THE YALE LAW JOURNAL POCKET PART

MARY SARAH BILDER

Why We Have Judicial Review

Judicial review in the United States is controversial largely because, as Daniel Farber and Suzanna Sherry explain, there exists among the public "a sense of innate conflict between democracy and judicial review."[1] The standard account of judicial review, which describes the practice as invented by Chief Justice John Marshall in *Marbury v. Madison*,[2] only contributes to that sense of concern. The origins of judicial review, however, do not lie in judicial creativity or even in the history of judicial power, but, as my *Yale Law Journal* article demonstrates,[3] in the commitment to limited legislative authority. Not until 1910 did "judicial review" become the popular label for the judiciary's practice of invalidating legislation contrary to the Constitution. For decades after the Founding, what we think of as "judicial review" was described not as judicial lawmaking, but rather as the practice of voiding legislation repugnant to the Constitution.

The generation that framed the Constitution presumed that courts would declare void legislation that was repugnant or contrary to the Constitution. They held this presumption because of colonial American practice. By the early seventeenth century, English law subjected the by-laws of corporations to the requirement that they not be repugnant to the laws of the nation. The early English settlements in Virginia and Massachusetts were originally corporations and so these settlements were bound by the principle that colonial legislation could not be repugnant to the laws of England. Under this standard, colonial lawyers appealed approximately 250 cases from colonial courts to the English Privy Council, and the Crown reviewed over 8500 colonial acts.

---

1. DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 140 (2002).
2. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
3. Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006).

After the American Revolution, this practice continued. State court judges voided state legislation inconsistent with their respective state constitutions. The Framers of the Constitution similarly presumed that judges would void legislation repugnant to the United States Constitution. Although a few Framers worried about the power, they expected it would exist. As James Madison stated, "A law violating a constitution established by the people themselves, would be considered by the Judges as null & void."[4] In fact, the word "Constitution" in the Supremacy Clause and the clause describing the Supreme Court's jurisdiction appeared to give textual authorization for judicial enforcement of constitutional constraints on state and federal legislation. Indeed, before *Marbury*, Justice Chase observed that although the Court had never adjudicated whether the judiciary had the authority to declare laws contrary to the Constitution void, this authority was acknowledged by general opinion, the entire Supreme Court bar, and some of the Supreme Court Justices.[5]

By 1803, as Chief Justice Marshall acknowledged in *Marbury*, "long and well established" principles answered "the question, whether an act, repugnant to the constitution, can become the law of the land."[6] Marshall concluded that "a law repugnant to the constitution is void; and that courts . . . are bound by that instrument."[7] As such, contrary to the traditional account of *Marbury*, Marshall's decision did not conjure judicial review out of thin air, but rather affirmed the well-established and long-practiced idea of limited legislative authority in the new context of the federal republic of the United States. In doing so, Marshall recommitted American constitutional law to a practice over four centuries old.

In turning away from the received assumption that the history of judicial review in the United States is a story of the expansion of judicial authority, and instead emphasizing the contribution of limited corporate and legislative authority, this account suggests new boundaries with respect to what history can tell us about the modern practice of judicial review. Because the practice presumed by the Founders emphasized the bounded nature of legislation limited by the laws of the nation, this history casts doubt on arguments that general "natural law" principles were regularly accepted as a legitimate basis for review. This history also helps to explain why federal courts embraced review

---

4. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 93 (Max Farrand ed., rev. ed. 1966) (July 23).

5. Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800) (opinion of Chase, J.).

6. *Marbury*, 5 U.S. (1 Cranch) at 176.

7. *Id.* at 180.

of state court decisions relatively easily, while the implications of review of congressional legislation were less well contemplated.

Equally importantly, this perspective suggests that attempts to resolve other modern concerns by looking to the history of the Founding era may be misguided or meet with great difficulty. The existence of a standard based on the word *repugnancy*—a word that seemed to mean something while remaining simultaneously ambiguous—provided a space for early American judges to avoid confronting the issue of whether they were engaged in what we would call narrow or broad constructions of the Constitution.[8] Similarly, because judicial review grew out of prior practice rather than an idea or conception of separation of powers, it was easy for the Founders to accept the judiciary's power to invalidate legislation that it deemed inconsistent with the Constitution without resolving the question of whether the judiciary was the ultimate interpreter of the Constitution.[9] The belief in a constitutionally constrained legislative power coexisted with an aspiration to maintain separation of powers, thereby allowing the judiciary of the Founding era to skirt the modern issues of judicial supremacy and departmentalism. After the ratification of the Constitution, as separation of powers became increasingly accepted as the highest constitutional principle, these questions came into greater focus. So although the Founding history can serve as a guide for resolving some of our modern worries concerning judicial review, we must wrestle with others unaided.

Mary Sarah Bilder is Professor of Law at Boston College Law School. She is the author of The Transatlantic Constitution: Colonial Legal Culture and the Empire *(2004)*.

Preferred Citation: Mary Sarah Bilder, *Why We Have Judicial Review*, 116 YALE L.J. POCKET PART 215 (2007), http://thepocketpart.org/2007/01/09/bilder.html.

8. For a later English effort to clarify the meaning of repugnancy in the imperial context, see The Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63.

9. I discuss the contributions of differing historigraphic approaches to our understanding of the origins of judicial review in Mary Sarah Bilder, *Idea or Practice: A Brief Historiography of Judicial Review*, J. POL'Y HIST. (forthcoming 2008) (manuscript on file with author).