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The Largely "Legislative" Character of the ("Horizontal" and "Vertical") Constitutional Checks Placed on Colonial Legislatures

1.1 THE STRUCTURE OF COLONIAL GOVERNMENTS

American colonial governments, which were established over the course of the seventeenth and early eighteenth centuries, took, as is well known, one of three basic forms. They were organized either as royal, proprietary, or corporate colonies. By the middle of the eighteenth century, the majority of colonies (eight of the thirteen) had been taken under the direct rule of the British Monarch. Three colonies remained proprietorships, Maryland, Pennsylvania, and Delaware, which "until the Revolution . . . had [a separate legislature but] the same governor as Pennsylvania."[1] Only two, Connecticut and Rhode Island, retained their status as corporate colonies.

Two features of the eleven royal and proprietary governments, under which most Americans then lived, are of particular importance for this book. The first being that in both types of governments popular elections were limited to the selection of members of a single house of the legislature, the lower house.[2] Decisions about who would serve as governor of the colony and who would sit as a member of the upper house of the legislature (the Council) lay not with the inhabitants of the colony but with the governor and monarch or the proprietor.[3] Both governors and councillors received their appointments from and served at the pleasure of

[1] Richard Hofstadter, William Miller and Daniel Aaron, *The American Republic: Volume One to 1865* (Englewood Cliffs New Jersey, Prentice Hall, Inc., c. 1959), 57.

[2] Pennsylvania and Delaware had unicameral legislatures, which were popularly elected, see Jackson Turner Main, *The Upper House in Revolutionary America, 1763–1788* (Madison, Wisc., The University of Wisconsin Press, 1967), 96.

[3] Except in Massachusetts where members of the upper house of the legislature were selected by the lower house and by outgoing members of the upper house, subject to the governor's veto, ibid., 68.

the king or the proprietor.[4] Although the subject is complicated,[5] councillors were often chosen from among a colony's elites, with an eye toward securing support for the colonial government from the colony's leading persons and as a counterweight to the lower houses, which were sometimes referred to as the "democratical" part of these governments.[6] In royal colonies, governors were instructed to nominate men to the Council who were "of good life, well affected to our government, of good estates and abilities, and not necessitous people."[7] In these colonies, the crown also appointed the judges, who like governors and members of the Council ordinarily served at pleasure. In this world, governors, legislatures, and judges all exercised a mix of capacities, judicial, legislative, and executive. Modern separation of powers ideas and practices were still at a formative stage. And so, in royal colonies, governors together with the upper house of the legislature normally sat as provincial courts of final resort in civil matters, often called Courts of Error.

The second noteworthy feature of royal and proprietary governments was that bills passed by the popularly elected legislative representatives of the people of the colony were subject, in colonies with bicameral legislatures, to a double "veto" wielded first typically by the unelected Council and then by the governor. Both governors and Councils exercised their "vetoes" as part of their role in lawmaking. Like the English monarch, governors were considered to be a third branch of the legislature, and the express assent of all three branches was required in order to confer the force of law on a bill.[8]

It was not coincidental that these "horizontal" constitutional constraints on popular assemblies were incorporated into the lawmaking

[4] "[I]n practice," according to Jackson Turner Main, "[councillors] usually enjoyed tenure for life," ibid., 4.

[5] Ibid., 3–4.

[6] See Daniel Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill, N.C., The University of North Carolina Press, 2005), 72.

[7] Leonard Labaree, *Royal Government in America: A Study of the British Colonial System before 1783* (New Haven, Ct., Yale University Press, 1930), 136.

[8] When Joseph H. Smith, a delegate to New York's Provincial Constitutional Convention, which was drafting the state's first constitution, proposed to give New York State's new governor "a negative upon all laws passed by the Senate and Assembly," he thought it necessary to add "the Governor . . . as a third branch of the Legislature." *Journals of the Provincial Congress, Provincial Convention, Committee of Safety and Council of Safety of the State of New York, 1775–1776–1777* (Albany, N.Y., Printed by Thurlow Weed, Printer to the State, 1842), I, 834. In many colonies, governors were also vested with judicial authority, sitting as Chancellor or as a member of the Court of Errors.

process. It was commonly understood that legislatures operated under the duty to deliberate upon and determine that proposed laws both promoted, or at least would not be detrimental to, the welfare of the polity (including the wider empire) and did not violate constitutional restrictions. Definitive judgments about constitutionality, in the eighteenth-century Anglo-American system, were to be made by legislatures (explicitly or implicitly) during the lawmaking process. In the case of colonial legislatures, these determinations were subject to further "vertical" review and reversal by the King's Privy Council, acting (almost always) in its "legislative" capacity. The imperial review process is described in greater detail later in the chapter.

For all the considerable differences among them, these American governments took their basic form from that of the British. The monarch was of course an unelected hereditary ruler who served as a third branch of the legislature;[9] the British Parliament consisted of two houses, of which only the lower house was popularly elected. The upper house of the British legislature, the hereditary House of Lords, also sat as the court of final resort in the realm. American governments were often thought to imperfectly mirror this "mixed" constitution of Britain, which combined elements of monarchical, aristocratic, and democratic government, maintaining a balance that was commonly viewed as keeping in check the natural evils that had long been associated with each type of government alone.[10]

In a number of colonies, over the course of the eighteenth century, constitutional clashes broke out between governors and the popularly elected lower legislative houses. Less often, the lower houses engaged in struggles with the colony's upper house, the Council.[11] But in more colonies, the most sustained and intense conflicts were those that erupted with governors. Many Americans viewed these battles between their legislatures and governors as a reprise of the long constitutional struggle that had taken place in England between Parliament and the English kings. English and American Whigs believed that in this long battle Parliament had steadfastly opposed the evils of excessive executive

[9] In his *Lectures on Law* delivered in 1790–1, James Wilson noted that in Britain, "the legislature consists of three branches, the king, the lords and the commons." Robert G. McCloskey (ed.), *The Works of James Wilson* (Cambridge, Mass., Harvard University Press, 1967), I, 312.

[10] Gordon Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill, N.C., The University of North Carolina Press, 1969), 18–20.

[11] Main, The Upper House in Revolutionary America, 5.

power and defended the liberties of the people. At a fundamental level, mid-eighteenth-century Anglo-American constitutional politics was still framed as a conflict between magistrates (monarchs or governors), on one side, and the people's (legislative) representatives, on the other. Not only did the gubernatorial "veto" in royal and proprietary colonies create a frustrating practical situation in which, at times, the people of the colony were prevented from enacting through their representatives the laws by which they wished to govern themselves. The continued existence of the "veto" was also understood to be of wider constitutional significance. Parliament had emerged from its battles with the English monarch having placed firm limits on the crown's power. After 1707 no British monarch ever refused assent to a bill that had been passed by the houses of Parliament. Increasingly, over the course of the eighteenth century, the two houses of Parliament came to be viewed as a sovereign legislature, essentially unchecked by the monarch. But colonial governors continued to wield an absolute "veto" over bills coming out of their legislatures. Over the decades leading up to the Revolution, many Americans developed a deep antipathy toward what they viewed as the excesses of gubernatorial power, and a strong desire to reduce it, among other ways, by eliminating the gubernatorial "veto."

For imperial officials and some Americans these clashes between governors and lower legislative houses were sometimes viewed as disordering the fine balance in these governments. Often, they attributed the problem to the dogged pursuit of greater power by popular assemblies. In a number of colonies, governors and Councils were effective in restraining the power of lower legislative houses.[12] But in other colonies, lower houses aggressively sought to expand their authority and often succeeded. Governors depended on the lower houses for payment of their salaries and expenses, and these bodies used this leverage to rein in their chief magistrates. As a result, in a number of colonies, governors, at times, felt compelled to give their assent to objectionable but especially popular bills that came to them from the legislature. In 1744–5, Cadwallader Colden, then an adviser to New York's royal governor George Clinton, wrote in a report prepared for Clinton that the actions of New York's lower house, the Assembly, placed at risk the "proper Balance between the Monarchical Aristocraticall & Democratical forms of Government."[13] Governor Clinton was "without force, without

[12] See ibid., for an excellent colony by colony description of the social composition and various political postures of the colonial Councils.

[13] Colden, "Observations on the Balance of Power in Government," [1744–45], *NYHS Coll.* (1935), 251, 253, quoted in Hulsebosch, Constituting Empire, 72.

money (which he can only obtain of an Assembly), without Friends or any Natural Interest."[14] Daniel Hulsebosch has written of this situation that

> [m]ost troubling, Colden believed, was the absence of the aristocratic element. The Council, on which he served for fifty years, was too weak to help counter the popular forces associated with the Assembly. He lamented the mistreatment of the councilors and other faithful crown servants, and he sought ways to insulate them from provincial harassment.[15]

If the actual power of governors was often less than their formal power, and if unelected Councils did not always operate to counterbalance lower houses as imperial officials hoped they would, still, when Americans had the opportunity to newly fashion their governments following Independence, the changes they made reflected their antagonism toward these features of their colonial regimes. In their new constitutions, they greatly reduced the powers of their governors. In most states, governors were stripped entirely of the authority to "veto" laws enacted by the houses of the legislature, in two states they were granted a limited "veto" that could be reversed by a super-majority vote of the legislature.[16] These new republican frames of government represented, for the time, sweeping change. The democratic principle of popular election was extended in nearly every state to the upper house of the legislature.[17] Legislatures could now more truly be considered the representatives of the people than at any time. But as a result of their colonial experiences, and their basic constitutional assumptions, the distrust of governors continued to run deep, and in the first years following Independence, most of the new constitutions did not even accord governors the dignity of popular election. They were reduced to being creatures of the legislature, appointed to their office by a vote of that body, in what

[14] Ibid. [15] Ibid.

[16] South Carolina retained a gubernatorial "veto" in its temporary 1776 constitution, which was eliminated just two years later in its constitution of 1778. Of the original permanent constitutions adopted down to 1780, only New York (1777) and Massachusetts (1780) gave "vetoes" of any kind to bodies outside the two houses of the legislature, and in both states these "vetoes" were reversible by a supermajority vote of the legislature. Chapter 2 discusses these provisions in greater detail.

[17] Under the first constitutions of Massachusetts, New Hampshire and South Carolina, members of the upper house were not popular elected but chosen by the popularly elected lower house. This arrangement was changed to popular election of the upper house within a few years, South Carolina (1778), Massachusetts (1780) and New Hampshire (1784).

can perhaps be seen as the ultimate triumph (for the moment) of popular assemblies in their long struggles with governors.[18]

These changes created significantly more democratic constitutions in which legislatures were given the plenary power to make laws on behalf of the people, unchecked by another branch of government. Under these first constitutions, American legislatures would be both considerably more democratic and substantially less constrained than they had been. A system replete with "vetoes" over legislation would be replaced by one in which, in many cases, there were none. In one respect, these developments were even more radical than the emergence of Parliamentary sovereignty in Britain, for in Britain, the hereditary House of Lords still stood as a bulwark against the popularly elected House of Commons.[19]

The first state constitutions brought governments in the rest of the country into broad conformity with the type of government the two corporate colonies, Connecticut and Rhode Island, had long enjoyed. In these colonies, both houses of the legislature had been popularly elected, as had the governor, from whom the power to "veto" laws had been withheld.[20] Following Independence, legislatures in Connecticut and Rhode Island, evidently satisfied with their existing frames of government, simply readopted their colonial charters.

Even during the early years following Independence, however, some Americans found these developments to be more than a little disquieting. Many conservative Whigs believed that they unhinged the fine balance of government by giving excessive power to the popular element. When these men thought about what could be done, they looked back to the example of their colonial constitutions for ideas about how to impose checks upon the largely unfettered power the first state constitutions had conferred on popularly elected legislatures. As attitudes toward these popularly elected legislatures grew less favorable during the early 1780s, more Americans

[18] Except in the two corporate colonies, and in Pennsylvania and New York, where the chief executives were popularly elected.

[19] To be certain, most members of the British lower house during this period were only "common" in so far as they were not generally members of the nobility. The overwhelming majority were large landowners drawn from the gentry sitting just below the landed aristocracy. The Commons was elected under a highly restrictive suffrage that gave perhaps only 20 percent of English men the right to vote for members of Parliament.

[20] In Connecticut, the governor also sat as a member of the upper house of the legislature where he was entitled to break ties by casting an additional vote when necessary, see Zephaniah Swift, *A System of the Laws of the State of Connecticut: In Six Books* (Windham, Ct., 1795, repr. Arno Press, 1972) I, 59–63.

began to look more approvingly on such efforts. Chapter 2 takes up the story of the first constitutions in greater detail.

If the distaste most Americans initially seem to have felt toward "vetoes" over the enactments of their legislatures can be traced in part to the role colonial governors had played in their governments, undoubtedly these sentiments also found their source in the further imperial review to which colonial laws had been subjected. But as with the "vetoes" of governors, from the beginning, some Americans saw in these imperial review procedures a prudential check that might serve to rein in the passions to which popularly elected legislatures seemed at times prone, and that they hoped might be re-established in their new governments in some acceptably modified domestic form.

1.2 PRIVY COUNCIL "LEGISLATIVE" REVIEW OF COLONIAL STATUTES

The broad contours of the system under which the legislative enactments of the American colonies came to be reviewed by the King-in-Council emerged over the course of the last quarter of the seventeenth century and the first decades of the eighteenth. Colonies were considered to be part of the king's demesnes, "his possessions, which, through indulgence of a fiction, he was deemed to hold by right of conquest . . . . [T]he whole apparatus of imperial administration was set up and elaborated on this premise."[21] In the charters of proprietary and corporate colonies, and in provisions in the governors' commissions in royal colonies, the king conveyed the authority to make laws. Most of these charter and commission grants contained one version or another of the restriction that colony laws must not be "contrary [or] repugnant" to the laws of England but should be "as near as may be, agreeable" to the laws of the realm "considering the nature and constitution of the place and people there."[22] These formulas left considerable room for colonial legislatures and the Privy Council to engage in broad, flexible evaluations directed at determining whether, because of the distinctive social and economic conditions in a colony, the welfare of that colony and the welfare of the

[21] Julius Goebel, Jr., *History of the Supreme Court of the United States I: Antecedents and Beginnings to 1801* (New York, Macmillan, 1971), 36.

[22] From the Rhode Island Charter of 1663, quoted in Mary S. Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, Mass., Harvard University Press, 2004), 41; see also Goebel, Antecedents and Beginnings, 3.

empire would be served by allowing a divergence from English law.[23] These kinds of considerations were integral to many Privy Council decisions about whether a statute actually violated the constitutional "repugnance" restriction.[24]

It took a number of years to settle the question whether the king's assent was required *before* a colony bill could become law, but in 1677, "[t]he Crown relinquished the claim to the formula 'Be it enacted by the King's Most Excellent Majesty by and with the consent of the General Assembly' and permitted the prevalent colonial 'Be it enacted by the Governor, Council and assembly.' The plantation enactment thus was not to be the act of the King [and consequently] in English eyes stood on no more stately footing than the act of any inferior jurisdiction in England."[25] Thereafter, in practice (even if the theory remained somewhat ambiguous) colonial bills gained the force of law when passed by the legislature and assented to by the governor of the colony. Confirmation by the king was not a necessary step in the lawmaking process. The king's Privy Council review, consequently, primarily involved the question of whether colonial laws should remain in force.

In a number of charters, the king had explicitly required colonies to transmit their statutes to his Privy Council for "approbation or disallowance."[26] In royal colonies this requirement was included in the governors' commissions. By the middle of the eighteenth century, all the colonies, except Connecticut and Rhode Island, were obliged to send copies of their statutes to England for review.[27] Statutes also came to the Council as the result of petitions for review brought by interested parties.[28] After its establishment in 1696, the Board of

[23] On the "interpretive flexibility of early written constitutionalism," see Mary S. Bilder, "Charter Constitutionalism: The Myth of Edward Coke and the Virginia Charter" (2016) 94 *North Carolina Law Review* 1545, 1590.

[24] Bilder, Transatlantic Constitution, 40–46; and Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* (New York, Columbia University, 1915), 139.

[25] Goebel, Antecedents and Beginnings, 66.

[26] Bilder, Transatlantic Constitution, 54–57; Goebel, Antecedents and Beginnings, 65–66; for a number of years there remained ambiguity about whether the king's "approbation" in his Privy Council served to pass a colony act into law or merely to confirm it. "In any event, so many acts, even in royal provinces, were operative as law without the royal pleasure ever being signified that we must conclude that whatever the theory, the Crown was practically not an indispensable party," 68.

[27] Bilder, Transatlantic Constitution, 56–57; Russell, Review of American Colonial Legislation, 20–22, 31–34, 36–37, 97–103.

[28] Russell, Review of American Colonial Legislation, 50–51.

Trade, upon which was placed the responsibility to advise the Council, performed the initial evaluation of statutes and issued a recommendation as to what the statute's fate should be. To arrive at these opinions the Board conducted extensive deliberations, which involved procuring the advice of the Board's counsel, or law officers of the Crown, and holding hearings at which colony agents and other parties presented their arguments about the validity, benefits or dangers of a statute.[29]

In cases in which individuals or groups of petitioners sought to have the Council disallow a statute (or declare it null and void *ab initio*), hearings became increasingly "formal and elaborate, each side being represented not only by an agent, but also by a solicitor. Thus, to cite one example among many, when in 1725 the Board considered several acts of New York regarding the Indian trade, the hearings extended over several days and the agent for the province and a solicitor for the merchants each addressed their lordships at considerable length."[30] Recommendations of the Board were sent to the Lords Committee of the Privy Council, where an additional round of hearings might be held. In one case in which the Board had advised a disallowance of statutes, a party petitioned the Lords Committee to reconsider this recommendation and instead to declare the acts null and void in their original creation. In urging the Lords Committee to propose this course of action to the Council itself, the British Attorney General Pratt made a number of arguments, which were answered in turn by those of Alexander Wedderburn, speaking for the colony.[31] "[O]nly after a report from [the Lords Committee] to the Council itself and a vote there would [an] Order in Council issue."[32]

These Council deliberations were distinctively "legislative" in that they revisited a broad range of issues, which typically included considerations both of constitutionality and of policy.

> Board ... committee reports and orders in council ... show that under normal conditions each individual law was scrutinized not only for violations of the instructions ... but also with a view to its probable expediency for the colony

[29] Goebel, Antecedents and Beginnings, 66–67.

[30] Russell, Review of American Colonial Legislation, 51.

[31] An account of this case is presented in Joseph H. Smith, *Appeals to the Privy Council from the American Plantations* (New York, Columbia University Press, 1950), 612–14; the report of the arguments made before the Committee is derived from Lord Hardwicke's notes, ibid., 613 fn. 465.

[32] Goebel, Antecedents and Beginnings, 67.

and the Empire, possible injury to other colonies, and unseemly infringements upon rights to private property or individual liberty.[33]

If the vote in the Council went against an act, as a result of "legislative" review, the Council normally ordered the statute to be "disallowed." The formula contained in the governors' commissions indicates that upon disallowance a statute would "*thenceforward* cease determine and become utterly void."[34] Disallowance, in other words, operated as a repeal of the statute, rendering it void going forward but leaving intact rights that had attached under it while it had been in effect.[35] In a small number of cases, however, the Privy Council went further, issuing an Order in Council that declared a statue null and void *ab initio*, that is of absolutely no legal effect from the beginning. Coming after some interval of time in which the act had been in operation "[a] declaration of nullity was something close to catastrophic, for everything that might have been done under it was rendered nugatory."[36] Though the Board of Trade repeatedly recommended declarations of nullity, because of the serious consequences and the persuasive arguments colony agents often made, the Council only followed this advice in a handful of cases.[37]

As the king had reserved only the power to *"disallow"* acts in certain colonial charters and in the royal governors' commissions, the basis of the Council's authority to render *declarations of nullity* in its legislative proceedings was somewhat unclear, as was much else about Privy Council practice. Goebel speculates that the Council's authority may have been based either on the principle that there were "few restraints upon the King's power in his demesnes" or on a statute passed by the King-in-Parliament in 1696 declaring colonial acts to be null and void if they were repugnant to certain English laws, which the Council later interpreted very broadly as giving it the authority to nullify all acts repugnant "to the known laws and statutes of the Kingdom."[38] At times, because of the confusing, internally contradictory verbal formulas the Council sometimes used,[39] it was difficult even to say

[33] Russell, Review of American Colonial Legislation, 109.
[34] Goebel, Antecedents and Beginnings, 68.
[35] Goebel comments that "[n]o wonder that the Crown strove to require suspending clauses . . . .," ibid.
[36] Ibid., 69. [37] Ibid., 71.
[38] Ibid., 69–71; and Smith, Appeals to the Privy Council, 523–32. Smith argues that the Council's power to nullify statutes in "legislative" proceedings derived solely from the 1696 Parliamentary statute, as broadly construed by the Council.
[39] Goebel notes the ambiguous and internally contradictory formulas the Council sometimes used, Antecedents and Beginnings, 68–71 ("Even so, the formula is on its face

whether they had disallowed an act or declared it null and void. Joseph Smith, who studied the Council's work exhaustively, devoted a number of pages in his monumental history to an attempt to clarify whether, in several cases, the Council, had disallowed an act or had declared it null and void from its inception.[40] In the case of a 1706 Order in Council, for example, he concluded that "[a]s to whether this is a disallowance or a declaration of nullity, there is support for either view."[41] Smith made clear that eighteenth century contemporaries were as apt to be confused by the formulas the Council sometimes used as modern historians. He noted that in 1767 both of the ambiguous cases he has just discussed were regarded as declarations of nullity.[42]

In other respects, as well, the basis of Council action was often obscure. A number of lawyers were of the view that since the king had not explicitly required Connecticut and Rhode Island to submit their statutes for "approbation or disallowance" in his charters to them, the Council had no authority to review their laws "legislatively."[43] Yet under pressure from the British government both colonies had in fact submitted copies of their statutes to the Council on a number of occasions,[44] and the Council had in fact disallowed both a Connecticut law and a Rhode Island law upon "legislative" review earlier in the century.[45] Joseph Smith observed that Council practice was poorly theorized and discussions about it were often "clouded by confused conceptions."[46]

Privy Council "legislative" review had a significant impact on the conduct of American provincial governments. Some "8,563 acts [were] submitted [to the Board of Trade] by the continental colonies[,] 469 or 5.5% were disallowed or declared null and void by orders in council."[47]

ambiguous since it could stand as well for a declaration of nullity," 69; "where the formula used was highly ambiguous," 71).

[40] Smith, Appeals to the Privy Council, 534–36.

[41] Ibid., 534–35; after a long discussion, he decided that another Order issued in 1718 must have been a disallowance, ibid., 536.

[42] Ibid., 535, 536. [43] Ibid., 549, 652.

[44] Russell, Review of American Colonial Legislation, 103 and 103 fn. 1 ("But to the recurrent insistence of the government that they send home complete copies of their acts, [even Connecticut and Rhode Island] yielded a somewhat dilatory compliance.") ("Collections of Connecticut laws were transmitted in 1699, 1706, 1710, 1740 and 1752; of Rhode Island in 1699, 1700, 1710"); see also Bilder, Transatlantic Constitution, 58–59.

[45] Smith, Appeals to the Privy Council, 549 fn. 121; Russell, Review of American Colonial Legislation, 103; and Goebel, Antecedents and Beginnings, 78.

[46] Smith, Appeals to the Privy Council, 523.

[47] Russell, Review of American Colonial Legislation, 221. Forrest McDonald reports the same numbers, *States' Rights and the Union, Imperium in Imperio, 1776–1876* (Lawrence, Kans., University of Kansas Press, 2000), 2. Russell goes on to say that

Perhaps as troubling, from the perspective of frustrated colonists, numerous colonial laws had been passed containing suspension clauses pending Privy Council approval and these and other statutes that had been submitted to the Board of Trade were simply not acted upon but were left in imperial limbo. It was Privy Council "legislative" review that Americans singled out to denounce in the Declaration of Independence.

There were certain subjects upon which American colonial legislatures repeatedly enacted laws that the Privy Council repeatedly intervened to disallow. One of these involved the jurisdiction of justices of the peace.[48] In England, JPs possessed the authority to hear cases that involved no more than forty shillings, £2. Reflecting, evidently, the desire of their constituents in many colonies for local, informal and inexpensive justice, colonial legislatures time and again passed statutes to increase the jurisdictional limit of the cases justices of the peace were authorized to hear. Justices' courts were local and often conducted by men with little or no legal training. Cases were ordinarily heard without observing common law formalities, and often without juries or lawyers. But these courts offered colonists, community based, inexpensive and speedy justice, of which they could avail themselves without having to travel great distances and without having to pay lawyers' fees.

In quite a few cases, the Privy Council reacted to these attempts to expand the scope of summary justice by disallowing a statute. In recommending that the Privy Council disallow a 1769 New Jersey statute that attempted to raise the jurisdictional limit of justices' courts to £10, the Board of Trade, for example, engaged in a not untypical judgment, which combined a repugnant to the laws of England analysis with a determination that the change would be damaging to the well-being of the colonial polity. The Board submitted that this type of law

> serves too often to favour the establishment of much petty Tyranny in men altogether unfit to be intrusted with such power, and that these Reasons have weighed so far with the Legislature of Great Britain, that this kind of Jurisdiction

"[b]y colonies the percentages of laws disallowed are: New Hampshire, 7.2 per cent.; Massachusetts, 2.8 per cent.; New York, 3.4 per cent.; New Jersey, 4.5 per cent.; Pennsylvania, 15.5 per cent.; Virginia, 4.3 per cent.; North Carolina, 8.8 per cent.; South Carolina, 4.9 per cent.; and Georgia, 9.4 per cent.," although he also concedes that "[n]umerous discrepancies preclude perfect exactitude, and the figures are only approximately correct," 221 and 221 fn. 2.

[48] On summary justice see Russell, Review of Colonial Legislation, 165–67.

has been always given with caution, sometimes with reluctance, and never hitherto . . . extended beyond the Sum of forty Shillings Sterling.[49]

Exercising its "legislative" judgment in constitutional matters, however, the Privy Council was, at times, prepared to allow some colonies to diverge from English law, based on its assessment of their local circumstances. New York, for example, was permitted to raise the jurisdictional limit on cases that mayors, justices of the peace and recorders could hear to £5 in local money. And the Council also allowed New Jersey to raise the jurisdictional threshold in its summary process courts to £5.[50] But should the Privy Council judge that a province had attempted to raise the jurisdictional amount too much or too quickly, it usually intervened to disallow it. When New York sought again to raise its limit, this time to £10, that act was disallowed.[51] "In like manner, New Jersey enjoyed for some years a five-pound limit, and attempted in vain to raise the amount to ten pounds."[52]

Privy Council dealings with these colonial laws are noteworthy because as it turns out, during the 1770s and 1780s a number of state legislatures took up where their colonial predecessors had left off, passing statutes to raise the jurisdictional limits of summary process courts. Only now the evaluation of the constitutionality of these statutes was (mainly) handled as a judicial, rather than as a legislative matter.[53] Of the roughly half dozen early American "judicial review" cases that arose down to 1787, two at least involved state courts declaring such statutes unconstitutional.[54]

This course of events looks very much like a continuation of the struggle between colonial legislatures and the Privy Council. The New Jersey case of *Holmes* v. *Walton*, decided in 1780, appears to be the first

[49] James Munro (ed.), *Acts of the Privy Council of England, Colonial Series* (London, His Majesty's Stationery Office, 1912), V, 310 (June 7, 1771).

[50] Russell, Review of Colonial Legislation, 165 fn. 1. [51] Ibid., 165–66.

[52] Ibid., 166 fn. 1.

[53] In 1782, New York's Council of Revision did deliberate upon one such case in the traditional way, as part of the lawmaking process, see Alfred B. Street, *The Council of Revision of the State of New York; and Its Vetoes* (Albany, N.Y., William Gould, Publisher, 1859), 241–42 ("An act to empower justices of the peace, mayors, recorders and aldermen to try causes to the value of ten Pounds").

[54] In particular, see *Holmes* v. *Walton* (N.J., 1780), and the New Hampshire £10 Act cases (1786–87). But several other of these early American "judicial review" cases also involved constitutional challenges to statutes that eliminated recourse to jury trials in other types of judicial proceeding, see *Trevett* v. *Weeden* (R.I., 1786) and *Bayard* v. *Singleton* (N.C., 1787). These cases are discussed in greater detail in later Chapters 8 and 9.

clear case in which an American court declared a state statute null and void on grounds that it was unconstitutional. The case involved a New Jersey act that had given justices of the peace authority to adjudicate disputes summarily in which personal property of great value was at stake. The statute did give parties the option to have the matter heard by a six-man jury before a single justice if more than £2 (40 shillings) was in controversy. The summary process the statute provided was nearly identical to that in a provincial New Jersey act that the Privy Council had disallowed in 1771, on the ground that it had sought to authorize the use of that process in the adjudication of disputes up to £10.[55] Whatever the judges in *Holmes* v. *Walton* may have thought about the grounds of their authority,[56] from a functional perspective, they were assuming a role that had been played (primarily) "legislatively" by the Privy Council under the previous government. Now, however, they were acting under a state constitution from which any express authority to "review" and "veto" the enactments of the state legislature were entirely absent.

1.3 PRIVY COUNCIL "JUDICIAL" REVIEW OF COLONIAL STATUTES

Although the Privy Council had lost its domestic judicial authority during the upheavals of the reign of Charles I,[57] it retained the authority to hear appeals from British colonies, and became, for all intents and purposes, the court of final resort for the empire. Litigants aggrieved by a decision of colonial courts, could if they met certain monetary and other requirements, appeal to the Privy Council, which sitting in its judicial capacity would decide whether to reverse or uphold the colonial court's judgment. It was not unusual at this time for a governmental body like the Council to exercise what we would today describe as both "legislative" and "judicial" powers. The House of Lords, after all, operated as both the upper house of the British legislature and the highest court in the land. In many

[55] Munro (ed.), Acts of the Privy Council of England, Colonial Series, V, 309–11 (June 7, 1771). The Privy Council also repeatedly intervened in its capacity as a "superior" legislature to disallow colonial paper currency laws, debtor relief legislation, legislation governing property rights, and acts vesting legislatures with authority to settle matters that "do constitutionally belong to courts of justice alone," Russell, Review of Colonial Legislation, 120–33, 152–56, quote at 191. These issues would also come to play a significant role in post-revolutionary American constitutional politics and law.

[56] The written record in the case is fragmentary; *Holmes* v. *Walton* is discussed in greater detail in Chapter 4.

[57] Goebel, Antecedents and Beginnings, 37; and Smith, Appeals to the Privy Council, 3.

American colonies, governors and the upper houses of colonial legislatures wielded both kinds of power as well.

After threshold legal issues were disposed of, appeals at the Privy Council were heard on their merits before the Lords Committee.[58] The Committee did not sit to hear appeals during defined terms as courts normally did but was scheduled for hearings by the Lord President of the Council, and hearings could be held during any month of the year.[59] Typically, two English barristers would appear for appellants and two for respondents. Each lawyer would ordinarily be entitled to make his main argument and to offer a rebuttal following opposing counsel's argument. At hearings, objections to the admissibility of evidence would be entertained and after discussion the Committee would rule on these. Oral arguments were usually devoted in part to the presentation of English precedents.[60]

Sitting in its judicial capacity, the Privy Council had heard appeals from colonial courts for quite a number of decades before, in February 1727/28 in the Connecticut case of *Winthrop* v. *Lechmere*, for the first and only time, the Council held a colonial statute null and void *ab initio* sitting in its judicial capacity.[61] In several other cases appellants asked the Council to strike down statutes, but in all of these, after considering the possibility, the Council decided against doing so.[62] *Winthrop* v. *Lechmere* introduced into Privy Council practice a new "judicial" procedure for controlling colonial legislation.[63]

It is commonly supposed that the basis of Privy Council action in *Winthrop* v. *Lechmere* was clear. Although Connecticut's charter contained no requirement that the colony submit its statutes to the Board of Trade and Council for approval or disallowance, it did contain the restriction on the legislature's lawmaking power that statutes must not be repugnant or contrary to the laws of England. When one of the parties in the case challenged the validity of Connecticut's partible inheritance statute, the Council undertook to determine whether the statute was valid in order to decide the controversy between the parties, which turned on the question whether the rule of partible inheritance was in effect at the time in Connecticut. In this case, the Council found the Connecticut partible inheritance statute to be repugnant to the English law of

[58] On the Council's appellate procedure see Goebel, Antecedents and Beginnings, 43–45.
[59] Smith, Appeals to the Privy Council, 289. [60] Ibid., 293–95. [61] Ibid., 537.
[62] Ibid., 562–77; Goebel, Antecedents and Beginnings, 76–79.
[63] Goebel, Antecedents and Beginnings, 76.

primogeniture and hence invalid. The adjudication, as adjudications generally do, necessarily involved a retroactive judgment about the state of the law at the time the controversy arose. Hence, if the Order in Council were to adjudge the statute invalid in order to decide the case, it would have to apply that decision retroactively by declaring it to have been void *ab initio*, i.e., without legal force from its inception, as it in fact did.

There were certainly clear differences in the way statutes reached the Privy Council in "legislative" as opposed to "judicial" proceedings, and key differences in the posture in which the Council examined statutes under the two types of proceedings. In "legislative" review, statutes reached the Council mainly as a result of having been submitted by a colony for "approval or disallowance." But statutes could also reach the Council, in this kind of proceeding, as a result of petitions from individuals or groups, who wished to see a colony statute they opposed, disallowed or nullified. And while, in "legislative" proceedings, the Council held hearings in which proponents and opponents of a statute made constitutional and policy arguments, they arrived at their opinion of the statute outside the context of a full-blown factual controversy. In "judicial" review, statutes came before the Council on appeal from the decision of a colonial court, and as part of a factual controversy that the parties had developed during a colonial adjudication.

For all their differences, however, there were certain inescapable similarities between Council "legislative" and "judicial" proceedings. As in the case of "legislative" review, hearings on appeal before the Lords Committee led not to a decision but to a report to the Council itself, "a mere tender of advice to the crown."[64] And after the full Council considered and voted upon the Lords Committee's report, their decision was embodied in an Order in Council, the same instrument employed to effectuate their decisions in "legislative" reviews. "There can be no doubt from the nature of the proceedings," Smith avers, "that we have to do with the exercise of a judicial function . . . . [But while] the judicial quality of conciliar proceedings is conceded . . . we venture to suppose that no common lawyer would have called the Order in Council a judgment, even if emitted in a common law cause."[65] He acknowledges that the Council was "a body where because of the confusion of functions the range of policy making was broader than would have been tolerable

[64] Smith, Appeals to the Privy Council, 314–17.
[65] Ibid., 316. He believes that it more closely resembled a decree in chancery as an expression of the king's "pleasure in peremptory form."

in an agency confined to the settlement of issues presented solely by litigation."[66]

With only a single exception, every (constitutional) "repugnance" determination the Council made occurred in the course of a "legislative" review of colonial statutes. "In point of sheer bulk the process of legislative review completely overshadowed the Council's judicial business; moreover, the Board of Trade in 1760 termed conciliar judicial power of 'less importance and inferior dignity' to the legislative."[67] Because Orders in Council disallowing (repealing) colonial statutes (or in a few cases declaring them null and void) upon "legislative" review had been issued for decades before the sole order of nullity in the appeal in *Winthrop* v. *Lechmere* was handed down, and because "legislative" Orders in Council continued to be issued in great numbers thereafter, Americans who were not intimately acquainted with Privy Council practice often seemed to assume that the decision in the Connecticut intestacy case was actually a "legislative" rather than a "judicial" determination, which involved a disallowance rather than a decree of nullity.[68]

Connecticut Governor Talcott upon learning of the Privy Council decision in *Winthrop* v. *Lechmere*, for example, drafted an address to the King asking for reconsideration. His text reveals that he did not comprehend precisely what the Council had done and how. "'Youre Excelent Majesty in Counsill was pleased to declare that the law . . . should be vacated, and that it was thereby *Repealled* and made Void . . . . [T]is humbly prayd it may not now be *disallowed*" after being in effect for so many decades[69] (emphasis added). In 1740, an agent for Connecticut, Francis Wilks, seems to have been equally confused. Wilks wrote Governor Talcott of the Council's decision that if Lechmere had argued the case properly "that law wou'd never have been *repealed*"[70] (emphasis added).

[66] Ibid., 655. [67] Ibid., 524 fn. 2. [68] Ibid., 577, 626.

[69] Talcott, 5 *Connecticut Historical Society Collection* (1896), 419, 420 quoted in Dudley Odell McGovney, "The British Origin of Judicial Review of Legislation" (1944) 93 *University of Pennsylvania Law Review* 1, at 17 fn. 40.

[70] McGovney, "British Origin of Judicial Review," 17 fn. 40, quoting a letter from Wilks, 5 *Connecticut Historical Society Collection* (1896), 330. There are other examples as well. "Despite his successful handling of the appeal in *Philips* v. *Savage*, it is startling to find [the distinguished solicitor Ferdinand John] Paris failing in his advice [in another case] to make any distinction between the ordinary disallowance of an act and a judicial declaration of voidness *ab initio* upon appeal," Smith, Appeals to the Privy Council, 572. A number of modern historians have seemed similarly confused, see Smith, Appeals to the Privy Council, 524 fn. 2. Although Julius Goebel thought absurd the idea that the order in *Winthrop* v. *Lechmere* could ever be taken to have been decided "legislatively" (Antecedents and Beginnings, 79) that is precisely what the distinguished scholar Edward

To be certain, a number of lawyers understood the differences between the two types of proceedings and began to make arguments in an effort to sharpen the distinction, perhaps going beyond what actual Privy Council practice would admit of. In a 1759 case, petitioners sought to have the Council declare a Virginia statute null and void *ab initio* upon "legislative" review. Alexander Wedderburn, arguing for the colony before the Lords Committee, maintained that "a declaration of nullity was not possible in the present proceeding. It was contended that the crown was here acting in a legislative capacity; that a declaration of nullity in such proceeding would bind nobody. The question of nullity was not to be tried in a summary way; but in a judicial proceeding in a court of appeals."[71] But Attorney General Pratt forcefully rejected that position. He "replied that surely the present body had as high authority to declare the act void as any court of judicature. The [Lords] Committee was reminded that it sat as a council of state to advise the King in *lawmaking*"[72] (emphasis added).

Although Smith contends that over time the Council increasingly was of the view that judicial proceedings were preferable if a statute was to be nullified, he notes that there was still "substantial opinion that an act could be declared null and void *ab initio* without judicial proceedings."[73]

S. Corwin seems to have believed. "[T]he Privy Council viewed its action in annulling the Connecticut [statute in the case of *Winthrop* v. *Lechmere*] as legislative rather than judicial . . . ." Edward S. Corwin, "The Establishment of Judicial Review, I" (1910) 9 *Michigan Law Review* 102, 103; see also Francis Fane, *Reports on the Laws of Connecticut* (Charles M. Andrews, ed., New Haven, Ct., Acorn Club, 1915), 18 (Fane reported that the Connecticut statute had been "disallowed by the Privy Council").

[71] Smith, Appeals to the Privy Council, 613; see also 612 and 614 for an elaboration of this argument by James Abercromby, an agent for Virginia. Abercromby argued that even if the statute was repugnant "it did not ly within their Lordships Jurisdiction to declare it *ab initio* void, all that they could do was, if they saw good Cause, to represent it to his Majesty as *voidable*, nor could the King from the manner in which Mr. Camm had pursued his Remedy [by legislative review], go further than to *repeal* the Law . . . " (612) He went on to add that "the Grand Point in Argument was whether this Case, coming by way of Petition to the King in Council, in their Legislative or Ministerial Capacity could authorize their Lordships to determine in the first Instance what was, or what was not, Law. We argued that this could not be done otherwise than by a Judicial Appeal to their Lordships, and that then and not till then their Lordships sitting in Judgment as Judges, . . . could in the Kings Name, as Judges declare what was Law . . . ." (614) William Samuel Johnson, a Connecticut agent, made a similar argument in correspondence with the Earl of Hillsborough, who was then Secretary of State for the American Department, see Smith, Appeals to the Privy Council, 652.

[72] Ibid., 613–14.

[73] Ibid., 634–35. Goebel notes that "[t]he bias in favor of judicial proceedings if a question of voiding an act *ab initio* was posed may be laid to the indurated common law tradition that issues of such moment should be settled in true adversarial proceedings," Antecedents and Beginnings, 72.

In fact, the Council nullified statutes upon "legislative" review at least five times, but only once sitting in its judicial capacity.[74] Indeed, four of these five "legislative" declarations of nullity took place after 1761.[75] And Goebel points to an interesting aspect of the last three of these "legislative" declarations of nullity. He notes that in all three cases the Council used the term "*adjudge* and declare . . . the said act to be void," employing the language of judgment to conclude a "legislative" review.[76] This is either an attempt by the Council "to cloak their action with the semblance of a judgment" as Goebel suggests,[77] or, just as likely, reflects the view that in both kinds of proceedings the King-in-Council was thought in fact to be delivering "judgments" upon what the law should be.

Philip Hamburger has recently reminded us that

> [i]n fact, all acts of Parliament . . . were [considered] "judgments" of the court of Parliament . . . . In the early seventeenth century, Henry Finch explained: "The Parliament is a Court . . . having an absolute power in all causes," whether "to make Lawes, to adjudge matters in Law, to trie causes of life and death," or "to reverse errors in the Kings Bench," and "*all their Decrees are as Judgments*."[78] (emphasis added)

"As many scholars have argued," Alison LaCroix notes, "the parsing of distinctions between such modern notions as judicial and legislative review and applying them retrospectively to seventeenth-and eighteenth-century legal proceedings is fraught with peril. Anglo-American jurists of the period did not recognize a firm distinction between adjudication and legislation . . . . Th[is] ambiguity endured in the American colonies. Consequently, to expect the legal forms of the period to conform neatly to modern taxonomies is to court anachronism."[79] The same can plausibly be said of the King-in-Council during the eighteenth century. Indeed, that the Council did upon "legislative" review occasionally declare statutes null and void *ab initio*, i.e., retroactively, served only to confuse further the distinction between its "judicial" and "legislative" capacities when it came to the review of statutes.

[74] Goebel, Antecedents and Beginnings, 70–72. [75] Ibid., 71–72. [76] Ibid., 71–72.
[77] Ibid., 72.
[78] Philip Hamburger, *Law and Judicial Duty* (Cambridge, Mass., Harvard University Press, 2008), 242.
[79] Alison LaCroix, *Ideological Origins of American Federalism* (Cambridge, Mass., Harvard University Press, 2010), 141; for a similar account of the lack of a clear binary distinction, see Paul D. Halliday, *Habeas Corpus: From England to Empire* (Cambridge, Mass., Harvard University Press, 2010), 20–21.

When the Council "disallowed" a colonial statute on the ground that it was "repugnant to the laws of England" following "legislative" review, it is clear enough that the Council was not rendering a "judgment" about the power of the colonial legislature to enact the law in the first place. The "disallowance" repealed the law prospectively, as the colonial legislature itself might have done if it had been persuaded of the statute's constitutional defects. Before the Privy Council intervened to repeal it, however, the statute would have possessed the full force of law. The Privy Council's act reflected the superior "legislative" authority of the Council, which empowered it to reconsider and reverse the "legislative" judgment of the "inferior" colonial assembly.[80] In the many proceedings that resulted in disallowance (repeal), the constitutional "repugnance" restriction would implicitly have been understood to be a "legislative/political" constraint on colonial legislatures, not a legal limitation on their powers.

Serious ambiguities about the nature of Privy Council review would naturally arise, however, when consideration was given to the cases in which the Council, upon "legislative" review, declared colonial statutes to be null and void, *ab initio*. Did this kind of decision represent a repugnancy judgment of an entirely different character, not a "legislative" judgment that a colonial statute should not have been enacted and was now being repealed retroactively, but a judgment in the nature of what may be termed a legal-judicial decision that a statute had never been law in the first place because by virtue of being repugnant to the laws of England was *ultra vires* under the terms of a charter or a governor's commission? What distinguished these two possible characterizations of Privy Council action in cases of retroactive voiding was that in the first the Council might well have been seen as acting to repeal an existing law retroactively, a "legislative" act. But in the second account, it might be viewed as simply declaring (finding) what the law was, arguably a "judicial" act. Were colonial statutes that were repugnant to the laws of England *ipso facto* void in themselves or only voidable by his Majesty?[81] Certainly, in the cases in which the Council voided colonial acts *ab initio* upon "legislative" review, it is not surprising that some plausibly seemed to think that the Council's determination was not essentially different from the repugnancy determination in which it normally engaged in other cases of "legislative" review. It merely involved a "legislative judgment"

[80] For numerous instances in which this happened see Russell, Review of American Colonial Legislation, 147–50.

[81] See Smith, Appeals to the Privy Council, 578.

that an existing law, being voidable, should be repealed, only in these cases retroactively.[82]

Inevitably, a similar ambiguity arose in connection with the Council's judgment in *Winthrop* v. *Lechmere* when the Council was sitting in a "judicial" capacity. Was its repugnancy determination in this case of an entirely different character than those in which it engaged when sitting "legislatively"? Some knowledgeable lawyers certainly seem to have believed that the Council's repugnance judgment in *Winthrop* v. *Lechmere* must have been in the nature of a legal-judicial judgment that the statute in question was simply not, and had never been, law, in that under its charter the Connecticut legislature had lacked the power to enact it. But other contemporaries seem to have been of the view that the judgments in all these cases of retroactive voiding were not essentially different from the judgments the Council normally delivered when they disallowed statutes upon "legislative" review. They were judgments that a legislative decision to enact a statute should be reversed, and that the existing law should be repealed retroactively. Privy Council practice, radically under theorized as it was, provided uncertain clarification of the issue, and perhaps no sharp distinction was in fact as yet commonly drawn between these two possibilities, because nothing of practical consequence turned on the distinction.[83] "As with so many other aspects of British constitutionalism," John Phillip Reid observes, "[perhaps] it was a question not only better left unanswered, but better left unasked."[84] When several colonial courts, however, began to claim the power to render judgments declaring statutes to be null and void, the question began to take on practical significance. Were such judgments properly "judicial" or were they "legislative" judgments that courts had absolutely no business engaging in?

[82] In the eighteenth century, legislatures did on occasion repeal laws retroactively. In 1704, for example, the Maryland legislature passed a statute that repealed an earlier 1699 one on the same subject, stating in the repealing clause of the 1704 act "That all acts of assembly [on the subject] made before [with certain exceptions] should be *null and void.*" In 1784, the Maryland General Court interpreted this language to mean that no rights could be claimed under the 1699 act because the legislature in effect had retroactively declared it to be null and void from its inception. See *Helms's Lessee* v. *Howard*, 2 Har. & McH. 57 (Md., 1784), 98. I wish to thank my colleague Matt Steilen for this reference.

[83] The Chief Justice of South Carolina, Benjamin Whitaker, sought clarification from the Board of Trade on precisely this issue early in 1743, apparently to no avail. The Board "appear to have done nothing to enlighten the chief justice" on the question, see Smith, Appeals to the Privy Council, 577–78.

[84] John Phillip Reid, *Constitutional History of the American Revolution: The Authority to Legislate* (Madison, Wisc., University of Wisconsin Press, 1991), 94.

These ambiguities about the nature of review of legislation persisted in America after Independence and became a factor both in bringing the American practice of judicial review into being and in efforts to halt its development by calling into question its lawfulness as an unauthorized exercise of the lawmaking power by judges.

Julius Goebel, Jr. and Joseph Smith agree that the origins of Privy Council "judicial review" can be traced back to domestic English judicial policies.

> The judicial doctrine that local law must conform to the common law was developed by the courts with reference to so-called local customs as well as by-laws, and represents a phase of their effort to reduce the law of the realm to uniformity . . . . The applicability of these conceptions to the plantations was facilitated by the circumstance that the corporate form had been employed in the case of early settlements . . . . Since the patents to proprietors in various particulars, including the limitation upon legislation, were substantially identical [to those imposed on domestic corporations], the extension of these precedents was no great *tour de force*, especially since the courts had executed with regard to private franchises identical rules respecting by-laws made at a court leet.[85]

This judicial doctrine rested on the idea that the king's courts exercised a supervisory enforcement authority over "inferior jurisdictions,"[86] both those within England and those abroad, to ensure that the acts of those jurisdictions conformed to the laws England. 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 the non-conforming laws enacted by the limited and dependent jurisdictions that were subordinate to it.

What English judges never did do, despite the dictum in *Bonham's Case* and in a few other opinions, was to declare an act of Parliament *null and void* upon judicial review.[87] Common law tradition had long barred English judges from doing so.[88]

Parliament, of course, did not exercise its lawmaking authority as a limited, dependent, "inferior" body and, under traditional English constitutional principles, 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

[85] Smith, Appeals to the Privy Council, 525–26; Professor Mary Bilder has filled in the picture of just how well established this English judicial doctrine was, see "The Corporate Origins of Judicial Review" (2006) 116 *Yale Law Journal*, 101.

[86] The term is Smith's, Appeals to the Privy Council, 527. [87] Ibid., 570–71.

[88] Hamburger, Law and Judicial Duty, 237.

one considered to be constitutionally acceptable, as it would have given judges, rather than Parliament, the final word on the making of the laws.[89] Another way of putting the matter is to say that while the English had a rich tradition of "vertical," "legislative" and "judicial" review, they did not possess a settled practice or doctrine of what may be called "horizontal judicial review." But it was precisely this type of constitutionally controversial "judicial review" that American state court judges and lawyers began to bring into being during the 1780s.

In one colony, however, ordinary "judicial" courts attempted, intermittently over many years, to call into question the validity of the colony's legislative enactments. Eventually, these efforts to establish judicial review by the ordinary courts in a colonial government 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 worked against 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.

1.4 THE COLONIAL DETERMINATION THAT ORDINARY JUDICIAL COURTS LACK THE AUTHORITY TO REVIEW THE ENACTMENTS OF THEIR LEGISLATURES

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. Beginning with an incident in 1693 under the proprietary government, South Carolina judges appear to have begun to question, from time to time, the validity of legislative acts; the legislature, especially the lower Commons House, responded forcefully to these challenges, in each instance by asserting its preeminence in the colonial government, arguing that ordinary courts simply did not possess the authority they were

[89] William Blackstone, *Commentaries on the Laws of England* (Chicago, University of Chicago Press, 1979, reprint of 1765 ed.), Book I, Section 3, 91.

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 ideas 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 review of legislation by ordinary courts, and recognized the legislature's preeminent authority to deliver judgments about the constitutionality of laws within the colony's government. This form of judicial review by ordinary courts of the colony, a controversial new practice, was not likely to become an established feature of these governments without the broad and steadfast 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 British 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 of ordinary colonial courts authority to declare statutes null and void was rejected.

The constitutional confrontations between South Carolina's legislature and courts, of course, involved more than internecine struggles between branches of the colonial government; 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. A particular

understanding of the specific character of the written constitutional limitations that had been imposed on colonial legislatures, one that broadly resonated with the dominant British view of the nature of the constitutional constraints that operated on Parliament, played a pivotal role in this outcome.

In 1693, the General Assembly of the colony, in a statement of its grievances addressed to the proprietors, complained of "Inferior Courts takeing 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."[90]

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 judgments. This would not have been an absurd claim at the time: not only was Parliament viewed as a high court, but colonial legislatures of the time sometimes operated as courts of final resort.[91] 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.[92] 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

[90] Edward McCrady, *History of South Carolina under the Proprietary Government, 1670–1719* (New York, The Macmillan Co., 1897), 242.

[91] See, for example, Scott Douglas Gerber, *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606–1787* (Oxford, Oxford University Press, 2011), 50 ("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); Swift, A System of the Laws of Connecticut I, 93 (the general assembly of Connecticut served as the court of final resort in that colony and state until 1784 when it was replaced by a court consisting of the governor and the upper house of the legislature); see also Smith, Appeals to the Privy Council, 637–51; Wood, Creation of the American Republic, 154–56.

[92] McGovney, British Origin of Judicial Review, 48–49.

Seven hundred & twenty four was *contrary & repugnant* to a clause in an Act of the Generall Assembly of this Province"[93] (emphasis added). 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*."[94] (emphasis added).

The Commons committee appears to have been suggesting that the judges were claiming a power to unmake or repeal laws that would in effect equal the authority of the whole legislature together, and since no single chamber acting alone could repeal a law, the court would, in effect, possess power "superior" to that of either legislative chamber. At the same time, the committee implied that in taking such action, the judges were improperly exercising the lawmaking power.

The judges for their part seem to have been attempting to create a practice of judicial review on the basis of the written constitutional limitations that had been imposed on South Carolina legislatures. 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. The judges seem to have taken the position that a colony statute passed contrary to these provisions would be *ultra vires*, beyond the granted power of the legislature to enact, and hence void, i.e., not law at all. But the judges could not have taken this position unless they also thought that the authority to engage in repugnancy determinations was not the legislature's and the King's alone, that the duty of ordinary colonial judges to "interpret the law" extended to consideration of the terms of the king's charter and his commission to his governor, and authorized them to make determinations as to whether an ordinary law passed by their own legislature was or was not repugnant to the terms of these foundational political-legal documents.

[93] Ibid., 10. [94] Ibid., 10–11.

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."[95] The use of this language suggests that the Commons wished to make the point that the relevant standard of repugnancy with which the courts of the colony should be concerned was the one established by the colony's own laws, since the judges were bound to apply these 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."[96] McCrady writes of this incident, "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."[97] For his pains, the Commons voted to withhold Wright's salary.[98]

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 in deciding cases.[99] These were invariably laymen and they had the numbers under the statute to outvote the Chief Justice in any ruling.[100] Wright complained of this act to the Board of Trade in 1733,[101] saying that under it the governor had appointed persons that "are intirely ignorant of the Laws and [can] over rule the Petitioner in

[95] Ibid., 10.

[96] Edward McCrady, *History of South Carolina under the Royal Government, 1719–1776* (New York, The Macmillan Co., 1899), 152.

[97] Ibid., 162. [98] Ibid., 159.

[99] James Munro (ed.), *Acts of the Privy Council of England, Colonial Series*, III (1720–45) (London, His Majesty's Stationery Office, 1910), 411. The original of these acts to empower the governor to appoint assistant judges was apparently enacted in the 1720s, see McCrady, History of South Carolina under the Royal Government, 7–8, 461.

[100] Ibid., at 8. [101] Ibid., at 460–61.

all Judicial Acts."[102] In March 1736, the Privy Council "repealed" this act along with others that had "allowed the Governor to appoint . . . [such] Assistant Judges."[103] 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.[104] 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."[105] 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*.[106]

Wright was therefore "of Opinion that this Act exceeds *the Power* granted by the King's Commission, and is repugnant to the Laws of *Britain* [and] . . . by the King's instructions ought not to operate to affect the Lives, Liberties, Estates and Properties of the People."[107]

[102] Munro (ed.,) Acts of the Privy Council, Colonial Series, III, 411.
[103] Ibid., 412. "Repealed" is the language the Council used.
[104] Hamburger, Law and Judicial Duty, 266.
[105] Quoted in ibid., 266 (based on reports in the *South Carolina Gazette* of May 1–8, 1736).
[106] Ibid., 267. [107] Ibid.

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 at all, 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."[108] Lamboll was of the opinion 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 again asserted as a reason for rejecting the claims state judges were beginning to make that they possessed the power 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*."[109] The record ends there; 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.[110] 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

[108] Ibid. [109] Ibid., 268.
[110] McCrady, History of South Carolina under the Royal Government, 180, 464.

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."[111]

While 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 judges had to apply the laws of the colony as written, until the king intervened to make his "judgment" known.[112] 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.[113] (emphasis added)

There were important ideas beneath the surface of Whitaker's statement. With only a few exceptions, when the Privy Council found a colonial statute to be repugnant to the laws of England, it concluded its proceedings by disallowing the statute. In these cases, a duly enacted colonial statute continued to possess the force of law in a colony until the king intervened to repeal it. Many Americans understood this to be the normal mode of proceeding in the Privy Council and as such seem to have drawn a number of inferences from it. First, the written constitutional constraint of repugnancy was not a limitation on the power of colonial legislatures to make binding law in the first instance. Duly enacted colonial laws enjoyed the force of law from their signing, pending the king's subsequent judgment of repugnance. They were not void in themselves for want of power in the legislature but were voidable by the king later. There is the further implication that the king's authority over colonial laws involved a "legislative judgment," i.e., the monarch "repealed" offending legislation. It was simple enough to see that as judges did not possess

[111] Hamburger, Law and Judicial Duty, 269–70.

[112] The account in the above paragraph is derived largely from Hamburger's, ibid., 269–70.

[113] "Memorial of Benjamin Whitaker, Esqr. To the Honble William Bull Esqr Lieut Govr" (September 16, 1742), quoted in Hamburger, Law and Judicial Duty, 270. A year later Whitaker appears to have thought that it remained an open question whether colonial statutes should be considered void if repugnant to English law or merely voidable at the election of the king, ibid.; see also Smith, Appeals to the Privy Council, 577–78.

"legislative" authority, they certainly did not have the power to repeal or void laws.[114]

But there is a second thread running through Whitaker's statement. Whether an actual statute was or was not repugnant to the laws of England depended upon an act of interpretation. Even when a statute looked as though it might be repugnant to the laws of England, it did not automatically follow that the law was void and without effect. Someone with the definitive authority to say so would have to make that determination. It would invite chaos if simply anyone could declare a law to be void and without effect when they thought it to be repugnant to the laws of England. Did an ordinary court possess the interpretive authority to make the determination that would be necessary to void the statute? Whitaker answered no, the king had reserved to himself alone the sole authority to "judge" whether a colonial statute was or was not repugnant to the laws of England. These ideas remained somewhat 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 colonial judge, that ordinary courts were entirely without 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 had power to declare a provincial law of South Carolina void as repugnant to the laws of England. Colonial assemblies, Michie said, were certainly obligated to conform their enactments to English law as closely as local circumstances permitted.[115]

> 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.*

[114] 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.

[115] Smith, Appeals to the Privy Council, 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*.[116] (emphasis added)

Michie drew on a number of widely held British constitutional understandings to support his opinion rejecting judicial review. The first was simply that "judgments" about the constitutionality of a bill were properly the colonial legislature's "alone in the first and his Majesty in his Privy Council in the last instance" to make. In England, he noted, judges were rightfully "expositors" of the law, but they never "questioned the power of making laws." Once a bill had been passed by the assembly and signed by the governor, it possessed the force of law, regardless of whether some might think that it conflicted with constitutional restrictions. Nullifying such an act, consequently, involved making a change to existing law. And only the legislature possessed the authority to do that. If judges were to assume that kind of power, Michie wrote, "*this would be for the courts jus dare [to make the law] and not dicere [to say what the law is]*"[117] (emphasis added).

To understand why judgments about the constitutionality of a law were commonly viewed as uniquely an aspect of the lawmaking power, it is necessary to understand something more about certain basic English views about the distinction between judicial and legislative functions. Parliament, of course, was understood to be a body that possessed both legislative and judicial capacities. In its bill proceedings these two kinds of functions were often deeply confused as Parliament would commonly pass legislation to settle private disputes, a judicial function, but would often

[116] Quoted in ibid., from the MS Journal So. Car. Court Common Pleas, 1754–63, 237. Note Michie's consistent use of the term "judge" and "judgment" to describe the king's "legislative" decision to repeal or declare void a colony statute.

[117] Ibid.; the distinction *jus dicere/jus dare* had apparently been introduced into English legal discourse by Francis Bacon during the early seventeenth century to distinguish between the proper and improper functions of courts, see Hamburger, Law and Judicial Duty, 224–25.

do so not by invoking an established legal rule to decide the controversy, but by enacting a new rule, seemingly a legislative function.

The upheavals of the seventeenth century began to force some to develop a sharper distinction between Parliament's functions. When a bill of attainder charging the Earl of Strafford with treason was introduced in the Commons during 1641, it set off a debate that produced some clarifications. Lord Digby argued that the evidence in the case did not support a charge of treason under existing laws but acknowledged that the Commons had the power to enact a new law defining the kind of conduct in which Strafford had engaged as treason. Digby, however, went on to condemn the idea that such a law should be applied retroactively to Strafford's conduct. "God keep me from giving Judgment of Death," he said, "upon a Law made *a posteriori*."[118] It was in this connection that Digby drew a distinction between the way Parliament should properly exercise its judicial as opposed to its legislative powers.

> There is in Parliament a double Power of Life and Death by Bill, *a Judicial Power, and a Legislative*; the measure of the one, is what's *legally just*, of the other, *what is Prudentially and Politickly fit for the good and preservation of the whole*.[119] (emphasis added)

The judicial power was devoted to delivering justice under existing law. The essence of Parliament's legislative power was to make new, general laws for the nation. Parliament possessed wide discretion in exercising this legislative power, but that discretion was to be guided by "prudence" and a "political" consideration for "the good and preservation of the whole." By "Politickly fit" Digby seems to have meant something like fitting for the broad polity. The discretion exercised in making laws (for the nation) should necessarily be guided by judgments about these larger considerations. As the representatives of the nation (or the people), Parliament, in its legislative capacity, was properly the body to make such judgments as it went about deciding whether to enact a bill into law or to repeal an

[118] I draw upon my colleague Matt Steilen's account of the Strafford case in this paragraph. The quotation, drawn from John Rushworth's 1680 account of *The Tryal of Thomas Earl of Strafford,* 52, appears in Matthew Steilen, "Bills of Attainder" (2016) 53 *Houston Law Review* 767, 814.

[119] Rushworth, The Tryal of Strafford, 53 quoted in Steilen, "Bills of Attainder," 814; in the same period, Matthew Hale drew a distinction between the two capacities of Parliament that seemed to rely on a roughly similar notion: "The supreme jurisdiction of parliament acts either *deliberative* where it makes laws or *Judicative* when it gives judgment." Mattthew Hale, *The Prerogatives of the King*, 181 (D.E.C. Yale, London, Selden Society, 1976), quoted in Hamburger, Law and Judicial Duty, 239 fn. 4.

existing one. In the British constitutional tradition, John Phillip Reid observes, the legislature, as it proceeded to enact statutes, was commonly thought to be subject to "the duty to protect society or 'the general good' or 'the good and happiness of the people', [and as one aspect of that duty] to 'preserve the constitution,' which meant making no laws '*inconsistent* with the *fundamental* Principles of just Government."[120] The determination that a colonial statute was "politickly fit" and not repugnant to the laws of England, was, as Michie put it, to be "judged" only by the colonial legislature in the first instance, and the king in council in the last. Courts did not possess the authority to make law. They operated under the duty to deliver justice under existing laws, as the judges interpreted the requirements those imposed.

The characterization 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 rejecting the new judicial practice, one of those persisting criticisms that would continue to plague the legitimacy of American judicial review.

The second basic reason Michie offered for finding that ordinary courts did not possess the authority to review and nullify legislative enactments grew out of the idea of review itself. Review was (is) considered to be an inherently hierarchal practice. Only a body with "superior" authority can legitimately reconsider and reverse the decisions of another authority. Only "higher" courts, for example, review and reverse the decisions of "lower" ones. Michie noted that English judges never questioned the power of Parliament to make law, and implied that the same applied to the relationship between colonial legislatures and their courts. While it was legitimate for the Privy Council, a "superior" legislative body, to review and repeal or void the laws of an "inferior" jurisdiction coming under its authority, it was improper for the courts of a jurisdiction to do so, not only because (1) they should not be exercising legislative power, but (2) also because the authority they possessed was inferior to – but at any rate certainly not superior to – that possessed by the legislature in that government. 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 constitutional position courts certainly did not, and were not entitled to, occupy.

[120] John Phillip Reid, Constitutional History of the American Revolution: The Authority to Legislate, 95.

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."[121] This was certainly not an idiosyncratic view. Just a few years later, Blackstone would write that if judges possessed the power to reject a statute enacted by Parliament that would be to "set the judicial power above that of the legislature, which would be subversive of all government."[122] Like the criticism that judicial review involved the improper exercise of legislative authority by courts, the objection that it placed judges over legislatures, had also appeared earlier in the century in South Carolina, and would reappear in the post-Independence clashes that developed during the 1780s between state legislatures and courts, another one of those intractable issues about the legitimacy of this form of judicial review that could not easily be resolved.

Americans of that later generation, however, sometimes addressed this problem not by denying that the grant to one party of the authority to review and reverse the decisions of another necessarily involved making that party constitutionally "superior" to the other but by completely reframing the description of the pertinent hierarchy. Judicial review, Alexander Hamilton acknowledged, involved the exercise of a superior authority over an inferior one, but it did not, he went on to argue, place courts above legislatures. As they went about their task, he said, judges were only acting on behalf of the higher authority of the people declared in their constitutions, and as such, their actions represented a legitimate exercise of the superior authority of the people over the inferior authority of their legislatures.[123] Judicial review, both Blackstone and his American audience recognized, necessarily involved the exercise of "vertical" authority. Hamilton's re-characterization served to acknowledge that reality, while brilliantly reformulating it as a constitutionally legitimate form of review that properly placed the people over their legislatures.

Chief Justice Michie offered a third crucial reason for holding that courts did not possess the authority to void duly enacted statutes of

[121] Quoted in Smith, Appeals to the Privy Council, 591.

[122] Blackstone, Commentaries, Book I, Section 3, 91; in a separate place in the Commentaries, Blackstone also observed 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," 49.

[123] No. 78 Federalist, in Clinton Rossiter (ed.), *The Federalist Papers* (New York, Mentor, 1999), 435.

the colony. He believed that such power in the courts would undermine the rule of law itself, creating chaos. That courts, which had not explicitly been granted this power could nevertheless claim it, raised the specter of widespread disobedience of the law. Could just anyone decide that a statute was repugnant to the laws of England and no longer need be obeyed. If judges, Michie observed, have the power to declare the colony's laws void, they "have a power [simply] to dispense with [laws] . . . . [and] everything will be left to precarious and arbitrary will and pleasure."

The repudiation by two Chief Justices of the colony of a number of the basic ideas upon which Chief Justice Wright had earlier relied, fatally undermined the case for review of legislation by ordinary courts. For now, more traditional Anglo/American constitutional understandings 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 views like Michie's and Whitaker's, of course, either in the colonies or in England.[124] 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 views like Whitaker's and Michie's by explicitly authorizing colonial courts to "judge" the repugnancy of colonial statutes, but the ministry seems to have ignored his efforts.[125] Abercromby, of course, must have believed that without such a statute the case for review of legislation by ordinary courts would founder, as it in fact did.

But the basic ideas that underlay the judges' claims to a power of judicial review did not disappear. As Chief Justice Wright had made apparent, the case for this form of judicial review began with a different opinion about the status of laws that were in conflict with the terms of charters and governors' commissions. Statutes adopted in contravention of such limitations simply did not possess the force of law; colonial legislatures lacked the power to enact them. Such laws were void, not

[124] Smith, Appeals to the Privy Council, 592. [125] Ibid., 578–82.

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. A very similar underlying dispute about the precise nature of the constraints written constitutions imposed on state legislatures would continue to separate supporters and opponents of judicial review during the 1780s. These highly technical disagreements about the exact nature of constitutional constraints were beneath it all fundamental disputes about the constitutional terms and conditions under which these governments would operate.

If constitutional restrictions limited the power of legislatures to enact law in the first place, it might well be appropriate 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 a charter or governor's commission was not law, and did not bind the court or the litigants before it. To arrive at this conclusion, of course, ordinary judges would have to interpret the terms of a statute and the provisions of a charter or a governor's commission, and it would still be a question whether they possessed the authority to deliver authoritative interpretations of these foundational "political-legal" documents. But it would be entirely plausible to characterize their determinations as "judicial," not "legislative," in that they would not be viewed as altering existing law but as finding that a statute had not been law in the first place.

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,[126] 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 several layers of review and an additional one would not only seem unnecessary but might actually lead to the overturning of established

[126] Hamburger, Law and Judicial Duty, 272–80.

constitutional hierarchies, as Michie implied. Suppose the king had decided to confirm a colony law; was it conceivable that the decision of a colonial court declaring a statute void could possibly preempt the king's judgment?

Drawing upon one strand in existing British constitutional ideas, an elementary case for judicial review by ordinary courts could be (and had been) made out, but it conflicted with other more fundamental constitutional values, and for that reason, among others, failed to persuade crucial members of the South Carolina bench. Without a firm 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.

When the case for this form of judicial review began to be made again in the 1780s, the Privy Council, of course, had been eliminated from American life (and gubernatorial vetoes had been eliminated or restricted), but advocates for the novel practice still had to contend with several of the dominant premises of British constitutionalism that had contributed to its earlier defeat in South Carolina, and to which many Americans continued to adhere. Promoters of judicial review found that a good place to start was with the idea that the written constitutions, which Americans had adopted upon declaring Independence, were in themselves a form of ordinary law and operated to deprive legislatures of the power to make binding any act that was in conflict with these instruments. From there, it was possible to begin to build a persuasive case for "horizontal" judicial review.

Of decisive importance this time around was that the political and constitutional climate had been transformed by the Revolution and its aftermath. Unlike most of their colonial predecessors, which had operated under layers of review, the first written constitutions, by conscious design, left the new state legislatures almost entirely unchecked. By the 1780s, more Americans had grown disenchanted with the resulting state of affairs. These new conditions drew an impressive group of elite American lawyers (and judges) into a largely spontaneous movement devoted to formulating convincing rationales for a practice of judicial review, which they believed to be essential to check the excesses of legislatures. The arguments and ideas, which emerged from their fertile legal imaginations, now circulated in a much more favorable political and constitutional environment, one that made it possible for this new thinking to supplant to

a considerable extent the fundamental assumptions that formed the bedrock of traditional Anglo/American constitutionalism– producing a constitutional revolution.

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