# The People Themselves: Popular Constitutionalism and Judicial Review

*LARRY D. KRAMER*

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## POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW

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✯ *To Sarah and Kiki* ✯

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Who Are the Best Keepers of the People's Liberties?

*Republican*.—The People themselves. The sacred trust can be no where so safe as in the hands most interested in preserving it.

*Anti-republican*.—The people are stupid, suspicious, licentious. They cannot safely trust themselves. When they have established government they should think of nothing but obedience, leaving the care of their liberties to their wiser rulers.

James Madison
*National Gazette*, December 22, 1792

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# THE PEOPLE THEMSELVES

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# *Introduction*

## POPULAR CONSTITUTIONALISM

Some snapshots from the early American Republic:

Monday, July 29, 1793. A jury acquitted Gideon Henfield of charges that he violated the law of nations by serving aboard a French privateer.[1] The facts of Henfield's case were uncontested, and his defense turned on a point of law. Henfield argued that it was unconstitutional to prosecute him because his actions were not proscribed by any existing statute or law of the United States. The court—consisting of Supreme Court Justices James Wilson and James Iredell and District Court Judge Richard Peters—instructed jurors that Henfield's defense was legally frivolous. It was the "joint and unanimous opinion of the court," Wilson told them, that Henfield's acts might be culpable as common law offenses against the United States.[2] The jury disagreed, and its verdict triggered celebrations throughout the nation. John Marshall reports that Henfield's acquittal was greeted with "extravagant marks of joy and exultation" by a public that doubted the administration's position.[3] Bonfires were lit and feasts held in cities and towns from Maine to Georgia. In Charleston, South Carolina, a "number of respectable citizens" followed an evening of "great hilarity and harmony" by toasting "[t]he patriotic jury of Philadelphia who acquitted Gideon Henfield, and supported the rights of man. (*Three cheers*)."[4] The *National Gazette* praised Henfield's jury for

upholding the Constitution against a court and an Administration whose views had been corrupted by "motives of policy":

> When the seven bishops (good and celebrated men) were tried for petitioning James the Second, a similar difference of opinion arose between the bench and the jury, the people then as the people now exulted in the verdict of acquittal; and our posterity will, probably, venerate this as we venerate that jury, for adding to the security of the rights and liberties of mankind.[5]

* * *

Saturday, July 18, 1795. At least 5,000 people gathered in front of Federal Hall in New York City to protest the Jay Treaty.[6] Planned for weeks by Republicans anxious to see the treaty condemned, the crowd of mostly tradesmen and laborers was unexpectedly joined by some of the city's elite, hastily assembled by Federalist merchants under the leadership of Alexander Hamilton. The determined Federalists tried to take over the rally. As the meeting was about to commence, Hamilton mounted the steps of a nearby building surrounded by supporters and began to speak. Republican leaders asked him to yield, which Hamilton haughtily refused to do. The crowd reacted angrily, drowning Hamilton out with "hissings, coughings, and hootings."[7] Hamilton offered a written resolution, which he urged be adopted as reflecting the true sense of the city. The crowd paused to listen, but exploded in fury upon hearing that it was "unnecessary to give an opinion on the treaty" because the people had "full confidence in the wisdom and virtue of the President of the United States, to whom, in conjunction with the Senate, the discussion of the question constitutionally belongs."[8] Hamilton and his companions were driven away amidst shouts of "we'll hear no more of it" and "tear it up."[9] Someone in the crowd allegedly threw a rock that hit Hamilton in the head. Similar scenes were repeated around the country.

* * *

July 2, 1798. During a debate in Congress over whether to adopt the Alien Act—which gave the President unilateral power to imprison or deport aliens, even in peacetime—New York's Edward Livingston reproached the bill's supporters. "If we are ready to violate the constitution we have sworn to defend," he warned, "will the people submit to our unauthorized acts? Will the states sanction our usurped powers? Sir, they ought not to submit. They

would deserve the chains which these measures are for them if they did not resist."[10] Responses to Livingston's admonition were immediate and widespread. Public meetings in Kentucky, Virginia, and throughout the Middle Atlantic states denounced the Alien and Sedition Acts and declared them null and void.[11] A militia company in one Virginia county announced that it would not assist in enforcing the laws, while a regiment in Madison County, Kentucky, resolved that such acts "are infringements of the Constitution and of natural rights, and . . . we cannot approve or submit to them."[12] Federalists responded to these and similar declarations by pleading that judgments of constitutionality be left for courts to make, a position their opponents fiercely denied. To say that "a decision as to the constitutionality of all legislative acts, lies solely with the judiciary," wrote a correspondent in the *Albany Register*, "is removing the cornerstone on which our federal compact rests; it is taking from the people the ultimate sovereignty."[13]

* * *

In these and countless similar scenes, Americans of the Founding era reveal how they understood their role in popular government in ways that we, who take so much for granted, do not. The United States was then the only country in the world with a government founded explicitly on the consent of its people, given in a distinct and identifiable act, and the people who gave that consent were intensely, profoundly conscious of the fact. And proud. This pride, this awareness of the fragility and importance of their venture in popular government, informed everything the Founding generation did. It was, as Gordon Wood has said, "the deeply felt meaning of the Revolution."[14]

Modern commentators, especially legal commentators, read the Founders' letters and speeches anachronistically, giving too much weight, or the wrong kind of weight, to complaints about "the excess of democracy."[15] We depict the men who framed and ratified the Constitution as striving to create a self-correcting system of checks and balances whose fundamental operations could all take place from within the government itself, with minimal involvement or interference from the people. Our political grammar is saturated with this reading of the Founding, which sees the movement to write a new Constitution almost exclusively in antidemocratic terms. Our Constitution on this view—a view that pervades both legal and historical scholarship on the subject—was adopted first and foremost to put a check on the people, to minimize their role in governing, to shove them as far offstage as possible without technically abandoning republicanism.

There is, of course, an element of truth to this characterization. Having overvalued the capacity of an unchecked legislature to govern during the wave of romantic enthusiasm that swept the country with the Declaration of Independence, America's leadership relearned the hard way in the 1780s why it was necessary to fragment and separate power within the government. Yet we must be careful, lest we exaggerate the extent and nature of the reaction by focusing too narrowly on its direction.

Equally important, we must not judge the words and actions of men of the eighteenth century by our own standards of what it means to be a "democrat." The views of even the most "anti" of Anti-Federalists would be reactionary today, very far outside the political mainstream in most respects. In their own time, however, and especially against the background of the greater Atlantic world, America's Founders were at the other end of the political spectrum: wild-eyed radicals taking a risky gamble on popular rule. The debate between Federalists and Anti-Federalists was, in effect, an argument between factions on the democratic left; even "high-toned" Federalists were populist under prevailing views, which deemed stable government without a monarch or formal aristocracy out of the question. America's Founding generation, in daring contrast, embraced a political ideology that celebrated the central role of "the people" in supplying government with its energy and direction, an ideal that remained at all times in the forefront of their thinking—Federalist and Anti-Federalist alike. Preserving liberty demanded a constitution whose internal architecture was carefully arranged to check power, just as it demanded leaders of sufficient "character" and "virtue." But structural innovations and virtuous leadership were "auxiliary devices" to channel and control popular politics, not to isolate or eliminate it. The people themselves remained responsible for making things work.

This was especially true when it came to a constitution, the most direct expression of the people's voice. Listen to St. George Tucker, in the appendix to his 1803 edition of *Blackstone's Commentaries:*

> [T]he American Revolution has formed a new epoch in the history of civil institutions, by reducing to practice, what, before, had been supposed to exist only in the visionary speculations of theoretical writers. . . . The world, for the first time since the annals of its inhabitants began, saw an original written compact formed by the free and deliberate voices of the individuals disposed to unite in the same social bonds; thus exhibiting a political phenomenon unknown to former ages. . . . [T]he powers of the several branches of government are defined, and

> the excess of them, as well in the *legislature*, as in the *other* branches, finds limits, which cannot be transgressed without offending against the greater power from whom all authority, among us, is derived; to wit, the PEOPLE.[16]

When Tucker and his contemporaries invoked "the people," moreover, they were not conjuring an empty abstraction or describing a mythic philosophical justification for government. "The people" they knew could speak, and had done so. "The people" they knew had fought a revolution, expressed dissatisfaction with the first fruits of independence, and debated and adopted a new charter to govern themselves. Certainly the Founders were concerned about the dangers of popular government, some of them obsessively so. But they were also captivated by its possibilities and in awe of its importance. Their Constitution remained, fundamentally, an act of popular will: the people's charter, made by the people. And, as we shall see, it was "the people themselves"—working through and responding to their agents in the government—who were responsible for seeing that it was properly interpreted and implemented. The idea of turning this responsibility over to judges was simply unthinkable.

A practice of judicial review did emerge, and early on—well before *Marbury v. Madison*, which mostly repeated arguments already developed by others. Among the objectives of this book is to elucidate the nature of this early practice, which bore little resemblance to judicial review today. But the story that follows is more than a revisionist history of the origins of judicial review (though it is certainly that). For efforts to define a role for courts have been part of a larger and more fundamental struggle to maintain the authority of ordinary citizens over their Constitution. Time and again, the Founding generation and its successors responded to evolving social, political, and cultural conditions by improvising institutional and intellectual solutions to preserve popular control over the course of constitutional law—a kind of control we seem to have lost, or surrendered, today.

We in the twenty-first century tend to divide the world into two distinct domains: a domain of politics and a domain of law. In politics, the people rule. But not in law. Law is set aside for a trained elite of judges and lawyers whose professional task is to implement the formal decisions produced in and by politics. The Constitution, in this modern understanding, is a species of law—special only inasmuch as it sets the boundaries within which politics takes place. As law, the Constitution is set aside for this same elite to handle, subject to paramount supervision from the U.S. Supreme Court. Constitu-

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

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

# 1

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

## THE CUSTOMARY CONSTITUTION

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

### *"What, But Immemorial Usage"*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## *"And Adjudge Such Act to be Void"*

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

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

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

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

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

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

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

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

To begin with, the only known seventeenth-century case on this side of the Atlantic to discuss Coke's doctrine rather clearly reflects the statutory interpretation view. The issue in *Giddings v. Browne*, decided in 1657, was whether the Ipswich Town Meeting could vote a gift of a hundred pounds to build a house for a minister. Magistrate Symonds ruled that the town had exceeded its authority under colonial law. Noting that the statute on which the town relied would be inconsistent with fundamental law (by authorizing a confiscation of property) were it construed to permit the gift, Symonds stated: "I conceive that it is an extreme dishonour cast upon the [colonial leg-

islature], to make such a construction of their positive laws as doth infringe the fundamentall law of mine and thine; for it must needs be void, if it should indeed be necessarily construed against the right or liberty of the subject. But the law in its true sense is good."[53] Later in the opinion, Symonds added "a little about interpretation of lawes and of rules to be attended therein"—his first rule being "that where a law is such as that, by wresting, a man may give such an interpretation as will overthrow it, when it might be construed to be good; this is a corrupt interpretation. So holy scripture may be wrested."[54] The analogy to Scripture is revealing. Obviously, no one could "overthrow" the Bible, much less find it void; the argument was that a construction that created such tension must be wrong.

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

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

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

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

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

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

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

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

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

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

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

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

## *"Accountable to the Community"*

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

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

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

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

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