



1-1-1980

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Recommended Citation

B. A. Goldberg, *"Interpretation" of "Due Process of Law"--A Study in Irrelevance of Legislative History*, 12 PAC. L. J. 621 (1981).

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“Interpretation” of “Due Process of Law”—A Study in Irrelevance of Legislative History

B. ABBOTT GOLDBERG*

Legislative history may not be the bulwark of statutory interpretation that some believe. In this introductory article, the author demonstrates that fact by tracing the history of the concept of “due process of law.”

When some students at the McGeorge Center for Legislative Research asked me to discuss the use of legislative history, I immediately thought of the quip, “only when legislative history is doubtful do you go to the statute.”¹ Then, more seriously, I thought of Justice Frankfurter’s “threefold imperative to law students: (1) Read the statute; (2) read the statute; (3) read the statute”² and his admonition, “The notion that because the words of the statute are plain, its meaning is also plain,

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1. Frankfurter, *Some Reflection on the Reading of Statutes*, 47 COLUM. L. REV. 527, 543 (1947) [hereinafter cited as Frankfurter].

2. H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in BENCHMARKS 202 (1967).

is merely pernicious oversimplification."³ To demonstrate these truths, by what I naively thought would be a familiar example, I selected the words "due process of law" which, while not statutory and having little legislative history as such, have enough history to demonstrate that reliance on history to persuade a court to reach a predictable result is to "lean on a slender reed."⁴ The history of "due process of law" is that the courts have used history only when it, or part of it, could be used to reach results the courts found just at the time of decision. The courts are controlled by their perception of current community values, not by history.⁵

APPLYING CANONS OF CONSTRUCTION TO "DUE PROCESS OF LAW"

I began with an exercise: read "due process of law" literally; and then invoke only the ordinary canons of construction while alert to the dangers of using the canons as if they were binding rules.⁶ I did not know that a similar experiment had been tried some seventy years earlier⁷ and so I unwittingly merely reproduced its results: the words "due process of law" do not of themselves necessarily state a limitation on or a purpose to limit legislative power.

Although this conclusion is neither novel nor remarkable, it astonished the students. And when I tried to relate it to Justice Black's references to "natural law due process"⁸ their expressions varied from incredulity to distaste. Therefore, I have attempted a simple explanation I hope will help them to understand and enjoy some of the recent literature on judicial review.⁹

"Due" means that which is "owing by right of circumstances or condition; that which ought to be given or rendered; proper to be conferred, granted or inflicted; . . . merited, appropriate, proper, right."¹⁰ The problem is not the meaning of the word but who is to decide what

3. *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting).

4. *Missouri v. Holland*, 252 U.S. 416, 434 (1920).

5. G. GILMORE, *THE AGES OF AMERICAN LAW* 17 (1977) [hereinafter cited as GILMORE].

6. "[T]here are two opposing canons on almost every point." Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed*, 3 VAND. L. REV. 395, 401 (1950) [hereinafter cited as Llewellyn]. "[T]hese rules of construction are not in any true sense rules of law. So far as valid, they are what Mr. Justice Holmes called them, axioms of experience." Frankfurter, *supra* note 1, at 544.

7. Reeder, *The Due Process Clauses and "The Substance of Individual Rights"*, 58 U. PA. L. REV. 191 (1910).

8. *E.g.*, *In re Winship*, 397 U.S. 358, 381 (1970) (Black, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 515-17 (1965) (Black, J., dissenting).

9. See generally R. BERGER, *GOVERNMENT BY JUDICIARY* (1977) [hereinafter cited as GOVERNMENT BY JUDICIARY]; J. ELY, *DEMOCRACY AND DISTRUST* (1980); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975) [hereinafter cited as Grey]. I think the answer to Grey's question is "Yes, but we don't admit it."

10. OXFORD ENGLISH DICTIONARY 813 (1971) (definition number six of "due").

is "merited, appropriate, right" in the circumstances, or in the language of *Morrissey v. Brewer*, "what process is due."¹¹ The Supreme Court has decided for itself that it is to make the decision according to "fundamental principles to be ascertained from time to time by judicial action," imprecise but "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."¹² It long ago rejected the proposition that the legislature could make any process "due," *i.e.*, that the purpose of the clause was simply to guard against unrestrained executive or judicial action.¹³ But whoever makes the decision, it is clear that the word "due" has been used as a descriptive generality rather than a precise definition. Indeed the Court has used it as a license to avoid definition: "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."¹⁴ But all it means is "appropriate."

"Process," since it is a noun rather than an adjective, has a more tangible meaning than "due." Its primary dictionary definition is "the mandate, summons or writ by which a person or thing is brought into court for litigation."¹⁵ But "process" also can be defined as "the whole of the proceedings in any action at law; the course or method of carrying on an action."¹⁶ Taking the fifth amendment as an example, one could conclude that the primary narrow meaning of "writ" rather than the broader secondary definition of "the whole proceeding" was intended. One of the canons of construction is "The same language used repeatedly in the same connection is presumed to bear the same meaning throughout the statute."¹⁷ The sixth amendment refers to "compulsory process for obtaining witnesses," obviously a reference to a writ. On the face of the amendments there is no reason for assigning different definitions to the same word used in both.

Another canon is "[e]very word and clause must be given effect" and not treated as surplusage.¹⁸ If "process" in the fifth amendment were

11. 408 U.S. 471, 481 (1972).

12. *Twining v. New Jersey*, 211 U.S. 78, 101-02 (1908); *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964).

13. *Murray v. Hoboken*, 59 U.S. (18 How.) 272, 276 (1856).

14. *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 (1978).

15. OXFORD ENGLISH DICTIONARY 2311 (1971) (definition number seven of "process"). The technical definition is virtually identical. 3 BOUVIER LAW DICTIONARY 2731 (8th ed. 1914).

16. OXFORD ENGLISH DICTIONARY 2311 (1971).

17. Llewellyn, *supra* note 6, at 404. Although "[t]here is no rule of interpretive law which requires the same meaning to be given to the same word when used in different places in the same statute," *Anderson v. Los Angeles*, 30 Cal. App. 3d 219, 224, 106 Cal. Rptr. 299, 302 (1973), "[i]t seems unlikely that the Legislature would have used the same word in such close juxtaposition with such widely different meanings," *Bady v. Detwiler*, 127 Cal. App. 2d 321, 326, 273 P.2d 941, 945 (1954).

18. Llewellyn, *supra* note 6, at 404.

given the more extensive meaning, it would make other parts of itself and the sixth, seventh, and eighth amendments redundant.¹⁹ Thus, a proper inference is that the specific definition of "writ" rather than the general meaning of trial procedure was intended.

Now apply the canon "[s]tatutes are to be read in the light of the common law, and a statute affirming a common law rule is to be construed in accordance with the common law."²⁰ The words "due process of law" can be traced at least as far back as the statute of 28 Edward III, chapter 3 (1354), which provided that no man be put out of his land, taken, imprisoned, or put to death, *i.e.*, deprived of life, liberty, or property, "without being brought in answer by due process of the law."²¹ Since the statute of 28 Edward III was adopted before the settlement of the colonies and not unsuited to their conditions, it could be "deemed to have entered into the fabric of the [American] common law."²² Take Blackstone as an example of the common law usage without ascribing to him any particular influence on the drafters of the amendment. He wrote that in both civil and criminal cases "process" meant the means of compelling the defendant to appear.²³ When it was repeated in the fifth amendment, it presumably meant only "that the appropriate writ to be used to summon the accused. . . [and] that judgment was not to be given against a man in his absence."²⁴

Finally, the canon, *noscitur a sociis*, that the statute is to be known from its fellows and read in context,²⁵ leads to the conclusion that the due process clause was intended to be no more than procedural, because the fifth amendment consists, with one exception, solely of procedural provisions and is located with other procedural amendments. The exception is the compensation clause, which is substantive. Why the compensation clause appears in the fifth amendment is something of a mystery. St. George Tucker, "the American Blackstone," said that it was probably intended to restrain the arbitrary and oppressive modes frequently employed during the American Revolution to obtain supplies without compensation.²⁶ A rationalization of its location is that it

19. *Hurtado v. California*, 110 U.S. 516, 534 (1884) ("due process" in fourteenth amendment does not include indictment by grand jury in fifth amendment).

20. Llewellyn, *supra* note 6, at 401.

21. Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265, 266 (1975).

22. *Beers v. Hotchkiss*, 256 N.Y. 41, 54, 175 N.E. 506, 510 (1931). See also *Twining v. New Jersey*, 211 U.S. 78, 100 (1908).

23. 3 W. BLACKSTONE, COMMENTARIES 279 (1768); 4 W. BLACKSTONE, COMMENTARIES 313 (1769).

24. Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265, 267 (1975).

25. Frankfurter, *supra* note 1, at 538.

26. See 1 W. BLACKSTONE, COMMENTARIES, App. 305-06 (St. G. Tucker ed. 1803). For a discussion on the life of St. George Tucker, see A. HOWARD, THE ROAD FROM RUNNYMEDE 268-

distinguishes takings for public use from takings to punish.²⁷ Whatever the explanation, it is clear that "due process of law" did not of its own force require compensation, for otherwise the compensation clause would have been unnecessary. Yet in what has been called "the first real 'incorporation' case,"²⁸ the court said, "it is not due process of law if provision be not made for compensation."²⁹

"Of law" would seem to mean any law, either common or statutory, which does not violate any other provision of the Constitution. But Daniel Webster argued "[e]verything which may pass under the form of an enactment is not . . . to be considered law of the land."³⁰ And this argument has been accepted:

The article [fifth amendment] is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law" by its mere will.³¹

"It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power."³² And so we know that all laws are not "law" within the meaning of the constitutional language. But what laws are "law" within its meaning we do not know until the Court tells us. Here the Court slides from "due process of law" to "natural justice"³³ lubricating the way by refusing to define "due process."

"Due process of law," read literally means appropriate writ authorized by any law. But this literal meaning is so far removed from common experience as to now seem absurd, and the attempt to apply the "plain meaning rule"³⁴ to these words is a "pernicious oversimplification." The words are now "spacious language"³⁵ of "convenient vagueness."³⁶ In reaching this result, the words in the Constitution have

71 (1968) [hereinafter cited as HOWARD]. "[T]he legislative history of the compensation clause is quite unilluminating" B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 7 (1977). See also *id.* at 192-93, nn.10-13.

27. Reeder, *The Due Process Clauses and the "Substance of Individual Rights,"* 58 U. PA. L. REV. 191, 212 (1910).

28. HOWARD, *supra* note 26, at 339.

29. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 236 (1897).

30. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 581 (1819). *Contra*, *Mayo v. Wilson*, 1 N.H. 53 (1817); *Patrick v. Commissioners*, 7 S.C. (4 McCord) 541 (1828).

31. *Murray v. Hoboken*, 59 U.S. (18 How.) 272, 276 (1856).

32. *Hurtado v. California*, 110 U.S. 516, 535 (1884).

33. GOVERNMENT BY JUDICIARY, *supra* note 9, at 257; Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591, 593, 609 n.62 (1911).

34. Reference to the "plain meaning rule" is not an implication that it is necessarily a sure guide. See H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, BENCHMARKS 205 (1967).

35. *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

36. See Hough, *Due Process of Law—To-day*, 32 HARV. L. REV. 218 (1919) [hereinafter cited as Hough]. But see GOVERNMENT BY JUDICIARY, *supra* note 9, at 193, 258.

played a minor role; the lawyers and courts have not relied on the text to find the content of the principles applied to invalidate legislation.³⁷ They have, in the apt words of Professor Grey, employed a "noninterpretive mode."³⁸ The words are now "a large generality which has gathered meaning from experience."

But who made it a large generality? Not they [the draftsmen who were our political ancestors]. We did. When they put it into the fifth amendment, its meaning was as fixed and definite as the common law could make a phrase. It had been chiseled into the law so incisively that any lawyer, and few others, could read and understand. It meant a procedural process, which could be ascertained from almost any law book. We turned the legal phrase into common speech and raised its meaning into the similitude of justice itself.³⁹

Of course the words "due process of law", if taken in their literal meaning, have no application to this case [jurisdiction to tax intangibles]; [but] it is too late to deny that they have been given a much more extended and artificial signification.⁴⁰

"The 14th Amendment is a roguish thing."⁴¹

To understand how the meaning of the words "due process of law" evolved from a clear expression into a term deserving Holmes' epithet, rogue, "a worthless fellow who sometimes preys extensively upon the community by fraud,"⁴² and to understand how we turned it into "a large generality," one must resort to history.

MAGNA CARTA AS A SOURCE OF "DUE PROCESS"

The history must start no later than 1215 because Lord Coke gave "due process" "an ancestry emerging into script in Magna Charta."⁴³ Coke's authority was accepted in *Murray v. Hoboken*,⁴⁴ the first case interpreting the due process clause of the fifth amendment,⁴⁵ and is re-

37. "Due process . . . precludes defining." *Rochin v. California*, 342 U.S. 165, 173 (1952) (Frankfurter, J.). "[T]here is wisdom . . . in the ascertaining of the intent and application of such an important phrase . . . by the gradual process of judicial inclusion and exclusion." *Davidson v. New Orleans*, 96 U.S. 97, 104 (1877).

38. Grey, *supra* note 9, at 707. Grey's terminology seems to be catching on. See J. ELY, *DEMOCRACY AND DISTRUST* 1 n.1 (1980). But see Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 n.1 (1980).

39. Curtis, *Review and Majority Rule*, in *SUPREME COURT AND SUPREME LAW* 177 (E. Cahn ed. 1954).

40. *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting); see 2 HOLMES-POLLOCK LETTERS 267-68 (M. Howe ed. 1941).

41. 2 HOLMES-POLLOCK LETTERS 137 (M. Howe ed. 1941).

42. *RANDOM HOUSE DICTIONARY* 791 (1966) (*sub.* Knave).

43. Hough, *supra* note 36, at 218.

44. 59 U.S. (18 How.) 272, 276 (1856); see Hough, *supra* note 36, at 222-23. Reliance on Coke to equate Magna Carta and due process was old hat even in 1856. See *Mayo v. Wilson*, 1 N.H. 53, 55 (1817); cf. *Gardner v. Newburgh*, 2 Johns. Ch. 161, 7 Am. Dec. 526, 528 (N.Y. 1816); 2 J. KENT, *COMMENTARIES* 10 (1827).

45. 2 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 350-51 (rev. ed. 1926).

spectable to this day.⁴⁶ Coke wrote that the words *nisi per legem terrae* ("unless by the law of the land"), in Magna Carta were equivalent to the words "without due process of law" in the statute of 37 Edward III, chapter 8 (1363), and citing the statute of 28 Edward III, chapter 3 (1354) in the margin, equivalent to "due process of the common law."⁴⁷ In the sense that no change in present judicial treatment of due process will result from a historical study, Judge Hough was correct when he wrote "it is now as idle to cavil or complain . . . over Coke's historical accuracy or lack of it, in respect of Magna Charta," and "[f]or present purposes it makes no difference whether Coke was right or wrong in identifying due process with the law of the land."⁴⁸ But history is relevant to illustrate Justice Frankfurter's point: "Some words are confined to their history; some are starting points for history. . . . Like currency, words sometimes appreciate or depreciate in value."⁴⁹ History demonstrates this process regardless of the result.

To attempt to unravel Magna Carta is to plunge into "[a] gulf profound . . . where whole armies have sunk," the Serbonian Bog of Paradise Lost.⁵⁰ Little is clear about it, not even why it is called *Magna*. Coke said it was so called "not that it is great in quantity . . .

Warren said that *Murray* was the first interpretation since 1819 and cited *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235 (1819). *Okely* could have involved the fifth amendment, but the court treated the case under the seventh amendment. Cf. Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 140, 163 n.42 (1949).

46. See *Payton v. New York*, 445 U.S. 573, 593 (1980).

47. Coke commented on chapter 29 of the statute of 9 Henry 3 (1225) rather than on the original version, chapter 39 of the charter signed by John in 1215. The 1225 version is the standard form, and chapter 39 of John's original 63 chapters or chapter 29 of Henry the Third's 37 chapters, as the case may be, is one of the four chapters still left on the statute-book. See A. PALLISTER, *MAGNA CARTA THE HERITAGE OF LIBERTY* 89 (1971) [hereinafter cited as PALLISTER]; A. GOODHART, "LAW OF THE LAND" 13, 37 (1966) [hereinafter cited as GOODHART]; W. McKECHNIE, *MAGNA CARTA* 154-55 (2d ed. 1914) [hereinafter cited as McKECHNIE]; M. ASHLEY, *MAGNA CARTA IN THE SEVENTEENTH CENTURY* 6-7 (1965) [hereinafter cited as ASHLEY]. Coke's comment, with his marginal notes inserted in brackets, follows:

"Nisi per Legem Terrae. But by the Law of the Land. For the true sense and exposition of these words, see the Statute of 37. E. 3. cap. 8 where the words, by the law of the Land, are rendered, without due process of Law, for there it is said, though it be contained in the great Charter, that no man be taken, imprisoned, or put out of his free-hold without process of the Law; that is, by indictment, or presentment of good and lawfull men, where such deed be done in due manner, or by writ originall of the Common law. [25.E.3.cap.4.]

"[28.E.3.cap.3.] Without being brought in to answere but by due Process of the Common law.

"[37.E.3.cap.8.] No man be put to answer without presentment before Justices, or thing of record, or by due process, or by writ originall, according to the old law of the land.

"[42.E.3.cap.3.] Wherein it is to be observed, that this Chapter is but declaratory of the old law of England. Rot. Parliament 42 E.3.nu.22.23 the case of Sir John A. Lee, the Steward of the Kings house."

2 E. COKE, *INSTITUTES* 50 (1642).

48. Hough, *supra* note 36, at 224, 228.

49. Frankfurter, *supra* note 1, at 537-38.

50. J. MILTON, *PARADISE LOST*, bk. 2, lines 592-94. The textual obscurity of the charter is not a recent discovery. See 1 J. KENT, *COMMENTARIES* 624 n.1 (Lec. XXIV) (10th ed. 1860).

but in respect of the great importance, and weightinesse of the matter."⁵¹ And he gave the quaint analogy of Alexander the Great so called "not in respect of the largeness of his body, for he was a little man, but in respect of the greatness of his heroicall spirit. . . . So as of this Great Charter. . . ."⁵² But more recent scholars say that it was called "Great" in the material sense to distinguish it from a small charter or *parva carta* granted by Henry III in 1237.⁵³ Its contemporaries usually called it *Carta Baronum*,⁵⁴ the charter of the barons, a suggestion of its reactionary features. Indeed the orthodox view of Magna Carta as a landmark of constitutional progress has been called a myth attributable to the "somewhat undigested learning and . . . powerful if somewhat unscrupulous intellect" of Lord Coke.⁵⁵

There is conflict as to its translation. The Charter provides that "[n]o freeman shall be taken . . . nor will we not pass upon him . . . nisi per legale iudicium parium suorum, vel per legem terrae."⁵⁶ Does the word *vel* mean "and" or "or"? In medieval Latin *vel* is sometimes equivalent to *et*.⁵⁷ The historians are in splendid disagreement.⁵⁸ Pollock and Maitland cut the Gordian knot by giving *vel* the meaning "and/or", and this circumlocution has been accepted by very reliable authorities.⁵⁹

Even where the translation is clear, there is doubt as to the thought intended to be conveyed. To what does *per legem terrae*, by the law of the land, refer? It may mean "law of the land" in the popular sense, or it may mean a mode of trial, e.g., wager of law or compurgation, battle or ordeal.⁶⁰ *Judicium parium suorum*, the judgment of his peers, did not mean trial by jury in any way resembling a modern trial⁶¹ but "that the

51. See 2 E. COKE, INSTITUTES §108, 81 (1628).

52. 2 E. COKE, INSTITUTES, Proeme (unpaged) (1642); see 1 *id.* §108 at 81 (1628).

53. See ASHLEY, *supra* note 47, at 6; GOODHART, *supra* note 47, at 37; McKECHNIE, *supra* note 47, at 120.

54. See McKECHNIE, *supra* note 47, at 120.

55. Jenks, *The Myth of Magna Carta*, 4 INDEPENDENT REV. 260, 272 (1904). Edward Jenks was a formidable legal historian. See Jenks, *The Development of Teutonic Law*, 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 34 n.2 (1907). "Magna Charta was reconstructed, almost invented, by Coke." C. MACDOUGALL, HOAXES 161 (Dover reprint 1958).

56. 2 E. COKE, INSTITUTES 45 (1642); 6 HALSBURY'S STATUTES OF ENGLAND 404 (3d ed. 1969).

57. McKECHNIE, *supra* note 47, at 381.

58. Using "or": Murray v. Hoboken, 59 U.S. (18 How.) 272, 276 (1856); 6 HALSBURY'S STATUTES OF ENGLAND 404 (3d ed. 1969); PALLISTER, *supra* note 47, at 117; Hough, *supra* note 36, at 218. Using "and": A. HOWARD, MAGNA CARTA TEXT AND COMMENTARY 14, 43 (1964), acknowledging but not discussing the dispute, *id.* at 32; HOWARD, *supra* note 26, at 388; McKECHNIE, *supra* note 47, at 381-82; McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27, 49-50 (1914) [hereinafter cited as McIlwain].

59. GOODHART, *supra* note 47, at 29; 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 61 (7th ed. 1956) [hereinafter cited as HOLDSWORTH].

60. GOODHART, *supra* note 47, at 22; HOLDSWORTH, *supra* note 59, at 60; McIlwain, *supra* note 58, at 47.

61. HOLDSWORTH, *supra* note 59, at 59-60.

jury of peers, *i.e.*, of equals, determined whether the party should be put to his proof in one of the established ways: ordeal by hot iron or by water, compurgation, wager of law, trial by battle or production of charter."⁶² "Few mistakes have been more important or more beneficent than this [equating *judicium parium* with trial by jury] in their practical results. But a mistake it is. . . ."⁶³ And if the phrase is read in its original sense, it is not improbable that *lex terrae* meant only the old modes of trial, that *vel* meant "and", and that this clause of Magna Carta "is wholly reactionary, and has no sort of constitutional significance."⁶⁴ So read, Magna Carta assured the barons they would not be tried by royal judges and recognitors who were not their peers;⁶⁵ it was a step backward rather than forward. "[T]he Barons compelled John to sign Magna Charta, which said. . . [t]hat the Barons should not be tried except by a special jury of other Barons who would understand."⁶⁶

Another view is that *legem terrae* has its "vague popular signification"⁶⁷ and that *vel* means "or", a view taken because the words *legem terrae* were from the *Assize of Novel Disseisin* of 1166. One might be properly disseised by a verdict in such an assize without a medial judgment of his peers, and there were other instances such as arrests of felons *flagrante delicto* and outlawry where the law of the land did not require a judgment of peers.⁶⁸ Conversely there were instances when the law of the land did require a judgment of one's peers, and such instances are said to have been the rule. This is the reason for concluding that *vel* "according to the circumstances may be construed as 'and' or as 'or'."⁶⁹

But "[t]his uncertainty of the phrase [*per legem terrae*] has proved of value in practice because its vagueness has made it possible to ascribe to Magna Carta various meanings."⁷⁰ Although Magna Carta was by

62. GOODHART, *supra* note 47, at 19-20; "the peers determine how the trial is to be conducted," See generally J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 198-99 (1898).

63. McIlwain, *supra* note 58, at 44.

64. HOLDSWORTH, *supra* note 59, at 61; cf. McKECHNIE, *supra* note 47, at 133 n.1; The constitutional fathers regarded *Magna Carta* as having been from the first a muniment of English liberties, but the view of it adopted by modern scholarship is a decidedly different one. This is that *Magna Carta* was to begin with a royal grant to a limited class of beneficiaries, and more or less at the expense of the realm at large.

Corwin, *The "Higher Law" Background of American Constitutional Law*, (pt. 1), 42 HARV. L. REV. 149, 175 (1928) [hereinafter cited as Corwin I].

65. HOLDSWORTH, *supra* note 59, at 59-60; see GOODHART, *supra* note 47, at 22.

66. W. SELLAR & R. YEATMAN, 1066 AND ALL THAT 26 (Dutton ed. n.d.).

67. McIlwain, *supra* note 58, at 46; McKECHNIE, *supra* note 47 at 380.

68. GOODHART, *supra* note 47, at 18. "The common law . . . was in its origins the law of 'the land'—that is, of realty. Between approximately 1400 and 1600, it became the law of 'the land,' of the country. . . ." M. TIGAR & M. LEVY, LAW AND THE RISE OF CAPITALISM 218 (1977).

69. HOLDSWORTH, *supra* note 59, at 62; see GOODHART, *supra* note 47, at 29.

70. GOODHART, *supra* note 47, at 23.

any interpretation at least in part reactionary, it became the “‘palladium’ of British liberties when men [were] no longer able to understand its real meaning.”⁷¹ The words “*nisi per legale iudicium parium suorum vel per legem terrae*” were worshipped “because it was possible to misunderstand them.”⁷² Magna Carta and its principal expositor, Lord Coke, became and have remained objects of esteem, if not veneration,⁷³ thereby proving the accuracy of Professor Goodhart’s observation, “It is not always recognized that some of the most valuable parts of the law can be attributed to errors in history or logic.”⁷⁴ “The fact is, Lord Coke had no authority for what he states, but I am afraid we should get rid of a good deal of what is considered law in Westminster Hall, if what Lord Coke says without authority is not law.”⁷⁵

“The great importance of Magna Carta was that it introduced a . . . theory of law under which the king could be legally bound. . . [by] ‘the law of the land’,” a law not dependent on the king’s command but “developed through the common custom of the realm.”⁷⁶ In the United States this restriction on the authority of the king was transformed into a restriction on all “the powers of government, unrestrained by the established principles of private rights and distributive justice.”⁷⁷ The how and why of the transformation of a restriction on what we now call the executive to include the legislative and judicial branches⁷⁸ is as much an account of politics, philosophy, and religion as it is of law. Although the materials emphasized here are legal, the law is most likely the manifestation of the combined effects of the other elements rather than the cause of the result.

Magna Carta was reissued nearly sixty times until about 1420, but it was substantially unused for the next 150 years⁷⁹ and “seems to have been largely forgotten or overlooked in Tudor times.”⁸⁰ Its transmutation into a symbol of political liberty was due to Lord Coke not in his capacity as a judge but as a commentator and member of Parliament,

71. McIlwain, *supra* note 58, at 46. See also *Hurtado v. California*, 110 U.S. 516, 544 (Harlan, J., dissenting); 4 W. BLACKSTONE, COMMENTARIES 349-50 (1769).

72. 1 E. POLLOCK AND F. MAITLAND, HISTORY OF ENGLISH LAW 173 n.3 (2d ed. 1898).

73. *E.g.*, *Payton v. New York*, 445 U.S. 573, 593, (1980); *North v. Russell*, 427 U.S. 328, 346 (1976) (Stewart, J., dissenting); *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819).

74. GOODHART, *supra* note 47, at 22.

75. *Garland v. Jekyll*, 130 Eng. Rep. 311, 320 (C.P. 1824).

76. GOODHART, *supra* note 47, at 27.

77. 17 U.S. (4 Wheat.) at 244. See also *Davidson v. New Orleans*, 96 U.S. 97, 102 (1878); *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829).

78. “[T]he provisions of Magna Carta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.” *Hurtado v. California*, 110 U.S. 516, 531-32 (1884).

79. GOODHART, *supra* note 47, at 41.

80. ASHLEY, *supra* note 47, at 7.

and to his political allies and friends.⁸¹

Its revival was not without birth pangs. The Levellers, a group of radicals who wanted greater rights, denigrated it as a "‘messe of pot-tage’ compared with the universal law of equity."⁸² Sir John Keeling, Chief Justice of the King’s Bench, wanted to ignore it and, in words perhaps intended to reflect the volatile properties of early seventeenth century soup but which are "too coarse for modern manners," disparaged it as "Magna Farta", an indecorum also attributed to Oliver Cromwell.⁸³ But Coke called it the *Charta libertatum Regni*,⁸⁴ and extolled it

[a]s the goldfiner will not out of the dust, threds, or shreds of gold, let passe the least crum, in respect of the excellency of the metall: so ought not the learned reader to let passe any syllable of this Law, in respect of the excellency of the matter.⁸⁵

Coke’s view was the one that was destined to prevail in the United States.

BONHAM’S CASE AND THE AMERICAN INSTITUTION OF JUDICIAL REVIEW

In the United States, Coke’s influence is based on his legal writings as well as his political efforts. "Coke [was] widely recognized by the American Colonists ‘as the greatest authority of his time on the law of England’."⁸⁶ His opinion in *Bonham’s Case*⁸⁷ has been described perhaps with some exaggeration as a dictum whereby "he furnished a form of words which, treated apart from his other ideas, as it was destined to be by a series of judges, commentators, and attorneys became the most important single source of the notion of judicial review."⁸⁸ "The opinion was the common law’s *locus classicus* on judicial review . . . ,"⁸⁹ to which "[a]ll the law and doctrine upon that topic goes back finally."⁹⁰ "The literature on *Bonham’s Case* is voluminous, repeti-

81. ASHLEY, *supra* note 47, at 4-5; e.g., S. WHITE, SIR EDWARD COKE AND "THE GRIEVANCES OF THE COMMONWEALTH," 1621-1628, at 122, 230 (1979) [hereinafter cited as WHITE].

82. ASHLEY, *supra* note 47, at 40-41; PALLISTER, *supra* note 47, at 18, 22.

83. ASHLEY, *supra* note 47, at 46 n.82, 48-49; PALLISTER, *supra* note 47, at 24, 29-30.

84. 2 E. COKE, INSTITUTES Proeme (unpaged) (1642).

85. *Id.* at 57. See also Prohibitions del Roy, 77 Eng. Rep. 1342, 1343 (1607).

86. Payton v. New York, 445 U.S. 573, 593-94 (1980).

87. 77 Eng. Rep. 638 (C.P. 1608), 646 (C.P. 1609) (Coke’s own report); *sub nom* College of Physician’s Case, 123 Eng. Rep., 628 (C.P. 1609) (Brownlow’s report).

88. Corwin, *The "Higher Law" Background of American Constitutional Law* (pt. 2), 42 HARV. L. REV. 365, 379 (1929) [hereinafter cited as Corwin II].

89. M. SMITH, THE WRITS OF ASSISTANCE CASES 358 (1978) [hereinafter cited as SMITH]; see also 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION 941 (1953) [hereinafter cited as CROSSKEY].

90. Corwin, *The Establishment of Judicial Review*, 9 MICH. L. REV. 102, 104 (1910). On *Bonham’s* relation to judicial review of administrative action as distinguished from review of validity

tious"⁹¹ and, to a degree, conflicting. Much of it tries to validate the American institution of judicial review by invoking *Bonham's Case* as its historical precedent,⁹² a doubtful proposition. I have seen but one that disentangles the separate and more readily supported proposition that *Bonham's Case* is a source of the "noninterpretive mode" of performing the function of judicial review, *i.e.*, the employment of extra-constitutional standards to exercise that function.⁹³

Thomas Bonham, M.D., graduate of Cambridge University, failed the examination of the Royal College of Physicians but practiced medicine in London nevertheless. He thus violated the charter of the College granted by Henry VIII and confirmed by Parliament. The College, acting under the charter, fined him and imprisoned him when he continued to practice and failed to pay the fine. This was unexceptional because Lord Coke had himself reported a recent case holding "to every fine imprisonment is incident."⁹⁴ But on his release Bonham brought an action for false imprisonment against the officers of the College and thereby raised a problem at the root of the case that has, so far as I have found, not been stated with primer simplicity: was the College a court of record?

Coke had also reported that courts not of record could not impose a fine or commit any to prison⁹⁵ and that judges of courts not of record could be sued for false judgments if they acted without jurisdiction or

of legislation, *see* Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953, 953-59 (1957).

91. Thorne, *The Constitution and the Courts: A Reexamination of the Famous Case of Dr. Bonham*, in *THE CONSTITUTION RECONSIDERED* 15 n.1 (C. Read ed. 1968) [hereinafter cited as Thorne] cites several references. For other references, *see* J. Goebel, *Antecedents and Beginnings to 1901*, 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 92 n.190 (P. Freund ed. 1971) [hereinafter cited as Goebel]. *See also* 2 LEGAL PAPERS OF JOHN ADAMS 118-28 (L. Wroth & H. Zobel eds. 1965); 1 B. BAILYN, *PAMPHLETS OF THE AMERICAN REVOLUTION* 412, 718 nn.7-11 (1965) [hereinafter cited as BAILYN]; J. GOUGH, *FUNDAMENTAL LAW IN ENGLISH HISTORY* 32 (1955) [hereinafter cited as GOUGH]; Berger, *Doctor Bonham's Case: Statutory Construction or Constitutional Theory?*, 117 U. PA. L. REV. 521 (1969) [hereinafter cited as *Bonham*]; Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 854-56 (1978); Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 674-76, 692 (1980). For an effort to consider the case in its medical rather than constitutional aspects *see* Goldberg, *Horseshoers, Doctors and Judges and the Law on Medical Competence*, 9 PAC. L.J. 107, 123-29 (1978). The definitive explication is A DISCOURSE UPON THE EXPOSITION & UNDERSTANDING OF STATUTES 85-92 (S. Thorne ed. 1942) [hereinafter cited as DISCOURSE].

92. *See, e.g.*, E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 221 (14th ed. 1978); Smith, *Marbury v. Madison, Lord Coke, and Dr. Bonham: Relics of the Past, Guidelines for the Present—Judicial Review in Transition*, 2 U. PUGET SOUND L. REV. 255, 261 (1979); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 855-56 (1978).

93. J. ELY, *DEMOCRACY AND DISTRUST* 40-41, at 294 n.93 (1980). The two separate problems are squinted at in Smith, *Dr. Bonham's Case and the Modern Significance of Lord Coke's Influence*, 41 WASH. L. REV. 297, 313-14 (1966) and Boudin, *Lord Coke and the American Doctrine of Judicial Power*, 6 N.Y.U.L. REV. 223, 223-24, 242 (1929) [hereinafter cited as Boudin].

94. *Beecher's Case*, 77 Eng. Rep. 559, 564 (Exch. 1608).

95. *Griesley's Case*, 77 Eng. Rep. 530, 535 (C.P. 1588).

abused their jurisdiction.⁹⁶ Thus the question in *Bonham's Case* was whether the charter had constituted the College of Physicians as a court of record. Lord Coke, before whom Bonham had the immediate good fortune to come, held "that neither the letters patent [the charter] nor the Act of Parliament has granted them any Court, but only an authority,"⁹⁷ "they are not made judges,"⁹⁸ and so could not impose a fine. Furthermore, the College had not made a proper record. "[T]heir proceedings ought not to be by parol,"⁹⁹ and "they cannot impose a fine, or imprisonment without a record of it."¹⁰⁰ Since the College was not a court, nor were its officers judges, and they had not made a proper record, the rule of judicial immunity protecting superior judges from suit for acts in their judicial capacity did not apply, and Bonham had stated a cause of action. In Coke's terms Bonham's commitment was "traversable in an action of false imprisonment."¹⁰¹

Bonham's Case invites an antiquarian spree,¹⁰² but its immediate interest is why Coke held that the College was not a court that could impose a fine but had only "an authority" to collect a fine "which is to be recovered by the law,"¹⁰³ i.e., by an ordinary action in a proper court. He gave five reasons, only the fourth of which is here material. The charter and the act divided the fine for unlicensed practice "one moiety to the King, and the other moiety to the president and the college."¹⁰⁴ If the College could by proceedings before its own members impose a fine for its own use, they would be judges in their own case

96. *Floyd v. Barker*, 77 Eng. Rep. 1305, 1307 (Star Chamber 1608); see *Case of the Marshalsea*, 77 Eng. Rep. 1027, 1038-41 (C.P. 1612); 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 234-37 (2d ed. 1937); Thorne, *Courts of Record and Sir Edward Coke*, 2 U. TORONTO L.J. 24, 35, 43-44 (1937). This type of problem still arises. See, e.g., *Stump v. Sparkman*, 435 U.S. 349, 359 (1978) (immunity of judges); *Barr v. Mateo*, 360 U.S. 564, 569-73 (1959) (immunity of executive officials).

97. 77 Eng. Rep. at 655.

98. *Id.* at 657.

99. *Id.* at 656.

100. *Id.* at 657.

101. *Id.*

102. Bonham complained that the College had committed him to the "Compter, London in the Poultry," also known as the Counter, a debtors prison, where he was "evilly treated . . . there so in prison for a long time, that is to say, by the space of seven days." *Id.* at 638, 645. He was released by the King's Bench for reasons not now discoverable. 1 G. CLARK, A HISTORY OF THE ROYAL COLLEGE OF PHYSICIANS OF LONDON 269 (1964). Although Coke's most popular biographer described the case as "piddling almost farcical," C. BOWEN, THE LION AND THE THRONE 309 (1957), it may have seemed less so to Bonham. Prisons then were places where "the stench and steam is intolerable and . . . [t]he very walls are covered with lice. . . ."; 10 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 182 n.7 (1938), and debtors prisons were particularly rigorous for the "debtor had to live at his own expense, charity or die of starvation," 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 323-33 (1937). Coke himself described the Counter as "a strait person" and noted the collusive "shift (in deceit of the Court)" whereby some prisoners obtained removals to the less stringent Fleet Prison. 2 E. COKE, INSTITUTES 215 ¶ e (1642), the use of a warrant *duci facias* "by the common people called a horse." The Case of Captain C., 86 Eng. Rep. 167 (K.B. 1673); 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 227 (1937).

103. 77 Eng. Rep. at 657.

104. *Id.* at 651.

"which is absurd."¹⁰⁵ Coke's words in his own report are:

4. The censors [of the College of Physicians] cannot be judges, ministers, and parties; judges to give sentence and judgment; ministers to make summons; and parties to have the moiety of the forfeiture . . . and one cannot be Judge and attorney for any of the parties. . . . 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.¹⁰⁶

These words have resulted in a small library of scholarly controversy. Are they dictum or, as Coke himself termed them, an alternative basis of his opinion?¹⁰⁷ More important, are they, as Plucknett believed, "words which challenged both Crown and Parliament"¹⁰⁸ (an anticipation of judicial supremacy as we now know it) or, as Thorne has explained, an "argument derived from the ordinary common-law rules of statutory interpretation" that repugnancies or contradictions are to be avoided and the repugnant words to be omitted? "There is no constitutional problem raised here, but only one of statutory construction."¹⁰⁹

Coke was concerned only with the application of a statute that led to results "encounter common droit & reason", not with the theory that "an Act of Parliament would be void from its first Creation" because of a conflict between its provisions and fundamental, natural or "higher" law.¹¹⁰

Eminent recent historians have accepted Thorne's view as correct,¹¹¹

105. 123 Eng. Rep. at 933.

106. 77 Eng. Rep. at 652. The language in Brownlow's report is essentially similar: [T]he president and college cannot . . . bring their action before themselves . . . but ought to have their action . . . for otherwise the penalty being given, the one moiety to them, and the other to the King, they shall be judges in propria causa, and shall be summoners, sheriffs, judges and parties also; which is absurd . . . if any statutes, are made against law and right, and so are these which makes any man judge in his own cause . . . this is a void statute, for it is impertinent [impossible?] to be observed.

123 Eng. Rep. at 933.

107. Describing them as dictum: *Bonham*, *supra* note 91, at 523; Corwin II, *supra* note 88, at 367; see GOUGH, *supra* note 91, at 32 n.4; R. MOTT, *DUE PROCESS OF LAW* 50, 56 (1926) [hereinafter cited as MOTT]; "[N]ot a dictum, but a very material portion of his argument." Thorne, *supra* note 91, at 21; "[T]he fourth argument is not a dictum, but takes its proper place as one of the five arguments directed toward the interpretation of the act." DISCOURSE, *supra* note 91, at 88 n.187.

108. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 34 (1926) [hereinafter cited as Plucknett].

109. Thorne, *supra* note 91, at 21.

110. DISCOURSE, *supra* note 91, at 89.

111. See generally GOUGH, *supra* note 91, at 32-33; BAILYN, *supra* note 91, at 412, 718 n.9; 2 LEGAL PAPERS OF JOHN ADAMS 118 (L. Worth & H. Zobel eds. 1965); G. ELTON, *THE TUDOR CONSTITUTION* 234 (1972); see also Boudin, *supra* note 93.

but others have disagreed.¹¹² The dispute is fascinating; the meaning of Coke's words has been analyzed according to their medieval usages,¹¹³ and his cited authorities have been minutely dissected.¹¹⁴ In a sense all this is irrelevant because whatever Coke meant, the colonists took him to declare the doctrine of judicial review,¹¹⁵ and "*Bonham's Case* began a new life in America."¹¹⁶ But in another sense the dispute is highly relevant; it proves that in the process of interpretation we all "listen with what psychologists used to call the apperception mass . . . with what is already in one's head."¹¹⁷ The colonists wanted to believe what they thought Coke said and therefore did believe. And to their acceptance of Coke as a revealed authority and as a judge they added their version of what he said about Magna Carta, which became to them a bulwark symbol of opposition to arbitrary government. They seem to have ignored the fact that *Bonham's Case* was eventually both reversed and overruled on its merits.¹¹⁸ "We live by symbols, and what shall be symbolized by any image of the sight depends upon the mind of him who sees it."¹¹⁹

Coke himself treated *Bonham's Case* as a rule of construction rather than of constitutional doctrine. Within a year after *Bonham*, he said that although the common law could disallow a custom for unreasonableness, it could disallow a statute only for repugnancy "as it appears by Dr. Bonham's Case . . .",¹²⁰ a proposition acceptable even to his

112. M. KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 364 n.10 (1942); *Bonham*, *supra* note 91, at 528. "Coke was not asserting simply a rule of statutory construction . . ." Corwin II, *supra* note 88, at 372; Smith, *Dr. Bonham's Case and the Modern Significance of Lord Coke's Influence*, 41 WASH. L. REV. 297, 314 (1966), "so called dictum."

113. See, e.g., Plucknett, *supra* note 108, at 40, 41, 55 n.71, 59 n.88; Corwin II, *supra* note 88, at 376; *Bonham*, *supra* note 91, at 530-32. THORNE, *supra* note 91, at 21-22.

114. Plucknett, *supra* note 108, at 35-48; Boudin, *supra* note 93, at 237-42.

115. HOWARD, *supra* note 26, at 101.

116. Goebel, *supra* note 91, at 92.

117. Frankfurter, *supra* note 1, at 536.

118. Coke said he "acquainted" the Chief Justice of the King's Bench with the judgment and reasons in *Bonham's Case* and "he well approved." 77 Eng. Rep. at 658. But the College brought a writ of error in the King's Bench and procured a reversal. 1 G. CLARK, A HISTORY OF THE ROYAL COLLEGE OF PHYSICIANS OF LONDON 213, 215 (1964). Although no report of this reversal has been found, the procedure was usual. As Coke himself wrote, "for if error be in the Common Pleas, that may be reversed in the King's Bench." Prohibitions Del Roy, 77 Eng. Rep. 1342 (1607); 1 HOLDSWORTH, *supra* note 59, at 201, 222, 245. The statement that after Coke's opinion in *Bonham's Case* "Parliament simply re-enacted the statute!" H. ABRAHAM, THE JUDICIAL PROCESS 322 (4th ed. 1980), is not documented. It may reflect confusion between acts of Parliament and the "statutes" which the College could itself adopt. See 1 G. CLARK, A HISTORY OF THE ROYAL COLLEGE OF PHYSICIANS OF LONDON 211-12 (1964). In *Groenvelt v. Burwell*, 91 Eng. Rep. 1202, 1211-12 (K.B. 1697), Lord Holt held that the College was a court of record, that its acts were not traversable, and that Groenvelt, who had been committed for malpractice, could not sue the College for false imprisonment. On Holt's disparagement of Coke and on the elements of personal interest each had in the respective cases see Goldberg, *Horseshoers, Doctors and Judges and the Law on Medical Competence*, 9 PAC. L.J. 107, 128, 131 (1978).

119. O. HOLMES, *John Marshall* in COLLECTED LEGAL PAPERS 270 (1920).

120. In reply to a committee including the Lord Treasurer Coke said:

[T]he King cannot change any part of the common law, nor create any offence by his

implacable critic Lord Ellesmere.¹²¹ And in two of his marginal references to *Bonham* in his *Institutes* he treats it as an example of the rule that the various parts of a statute are to be harmonized if possible, "otherwise the Act should be contrary to it selfe, which in all Expositions is to bee avoided,"¹²² and that a statute impossible of performance need not be observed.¹²³

Of equal interest is what Coke did not say. When he referred to what he called "a Maxime in Law" that one should not be a judge in his own case,¹²⁴ he did not say that violation of the maxim was contrary to the law of the land, *i.e.*, Magna Carta. The absence of a reference to Magna Carta cannot be satisfactorily explained as an inadvertence because of his holding, about five years after *Bonham's Case*, in the case of "the impudent fellow named Bagg."¹²⁵ Bagg, a burgess of Plymouth, was disenfranchised without notice, opportunity to answer, or a hearing for conduct towards the mayor so unseemly that, following the example of Gibbon, "the licentious passages are left in the decent obscurity of a learned language."¹²⁶ Coke restored him to his franchise because the corporation did not have authority to remove him for reasonable cause "by charter or prescription," which would have been "*per legem terrae*" and, therefore, permissible under "Magna Charta, cap. 29," and so he could be removed only after conviction "*per judicium*

proclamation, which was not an offence before, without Parliament . . . also the law of England is divided into three parts, common law, statute law, and custom; but the King's proclamation is none of them.

Proclamations, 77 Eng. Rep. 1352, 1353, 1354 (1610). He thereafter made the statement quoted in the text in *Rowles v. Mason*, 123 Eng. Rep. 892, 895 (C.P. 1610), which Thorne uses. Thorne, *supra* note 91, at 17, but Corwin discounts, Corwin II, *supra* note 88, at 374.

121. He [the new chief justice's grandfather unlike the then recently deposed Coke] challenged not power for the Judges of this Court to . . . judge Statutes and Acts of Parliament to be void, if they conceived them to be against common right and reason; . . . I speak not of impossibilities or direct repugnances.

The Lord Chancellor's Speech to Sir Henry Montague, when he was Sworn Chief Justice of the Kings Bench, 72 Eng. Rep. 931, 932 (1616).

122. 2 E. COKE, INSTITUTES 402 (1642) (misnumbered 204 in original).

123. *Id.* at 587-88.

124. "*[Q]uia aliquis non debet esse Judex in propria causa.*" 1 E. COKE, INSTITUTES 141 (1628); see 77 Eng. Rep. at 652.

125. Bagg's Case, 77 Eng. Rep. 1271 (K.B. 1612); "[I]f a Freeman in City, Burgh or Town corporate be disfranchised unjustly . . . this court (King's Bench) may relieve the party, as it appeareth in James Bagg's case." 4 E. Coke, INSTITUTES 71 (1644).

126. CROGATE: Why, what did he do?

BARON SURREBUTTER: I am almost ashamed to say. He came up to me, and without the smallest ceremony (to use the language of the pleadings in his case), "Convertens posteriorem partem corporis sui more inhumano et incivili versus meipsum scurriliter contemptuose incivilliter et alta voce dixit haec anglicana verba sequentia, videlicet,—COME AND KISS.

CROGATE: I can guess pretty well what you mean, though I don't know much Latin

.....
G. Hayes, *Crogate's Case: A Dialogue in ye Shades on Special Pleading Reform*, in 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW, Appendix 421 (3d ed. 1944). Those who cannot guess may see 77 Eng. Rep. at 1275 where the conduct is said to be "*contra bonos mores* . . . but no cause of disfranchisement, or of indictment." *Id.* n.*.

parium suorum" of a crime "whereby he has become infamous."¹²⁷ And, he added, even if there was authority to remove him by charter or prescription, the instant removal was void and not binding because of the lack of notice and opportunity to defend.¹²⁸ Note that *Bagg's Case* invalidated the acts of a municipal corporation for violation of a statute, Magna Carta; no case has been found holding a statute invalid for violating another statute, not even Magna Carta.¹²⁹ Thus Coke in *Bonham*, cannot if he were consistent, be considered to have treated the statute of the College of Physicians as void because it was not part of the law of the land; it was simply a part of the law of the land that for reasons he found sufficient would not be applied to reach what he considered an absurd result—an old and conventional principle of statutory construction.¹³⁰ Lord Coke said nothing in *Bonham* about law of the land or due process. Chief Justice Taft, not Lord Coke, elevated *aliquis non debet esse Judex in propria causa* from a canon of propriety to an element of due process of law.¹³¹ To anticipate a bit of the story, the common law maxim forbidding double jeopardy is incorporated in the Constitution.¹³² Following the conventional canon of *expressio unius*, one might conclude that those maxims not incorporated were not constitutional requirements. But we are dealing with a "noninterpretive mode," and by Chief Justice Taft's time it was common learning that due process of law included some maxims not expressed in the Constitution.¹³³ And this learning has since been followed. Witness

127. 77 Eng. Rep. at 1279.

128. 77 Eng. Rep. at 1280. "For practical purposes . . . the history of *mandamus* begins with *Bagg's Case*." J. SMITH, CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS 257 (1965).

129. See Berger, "Law of the Land" Reconsidered, 74 NW. L. REV. 1, 4-5 (1979) [hereinafter cited as *Law of the Land*] (quoting Plucknett, *supra* note 108, at 628, 629).

130. E.g., *Haggard Co. v. Helvering*, 308 U.S. 389, 394 (1940); *Quincy (Mass.)*, Appendix 523-24 (1865).

131. "But except in cases resting on such ['remote, trifling and insignificant'] reasons, we do not see how the legislature can have any power to abolish a maxim which is among the fundamentals of judicial authority." *Tumey v. Ohio*, 273 U.S. 510, 531 (1927). But see the notes of Horace Gray, later a Justice of the United States Supreme Court, *Quincy (Mass.)*, Appendix 525 n.25 (1865); SMITH, *supra* note 89, at 361-62. For recent examples of the problem, see *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *American General Ins. Co. v. F.T.C.*, 589 F.2d 462 (9th Cir. 1979); *Applebaum v. Board of Directors of Barton Memorial Hosp.*, 104 Cal. App. 3d 648, 163 Cal. Rptr. 831 (1980). *Bonham's Case* lives on.

132. Coke reported "the maxim of common law is, that the life of a man shall not be twice put in jeopardy for one and the same offence." *Vaux's Case*, 76 Eng. Rep. 992, 993 (K.B. 1591); see Goebel, *supra* note 91, at 448.

133. The maxims of Magna Charta and the common law are the interpreters of constitutional grants of power, and those acts which by those maxims the several departments of government are forbidden to do cannot be considered within any grant or apportionment of power which the people in general terms have made to those departments.

T. COOLEY, CONSTITUTIONAL LIMITATIONS 175 (1868). See *id.* at 356, 410. See also *Ex parte Ah Fook*, 49 Cal. 402, 406 (1874). Long before the restraint of the fourteenth amendment, Justice Chase said a state legislature could not make a man a judge in his own case. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798). And Chief Justice John Marshall intimated the same. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810).

the raising of the common law maxim requiring proof beyond a reasonable doubt in criminal cases¹³⁴ to constitutional stature over the objection of Justice Black that this turns "law of the land" into "law of the judges."¹³⁵

Coke's influence on the foundation of the doctrine of judicial review was, however, based as much on his activities as a politician after he left the bench and as a commentator on the law as it was on the authority of *Bonham's Case*. Plucknett's argument that Coke misapplied medieval precedents in *Bonham* for his own political purposes and engaged in "an antiquarian revival of obsolescent law with a view to applying it to current needs,"¹³⁶ i.e., limitation of the king's power, may be correct. Indeed Coke has been called the father of "the Whig interpretation of English history,"¹³⁷ which eventually led to the doctrine of Parliamentary supremacy in England.¹³⁸ But advocacy of such legislative omnicompetence cannot account for Coke's acceptability in the United States.

COKE, MAGNA CARTA, AND LEGISLATIVE SUPREMACY

Some have questioned whether Coke was an advocate of Parliamentary supremacy, and whether his works were used in the formative period of the Union to support such supremacy. A fairly typical statement is that Coke believed that "[s]tatutes, to be legitimate, must conform to this fundamental law [Magna Carta], and merely because a declaration is an Act of Parliament is no guarantee that it is according to the principles of the English common law and custom."¹³⁹ This idea seems attractive to us because, if true, and combined with the more extravagant implications of *Bonham's Case*, it provides an unblemished pedigree or clear chain of title for the current institution of judicial review "because it [Magna Carta] was a *document* and so gave definite,

134. For references to the reasonable doubt rule as a maxim, see J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 551-53, 557 (1898); 9 J. WIGMORE, EVIDENCE §2497 at 320-21 (3d ed. 1940).

135. *In re Winship*, 397 U.S. 358, 384 (1970).

136. Plucknett, *supra* note 108, at 45.

137. ASHLEY, *supra* note 47, at 4, 53, 60-61.

138. Cf. GOODHART, *supra* note 47, at 53-54.

139. MOTT, *supra* note 107, at 67. Although Dean Griswold called Mott a "leading author," E. Griswold, *Per Legem Terrae*, in THE 5TH AMENDMENT TODAY 32 (1955), Mott's book received rather tepid reviews on publication and posthumous withering denunciation. *Law of the Land*, *supra* note 129, at 2, 28, 29. In addition to the faults found by Berger, Mott was plainly wrong in saying that *Terett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815), overruled *Turpin v. Lockett*, 10 Va. (6 Call) 113 (1804). See *Selden v. Overseers of Poor*, 38 Va. (11 Leigh) 127 (1840); MOTT, *supra* note 107, at 196. And Mott's statement that prior to *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), there were "numerous dicta" that the fifth amendment limited the states is not supported by his citations. See MOTT, *supra* note 107, at 203, & n.45. Nevertheless, what Berger calls the "mountain of facts" Mott amassed remains useful as a case finder even though his conclusions are suspect.

tangible embodiment to the notion of higher law."¹⁴⁰ Unfortunately for purposes of lucid and succinct explanation, it is not true.

"In 1297 the famous Confirmatio Cartarum by Edward I provided that 'if any judgments be given from henceforth contrary to the points of the Charter aforesaid . . . they shall be holden for naught'."¹⁴¹ And "[i]n 1369 Parliament sought to deprive future parliaments of the power to effect any alterations in the terms of Magna Carta."¹⁴² From these origins there are attributed to Coke the notion that Magna Carta was unalterable,¹⁴³ and the proposition "that any statute passed by Parliament contrary to Magna Carta, the cornerstone of the rights of Englishmen should be 'holden for none.'"¹⁴⁴ Coke did indeed use the words "holden for none," and this form of statement gives the impression that Coke considered Magna Carta something like a constitution that controlled future legislation.¹⁴⁵ Coke is said to have once argued in Parliament in 1628, "that since 'all statutes against Magna Carta are deemed void,' the Commons might not alter the charter."¹⁴⁶ But if Coke had intended to declare the inviolability of Magna Carta enforceable by judicial supremacy, one would think that he would have said so in his *Institutes*, particularly the second.¹⁴⁷ But what he actually wrote was this:

The highest and most binding Laws are the Statutes which are established by Parliament; and by authority of that highest Court it is enacted (onely to shew their tender care of *Magna Charta*, and *Charta de Foresta*) That if any Statute be made contrary to the great Charter, or the Charter of the Forest, that shall be holden for none: By which words all former Statutes made against either of those Char-

140. Corwin I, *supra* note 64, at 176.

141. GOODHART, *supra* note 47, at 37-38; HOWARD, *supra* note 26, at 9.

142. GOODHART, *supra* note 47, at 39.

143. The classical statement seems to be "Even Bacon agrees with Coke that Magna Charta is unalterable." C. McILWAIN, *THE HIGH COURT OF PARLIAMENT* 64 (1910). Berger and Grey repeat McIlwain uncritically. R. BERGER, *CONGRESS AND THE SUPREME COURT* 358, & n.43 (1969); cf. GOVERNMENT BY JUDICIARY, *supra* note 9, at 194 n.4; Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 852 (1978). McIlwain's conclusion that Coke and Bacon agreed is now questioned. ASHLEY, *supra* note 47, at 10 n.16. On Coke's vacillations, see ASHLEY, *supra* note 47, at 8-13; 5 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 472-78 (3d ed. 1945).

144. HOWARD, *supra* note 26, at 18. Both Howard and Grey, see note 143 *supra*, cite 2 E. COKE, *INSTITUTES* Proeme (unpagged) (1642). This makes it hard to see why they did not qualify their statements. See note 153 *infra*.

145. HOWARD, *supra* note 26, at 122; MOTT, *supra* note 107, at 63 n.58. Corwin II, *supra* note 88, at 374 n.32, gives other references that might give the same impression but carefully explains that Coke recognized Parliament's authority as a court.

146. WHITE, *supra* note 81, at 255.

147. The *Institutes* were written by 1628, but only the first, commonly known as COKE ON LITTLETON, was then published. The last three were confiscated by the crown and not published until 1641 or 1644. WHITE, *supra* note 81, at 10, although the publisher's date in the facsimile edition of the second is 1642; 5 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 454-55 (3d ed. 1945). Coke may have feared publication would "shorten his few remaining years by . . . imprisonment in the Tower." *Id.* at 471.

ters are now repealed;¹⁴⁸

His authority, cited in the margin, is 42 Edward III, chapter 1, the statute of 1369 referred to by Goodhart.¹⁴⁹ That he really meant that former inconsistent statutes were repealed but that subsequent statutes contrary to Magna Carta were valid is shown by his examples. As an example of invalidity he cites not a statute, but a town charter and ordinance.¹⁵⁰ On a statute he cites the notorious case of Empson and Dudley, "Justices of peace" who, by "Act of Parliament made," prosecuted "infinite numbers of people" without prior indictment or presentment "by the verdict of twelve men upon a bare information" as an example of "horrible oppression, and exactions." He does not say the statute was invalid but only that it was repealed by an act of 1 Henry VIII (1509), and that the necessity for the repeal should "admonish" Parliaments to adhere to trial "per legem terrae" and "bring not in absolute, and partiall trialls by discretion."¹⁵¹ He repeats the story of the "unsufferable pressures and oppressions" by Empson and Dudley with the warning that it is "[a] good caveat to Parliaments to leave all causes to be measured by the golden and streight metwand of the law, and not to the incertain and crooked cord of discretion."¹⁵² But he does not say that a law is void if Parliament does not follow his admonition. And as an example of an act which was to be deemed repealed by the statute of 1369, he cites 17 Edward II "capitulum ultimo" (1333), which, of course, if inconsistent with Magna Carta would have been within the literal meaning of the later act as a repealer.¹⁵³ And he said expressly: "[s]ubsequent parliaments cannot be restrained by the former."¹⁵⁴ Holdsworth believed Coke's post-*Bonham* views were recantations evidencing his political bias and that he came to admit the supremacy of Parliament "freely and fully," that he believed not in "supremacy of an unchangeable law, but [in] the supremacy of a law Parliament can change."¹⁵⁵ And, as a practical matter, even chapter 29 (or 39) has been departed from in temporary and abnormal times when

148. 2 E. COKE, INSTITUTES, Proeme (4th of the unpagged pages) (1642). See also 4 *id.* 36 (1644).

149. GOODHART, *supra* note 47, at 39.

150. 2 E. COKE, INSTITUTES 54 (1642); see *Law of the Land*, *supra* note 129, at 4-5.

151. 2 E. COKE, INSTITUTES 51 (1642).

152. 4 *id.* 41 (1644).

153. 3 *id.* 111 (1644). In 1 E. COKE, INSTITUTES §108 at 81 (1628) he did say: "[a]nd by the statute of 42 E. 3, ca. 3. if any statute be made against either of these Charters it shall be void." Either he had second thoughts or elided the full exposition as did Grey and Howard some three hundred years later. See note 144 *supra*.

154. 4 E. COKE, INSTITUTES 43 (1644) under the heading "Acts against the power of the Parliament subsequent bind not." *Id.* at 42. This is still hornbook law. See *County of Sacramento v. Lackner*, 97 Cal. App. 3d 576, 589-90, 159 Cal. Rptr. 1, 8-9 (1979).

155. See generally 4 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 187 (3d ed. 1945); 5 *id.* at 475-76. See generally PALLISTER, *supra* note 47, at 103; GOODHART, *supra* note 47, at 40.

required by national security. "[A] war could not be carried out according to the principles of Magna Charta."¹⁵⁶

Although they seem clear enough, two famous passages from Coke have been much debated. The one is the statement he attributed to Herle, C.J., "the award of Parliament was the highest Law that could bee."¹⁵⁷ The other is: "Of the power and jurisdiction of the Parliament for making of laws in proceeding by Bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds."¹⁵⁸ Corwin explains these passages as instances of Coke's failure to distinguish between Parliament's dual capacities as a court and as a legislature, and says these passages were not exemplifications of legislative sovereignty.¹⁵⁹ Boudin, considering the second, relates it to Coke's statement in Parliament that "Magna Charta is such a fellow that he knows no sovereign," and says that "sovereign" meant only the king, *i.e.*, that the charter was a restriction only on executive rather than legislative power.¹⁶⁰ The implications of these arguments are that whatever Coke said, he considered Parliament bound by some sort of higher or fundamental or natural law. Pallister argues that Coke did not express himself on that point. Coke "never suggested—indeed never imagined—that it [Magna Carta] might be applied or need to be applied against parliament."¹⁶¹ The United States Supreme Court took this tack almost a century ago when it said in *Hurtado v. California*:

[W]e shall be ready to acknowledge that it is better not to go too far back into antiquity for the best securities for our 'ancient liberties'. . . .

The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament. . . . The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.¹⁶²

This statement was written while Mr. Justice Gray was a member of

156. PALLISTER, *supra* note 47, at 103 (quoting Lord Scrutton in *Ronnfeldt v. Phillips*, 35 T.L.R. 46, 47 (C.A. 1918)).

157. 2 E. COKE, INSTITUTES 498 (1642).

158. 4 *id.* 36 (1644).

159. Corwin II, *supra* note 88, at 374-79. See generally GOUGH, *supra* note 91, at 42-43.

160. See Boudin, *supra* note 93, at 235. See also PALLISTER, *supra* note 47, at 48; HOWARD, *supra* note 26, at 234 (views of James Madison). GOODHART, *supra* note 47, at 68. "Magna Carta is such a fellow as he will have no saving," WHITE, *supra* note 81, at 267.

161. PALLISTER, *supra* note 47, at 48.

162. 110 U.S. 516, 530, 531, 532 (1884). See also Davidson v. New Orleans, 96 U.S. 97, 102 (1877). For a similar sloughing off of inconvenient history see *Wynehamer v. People*, 13 N.Y. 378, 392 (1856).

the court, and it is Gray's appendix to Quincy's report of *Paxton's Case*, *The Writs of Assistance Case*, which supplied much of the raw material for the later writings on *Bonham*.¹⁶³ Although it has been suggested that Gray's history may have been unduly emphasized, its accuracy has not been attacked, and his concurrence is some indication of *Hurtado's* accuracy.

The fact is that *Bonham*, which says nothing about natural law but is based on the law of reason, had read into it part of what Coke had said earlier in *Calvin's Case*: "[t]he law of nature is part of the law of England: . . . the law of nature was before any judicial or municipal law: . . . the law of nature is immutable."¹⁶⁴ This expansion of *Bonham* was then combined with a reading of Coke on Magna Carta to attribute to him the idea that Magna Carta had no sovereign of any sort, neither king nor parliament, that it was expression of fundamental law limiting both indifferently.¹⁶⁵ In *Calvin* Coke did say "the Parliament could not take away the protection which the law of nature giveth."¹⁶⁶ The statute he said was invalid was that of 25 Edward III, chapter 22 (1351), which was presumably repealed by 42 Edward III, chapter 1 (1369). And if one applies Coke's heretofore ignored qualification in his *Proeme* to his *Second Institute* concerning the repeal of "former Statutes," Coke becomes consistent. Thus *Calvin* should not be combined with an expansive reading of *Bonham* and Coke on Magna Carta to attribute to Coke the invention of the idea that Magna Carta had no sovereign of any sort.¹⁶⁷ Through reverence of Coke, immutability became another myth of Magna Carta,¹⁶⁸ but "in world history myths are

163. See Goebel, *supra* note 91, at 93 n.191.

164. *Calvin's Case*, 77 Eng. Rep. 377, 391-92 (C.P. 1608). Here Coke cited "Doctor and Student, cap. 2. and 4." Doctor and Student does say: "The lawe of nature specyally consydered: whiche is also called the lawe of [reason]" [brackets in original], ST. GERMAN'S DOCTOR AND STUDENT, 91 SELDEN SOCIETY 13 (T. Plucknett and J. Barton eds. 1974), and continues "it may not be put away/ ne it is neuer chaungeable by no dyuerstie of place ne tyme . . . for natural rights are immutable . . . And therefore agaynst this lawe prescripcyon statute nor custome may not preuayle," *id.* at 15. As Thorne wrote, if in *Bonham* Coke meant to declare a statute void as beyond parliamentary authority, it is difficult to explain why he did not again cite Doctor and Student. DISCOURSE, *supra* note 91, at 86. Berger suggests that Coke "might well have felt no need to repeat citations for a point so generally accepted and so recently reiterated," and that "a seventeenth century lawyer might reasonably assume that Coke's 'against reason' [in *Bonham*] was the familiar version of 'against the law of nature' [in *Calvin*]." *Bonham*, *supra* note 91, at 529. Without attempting to assess the correctness of either point of view, Berger's article is an explanation of how *Bonham* was extended via *Calvin* in the United States. St. German is said to have eventually concluded that parliamentary authority was absolute. Abrams, *Kingship, Equity and Natural Law in Christopher St. German*, in ESSAYS IN HONOR OF FELIX FRANKFURTER 467, 478-79 (M. Forkosch ed. 1966).

165. GOUGH, *supra* note 91, at 31 n.1.

166. 77 Eng. Rep. at 393. "On the fact of it this looks like a theory that the law of nature was a fundamental law, and constituted a limit to parliament's legislative capacity." GOUGH, *supra* note 91, at 44-45.

167. ASHLEY, *supra* note 47, at 30-31.

168. The original myth was that Magna Carta was a popular constitutional document rather

often more potent and longer-lived than are the facts."¹⁶⁹

Whether the myth of immutability was invented by Coke or by his followers or enemies is not important here. My purpose is not the moral one of either legitimizing or bastardizing the American institution of judicial review and the standards whereby it is exercised. My purpose is the physiological one of trying to describe the birth process and showing how anomalous it is if tested by ordinary rules of interpretation. "It tickles the fancy that *Bonham's Case*, adapted and stretched as might be, rose up in America to avenge itself upon the parliamentary absolutism that had thrust it into limbo in England," and it also shows how a governing mind can be "stupified on its own hokum."¹⁷⁰ With

than one of feudal reaction. See Jenks, *The Myth of the Magna Carta*, 4 INDEPENDENT REV. 260 (1904). For other references to a myth of Magna Carta, see PALLISTER, *supra* note 47, at preface, 1, 3, 4; GOODHART, *supra* note 47, at 16, 22-24 (1966); C. HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 34 (2d ed. 1932) [hereinafter cited as HAINES].

169. GOODHART, *supra* note 47, at 4.

170. SMITH, *supra* note 89, at 491. *Bonham* survived in principle long after its reversal on the merits, see notes 88-92 *supra*, and its passage to oblivion was not wholly serene. It and *Calvin* were applied but not cited in *Day v. Savadge*, 80 Eng. Rep. 235, 237 (C.P. 1614):

[E]ven an Act of Parliament, made against natural equity, as to make a man Judge in his own case, is void in its self, for jura naturae sunt immutabilia, and they are leges legum.

It "bore strange fruit," Plucknett, *supra* note 108, at 53; in *Goddan v. Hales*, 89 Eng. Rep. 1050 (K.B. 1686), when applied by a rigged court to hold an act of parliament could not alter the king's prerogative. (The rigging is amusingly described in 2 J. CAMPBELL, THE LIVES OF THE CHIEF JUSTICES 85-87 (5th ed. 1868).) *Goddan* was followed by the Revolution of 1688, which should have obliterated *Bonham*, Plucknett, *supra* note 108, at 53-54, but it survived to be applied by Lord Holt, not an unqualified admirer of Coke, see *Groenvelt v. Burwell*, 91 Eng. Rep. 1202, 1212 (K.B. 1697); in *City of London v. Wood*, 88 Eng. Rep. 1592, 1602 (K.B. 1701), the court said:

[W]hat my Lord Coke says in *Dr. Bonham's Case* in his 8 Co. is far from any extravagancy . . . it is impossible that one should be Judge and party . . . and an Act of Parliament can do no wrong, though it may do several things that look pretty odd. . . .

Holt's opinion wavers so that within one paragraph it has been called both *Bonham's* "last hurrah" and "final flicker." SMITH, *supra* note 89, at 489; Plucknett, *supra* note 108, at 54, 55.

Bonham may have flickered out, but its embers continue to glow in law books, see, e.g., M. BACON, A NEW ABRIDGMENT OF THE LAW 635 ¶¶ 12, 13 (6th ed. 1793); 1 W. BLACKSTONE, COMMENTARIES 91 (1765) (cited as "8 Rep. 118"). By an old custom Coke's reports are referred to as "The Reports." *Id.* at 72. Plucknett, *supra* note 108, at 30.

Blackstone originally disparaged *Bonham* by saying that no power could control Parliament, but by his ninth edition he revived it a bit by saying that there was no power "in the ordinary forms of Constitution" that could control Parliament. Gray, Quincy, Appendix I 526 n.26 (Mass. 1865). Blackstone is so obscure that Jeremy Bentham said, "He speaks the word and all is darkness." C. EVERETT, INTRODUCTION TO J. BENTHAM, THE LIMITS OF JURISPRUDENCE DEFINED 19 (1945). And Goebel suggested that the "shifty passages of the tenth rule," the one Blackstone changed, had been drafted by a committee. GOEBEL, *supra* note 91, at 94. Gray conjectured "[p]erhaps the American Revolution forced itself . . . upon the notice of the learned commentator." Gray, Quincy, Appendix I 526 n.26 (Mass. 1865). Cf. Plucknett, *supra* note 108, at 60. Gray's conjecture is compatible with a form in which Blackstone became popular in America. 1 W. BLACKSTONE, COMMENTARIES 91 n.20 (St. G. Tucker ed. 1803) ("[A]ll acts of the legislature . . . which violate . . . [the] Constitution . . . are not binding upon any other branch of the federal or State government . . .") Tucker's is said to have been the most important of the early American treatises. J. HURST, THE GROWTH OF AMERICAN LAW 256-57 (1950).

Bonham continued to be "quoted by silly people", 2 J. CAMPBELL, LIVES OF THE LORD CHANCELLORS 383 (5th ed. 1868). *Day v. Savadge* was formally interred by *Lee v. Bude & Torrington Junction Ry. Co.*, L.R. 6 C.P. 576, 582 (1871). And in the case of the "railway enthusiast who bought for ten shillings the reversionary interest in twenty-two yards of a disused railway line," Wallington, *Sovereignty Regained*, 37 MOD. L. REV. 686 (1974), *Bonham* was recently disposed of

its extrapolations and extensions it was one of the sources, but not the only source of the problem that to this day remains intractable:

the interplay between the tradition of looking to fundamental documents for guarantees of men's liberties and the visions of a "higher law" from which those liberties spring. . . . [W]hether in conflict or in unison, the two traditions of natural law and constitutional law [became] part and parcel of life and law in America.¹⁷¹

COLONIAL SOURCES OF JUDICIAL REVIEW

The other sources of the present problem are more elusive than tracing a simple line of descent from *Bonham* or *Calvin* as precedents. They include religion, political philosophy, and the fact that colonial activities were subject to judicial review in England.¹⁷² A primary factor is that when the Puritans settled the Massachusetts Bay Colony in the 1620's, they assumed "that there were definite limits which the legislators were not free to transgress—this, in a word, was constitutionalism."¹⁷³ Put somewhat differently, the concept of Parliamentary sovereignty, which resulted from the Revolution of 1688 in England and extinguished *Bonham* as a practical authority there, fell into an uncongenial environment here, never flourished, and eventually died.¹⁷⁴

The Puritan preoccupation with the laws of God and their relation to the proper limits of political power "was never better stated than by John Cotton," a Puritan divine, writing of the necessity to limit the "liberty and authority: of magistrates and officers of the church and commonwealth:"

[F]or what ever transcendant power is given, it will certainly overrun those that give it, and those that receive it: There is a straine in a mans heart that will sometime or other runne out to excesse, unless the Lord restrain it, but it is not good to venture it: It is necessary therefore, that all power that is on earth be limited.¹⁷⁵

One source of limitation was the word of God. Thus the Massachusetts laws of 1648 provided in paraphrase of Magna Carta:

in principle if not by name. See *British Rys. Board v. Pickin*, [1974] A.C. 765, 782, 798. "[A] happy ending—at least for the orthodox constitutional lawyer." Wallington, *supra*, at 686.

171. Cf. HOWARD, *supra* note 26, at 52.

172. HAINES, *supra* note 168, at 227 n.48. "The history of judicial review in the colonies suggests many roots . . ." 2 LEGAL PAPERS OF JOHN ADAMS 121 n.44 (L. Wroth & H. Zobel eds. 1965).

173. 1 D. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 20 (Caravalle ed. 1958) [hereinafter cited as BOORSTIN].

174. Morgan, *Colonial Ideals of Parliamentary Power*, in *THE REINTERPRETATION OF THE AMERICAN REVOLUTION 1763-1789* 151 (J. Greene ed. 1968); SMITH, *supra* note 89, at 490-92.

175. BOORSTIN, *supra* note 173, at 30. See also BOORSTIN, *supra* note 173, at 28 (religious offenses made capital crimes).

That no mans life shall be taken away; no mans honour or good name shall be stayned . . . unless it be by the vertue or equity of some expresse law of the Country warranting the same established by a General Court & sufficiently published; or in case of the defect of a law in any particular case by the word of God. And in capital cases, or in cases concerning dismembring [sic] or banishment according to that word to be judged by the General Court.¹⁷⁶

The laws of the Plymouth Colony had a similar provision:

[N]o person in this Government shall be damaged in respect of Life, Limb, Liberty, Good name or Estate, under colour of Law, or countenance of Authority, but by virtue of equity of some expresse law of the General Court of this Colony, the known Law of God, or the good and equitable laws of our Nation suitable for us, being brought to Answer by due process thereof.¹⁷⁷

Invocation of the limiting laws of God was not necessarily innovative. English lawyers and judges had given the Bible "special cogency" as the source of law, but the Puritans were more literal in their reading of the Bible and more influenced by it than their fellow Englishmen.¹⁷⁸ Thus, in 1657, came the case Corwin described as the earliest example he had seen of "the proverb which may be regarded as the 'folk-origin,' so to speak, of American constitutional law, that 'the property of A cannot be given to B without A's consent.'" A magistrate held the town of Ipswich, Massachusetts, could not levy a tax to buy a dwelling to give in fee to its minister, and cited among his authorities the "fundamental law which God and nature has given to the people."¹⁷⁹ Corwin said the case was "specific evidence of Coke's influence" during the early colonial period.¹⁸⁰ But since neither he nor the other commentators indicate that the magistrate, who is said to have been "a

176. T. BARNES, *THE BOOK OF THE GENERAL LAWS AND LIBERTIES CONCERNING THE INHABITANTS OF MASSACHUSETTS* 1 (1975). This is a reprint of the "Code of 1648," *Id.* introduction at 7. The quoted portion, in turn, is a repetition of the preamble to the "Body of Liberties" of 1641. *Id.* introduction 7-8; MOTT, *supra* note 107, at 9-10.

177. J. CUSHING, *THE LAWS OF THE PILGRIMS* 2 (1977). This is a facsimile of "The Book of the General Laws of the Inhabitants of The Jurisdiction of New-Plimouth," 1672 & 1675. The quotation is from the printing of 1672. The reference to God was omitted in the revision of 1671 printed in 1685, by which time Plymouth was merged with Massachusetts Bay and other colonies into the Dominion of New England. *Id.* at xvii-xviii. The 1685 edition provides, "And none need suffer as aforesaid, without being brought to answer by due course and process of Law."

178. G. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS* 144, 145 (1960). The statement that the colonial administrators of the law "were compelled to fall back on the Bible or on popular conceptions of natural law" is not borne out by the more recent historians. The resort seems to have been a matter of choice rather than necessity. *But cf.* HAINES, *supra* note 168, at 38.

179. Corwin, *The Establishment of Judicial Review*, 9 MICH. L. REV. 102, 105 (1910); Corwin II, *supra* note 88, at 395; MOTT, *supra* note 107, at 115-17. The case is *Giddings v. Brown*, 2 Hutchinson Papers 1 (1865) reprinted in part in D. MCGOVNEY, *CASES ON CONSTITUTIONAL LAW* 8 (1930) and M. HOWE, *READINGS IN AMERICAN LEGAL HISTORY* 231 (1949). The quotation is from MCGOVNEY at 9 and HOWE at 232. MCGOVNEY, at 8 n.8, and HOWE at 240 n.7, but not Corwin, note that the Ipswich magistrate was overruled by the General Court at Boston.

180. Corwin II, *supra* note 88, at 394-95.

careful student and great admirer of the English common law,"¹⁸¹ cited Coke, another historian's view that the case exemplifies a conception of the New England colonists that the common law was "not at all binding *per se*, but in as far as expressive of the law of God to be used for purposes of illustration and guidance"¹⁸² seems just as likely. And what may be equally likely is that the action of the magistrate was a reflection of colonial constitutionalism—the assumption that there were definite limits which the legislature was not free to transgress.¹⁸³ The magistrate anticipated Locke by some forty years.¹⁸⁴

The linkage of the "immutable" natural law to common law and the law of God in the minds of the colonists must be emphasized. The sermon was a principle means of affirming the values of the community, and "[t]he New England meeting-house, like the synagogue on which it was consciously modeled, was primarily a place of instruction. . . . [T]he sermon was the central event in the meeting-house."¹⁸⁵ The Puritan sermon is said to have been "more like a lawyer's brief than a work of art."¹⁸⁶ And John Milton, arguing that one parliament could not bind its successors, complained of hearing "mooting and law lectures from the pulpit."¹⁸⁷ Mrs. Bowen gave a colorful account of the sort of sermons to which young John Adams was exposed.

How were Englishmen governed, Mr. Briant [the preacher] demanded, leaning forward, his thin young hands grasping the pulpit rail. By His Majesty George the Second—and long might he reign! By the will of Parliament, yes. But above and beyond this was another, greater will, another law. *God's law—natural law*, the law of the people, granted them by heaven. Alone among governments of the world, the British constitution was founded not on the hereditary power of kings, but on a compact made originally between God and Moses or between God and man. This compact was the glorious inheritance of Englishmen. This was the people's law! And it was higher than parliaments, higher than kings. If Parliament and King

181. Reinsch, *The English Common Law in the Early American Colonies*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367, 376 (1907). Boorstin lists Reinsch among the few important and competent works on the history of American lawyers and private law. BOORSTIN, *supra* note 173, at 399.

182. Reinsch, *The English Common Law in the Early American Colonies*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 377 (1907).

183. BOORSTIN, *supra* note 173, at 20.

184. In his so-called Second Treatise of Government, published in 1698, Locke wrote: "138. Thirdly, The Supream Power cannot take from any Man any part of his Property without his own consent." J. LOCKE, TWO TREATISES OF GOVERNMENT 406 (P. Laslett rev. ed. 1963).

185. BOORSTIN, *supra* note 173, at 12; see G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 88-93, 118-19 (1960). Corwin II, *supra* note 88, at 395-96; BAILYN, *supra* note 89, at 27. See generally BOORSTIN, *supra* note 173, at 10-19.

186. BOORSTIN, *supra* note 173, at 11.

187. GOUGH, *supra* note 91, at 138.

did not obey, men had a right to rebel.¹⁸⁸

Added to the ideas of a limited government derived from the laws of God were those the colonists took from John Locke. From Corwin, one might get the idea that Locke was almost the exclusive source of colonial thinking about natural rights or liberties and the social compact,¹⁸⁹ but it is now clear that his influence was not unique.¹⁹⁰

Locke's thesis was that there need be no sovereign government, uncontrolled by law, in a state. All men are born with certain natural rights which they hold as human beings and not as subjects of the state. It is to protect these rights that the state is created by the consent of the men who compose it. The power of the state need not and ought not to be unlimited; it is held in trust for the people and should be used only for their benefit.¹⁹¹

Indeed, in the decade or so preceding the American Revolution, colonial thinking had progressed beyond Locke's conception of the people as a check on government and the traditional view that law was a command prescribed by a superior (the sovereign) to an inferior (the subject), to the view that the binding power of law flowed only from the continuous assent of the subjects of law,¹⁹² a view wrapped up in the slogan, "[N]o taxation without representation."¹⁹³ This rallying cry of revolution may have been doubtfully derived from Magna Carta's provisions on scutage and aids,¹⁹⁴ but there is no doubt that to Americans it connoted a limit on Parliament's authority over them.

Another contributor to the America idea of judicial review of legislation was the practice during the colonial period of reviewing cases before the Privy Council sitting as a judicial body, as distinguished from the practice of presenting colonial statutes to that body for its administrative disallowance of such statutes for lack of conformity to the laws of England.¹⁹⁵ The policy influenced American legislation, although the procedure of such appeals did not since it was so esoteric and remote.¹⁹⁶ The leading case was *Winthrop v. Lechemere* in 1727-28

188. C. BOWEN, JOHN ADAMS AND THE AMERICAN REVOLUTION 31-32 (1950).

189. Corwin II, *supra* note 88, at 389-94.

190. BAILYN, *supra* note 89, at 24-36.

191. GOODHART, *supra* note 47, at 53-54.

192. BAILYN, *supra* note 89, at 98.

193. PALLISTER, *supra* note 47, at 56-57; GOODHART, *supra* note 47, at 56.

194. The reference is to chapters 12 and 14 of the 1215 version of Magna Carta. These sections were omitted from the version of Henry III (1225), which is the definitive form. McKECHNIE, *supra* note 47, at 497 n.2. "[E]nthusiasts found in it [c.12] the modern doctrine that the Crown can impose no burden without the consent of Parliament." McKECHNIE, *supra* note 47, at 232. On the omissions, see McKECHNIE, *supra* note 47, at 233; 255.

195. The most readable account found is McGovney, *The British Origin of the Review of Legislation*, 93 U. PA. L. REV. 1 (1944). More extensive accounts are in HAINES, *supra* note 166, at 44-66 and J. SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 523-664 (1950).

196. Goebel, *supra* note 91, at 42.

invalidating a Connecticut statute because it established rules of intestate succession at variance with the common law of primogeniture. The case, as such, was never printed, but the "determination was given currency beyond even the confines of the [legal] profession for it was noticed in a mid-eighteenth century American history book and so acquired the quality of a notable event, which indeed it was."¹⁹⁷ Its persistence as a basis for acceptance of the judicial review of statutes is also illustrated by a discussion between William Samuel Johnson, the Connecticut agent in England, and Lord Hillsborough in 1768. Johnson clearly understood the concept that a court could declare a statute unconstitutional. When he was a Connecticut delegate to the Constitutional Convention in 1787, "it is very significant that it was he who moved in the Convention to insert the words 'this Constitution' before the word[s] 'the laws' in what is now Article III, Section 2, of the Constitution. . . ."¹⁹⁸ The effect of Johnson's change "was to place beyond question the role of the Supreme Court as arbiter of the Constitution."¹⁹⁹ Thus the influence of *Winthrop v. Lechemere* should not be minimized²⁰⁰ even though it may not be "the one clear-cut precedent for the American doctrine of judicial review."²⁰¹

THE REVIVAL OF *BONHAM* BY AMERICAN REVOLUTIONARIES

Despite the attention lavished on *Bonham*, even relatively recently, the effort to derive from it and Coke "Justice Marshall's concept of the power of judicial review . . ."²⁰² and its laudation as the "single most important source of the concept of judicial review,"²⁰³ it is remarkable how little attention was paid to *Bonham* in colonial times. Corwin attributes *Giddings v. Brown* to Coke's influence,²⁰⁴ but the magistrate

197. Goebel, *supra* note 91, at 78.

198. McGovney, *The British Origin of the Review of Legislation*, 93 U. PA. L. REV. 1, 35 (1944).

199. Goebel, *supra* note 91, at 241.

200. Corwin, *The Establishment of Judicial Review*, 9 MICH. L. REV. 102, 103 (1905), contended that the advocates of judicial review knew nothing about *Winthrop v. Lechemere*. McGovney shows he was wrong. "Obviously the political thinking of a people which had abided for eighty and more years under a scheme of government that maintained a standard to which law-making must conform was to be thereby affected." 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 283 (Goebel ed. 1964).

James B. Thayer, writing in the late nineteenth century, [*The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 130-31 (1893)] thought this colonial experience [living under written charters enforced by various means including appeals to the Privy Council] central to the later adoption of the constitutional doctrine of judicial review.

Howard, *supra* note 26, at 279.

201. Goebel, *supra* note 91, at 79.

202. Smith, *Marbury v. Madison, Lord Coke and Dr. Bonham: Relics of the Past Guidelines for the Present—Judicial Review in Transition?*, 2 U. PUGET SOUND L. REV. 255, 267 (1979).

203. Smith, *Dr. Bonham's Case and the Modern Significance of Lord Coke's Influence*, 41 WASH. L. REV. 297, 313 (1966).

204. Corwin II, *supra* note 88, at 394-95.

cited Dalton's *Country Justice* and Finch's *Law*,²⁰⁵ the available editions of which contain no reference to *Bonham*. McGovney says that after *Giddings*, the next recorded appearance of Coke's dictum in colonial courts was in James Otis's argument in the *Writs of Assistance Case*,²⁰⁶ which will be discussed hereafter. This inattention is all the more remarkable considering the esteem in which the colonials held Coke.²⁰⁷ A partial set of Coke's Reports came over on the *Mayflower*.²⁰⁸ In 1647, the General Court of Massachusetts Bay ordered, among other of his books, two sets of his reports and his work on Magna Carta, i.e., the *Second Institute*, "to the end we may have the better light for making and proceeding about laws."²⁰⁹ In the colonies "the cornerstone of a legal education, however acquired, was Sir Edward Coke's works."²¹⁰ Thomas Jefferson, for example, mastered Coke, admired him, said of him, "a sounder Whig never wrote, nor profounder learning in the orthodox doctrines of British liberties,"²¹¹ and preferred him to "the honeyed Mansfieldism of Blackstone." Indeed he described "Blackstone lawyers" as "ephemeral insects of the law."²¹² What the colonists could have derived from Coke and a literal reading of *Bonham's Case* and *Calvin's Case* was that the courts could declare that an act violative of the common law was void, and that an act contrary to Magna Carta was void, disregarding Coke's qualifications with regard to the "holden for none" clause applying only to "former Statutes." Thus the cases and the *Institutes* may have contributed to the concept of a "superstatute, a constitution placing fundamental liberties beyond the reach of Parliament as well as the King and his ministers."²¹³ But the quantity of the contribution is questionable.

The documented revival of *Bonham's Case* and *Day v. Savadge* did not occur until their sesquicentennial when James Otis relied on them in his argument in *Province v. Paxton*, more commonly known as *Paxton's Case* or the *Writs of Assistance Case* in 1761.²¹⁴ James Otis (1725-

205. READINGS IN AMERICAN LEGAL HISTORY 234 n.2, 236 n.3, 237 n.4, 5 (Howe ed. 1949).

206. McGovney, *The British Origin of Judicial Review of Legislation*, 93 U. PA. L. REV. 1, 4-5 (1944). Other cases are cited in MOTT, *supra* note 107, at 91 n.19 but McGovney and Corwin disregarded them, perhaps because they are inconsequential. See G. GILMORE, *THE AGES OF AMERICAN LAW* 8-10 (1977).

207. *E.g.*, *Payton v. New York*, 445 U.S. 573, 593-94 (1980).

208. S. THORNE, *SIR EDWARD COKE 1552-1952* 1 (1957).

209. BOORSTIN, *supra* note 173, at 28; G. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS* 135 (1960), suggests they were for use in drafting the "Code of 1648." See note 176 *supra*.

210. HOWARD, *supra* note 26, at 130.

211. BOORSTIN, *supra* note 173, at 203.

212. Corwin II, *supra* note 88, at 405 n.127.

213. HOWARD, *supra* note 26, at 121-22, 18-19.

214. For a comprehensive and delightful account, see SMITH, *supra* note 89. For a sparkling review, see Mann, Book Review, 11 CONN. L. REV. 353 (1979).

83) was a Boston lawyer, classical scholar and, according to John Adams, "a great master of the laws of nature and of nations,"²¹⁵ who, to vindicate a family political disappointment "most enthusiastically and frenzically" turned on the administration in its efforts to enforce the Navigation Acts.²¹⁶ John Adams, then a fledgling lawyer, attended the arguments and took copious notes, which were edited by Horace Gray, later to be a Justice of the United States Supreme Court, but were not published until nearly a hundred years later in 1865. Thus we have the curious spectacle of a lawyer relying on cases almost a century and a half old and that reliance not being made commonly available to the bar until another century had passed. Otis cited *Bonham*, and Magna Carta, chapter 29, *Day v. Savadge*, and *City of London v. Wood*.²¹⁷

Otis, while he recognized the jurisdiction of Parliament over the Colonies, denied that it was the final arbiter of the justice and constitutionality of its own acts; and relying upon the words of the greatest English lawyers, and putting out of sight the circumstances under which they were uttered, contended that the validity of statutes must be judged by the Courts of Justice. Thus, Otis foreshadowed the principle of American constitutional law, that it is the duty of the judiciary to declare unconstitutional statutes void.²¹⁸ Otis's words, as noted by John Adams, were:

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 [for a writ of assistance], it would be void. The Executive Courts must pass such Acts into disuse—8 Rep. 118 [*Bonham's Case*] from Viner.—Reason of ye Com Law to control an Act of Parliament.²¹⁹

Otis's attack on the writs of assistance did not receive much publicity,²²⁰ but it was repeated and amplified in his pamphlet, *The Rights of the British Colonies Asserted and Proved*, published in 1764. There he quoted from Locke, denying that Parliament was omnipotent: "The Parliament cannot make 2 and 2, 5: omnipotency cannot do it," a paraphrase of Grotius' proposition that the law of nature is the Law of God and a Law to God,²²¹ and consolidated his sentiments.

215. BAILYN, *supra* note 89, at 410-11.

216. Quincy iv (Mass. 1865).

217. See Quincy 474, 483-85, 520-36 (Mass. 1865).

218. Quincy 520-21 (Appendix I, Gray's notes) (Mass. 1865).

219. Quincy, Appendix I 474 (Mass. 1865). "Executive Courts" means courts of justice, which "execute" the laws as distinguished from "legislative courts" such as the General Court, which make them. 2 LEGAL PAPERS OF JOHN ADAMS 128 (L. Wroth & H. Zobel ed. 1965).

220. Lovejoy, "Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1764-1776," in THE REINTERPRETATION OF THE AMERICAN REVOLUTION 203 (J. Greene ed. 1968).

221. BAILYN, *supra* note 89, at 434, 454; Corwin II, *supra* note 88, at 381 (quoting Grotius); A. D'ENTREVES, NATURAL LAW 56 (2d ed. 1970).

'Tis hoped it will not be considered as a new doctrine that even the authority of the Parliament of *Great Britain* is circumscribed by certain bounds which if exceeded their acts become those of mere *power* without *right*, and consequently void. The judges of England have declared in favor of these sentiments when they expressly declare that *acts of Parliament against natural equity are void*. That *acts against the fundamental principles of the British constitution are void*. This doctrine is agreeable to the law of nature and nations, and to the divine dictates of natural and revealed religion.²²²

Bailyn tells us,

Of all the pronouncements issued by the colonists in the agitated year between the passage of the Sugar Act and that of the Stamp Act (April 1764-March 1765) none was more widely known or commented upon than James Otis's *The Rights of the British Colonies Asserted and Proved*.²²³

It was cited with approbation by Lord Chatham, a former Chief Justice of England, in his argument in the House of Lords against the Stamp Act. Although Chatham's repudiation of parliamentary sovereignty has been characterized as a statement of moral principle rather than of legal right,²²⁴ it shows the currency, if not the acceptance, of Otis's theses.

Colonial adherence to Magna Carta as a generic term for documents of constitutional significance and a symbol and reminder of the principles binding on government²²⁵ was demonstrated shortly after Otis's pamphlet. In *Sewall v. Hancock*,²²⁶ a prosecution against John Hancock for smuggling, John Adams argued for the defense that allowing the prosecution to proceed before a single judge in admiralty violated the right to jury trial provided by Magna Carta. This form of prosecution had been provided by statute of Parliament because "it was a truism that no jury could be found to convict for violation of the Acts of Trade."²²⁷ Adams did not argue that the statute was void because it violated Magna Carta, although others are said to have done so. But he did refer to Coke's *Second Institute* at length as an example of the dangers of abridging the right to jury trial "which if properly attended might be sufficient even to make a Parliament tremble."²²⁸ Adams' ar-

222. BAILYN, *supra* note 89, at 476-77. Otis cited *Bonham* and the subsequent cases.

223. BAILYN, *supra* note 89, at 409.

224. GOUGH, *supra* note 91, at 193-94. Chatham was called a "political heretic." PALLISTER, *supra* note 47, at 55.

225. Corwin II, *supra* note 88, at 394.

226. 2 LEGAL PAPERS OF JOHN ADAMS 173 (L. Wroth & H. Zobel ed. 1965).

227. *Id.* at 188.

228. *Id.* at 204. PALLISTER, *supra* note 47, at 47 offers this explanation of Coke's view: Fundamental law is thus not so much law that is unchangeable but rather law that it is dangerous to change; as Coke put it: 'so dangerous a thing it is to shake or alter any of

gument was digested and sent to the Massachusetts agent in London, Benjamin Franklin.²²⁹ It had been anticipated by the Massachusetts Assembly when it declared the Stamp Act invalid, "against Magna Charta and the natural rights of Englishmen, and therefore, according to the Lord Coke, null and void."²³⁰ It remains as an example of the times showing how legal argument at the courtroom level could be manipulated into political argument over the nature of government.²³¹

JUDICIAL REVIEW PRIOR TO *MARBURY V. MADISON*

A natural inference from the religious, philosophical, and administrative experience during colonial times is that between the Revolution and the Constitution, a coherent and accessible body of precedent would have developed on the standards whereby judicial review of legislation was to be applied. But for at least two reasons what seems natural did not occur. The first reason is simply mechanical—the absence of published reports. The second is that the cases on judicial review that did achieve some relatively broad publicity were directed more to the legitimacy of the institution than to the standards of review.

The inaccessibility of early American materials troubled even Chancellor Kent, who wrote at the end of the eighteenth century:

When I came to the bench [1798] there were no reports or State precedents. The opinions from the bench were delivered *ore tenus*. We had no law of our own, & nobody knew what it was. I first introduced a thorough examination of cases & written opinions.²³²

Kent has been corroborated by more recent historians who say variously of the period, that the law "rested upon oral tradition—it was . . . a memory jurisprudence,"²³³ and without reports "there was nothing which could rationally be called a legal system. . . . We sloughed off our two hundred years of colonial tutelage as if they had never been."²³⁴ Even those who have attempted to use the whisps and frag-

the rules of fundamental points of the common law, which in truth are the main pillars and supports of the fabric of the commonwealth.'

The quotation is from 2 E. COKE, INSTITUTES 74 (1642), on the impropriety of coroners and sheriffs accepting rewards from private persons for the performance of their offices. This is another example of lifting Cokean sentiments out of their context and, conversely, of Coke's propensity to erupt with a portentous pontification from a limited subject.

229. Lovejoy, "Rights Imply Equality:" *The Case Against Admiralty Jurisdiction in America, 1764-1776*, in *THE REINTERPRETATION OF THE AMERICAN REVOLUTION* 104 n.61 (J. Greene ed. 1968).

230. C. BOWEN, *THE LION AND THE THRONE* 315-16 (1957).

231. 2 *LEGAL PAPERS OF JOHN ADAMS* 193 (L. Wroth & H. Zobel ed. 1965).

232. Kent, *An American Law Student of a Hundred Years Ago*, in 1 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 842-43 (1907).

233. Goebel, *supra* note 91, at 112.

234. G. GILMORE, *THE AGES OF AMERICAN LAW* 9, 10 (1977).

ments antedating the Constitution as real or supposed precedents acknowledge the danger of emphasizing them, because "frequently the opinions which appear so important today are unknown until brought to light by an enthusiastic student,"²³⁵ and that they can be discovered only by "ransacking" the records of the period.²³⁶

The handful of cases on judicial review as an institution have been collected and evaluated by various scholars.²³⁷ As a whole they are not instructive on the standards of review because they involved specifics of various state constitutions such as the right to trial by jury and, presaging *Marbury v. Madison*, interference with the structure or jurisdiction of the courts. They are interesting in a broader sense in that the circumstances surrounding them can be used to document popular hostility to the institution and initial acceptance of the idea of legislative supremacy.²³⁸ Two of the better known of these cases illustrate the point. *Rutgers v. Waddington*²³⁹ involved the incompatibility of a New York statute, The Trespass Act, a pro-patriot relief measure, to the treaty of peace with England. Although Alexander Hamilton, for the royalist defendants, invoked the law of nations and *Bonham's Case*,²⁴⁰ he achieved only a partial success. The court instead resorted to a process of interpretation to give Hamilton's clients some protection but disclaimed any general authority to override the legislature and paraphrased Blackstone's tenth rule:

The supremacy of the Legislature need not be called into question; if they think fit *positively* to enact a law, there is no power which can controul them. When the main object of such a law is clearly expressed, and the intention manifest, the Judges are not at liberty, although it appears to them to be *unreasonable*, to reject it: for this were to set the *judicial* above the legislative, which would be subversive of all government.²⁴¹

Despite this deference to the Legislature, popular resentment of the opinion nearly cost the judges their offices and produced angry public reaction to the idea of judicial control of legislation.²⁴²

235. HAINES, *supra* note 168, at 94.

236. CROSSKEY, *supra* note 89, at 943.

237. See generally Goebel, *supra* note 91, at 125-42; CROSSKEY, *supra* note 89, at 938-75; HAINES, *supra* note 168, at 88-121; see also *Law of the Land*, *supra* note 129.

238. GOEBEL, *supra* note 91, at 142.

239. GOEBEL, *supra* note 91, at 132; 1 LAW PRACTICE OF ALEXANDER HAMILTON 282-419 (J. Goebel ed. 1964).

240. 1 LAW PRACTICE OF ALEXANDER HAMILTON 357 (J. Goebel ed. 1964). Hamilton also cited *The Lord Cromwell's Case*, 8 Co. Rep. 13a, 75 Eng. Rep. 877, 880 (K.B. 1557) saying that a private act "against law and reason" was void.

241. 1 LAW PRACTICE OF ALEXANDER HAMILTON 415 (J. Goebel ed. 1964). See also *id.* at 309.

242. *Id.* at 312-15. See also Goebel, *supra* note 91, at 137. Confronted with a hostile public

Another example is *Trevett v. Weeden*,²⁴³ according to Cooley, "the first case in which a legislative enactment was declared unconstitutional and void by the courts of a State."²⁴⁴ Rhode Island had adopted a paper money policy enforced by statutes making it a crime, summarily punishable without jury trial, to refuse to accept the virtually worthless paper currency to satisfy antecedent debts. The popularity of the policy was summarized in a jingle:

Bankrupts their creditors with rage pursue;
No stop, no mercy from the debtor crew.²⁴⁵

The court refused to take jurisdiction of an action against a recalcitrant butcher, Weeden, who refused to accept paper money. The court found the denial of jury trial inconsistent with the "law of the land" clause in the Rhode Island charter. (Rhode Island had not yet adopted a constitution.) In effect, it held the "Enforcing Act" unconstitutional without actually declaring it so. This result cost four of the five judges their offices; the Legislature refused to reelect them.²⁴⁶

Thayer wrote that the reactions to *Trevett v. Weeden* and *Rutgers v. Waddington* seemed to indicate a public impression "that the change from colonial dependence to independence had made the legislature the substitute for Parliament, with a like omnipotence."²⁴⁷ Crosskey, whose "eccentric studies"²⁴⁸ must be read with circumspection, minimized the importance of these cases but inferred from others like them that it is "not to be doubted" they were known to the members of the Convention of 1787 and that the members would, therefore, have ex-

and a threat of appeal *Waddington* settled with Mrs. Rutgers and the case was soon "entirely forgotten." 1 J. THAYER, *CASES ON CONSTITUTIONAL LAW* 73 n.1 (1895).

243. GOEBEL, *supra* note 91, at 137-41; CROSSKEY, *supra* note 89, at 965-68; HAINES, *supra* note 168, at 105-12. The case was not reported. The account of it was prepared by James M. Varnum, defense counsel, and consists mostly of his brief. For references, see HAINES, *supra* note 168, at 105. Varnum is said to have quoted Coke in *Bonham* via Bacon's Abridgment. B. COXE, *JUDICIAL POWERS AND UNCONSTITUTIONAL LEGISLATION* 177, 243 (1893).

244. T. COOLEY, *CONSTITUTIONAL LIMITATIONS* 26 n.1 (1868). Cooley later added *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787), disallowing a denial of jury trial, as the second holding of unconstitutionality. T. COOLEY, *CONSTITUTIONAL LIMITATIONS* 36 n.1 (5th ed. 1883). Despite his general disagreement with other writers, Crosskey agrees that *Bayard v. Singleton* is a "supportive precedent" for judicial review. CROSSKEY, *supra* note 89, at 974. Cooley gives an instance of impeachment of judges in Ohio in 1808 for refusing to enforce an unconstitutional enactment. T. COOLEY, *CONSTITUTIONAL LIMITATIONS* 194 n.1 (5th ed. 1883).

245. A. NEVINS & H. COMMAGER, *A SHORT HISTORY OF THE UNITED STATES* 110 (1956).

246. GOEBEL, *supra* note 91, at 141; T. COOLEY, *CONSTITUTIONAL LIMITATIONS* 194 n.1 (5th ed. 1883).

247. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 132 (1893). ("This paper is a singularly important piece of American legal scholarship. . . ." A. BICKEL, *THE LEAST DANGEROUS BRANCH* 35 (1962).) See also Farrand, *The First Hayburn Case, 1792*, 13 AM. HIST. REV. 281, 285 (1908).

248. L. Levy, *Judicial Review History and Democracy in JUDGEMENTS*, *ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 26 (1972). "Most constitutional law experts, . . . in a series of savage reviews, condemned Professor Crosskey in the ninth circle of hell." G. GILMORE, *THE AGES OF AMERICAN LAW* 117 n.3 (1977).

pressly provided for judicial review in the Constitution if they desired the Supreme Court to have that power.²⁴⁹ But it seems equally arguable that since the power had already been exercised, the members would have expressly denied it if they desired the Court not to have it.

Although some argumentative reference was made to *Bonham's Case*, it should not be over-emphasized. It was but one element "in the complex corpus of ideas and usages from which a distinctively native doctrine of control over legislation eventually emerged."²⁵⁰ *Bonham's* hold on American constitutional commentary may be due to the publicity James Bradley Thayer gave to Justice Horace Gray's notes in Quincy's Reports, published in 1865, rather than to demonstrable evidence of its effect in American courts. After all, John Marshall did not cite *Bonham* in *Marbury v. Madison*.²⁵¹

Marshall's failure to cite *Bonham* in *Marbury* can be explained on the facile ground that *Marbury* involved a specific provision of the written constitution, article III, but *Bonham* involved only a general unwritten maxim which might not have constitutional significance, and so *Bonham* was irrelevant. But this cursory dismissal is not enough when one considers statements such as "[i]n it [*Marbury*] the Chief Justice asserted Coke's theory of judicial supremacy,"²⁵² and "Justice Marshall's concept of the power of judicial review [is] derived from Lord Coke and *Bonham's Case*."²⁵³ Counterpoised to these are those of Sir Henry Maine that the supreme authority of courts in America is "not only the most interesting but virtually unique creation of the founts of the Constitution. . . . There is no precedent for it, either in the ancient or modern world,"²⁵⁴ and of Senator Beveridge, Marshall's "official biographer," that the principle of judicial review "is wholly and exclusively American. It is America's original contribution to the science of law."²⁵⁵ Wherever Marshall got the concept from, it is clear that he had it well in mind at least fifteen years before *Marbury*. Speaking at the Virginia Convention on the adoption of the Constitution he said on June 20, 1788:

Has the government of the United States power to make laws on

249. CROSSKEY, *supra* note 91, at 965, 968, 973-74.

250. Goebel, *supra* note 91, at 93. See also CROSSKEY, *supra* note 89, at 941. "[T]he importance of Coke, while undeniable, ought not to be exaggerated."

251. 5 U.S. (1 Cranch) 137 (1803).

252. HAINES, *supra* note 168, at 202.

253. Smith, *Marbury v. Madison, Lord Coke and Dr. Bonham: Relics of the Past Guidelines for the Present—Judicial Review in Transition*, 2 U. PUGET SOUND L. REV. 255, 267 (1979).

254. H. MAINE, POPULAR GOVERNMENT 217 (1886), quoted in HAINES, *supra* note 168, at 24 n.39. Haines said Maine exaggerated.

255. 3 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 142 (1919) quoted in HOWARD, *supra* note 26, at 277. Howard chides Beveridge with overemphasis of exclusivity and originality. HOWARD, *supra* note 26, at 277-78.

every subject? . . . Can they make laws affecting the mode of transferring property, or contracts or claims, between citizens of the same state? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void.²⁵⁶

This seems more consonant with an interpretation of the Supremacy Clause²⁵⁷ than an extrapolation from the natural rights attributed to *Bonham*. It is of course true that Kent did laud Coke in *Bonham*,²⁵⁸ but this may be an *ex post facto* rationalization and justification of the doctrine of judicial review in face of the "rising opposition to the theory of judicial control over legislation."²⁵⁹ And it is also true that Marshall himself from time to time expressed sentiments in favor of natural law. But the most that can be said with safety about *Bonham* and its associates and progeny is that in substance Coke's theory was more consistent with Parliamentary supremacy than judicial supremacy; that Parliamentary supremacy had been radically rejected in America, really reducing *Bonham*, which had no radical overtones, to "dead wood on both sides of the Atlantic,"²⁶⁰ and that the American view may well be an indigenous hybrid of a variety of elements of American political thought, some of which originated elsewhere and all uniquely compounded here.²⁶¹

256. 3 J. ELLIOTT, DEBATES IN THE SEVERAL STATE CONVENTIONS 553 (2d ed. 1836-45). Marshall has been accused of using *Marbury* to vindicate his own political ideas, HAINES, *supra* note 168, at 199-203, and of begging the question "who should be empowered to decide that the act is repugnant, Congress or the Court?" A. BICKEL, THE LEAST DANGEROUS BRANCH 3 (1962); and with an act of "usurpation," *id.* at 15.

257. See, e.g., Goebel, *supra* note 91, at 241; "The effect of this [the Supremacy Clause] was to place beyond question the role of the Supreme Court as arbiter of the Constitution." A. BICKEL, THE LEAST DANGEROUS BRANCH 15 (1962):

[I]t is as clear as such matters can be that the Framers of the Constitution specifically, if tacitly, expected that the federal courts would assume a power—of whatever exact dimensions—to pass on the constitutionality of actions of the Congress and the President, as well as of the several states.

St. George Tucker relied on the status of the state constitution as "the supreme law of the land" to sustain the institution of judicial review in Virginia. *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 79 (1793).

258. See generally 1 J. KENT, COMMENTARIES ON AMERICAN LAW 420 (1826). Gray thought Kent praised "a boldness Coke never assumed." Quincy (Mass.), Appendix I at 524 n.23 (1865).

259. HAINES, *supra* note 168, at 202 and 232 *passim*.

260. See SMITH, *supra* note 89, at 492. But see SMITH, *supra* note 89, at 358.

261. For an example of the express rejection of legislative omnipotence and rejection of the analogy to Parliament, see *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 48 (Henry, J.), 60 (Tyler, J.), (1793). Tucker, J., called the idea that the legislature was the sole judge of the constitutionality of its acts a "sophism [which] could never have obtained a moment's credit with the world, had such a thing as a written Constitution existed before the American revolution." *Id.* at 77. For Tucker's repudiation of Blackstone's theory of sovereignty in Parliament rather than in the people, see Cover, Book Review, 70 COLUM. L. REV. 1475, 1477-79 (1970). See note 170 *supra*. *Bonham's Case* is not cited in *Kemper v. Hawkins*, a circumstance supporting the inference that judicial review was a newly created rather than a derived institution.

CONCLUSION: ANTICIPATING MORE ON THE STANDARDS OF JUDICIAL REVIEW

The institution of judicial review was not accepted without question. In Vermont it was denounced as "anti-republican," and in Ohio in 1808 judges were impeached for holding legislative acts unconstitutional.²⁶² As late as 1825, John Bannister Gibson, whom Roscoe Pound considered one of our ten greatest judges,²⁶³ wrote in dissent, "It is the business of the judiciary to interpret the laws, not scan the authority of the lawgiver."²⁶⁴ But Gibson succumbed to the course of events and twenty years later changed his opinion.²⁶⁵ Like it or not, the institution is with us, and arguments over its legitimacy, no matter how ingenious or historically supportable, are academic and tangential to the issue at hand, which is not the authority to exercise the power but the development of the standards to be followed in its exercise. On the latter point there is suprisingly little discussion. As late as 1979, Raoul Berger wrote that the pre-1787 cases "have never been examined for their due process implications."²⁶⁶ Berger then examined some precedents both before and after 1787 and concluded that the extended use of either "law of the land" or "due process of law" is historically unsupported. In his vigorous terms, "by dint of repetition, what was manifest [judicial] usurpation became clothed in respectability."²⁶⁷ In a future essay I hope to review some of those same cases to show how this respectability was achieved.

262. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 133-34 (1893).

263. See B. SCHWARTZ, *THE LAW IN AMERICA* 76-77 (1974). Gibson was very versatile. "He was probably the only major judge who designed his own false teeth." L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 120 (1973).

264. *Eakin v. Raub*, 12 Serg. & Rowl. 330 (Pa. 1825) (Gibson, J., dissenting). See generally HAINES, *supra* note 168, at 272-84.

265. See *Norris v. Clymer*, 2 Pa. 277, 281 (1845). "The late [Constitutional] Convention by their silence sanctioned the pretensions of the courts to deal freely with the acts of the legislature. . . ."

266. *Law of the Land*, *supra* note 129, at 2.

267. *Law of the Land*, *supra* note 129, at 30.

