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Idea or Practice: A Brief Historiography of Judicial Review Mary Sarah Bilder*

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Abstract

Judicial review may be the most publicly contested aspect of American constitutionalism. The conventional beliefs that judicial review should be understood as an idea and American constitutionalism studied as a new rationalistic, political science are largely due to the influential scholarship of Edward Corwin. This brief essay recovers the pre-Corwin discussion about the origins of judicial review to demonstrate the way in which the approach to judicial review as an idea has been, itself, historically constructed by scholarly inclination, disciplinary identification, and the availability of historical materials

Judicial review may be the most publicly contested aspect of American constitutionalism. When courts void legislation, they implicitly seem to strike at the heart of the principle of separation of powers. The act inherently suggests that the elected legislature is not always the legitimate representative of the people and that democratic majoritarianism is not the fundamental principle of American politics. Because judicial review can be described in opposition to ideas often deemed fundamental to American constitutionalism, the origins of judicial review have intrigued scholars of politics, history, and law. For the last century, the origins inquiry has started from the assumption that the origins of judicial review lie in an idea, an intellectual doctrine about judicial power. In fact, the origins of judicial review lie in a pre-Revolutionary practice and idea of limited legislative authority.

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¹ Recent articles with titles on the origins of judicial review include Mary Sarah Bilder, The Corporate Origins of Judicial Review, 116 YALE L.J. 502 (2006) [hereinafter, Bilder, Corporate Origins]; Saikrishna B. Prakash & John C. Yoo, The Origins of Judicial Review, 70 U. CHI. L. REV. 887 (2003); Symposium: The Constitutional Origins of Judicial Review, 72 GEO. WASH. L. REV. 1 (2003); 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); Charles F. Hobson, The Origins of Judicial Review: A Historian's Explanation, 56 WASH. & LEE L. REV. 811 (1999); Jack N. Rakove, The Origins of Judicial Review: A Plea for New Contexts, 49 STAN. L. REV. 1031 (1997).

The conventional story, recounted in most law school casebooks and therefore drilled into the minds of most lawyers, does not discuss pre-Revolutionary practices. It begins in 1803 with *Marbury v. Madison*.² In some versions, Chief Justice Marshall invents judicial review himself, often constructed as a sneaky judicial power grab. In other versions, he draws on a seventeenth-century English legal idea or early state judicial precedents to claim this power for the federal judiciary over congressional legislation. In all of these versions, American colonial legal practices are inaccurately given little significance and judicial review presented as an issue of the legitimacy of the judiciary.

Marshall did not invent judicial review. Judicial review developed from a longstanding English practice of reviewing the bylaws of corporations for repugnancy to the laws of England.³ During the late sixteenth and early seventeenth centuries, Edward Coke and other English judges affirmed and justified this practice as based on an understanding that a delegated authority possessed only limited legislative power. Because early colonial settlements were initially structured as corporations, this practice was extended to the American colonies.

By the eighteenth century, the original corporate practice became a transatlantic colonial constitution that American colonial law could not be repugnant to the laws of England. This constitutional limit appeared written into colonial charters, English parliamentary legislation, and royal instructions to governors and other officials. The Privy Council enforced the limited nature of colonial authority through review of colonial legislation and appeals from colonial courts to the Privy Council. The meaning of repugnancy to the laws of England, however, was always contested, in particular because divergences due to local conditions and circumstances were permitted. For decades, colonial and English lawyers and government officials argued over the application of the limit in numerous specific cases and contexts.

After 1776, repugnancy practice and this assumption of limited legislative authority persisted. In place of "the laws of England," post-Revolutionary lawyers substituted the "constitution." State courts reviewed state legislation for repugnancy to new state constitutions. At the Constitutional Convention, the Framers assumed that repugnancy practice would continue. The Constitution's supremacy clause and jurisdictional grant to the Supreme Court reflected the persistent assumption that legislative authority would continue to be limited by

² Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); *see, e.g.,* NORMAN REDLICH, ET AL., CONSTITUTIONAL LAW (4th ed., 2002); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1-9 (2d ed. 2005); JESSE CHOPER, ET AL., CONSTITUTIONAL LAW (9th ed. 2001) (all beginning with *Marbury*). Brief mentions of Privy Council review and *Dr. Bonham's Case* appear in KATHLEEN SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 15 (15th ed., 2004); CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 17 (2d ed. 2005); RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES 13 (7th ed. 2003).

³ See Bilder, Corporate Origins, supra note 1 (containing extended version of this argument); see also Mary Sarah Bilder, The Transatlantic Constitution: Colonial Legal Culture and the Empire (2004).

the practice of repugnancy review. As James Madison stated, "A law violating a constitution established by the people themselves, would be considered by the Judges as null & void."

After 1787, the practice became part of American constitutionalism. Section 25 of the Judiciary Act incorporated repugnancy language for review of state legislation. Supreme Court justices stated they agreed with the principle. In *Marbury*, Chief Justice Marshall confirmed the "long and well established" principle that "a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument."⁵

The conventional beliefs that judicial review should be understood as an idea and American constitutionalism studied as a new rationalistic, political science are largely due to the influential scholarship of Edward Corwin. Prior to Corwin, those who discussed the origins of judicial review struggled to reconcile historical practice and ideas; after Corwin, ideas alone proved decisive. The growing division among law, history, and political science ensured that this significant shift in approach was not revisited.⁶

This brief essay recovers the pre-Corwin discussion about the origins of judicial review to demonstrate the way in which the approach to judicial review as an idea has been, itself, historically constructed by scholarly inclination, disciplinary identification, and the availability of historical materials. Although many scholars writing on the origins issue between 1880 and 1920 were motivated by the contemporary Supreme Court, this essay does not delve into the politics of the debate. Over the years, these historical arguments and the conception of idea and practice have favored or opposed the Court depending on the political alignment of the Court and Congress. Instead, this essay focuses on the conception of judicial review and the perceived relevance of colonial experience and practice.

I. Judicial Review as Doctrine and Practice

What contemporary scholars and the public call "judicial review" originally had no such name. Indeed, until the early twentieth century, commentators identified it descriptively as courts voiding legislation repugnant to a constitution. After the Civil War, three different understandings of the origins of this judicial capacity arose. These understandings can be linked with individual lawyers whose intellectual and professional backgrounds guided their inquiries. The judicially-oriented Horace Gray described this judicial capacity as an

⁶ The division appeared in the chartering of the American Historical Association (1884), the American Association of Law Schools (1900), and the American Political Science Association (1903). *See* G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 509 (2002).

 $^{^4}$ 2 The Records of the Federal Convention of 1787, at 93 (Max Farrand ed., rev. ed. 1966) (July 23).

⁵ *Marbury*, 5 U.S. at 180.

intellectual doctrine with roots in seventeenth-century English law, in particular, *Dr. Bonham's Case*. The young lawyer William Meigs saw it as part of a new political science traceable through materials related to the Constitution's framing. The lawyer-historian Brinton Coxe suggested it could be viewed as a practice with origins in the colonial imperial relationship, in particular, the Privy Council's review in *Winthrop v. Lechmere*. At the end of the century, Harvard Law Professor James Bradley Thayer sought to embrace all three understandings.

Horace Gray (1828-1902), perhaps more than others, was initially responsible for the argument that the doctrine of "judicial duty" had its origins in seventeenth-century English law. In 1865, Gray wrote an appendix to a collection of reports of Massachusetts colonial court cases. The volume as a whole implicitly suggested continuities between the current Supreme Judicial Court and its colonial predecessor. Gray's interest lay in a 1761 case involving an argument by James Otis, a Massachusetts lawyer and future Revolutionary and, in particular, one aspect of this argument. In the case, Otis reportedly argued that "As to Acts of Parliament. an Act against the Constitution is void: an Act against natural Equity is void." Gray had to go out of his way to comment on this sentence. Otis' comment actually never appeared in the reports because the author, Josiah Quincy, had been "absent ... most of the Time" during Otis' argument.

Gray concluded that "the principle of American Constitutional Law, that it is the duty of the judiciary to declare unconstitutional statutes void" had been "foreshadowed" in the argument by Otis. 10 Gray referred to this belief as a "doctrine," "a favorite in the Colonies before the Revolution." Gray found its origins in "some of the highest authorities in the English law," in particular, Chief Justice Edward Coke's comment in *Dr. Bonham's Case* (1610). Although the reference to Coke had appeared previously, Gray linked it tightly and approvingly to the judicial duty. He declared that "this duty was recognized, and

⁷ 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 395, 521 (Boston, Little, Brown & Co. 1865) (appendix written by Horace Gray, Jr.) (discussing *Paxton's Case* (the *Writs of Assistance Case*)).

⁸ *Id.* at 474.

⁹ *Id.* at 55

¹⁰ *Id.* at 395, 521. Otis reportedly argued that "As to Acts of Parliament. an Act against the Constitution is void: an Act against natural Equity is void." *Id.* at 474. A new edition of the reports is forthcoming by Daniel R. Coquillette.

¹¹ *Id*. at 527.

¹² *Id.* at 521; *see* Dr. Bonham's Case (1610) 77 Eng. Rep. 646, 652 (K.B.) ("[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").

¹³ See George Richard Minot, Continuation of the History of the Province of Massachusetts Bay from the Year 1748 to 1765, at 98 (1803); 2 Charles Francis Adams,

unconstitutional acts set aside, by courts of justice, even before the adoption of the Constitution of the United States." This power was thus now "too well settled to require an accumulation of authorities." 15

Gray's approach reflected his judicial viewpoint. Born in 1828, Gray had come of age amidst Boston antislavery discussions. Between 1854 and 1861, he served as reporter to the Massachusetts Supreme Judicial Court and, in 1864, became a justice on that Court. ¹⁶ The Massachusetts Court had accepted that courts had the power to void legislation repugnant to the Constitution since the early nineteenth century. ¹⁷ Gray's comfort with this capacity was evident in an 1857 critique he wrote of the *Dred Scott* decision. Nowadays, the decision is often classified as the second example of judicial review but Gray did not view the case in that category. Gray's criticism focused instead on the unnecessary "extrajudicial" reach of the decision. ¹⁸

The analysis also characterized his larger idea about the origins of American law. He had become court reporter at twenty-six. The "indefatigable research" and focus on judicial cases was characteristic. ¹⁹ The desire to connect American legal doctrine with English legal precedents would further typify Gray's vision. He "delighted to go to the fountains of the law and trace its growth from the beginning." ²⁰ On the Supreme Court, he became known for studying

THE WORKS OF JOHN ADAMS 124 n. 1, 521-525 (1850) (discussing argument but not judicial review); see also 4 GEORGE BANCROFT, HISTORY OF THE, UNITED STATES 414, 416 n. 1 (1856) (recounting argument as "the opening scene of American resistance" and the origin of the "revolutionary doctrine ... which esteemed reason and the constitution superior to an act of parliament").

¹⁴ QUINCY, *supra* note 7, at 529.

¹⁵ *Id.* at 530.

¹⁶ Summary of Events, 8 Am. L. REV. 167 (1873-1874).

¹⁷ See Portland Bank v. Apthorp, 12 Mass. 252, 253 (1815); see also James M. Rosenthal, Massachusetts Acts and Resolves Declared Unconstitutional by the Supreme Judicial Court of Massachusetts, 1 Mass. L.Q. 301-318 (1916) (discussing cases).

¹⁸ [Horace Gray and John Lowell], A Legal Review of the Case of Dred Scott, (Boston: Crosby and Nichols, 1857); *see also* Thomas Benton, Historical and Legal Examination of ... the Dred Scott Case, which declares the Unconstitutionality of the Missouri Compromise Act ... 4 (photo reprint 1969) (1857) (criticizing decision but not because of lack of authority over congressional acts). Gray belonged to the Free Soil party and opposed slavery. *See* Herbert Parker, *Memorial*, 182 Mass. 613, 615 (1903). Whether *Dred Scott* was an example of judicial review intrigued others. *See* 131 U.S. ccxxv (1888) (omitting case from list of examples of review of congressional legislation); Brinton Coxe, An Essay on Judicial Power and Unconstitutional Legislation 10 (photo. reprint 2005) (1893) (arguing for inclusion as the "first in which an act of Congress was decided by the court to be unconstitutional for reasons *not* relating to its own judicial department of the government"); J.B.T., *Review*, 7 Harv. L. Rev. 380, 381 (1894) (stating there "are reasons for omitting that case to which he does not advert, but there was at least as much reason for inserting it as in the case of two or three others that are there)".

¹⁹ A Day in a Massachusetts Court, 9 ALB. L.J. 283 (1874).

²⁰ Parker, *supra* note 18, at 620.

"expositions of law most eagerly in the opinions of the English judges, which seemed to him to furnish the best standards for the American courts." ²¹

Gray's argument about this judicial doctrine proved more influential than might have been expected of comments made in an appendix to a volume of colonial reports. His friends at Harvard Law School where his half-brother, James Chipman Gray, taught, included another important commentator on the judicial doctrine, James Bradley Thayer. In 1882, Gray had the opportunity to apply his ideas about judicial duty to the Supreme Court when he became a Justice on the United States Supreme Court, serving for twenty years. Although in the 1870s, the Court had begun to void congressional legislation, after Gray joined, the Court increasingly seemed comfortable with judicial review. Among other decisions, Gray joined the majority in the controversial decision in the *Civil Rights Cases* (1883), holding unconstitutional the 1875 Civil Rights Act.²² The following year, he wrote the majority opinion in *Julliard v. Greenman* (1884), the last of the legal tender cases.²³ Lastly, Gray may have had a direct influence on later advocates of judicial review, in particular, Louis Brandeis, who served as a judicial clerk for Gray on the Massachusetts Supreme Judicial Court.²⁴

A young Philadelphia lawyer, William Meigs (1852-1929), found the Coke argument less persuasive. Born in 1852, Meigs would go on to write biographies of Charles Jared Ingersoll, John Calhoun, and Thomas Hart Benton. ²⁵ He would become perhaps best known for *The Growth of the Constitution in the Federal Convention of 1787* with its publication and attribution of the draft of the Constitution used by the Committee of Detail. ²⁶ The subtitle explained the impressive work: "An effort to trace the origin and development of each separate clause from its first suggestion in that body to the form finally approved." ²⁷

This fascination with the constitutional founding appeared in Meigs' influential 1885 article on "the judicial power." Meigs rejected the Coke

²¹ Marcus Perrin Knowlton, *Memorial*, 182 Mass. 622, 624 (1903).

²² The Civil Rights Cases, 109 U.S. 3 (1883).

²³ Julliard v. Greenman, 110 U.S. 421 (1884).

²⁴ See Robert Bloom, The Origin of the Supreme Judicial Court Law Clerk System (2002), http://sjclawclerks.socialaw.com/history.htm.

²⁵ WILLIAM M. MEIGS, THE LIFE OF CHARLES JARED INGERSOLL (1897); WILLIAM M. MEIGS, THE LIFE OF THOMAS HART BENTON (1904); WILLIAM M. MEIGS, THE LIFE OF JOHN CALDWELL CALHOUN (1917).

²⁶ WILLIAM M. MEIGS, THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787, 317 (1900).

²⁷ *Id.* at title page.

²⁸ William M. Meigs, *The Relation of the Judiciary to the Constitution*, 19 Am. L. Rev. 175, 176, 177 (1885) (noting the recent decision in the *Civil Rights Cases*). Meigs was drawn to the topic in part because of Richard Street's controversial paper, "How Far Questions of Public Policy May Enter into Judicial Decisions," presented at the American Bar Association meeting. *See* 6 REPORT OF THE ... ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 179 (1883); Meigs, *The Relation, supra* note 28, at 198.

argument as one of "a few scattering cases" based on either basic common law principles or "vagaries inspired by an overweaning admiration for the common law and a bold and independent spirit."²⁹ He declared, instead, that the "American doctrine" was "emphatically a new departure in governmental science."30

The assertion of this "new and original" doctrine could be traced in a series of cases decided between 1778 and 1787.31 Meigs discussed what has become a familiar line-up: Phillips, Commonwealth v. Caton, Rutgers v. Waddington, Holmes v. Walton, Trevett v. Weeden, Bayard v. Singleton. 32 Having established the judicial doctrine in the states, Meigs turned to the Federal Convention. He declared that "these assertions of power by the courts were in general approved by the country, and Gerry expressly stated so in the Federal Convention."³³ Relying on *Elliott's Debates*, Meigs counted six delegates in support at the Federal Convention and numerous others in support at state ratifying conventions.³⁴ He argued that the *Federalist* discussed it "not as a novelty" but to "answer objections which might still trouble some persons." In legal commentators, post-1787 state and federal cases, and finally Marbury, Meigs found repeated acceptance of the doctrine.³⁶ He concluded that "the doctrine has been received" with "unanimity and general absence of serious conflict."37

For Meigs, the founding origins story did not answer all questions related to the application of the judicial power in contemporary debates. In particular, Meigs believed that the early history did not demonstrate that judicial decisions had been judged conclusive. He insisted that the earlier theory was that "there is no department of the government which can irrevocably settle for all whether such or such a power can be constitutionally exercised."38 The judiciary, according to Meigs, did not bind other departments or "conclusively settle the meaning of the constitution."³⁹ If a department concluded that the court was

³¹ *Id.* at 177.

²⁹ Id. at 176, 177. He noted that the "doctrine of Coke" likely "had its part in the matter" but emphasized post-Revolutionary decisions. Id. at 177-178.

³⁰ *Id*.

³² *Id.* at 178-182.

³³ *Id.* at 182-183.

³⁴ Id. at 184-185; see 5 Jonathan Elliot, Debates on the Adoption of the Federal CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787 (1845).

³⁵ *Id.* at 184-185.

³⁶ *Id.* at 185-187.

³⁷ *Id.* at 188.

³⁸ *Id.* at 199.

³⁹ *Id.* at 202.

wrong, it was their "duty" to "decline to follow the judiciary's opinion." Nonetheless, the judiciary had the power.

This argument that judicial power was part of the new political science of American government and that its origins could be traced in founding documents appealed to other young lawyers and practitioners of political science. Charles Burke Elliott (1861-1935) addressed the issue in an article aptly titled, *The Legislatures and the Courts: The Power to Declare Statutes Unconstitutional*. Elliott had a law degree from the University of Iowa and received the first Ph.D. in history from the University of Minnesota in 1888. His advisors taught in history and political science. Elliott alter became a law professor, judge, and noted author of treatises on corporations and insurance.

The growing influence of political science was evident in the placement of the article in an early issue of the new *Political Science Quarterly*. Elliott emphasized the way in which the "new and original" idea in political science that "the judiciary was made a co-ordinate department of government" altered understandings of judicial power. Elliott believed that by 1787 "the idea of controlling the legislature through the judiciary must have been familiar" to members of the Convention. Elliott summarized, the "doctrine" was "of course the outgrowth of a written constitution and a federal system of government" presumed became of a desire to limit legislative power. Unlike Meigs, Elliott did not find in the historical origins much guidance on precisely when and how the courts should apply the doctrine. His concluding normative discussion was conducted entirely on theoretical grounds.

A third group of historically-interested lawyers did not view this judicial capacity as part of a new political science invented at the founding or the adoption of an English ida about parliamentary power. They saw similarities in the Privy Council's review of colonial legislation. In particular, they puzzled over the meaning of *Winthrop v. Lechmere*, an appeal from Connecticut in which Privy Council had declared void the colony's intestate act. Materials related to *Winthrop* had begun to appear in the late nineteenth-century publication projects of state historical societies. Based solely on a few initial documents from the appeal, Brooks Adams—lawyer and historian—had concluded that it showed "the process by which the conception of constitutional limitations became rooted in the minds

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⁴⁰ *Id.* .

⁴¹ Tim Brady, *The Ph.D. and the Northeastern Fisheries*, *MINNESOTA* MAGAZINE (2005).

⁴² Charles B. Elliott, *The Legislatures and the Courts: The Power to Declare Statutes Unconstitutional*, 5 Pol. Sci. QTLY. 224, 230 (1890).

⁴³ *Id.* at 229.

⁴⁴ *Id.* at 239.

⁴⁵ *Id.* at 230.

⁴⁶ *Id.* at 252-258.

of the first generation of lawyers."⁴⁷ Constitutional limitations on legislative power had predisposed revolutionaries and constitutional framers to a judicial power to declare legislation void. The 1890s brought the publication of additional papers related to the *Winthrop* appeal and its connections to "questions of constitutional law" were further explored.⁴⁸

Most influential among these writers was Brinton Coxe (1833-1892). In an influential posthumously-published book, *An Essay on Judicial Power and Unconstitutional Legislation* (1893), Coxe argued that the Constitution expressly authorized the judicial power. A member of the Philadelphia bar, Coxe had served as President of the Historical Society of Pennsylvania. He had long been interested in colonial history and in the general question of the origins of laws. In 1866, he translated a German judge's work on the influence of the Roman law on Bracton. Coxe was apparently "an ardent Democrat and a strict constructionist." A memorialist stated that his "feeling towards the Constitution ... was a passion; he was possessed of it, and he mourned almost as a personal calamity whatever he looked on as an impairment of its sacred obligation." "52

Coxe's book supported the judicial power. The book ranged far and wide in its effort to bring all sources to bear on the origins of the power. German law, Roman law, Canon law, English law were surveyed. The 1780s cases and Convention commentary reviewed. Amidst this material, one chapter discussed colonial limits on legislation and the *Winthrop* appeal. Coxe suggested that the

⁴⁷ Brooks Adams, The Emancipation of Massachusetts: The Dream and the Reality (1886) (discussing *Winthrop* at 293-302). For the decree, see The Public Records of the Colony of Connecticut, 1726-1735, at 191-192, 571-579 (1873). For materials related to another appeal, *Philip v. Savage*, see Proceedings of the Massachusetts Historical Society for 1860-1862, 64-80, 165-171.

⁴⁸ Mellen Chamberlain, *Remarks on The Talcott Papers*, 8 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY, 1892-1894 (2nd ser.) 123 (1894); 1 THE TALCOTT PAPERS: CORRESPONDENCE AND DOCUMENTS (CHIEFLY OFFICIAL) DURING JOSEPH TALCOTT'S GOVERNORSHIP OF THE COLONY OF CONNECTICUT, 1724-1741 (1892). Chamberlain was a lawyer, Chief Justice of the Boston Municipal Court, antiquarian, and the Librarian for the Boston Public Library. Adams and Thayer both acknowledged his assistance in their works on the judicial power.

⁴⁹ COXE, *supra* note 18. Coxe's book was an extensive reply to Philadelphia lawyer, Richard McMurtie. McMurtie argued that the judicial power had been acquired solely as a "mere deduction of logic, by inference, and with no basis in the Constitution. RICHARD C. McMurtie, Observations on Mr. George Bancroft's Plea for the Constitution 13-14 (1886). In turn, McMurtie's pamphlet responded to George Bancroft's criticism of Gray's statement in *Julliard* that congressional power included aspects belonging "to sovereignty in other civilized nations, and not expressly withheld from congress by the constitution." *See* George Bancroft, A Plea for the Constitution of the United States: Wounded in the House of its Guardians (1886); *Julliard*, 110 U.S. at 450.

 $^{^{50}}$ 2 Hampton L. Carson, A History of the Historical Society of Pennsylvania 9 (1940).

⁵¹ *Id.* at 10. Corwin considered Coxe a "conservative." EDWARD S. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW: ITS LEGAL AND HISTORICAL BASIS AND OTHER ESSAYS 2 (1914).

⁵² *Id.* at 12 (quoting proceedings of the memorial meeting in 1892).

appeal might show that "an English model existed ... for the American judicial competency." To encourage further research, Coxe reprinted the order in the *Winthrop* appeal in his appendix. ⁵⁴

That the colonial period could be responsible for aspects of American constitutionalism intrigued others. One young historian soon destined for law school explained the constitutional implications at the American Historical Association's Annual Meeting. 55 Harold D. Hazeltine explained that "[d]uring the development of this practice, ... 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 received sanction from England"⁵⁶ He sought to illuminate this "neglected phase of our constitutional history."⁵⁷ As he declared, "we now appreciate more fully than ever that the systems of society and government developing in the colonies finally come to possess a broader usefulness in the constitutional life of the United States."58 There had been "doubtless many" cases that would "throw light upon contemporaneous views of the courts as to their powers to interpret colonial charters," but unfortunately only a few were known.⁵⁹ Nonetheless, those interested in the intertwining of history and political science found appealing the argument that the judicial power had arisen from colonial and imperial practices. 60

⁵³ COXE, *supra* note 18, at 212; *see also* Thomas Reaburn White, *Some Recent Criticism of* Gelpcke versus Dubuque (Part IV), 47 Am. L. Reg. 657, 665 (1899) (attempting to apply Coxe's discussion of *Winthrop* to current cases); J. Westlake, *Judicial Power in the United States*, 11 L. Q. REV. 81, 84 (1895) (review of Coxe's book, noting that it traced the "environment in which the framers of the constitution of 1787 were placed"). Coxe struggled to fit the Privy Council's action into American constitutionalism's distinction of legislative versus judicial action despite recognizing that the distinction made no sense applied to the imperial relationship and the prerogative. *Id.* at 212-213.

⁵⁴ COXE, *supra* note 18, at 370-382; *see also id.* at 198-199 (reprinted attorney general and solicitor general opinion in the case).

⁵⁵ Harold D. Hazeltine, *Appeals from Colonial Courts to the King in Council, with Especial Reference to Rhode Island*, 18 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSN. FOR THE YEAR 1894, at 299-300 (1895). In November 1894, Charles M. Andrews published an extensive article on *Winthrop* but with little interest beyond the imperial relationship. Charles McLean Andrews, *The Connecticut Intestacy Law*, 3 YALE REV. 261-294 (1894).

⁵⁶ Hazeltine, *supra* note 55, 299-300, 345. The "King in council" was the "supreme court of the colonies" and the "noble predecessor of a still nobler tribunal, the Supreme Court of the United States." *Id.* at 345, 350.

⁵⁷ *Id.* at 300.

⁵⁸ *Id.* at 299.

⁵⁹ Andrew McFarland Davis, *The Case of Frost v. Leighton*, 2 AM. HIST. REV. 229 (1897).

⁶⁰ See 5 JOHN BACH McMaster, A History of the People of the United States, from the Revolution to the Civil War 394 (New York, 1927) (1900) (explaining that judges "had assumed the right to set aside acts of legislation which in their opinion were unconstitutional" as the "slow outcome of circumstances"). Wilson also accepted the colonial practice claim as the

Harvard Law School professor James Bradley Thaver merged these three different claims about the origins of the judicial power. Although Thayer was known for his work in evidence, 61 he also wrote in influential article in 1893 on the "American doctrine of constitutional law."62 His description of a rule of administration for the "narrow" judicial power is seen as the "first systematic defense of what has come to be known as rationality review."64 More importantly, Thayer taught constitutional law at Harvard for many years and wrote Cases on Constitutional Law (1895), a significant constitutional law casebook. 65 Through the article, constitutional law class, and casebook, Thayer influenced leading legal figures such as Learned Hand, Oliver Wendell Holmes Jr., Louis Brandeis, and Felix Frankfurter. 66 A graduate of Harvard College and Law School, Thayer had worked as a lawyer in Boston before becoming a Harvard professor in 1874.⁶⁷ After Thayer's death, one colleague noted that Thayer had loved "his historical work" the best. 68 Another emphasized that Thayer had "little inclination" to show the law as necessarily "perfectly logical or entirely consistent body of legal doctrine." Instead, he was interested in "what the law was, and how it had grown up in this way rather than work out a more systematic and logical theory than the courts had made."69

origins of constitutional interpretation. *See* Woodrow Wilson, The State: Elements of Historical and Practical Politics 462 (rev. ed. 1900).

⁶¹ G. Edward White, Revisiting James Bradley Thayer, 88 Nw. U. L. Rev. 48, 66 n. 71 (1993).

⁶² James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 130 (1893); *see* Leonard W. Levy, Editorial Note, in JUDICIAL REVIEW AND THE SUPREME COURT: SELECTED ESSAYS 43 (1967) (noting that Felix Frankfurter called it the "one piece of writing" on American constitutional law); *Introduction: One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 Nw. U. L. REV. v (1993) (noting Henry Monaghan's reference as "'the most influential essay ever written on American constitutional law"').

⁶³ Thayer, *The Origin, supra* note 62, at 138; see James B. Thayer, *Constitutionality of Legislation: The Precise Question for a Court*, 38 NATION 314 (1884) (discussing issue without historical inquiry). Thayer's essay in the *Nation* intriguingly foreshadowed later approached to judicial review by distinguishing questions of "personal rights under the Constitution" from those "determining the constitutionality of legislative action" in which the courts should ask whether the legislative construction is unreasonable. *Id.*

⁶⁴Introduction, supra note 62, at v. For contemporary criticism of Thayer's thesis that "a judge should never declare an act of legislation unconstitutional, unless the constitutionality is beyond reasonable doubt," see [Anon.], A Paper by Professor Thayer, 42 Am. L. REG. 73, 74-75 (1894).

 $^{^{65}}$ James Bradley Thayer, Cases on Constitutional Law (1895). \setminus

⁶⁶ See Edward Pucell, Learned Hand: The Jurisprudential Trajectory of an Old Progressive, 43 Buffalo L. Rev. 873, 884-885 (1995) (book review).

⁶⁷ On Thayer, see Jay Hook, *A Brief Life of James Bradley Thayer*, 78 Nw. U. L. Rev. 1 (1993); White, *supra* note 63, at 48.

⁶⁸ James Bradley Thayer, 15 HARV. L. REV. 598, 602 (1902) (comments of John Chipman Gray).

⁶⁹ *Id.* at 608 (comments of Samuel Williston).

Thaver liked the argument that judicial power had its origins in colonial history. In January 1894, Thayer reviewed Coxe's book and referred to "the great colonial case" of Winthrop as a possible precedent for judicial power. 70 That same year, he circulated the draft of his new constitutional law casebook with Winthrop v. Lechmere, as well as the note of his close friend, Horace Gray, on the Coke-Otis connection.⁷¹ His article similarly explored the issue, "How did our American doctrine, which allows to the judiciary the power to declare legislative Acts unconstitutional ... come about ...?⁷² Twice Thayer stated that "this remarkable practice" was a "natural result" of colonial political experience. 73 He broadly construed this practice as including enforcement of the colonial charters by forfeiture, parliamentary legislation, by "the direct annulling of legislation by the Crown," and by "ultimate appeal to the Privy Council." Thayer found the Coke and founding evidences compatible with this claim. ⁷⁵ He concluded that the post-Constitutional doctrine was merely a "new application of judicial power."⁷⁶ As one reviewer of the article noted, Thayer had found the origin in the colonial period's limitation on colonial assemblies.

The existence of the colonial practice led in part to Thayer's vision of the appropriate scope of judicial power.⁷⁸ Thayer recognized that the practice was in tension with the belief that the "powers of government" could be

⁷⁰ J.B.T., *Review*, *supra* note 18 (noting "Mr. Coxe abandons quite too readily the view that it involved a *judicial* declaration of the invalidity of the colonial Act").

⁷¹ 1 THAYER, *supra* note 65, at 39-40 n.1 (seemingly disagreeing on the Privy Council decree as a "legislative, and not a judicial proceeding"); *see* Simeon E. Baldwin, *Review*, 1 AM. HIST. REV. 163, 164-165, 167 (1895) (apparently confused over *Winthrop*).

⁷² Thayer, *Origin, supra* note 62, at 130; *see* James B. Thayer, *Constitutionality of Legislation: The Precise Question for a Court*, 38 NATION 314 (1884) (discussing issue without historical inquiry).

⁷³ Thayer, *Origin, supra* note 62, 130-131.

⁷⁴ *Id*.

⁷⁵ He added that the "doctrine" was "probably helped into existence by a theory which found some favor among our ancestors at the time of the Revolution" and repeated Gray's argument for a Coke-Otis connection. *Id.* at 133 and n. 2; *see* Barton H. Thompson, Jr., *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause*, 44 STAN. L. REV. 1373, 1432 n. 361 (noting friendship). His casebook indeed included a number of the cases first discussed by William Meigs. 1 THAYER, *supra* note 65, at 40-154 (including *Commonwealth v. Caton, Rutgers v. Waddington, Trevett v. Weeden, Bayard v. Singleton, The Federalist, Vanhorne's Lessee v. Dorrance, Cooper v. Telfair, Marbury v. Madison, Fletcher v. Peck, Martin v. Hunter's Lessee, Eakin v. Raub and Notes by Brinton Coxe and Thayer).*

⁷⁶ Thayer, *Origin*, *supra* note 62, 132.

⁷⁷ [Anon.], *Editorial Notes and Comments: A Paper by Professor Thayer*, 42 Am. L. REG. 73, 74 (1894).

⁷⁸ For more detailed historical interpretations of the article, see Mark Tushnet, *Thayer's Target: Judicial Review or Democracy?*, 88 Nw. U. L. Rev. 9 (1993); G. Edward White, *Revisiting James Bradley Thayer*, 88 Nw. U. L. Rev. 48 (1993).

compartmentalized.⁷⁹ The continuation of this practice had given judges a "judicial function" that also involved "taking a part . . . in the political conduct of government."⁸⁰ How should the practice and necessity of judicial voiding of statutes repugnant to the constitution be balanced with the theory of separation of powers? Thayer's conclusion appeared to be courts should be cautious because they *did* make law, not merely interpret it.⁸¹

At the end of the nineteenth century, the judiciary's practice of voiding statutes repugnant to the constitution understood as doctrine and practice, had a rich American history that pre-dated *Marbury v. Madison*. That Coke's comment had some appeal to at least one Revolutionary seemed hard to disprove. That the colonial practice of reviewing legislation and appeals had an impact on generations of colonial Americans seemed persuasive. That the founding generation had reconfigured this history as American seemed compelling.

II. Judicial Review as Idea

Yet, with the twentieth century, scholars would abandon this rich history for a far simpler story about the origins of American legal and governmental institutions. The *Lochner* decision reawoke the origins debate. Initially, the debate remained framed by the nineteenth-century discussion in which there had not seemed much question that the framers had an understanding of the judicial power. William Meigs himself had absorbed the colonial practice argument into his claim of a new political science. He insisted "this colonial training had an enormous influence" on the founders. He insisted "this colonial training had an enormous influence" on the founders. He mirresistibly think in grooves. He is still that it is grooved to looking upon acts of assembly as possibly void . . . could hardly avoid carrying this idea on to the new system. The colonial origins did not mean that the Court had always used the power correctly. Meigs emphasized, "gross blunders have been made" and "grave abuses have crept in." Far too often courts made up their minds and then found reasons rather than reserving the power only for cases in which one could have no reasonable doubt about the violation of the constitution.

⁷⁹ Thayer, *Origin*, *supra* note 62, 134, *see id.* at 152.

⁸⁰ Id. at 152.

⁸¹ Id. at 136-138.

⁸² William Meigs, *Some Recent Attacks on the American Doctrine of Judicial Power*, 40 AM. L. REV. 641, 650 (1906); *see also* William M. Meigs, THE RELATION OF THE JUDICIARY TO THE CONSTITUTION 15-47 (photo reprint 1971) (1919) (discussing additional evidence including South Carolina judge's discussion of whether colonial acts were void ab initio or only voidable by disallowance).

⁸³ Meigs, Some Recent Attacks, supra note 82, at 650.

⁸⁴ *Id*.

⁸⁵ *Id.* at 669

⁸⁶ *Id.* at 669-770.

For others, however, the colonial practice claim justified an unjustifiable power and needed to be vanquished. As one author wrote, no Framer had referred to *Winthrop v. Lechmere*. It was "fantastic ... to assert that it shaped the conception of judicial power about to be created." Indeed, "legal writers of respectable authority" increasingly suggested that the framers had not intended to grant this power. ⁸⁸ This debate over whether the Supreme Court had "'usurped' the power to invalidate acts of Congress on constitutional grounds" became a "popular discussion characterized by no little sound and fury."

Edward Corwin came to this discussion opposed to the Court's power. He had received his Ph.D. in history in 1905 and was hired by Woodrow Wilson into Princeton's new department of history, politics, and economics. He would become "perhaps the foremost twentieth-century authority on the Constitution." Compared to Louis Boudin and perhaps even Charles Beard, Corwin was "not markedly ideological in his approach" to the Court and a "political independent." Nevertheless, Corwin's scholarship on the origins of judicial review had a particular conception of constitutionalism. Corwin had doubts about "judicial paramountcy," describing the Court as "another human, and therefore presumably fallible, institution—a bench of judges."

In bestowing the term "judicial review" upon this capacity, Edward Corwin permanently reframed twentieth-century understandings of the role of courts. In 1906, he suggested that from pure *dicta* in 1782, the judicial capacity had become the "foundation rule of American constitutional law." By 1909, Corwin began to call the doctrine, "judicial review," and started work on his tentatively titled book, *The Growth of Judicial Review*.

Corwin proclaimed "the rationalistic background of American constitutional history." Colleague Charles McIlwain's interest in "tracing the history of certain legal ideas," in particular, fundamental law and the

⁹⁰ 1 RICHARD LOSS, *Introduction*, CORWIN ON THE CONSTITUTION 17 (1981).

⁸⁷ William Trickett, *Judicial Dispensation from Congressional Statutes*, 41 Am. L. Rev. 65, 71 (1907)

⁸⁸ Charles A. Beard, The Supreme Court and the Constitution 1 (1912).

⁸⁹ *Id.* at v (1938).

⁹¹ G. Edward White, *The Constitutional Journey of Marbury v. Madison, 89 VA. L. Rev. 1463, 1532 (2003); see L.B. Boudin, Government by Judiciary, 26 Pol. Sci. Q. 238 (1911).*

⁹² Edward S. Corwin, *The Supreme Court and Unconstitutional Acts of Congress*, 4 MICH. L. REV. 616, 622, 625 (1906).

⁹³ *Id.* at 630.

⁹⁴ Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 660, 670 (1909) [hereinafter Corwin, *Supreme Court*].

⁹⁵ Edward S. Corwin, *The Establishment of Judicial Review*, 9 MICH. L. REV. 102, 103 (1911) [hereinafter Corwin, *Establishment*].

differentiation of legislation and adjudication, was influential. ⁹⁶ Corwin mocked "those who would insist upon its institutional background." They were the "disciples of Savigny in the field of legal history," swayed by "the doctrine of evolution." Corwin argued that whenever the constitutional "Fathers" borrowed "from the past any of the really distinctive features of our constitutional system ... they will be found to have taken them, not in the form of institutions tested and hammered into shape by practice, but as raw ideas." His claim was clear: the Framers' "indebtedness to the past was for ideas rather than for institutions."

Corwin declared the "truth": judicial review rested on foundations "entirely independent of American colonial history." The origins of judicial review—the "idea of legislative power as limited"—were in the "idea of fundamental law." All "law and doctrine" on judicial review "goes back finally to Coke's famous dictum in *Dr. Bonham's Case.*" Corwin repeated Gray's genealogy, emphasizing Otis' comment and declaring that "then and there American constitutional theory was born." Although neither Otis nor Coke was mentioned at the Convention, Corwin declared that *Winthrop* was "totally unknown to those who brought about judicial review." 103

The interest in ideas gathered strength. The 1911 publication of Max Farrand's masterpiece, *The Records of the Federal Convention of 1787* made easily accessible the Convention records. ¹⁰⁴ The original index contained no entry for "judicial review," but did list "Laws contrary to the Constitution, power of the courts over." ¹⁰⁵ In 1912, Charles Beard, an associate "professor of politics" at Columbia, reviewed the Constitutional Convention evidence in Farrand's volumes. Beard concluded that "judicial control over legislation was implied in the provisions of the federal Constitution." ¹⁰⁶ Beard's inquiry into the "intention

⁹⁶ CHARLES HOWARD MCILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY: AN HISTORICAL ESSAY ON THE BOUNDARIES BETWEEN LEGISLATION AND ADJUDICATION IN ENGLAND vii (1910). McIlwain stated that the contemporary debate over judicial power was of "utmost consequence." *Id.* at viii-ix.

⁹⁷ Corwin, *The Establishment*, *supra* note 95, at 130.

⁹⁸ *Id.* at 102.

⁹⁹ *Id.* at 103.

¹⁰⁰ *Id.* at 104.

¹⁰¹ *Id.* at 103-104.

¹⁰² *Id.* at 106.

¹⁰³ *Id.* at 103. Framers did refer to Privy Council practice. *See, e.g.,* 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 4, at 164 (June 8) (including Pinckney's statement that the "negative of the Crown had been found beneficial"); *id.* at 168 (presenting Madison's statement regarding "the practice in Royal Colonies before the Revolution").

¹⁰⁴ Max Farrand, The Records of the Federal Convention of 1787 (1911).

¹⁰⁵ 3 FARRAND, *supra* note 104, at 663, 665.

¹⁰⁶ BEARD, *supra* note 88, at 115; *see also* HORACE A. DAVIS, THE JUDICIAL VETO 43 (photo reprint 1971) (1914) (discussing same evidence for opposite conclusion).

of the framers" reframed the inquiry. Historian Andrew McLaughlin similarly acknowledged that "[p]robably this historical background—colonial experience, the nature and the practices of the imperial system—had its effect." Indeed, without "this colonial experience the courts might not have come to exercise the power"; nonetheless, the "main line of argument and the main ideas" arose during the Revolution. 108

In 1914, Corwin described himself now as one of group of legal-historians "who represent judicial review as the natural outgrowth of ideas that were common property in the period when the Constitution was established." The colonial practice argument had collapsed so quickly that his book, *The Doctrine of Judicial Review*, discussed it only in the notes. As the epigraph declared, quoting Maitland, "The history of law must be a history of Ideas."

Corwin's triumph was not absolute. At Columbia, students of Herbert Osgood and others continued to attempt to argue that colonial institutions and practices had contributed to constitutionalism. Arthur Meier Schlesinger described how the Privy Council was "analogous" to the Supreme Court and noted that appeals "involved the important principle of American jurisprudence which accords to the judiciary the power of declaring invalid an act of a subordinate legislature." Elmer Beecher Russell showed pervasive Privy Council review of colonial legislation. He claimed that the colonists "thus became accustomed to a limitation upon the power of their legislatures." As he put it, this practice was "at once a precedent and a preparation for the power of judicial annulment upon constitutional grounds."

¹⁰⁷ BEARD, *supra* note 88, at 15-16; *see* Frank E. Melvin, *The Judicial Bulwark of the Constitution*, 8 AM. POL. SCI. REV. 167 (1914) (discussing debate and Constitutional Convention evidence in detail).

¹⁰⁸ Andrew C. McLaughlin, The Courts, The Constitution, and Parties 102-103 (photo reprint 1972) (1912). McLaughlin's student, Arthur P. Scott, had apparently searched for the early material. *Id.* at vi. He later published *The Constitutional Aspects of the Parson's Cause*, 31 Pol. Sci. Q. 558, 575 (1916) (arguing the three principles on which the power to declare a law unconstitutional rests were "clearly discernible" in Virginia cases relating to the two-penny act of 1758). For the transitional shift towards fundamental law, see Charles Groves Haines, The American Doctrine of Judicial Supremacy (1914) (describing colonial practices but focusing on fundamental law as "overruling law of nature or law of God").

¹⁰⁹ Edward S. Corwin, Marbury v. Madison *and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538 (1914).

¹¹⁰ CORWIN, DOCTRINE OF JUDICIAL REVIEW, *supra* note 51, title page, 74-75. Corwin continued to explore the fundamental law claim into the 1920s. *See* EDWARD S. CORWIN, THE "HIGHER LAW' BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955) (republishing *Harvard Law Review* articles of 1928-1929).

¹¹¹ Arthur Meier Schlesinger, *Colonial Appeals to the Privy Council*, 28 POL. Sci. Q. 279-97, 433-50 (1913).

¹¹² ELMER BEECHER RUSSELL, THE REVIEW OF AMERICAN LEGISLATION BY THE KING IN COUNCIL 227 (photo reprint 1976) (1915); *see also* GEORGE A. WASHBURNE, IMPERIAL CONTROL OF THE ADMINISTRATION OF JUSTICE IN THE THIRTEEN AMERICAN COLONIES, 1684-1776, at 189 (1923) (concluding that the Privy Council's "function" became "the precedent for that power of judicial

It was all too late. Judicial review, indeed American constitutionalism, was comprised of legal ideas, not imperial or colonial institutions, politics, and practices. The Constitution broke American history in two. The colonial period led to the Revolution. The constitutional period began after. This redefinition doomed Columbia Law Professor Joseph Smith's magnificent institutional and procedural account of the Privy Council's appellate jurisdiction to a struggle over whether Privy Council review represented an idea about judicial or legislative authority. ¹¹³

III. Constitutionalism as Idea and Practice

The time might be ripe to reconsider this depiction of the origins of judicial review and of constitutionalism as the history of ideas. As the Court's politics changed, Corwin himself grew uncomfortable with his insistence on the "juristic doctrine of judicial review." By the late 1930s, he acknowledged that judicial review is "a *practice*, an *institution* of government." Judicial review, is both—an idea and a practice.

Contemporary constitutional scholars have begun to show renewed interest in the conception of constitutionalism as practice. Lawrence Sager analyzes our "constitutional practice." Richard Fallon discusses "implementing" constitutional norms through practice. Barry Friedman advocates abandonment of the "predominantly normative" approach to judicial review for the positive and descriptive approach of contemporary political science. These scholars recognize that for far too long, American constitutionalism has been only about ideas, not practices.

annulment of legislation exercised at the present time ... by the Supreme Court."). Beecher and Russell were students of Herbert Osgood.

¹¹³ See Joseph Henry Smith, Appeals to the Privy Council from the American Plantations (1950); see also Julius Goebel, Jr., Antecedents and Beginnings to 1801 (History of the Supreme Court of the United States) (1971), 1-142.

¹¹⁴ EDWARD S. CORWIN, COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT FOR POPULAR GOVERNMENT 16, 17 (Gloucester, 1957) (1938). Corwin struggled to reconcile his growing perception that modern judicial review was a practice and the more extensive colonial evidence with his declaration that the colonial practices could not have the "force of precedents" because no Framer discussed them. *Id.* at 17-25. For recent scholarship on the origins reflecting this tension between an awareness of earlier practices and the continued focus on legal ideas, see William Michael Treanor, *Judicial Review before Marbury*, 58 STAN. L. REV. 455, 468 n. 45 (2005); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7 (2004); Philip Hamburger, *Law and Judicial Duty*, 72 GEO. WASH. L. REV. 1, 17 (2003).

¹¹⁵ LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2004).

¹¹⁶ RICHARD H. FALLON, IMPLEMENTING THE CONSTITUTION (2001).

¹¹⁷ Barry Friedman, *The Politics of Judicial Review*, 84 Tex. L. Rev. 259 (2005); *see also* Barry Friedman, *The Sedimentary Constitution*, 147 U. Pa. L. Rev. 1, 90 (1998) (suggesting a theory of sedimentary constitutionalism that sees "the creation of constitutional law as a gradual societal process").

As this brief historiography suggests, the conception of judicial review as an idea developed from the approach taken to the question rather than because it was the inherently correct answer. Cases and Convention records could be read as textual evidence in a closed intellectual system that revealed a coherent idea about judicial power. It was much harder to prove definitively that everyday colonial political practices had formed a set of assumptions about limited legislative authority. These differing conclusions about the origins of judicial review also rested on larger disciplinary assumptions. The influence of *Dr. Bonham's Case* presumed a certain autonomy of legal ideas across time and space; the claim of colonial practice presumed a certain degree of continuity despite American independence; the argument for a new political science presumed a certain discontinuity and rejection of English and colonial constitutionalism.

The recovery of the importance of colonial practices to the origins of judicial review does not need to result in the abandonment of the importance of legal ideas and doctrines. Discussing judicial review as practice, however, demonstrates that at least some ideas of American constitutionalism have their origins in political and legal experience rather than the legal imagination. Reconstructing the origins of judicial review in English and colonial practice resurrects an earlier idea about limited legislative authority and thus enriches contemporary discussions of American constitutionalism. Finally, the recognition that American constitutionalism is the result of new political ideas *and* the adaptation of older legal and political practices demonstrates that aspects arising from the adaptation of colonial constitutionalism coexist in tension with those arising from post-Revolutionary theories of governance. As a historical matter, American constitutionalism was not a single, coherent political science.

Judicial review was not invented by historians, political scientists, or law professors. Because judicial review arose from a colonial practice, history has something to contribute. Because judicial review was rationalized as compatible with a written constitution and separation of powers, political science has something to contribute. Because judicial review involves interpreting the boundary between legitimate legislative power and unconstitutional authority, law has something to contribute. We may not be able to stop calling the practice judicial review, but scholars can begin to think more critically and constructively about the ways in which the story of its origins has often been the story of ourselves and our unspoken disciplinary assumptions.