Introduction

Most historians trace the immediate origins of American judicial review to a series of half a dozen cases that arose in half a dozen states during the 1780s. In these cases, lawyers began to argue that such and such a state statute was unconstitutional and that the judges should not consider it law in reaching their decisions. In several of these cases, the judges agreed and proceeded to take what a number of contemporaries regarded as the unprecedented step of "dispensing with"[1] the challenged act. Many historians believe that before these cases arose, no established tradition in the Anglo/American constitutional world authorized judges to "do away" with the duly enacted laws of their own legislatures.[2] By the mid-eighteenth century, it was largely taken for granted that English judges did not possess the authority to disregard acts of Parliament in deciding cases, and the same held true for American judges with respect to the laws their own legislatures had passed, although that proposition was occasionally tested, as Chapter 1 will make clear. After Independence, not a single one of the written constitutions the states adopted expressly

[1] The term "judicial review" was not used during the eighteenth century. Edward Corwin seems to have coined the expression at the beginning of the twentieth century, see Mary S. Bilder, "Idea or Practice: A Brief Historiography of Judicial Review" (2008) 20 *The Journal of Policy History* 6, 16. The phrases "dispense with laws" and "do away with laws" were commonly used during the early period to describe the judges' actions.

[2] This type of review is often referred to as "horizontal," in that it involves review of the laws a legislature has passed by one of the nonlegislative branches in the same government, and is normally contrasted to "vertical" review, which involves review by agents of a "superior" government of the laws a subordinate jurisdiction has passed. An example of "vertical" review is to be found in British Privy Council review of the laws of American colonial governments. The significance of the distinction is discussed below.

authorized judges to review and set aside the statutes their legislatures had passed.

How then were American judges able to acquire such an "alarming"[3] power? The answer to that question has not been all that obvious. The early cases themselves failed to provide clear-cut answers. They arose in a number of different states, more or less haphazardly (it seemed), and had little apparent connection to one another. And they posed other problems for historians. Most states had not yet begun to publish official court reports, and a number of the early cases had to be reconstructed from more or less fragmentary manuscript materials or from accounts published years, even decades, later. As a result, over the last century and more, historians have repeatedly returned to the question, producing an enormous body of scholarly literature, too large to cite here, in an effort to develop some clear, comprehensive picture of how precisely American judicial review came into being. The subject has continued to engage historians largely because none of the resulting accounts seems to have proven entirely satisfactory; none has managed to produce a consensus among historians about how the emergence and development of early American judicial review should properly be understood. One recent article has described this state of affairs as "Judicial Review's Uncertain Origins."[4]

Over the last several decades, historians have continued to seek a clearer picture of the practice's initial development. During that time, they have produced an additional large body of scholarship that describes the early history of American judicial review in great detail. This literature shows that the 1780s and 1790s were crucial decades in judicial review's formation and dissemination. For all that this work has added to our knowledge of the practice in the early period, however, it does not appear to have provided a definitive resolution of the larger problem.

The two major books that have been published on the subject since 2000 have both, in their different ways, attempted to produce

[3] Ironically, this is the word used by one of the leading early proponents of judicial review, James Iredell, to characterize the novel practice in 1787 (see letter from James Iredell to Richard Spaight, August 26, 1787) in Griffith McRee (ed.), *Life and Correspondence of James Iredell* (1857, repr. New York, Peter Smith, 1949), II, 176. In a similar vein, another early supporter of judicial review, Gouverneur Morris, referred to the new practice as "dangerous" but nevertheless "necessary" in 1785, see Jared Sparks (ed.), *The Life and Times of Gouverneur Morris, with Selections from His Correspondence and Miscellaneous Papers* (Boston, Gray Bowen, 1832), III, 438.

[4] Thomas Bettge, "Marbury in the Vanishing Cabinet: Evaluating Originalism in the Light of Judicial Review's Uncertain Origins" (2018) 55 *Willamette Law Review* 1.

comprehensive historical accounts aimed at generating agreement among historians about how precisely to understand the emergence of early American judicial review. The problem has turned out to be that while both books represent major contributions to the field, they contradict one another almost completely on the larger questions.

The People Themselves by Larry Kramer[5] was published in 2004. Kramer depicts American judicial review as an entirely novel practice, so much so that when the judges began to engage in it in the 1780s, it was, he argues, as a form of revolutionary judicial civil disobedience waged on behalf of the people, rather than as a claim that the formal authority of judges included that power. By the 1790s, the status of judicial review had changed, according to Kramer, thanks largely to the efforts of the Federalists, but he does not present nearly enough detail to allow us to understand precisely how this process occurred. There is much to learn from Kramer's book, and much to admire, but it does not offer, at the end of the day, an account of the early period that makes the initial emergence and dissemination of the practice fully comprehensible.

Philip Hamburger's *Law and Judicial Duty*,[6] the second major book to be published on the subject in recent decades, is a consummate, comprehensive work of historical research. But his larger thesis completely contradicts central aspects of Kramer's. Hamburger argues that far from being a novel and deeply controversial practice, American judicial review arose relatively unproblematically from the simple duty under which judges had long held office, to decide cases according to the laws of the land. There is simply too much evidence from the period, however, that American judicial review was in fact a novel and deeply controversial practice for Hamburger's core contention to be persuasive. In particular, Hamburger fails to credit precisely how deep were the disagreements in the period over precisely what counted as a "law of the land" that judges were obligated to take into account in making their decisions.

This book has the immodest ambition of providing a detailed account of the emergence of early American judicial review that yields a clearer picture of how precisely it was brought into being in the 1780s and how, by the early 1790s, it had managed to achieve wide acceptance in the American constitutional system. It approaches this subject, however, by

[5] Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford, Oxford University Press, 2004).
[6] Philip Hamburger, *Law and Judicial Duty* (Cambridge, Mass., Harvard University Press, 2008).

beginning with an earlier period. The book first, in Chapter 1, offers a description of the constitutional arrangements under which American colonial governments operated and then, in Chapters 2 and 3, proceeds to describe the constitutional design of American governments immediately following Independence in the 1770s, under the first written constitutions. By beginning in this way, the book aims to show that before the 1780s, Americans inhabited a constitutional universe structured by a fundamentally different set of premises than the one that would subsequently emerge beginning in the 1780s, a set of premises that were unfavorable to the development of a practice of "horizontal" judicial review. The book approaches the subject by widening the lens beyond judicial review itself to examine more broadly the kinds of institutional checks that were placed on the lawmaking power of legislatures in the earlier systems. And rather than restrict itself to ideas abstractly considered, the book seeks to explore what the concrete operation of those kinds of checks reveals about the constitutional assumptions upon which they were based and the profoundly different shape they gave to this earlier constitutional order. The constitutional arrangements in American colonial governments, to be certain, differed substantially from those that replaced them following Independence. But for all their differences, they shared a core constitutional logic that was deeply incompatible with the type of judicial review that emerged in the American states during the 1780s. In both earlier systems, the question of constitutionality was viewed largely as a matter for legislatures to decide, an integral aspect of their duty to promote the wellbeing of the polity as they went about enacting the laws. Courts simply had nothing to do with these kinds of judgments.

By developing a detailed account of this earlier constitutional design, the first three chapters seek to pinpoint the ways in which the premises underlying the emerging practice of American judicial review were both novel and controversial. And having done this, subsequent chapters seek to develop a richer understanding of precisely what changes had to take place in constitutional assumptions to make the early practice of judicial review not only viable but, for many, self-evidently legitimate. The balance of the book is devoted to describing how a new constitutional order was brought into being, and how it managed to gain broad acceptance, supplanting (but by no means eliminating) the older constitutional thinking. Judicial review was made possible, the book argues, by changing basic views about constitutions and constitutional obligations. In this period constitutions began to be seen as a form of ordinary (higher) law. This

development transformed constitutional logic almost completely and opened the way for lawyers to argue that judges were entitled to expound constitutions on the same terms as they expounded any other law. In developing this story, each of the Chapters 4 thru 9 gives a detailed account of one of the early constitutional cases that arose during the 1780s. The final chapter, Chapter 10, describes the critical role the Federal Convention of 1787 played in bringing judicial review into the new constitutional design, and in promoting the constitutional logic that underlay it. Thanks in significant part to the decisions taken at the Federal Convention, the book argues in conclusion, by the early 1790s, the recently developed practice and doctrine of judicial review was being rapidly disseminated, and had become a permanent, if still deeply controversial, feature of the American constitutional order.

1

Chapter 1 begins by describing how legislatures and legislation were treated in American colonial governments. In the vast majority of these governments, governors and upper houses of the legislature were appointed, rather than popularly elected, and they possessed absolute vetoes over bills emerging from the popularly elected lower houses. All American colonial governments operated under one version or another of the imperial constitutional restriction that the laws they made should not be contrary or repugnant to the laws of England but "as near as may be, agreeable [to English law], considering the nature and constitution of the place and people there."[7]

One function of the vetoes governors and appointed upper houses wielded was to enforce this constitutional restriction, through a kind of "horizontal" review. The chapter seeks to highlight how fundamentally different this form of constitutional review was from the judicial review to which we are accustomed. It was a type of review deployed in the course of lawmaking, as an aspect of the decision whether to enact a bill into law, or to repeal or amend a law already made. The initial judgment that a proposed or existing law satisfied constitutional standards was typically made (most often implicitly) by the popularly elected lower house of the legislature. It was then reviewed by the appointed upper house and the governor, both of which had to assent before a bill became law. In this

[7] On these restrictions see Mary S. Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, Mass., Harvard University Press, 2004), 41.

way, determinations of constitutionality were viewed as an integral aspect of lawmaking.

These judgments about constitutionality, moreover, were made as part of the wider political obligation under which legislatures operated to make laws that did not harm but promoted the welfare of the polity. In fulfilling this duty, legislatures were bound to consider, for example, whether a proposed law represented wise policy, and whether it promoted the public good. The judgment about constitutionality, rather than being an entirely separate "legal" inquiry, was primarily considered to be one type of decision about the good of the polity that legislatures were obligated to make as they went about enacting or changing laws. And as a result, the quality of this kind of judgment was somewhat different from modern judgments about constitutionality. It involved a more fluid, open textured legislative determination that the proposed law would preserve the fundamental principles of the constitution, and reflected a view of constitutional restrictions as imposing a form of "political" duty on legislatures.

Within the empire, of course, American governments were considered "limited and dependent jurisdictions," whose laws should not be contrary or repugnant to the laws of the "superior" British government. Most (but not all) American colonies were required to transmit their laws to England for additional "vertical" review by the Board of Trade and Privy Council; the second section of Chapter 1 takes up this subject. Historians have been interested in Privy Council review for a long time, often because they viewed it as foretelling the development of American judicial review. This part of the chapter seeks to show, however, that in the overwhelming majority of cases, the "vertical" review to which American laws were subjected was more nearly akin to the "legislative" review they had undergone in the colony itself. In other words, in most cases, the Board of Trade and Privy Council reviewed American laws sitting in their capacity as a higher legislative body with the power to reconsider and reverse the decisions American legislatures had made to enact a law in the first place.

In deciding whether to reverse an American legislature's decision, the Privy Council considered a variety of factors that were understood to enter into legislative determinations more generally. These included, for example, considerations of whether the statute conflicted with the commercial policies of the empire. But the Council also commonly undertook to review the question whether the statute satisfied the constitutional standard that the act not be repugnant to the laws of England. In doing

so they deployed an analysis that also involved a number of policy determinations.[8] If after this mixed (constitutional and nonconstitutional) "legislative" review, the Council determined that the statute did not promote the welfare of the empire or that it violated constitutional standards, most commonly they would order the law to be "disallowed." This enforcement mechanism was employed in the vast majority of cases in which the Council intervened, and it reveals a good deal about the assumptions underlying most Privy Council reviews. "Disallowance" repealed a statute going forward. If a colonial legislature had reconvened to reconsider and reverse its original determination that a statute satisfied constitutional standards, and then proceeded to repeal that statute, it would operate (in law) in the same way as did a Privy Council "disallowance."

That in the overwhelming majority of cases, the Privy Council repealed a colonial statute rather than declaring it void *ab initio* is also significant for what it tells us about the implicit view of constitutional restrictions that it reflects. Up until the Privy Council handed down its order of disallowance, a statute continued to possess the full force of law. In other words, not only was the determination of constitutionality viewed as a legislative matter primarily, but an adverse constitutional determination by the Council was not viewed as a decision that the colonial legislature lacked the constitutional power to confer the force of law on an act in the first place. That result reinforces the view that rather than being understood as a kind of rigid, disabling legal limitation, with a right and wrong answer, constitutional restraints were understood to impose more open-ended political duties over which there could be differing legislative judgments. It was the superiority of the Council's "legislative" authority that gave it the power to reverse the colonial legislature's determination of constitutionality and to repeal the statute.

The brief account here emphasizes the predominant role "vertical" "legislative" review played in the career of American colonial governments, with its "repeal" remedy (in the overwhelming majority of cases) for constitutional violations. But the subject of Privy Council review is considerably more complex than this short summary can convey. For one, the Council, did, on several occasions, declare colonial statutes to be void *ab initio* upon "vertical" "legislative" review. And this irregularity, among others, is examined more fully in Chapter 1.

[8] Bilder, Transatlantic Constitution, 40–42.

The chapter also addresses the role "vertical" judicial review played in the imperial system, but it shows how relatively uncommon and unimportant in the larger scheme such review was. The Privy Council did sit as the principal court of appeal for the empire. And in this capacity, they reviewed numerous decisions from colonial courts. But of the large number of cases they heard on appeal, the constitutionality of a statute was only challenged before them in a small handful of cases, and the Council, while sitting in its judicial capacity, only acted to declare a colonial statute void *ab initio* in a single instance. But because Privy Council practice was radically under-theorized, historians have even disagreed about whether that single instance represented an exercise of judicial or legislative power, as the discussion in Chapter 1 will make clear.

On the overwhelming majority of occasions, constitutional review of colonial legislation took the form of "vertical" "legislative" review, and led to the repeal of offending statutes, reflecting the quite distinctive constitutional logic of the British system. But Chapter 1 also shows that "vertical" judicial review of the laws and bylaws of dependent jurisdictions was a well-established British constitutional practice, and though it only played a vanishingly small role in the review of American colonial legislatures, it would serve as inspiration for one specific form of the American judicial review that appeared in the 1780s, the "vertical" judicial review of state laws established by the Federal Constitution of 1787. And that subject is taken up in Chapter 6 and more substantially in Chapter 10. There was no similarly established practice of "horizontal" judicial review in the British system, and when that form of review began to appear in the American states during the 1780s, it arrived as a controversial novelty.

The final section of Chapter 1 takes up the subject of "horizontal" judicial review, showing that serious efforts to establish the practice in one colony, South Carolina, ultimately foundered because it was judged to be deeply incompatible with the basic premises of the British constitutional system. This section describes the attempts that were made in South Carolina over a period of decades to have courts of the colony dispense with statutes that had been enacted by their own legislature, on the ground that the laws violated the repugnance restriction of the imperial system. One early South Carolina Chief Justice did in fact find that ordinary colonial courts possessed this authority, holding that constitutional obligations actually operated as a limitation on the legislature's power to confer the force of law on acts that conflicted with the constitutional prohibition. But that opinion seems to have represented a distinctly

minority view. And ultimately, in the middle of the eighteenth century, two different Chief Justices of South Carolina laid these efforts definitively to rest, rejecting the idea that a colonial court could possibly possess the authority to overturn an act duly passed by the legislature of that colony. Their reasoning is especially revealing of the standard British constitutional assumptions upon which they relied.

The justices gave three main reasons for their opinions. First, they held that determinations of constitutionality and unconstitutionality were properly the province of the legislature alone, rendered by that body as part of the lawmaking process. If a colonial judge were to refuse to apply a duly enacted provincial law on the ground that it was unconstitutional, he would be improperly engaging in a legislative act, unmaking an existing law, and courts simply did not possess that kind of legislative authority. Second, allowing a court of the colony to overturn the decision of the legislature of that colony would establish the court as a superior authority sitting in judgment of the legislature's determinations, an outcome that was deeply inconsistent with fundamental British assumptions about the proper role of legislatures (and courts) in government. Legislatures were widely seen as supreme within government because they acted as the representatives of (and with the authority of) the entire nation (or of "the people"). Placing judges above legislatures would overturn the entire constitution. Third, the legitimate role of judges was to decide cases according to the laws of the land, but this duty was interpreted to mean that the judicial obligation was to apply existing common and statute law as it then stood, in the same way English judges were ordinarily expected to do. Judges possessed no authority to pick and choose between duly enacted laws, to decide to enforce some and turn their back on others. Doing so would not only represent a violation of their duty to decide cases according to the laws of the land but would also represent an attack, the Chief Justices made clear, on the rule of law itself. The central contention of Philip Hamburger's book, that the judicial duty to decide cases according to the laws of the land led straightforwardly to acceptance of judicial review, runs into the problem that that duty was often being interpreted in a quite different way even during the 1780s.

The authority to reverse the colonial legislature's judgment about the constitutionality of a law, and to repeal that law, was exercised by a superior legislative authority alone, the monarch and his privy council. These South Carolina judicial opinions reveal precisely why the earlier constitutional system did not provide fertile ground for the development of "horizontal" judicial review, and in part explain why this form of

judicial review was so controversial when it was later introduced in the American states. But the analysis contained in these opinions also points toward the changes in constitutional assumptions that would have to take place for "horizontal" judicial review to become a viable practice.

Chapter 2 moves the story forward to consider the treatment of legislatures and legislation, and the nature of constitutional restraints, under the first written American constitutions. Most obviously, these constitutions swept away the entire apparatus of imperial review. But they went further; they established genuinely republican governments. The actual details, state by state, are complicated and examined in greater detail in the chapter itself, but in the majority of states both houses of the legislature were now to be popularly elected, and the popularly elected legislature itself (in most cases) would choose the governor. Perhaps even more significantly, governors, with only a few exceptions, were stripped of any power to veto bills, which upon passage by the two houses of the legislature became law. In this way, Americans self-consciously decided not to impose any institutional check on their legislatures. They did so, it seems, not only because they believed that in their now fully independent states the constitutional position of legislatures should resemble that of the two houses of Parliament, which had achieved independence from the royal veto (de facto) by the early eighteenth century, but also because many Americans had long detested the layers of review to which the laws issuing from their colonial assemblies had been subjected and were now in a position to eliminate them. In effect, this institutional design carried over from the British constitutional tradition the assumption that legislatures in sovereign states were supreme within governments and were the proper bodies to make determinations about constitutionality as part of their duty to promote the welfare of the polity as they went about enacting the laws. And at least within government, those judgments were to be final.

At the same time, many Americans on both ends of the political spectrum were (often for quite different reasons) deeply suspicious of governmental power, including even that of their own legislative representatives. Breaking with British tradition, or at least drawing on subordinate strands in that tradition, several constitutions included clauses that indicated, but mainly in hortatory language expressed in passive constructions, that rights included in constitutions ought not to be done away with, or in a few cases that constitutions themselves should not be altered, abolished or infringed. These clauses (and their language) are examined in detail in the chapter itself. In only two states, Pennsylvania and New York,