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Robert J. Steinfeld

*University at Buffalo School of Law*

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# The Rejection of Horizontal Judicial Review During America's Colonial Period

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Robert J. Steinfeld\*

## Abstract

What we now call judicial review in the United States became part of the American constitutional system during the 1780s. There had been an earlier English tradition of review, which subjected the “legislative” enactments of inferior jurisdictions to reevaluation, but this English tradition rested on the idea that review was an inherently “vertical” enterprise. Only a “superior” jurisdiction was entitled to review and void the enactments of another “legislative” body. The great innovation that American state judges introduced during the 1780s was subjecting the enactments of their own legislatures to review, initiating a constitutionally controversial form of “horizontal” review. This article examines an earlier (failed) effort to introduce “horizontal” judicial review into one American colony. The debate that grew out of this attempt reveals a good deal not only about the underlying ideas upon which judges could draw—even at that time—to justify such a practice, but also about the dominant assumptions of English constitutionalism that worked against this form of judicial review. Significant changes would have to take place in political and constitutional conditions before the case for “horizontal” judicial review could succeed in America.

## I. The Background

Since the turn of the last century, and especially since the Supreme Court's decision in *Bush v. Gore*,<sup>1</sup> a significant number of constitutional historians have undertaken a reexamination of the old, vexing question of the origins of American judicial review. Mary Bilder, Philip Hamburger and Larry Kramer, among others, have recently produced important scholarship on the subject.<sup>2</sup> But their work offers strikingly different accounts of the genesis of the American practice.<sup>3</sup> Historians keep returning to the subject not only because

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\* Joseph W. Belluck and Laura L. Aswad Professor of Civil Justice, State University of New York at Buffalo School of Law.

<sup>1</sup> 531 U.S. 98 (2000) (on constitutional grounds, halting vote recount in Florida, thereby determining the outcome of the Presidential election of 2000 in favor of George W. Bush).

<sup>2</sup> Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 *Yale L.J.* 502 (2006) [hereinafter *Bilder, Corporate Origins*]; Mary Sarah Bilder, *Idea or Practice? A Brief Historiography of Judicial Review*, Boston College Law School Legal Studies Research Paper Series, 156 (May, 2008), especially 17-18 [hereinafter *Bilder, Idea or Practice*]; Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (2004); Philip Hamburger, *Law and Judicial Duty* (2008); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004).

judicial review remains singularly important in American life, but also because existing historical explanations are not entirely satisfactory.

What were the sources of the judicial review that first appeared in America during the 1780s? Was the practice an entirely novel invention of American judges (and lawyers), or did it derive from earlier traditions and ideas? Was it in some sense a product of both? By what means did it establish itself in relatively few years as the defining practice of American constitutionalism? That it was novel, at least in certain respects, there can be little doubt. No English judge had ever actually pronounced an act of Parliament, the supreme legislative body in the state, void by judicial review. “[D]espite the statements in *Bonham’s case* and in several other decisions,” Joseph Smith pointed out in his monumental *Appeals to the Privy Council*, “no English court had ever declared . . . an act of Parliament [null and void] by judicial review.”<sup>4</sup> Historians now generally agree that common law tradition had long barred English judges from doing so.<sup>5</sup> By the middle of the eighteenth century, common law judges were no longer even suggesting that they might possess this kind of authority.<sup>6</sup>

The substantially lesser power of English judges has often been attributed to the absence of a written constitution in England. While it is true that American lawyers in the 1780s based their most convincing and enduring arguments for judicial review on a particular set of ideas about written constitutions, those ideas were not necessarily entailed by written constitutions themselves. The adoption of written constitutions in other nations had not inevitably brought judicial review in their wake. “[T]here are formal, rigid constitutions [in Belgium and France, for instance],” J.W. Gough noted, “where the legislature

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<sup>3</sup> To simplify more than a little: Kramer portrays the advent of American judicial review as largely new, the result of a kind of civil disobedience by judges during the late 1770s and early 1780s in which they simply refused to recognize as binding statutes that they viewed as unconstitutional, not completely unlike the resistance that followed passage of the Stamp Act in the 1760s. Hamburger sees American judicial review as flowing relatively unproblematically from centuries-old English notions of judicial duty to decide according to the laws of the land. Bilder traces its origins to the British judicial practice of reviewing and striking down *ultra vires* corporate by-laws.

<sup>4</sup> Joseph H. Smith, *Appeals to the Privy Council from the American Plantations* 570-71 (1950); *Dr. Bonham’s Case*, 8 Co. Rep. 113b, 118a, 77 Eng. Rep. 646, 652 (1611).

<sup>5</sup> Hamburger, *supra* note 2, at 237.

<sup>6</sup> For references by English courts to the dictum in *Bonham’s Case* prior to the mid-eighteenth century, see *Day v. Savadge*, Hob. 85, 80 Eng. Rep. 235, 237 (1615); *City of London v. Wood*, 12 Mod. 669, 88 Eng. Rep. 1592, 1602 (1701). Coke’s dictum was reproduced in several popular eighteenth-century legal abridgments. See 4 Matthew Bacon, *A New Abridgment of the Law* 649 (1736-66); 4 Sir John Comyns, *A Digest of the Laws of England* 340 (1762-67); 19 Charles Viner, *A General Abridgment of Law and Equity* 512-13 (1741-53); and in his *Commentaries*, Blackstone offered an influential gloss on Coke’s words. 1 William Blackstone, *Commentaries on the Laws of England* 91 (1765). For an assessment of the limited impact of *Bonham’s Case* on the development of American judicial review, see Kramer, *supra* note 2, at 19-23. The weight of current opinion among constitutional historians seems to be “that no more can be claimed [for Coke’s dictum] than that it was a single ingredient in the complex corpus of ideas and usages from which a distinctively native doctrine of control over legislation eventually emerged. The case seems to have enjoyed only a brief usefulness in pre-Revolutionary polemics.” Julius Goebel, Jr., *Antecedents and Beginnings to 1801*, at 93 (1971).

has restricted powers, yet the judges do not pronounce on the validity or otherwise of legislation.”<sup>7</sup> Edward Corwin’s view of the matter was that “many and various arguments have been offered to prove that judicial review is implied in the very nature of a written constitution, some of them manifestly insufficient for the purpose; though that is not to say that they may not have assisted in securing general acceptance of the institution.”<sup>8</sup> Gordon Wood observed that “[t]he Americans’ development of what came to be called judicial review was not simply the product of their conception of a constitution as a higher law embodied in a written document. . . . Different circumstances, different ideas ultimately made the practice of judicial review possible and justifiable in America.”<sup>9</sup>

In significant respects, the adoption of written constitutions by the states, beginning in 1776, actually deepens the mystery of American judicial review. It is true that a number of early constitutions were drawn up in haste, but others were drafted after extended deliberations. The framers of these documents argued over, and took great pains to define, the structure of their new governments. Many believed that the future well-being of their republics depended on the success of their efforts. Was there to be a governor, or an executive council? Was the governor to be elected by the people or appointed by the legislature? Was the legislature to be composed of one house or two? Under what suffrage rules were members of the houses to be elected? What was to be the length of their terms? What powers was the governor to possess? Was the governor or was the legislature to exercise the power to appoint civil officers, including judges? Were judges to serve for a term of years or during good behavior? How were they to be appointed?

The framers of early constitutions confronted these and dozens of similar issues as they set about constructing their governments. Yet, not a single state constitution even hinted at the possibility that judges, acting in their ordinary capacity as judges, would possess the authority to review and declare null and void the acts of the supreme legislative body in the state.<sup>10</sup> Indeed, the subject of judicial review did not even arise during the deliberations in any state convention of the period, an absence made all the more noteworthy by the repeated discussions of judicial review at the federal convention little more than a decade later. A number of early state constitutions placed the judiciary in a clearly subordinate role to legislatures. In half a dozen states, judges of the highest court,

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<sup>7</sup> J.W. Gough, *Fundamental Law in English Constitutional History* 214 (1971).

<sup>8</sup> Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 *Am. Hist. Rev.* 511, 522 (1925).

<sup>9</sup> Gordon Wood, *The Creation of the American Republic, 1776-1787*, at 292 (1969).

<sup>10</sup> The New York Constitution of 1777 did create a Council of Revision consisting of the Governor, the chancellor and the judges of the Supreme Court, which was authorized to review and veto bills if the council found them inconsistent with the spirit of the constitution or with the public good. Thus, New York’s high court judges were given explicit authority to review the constitutionality of legislation, *but as members of the Council of Revision with a formal role in the lawmaking power*. The inclusion of this provision in the New York Constitution, together with the absence of provisions granting judges powers to review legislation for constitutionality in other state constitutions, only serves to drive home the point that no evidence can be found that these written constitutions explicitly authorized what would come to be known as judicial review.

appointed in most cases by legislatures, served for a term of years, rather than during good behavior.<sup>11</sup> And in several states, New York and New Jersey among them, constitutions established courts of final resort on which the upper house of the legislature sat. Undoubtedly, these last measures were adopted in imitation of the role the House of Lords played in England, or of colonial constitutions under which governors and councils<sup>12</sup> had sat as courts of final resort in many colonies.<sup>13</sup> Having constructed their highest courts in this way, however, it is difficult to imagine that in 1776 and 1777 these framers foresaw the possibility of judicial review as a significant factor in the constitutional system they were establishing.<sup>14</sup> From Richard Spaight, writing to his friend James Iredell in 1787, to Chief Justice Gibson of the Pennsylvania Supreme Court, writing in a well-known dissent in the 1820s, many of those who criticized the new practice of judicial review as a usurpation of constitutional authority pointed to the absence of an explicit constitutional grant as a principal ground for their objection.<sup>15</sup>

Many historians have rejected the idea that the development of American judicial review can simply be explained as the natural by-product of the adoption of written constitutions and have pursued other explanations. One eminent school of constitutional historians traces the roots of American judicial review back to English imperial practices, in particular to the authority exercised by the King's Privy Council to review and strike down statutes enacted by American colonial legislatures.<sup>16</sup> The basic argument of this school has been that through these imperial practices Americans grew accustomed to the idea that legislatures did not necessarily possess unlimited powers, and their acts might be subject to review and reversal should they exceed the restrictions imposed upon them.<sup>17</sup> The King's Privy Council had long enforced limitations on the power of American colonial legislatures to make law. In general, provincial legislatures were obliged to conform to the requirement that their statutes not be repugnant or contrary to the laws of England. The Privy Council supervised colonial legislatures through two modes of review. The first,

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<sup>11</sup> Wood, *supra* note 9, at 161 n.65.

<sup>12</sup> Colonial Councils also served as the upper houses of their legislatures. Jackson Turner Main, *The Upper House in Revolutionary America, 1763-1788*, at 4 (1967).

<sup>13</sup> "After 1735 the final locus of appeal within the colonies was the governor and council in all the royal provinces, except Massachusetts. In the two proprietary colonies, the Supreme Court in Pennsylvania and the Court of Appeals in Maryland performed this function. In the two corporate colonies, Connecticut and Rhode Island, the Assembly was the final resort. It may be remarked that there appears to have been no prejudice against a final review by bodies in which laymen sat in a judicial capacity." Goebel, *supra* note 6, at 15.

<sup>14</sup> By 1788, in contrast, Alexander Hamilton took pains to address the issues posed for the emerging practice of judicial review by state courts of final resort constituted in this way. See discussion in *Federalist* No. 81.

<sup>15</sup> Richard Spaight to James Iredell, Aug. 12, 1787 in 2 *Life and Correspondence of James Iredell* 169 (Griffith McKee ed., 1949); *Eakin v. Raub*, 12 Serg. & Rawle 330, 347, 353-53 (Pa. 1825) (Gibson, J., dissenting).

<sup>16</sup> Distinguished historians of this school include Smith, *supra* note 4; Goebel, *supra* note 6; and Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* (1915).

<sup>17</sup> See, e.g., Goebel, *supra* note 6, at 60.

administrative or legislative<sup>18</sup> review, was by far the more important. By the middle of the eighteenth century, most American colonies were required to submit their statutes to the Board of Trade and the Privy Council for review and confirmation. Disgruntled colonists could also bring statutes before the Council through petitions seeking to have that body disallow or declare a colony statute null and void. After reviewing a statute, the Board of Trade would recommend to the Council that a law be confirmed, disallowed or declared null and void.<sup>19</sup> An Order in Council issued as the final act in this process.<sup>20</sup> Literally thousands of American statutes were sent to the Board of Trade to undergo the process of administrative (or legislative) review. “8,563 acts [were] submitted by the continental colonies. 469 or 5.5% were disallowed or declared null and void by orders in council.”<sup>21</sup> Given the scale on which this mode of Privy Council review was conducted, it is unsurprising that Americans were well acquainted with its workings. Thomas Jefferson had good reasons for listing first (and condemning) the practice of legislative review in the bill of particulars he drew up indicting the king in the Declaration of Independence.

The Privy Council also reviewed American legislation through a second process, though only on a limited number of occasions. The Council conducted administrative/legislative reviews of colonial laws that were submitted to it, but it also sat as a court of final resort for the colonies. This mixture of powers was not unusual at the time. Parliament, the King, colonial legislatures, royal governors and councils all commonly exercised both judicial and legislative powers. Parties in cases brought in colonial courts could, if certain monetary thresholds and other requirements were met, appeal adverse decisions to the King’s Privy Council. Sitting in its judicial capacity, the Council was asked by parties, in a handful of cases, to enforce the imperial repugnancy standard by declaring null and void an offending colonial statute upon which the outcome of the case turned.<sup>22</sup> The Council appears to have done so in only a single case: in *Winthrop v. Lechmere*, it issued an Order in Council on February 15, 1727/8 declaring a Connecticut partible inheritance statute null and void as contrary to the laws of England.<sup>23</sup> This is the only known instance

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<sup>18</sup> This process may certainly be viewed as a form of legislative review in that it could end in the repeal (disallowance) of a statute. Goebel takes exception to the use of the term “repeal” to describe the disallowance, however, although “repeal” was the term contemporaries most commonly used to describe it. Goebel argues that “in English legislative usage a repeal could only be effected by the power which brought the law into being. Since the Crown had no hand in the making of a colonial act, the word repeal was presumably used in the non-technical sense of annul.” *Id.* at 68-69.

<sup>19</sup> A disallowance operated as a “repeal” of the statute, whereas a declaration of nullity eliminated all rights that had accrued under the statute from its passage. Only a handful of declarations of nullity were issued as a result of administrative review, though the Board of Trade apparently recommended such action to the Council more often. The Council, however, mainly adhered to the policy of issuing disallowances upon administrative review. See *id.* at 70-71.

<sup>20</sup> *Id.* at 67.

<sup>21</sup> Russell, *supra* note 16, at 221.

<sup>22</sup> Smith, *supra* note 4, at 537-82; see also Goebel, *supra* note 6, at 73-80.

<sup>23</sup> See Smith, *supra* note 4, at 551.

in which the Privy Council declared a colonial statute null and void by judicial review. It did, however, also consider doing so in a small number of other cases, establishing beyond question its authority to nullify non-conforming colonial statutes in the course of deciding judicially an appeal from a colonial court. It should be noted that an Order in Council also issued as the final act in this process of judicial review, just as it did in the process of administrative review.<sup>24</sup> Joseph Smith described as “maladroit” “the . . . selection of the ‘Order’ as the instrument of [the Council’s judicial] decision[s].”<sup>25</sup>

Historians who have investigated the origins of these Privy Council practices have found that they were based to a considerable extent on older domestic English traditions of judicial control.<sup>26</sup> There were many inferior lawmaking bodies in late medieval and early modern England, including chartered boroughs, corporate municipalities, and guilds, which had been created by royal grant. “Nothing was better settled in English law than that enactments by inferior jurisdictions thus created were subject to administrative or judicial review.”<sup>27</sup> In the fifteenth century, Parliament enacted a statute requiring that new ordinances of guilds, crafts, and other corporate entities “be submitted to justices of the peace, or to the chief governors of cities and made of record. Ordinances in disherison or diminution of royal franchises or against the common profit of the people were forbidden, and the justices were empowered to revoke or repeal those found illegal or unreasonable.”<sup>28</sup> This tradition of what may be called administrative review of the ordinances of limited, inferior jurisdictions was reinvigorated in 1504, when Parliament passed a new statute. “Examination and approval of ordinances [enacted by some inferior corporate entities, crafts, mysteries and guilds] was committed to the Chancellor, Treasurer, the Chief Justices of either Bench, or any three of them or before the Justices of Assize on circuit.”<sup>29</sup> Parliament had also just “a few years earlier declared void by statute a London ordinance.”<sup>30</sup> It was in these years, at the beginning of the sixteenth century, that the requirement began to be added to corporate charters, later on including those of American colonies, that their enactments must not be contrary or repugnant to the laws of England.<sup>31</sup>

It was during roughly the same period that the common law courts revived their tradition of declaring void corporate ordinances or by-laws that were contrary to common

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<sup>24</sup> Goebel, *supra* note 6, at 44-45.

<sup>25</sup> Smith, *supra* note 4, at 660.

<sup>26</sup> Goebel, *supra* note 6, at 50-60.

<sup>27</sup> *Id.* at 52-53. Goebel warns that “[t]he distinction of administrative and judicial duties is made advisedly, for the immixion of governmental functions was such at this period that such a differentiation would hardly then be made.” *Id.* at 53 n.7.

<sup>28</sup> *Id.* at 54.

<sup>29</sup> *Id.* at 55.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 56.

law or common right in the course of deciding cases brought before them.<sup>32</sup> Unlike the “administrative” review performed by the chancellor, the chief justices, and the justices of assize on circuit, this form of “judicial” review offered individuals involved in legal disputes protection by the courts for their common law rights against the by-laws or ordinances of inferior jurisdictions. At the time the Privy Council began to control colonial law through the two modes of review discussed, “the ordinances of [English] companies were still being submitted . . . for allowance consistently by the Lord Chancellor who was of the Privy Council and the Chief Justices. The [common law] courts were still holding void [by judicial review] illegal enactments [of inferior jurisdictions].”<sup>33</sup>

An earlier generation of historians concluded that one important source of American judicial review could be found in Privy Council practices. More recently, however, historian Mary Bilder has argued that the older tradition of English domestic corporate judicial review, which continued to operate in the eighteenth century, was more directly responsible for the development of American judicial review.<sup>34</sup> American lawyers, Bilder shows, were well acquainted with this tradition, as it was fully presented in the legal abridgements and digests they routinely consulted and circulated widely in the colonies.

There is a serious difficulty, however, with explanations that rely exclusively on these traditions. The “administrative” and “judicial” review in which the Privy Council and English common law courts engaged rested on the principle that these bodies were enforcing the laws of a superior jurisdiction against the enactments of limited, inferior jurisdictions that were dependent upon it.<sup>35</sup> That the acts of Parliament were not similarly subject to judicial or administrative review serves to drive home the point that the judicial review erected on this traditional principle was profoundly different from the later American practice. While the English possessed a clear theory and practice of what may be called “vertical” judicial (and administrative/legislative) review, it does not appear that they had developed a practice of what may be called “horizontal” judicial review. The great leap of American state judges in the 1780s was to subject to review the enactments of the supreme legislative body in their governments. Such a thing had not been done before—and for good reason. “Horizontal” review implicated deep and profound constitutional issues, for it necessarily involved the question of where the final word on the laws would rest within government.<sup>36</sup>

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<sup>32</sup> Id. at 58.

<sup>33</sup> Id. at 59-60.

<sup>34</sup> Bilder, *Corporate Origins*, supra note 2; Bilder, *Idea or Practice*, supra note 2, at 17-18.

<sup>35</sup> Goebel, supra note 6, at 46, 52, 60, 76; Smith, supra note 4, at 523.

<sup>36</sup> In *Law and Judicial Duty* (2008), Philip Hamburger argues that American judicial review flowed unproblematically from long held ideas about the duty of the judicial office, ideas that showed great continuity over the centuries. He claims that the duty of English judges did not extend to annulling acts of Parliament only because of two unique aspects of the English constitutional system. Parliament was the highest English court in the realm and the English constitution was customary, and therefore subject to final interpretation by Parliament itself. In the quite differently organized American constitutional system, he asserts, judicial review represented a simple deduction from long held views about the duty of the judges,



The first acts of American judicial review elicited the charge that the judges were claiming an illegitimate “superiority” over legislatures, and this suggests an understanding by Americans of the core principle underlying traditional English practices of review.<sup>37</sup> That reaction also demonstrates that many Americans were convinced that judicial review violated the basic assumptions upon which their constitutional system had rested since 1776 in that it conferred on judges, under certain circumstances, rather than legislatures, the final word on the laws. The conceptual innovations early theorists of American judicial review utilized to turn the new practice into an acceptable form of “vertical” review depended finally upon a conception of “the people’s” will as fundamentally bifurcated. The “superior” will of “the people” would now be said to be embodied in written constitutions outside of and above government and to be opposed to an “inferior” will of legislatures, now, despite frequent popular elections, somehow no longer comprehensively representing the “will of the people.” Under this new view, “the people” were thought to have a temporary, changeable, “inferior” will (expressed at elections and embodied in legislatures) and a “superior” permanent will (embodied in constitutions) as interpreted by the judges.

The early theorists of American judicial review were working within the English tradition, even as they transformed it. The road to American judicial review ran through English practices of review, but to fully justify the new practice it was necessary to replace a number of the fundamental assumptions underlying early American constitutionalism, which had been borrowed largely from English tradition, with a new set of ideas: the people would now be viewed as standing outside of and above their governments, rather than as being embodied in government by their legislatures. Written constitutions would now come to be regarded as the people’s direct enactment of a judicially cognizable law expressing

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particularly that they must decide cases according to the law of the land, which included constitutions. One objection to Hamburger’s argument is that simply because Parliament was the highest court in the realm and the constitution was customary should not have meant, if the English constitution was indeed viewed as a form of law cognizable before courts, that lower English common law courts were foreclosed from pronouncing on the constitutionality of statutes, so long as their judgments were subject to reversal by Parliament. In the American context, courts that were not courts of final resort did, from the beginning, declare acts of American legislatures unconstitutional, subject to reversal by the court of final resort in that government. In England no court at any level ever did so. Part of the novelty of American judicial review was precisely that it began to treat constitutions as a form of law directly analogous to statute law. Because treating constitutions in this way was novel, American judicial review was controversial and provoked harsh criticisms from a variety of sources.

<sup>37</sup> This criticism may have been picked up from Blackstone’s *Commentaries*, which was greatly esteemed in America, but it had also been made earlier during a dispute about judicial review that arose in colonial South Carolina. See text and notes below. Blackstone had written that if the judges possessed power to reject a statute enacted by Parliament that would “set the judicial power above that of the legislature, which would be subversive of all government.” 1 Blackstone, *supra* note 6, at 91. It seems likely that Alexander Hamilton’s response to this criticism in Federalist No. 78 was meant to supplant Blackstone’s view of the matter, as much as to answer local critics. In Federalist No. 78 Hamilton wrote: “Nor does [the doctrine of judicial review] by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter . . . .”

their permanent, binding will. And an inherent aspect of the duty of judges would be to interpret and enforce this new kind of law on behalf of the people against their own legislatures.

The doctrine and practice of *English* “judicial” review relied heavily on the idea that a superior jurisdiction (and its courts) enjoyed the authority to nullify non-conforming laws that violated the restrictions on the legislative authority of the limited and dependent jurisdictions subordinate to it. Despite the dictum in *Bonham’s Case* and a few other opinions, however, English judges never declared an act of Parliament null and void upon judicial review.<sup>38</sup> Common law tradition had long barred English judges from doing so.<sup>39</sup> Parliament, of course, did not exercise its law making authority as a limited, dependent, “inferior” body, and under traditional English constitutional conceptions, had the common law courts assumed the power to nullify its acts, they would necessarily have been claiming an authority “superior” to Parliament’s, a result that practically no one considered to be constitutionally acceptable, as it would have given judges (under certain circumstances), rather than Parliament, the final word on the laws.<sup>40</sup> Another way of putting the matter is to say that while the English had a rich tradition of “vertical” “judicial” and “legislative” review, they did not possess a settled practice or doctrine of what we may call “horizontal” “judicial” review. But it was precisely this kind of constitutionally controversial “horizontal” “judicial review” that American state court judges and lawyers introduced in the 1780s.

In one colony, however, during the colonial period, courts intermittently over many years attempted to call into question the validity of colonial legislative enactments. Eventually, these efforts to establish a “horizontal” judicial review failed. But the debate that grew out of their attempts reveals a good deal not only about the underlying ideas upon which judges could draw, even at that time, to justify such a practice, but also about the dominant assumptions of English constitutionalism that foreclosed this form of judicial review. To a remarkable extent, this earlier ideological and political contest would be played out again during the 1780s, with the opposite result.

## II. The Rejection of American Style (“Horizontal”) Judicial Review During the Colonial Period

Historians have discovered only an occasional instance here and there in which an American colonial court refused to enforce or attempted to nullify a colonial statute, and no firm conclusions can be drawn from these isolated incidents. But in South Carolina, historians have uncovered evidence of an intermittent, decades-long conflict between the legislature and the courts over the proper constitutional relationship between the two. Be-

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<sup>38</sup> Smith, *supra* note 4, at 570-71.

<sup>39</sup> Hamburger, *supra* note 2, at 237.

<sup>40</sup> 1 Blackstone, *supra* note 6, at 91. Blackstone had also observed in the *Commentaries* that “[b]y the sovereign power . . . is meant the making of laws; for wherever that power resides, all others must conform to, and be directed by it. . . . [A]ll the other powers of the state must obey the legislative power in the execution of their several functions, or else the constitution is at an end.” *Id.* at 49.

ginning with an incident in 1693 under the proprietary government, South Carolina judges seemingly began to question, from time to time, the validity of legislative acts; the legislature, especially the lower Commons House, appears to have responded forcefully in each instance by asserting its preeminence in the colonial government, arguing that the courts simply did not possess the authority they were attempting to claim. This was a battle of constitutional ideas as well as a political struggle, where the legislature seems to have relied on prevailing English constitutional notions about the proper relationship between Parliament and the courts to vindicate its position by analogy. Although the two opposing constitutional positions were not fully developed in this series of confrontations, in the end, two South Carolina chief justices repudiated the ideas that other lawyers and judges had advanced to justify “horizontal” judicial review, and recognized the legislature’s preeminent authority in the colonial government. Their views rested in large part on prevailing English notions about the proper relationship between Parliament and the courts. “Horizontal” judicial review, as a controversial new practice, was not likely to become an established feature of colonial governments without the broad support of the bench and bar. The rejection by two chief justices of the colony of the principal ideas upon which it rested marked its death knell in South Carolina. Thereafter, more traditional English constitutional ideas would be taken definitively to govern the relationship between courts and the legislature in South Carolina’s colonial government. In the process, an alternative set of ideas that would have given judges authority to nullify colony statutes was rejected.

The constitutional confrontations between South Carolina’s legislature and courts, of course, involved more than internecine struggles between colonial governmental bodies; they were overlaid by an imperial dimension, clashes between the colonial legislature and the proprietors of the colony in one instance, and—after 1721 when South Carolina became a royal colony—between the popularly elected lower house of the legislature and the monarch’s appointee, the chief justice of the colony. Although the larger context was somewhat different, there are striking similarities between the conflicts in colonial South Carolina and those that would arise during the 1780s between state legislatures and courts, when the latter began to claim the authority to judge the validity of state statutes. A number of the key arguments and ideas found in the South Carolina controversies reappeared in these subsequent conflicts. Only the outcome then would be different; in the 1780s the judges and the ideas that justified their actions would prevail, and in the process supplant traditional Anglo-American conceptions about the proper relationship between legislatures and courts with a set of ideas that marked a constitutional revolution. But that was not the result in eighteenth-century colonial South Carolina, where traditional constitutional ideas continued, in the end, to govern that relationship.

In 1693, the General Assembly of the colony, in a statement of its grievances addressed to the proprietors, complained of “Inferior Courts taking upon them to try adjudge & Determine the power of assembly for ye Validity of Acts made by them or of such matters and things as are acted by or Relateing to ye House of Commons all which

we humbly Conceive is only inquireable into and Determinable by ye Next Succeeding General Assembly.”<sup>41</sup>

It is evident from this brief entry that the colony’s General Assembly believed the proprietors’ courts had overstepped their bounds by judging the validity of the Assembly’s Acts, which, they asserted, were matters proper only for the Assembly itself to consider and decide upon. One interpretation of the brief text is that the Assembly was styling itself a court “superior” to all others in the colony, and, as such, “Inferior Courts” had no authority to question its decisions. This would not have been an absurd claim at the time: not only was Parliament thought of as a high court, but colonial legislatures of the time frequently operated as courts of final resort.<sup>42</sup> In royal colonies, the upper house of the legislature formally served as part of the highest court in the colony.<sup>43</sup> Nothing more, however, is known about this incident.

But a number of decades later, in August 1724, the General Court of South Carolina, sitting in Charlestown, apparently ignored an Assembly statute in ruling on a motion in a case.<sup>44</sup> It is not known why it took more than two years for the legislature to respond, but in December 1726 the Commons House of the General Assembly voted “that the opinion of the Generall Court in Charles Town of the 22nd of August One thousand Seven hundred & twenty four was *contrary & repugnant* to a clause in an Act of the General Assembly of this Province.”<sup>45</sup> The chief justice of the colony, who sat on the General Court, was also a member of the Commons, and submitted to that chamber a representation, also signed by two assistant judges, justifying their action. Upon reading this representation a committee of the Commons reported that the judges had taken

several Positions of a dangerous Tendency to this Province, as first the whole Government is arraigned for passing Laws as ’tis suggested contrary to the Kings Instructions and Repugnant to the Laws of England. Secondly, the Judges Suggest they have a power of dispensing with all such Laws at pleasure & that they are Sole Judges & Interpreters of our Laws which *your Committee are of opinion is assuming a power Superior to that of this house & equal with that of the whole Legislative body united.*<sup>46</sup>

The Commons committee seems to have been suggesting that the judges were claiming a power to unmake laws that would in effect equal the authority of the whole legislature

<sup>41</sup> Edward McCrady, *History of South Carolina under the Proprietary Government, 1670-1719*, at 242 (1897).

<sup>42</sup> See, e.g., Scott Douglas Gerber, *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606-1787*, at 50 (2011) (“The general Assembly [of Virginia] served until 1682/3 as the highest court in the colony. . . . The assembly ceased serving as a judicial body in 1682/3 [as the result of an] order of the crown.”); 71 (Plymouth Colony), 76 (Massachusetts Bay Colony); see also Smith, *supra* note 4, at 637-51; Wood, *supra* note 9, at 154.

<sup>43</sup> Goebel, *supra* note 6, at 15.

<sup>44</sup> Dudley Odell McGovney, *The British Origins of Judicial Review of Legislation*, 93 U. Pa. L. Rev. 1, 48-49 (1944).

<sup>45</sup> *Id.* at 10.

<sup>46</sup> *Id.* at 10-11 (emphasis added).

together, and be greater than that of either legislative chamber alone. They imply that in taking such action, the judges would be improperly exercising the lawmaking power.

It is not possible, of course, to say with certainty what the judges' position was, but one interpretation of their views would be the following: both the original Carolina charter and later, the royal governor's commission, contained versions of the requirement that the colony's laws must not be repugnant or contrary to the laws of England. A colony statute made contrary to these provisions would be *ultra vires*, beyond the granted power of the legislature to enact. Hence, statutes repugnant to the laws of England would be void, and if they were void, i.e., not law, they would bind neither the inhabitants of the colony nor the judges. Implicitly, the judges appear to have been asserting that colonial courts possessed the authority to make this kind of repugnancy determination about statutes enacted by their own legislatures.

The Commons' view, not surprisingly, was quite different. Their resolution denounced the court's action as "contrary & repugnant to a clause in an Act of the Generall Assembly of this Province."<sup>47</sup> The use of this language suggests that the Commons was making the point that the relevant standard of repugnancy with which the colony's courts should be concerned was established by the colony's existing laws, which the judges were bound to apply as written. This is all that has been found about this incident, but it is hardly the end of the larger story.

Following a decade-long transition to royal government during the 1720s, the Crown authorized South Carolina's governor to commission Robert Wright the Chief Justice of the colony. What followed were years of conflict between the Chief Justice and the legislature. During the early 1730s the Commons House of the Assembly committed several men into their custody for wrongs they were alleged to have committed. The men sued out a writ of *habeas corpus*, which Chief Justice Wright granted. "On the 7th of April, 1733, the House [in response] passed a series of resolutions, in which they declared that it was the undeniable privilege of the Commons' House of Assembly to commit into [their] custody any such persons as they might judge to deserve to be so committed."<sup>48</sup> McCrady writes of the incident that "Chief Justice Wright stands alone at that time . . . in resisting the power of a legislature in such a case. The theory of such [legislative] power rests on the theory of the omnipotence of Parliament and on the theory that either House sits as a court."<sup>49</sup> For his pains, the Commons voted to withhold Wright's salary.<sup>50</sup>

Sometime following Wright's appointment as Chief Justice, the legislature passed an act empowering the governor to appoint two or more Assistant Judges to sit with him

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<sup>47</sup> Id. at 10.

<sup>48</sup> Edward McCrady, *The History of South Carolina under the Royal Government, 1719-1776*, at 152 (1899).

<sup>49</sup> Id. at 162.

<sup>50</sup> Id. at 159.

in deciding cases.<sup>51</sup> These were invariably laymen and they had the numbers under the statute to outvote the Chief Justice in any ruling.<sup>52</sup> Wright complained of this act to the Board of Trade in 1733,<sup>53</sup> saying that under it the governor had appointed persons that “are intirely ignorant of the Laws and [can] over rule the Petitioner in all Judicial Acts.”<sup>54</sup> In March 1736, the Privy Council “repealed” this act along with others that had “allowed the Governor to appoint . . . [such] Assistant Judges.”<sup>55</sup> Either because the Council’s decision had not yet reached South Carolina by May 1736 or because the legislature had already passed a new act empowering the governor to appoint assistant judges, when Chief Justice Wright called into question the validity of a South Carolina statute, in the course of deciding to grant a motion in arrest of judgment in a case in May of the same year, the assistant judges were still sitting, and intervened to call Wright’s view of the matter into question.

Wright’s is the fullest opinion by a colonial judge that has been found asserting the view that American colonial courts possessed the power to judge the validity of their colony’s statutes. The case involved a colonial inhabitant convicted of counterfeiting under an act of the Assembly that imposed the death penalty for the crime. Under English law, first time offenders in these kinds of cases were entitled to relief from the death penalty. Defendant’s lawyers moved in arrest of judgment that the colony’s statute conflicted with English law.<sup>56</sup> Chief Justice Wright took the position that the motion should be granted. He opined that under the British constitution, subjects were bound by “no laws but those of our own making, that is by the King, Lords and Commons in Parliament assembled.”<sup>57</sup> As the prisoner was a British subject he was entitled to the protection of these laws. “Far be it from me,” Wright said,

to impeach or question the Validity of any Law of this Province, or the Authority by which it is made; but by my Commission I am required and sworn to judge between the King and his People, according to the Laws and Statutes of *Great Britain* and the Laws of the Province, [and] therefore must inquire by what Authority they are made, and whether this Law be agre[e]able to the Laws of *Great Britain*, or can operate to supersede any Law of *Britain*.<sup>58</sup>

If the colonial law were valid, it would “Annul and Supersede” British law and would “overset our Whole Constitution.” Wright was therefore “of Opinion that this Act exceeds the Power granted by the King’s Commission, and is repugnant to the Laws of

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<sup>51</sup> Acts of the Privy Council of England, Colonial Series III (1720-1745), at 411 (James Munro ed., 1910). [hereinafter Privy Council]. According to McCrady, the original of these acts to empower the governor to appoint assistant judges was enacted in the 1720s. McCrady, *supra* note 48, at 7-8, 461.

<sup>52</sup> McCrady, *supra* note 48, at 8.

<sup>53</sup> *Id.* at 460-61.

<sup>54</sup> Privy Council, *supra* note 51, at 411.

<sup>55</sup> *Id.* at 412. “Repealed” is the language used by the Council.

<sup>56</sup> Hamburger, *supra* note 2, at 266.

<sup>57</sup> Quoted in *id.* at 266 (based on reports in the South Carolina Gazette of May 1-8, 1736).

<sup>58</sup> *Id.* at 267.

*Britain* [and] . . . by the King's instructions ought not to operate to affect the Lives, Liberties, Estates and Properties of the People."<sup>59</sup>

One of the lay assistant judges, Thomas Lamboll, dissented strongly from Wright's opinion. It was his view that the colony law was not repugnant to English law, in that the proper standard for evaluating colony statutes under the language of the charter was whether laws had been made "as near as conveniently may be" to English law, and this statute satisfied that standard. He then proceeded to turn on its head Wright's point about being governed by laws made by one's own representatives, arguing that among the rights and privileges Englishmen possessed "in their Mother Country, and retain'd and brought over with them hither . . . [was] that of giving their Consent by the legal Representatives to such good and wholesome Laws for the Government of the whole Community."<sup>60</sup> Lamboll appears to have been saying that, as Englishmen, the inhabitants of the colony were entitled to be governed by laws made by their own representatives in their own legislatures. Decades later, after the imperial apparatus had been swept away by the Revolution, the principle that the people were entitled to govern themselves by laws made by their representatives was repeatedly asserted as a reason for rejecting the claims state judges were beginning to make that they possessed the authority to set aside such laws. Following Lamboll's dissent, proceedings were adjourned until a "*fuller Bench*" could be assembled "*to decide the Cause by a Majority*."<sup>61</sup> The record ends here; nothing further is known about the outcome of the disputed ruling.

Chief Justice Wright died in 1739 in a yellow fever outbreak, and after a brief interim term served by one of the lay judges, Benjamin Whitaker was appointed and apparently confirmed in 1742 as Chief Justice of the colony.<sup>62</sup> In September 1742, at the beginning of the new legislative session, Whitaker was also chosen Speaker of the Commons. On the one hand, Whitaker would seem to have been aligned with the Commons. On the other, he confronted the problem that, following the king's repeal of the laws providing for assistant judges, the General Assembly had enacted new ones authorizing these judges to continue to play the role they had under the old statutes. Whitaker did not like the idea of being outvoted by lay judges any more than Wright had, but also must have understood that so long as the assistant judges continued to sit on the court, there would be no possibility of declaring those statutes void. Soon after his election as Speaker of the Commons, he appears to have decided to pursue a political strategy to address the problem. He wrote a memorial to the Lieutenant Governor in which he attempted to undermine the power of the assistant judges by pointing out that the new laws could not possibly be interpreted to reenact "part of an Act, [which] the King had repealed."<sup>63</sup> While

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<sup>59</sup> Id.

<sup>60</sup> Id.

<sup>61</sup> Id. at 268 (emphasis in original).

<sup>62</sup> McCrady, *supra* note 48, at 180, 464.

<sup>63</sup> Hamburger, *supra* note 2, at 269-70.

relying on the king's disallowance to call into question the legitimacy of the new statutes, he simultaneously disclaimed any authority in his own court to declare acts of the legislature void. The king had the sole power of "judging" the colony's statutes; colonial courts had to apply the laws of the colony as written, until the king intervened to make his "judgment" known.<sup>64</sup> Whitaker wrote,

in the Plantations in America which are dependent Governments and are only impowered to make Laws, under certain Conditions, Limitations and Restrictions, the Judges . . . are bound to Observe the laws that are pass'd by the General Assembly till they are repealed by the King. [F]or though such Laws . . . may be repugnant to Ye Laws of England, yet it is conceived Such Laws are not Ipso facto void in themselves, but only voidable by his Majesty's *disallowance or repeal*, who tis humbly Apprehended *has reserved to himself the sole power of Judging* of Such Contriety, or repugnancy.<sup>65</sup>

There were important ideas beneath the surface of Whitaker's statement. For one, there is the suggestion that the king's authority over colonial laws involved a "legislative judgment" (voidable, repeal) and by implication, was not properly a "judicial" matter ("such laws are not Ipso facto void in themselves").<sup>66</sup> There is also the intimation that only a "superior" authority can properly "judge" whether to annul the acts of the limited and dependent legislatures under it. These ideas remained largely undeveloped in Whitaker's memorial, waiting for a later Chief Justice of South Carolina, James Michie, to elaborate, in an opinion that represents the fullest expression of the view, offered by a colony judge, that colonial courts did not possess the authority to declare colony statutes null and void.

In January of 1760, Chief Justice Michie handed down, in the case of *Williams, Administrator de bonis non v. Executors of Watson*, an opinion rejecting the arguments of counsel that the court should declare a provincial law of South Carolina void as repugnant to the laws of England. Colonial assemblies, Michie announced, should strive to conform their enactments to English law as closely as local circumstances permitted.<sup>67</sup>

But in their deviations they and they alone in the first and his Majesty in his Privy Council in the last instance were the *judges* . . . whatever dissonance it [the provincial act at issue] may have to the laws and customs of England or how repugnant soever it may be to them, it is apprehended that this court can give no relief. *For if this court has a power of judging whether the laws which the General Assembly made are void or not, they have a power superior to the General Assembly.* But this is a power which I conceive this court has not. *Judges in England are the proper expositors of Acts of Parliament when they are made, but I don't remember that they ever questioned the power of making laws.*

<sup>64</sup> The account in the above paragraph is derived largely from Hamburger's narrative. *Id.* at 269-70.

<sup>65</sup> Memorial of Benjamin Whitaker, Esqr. To the Honble William Bull Esqr Lieut Govr (Sept. 16, 1742), quoted in Hamburger, *supra* note 2, at 270. A year later Whitaker appears to have thought that it remained an open question whether colonial statutes should be considered void when repugnant to English law or merely voidable at the election of the king. *Id.*; see also Smith, *supra* note 4, at 577-78.

<sup>66</sup> It is possible that Whitaker was not aware that the Council had voided a colonial statute sitting in its judicial capacity, or perhaps as was true of others, that he viewed the Council's actions under either procedure as a type of "legislative judgment" made by the king upon colonial laws.

<sup>67</sup> Smith, *supra* note 4, at 591.



*The plantations are limited and dependant governments. They have power to make laws, and the King has reserved to himself and his Privy Council a right of judging those laws and till the King thinks fit to repeal them they continue their full force and obligation. This power of repealing the King has reserved to himself and to himself alone, with the advice of his Privy Council. But if the courts of America had a power to adjudge them void it would anticipate the King's judgment and would be two powers of repealing, which is inconsistent with the nature of our constitution; this would be for the courts jus dare [to make the law] and not dicere [to say what the law is]. It is easy to see the consequence of those arguments. For if this court has a power to adjudge our laws to be void, they have a power to dispense with them. [A]nd everything will be left to precarious and arbitrary will and pleasure.*

So our acts of Assembly if they are contrary to the King's instructions or repugnant to the laws of England, they are not void, for the King may confirm them. But they continue in force until they are repealed or made void.<sup>68</sup>

Several points should be made about Chief Justice Michie's opinion. Like Whitaker's, Michie's opinion began with a premise that seemed to reflect everyday experience. Statutes that had been duly enacted by the colonial legislature and signed by the governor possessed the force of law in the colony, until the king intervened to repeal (or void) them. Hence, they had to be understood as "voidable," not "void." The repugnance restrictions contained in the charter and governor's commission were not to be understood as depriving the assembly of the "legislative" power to enact statutes in the first place, but conferred that power subject to the king's superior "legislative" power to reverse those decisions later if the king found them to be repugnant to English law. The repugnance limitation, in this view, was what might be termed a political-legislative limitation. Changing existing law (making or repealing a statute) was a "legislative" act and only a (superior) "legislative" power could properly perform it.

By contrast, it was the role of judges to expound the law as it was; they exceeded their authority when they attempted to undertake the legislative function of making or unmaking law. Invoking a distinction that had apparently been introduced into legal discourse by Francis Bacon during the early seventeenth century, Michie noted that courts are entitled to *jus dicere* (to say what the law is), not to *jus dare* (to make or change the law).<sup>69</sup> He observed that the "Judges in England are the proper expositors of Acts of Parliament when they are made, but I don't remember that they ever questioned the power of making laws." His view was that in these legislative matters, colonial legislatures "alone in the first and his Majesty in his Privy Council in the last instance were the [proper] judges."<sup>70</sup> This assessment of judicial review as an illegitimate exercise of legislative power, appeared, as already noted, in earlier South Carolina clashes between judges and the legislature, and would reappear during the 1780s as one of the principal reasons urged for

<sup>68</sup> Quoted in *id.*, from the MS Journal So. Car. Court Common Pleas, 1754-1763, at 237 (emphasis added). Notice Michie's use of the term "judge" and "judgment" to describe the king's "legislative" decision to repeal or declare void a colony statute.

<sup>69</sup> Hamburger, *supra* note 2, at 224-25.

<sup>70</sup> See the longer quote from Michie's opinion above.

rejecting the new judicial practice, one of those persisting criticisms that would continue to plague the reputation and legitimacy of judicial review.

There is a second important idea that Michie draws upon, connected to the first. The first objection goes to the nature of the act of voiding, which Michie understands to be a “legislative” rather than a “judicial” act, law making (or unmaking) rather than law finding. The second goes to the question of who may properly carry out such an act. Review was considered to be an inherently hierarchal practice. Only a “superior” (legislative) authority can legitimately reconsider and reverse the judgment of a legislature. Michie notes the limitation on the power of English judges to question the validity of acts of Parliament, and implies that the same principle applies to the relationship between colonial courts and their legislatures. The deeper logic of this position seems to be that while it is legitimate for the Privy Council, a higher legislative authority, to review and repeal or void the “legislative” acts of an inferior jurisdiction that comes under their authority, it is improper for the courts of a jurisdiction to do so, not only because they should not be exercising legislative power, but also because the jurisdiction they do possess is inferior to—and certainly no higher than—that possessed by the legislature in that jurisdiction. To allow courts to call into question the validity of acts of the legislature would necessarily be to place them above legislatures as a “superior” supervising authority, a position courts certainly did not, and were not entitled to, possess.

Michie disclaimed any authority in his court to declare colonial acts void, saying that “if this court has a power of judging whether the laws which the General Assembly made are void or not, they have a power superior to the General Assembly.”<sup>71</sup> And such a result would not only violate the fundamental English constitutional principle of parliamentary supremacy, which many Americans took to apply equally to the relationship between American legislatures and *their* courts; it would also violate the more basic principle that only a superior authority can reconsider and reverse the decisions of another body. This objection to “horizontal” judicial review, as placing judges above legislatures, had, as already noted, also appeared earlier in the century in South Carolina, and would reappear decades later in the post-independence clashes that developed during the 1780s between state legislatures and courts, another one of those fundamental issues about the legitimacy of “horizontal” judicial review that could not be easily resolved.

Americans of that later generation sometimes addressed this problem not by denying that judicial review of necessity involved review by a superior authority of the decisions made by an inferior one, but by completely reframing the description of the pertinent hierarchy. Judicial review, Alexander Hamilton seems to acknowledge, involves the exercise of a superior authority in overturning the judgments of an inferior authority, but such acts did not, as many believed, place the courts above the legislature, for the courts were acting on behalf of the higher authority of the people declared in their constitutions. As such, it was the superiority of the people over their legislatures, not the superiority of

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<sup>71</sup> Quoted in Smith, *supra* note 4, at 591.

the courts, which properly described the exercise of this hierarchal power by American courts.<sup>72</sup> Judicial review, many thought, necessarily involved the exercise of a “vertical” authority. Hamilton’s brilliant re-characterization served to transform questionable “horizontal” review into a form of legitimate “vertical” review.

Chief Justice Michie also thought that allowing courts to exercise such power would undermine the rule of law itself. If judges “have a power [simply] to dispense with [laws] . . . everything will be left to precarious and arbitrary will and pleasure.” The repudiation by two chief justices of the colony of the ideas upon which the earlier Chief Justice Wright had relied, fatally undermined the case for “horizontal” judicial review. For now, traditional ideas about the proper relationship between courts and legislatures prevailed, and the efforts to establish this form of judicial review in colonial South Carolina failed to bear fruit.

Not everyone accepted Michie’s views, of course, either in the colonies or in England.<sup>73</sup> The very fact that an earlier chief justice had thought to argue for the practice and that, in the very case in which Michie delivered his opinion, counsel for the defendant had been asking the court to nullify a statute, testifies to the potential viability of the opposing ideas. James Abercromby, a “British-born barrister, who prior to 1743 had served nearly thirteen years as Attorney and Advocate General of South Carolina and had acted since 1749 as colonial agent for North Carolina,” tried in 1752 to interest the British ministry in his proposal for a Parliamentary statute that would have overturned Whitaker’s and Michie’s views by explicitly authorizing colonial courts to “judge” the repugnancy of colonial statutes, but the ministry seems to have ignored his efforts.<sup>74</sup> Abercromby, of course, must have believed that without such a statute the case for “horizontal” judicial review would founder, as it in fact did.

But the ideas which underlay the judges’ claims to a power of judicial review did not disappear. As Chief Justice Wright had made apparent, the case for “horizontal” judicial review began with a different opinion about the status of laws that were in conflict with charter and governor’s commission restrictions. Statutes adopted in contravention of such limitations simply did not have the force of law; colonial legislatures lacked the power to enact them. Such laws were void, not voidable. Underneath it all, this represented a different view of the nature of the restrictions under which colonial legislatures operated. Repugnancy was a limitation upon the power of colonial legislatures to make law in the first place, what might be termed a legal-judicial limitation, rather than a political-legislative one. Underlying disputes about the nature of the constraints under which legislatures operated would continue to separate supporters and opponents of judicial review, in a somewhat different form, during the 1780s.

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<sup>72</sup> See *The Federalist* No. 78.

<sup>73</sup> Smith, *supra* note 4, at 592.

<sup>74</sup> *Id.* at 578-82.

If the restrictions under which legislatures operated limited their power to enact law in the first place, it was completely appropriate, indeed necessary, for judges who were charged with determining what the law was, as they went about deciding cases, to say that a statute in conflict with charter or governor's commission restrictions was not law, and did not bind the court or the litigants before it. To arrive at this conclusion, of course, they had to interpret the terms of a statute and the provisions of a charter or a governor's commission, but it was the proper duty of judges to expound the law and to declare what it was. Such determinations were not "legislative" in that they did not alter existing law; indeed, they did not involve the act of voiding a law at all. They simply determined that a statute had never been law in the first place. Moreover, as they did not involve the voiding of a law and did not, from this perspective, involve the reversal of a legislature's decision, they also did not require that courts possess a power "superior" to the legislature's. Any judge on any court could properly perform such law finding duties in the course of adjudicating cases.

One deeply problematic aspect of all this involved the question of who properly was entitled to make the judgment that a legislature had exceeded its granted powers. Was an ordinary court entitled to look into the legislature's authority to enact a statute by taking notice of such things as royal charters or governor's commissions, and was it then entitled to deliver an authoritative interpretation of the language in these instruments (as well as of ordinary statutes) in the course of deciding a case? Or were such interpretive acts beyond the proper jurisdiction of an ordinary court, whose duty it was simply to expound and apply the law as written? The case for "horizontal" judicial review depended crucially on the view that any judge on any court had jurisdiction to take cognizance of and to interpret the foundational documents of government (royal charters, governors' commissions) and then to make an authoritative determination that an enacted statute stood in violation of the restrictive language contained in them, and hence was not law. For many contemporaries this was a deeply unsettling idea, not least because it threatened to overturn the established hierarchies of authority.

There were other isolated incidents in which colonial judges declared provincial statutes not to be binding law, or in which, during the run up to Independence, they declared an act of Parliament void,<sup>75</sup> but these did not grow into a movement that might have made judicial review a regular feature of colonial governments. Not only were prevailing constitutional ideas of the period unfavorable to this development, but so also was the broader political situation.

The notion that colonial courts could enforce the imperial repugnancy standard by overturning the enactments of provincial legislatures would not likely have held a great deal of appeal for many American political leaders. Nor would the British have accepted the idea that a colonial court could possibly possess the power to declare an act of Parliament void. In any case, the enactments of American legislatures were already subject to

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<sup>75</sup> Hamburger, *supra* note 2, at 272-80.

several layers of review and an additional one would not only seem unnecessary, but might actually have resulted in overturning the hierarchy of established relations, as Michie pointed out. Suppose the king had decided to confirm a colony law; would the decision of a colonial court that the law was null and void preempt the king's judgment?

Drawing upon existing English constitutional conceptions, the case for "horizontal" judicial review could be (and had been) made out, but it conflicted with other more fundamental constitutional ideas, and for that reason, among others, failed to persuade crucial members of the South Carolina bench. Without a broad commitment to these ideas by the judges, no movement for judicial review was likely to succeed. As important, the practice did not generate the wider political support that would have been necessary to make it a regular feature of American colonial governments. For many Americans, the political and constitutional consequences of accepting the argument for judicial review were simply intolerable. The case for "horizontal" judicial review was there to be made and appeared almost self-evident if one accepted its basic premise about the nature of the constraint under which legislatures operated; what it required was a more favorable political and constitutional climate to flourish and prevail against the basic constitutional values with which it remained deeply in conflict.