be utterly void and of none effect."²³⁹ As the author noted, "[I]n other words, they are to be in the nature of civil corporations."²⁴⁰

Although this state-as-corporation model was not adopted,²⁴¹ almost every one of the occasional comments made at the Convention regarding judicial review betrayed the preexisting assumption that legislation would be limited by the Constitution and that judges would therefore necessarily declare laws contrary to the Constitution void.²⁴² These comments mostly occurred in

^{237.} West-Chester Farmer, *To the Citizens of America*, N.Y. DAILY ADVERTISER, June 8, 1787, in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 128, 129 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter DHRC].

^{238.} *Id.*

^{239.} *Id.* at 129-30.

^{240.} *Id.* at 129. On the conceptualization of states as corporations, see FREDERIC WILLIAM MAITLAND, SELECTED ESSAYS 123-24 (1936); and Eric Enlow, *The Corporate Conception of the State and the Origins of Limited Constitutional Government*, 6 WASH. U. J.L. & POL'Y 1 (2001).

^{241.} The degree to which the states could be analogized to corporations was occasionally mentioned during the Convention. Gouverneur Morris commented on the original nature of the colonial relationship: the states before the Revolution had been "nothing more than colonial corporations." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 552 (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS OF THE FEDERAL CONVENTION] (July 7). James Madison allegedly described the states as "only great corporations, having the power of making by-laws, and these are effectual only if they are not contradictory to the general confederation." *Id.* at 471 (June 29) (Yates's notes). Madison later cast doubt on the accuracy of Yates's notes with respect to this comment. See Letter from James Madison to W.C. Rives (Oct. 21, 1833), in 3 *id.* at 521, 521-22. Yates also recorded Hamilton as desiring to reduce the states to "simple corporations." Extracts from Yates's Secret Proceedings, in 3 RECORDS OF THE FEDERAL CONVENTION, *supra*, at 410, 413. Madison did later write Jefferson, "How long has it taken to fix, and how imperfectly is yet fixed the legislative power of corporations, though that power is subordinate in the most compleat manner?" Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in JAMES MADISON, WRITINGS 148 (Jack Rakove ed., 1999).

^{242.} The sources for this debate have changed little over the last century. See, e.g., CHARLES A. BEARD, THE SUPREME COURT AND THE CONSTITUTION (1912); BERGER, *supra* note 219, at 47-81; KRAMER, *supra* note 5, at 78-92; Meigs, *supra* note 219, at 183-85; Prakash & Yoo, *Origins*, *supra* note 12; Prakash & Yoo, *Questions*, *supra* note 12. Most of those commenting on judicial review had studied law, including Gunning Bedford, John Dickinson, Alexander Hamilton, Rufus King, Luther Martin, John Mercer, and James Wilson. See FRAMERS OF

discussions relating to the negative power (usually over state legislation), an executive-judicial Council of Revision, and an executive veto (usually over federal legislation).²⁴³ Concerns about explicitly mixing executive and judicial powers and anxiety over the evisceration of the states sunk these proposals. Not one, however, was rejected because of disagreement over judges' duty to void laws contrary to the Constitution; in fact, the presumed continuation of the practice may have served in some minds as a rationale for the rejections.

The delegates who seemed to disagree with judicial review used the word "ought," signaling an aspiration rather than present reality or future expectations. In June, Gunning Bedford declared (as Madison later summarized) that the representatives of the people "ought to be under no external control whatever."²⁴⁴ In August, in a discussion over the executive veto, Francis Mercer stated that that he "disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontrollable."²⁴⁵ Mercer's reference to "Doctrine" emphasized the prior existence of the practice. John Dickenson was "strongly impressed" by Mercer's

THE CONSTITUTION 125-26, 139, 155, 163, 177, 181, 210 (James H. Charlton et al. eds., 1986). Those speaking on the subject who did not explicitly train as lawyers were James Madison, George Mason, and Elbridge Gerry. Madison and Mason, however, both read extensively in law. *See id.* at 172, 179.

²⁴³ Madison and others argued for a continuation of the practice of reviewing legislation, proposing that the national legislature enjoy the power to negative state laws "as heretofore exercised by the Kingly prerogative." Letter from James Madison to George Washington (Apr. 16, 1787), in WRITINGS, *supra* note 241, at 80, 81; *see also* 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 241, at 164 (June 8) (presenting Pinckney's statement that the "negative of the Crown had been found beneficial"); *id.* at 168 (June 8) (presenting Madison's statement that it had been "the practice in Royal Colonies before the Revolution and would not have been inconvenient"). Alexander Hamilton's rejected plan for the government provided for "[a]ll laws of the particular States contrary to the Constitution or laws of the United States to be utterly void." 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 241, at 293 (June 18).

²⁴⁴ 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 241, at 101 (June 4) (presenting the debate over the Council of Revision and the executive veto); *see also id.* at 106 (June 4) (Yates's notes) (discussing Bedford's opposition to the executive veto); *id.* at 109 (Pierce's notes) (discussing Bedford's "opinion that no check was necessary on a Legislature"). The statement was even more ambiguous in context, as it was seemingly aimed at rejecting both the Council of Revision and an executive veto. Bedford emphasized that he opposed "every check on the Legislative" and "thought it would be sufficient to mark out in the Constitution the boundaries to the Legislative Authority" because the two branches (i.e., the two Houses of Congress) would check themselves. *Id.* at 100-01 (June 4).

²⁴⁵ 2 *id.* at 298 (Aug. 15). For another effort to show that the comments of Mercer and Dickinson "might actually advance the case for judicial review of federal legislation," see Prakash & Yoo, *Origins*, *supra* note 12, at 943.

comment and noted that he “thought no such power ought to exist.” However, Dickenson concluded that he “was at the same time at a loss what expedient to substitute.”²⁴⁶ Richard Spaight’s famous letter to James Iredell similarly commented that “no judiciary ought ever to possess” the power to negative legislation.²⁴⁷ Not one of these delegates further argued the point.

In contrast, other comments assumed a continuing practice. In debates over the Council of Revision, Rufus King assumed that judges would “no doubt stop the operation of such [statutes] as shall appear repugnant to the constitution.”²⁴⁸ Elbridge Gerry noted that in some states, with “general approbation,” the “Judges had <actually> set aside laws as being agst. the

246. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 241, at 299 (Aug. 15). Gouverneur Morris equivocated: “He could not agree that the Judiciary which was part of the Executive, should be bound to say that a direct violation of the Constitution was law. A controul over the legislature might have its inconveniences. But view the danger on the other side.” *Id.*

247. Letter from Richard Spaight to James Iredell (Aug. 12, 1787), in 2 MCREE, *supra* note 218, at 168, 169 (adding that “it would have been absurd, and contrary to the practice of all the world,” if the judges had the power to operate as “an absolute negative on the proceedings of the Legislature, which no judiciary ought ever to possess”); *see also* WILLIS P. WHICHARD, JUSTICE JAMES IREDELL 13-14 (2000) (discussing Spaight’s letter to Iredell). Despite a century of repeated citation, the views of Spaight, a North Carolina delegate to the Constitutional Convention, deserve less precedential weight. See COXE, *supra* note 5, at 385-86 (reprinting Spaight’s letter to Iredell and being among the first to call attention to the correspondence); SNOWISS, *supra* note 219, at 33 (citing Spaight as emblematic of an unidentified group of judicial-review opponents). Spaight, of course, never made the comment at the Convention. More importantly, Spaight wanted America to follow the *world’s* practice, not prior American practice. He had lived for much of his young life in Scotland. He was educated at the University of Glasgow and did not return to the colonies until 1778. JOHN H. WHEELER, SKETCH OF THE LIFE OF RICHARD DOBBS SPAIGHT OF NORTH CAROLINA 9 (Balt., William K. Boyle 1880). Iredell’s response interestingly emphasized the difference between England and America. See Letter from James Iredell to Richard Spaight (Aug. 26, 1787), in 2 MCREE, *supra* note 218, at 172, 172 (“Without an express Constitution the powers of the Legislature would undoubtedly have been absolute (as the Parliament in Great Britain is held to be)”); *see also* 1 THE PAPERS OF JAMES IREDELL, *supra* note 218, at xxxvii (noting that Iredell moved from England to North Carolina in 1768 at the age of seventeen); WHICHARD, *supra*, at xv, 3-4 (discussing Iredell’s colonial legal education). Iredell’s comment—“it has ever been my opinion, that an act inconsistent with the Constitution was void; and that the judges, consistently with their duties, could not carry it into effect”—echoed his own American legal education. Letter from James Iredell to Richard Spaight, *supra*, at 172; *see* WHICHARD, *supra*, at 3-8. The European perspective was also apparent in the remark of the principal French diplomat that the power of the Supreme Court to hear cases arising under the Constitution meant that the states “will resemble corporations rather than Sovereign assemblies.” Letter from Louis Guillaume Otto to Comte de Montmorin (Oct. 20, 1787), in 13 DHRC, *supra* note 237, at 422, 424-25.

248. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 241, at 109 (Pierce’s notes).

Constitution.”²⁴⁹ James Wilson worried that without the ability to negative state laws in advance of promulgation, laws that “may be unjust, may be unwise, may be dangerous, may be destructive,” might not “be so unconstitutional as to justify the Judges in refusing to give them effect.”²⁵⁰ Luther Martin stated that “as to the Constitutionality of laws, that point will come before the Judges in their proper official character.”²⁵¹ George Mason referred to Martin’s comment to the effect that judges, in their “expository capacity,” could “declare an unconstitutional law void.”²⁵² James Madison stated, “A law violating a constitution established by the people themselves, would be considered by the Judges as null & void.”²⁵³

This assumption that state and federal legislation would be bound by the Constitution—and that the judiciary would enforce this limit—explains the parallel addition, near the end of the Convention, of “the Constitution” to the Supremacy Clause and the Supreme Court’s jurisdiction. On August 23, John Rutledge moved to clarify that state legislation would be bound by the Constitution.²⁵⁴ On August 27, Samuel Johnson moved to add “this Constitution” to the jurisdictional grant for the Court.²⁵⁵ Johnson wanted the

^{249.} *Id.* at 97 (June 4) (alteration in original) (noting that the judiciary “will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality”).

^{250.} *2 id.* at 73 (July 21) (stating that “[j]udges, as expositors of the Laws would have an opportunity of defending their constitutional rights,” but that the power did not “go far enough”); *see also id.* at 391 (Aug. 23) (“The firmness of Judges is not of itself sufficient . . . It will be better to prevent the passage of an improper law, than to declare it void when passed.”).

^{251.} *Id.* at 76 (July 21) (noting that in “this character they have a negative on the laws”).

^{252.} *Id.* at 78 (July 21). He continued, “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.” *Id.*

^{253.} *Id.* at 93 (July 23); *see id.* at 440 (Aug. 28) (presenting Madison’s comment that the prohibition of ex post facto laws “will oblige the Judges to declare such interferences null & void”); *see also id.* at 376 (quoting a similar comment by Hugh Williamson).

^{254.} The Committee of Detail’s version of the Supremacy Clause (art. VIII) provided: “The Acts of the Legislature of the United States made in pursuance of this Constitution, and all treaties made . . . shall be the supreme law of the several States . . . and the judges in the several States shall be bound thereby in their decisions . . .” *Id.* at 183 (Aug. 6). The motion altered it to: “This Constitution and the Laws of the United States made in pursuance thereof . . . shall be the supreme law of the several States . . . and the Judges in the several States shall be bound thereby in their decisions . . .” *Id.* at 381-82 (Aug. 23); *see also id.* at 389 (presenting Rutledge’s motion).

^{255.} Article XI, section 3 of the Committee of Detail draft provided: “The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States . . .” *Id.* at 186 (Aug. 6). The motion, along with another one by Rutledge,

two clauses to be conformable.²⁵⁶ Both amendments passed unanimously.²⁵⁷ No one argued that the judiciary should not enforce constitutional constraints on legislation.²⁵⁸ The Constitution now appeared to have textual authorization for judicial enforcement of constitutional constraints on state and federal legislation.

At the state ratifying conventions, the limited nature of legislative power and the judiciary's concomitant role was repeatedly presumed. In Pennsylvania, James Wilson stated that "under this Constitution, the legislature may be restrained, and kept within its prescribed bounds, by the

resulted in the clause stating: "The Jurisdiction of the Supreme Court shall extend to all cases arising under the Constitution, the laws of the United States . . ." *Id.* at 423-24, 430-32 (Aug. 27). In the late nineteenth century, Brinton Coxe argued that the "arising under" clause represented explicit textual authorization for judicial review. *See COXE, supra* note 5, at 336-39; *see also* Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 91 (2003) (arguing that the Supremacy Clause provides an "express textual basis for judicial review of federal statutes" claimed to exceed federal authority); Prakash & Yoo, *Origins, supra* note 12, at 907 (making a similar argument).

- ²⁵⁶. *See* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 241, at 430-31. Like others who assumed a continuing practice, Rutledge and Johnson had studied law; indeed, they may have been particularly knowledgeable about colonial repugnancy practice under English law. During the 1760s, Rutledge was at the Middle Temple and Johnson received a Doctor of Laws from Oxford University. *See* MAX FARRAND, THE FRAMING OF THE CONSTITUTION 33 (1913) (discussing Johnson); FRAMERS OF THE CONSTITUTION, *supra* note 242, at 198 (discussing Rutledge). The Columbia Law School Library holds a collection of Privy Council appeals briefs with notes believed to be by Johnson. *Connecticut Cases, &c.* (c. 1771) (on file with the William Samuel Johnson Collection, Diamond Law Library, Columbia Law School).
- ²⁵⁷. *See* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 241, at 430-31; Amended Draft Constitution Submitted to the Committee of Style (Sept. 10, 1787), *in* 1 DHRC, *supra* note 237, at 270, 281 (Merrill Jensen ed., 1976).
- ²⁵⁸. Madison "doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department." 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 241, at 430 (Aug. 27). Johnson's motion was unanimously approved because, according to Madison's self-referential comment, it was "generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature." *Id.* Madison seems likely to have meant that the grant should not be read to extend the jurisdiction into the legislative or executive power. This conversation was not the only appearance of "judiciary nature." *See* 1 *id.* at 63, 67 (June 1) (statement of James Madison) (defining executive power as "to execute such powers, not legislative or judiciary in their nature"); *see also* THE FEDERALIST NO. 48 (James Madison), reprinted in 2 THE DEBATE ON THE CONSTITUTION 136, 136 (Bernard Bailyn ed., 1993) ("After discriminating therefore in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each against the invasion of the others.").

interposition of the judicial department.”²⁵⁹ In Connecticut, Oliver Ellsworth declared:

If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality are to be made independent, will declare it to be void.²⁶⁰

In Massachusetts, Samuel Adams explained, “if any law made by the federal government shall be extended beyond the power granted by the proposed Constitution, and inconsistent with the Constitution of this State, it will be an error, and adjudged by the courts of law to be void.”²⁶¹

Despite the lengthy debates in the Virginia convention over the boundaries between state and national authority and the independent spirit of the judiciary, opposing delegates repeatedly agreed that legislation contrary to the Constitution had to be declared void by judges.²⁶² Edmund Pendleton noted that the state judiciary had “prevented the operation of some unconstitutional acts.”²⁶³ Patrick Henry commented, “I take it as the highest encomium on this

^{259.} 2 DHRC, *supra* note 237, at 450 (Merrill Jensen ed., 1976) (Dec. 1, 1787); *see id.* (“[T]he power of the Constitution was paramount to the power of the legislature, acting under that Constitution. . . . [T]he legislature, when acting in that capacity, may transgress the bounds assigned to it . . . ; 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.”); *id.* at 453 (“[T]he supreme power is in and retained by the people.”); *id.* at 492 (Dec. 4, 1787); *id.* at 517 (Dec. 7, 1787) (explicitly discussing federal legislation); *see also id.* at 524-25 (presenting a newspaper summary of Wilson’s statements); KRAMER, *supra* note 5, at 284 n.48 (discussing the response to Wilson).

^{260.} 3 DHRC, *supra* note 237, at 535, 553 (Merrill Jensen ed., 1978) (Jan. 7, 1788). Ellsworth added that “if the states go beyond their limits, if they make a law which is an usurpation upon the general government, the law is void; and upright, independent judges will declare it to be so.” *Id.*

^{261.} 6 DHRC, *supra* note 237, at 1395 (2000) (Feb. 1, 1788).

^{262.} See, e.g., 9 DHRC, *supra* note 237, at 1070 (1990) (June 9, 1788) (Patrick Henry); *cf. id.* at 1080 (Henry Lee) (discussing delegated powers); *id.* at 1141 (June 10, 1788) (James Monroe) (discussing the “propriety of [the] judiciary to judge on laws in contradistinction to [the] legislature”).

^{263.} 10 DHRC, *supra* note 237, at 1197 (1993) (June 12, 1788). In May 1788, Pendleton, as President of the Virginia Court of Appeals, had written the Assembly that a bill relating to the district courts was “contrary to the Spirit of the [Virginia] Constitution.” Letter from Charles Lee to George Washington (May 14, 1788), *in* 9 DHRC, *supra* note 237, at 797, 798 n.2 (1990).

country, that the acts of the Legislature, if unconstitutional, are liable to be opposed by the Judiciary.”²⁶⁴ George Nicholas declared that “in all well regulated communities,” if the legislature exceeds its powers, “the Judiciary will declare it void.”²⁶⁵ George Mason read the Constitution as giving “an express power . . . to the Federal Court, to take cognizance of such controversies, and to declare null all *ex post facto* laws.”²⁶⁶ John Marshall proclaimed that, if Congress went beyond its delegated enumerated powers, “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.”²⁶⁷

Supporters and opponents of the Constitution in newspaper editorials made the same assumption. In Maryland, “Aristides” stated that every state or federal judge “will have a right to reject any act, handed to him as a law, which he may conceive repugnant to the constitution.”²⁶⁸ In Virginia, Alexander White wrote that, “should Congress attempt to exercise any powers which are not expressly delegated to them, their acts would be considered as void, and disregarded.”²⁶⁹ In Pennsylvania, “Centinel” stated that if “Congress be disposed to violate” the Constitution, “they would be prevented” by “the supreme court . . . whose province it would be to determine the constitutionality of any law.”²⁷⁰ In New York, a “Republican” worried that certain laws by the legislature might “come under the description of *ex post facto* laws, and as repugnant to the constitution, be nugatory and void.”²⁷¹

^{264.} 10 DHRC, *supra* note 237, at 1219-20 (1993) (June 12, 1788). Henry also noted that, if Congress altered a constitutional clause, “the Federal Judges, if they spoke the sentiments of independent men, would declare their prohibition nugatory and void.” *Id.* at 1420-21 (June 20, 1788).

^{265.} *Id.* at 1327 (June 16, 1788).

^{266.} *Id.* at 1361 (June 17, 1788).

^{267.} *Id.* at 1431 (June 20, 1788); *see also id.* at 1432 (“To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the Judiciary?”). William Grayson echoed Marshall, stating that “[i]f the Congress cannot make a law against the Constitution, I apprehend they cannot make a law to abridge it,” for “[t]he Judges are to defend it,” and “[t]hey can neither abridge nor extend it.” *Id.* at 1448 (June 21, 1788).

^{268.} ARISTIDES [ALEXANDER CONTEE HANSON], REMARKS ON THE PROPOSED PLAN (1788), reprinted in 15 DHRC, *supra* note 237, at 522, 531 (1984).

^{269.} Alexander White, *To the Citizens of Virginia*, GAZETTE (Winchester, Va.), Feb. 29, 1788, reprinted in 8 DHRC, *supra* note 237, at 438, 438 (1988).

^{270.} Centinel XVI [Samuel Bryan], *To the People of Pennsylvania*, PHILA. INDEP. GAZETTEER, Feb. 26, 1788, reprinted in 16 DHRC, *supra* note 237, at 217, 219-20 (1986).

^{271.} *A Republican*, N.Y. J., Dec. 27, 1787, reprinted in 19 DHRC, *supra* note 237, at 473, 474 (2003).

Even the critic of judicial review, the Anti-Federalist writer “Brutus,” assumed that the practice would continue under the Constitution.²⁷² In Number 11, he noted that the “legislatures must be controuled by the constitution, and not the constitution by them.”²⁷³ In Number 12, he explained that “the supreme court has the power . . . to determine all questions that may arise in the course of legal discussion, on the meaning and construction of the constitution.”²⁷⁴ The Court would “take no notice” of laws which, “in the judgment of the court,” are repugnant to the Constitution; to do otherwise would be to “make a superior law give way to an inferior.”²⁷⁵ In Number 15, he explained that if “the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void.”²⁷⁶ Brutus nonetheless criticized the Constitution for the practice.²⁷⁷ As he famously wrote, the judges would be “independent of the people, of the legislature, and of every power under heaven.”²⁷⁸ He wished “construction of the constitution” had been placed with the legislature.²⁷⁹ Yet Brutus was surprisingly reticent about an alternate solution and seemed ultimately to think impeachment a

^{272.} Brutus XI through XVI address the judicial power. Robert Yates is thought to be a possible author. See 2 THE DEBATE ON THE CONSTITUTION, *supra* note 258, at 1111 n.40.2.

^{273.} *Brutus XI*, N.Y. J., Jan. 31, 1788, reprinted in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 258, at 129, 132.

^{274.} *Brutus XII*, N.Y. J., Feb. 7 & 14, 1788, reprinted in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 258, at 171, 171-72.

^{275.} *Id.*, reprinted in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 258, at 172. He also wrote that courts “are vested with the supreme and uncontrollable power, to determine, in all cases that come before them, what the constitution means; they cannot, therefore, execute a law, which, in their judgment, opposes the constitution, unless we can suppose they can make a superior law give way to an inferior.” Brutus was worried that the courts would interpret the legislative power broadly, thus expanding the national government. *Id.*, reprinted in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 258, at 172; see also *id.*, reprinted in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 258, at 177; *Brutus XIII*, N.Y. J., Feb. 21, 1788, reprinted in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 258, at 222, 222 (“The proper province of the judicial power . . . is . . . to declare what is the law of the land.”).

^{276.} *Brutus XV*, N.Y. J., Mar. 20, 1788, reprinted in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 258, at 372, 376.

^{277.} *Id.*, reprinted in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 258, at 372 (comparing America, where the power of the judges is “superior to the legislature,” with England, where the judges “in no instance assume the authority to set aside an act of parliament under the idea that it is inconsistent with their constitution”).

^{278.} *Id.*, reprinted in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 258, at 373.

^{279.} *Id.*, reprinted in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 258, at 377.

sufficient check because it gave the legislature “judicial powers in the last resort.”²⁸⁰

This context illuminates the most famous discussion of judicial review by “Publius”—Alexander Hamilton—in *The Federalist No. 78*. Prior to the appearance of the Brutus editorials, Hamilton had assumed judicial review: the judges “would pronounce the resolutions” of a factious legislative majority “to be contrary to the supreme law of the land, unconstitutional and void.”²⁸¹ Brutus’s comments led Hamilton to explain that judicial review was an unavoidable consequence of limited legislative power. Hamilton repeated that the “duty” of courts of justice “must be to declare all acts contrary to the manifest tenor of the constitution void.”²⁸² He referred to this standard as one about “repugnancy.”²⁸³ He explained that this “right” to pronounce contrary

- ^{280.} *Brutus XVI*, N.Y. J., Apr. 10, 1788, reprinted in 20 DHRC, *supra* note 237, at 907, 911 (John P. Kaminski et al. eds., 2004); see also THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 258, reprinted in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 258, at 483, 486-87 (reading the impeachment power as a constitutional check on the judiciary in cases of “a series of deliberate usurpations on the authority of the legislature”). A recommended amendment permitted the President to nominate a commission to correct and review Supreme Court judgments. *Recommending Amendments*, POUGHKEEPSIE (N.Y.) COUNTRY J., Aug. 12, 1788, reprinted in 18 DHRC, *supra* note 237, at 301, 305 (1995); see Letter from Gaspard Joseph Amand Ducher to Comte de la Luserne (Aug. 25, 1788), in 18 DHRC, *supra* note 237, at 345, 349 (1995). For a similar reading of Brutus’s understanding of judicial review, see HULSEBOSCH, *supra* note 187, at 250.
- ^{281.} THE FEDERALIST NO. 16 (Alexander Hamilton), *supra* note 258, reprinted in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 258, at 451, 455. In *The Federalist No. 22*, Hamilton explained that the “want of a judiciary power” marred the Articles of Confederation, because “[l]aws are a dead letter without courts to expound and define their true meaning and operation.” THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 258, reprinted in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 258, at 507, 513.
- ^{282.} THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 258, reprinted in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 258, at 467, 469; see also THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 258, reprinted in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 258, at 476, 476-77 (discussing the reason for “authority in the federal courts, to over-rule” state laws in “manifest contravention of the articles of Union”); THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 258, reprinted in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 258, at 484 (stating that “the general theory of a limited constitution” meant that “the constitution ought to be the standard of construction for the laws” and that the Constitution attempted “to set bounds to the legislative discretion”).
- ^{283.} THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 258, reprinted in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 258, at 471 (pointing out that the criticism that “courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature” would apply to “contradictory statutes” or any case of statutory interpretation); see also BILDER, *supra* note 31, at 192 (discussing Hamilton’s use of “repugnant” and “repugnancy” in *The Federalist Nos. 32* and *78*); HULSEBOSCH, *supra* note 187, at 247-48 (discussing Hamilton’s use of the concept in *The Federalist No. 78*).

legislative acts void did not “suppose a superiority of the judicial to the legislative power.”²⁸⁴ Rather, it was that “every act of a delegated authority, contrary to the tenor of” its commission, “is void.”²⁸⁵ American constitutionalism was merely a new version of an old practice involving delegated authorities. Here, “the power of the people” is superior to both legislative and judicial power; judges were to be governed by the will of the “people . . . declared in the Constitution,” and “[n]o legislative act, therefore, contrary to the Constitution, can be valid.”²⁸⁶ For Hamilton, in short, judicial review was inescapable.

III. THE PRACTICE OF REPUGNANCY

The American practice of judicial review was based on repugnancy and constitutional constraints on delegated legislative authority. Seventeenth-century statements about fundamental law did not create the practice. Late-eighteenth-century concerns over a separation of powers did not shake it. Early-nineteenth-century desires for popular legislative sovereignty had surprisingly little impact on its existence.

After ratification, “repugnancy” and judicial review continued.²⁸⁷ “Repugnancy” explicitly governed federal review of state legislation. Section 25 of the Judiciary Act of 1789 gave the Supreme Court jurisdiction when a state court upheld a state statute or authority against the claim that it was “repugnant to the constitution, treaties or laws of the United States.”²⁸⁸ As Luther Martin described, “If the constitution admits of any construction necessarily repugnant to the laws of the state, it is a repeal of them,” for “[a]ll

²⁸⁴. THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 258, reprinted in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 258, at 467–68.

²⁸⁵. *Id.*, reprinted in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 258, at 467.

²⁸⁶. *Id.*, reprinted in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 258, at 467–68.

²⁸⁷. The repugnancy principle also continued to appear in its original guise when state courts reviewed claims that the bylaws of municipal corporations were repugnant to the state constitution. See *Carlisle v. Baker*, 1 Yeates 471, 473 (Pa. 1795) (discussing the 1789 Philadelphia incorporation act that gave authority for “laws and ordinances, ‘provided the same shall not be repugnant to the laws and constitution of this commonwealth’”); see also *Respublica v. Duquet*, 2 Yeates 493, 497 (Pa. 1799); *Zylstra v. Corp. of Charleston*, 1 S.C.L. (1 Bay) 382 (Ct. Com. Pl. 1794).

²⁸⁸. Ch. 20, § 25, 1 Stat. 73, 85–86; see Wallace Mendelson, *The Judiciary Act of 1789: The Formal Origin of Federal Judicial Review*, 76 JUDICATURE 133 (1992); Newmyer, *supra* note 32, at 846–48.

acts inconsistent with the constitution are null and void.”²⁸⁹ “Repugnancy” also seemed to govern federal review of federal legislation. James Wilson’s *Lectures on Law* (1790-1791) posited “that the legislature should pass an act, manifestly repugnant to some part of the constitution . . . and that the operation and validity” of the act came before a court. The answer to “[w]hat is the law of the land?” was a “very easy one.”²⁹⁰ Wilson explained that the congressional act would be “void” because it was a “subordinate power.”²⁹¹ The judicial department was not made “superior,” but rather was given “in particular instances, and for particular purposes, the power of declaring and enforcing the superior power of the constitution—the supreme law of the land.”²⁹²

In state courts, judges echoed the familiar rhetoric, repeatedly embracing “repugnancy” as the standard.²⁹³ In 1793, in the Virginia General Court, Judge Roane explained that the legislature was “not sovereign but subordinate” to the state constitution.²⁹⁴ The “judiciary may and ought to adjudge a law

^{289.} State v. Sluby, 2 H. & McH. 480, 481 (Md. 1790) (deciding whether the Constitution repealed state revenue laws); *see also* Campbell v. Morris, 3 H. & McH. 535, 565 (Md. 1797) (considering whether a state law relating to attachment was “repugnant to the 4th article of the federal constitution” by violating the Privileges and Immunities Clause); Donaldson v. Harvey, 3 H. & McH. 12, 14 (Md. 1790) (presenting the plaintiff’s argument that the Constitution was “supreme law . . . and the act of [the] assembly is repugnant to it” in a case concerning whether the Constitution repealed a state law relating to antecedent debts).

^{290.} 1 JAMES WILSON, *Comparison of the Constitution of the United States, with That of Great Britain* (1790), in THE WORKS OF JAMES WILSON, *supra* note 51, at 309, 329-30.

^{291.} *Id.* at 330.

^{292.} *Id.*; *see* 1 JAMES WILSON, *Of Government* (1790), in THE WORKS OF JAMES WILSON, *supra* note 51, at 284, 300 (arguing that the legislative power is subject to a “given degree of control by the judiciary department, whenever the laws, though in fact passed, are found to be contradictory to the constitution”).

^{293.} Discussion of these cases dates to the nineteenth century. *See, e.g.*, QUINCY, *supra* note 5, app. 1, at 528 n.29, 529 n.31, 530 n.33; Meigs, *supra* note 219, at 185-88. As discussed *supra* note 30, Connecticut and Rhode Island retained their colonial charters as state constitutions, continued their doctrines of legislative supremacy, and did not embrace judicial review as readily. *See* BILDER, *supra* note 31, at 191, 279 n.11 (noting that Rhode Island did not accept state judicial review until approximately 1856); 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 50-54 (1795) (arguing against judicial review in his discussion of the “laws of Connecticut”).

^{294.} Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 36 (1793) (Roane, J.). The court in *Kamper* considered an act of the assembly relating to district court judges. The possible interference with the state legislature appeared stronger because the Virginia Constitution of 1776 had never gone through a ratification process and thus looked suspiciously like ordinary legislation. Previously, in 1788, the court of appeals had decided that a “law contrary to the constitution” was void. *Id.* at 23 (Nelson, J.). Several judges reiterated their basic

unconstitutional and void, if it be plainly repugnant to the letter of the Constitution, or the fundamental principles thereof.”²⁹⁵ In North Carolina in 1794, Judge Williams declared that judges “are to administer the constitutional laws, not such as are repugnant to the constitution.”²⁹⁶ In South Carolina in 1796, Judge Waites concluded that “[i]f an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the constitution.”²⁹⁷ In Pennsylvania in 1799, the supreme court considered whether acts were “repugnant to the constitution.”²⁹⁸ In Vermont, the supreme court heard arguments as to whether a state act was “unconstitutional, and therefore void; being manifestly repugnant to” a clause in the “general Constitution.”²⁹⁹ In New Jersey in 1802,

understanding of constrained legislation in the wake of Brutus’s argument that “declaring an act of the legislature to be no law, assumes legislative authority, or claims a superiority over the legislature.” *E.g.*, *id.* at 30.

- ²⁹⁵. *Id.* at 40 (Roane, J.); *see also id.* at 35-36 (“[T]he judiciary may and ought not only to refuse to execute a law expressly repugnant to the Constitution; but also one which is, by a plain and natural construction, in opposition to the fundamental principles thereof.”). Judge Tyler noted that while he would not “in an extra-judicial manner assume the right to negative a law,” he would not shrink from the question “how far the law be a violation of the constitution.” *Id.* at 61 (Tyler, J.). Judge Tucker simply cited at length from *The Federalist No. 78*, finding it “so full, so apposite, and so conclusive” that it was “unnecessary to add any thing farther on the subject.” *Id.* at 84 (Tucker, J.). Judge Roane did not see “any express provision in, or fundamental principle of, the constitution, restricting the power of the legislature in this respect.” *Id.* at 44-45 (Roane, J.). Judge Henry was oblique on the issue but did note that the English model in which “Parliament was omnipotent, and their powers beyond control” had not been followed. *Id.* at 48 (Henry, J.). He also noted that the colonial legislature had had “no bounds to their authority but the negative of the crown.” *Id.*
- ²⁹⁶. *State v. [], 2 N.C. (1 Hayw.) 28, 29 (1794); see also Trs. of the Univ. v. Foy, 3 N.C. (2 Hayw.) 310, 316 (1804) (argument of plaintiff's counsel) (“[T]here can be no doubt, that every act of the legislature, repugnant to the constitution, is absolutely void.” (quoting Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308 (C.C.D. Pa. 1795)); Jones v. Jones, 2 N.C. (1 Hayw.) 488, 491 (1797) (presenting an attorney's statement that acts “not repugnant to that constitution, must be enforced”).*
- ²⁹⁷. *Lindsay v. Comm'r's, 2 S.C.L. (2 Bay) 38, 61-62 (Constitutional Ct. App. 1796); see id. at 62 (noting also that the act was “repugnant” to the constitution); see also Bowman v. Middleton, 1 S.C.L. (1 Bay) 252, 254 (Ct. Com. Pl. 1792) (voiding an act as “against common right and reason as well as against magna charta”).*
- ²⁹⁸. *Ex parte Blair M'Clenachan, 2 Yeates 502, 505 (Pa. 1799); see also Respublica v. Duquet, 2 Yeates 493, 501 (Pa. 1799) (“[A] breach of the constitution by the legislature, and the clashing of the law with the constitution, must be evident indeed, before . . . declar[ing] a law void . . . ; yet if a violation of the constitution should . . . be made . . . we shall think it our duty . . . of saying such law is void.”).*
- ²⁹⁹. *Doe ex dem. Forbes v. Smith, 1 Tyl. 38, 38, 40 (Vt. 1801) (relating to retrospective laws); see also Kinne v. Plumb, 1 Tyl. 20, 22 (Vt. 1801) (discussing a state law permitting county courts to make rules so long as they are not “repugnant to the constitution or laws of the State”).*

the supreme court stated that “[t]he legislature act[s] by delegated and circumscribed authority.”³⁰⁰ The court noted the “uniform course of decision” in the states and the United States Supreme Court that courts could declare unconstitutional laws void.³⁰¹ That same year, the Maryland General Court noted that two arguments—that “an act of assembly repugnant to the constitution is void” and that the court had a right to so determine—had not been controverted in the case at hand or in any case before the court.³⁰²

Supreme Court Justices on circuit accepted the practice. In 1791, in a series of actions that led to *Hayburn’s Case*, the Justices refused to carry into effect the federal statute designating circuit courts to report on pension cases of disabled officers and soldiers.³⁰³ Although the objections included the rationale that the duty was “not of a judicial nature,” each letter implied that the act was unconstitutional if construed to require judges as an official matter to consider the cases.³⁰⁴ In 1795 in *Vanhorne’s Lessee v. Dorrance*, Justice Paterson on circuit stated that legislatures are “[c]reatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: . . . all their acts must be conformable to it, or else they will be void.”³⁰⁵ He

^{300.} *State v. Parkhurst*, 9 N.J.L. (4 Halst.) 427, 443 (1802).

^{301.} *Id.* at 444. The court stated that the question whether it could control legislation contrary to the state constitution was a “question which of late years has been considerably agitated in these United States.” *Id.*

^{302.} *Whittington v. Polk*, 1 H. & J. 236, 242 (Md. Gen. Ct. 1802). Chief Judge Chase explained the limited nature of legislative power and the court’s obligation to decide cases judicially brought before it. *Id.* at 242-45 (Chase, C.J.).

^{303.} 2 U.S. (2 Dall.) 409, 412-13 n.† (1792) (reproducing Attorney General Randolph’s argument and the North Carolina circuit court letter of Iredell and Sitgreaves).

^{304.} See *id.* at 410 n.† (reproducing the New York circuit court’s statement by Circuit Justices Jay and Cushing and Judge Duane that “neither the *Legislative* nor the *Executive* branches, can constitutionally assign” nonjudicial duties to the judicial branch); *id.* at 412 n.† (providing the Pennsylvania circuit court’s description of the problem by Circuit Justices Wilson and Blair and Judge Peters as to “be obliged to act contrary, either to the obvious directions of Congress, or to a constitutional principle, in our judgment equally obvious”); *id.* at 412-13 n.† (providing the North Carolina circuit court’s explanation that “courts cannot be warranted . . . by virtue of that part of the Constitution . . . for the exercise of which any act of the legislature is provided . . . or . . . not provided for upon the terms the Constitution requires”).

^{305.} 2 U.S. (2 Dall.) 304, 308 (C.C.D. Pa. 1795) (declaring the Pennsylvania confirming act void). Pennsylvania had passed a “confirming act” in 1787 that sought to settle long-disputed land claims between Connecticut and Pennsylvania settlers and to compensate Pennsylvania claimants who thereby lost land. *Id.* at 313, 316. Paterson drew a distinction between the United States and England, where “the authority of the Parliament runs without limits, and rises above controul,” “the validity of an act of Parliament cannot be drawn into question by the judicial department,” and there was “no written constitution, no fundamental law,

declared, “Whatever may be the case in other countries, yet in this there can be no doubt, that every act of the Legislature, repugnant to the Constitution, is absolutely void.”³⁰⁶ In such a case, “it will be the duty of the Court to adhere to the Constitution, and to declare the act null and void.”³⁰⁷

On the Supreme Court, the Justices continued to repeat the rhetoric. In 1798, in *Calder v. Bull*,³⁰⁸ Justice Iredell stated that if “any act of Congress” or a state legislature violates provisions of the federal Constitution, “it is unquestionably void.”³⁰⁹ Justice Chase noted that if he “ever exercise[d] the jurisdiction” to declare a law void under the Ex Post Facto Clause, he would “not decide any law to be void, but in a very clear case.”³¹⁰ In 1800, the Court considered in *Cooper v. Telfair* the proposition that if “the law is contrary to the constitution, the law is void; and the judiciary authority . . . may pronounce it to be so.”³¹¹ In his opinion in *Cooper*, Chase emphasized that, although the

nothing visible, nothing real, nothing certain, by which a statute can be tested.” *Id.* at 308. Paterson noted that “[i]n America the case is widely different.” *Id.*

³⁰⁶ *Id.* at 308; *see also id.* at 309 (“I take it to be a clear position; that if a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance.”).

³⁰⁷ *Id.* at 309.

³⁰⁸ 3 U.S. (3 Dall.) 386 (1798). The Connecticut legislature had granted a new hearing in a probate case. The case involved the application of post-1787 constitutional ideas to colonial constitutional practices because Connecticut retained its colonial charter as a constitution and its legislature had long sat as the highest judicial power. In August 1797, Stephen Twining, arguing for judicial review in a moot at Connecticut’s Litchfield Law School, stated that the Supreme Court had decided the question. *See Donald F. Melhorn, Jr., A Moot Court Exercise: Debating Judicial Review Prior to Marbury v. Madison*, 12 CONST. COMMENT. 327, 340-41 (1995). One possible precedent is *Chandler v. Secretary of War* (U.S. 1794) (no extant report), which is discussed in *Marbury*. *See Sherman, supra* note 19.

³⁰⁹ *Calder*, 3 U.S. (3 Dall.) at 399 (Iredell, J.). He added that “as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case.” *Id.* He noted that the Court could not, however, declare it void “merely because it is, in their judgment, contrary to the principles of natural justice.” *Id.*

³¹⁰ *Id.* at 395 (Chase, J.) (emphasis omitted). Justice Chase had earlier commented that he was not giving “an opinion, at this time, whether this Court has jurisdiction to decide that any law made by Congress, contrary to the Constitution of the United States, is void.” *Id.* at 392 (emphasis omitted).

³¹¹ 4 U.S. (4 Dall.) 14, 16 (1800) (concerning a state law claimed to be “repugnant to the true intent and meaning” of the state constitution). The Court found grounds to declare the law void, though the Justices differed on the standard to apply in voiding repugnant legislation. *Compare id.* at 18 (Washington, J.) (favoring a presumption of validity and asking whether the act was “so repugnant to any constitutional regulation, as to be excepted from the legislative jurisdiction, by a necessary implication”), *and id.* at 19 (Paterson, J.) (arguing that a “clear and unequivocal breach of the constitution, not a doubtful and argumentative implication,” was required), *with id.* at 18 (Chase, J.) (arguing that the “general principles”

Supreme Court had never actually adjudicated the question, the “general opinion,” “all this bar,” and “some of the Judges . . . individually, in the Circuits” had so decided.³¹²

In 1803, Chief Justice John Marshall correctly acknowledged that “long and well established” principles addressed “the question, whether an act, repugnant to the constitution, can become the law of the land.”³¹³ He was equally right that the question was “happily, not of an intricacy proportioned to its interest.”³¹⁴ The question had not been addressed in Charles Lee’s argument before the Court and was perhaps occasioned by Chase’s comment that the Court had never explicitly decided the question. Marshall’s opinion patched together the familiar phrases, repeatedly emphasizing repugnancy.³¹⁵ “The powers of the legislature are defined, and limited”; thus, it was a “proposition too plain to be contested, that the constitution controls any legislative act repugnant to it.”³¹⁶ An act of the legislature, repugnant to the Constitution, could not “bind the courts, and oblige them to give it effect.”³¹⁷ Marshall concluded that “a law repugnant to the constitution is void; and that *courts* . . . are bound by that instrument.”³¹⁸ Accepting the well-established and long-practiced idea of limited legislative authority, American constitutional law recommitted itself to a practice over four centuries old.

Despite the repeated criticisms of *Marbury* voiced by those such as Thomas Jefferson, for most of the nineteenth century the explanation for the practice

of the state constitution were “not to be regarded as rules to fetter and controul; but as matter merely declaratory and directory”). The defendant’s argument appears to have attempted to contrast a state’s sovereignty with the limited bylaw authority of corporations. *Id.* at 17. A similar struggle over the differences between states and corporations occurs in Justice Iredell’s argument in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 446-48 (1793) (Iredell, J.).

³¹². *Cooper*, 4 U.S. (4 Dall.) at 19 (Chase, J.); *see also id.* at 20 (Cushing, J.) (expressing a belief that the Supreme Court had the power “to declare the law void”); Gerber, *supra* note 14, at 11 (arguing that the “pre-Marshall Court justices understood the concept of judicial review, that they argued for it, and that they practiced it”). For a discussion of the presumption of judicial review in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1803), see Mark A. Gruber, *Establishing Judicial Review? Schooner Peggy and the Early Marshall Court*, 51 POL. RES. Q. 221 (1998).

³¹³. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). On the surrounding politics, see James M. O’Fallon, *Marbury*, 44 STAN. L. REV. 219 (1992).

³¹⁴. *Marbury*, 5 U.S. (1 Cranch) at 176.

³¹⁵. *Id.* at 176-77, 180.

³¹⁶. *Id.* at 176, 177. Marshall pointed out there was “no middle ground”; the Constitution either controlled legislation or it did not. *Id.* at 177.

³¹⁷. *Id.* at 177.

³¹⁸. *Id.* at 180.

and the use of “repugnant” initially remained unchanged.³¹⁹ As Chancellor Kent noted in his treatise, if “the Constitution does not control any legislative act repugnant to it, then the legislature may alter the Constitution by an ordinary act.” The theory of government based on a written constitution must be “that an act of the legislature repugnant to the Constitution is void” and the judiciary must so declare it.³²⁰ Other nineteenth-century commentators repeated the constrained legislation theory.³²¹ In 1889, J.C. Bancroft Davis, the Supreme Court reporter, could list more than 200 cases in which “Statutes or Ordinances Have Been Held To Be Repugnant to the Constitution or Laws of the United States.”³²²

The late nineteenth century brought an end to the ease with which the practice could be justified by repeating the repugnancy rhetoric. Supreme Court decisions striking down an increased number of congressional acts brought new critics.³²³ In 1893, Harvard law professor James Bradley Thayer

^{319.} On the Jefferson critique, see Robert J. Reinstein & Mark C. Rahdert, *Reconstructing Marbury*, 57 ARK. L. REV. 729, 755 n.135 (2005). For discussion of early citations of *Marbury* mostly focusing on “technical” points relating to jurisdiction or mandamus, see David E. Marion, *Judicial Faithfulness or Wandering Indulgence? Original Intentions and the History of Marbury v. Madison*, 57 ALA. L. REV. 1041, 1043-44 (2006).

^{320.} 1 KENT, *supra* note 3, at 453; *see also* 3 STORY, *supra* note 207, § 1570, at 428-35 (justifying judicial review under the theory of constitutionally constrained legislation).

^{321.} See, e.g., THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 159-88 (Boston, Little, Brown & Co. 1868); THOMAS SERGEANT, CONSTITUTIONAL LAW: BEING A VIEW OF THE PRACTICE AND JURISDICTION OF THE UNITED STATES, AND OF CONSTITUTIONAL POINTS DECIDED 306, 308, 332 (Phila., P.H. Nicklin & T. Johnson 2d ed. 1830) (discussing instances in which state legislation was “repugnant” to Article I of the Constitution); *id.* at 403 (“[I]f the law of a state be repugnant to, or incompatible with the constitution of the United States . . . it is void . . . It seems, however, that this power of declaring an act of Congress or a law unconstitutional, will be exercised only in a clear case.”).

^{322.} 131 U.S. app. at ccxxxv (1889). The list included twenty cases concerning federal statutes and 181 cases concerning state statutes. *Id.* app. at ccxxxv-cclxiii. Coxe argued that there were 177 in all. See COXE, *supra* note 5, at 22. A Westlaw search for “repugnant /s/ constitution” in the “sct” database produced the following number of cases: 7 (1793-1809); 11 (1810-1819); 18 (1820-1829); 22 (1830-1839); 32 (1840-1849); 29 (1850-1859); 36 (1860-1869); 71 (1870-1879); and 81 (1880-1889). (Results have not been examined for overinclusiveness.) “Repugnant” often appeared because 28 U.S.C. § 1257(a) provides for a writ of certiorari to state supreme courts when “the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States.” 28 U.S.C. § 1257(a) (2000).

^{323.} See, e.g., The Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1883); Trade-Mark Cases, 100 U.S. 82 (1879); United States v. Fox, 95 U.S. 670 (1878); United States v. Reese, 92 U.S. 214 (1876); United States v. R.R., 84 U.S. (17 Wall.) 322

summarized the conventional explanation for the Court's voiding acts as repugnant to the Constitution, stating that the "legislature had only a delegated and limited authority under the constitutions; that these restraints . . . must be regarded as so much law; and, as being law, that they must be interpreted and applied by the court."³²⁴ He then mocked this reasoning, calling it a "severe line of argument" that treated the Constitution as if it were "a private letter of attorney."³²⁵ Thayer declared that the practice had been "put as a mere matter of course" and repeatedly condemned the underlying theory as "simple."³²⁶

Permanently transforming the discussion from its focus on legislative power, Thayer focused on the "clear limits of judicial power."³²⁷ He subtly and implicitly rejected the longstanding claim that judicial review was justified because legislative power was delegated and constrained by the Constitution. Thayer argued that courts were not advancing "merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it."³²⁸ He embraced the "great range of possible harm and evil" that was and must be left open to the legislatures and rejected the belief that the "power of courts" could "save a people from ruin."³²⁹

Thayer, however, could not abandon years of practice of constrained legislative power. He suggested a compromise—a "rule of administration."³³⁰

(1873); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872); *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871); *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870); *Justices v. Murray*, 76 U.S. (9 Wall.) 274 (1869); *United States v. Dewitt*, 76 U.S. (9 Wall.) 41 (1869); *see also* 131 U.S. app. at ccxxxvi-ccxxxvii (listing additional cases in which the Supreme Court held statutes of the United States repugnant to the Constitution or laws of the United States). Davis claimed that seven cases prior to 1869 had held federal statutes void. *Id.* app. at ccxxxv-ccxxxvi. The list in the *U.S. Reports* included *United States v. Todd* (U.S. 1794), reported in *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52 (1851), and *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), and did not include *Scott v. Sandford* (*Dred Scott*), 60 U.S. (19 How.) 393 (1857). For a critique, see COXE, *supra* note 5, at 8-23. Coxe also discussed *Chandler v. Secretary of War*. *Id.* at 14-17 (referring to the case as "— v. Secretary of War").

³²⁴ James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 138 (1893).

³²⁵ *Id.* at 139.

³²⁶ *Id.* at 138-39; *see id.* (using such terms as "very simple ground," "simple and narrow," or "simple precepts").

³²⁷ *Id.* at 156.

³²⁸ *Id.* at 144.

³²⁹ *Id.* at 156.

³³⁰ *Id.* at 140.

He read the early cases for comments about what might now be seen as the concerns of scope and departmentalism. Thayer focused on the language in which judges had referred to “clear,” “plain,” or “manifest” violations and invalidities so “obviously repugnant” that “all men of sense and reflection in the community may perceive the repugnancy.”³³¹ He pointed to earlier judicial comments regarding deference, respect, and presumptions in favor of the legislative branch.³³² Thayer converted these discussions into a test based on whether a reasonable legislature could have thought the law constitutional—what modern constitutional law has come to describe as a rational basis, reasonableness, or minimalist test.³³³

Repugnancy began to vanish. By the twentieth century, Princeton professor Edward S. Corwin’s studies of what he termed “judicial review” continued to shift the discussion away from legislative constraint and toward judicial power.³³⁴ The reasons for repugnancy’s demise lie outside this Article. Perhaps “repugnant” began to carry its colloquial connotation of value-laden offensiveness or repulsiveness, not inconsistency or contradiction. Perhaps a court deciding repugnancy seemed like a court deciding its personal social preferences. Whatever the reasons, although the Court continued to use the phrase “repugnant to the Constitution” into the 1920s, the lines over the judiciary’s declaration of unconstitutional acts had been redrawn.³³⁵ The debate over judicial review has continued to focus less on constraints on legislative power than on the legitimacy or illegitimacy of judicial power and the

^{331.} *Id.* at 140–42.

^{332.} *Id.* at 142, 145.

^{333.} *Id.* at 148–49. For a discussion of Thayer’s article and test, see *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 Nw. U. L. REV. 1 (1993). Although in an earlier letter in *The Nation*, Thayer had hinted that questions of “personal right under the Constitution” might fall outside of his reasonableness test, the reference did not reappear in the article. James B. Thayer, *Constitutionality of Legislation: The Precise Question for a Court*, 38 NATION 314 (1884).

^{334.} EDWARD S. CORWIN, *COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT* (1938); EDWARD S. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW: ITS LEGAL AND HISTORICAL BASIS AND OTHER ESSAYS* (1914); Edward S. Corwin, *The Establishment of Judicial Review* (pts. 1 & 2), 9 MICH. L. REV. 102, 283 (1910–1911); Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law* (pts. 1 & 2), 42 HARV. L. REV. 149, 365 (1928–1929); Corwin, *supra* note 5.

^{335.} Appearances of “repugnancy” fell dramatically after 1920. A Westlaw search for “repugnant /s constitution” in the “sct” database produced the following number of cases: 81 (1880–1889); 130 (1890–1899); 164 (1900–1909); 171 (1910–1919); and 65 (1920–1929). (Results have not been examined for overinclusiveness.)

appropriate standard. “Repugnancy” has nearly disappeared from Supreme Court opinions.³³⁶

CONCLUSION

The lost faith in the standard of “repugnancy” need not necessarily be regretted. Two centuries of further practice have limited our ability to accept on faith that the Constitution always and necessarily represents the will of the people, that the legislature’s lawmaking authority should be narrowly limited by the text of a Constitution notoriously difficult to change, and that judges can simply declare when legislation is repugnant to the Constitution. Nonetheless, modern discussions of judicial review often may dwell too exclusively on the idea of judicial review as imposed by judges on democratic politics.

While today we may better appreciate the difficulties with the repugnancy practice, we might do well to recall the power of this belief in the legislatively constrained nature of a delegated authority. As Daniel Farber and Suzanna Sherry have recently written, much of the angst among modern constitutional scholars comes from “a sense of innate conflict between democracy and judicial review.”³³⁷ But, as a matter of history, not everyone has seen the problem this way. The presumption that legislative power was necessarily constrained by constitutions and that judicial action was simply responding to this constraint originally overwhelmed alternative ways of understanding the relationship of legislatures, courts, and constitutions. This approach was neither disingenuous nor cursory; those who advanced it were not incapable of understanding the difficulties with judicial action. They simply believed deeply that American constitutionalism was based, first and foremost, on constraining legislation by the laws of the nation and, most importantly, the Constitution. This history can remind us that both legislative and judicial power are legitimated by the belief that the Constitution delegates the power of the people—an entity that exists over time—and thus may reinforce the belief in the bounded, yet changing, nature of the Constitution.

This history of the repugnancy practice also presents a challenge to originalism and suggests one possible approach to the relevance of the history

³³⁶. A Westlaw search for “repugnant /s constitution” in the “sct” database produced the following number of cases: 65 (1920-1929); 66 (1930-1939); 29 (1940-1949); 15 (1950-1959); 24 (1960-1969); 26 (1970-1979); 43 (1980-1989); 11 (1990-1999); and 5 (2000-2006). (Results have not been examined for overinclusiveness.)

³³⁷. DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 140 (2002).

of the Framing for liberal constitutionalism.³³⁸ Originalism, whether phrased as an active verb of the *intent* of some person or persons or the passive noun of the *meaning* of constitutional text, assumes that the constitutional word, concept, or structure at issue is capable of being interpreted in a fixed sense in the initial constitutional moment and that this fixed intent or meaning is what binds constitutional interpretation.³³⁹ Originalism as practiced thus tends to limit the range of legitimate constitutional interpretations to issues that had been or were being explicitly confronted.³⁴⁰

In this history of judicial review, however, what we find instead are *assumptions*. The courts' ability to void repugnant legislation was simply assumed because of past corporate and colonial practices that limited legislation by the laws of the nation. Original intent fails to capture this history: judicial review was not the product of any *intent* by the Framing generation to create it, yet neither was it unintended, deliberately omitted, or rejected. The original meaning approach is seemingly more sympathetic to the problem of historical assumptions. Yet as applied, original meaning interpretations tend to convert particular assumptions into intent by concluding that the Founders intended to confine legitimate interpretations

^{338.} For discussion of other difficulties, including the question whether originalists are bound by originalist understandings of originalism, see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003). For the originalism debate as a historical question, see generally LEVY, *supra* note 219; RAKOVE, *supra* note 21, at 339-65; and H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). For the debate as a philosophical question, see generally DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* (2005); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); and CHRISTOPHER WOLFE, *HOW TO READ THE CONSTITUTION: ORIGINALISM, CONSTITUTIONAL INTERPRETATION, AND JUDICIAL POWER* (1996).

^{339.} See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 87-117 (2004) [hereinafter BARNETT, *RESTORING THE LOST CONSTITUTION*] (arguing for "moderate" originalism based on "original meaning" instead of "original intent"); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999). For a suggestion that the "practical differences between original meaning and original intent may be negligible," see Douglas G. Smith, *Does the Constitution Embody a "Presumption of Liberty"?*, 2005 U. ILL. L. REV. 319, 325 (reviewing BARNETT, *RESTORING THE LOST CONSTITUTION*, *supra*). See also Nelson, *supra* note 338, at 556-60 (discussing the difficulty of distinguishing between original meaning and original intent). For a discussion of "meaning," "intent," and "understanding," see RAKOVE, *supra* note 21, at xiii, 7-8.

^{340.} See Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1267 (1987) (constructing a flowchart for when original understanding interpretation is possible).

solely to those assumptions.³⁴¹ Neither originalist approach persuasively addresses the contextual contingency inherent in the existence of constitutional assumptions.³⁴²

History matters—not because it tells us *what* we should think about the Constitution, but because it suggests *how* we might think about it. The practice of voiding statutes under a repugnancy standard was presumed to be part of the original constitutional structure. The nature of this practice, however, was only partially reconceptualized in the language and ideologies of new American constitutionalism. While a Constitution of the people was understood as the supreme authority binding both legislature and judiciary, which laws suffered from repugnancy and when the coordinate branch of the judiciary should exercise its authority were problems not decisively answered in 1787.

We can care about constitutional history without being constitutional originalists. If we replace the originalist search with a historical appreciation of *assumptions*, we might better articulate how certain structures and ideas were assumed to be part of the constitutional framework but were not fully articulated or conceived. We might come to accept that, while history can go far in assisting in the interpretation of constitutional questions, there are inherent limits to the inquiry. Rather than desire to know with unattainable certainty the Framing generation's intent, we would perhaps do better to seek to understand the more attainable boundaries of their assumptions.

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341. See BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 339, at 131–47 (arguing for an “assumption” that judges could nullify unconstitutional laws and therefore that the assumption could not have been intended to include “judicial supremacy”).
342. Cf. Edward A. Purcell, Jr., *Evolving Understandings of American Federalism: Some Shifting Parameters*, 50 N.Y.L. SCH. L. REV. 635, 697–98 (2006) (making a similar point about originalist interpretations of constitutional federalism).