AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 2: The Colonial Era—Foundations/Principles

Colonial Era Discussions of the Power of Judicial Review

Several prominent judges and lawyers during the seventeenth and eighteenth century began to insist that the constitution was judicially enforceable law. The leading authority for this position was Lord Coke's opinion in *Bonham's Case* (1610). The crucial passage in that opinion declared, "The common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void." Several other seventeenth century English judges reached similar conclusions. Lord Hobart in *Day v. Savage* (1615) declared "an Act of Parliament, made against natural equity, as to make a man Judge in his own case, is void in itself."[1]

By the mid-eighteenth century, English and American notions of judicial power and constitutional power were diverging. English judges more consistently disavowed any constitutional authority to challenge parliamentary edicts. Chief Justice John Holt (1642–1710) in *City of London v. Wood* (1702) stated, "An act of Parliament can do no wrong, though it may do several things that look pretty odd." William Blackstone captured the consensus among English legal authorities at the time of the American Revolution when he similarly asserted, "If the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it, . . . for that were to set the judicial power above that of the legislature, which would be subversive of all government." Americans began to slowly take a different route. A few colonial judges voided local ordinances. Magistrate Samuel Symonds of the Massachusetts Colony in *Giddings v. Browne* (1655) asserted, "Laws positive doe lose their force and are no laws at all, which are directly contrary to the former viz. native or fundamental." Prominent American Revolutionaries insisted that English judges had the power to declare unconstitutional parliamentary laws that they believed violated constitutional rights. James Otis, when calling on the Superior Court of Massachusetts to declare writs of assistance unconstitutional, referred to *Bonham's Case* when declaring,

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

Bonham's Case, 8 Coke Reports 651 (1610)

[1] For other English and American cases that may be antecedents of judicial review, see Mark A. Graber and Michael Perhac, *Marbury versus Madison: Documents and Commentary* (Washington, DC: CQ Press, 2002).

Thomas Bonham was fined by the Royal College of Physicians for practicing medicine in London without obtaining a license. The Royal College of Physicians, under Parliamentary law, was authorized to determine who was competent to practice medicine in England and to collect fines from those persons who practiced without a license. Bonham challenged his fine on two grounds. First, he insisted that the law applied only to London residents. As a graduate of Cambridge University, he was entitled to practice in London during a short stay in the city without obtaining a license. Second, Bonham claimed that Parliament could not vest the same persons with the power to determine whether an applicant was qualified to practice medicine and the right to collect the fine if they determined an applicant was unqualified.

Lord Edward Coke, the most prominent English judge of the seventeenth century, agreed with both of Bonham's contentions. Most of Coke's opinion in Bonham *maintained as a matter of statutory interpretation that persons who received medical degrees from other universities could legally practice temporarily in London without a license from the Royal College. The more famous part of his opinion declares that the basic common law principle that no person should be a judge in their own case was violated when the Royal College sought to both determine whether* Bonham *was qualified to practice medicine and collect the fine for the unauthorized practice of that profession. Americans interpreted* Bonham *as holding that a higher constitutional law, written or unwritten, limited the power of constitutional legislatures, and that courts were the institution responsible for enforcing that higher law. Is that the correct interpretation of* Bonham*? Might the case stand for the principle that laws should be interpreted as consistent with the common law whenever possible? As was the case with* Marbury v. Madison *(1803), much of the most important language in* Bonham *was unnecessary to resolving the actual issue before the justices. Having resolved that* Bonham *was not violating the statute, Coke need not have uttered the famous lines excerpted below. Why do you think broad assertions of judicial power are often made in such a fashion? Was Coke just doing his job to cover all bases or is* Bonham *an early example of strategic judicial decision making?*[2]

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He who practises physic in London doth not offend the statute by his practise, unless he practices it by the space of a month. But the clause . . . doth not prescribe any certain time, but at what time soever he ministers physic . . . he shall be punished by the said second branch: and the law hath great reason in making this distinction, for divers nobles, gentlemen, and others, come upon divers occasions to London, and when they are here they become subject to diseases, and thereupon they send for their physicians in the country, who know their bodies, and the cause of their diseases; now it was never the meaning of the Act to bar any one of his own physicians; and when he is here he may practise and minister to another by two or three weeks, &c. without any forfeiture; for any one who practises physic . . . in London though he has not taken any degree in any of the universities shall forfeit nothing unless he practises it by the space of a month; and that was the reason that the time of a month was put in the Act. . . .

. . . The censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture. . . . And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void; and therefore . . . some statutes are made against law and right which those who made them perceiving, would not put them in execution. . . .

[2] See Theodore F. T. Plucknett, "*Bonham's Case* and Judicial Review," *Harvard Law Review* 40 (1926): 30. For other English and American cases that may be antecedents of judicial review, see Graber and Perhac, *Marbury versus Madison*.

William Blackstone, **Commentaries on the Laws of England** (1765)[3]

William Blackstone insisted that natural law was the highest form of law and maintained that English subjects had numerous fundamental constitutional rights, but he nevertheless insisted that courts had no power to declare Parliamentary laws unconstitutional. Why did Blackstone believe that courts could not reject a Parliamentary statute, even if that statute violated fundamental rights? Why was Blackstone so confident that English liberties were adequately protected under the English Constitution?

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[P]olitical or civil liberty is the very end and scope of the constitution. This liberty, rightly understood, consists in the power of doing whatever the laws permit. . . .

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This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original.

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If man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other laws than the law of nature, and the law of God. Neither could any other law possibly exist: for a law always supposes some superior who is to make it; and, in a state of nature, we are all equal, without any other superior but Him who is the author of our being. But man was formed for society; and, as is demonstrated by the writers on this subject, is neither capable of living alone, nor indeed has the courage to do it. However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many, and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law to regulate this mutual intercourse, called "the law of nations," which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any, but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities: in the construction also of which compacts we have no other rule to resort to, but the law of nature; being the only one to which all the communities are equally subject; and therefore the civil law very justly observes, that *quod naturalis ratio inter omnes homines constituit, vocatur jus gentium* ["the rule which natural reason has established among all men is called the law of nations"].

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The only true and natural foundations of society are the wants and the fears of individuals. Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as society either natural or civil; and that, from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor. This notion, of an actually existing unconnected state of nature, is too wild to be seriously admitted: and besides it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preservation two thousand years afterwards; both which were effected by the means of single families. These formed the first natural society, among themselves; which, every day extending its limits, laid the first though imperfect rudiments of civil or political society: and when it grew too large to subsist with convenience in that pastoral state, wherein the patriarchs appear to have lived, it necessarily subdivided itself by various migrations into more. Afterwards, as agriculture increased, which employs and can maintain a much greater number of hands, migrations became less frequent: and various tribes, which had formerly separated, reunited again; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But though society had not its formal beginning from any convention of individuals, actuated by their wants

[3] William Blackstone, *Blackstone's Commentaries* (vol. 1), ed. St. George Tucker (Philadelphia, PA: William Young Birch and Abraham Small, 1803), 6, 41–43, 90–91, 108–110; 2:160–62.

and their fears; yet it is the *sense* of their weakness and imperfection that *keeps* mankind together; that demonstrates the necessity of this union; and that therefore is the solid and natural foundation, as well as the cement of civil society. And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, in the very act of associating together: namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole, or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all it was impossible that protection should be certainly extended to any.

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[A]cts of parliament that are impossible to be performed are of no validity: and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions; though I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it. Thus if an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel. But, if we could conceive it possible for the parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.

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The power and jurisdiction of parliament . . . is so transcendent and absolute, that it cannot be confined, either for causes or persons within any bounds. . . . It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime or criminal; this being the place where that absolute despotic power, which must, in all governments, reside somewhere, is entrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new model the succession to the crown. . . . It can alter the established religion of the land. . . . I can, in short, do everything that is not naturally impossible. . . . True it is, that what the parliament doth, no authority can undo. So that it is a matter most essential to the liberties of this kingdom, that such members be delegated to this important trust, as are most eminent for their fortitude, and their knowledge. . . .

It must be owned that Mr. Locke, and other theoretical writers, have held that "there remains still inherent in the people a supreme power to remove or alter the legislature, when they find the legislative act contrary to the trust reposed in them; for when such trust is abused, it is thereby forfeited, and devolves to those who gave it." But, however, just this conclusion may be, in theory, we cannot practically adopt it, nor take any legal steps for carrying it into execution, under any dispensation of government at present actually existing. For this devolution of power, to the people at large, included in it a dissolution of the whole form of government established by the people. So long, therefore, as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.

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