

A DISCRETE AND COSMOPOLITAN MINORITY: THE LOYALISTS,  
THE ATLANTIC WORLD, AND THE ORIGINS OF JUDICIAL  
REVIEW

DANIEL J. HULSEBOSCH\*

In *The People Themselves*, Larry D. Kramer contributes to the jurisprudential revolution in which judicial review is being removed from the center of American constitutionalism and realigned with the many devices of popular constitutionalism that the people can use to shape constitutional meaning.<sup>1</sup> Kramer is largely persuasive in showing that judicial review—the scrutiny by ordinary judges of statutes to determine whether they are consistent with the state or federal constitution—was not central to the constitutionalism of the founding generation. Still, Kramer notes, the blueprint for judicial review of legislation was largely drafted early in the founding period. The *causes* of the origins of judicial review, however, remain somewhat mysterious in his second chapter, entitled “The Origins of Judicial Review.”<sup>2</sup> Those origins remain mysterious outside the book, too. Building on Sylvia Snowiss’s claim that, at least before *Marbury v. Madison*,<sup>3</sup> early judicial review was a “substitute for revolution” rather than an extension of ordinary adjudication,<sup>4</sup> Gordon S. Wood argues that delegates to the Philadelphia Constitutional Convention “regarded judicial nullification of legislation with a sense of awe and wonder . . . .”<sup>5</sup> Perhaps historians and legal scholars still do. There remains no convincing account of where judicial review came from or why it appeared in elemental form in state courts in the 1780s.

\* Professor, New York University School of Law. The author thanks the participants at the Popular Constitutionalism Conference, Chicago-Kent College of Law, the members of the Legal History Colloquium at New York University School of Law, the members of the Early American History Workshop at the University of Maryland, Alfred Brophy, Kevin Davis, Barry Friedman, David Golove, and Helen Hershkoff for their comments. He also thanks Sarah Trombley for research assistance, and he is grateful for the research support of the D’Agostino/Greenberg Fund at NYU School of Law.

1. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004). For an analysis of Kramer’s version of popular constitutionalism, see Daniel J. Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653 (2005) (book review).

2. KRAMER, *supra* note 1, at 35–72.

3. 5 U.S. (1 Cranch) 137 (1803).

4. SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 74 (1990).

5. Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 WASH. & LEE L. REV. 787, 796 (1999).

This essay argues that *anti-antiloyalism*<sup>6</sup>—by which I mean the reaction of some lawyers and judges against the antiloyalist legislation passed in the states during and just after the Revolution—created the occasion and inspired the justifications for the earliest examples in American courts of what is now called judicial review of legislation. Precedents existed for the practice of courts, and especially conciliar bodies of superior jurisdictions, reviewing the legislative outputs of inferior ones in the Anglo-American world.<sup>7</sup> And during the late colonial period, colonists penned countless protests in defense of customary fundamental law, usually called the liberties of Englishmen.<sup>8</sup> These claims that ancient liberties restrained government drew on a long Anglo-American tradition of the rule of law.<sup>9</sup> But the proposition that one jurisdiction's courts could nullify the legislative output of the highest lawmaking power in that same jurisdiction was a dubious one throughout the early modern period and especially in the late eighteenth-century Anglophone world.<sup>10</sup> Nonetheless, a handful of state courts in the 1780s began to innovate upon these diverse traditions and invoked the fundamental law of their own state constitutions or the Treaty of 1783 with Britain to minimize, revise, and even nullify state legislation targeting

6. Cf. Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002) (arguing that the Rehnquist Court is following a “deeply felt but as yet poorly theorized” agenda in constitutional litigation).

7. For conciliar review of colonial and corporate legislation, both direct review of statutes and indirect review while hearing judicial appeals, see JOSEPH HENRY SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* (1950); ELMER BEECHER RUSSELL, *THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL* (1915); Arthur Meier Schlesinger, *Colonial Appeals to the Privy Council*, 28 POL. SCI. Q. 279–97, 433–50 (1913). For arguments linking conciliar review to judicial review, see Joseph H. Smith, *Administrative Control of the Courts of the American Plantations*, 60 COLUM. L. REV. 1210, 1253 (1961) (concluding that “recurrent administrative testing of colonial statutes against a ‘constitutional’ standard exemplified in the laws of England helped pave the way for acceptance of the doctrine of judicial review in the new nation”); MARY S. BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE 186–96* (2004) (suggesting influence of Privy Council repugnancy standard on Rhode Island judicial review case *Trevett v. Weeden* (1786)). For the argument that English common law courts’ review of corporation by-laws and local customs provide the context for judicial review of legislation, see Philip Hamburger, *Law and Judicial Duty*, 72 GEO. WASH. L. REV. 1 (2003) (arguing that English common law courts’ review of lesser courts and lesser lawmaking bodies created tradition of judicial duty to vindicate higher law).

8. For a comprehensive survey of these protests, see JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* (4 vols.) (1986–93).

9. See JOHN PHILLIP REID, *RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* (2004).

10. Cf. *id.* at 97 n.1 (observing that judicial review differentiates the American from British manifestations of the rule of law). For the orthodox account of Parliamentary supremacy in Great Britain, see 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 91 (Univ. of Chi. Press 1979) (1765) (stating that “if the [British] parliament will positively enact a thing to be done which is unreasonable, I know of no power that can 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 would set the judicial power above that of the legislature, which would be subversive of all government”).

loyalists and interfering with transatlantic commerce. They did so for many reasons. A primary one was to help integrate the United States into the Atlantic world of diplomacy, trade, and ideas.

#### I. JUDICIAL REVIEW AND THE REINTEGRATION OF THE UNITED STATES INTO THE ATLANTIC WORLD

For a long time historians have known that there were several state judicial cases at the end of and just after the Revolution that prefigured judicial review. Recently, these cases have helped reorient scholarly understanding of the advent of judicial review.<sup>11</sup> No longer do most constitutional scholars believe that Chief Justice John Marshall created judicial review in 1803. But there is no satisfying account of the early state cases that explains why they occurred when they did or what the participants were trying to accomplish. Understanding why at least some lawyers and judges wanted to add judicial review to the toolbox of constitutional construction can perhaps shed light on the dynamic between state legislatures and proto-Federalist lawyers and judges in the so-called “critical period” that Kramer sees, in the tradition of Progressive historiography, as generating a lasting struggle between legal aristocrats and the people.<sup>12</sup>

It might also shed light on why many mainstream law professors are wary of popular constitutionalism. These critics resist the historical claim that judicial review was peripheral to early American constitutionalism and the normative claim that the historical centrality of popular constitutionalism ought to inform modern attitudes about judicial review. To them, popular constitutionalism invites the gradual erosion of civil rights won in the twentieth century and thus endangers the most humanitarian dimension of American constitutionalism: the protection of “discrete and insular minorities”<sup>13</sup> from the tyranny of the majority.<sup>14</sup> At this point, supporters and critics of popular constitutionalism agree: both see judicial review as an

11. See, e.g., KRAMER, *supra* note 1, at 57–72; Matthew P. Harrington, *Judicial Review Before John Marshall*, 72 GEO. WASH. L. REV. 51, 73–85 (2003); William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005).

12. For Kramer’s account of constitutional developments in the 1780s, see KRAMER, *supra* note 1, at 35–72. For a Progressive history of the “critical period” between the Revolution and the ratification of the federal Constitutions, see E. WILDER SPAULDING, *NEW YORK IN THE CRITICAL PERIOD, 1783–1789* (1932).

13. This is the famous formulation of Justice Harlan Fiske Stone in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). For an acceptance of this rationale by a scholar who was otherwise skeptical of judicial review, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

14. See, e.g., L. A. Powe, Jr., *Are “the People” Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855 (2005) (reviewing KRAMER, *supra* note 1).

institution that restrains popular legislation. The key difference is that supporters of popular constitutionalism believe that the framers of the American constitutions assumed that the people would control the construction of those constitutions and that the people can still be trusted to make wise decisions about the protection of minority rights. Advocates of judicial review, on the other hand, are reluctant to commit all constitutional interpretation to the people's elected representatives. Understanding the reasons why some early Americans groped toward judicial review might help dissolve the binaries that dominate present debates about the nature of constitutional construction that Kramer sees as having deep roots in American constitutional culture: democracy versus aristocracy, the people versus the lawyers, populism versus humanitarianism, majoritarianism versus rights, and so on.

The forerunners of judicial review in state courts during the 1780s cannot be characterized as either aristocratic or humanitarian. But neither can they be domesticated as exercises of popular constitutionalism in new form, a substitute for revolution. Instead, participants in these cases were seeking a new way to achieve an old constitutional ideal that can be called transatlantic equality: an equality of the political regimes on both sides of the Atlantic as much, or more, than the equality of individuals with each other on either side.<sup>15</sup> In addition to beginning to uncover the original reasons for judicial review, this search for causation should help make the study of early American constitutionalism less provincial.<sup>16</sup> Most scholars interested in popular constitutionalism do not look outside the colonies, states, or nation, to the Atlantic world of empires from which those political jurisdictions came. Early American constitutionalism, however, cannot be understood outside of the larger world from which Euro-Americans derived their constitutional languages and in which they lived and did business before and after the Revolution.

The argument here is that these early innovations in judicial construction of the relationship between statutes and constitutions were driven

15. John Phillip Reid uses the term "isonomy" to describe the North American colonists' pursuit of constitutional equality with Englishmen across the ocean. JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* 82–86 (1986). For claims of transatlantic equality in one American colony, see DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 90–96 (2005) [hereinafter HULSEBOSCH, *CONSTITUTING EMPIRE*].

16. The earliest constitutional history is necessarily transatlantic, but the conventional studies of periods after 1776 shrink their subject's horizons, at least until the mid-twentieth century. For the latter, see Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *HARV. L. REV.* 518 (1980); MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000) (arguing that Cold War imperatives, particularly the need to appeal to decolonizing nations, were a key factor in postwar race jurisprudence).

largely, though not entirely, by the plight of the loyalists. By “loyalists,” I mean those colonists who sided with the British Empire during the Revolution, including some who emigrated to Britain or other British colonies and others who wished to remain in or to return to the United States.<sup>17</sup> In addition, the term also embraces royal subjects residing in Britain who had commercial and property interests in the colonies. Together, they formed a discrete and isolated minority, held in contempt when not hated, and an easy target for legislative revenge.

The soft quantitative fact underlying the claim is that most of the early state cases in which courts exercised some form of judicial review—five of a small set of seven cases—involved loyalists who were challenging anti-loyalist state legislation.<sup>18</sup> Their lawyers, many of whom soon became known as Federalists, argued in and out of court that the problem with this systematic abuse of the loyalist minority was that it threatened the states’ ability to reintegrate into the Atlantic world. Revenge justice satisfied local constituencies and fitted into a long Anglo-American tradition, but it also endangered international respect for the Union. Without that respect, Americans would not be able to participate fully in Atlantic trade, and the states would be vulnerable to the Atlantic empires that encircled them: France, Spain, and Great Britain.

Claims about these cases must be modest. First, they are few in number. Relying on existing histories that have uncovered the early state cases rather than exploring the state judicial archives for new ones, it is reasonable to conclude that, between the Declaration of Independence in 1776 and the Philadelphia Convention in 1787, there were seven situations in which state judges exercised judicial review or engaged in strong interpretation that effectively neutralized state statutes. Five of these cases involved loyalist defendants challenging antiloyalist laws, including the first four instances. Two others were challenges to debtor-creditor legislation; one of

17. Still useful is CLAUDE HALSTEAD VAN TYNE, *THE LOYALISTS IN THE AMERICAN REVOLUTION* (1902), which contains two appendices that list most of the state antiloyalist laws, including some in every state. See also JANICE POTTER, *THE LIBERTY WE SEEK: LOYALIST IDEOLOGY IN COLONIAL NEW YORK AND MASSACHUSETTS* (1983); PHILIP RANLET, *THE NEW YORK LOYALISTS* (2d ed. 2002); Oscar Zeichner, *The Loyalist Problem in New York After the Revolution*, 21 N.Y. HIST. 284–302 (1940).

18. See Table, Appendix. A useful overview is CHARLES GROVE HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 88–121 (2d ed. 1959). See also W. P. Trent, *The Case of Josiah Philips*, 1 AM. HIST. REV. 444 (1896) (discussing the Virginia case of 1778); Austin Scott, *Holmes v. Walton: The New Jersey Precedent*, 4 AM. HIST. REV. 456 (1899) (discussing the New Jersey case of 1780); William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491 (1994) (analyzing the Virginia case of 1782, also known as *Commonwealth v. Caton*, 8 Va. (4 Call) 5 (1782)); Richard Lambert, *The “Ten Pound Act” Cases and the Origins of Judicial Review in New Hampshire*, N.H. B. J., Mar. 2002, at 37 (2002); and sources cited *infra* Part V.

these statutes demanded that creditors accept paper money, while the other gave the state's courts jurisdiction to decide debt cases without a jury when the debt claimed was ten pounds or less.<sup>19</sup> This is a small data set. If there are other revolutionary era cases awaiting discovery, they could support or qualify this thesis.

The second caution is that Anglo-American courts were just beginning to articulate reasoned opinions. Judicial opinions exist for only a few of these cases. Consequently, there is limited material from which to draw conclusions about the reasoning in these cases. Early modern legal records were designed to record the material relevant for enforcement and possible review, not to disclose doctrinal reasoning, let alone the larger political context and meaning of each litigation. Not all of even these records survive. To understand the context in which these cases transpired, the historian must use surrounding documents, such as lawyers' briefs when available, along with inferential reasoning. In addition, much of the argument here depends on how contemporaries perceived these cases rather than what they meant to the parties involved.

This relative absence of judicial reasoning is itself important: it helps move the spotlight from judges (where most legal scholars focus) to lawyers, and it puts more emphasis on creative advocacy than official doctrine. The lawyers were acting like diplomats themselves and used creative legal argument to persuade judges that they were all part of a larger world of law whose boundaries went beyond their jurisdiction, their state, and the United States. As such, these cases can be seen part of a larger strategy to obtain redress for loyalists and to keep the states from interfering with international diplomacy.

Third, the concept of an "Atlantic world" is a modern heuristic.<sup>20</sup> It does, however, reflect ideas and languages current in early modern North America. Keywords signaling that larger world included "civilization," "commerce," "the law of nations," "humanity," and the "respect" of the European-based "empires."

These modest and ambiguous examples of judicial scrutiny of legislation are nonetheless significant because they reveal the original context and method of judicial review of legislation. They also suggest the importance for early American constitutionalism of the participants' personal experience in these cases. First, the primary effect of this early scrutiny was to

19. The New Hampshire Ten Pound Act gave rise to six cases in the state courts during 1786, but I treat them as one case because they dealt with the single statute. See generally Lambert, *supra* note 18.

20. See Bernard Bailyn, *The Idea of Atlantic History*, 20 *ITINERARIO* 19 (1996) (discussing the explanatory power of "Atlantic world" for early modern history).

neutralize antiloyalist legislation that violated the Peace Treaty of 1783 and the law of nations. Even the two cases not involving loyalists had ramifications for loyalist and British creditors. Second, these cases reveal that some lawyers and judges were interested in locating hierarchies of substantive law rather than hierarchies of jurisdiction. They were willing to entertain horizontal review of legislatures by coordinate courts that drew on a source of higher law, typically one originating outside that jurisdiction but often incorporated, explicitly or implicitly, into the state's constitution.<sup>21</sup> These cases are not examples of an external or conciliar body exercising a recognized power to review legislation. The revolutionaries were familiar with conciliar review of colonial statutes. Some of them, such as those in New York, tried to duplicate this process in their Council of Revision.<sup>22</sup> These cases were of a different order, which is why they were controversial. Lawyers and judges justified that horizontal review by arguing that the courts were drawing on a superior body of law, like the common law incorporated into a state constitution, the law of nations, or a Confederation treaty. They continued to embrace the colonial customary constitution of ancient liberties, but they were also funneling it, in part and not exclusively, into constitutional doctrine applied in ordinary courts. As they did so, they were beginning to draw newly distinct lines between ordinary common law, statutory law, and the law of the constitution, and then to arrange those separate bodies of law in a three-level hierarchy unknown in Britain or the colonies. In short, these lawyers and judges were groping toward a new genre of constitutional law: a hybrid discourse of law and politics tethered to—but existing apart from—written constitutions that offered a structured arena in which people could struggle over the fundamental nature of their state. The Federalists elaborated this hierarchy of law in the ratification debate, and then began to apply and develop it in the courts during the 1790s. The content of each level, of course, remained contested—and still does. The point here is that men who a few years later embraced Federalism started to draw these lines in concrete cases involving antiloyalist legislation.<sup>23</sup>

21. There was even review by inferior courts, such as the municipal court that interpreted state legislation in *Rutgers v. Waddington*, discussed *infra* Part V.A.1. See also Hamburger, *supra* note 7, at 34–38 (discussing judicial review of ten pound jurisdictional acts by New Hampshire inferior courts).

22. See HULSEBOSCH, CONSTITUTING EMPIRE, *supra* note 15, at 178–79 (arguing that the Council of Revision created a “bridge” between external conciliar and internal judicial review).

23. See *id.* at 9–10, 203–58. I derive the idea of constitutional law as a structured “arena of struggle” from Hendrik Hartog, *The Constitution of Aspiration and “The Rights That Belong to Us All,”* in THE CONSTITUTION AND AMERICAN LIFE 353, 366 (David Thelen ed., 1988) (arguing that “[t]he plausibility . . . of constitutional history as an arena of struggle between contending and changing normative orders makes it important to consider the relative constants that have channeled and structured ongoing conflicts”). Cf. WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL*

Third, in the small world of post-revolutionary America, these cases provided experience for lawyers and judges to think about the nature of the new state constitutions, the relationship of each constitution to the others, the relationship between the state constitutions and the Articles of Confederation, and finally the connection between those states and the Confederation to the larger Atlantic world of empires whence they came. Several of them went on to become leading Federalists and served in the first federal government. Their experience with antiloyalist legislation was part of their constitutional education.

It was not that this group developed greater sensitivity toward discrete and insular minorities than the average legislator. Instead, they had a cosmopolitan outlook on Atlantic geopolitics. From their perspective, antiloyalist legislation impeded the reintegration of the states into that world. In short, the reintegration of the loyalists into the states would help facilitate the reintegration of the United States into the Atlantic world—what at least some considered to be civilization.<sup>24</sup>

This cosmopolitan concern for that larger world was a key motivation behind these forerunners of judicial review and the formation of a separate genre of constitutional law.<sup>25</sup> It was not a play for aristocracy or elitism in the abstract. It was not reflexively anti-democratic. It was not driven simply by interest. It was not just another mechanism of the sort that James Madison imagined would manage the physics of a faction-ridden republic. It was designed to elevate the United States to the level of the powers whose capitals were across the Atlantic.

Much of that aspiration focused on commerce. Three-quarters of the former colonies' trade had been with other dominions in the British Empire, especially the West Indian colonies. Reestablishing that trade, along with commercial relations with other European empires, was a key part of the Federalist program. Interest was in play, to be sure, and another sort of historian might now cite Immanuel Wallerstein and relate this expression of the rule of law to international capitalism.<sup>26</sup> But in the eighteenth century, commerce yielded benefits besides wealth. It was thought to encourage everything from good manners to peaceful and humanitarian

REVIEW 68–71 (2000) (arguing that the Marshall Court struggled to differentiate constitutional from political decision making).

24. A suggestive study of the reintegration of loyalists in one state is DAVID EDWARD MAAS, *THE RETURN OF THE MASSACHUSETTS LOYALISTS* (1989).

25. On the creation of the new genre of constitutional law, see HULSEBOSCH, *CONSTITUTING EMPIRE*, *supra* note 15, at 207–13, 237–58.

26. See IMMANUEL WALLERSTEIN, *THE MODERN WORLD-SYSTEM* (3 vols.) (1974–88).



sentiments. It reflected and sustained the highest stage of human civilization.<sup>27</sup>

Reintegration was not, therefore, simply a diplomat's or merchant's ploy. Playing by the rules of this Atlantic world would slow down the emigration of loyalists and their capital, reopen traditional trade networks, and attract international investment. In short, it would facilitate the circulation of people, ideas, and credit. But the whole was worth more than the sum of its parts. Reintegration of the American provinces into the Atlantic world would mean, for the first time, full membership in that world. They did not really have that before the Revolution. The failure of British administrators to respect the liberties of Englishmen and similar indices of civilization had enraged almost all colonists, both those who rebelled and those who did not.<sup>28</sup> After the Revolution, treating those who did not rebel fairly would give all Americans entry into a club from which they had long been excluded. Consequently, the treatment of the loyalists was central to constitutional debates of the 1780s.

## II. THE LOYALISTS AND POPULAR CONSTITUTIONALISM

The American loyalists practiced popular constitutionalism before, during, and after the Revolution, which supports Kramer's contention that customary forms of redress like representation, petitions, and protests were at the center of Anglo-American constitutionalism. Before the Revolution, many who later remained loyal to the British Empire were leading colonial Whigs and formulated standard arguments for colonial liberties. A good example is William Smith, Jr., of New York. Smith was a lawyer, pamphleteer, and member of the colonial Assembly, and eventually chief justice of the provincial supreme court. In the decade before the Revolution, he penned many of the Assembly's petitions to the British government. His petitions emphasized the colonists' equal claim to enjoy the liberties of Englishmen, especially the right of representation, the right to jury trials, and the right to exercise some control over colonial officials. Smith was conflicted at the moment of decision, and throughout the war he hoped for reconciliation. He maintained good relations with New York's revolutionaries, many of whom had been his colleagues and partners. His old friends who became framers of the state constitution of 1777 sent Smith—who was within British lines and serving as an advisor to the British governor-

27. A good treatment of this ideology of commerce that traces it to the Scottish Enlightenment is ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* (1977).

28. See REID, *supra* note 8; HULSEBOSCH, *CONSTITUTING EMPIRE*, *supra* note 15, at 105–44.

general—a draft for his review, and he offered his comments. He finally left New York in 1783 and became chief justice of Quebec.<sup>29</sup>

During the Revolution, most British-controlled territory in the thirteen colonies was under martial law. Many loyalists continued to petition for the restoration of civil government, especially the reactivation of their representative assemblies. Once again, their discourse would have been familiar to the revolutionaries. In October 1776, more than one thousand New Yorkers signed a petition to the governor-general asking him to restore trade and civil government in the city. It began as a loyalist answer to the Declaration of Independence. They pledged “allegiance” to the king and conceded “the Constitutional Supremacy of Great Britain over the Colonies.” While pledging loyalty to the Crown, the petitioners requested the return of their assembly. The signers were not disgruntled neutrals. They included prominent loyalists, including four members of the governor’s council, supreme court justices, the attorney general, and hundreds of other officeholders, lawyers, and merchants. The petition had no effect.<sup>30</sup>

During and after the war, the American loyalists used petitions, protests, and pamphlets to lobby for compensation in London and for the return of confiscated property in the United States. In London, the British Parliament established a Commission on Loyalist Compensation that entertained petitions for compensation for property lost during the Revolution and disbursed more than 3 million pounds sterling for loss of property, income from offices held at the time of the revolt, and actual professional income lost, though not for the loss of expected income or trade.<sup>31</sup> Loyalists invested much time and effort publicizing their woes to members of Parliament and the public. One pamphlet, for example, collected dozens of New York State statutes that targeted loyalists.<sup>32</sup>

In the new United States, loyalists petitioned legislatures for the return of confiscated property. In New York, several obtained private bills that ended their banishment and restored some of their property rights.<sup>33</sup>

29. On Smith, see HULSEBOSCH, *CONSTITUTING EMPIRE*, *supra* note 15, at 92–94, 166–68.

30. See R.W.G. Vail, *The Loyalist Declaration of Dependence of November 28, 1776*, 31 N.Y. HIST. SOC’Y Q. 68 (1947) (discussing and reproducing the petition).

31. See WALLACE BROWN, *THE GOOD AMERICANS: THE LOYALISTS IN THE AMERICAN REVOLUTION* 188 (1969); JOHN EARDLEY-WILMOT, *HISTORICAL VIEW OF THE COMMISSION FOR ENQUIRING INTO THE LOSSES, SERVICES, AND CLAIMS, OF THE AMERICAN LOYALISTS, AT THE CLOSE OF THE WAR BETWEEN GREAT BRITAIN AND HER COLONIES, IN 1783* (Gregg Press 1972) (1815) (memoir of claims process by commission member).

32. See *LAWS OF THE LEGISLATURE OF THE STATE OF NEW YORK, IN FORCE AGAINST THE LOYALISTS, AND AFFECTING THE TRADE OF GREAT BRITAIN, AND BRITISH MERCHANTS, AND OTHERS HAVING PROPERTY IN THAT STATE* (London, 1786) [hereinafter *LAWS AGAINST THE LOYALISTS*].

33. See, e.g., Act to Preserve the Freedoms and Independence of this State, and for Other Purposes Therein Mentioned (May 12, 1784) (permitting return of twenty-seven banished loyalists).

In sum, the American loyalists participated fully in the customary constitutionalism that Kramer describes as prevalent in North America. Although they also shared much of the ideology of English liberties and colonial protest, the important point here is that, procedurally, their constitutional behavior was similar to the revolutionaries and the American founders—except that they remained loyal to the empire. They achieved moderate success in vindicating what they saw as their constitutional liberties: some compensation in London and some restitution in the United States. Yet the loyalists were never made whole, and their plight—the subject of diplomacy and litigation into the nineteenth century—was a catalyst for increasing the judiciary’s role in defining American constitutional liberties.

### III. STATE ANTILOYALIST LEGISLATION

Modern scholars refer to the punitive treatment of a defeated class in a civil war as “transitional justice”: the striving by post-revolutionary leaders to exact revenge on those who ruled before.<sup>34</sup> In the early United States, the Crown and its imperial agents were gone. But thousands of people remained loyal, and many thousands more were neutral. A sampling of anti-loyalist statutes from the new state of New York will provide a sense of what transitional justice looked like in one province. The list is partial. A more complete collection compiled by an aggrieved New York loyalist included thirty-two statutes passed between 1778 and 1785 and ran to over 150 pages.<sup>35</sup>

It is important to note at the outset that legislative antiloyalism was not simply revenge justice or the product of irrational politics.<sup>36</sup> The statutes are so numerous, so encompassing, and so detailed that they reveal a systematic attempt to stigmatize the loyalists, to take their property, to tax what remained, and to force them to settle debts cheaply. In sum, the statutes reflect a conscious program of ousting loyalists and generating income for states whose revenue sources were devastated by war. Heavy taxation of citizens was ideologically and practically impossible; there simply was

34. See RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000).

35. *LAWS AGAINST THE LOYALISTS*, *supra* note 32.

36. Typically, the revolutionary-era state legislatures are characterized as being “out of control.” See, e.g., Harrington, *supra* note 11, at 53. This characterization tracks that of James Madison. See generally JAMES MADISON, *The Vices of the Political System of the United States*, in 9 *THE PAPERS OF JAMES MADISON* 345, 348–57 (William M. E. Rachal ed., 1975). See also JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 35–56 (1996) (describing and seemingly accepting Madison’s account of state legislation as full of “vices”); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1789* (1969).

not enough economic activity to generate substantial revenue from ordinary taxation, either.<sup>37</sup> Antiloyalism filled the fiscal gap.

In addition, state legislative drafters modeled their antiloyalist statutes on English treason and related statutes. Little of what the states enacted was new in the Anglo-American world. For centuries, English monarchs, their councils, and Parliament had produced treason statutes, acts of attainder, acts of sequestration, loyalty oaths, treason convictions, and so on. During and after almost every constitutional controversy in English history, winners declared losers to be traitors and expropriated their property.<sup>38</sup> In sum, the burst of antiloyalist legislation in the American states cannot be dismissed, in Madisonian terms, as temporary legislative misjudgment. It represented a package of revolutionary justice that was customary throughout the British Atlantic and, at least within each state, fiscally rational.<sup>39</sup> It is therefore no surprise that every single state established a mechanism for convicting loyalists of treason and confiscating their property.<sup>40</sup> It would have been surprising if any of the states had not done so. If there was anything new in the process, it was the relative (though not complete) absence of capital punishment for convicted traitors.<sup>41</sup> Additionally, the British government was ruling by martial law rather than statute law, and the military confiscated property—from revolutionaries as well as from loyalists. The loyalists took it from both sides: the revolutionaries saw them as enemies, while the military governments did not treat them as equal Britons, either.<sup>42</sup>

New York—where the Revolution was a civil war from the beginning—is a good example. The revolutionary government's antiloyalist program was more extensive than in the other states but not unusual in kind. It attacked the loyalists by criminalizing their status, taking or taxing their property, and making it difficult for them to collect debts. The first

37. For the states' financial straits, see MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781-1789*, at 302-12 (4th prtg. 1965).

38. Contemporary examples came after the Jacobite rebellions of 1715 and 1745. See ANNETTE M. SMITH, *JACOBITE ESTATES OF THE FORTY-FIVE 1-18* (1982) (discussing the decades-long process of forfeiture, partial restitution, and settlement of creditor claims against confiscated estates). An overview of medieval and early modern examples can be found in J.G. BELLAMY, *THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES* (1970); JOHN BELLAMY, *THE TUDOR LAW OF TREASON: AN INTRODUCTION* (1979).

39. For a rare sympathetic account of the states in the 1780s see JENSEN, *supra* note 37.

40. See VAN TYNE, *supra* note 17, at 335-41 (listing forfeiture laws from thirteen states).

41. Although most were simply banished, several were executed. See BRADLEY CHAPIN, *THE AMERICAN LAW OF TREASON: REVOLUTIONARY AND EARLY NATIONAL ORIGINS 29-45* (1964) (recounting the development of treason, its enforcement in the revolutionary states, and the reduction of its penalties compared to England). For capital punishment after the Jacobite rebellion, see SMITH, *supra* note 38, at 2 (noting that about eighty Jacobites were executed under acts of attainder).

42. See HULSEBOSCH, *CONSTITUTING EMPIRE, supra* note 15, at 163-64.

step in most states was to pass statutes that distinguished patriots from enemies and required the latter to move behind enemy lines. The New York legislature did so in 1776 and 1778.<sup>43</sup> In 1779, the state created loyalty oaths for those who wished to practice law; then it did the same for all voters and officeholders.<sup>44</sup> In 1784—after the Peace Treaty—the legislature passed a law declaring, that all who remained within British lines could be convicted of misprision of treason (a misdemeanor offense for failing to report the treason of others) and thus disabled them from voting or holding office.<sup>45</sup>

Loyalist real property was another target. In 1779, the legislature passed a confiscation act in which fifty-nine prominent loyalists were attainted, that is, convicted of treason by statute, and their land was forfeited.<sup>46</sup> The state constitution of 1777 had declared that “no acts of attainder shall be passed by the legislature of this state, for crimes other than those committed before the termination of the present war.”<sup>47</sup> In the meantime, loyalists were fair game. The act also established a commission on forfeitures to take and redistribute that land and the land of others convicted of loyalty to the Crown. In the spring of 1784, more than six months after the final Peace Treaty in which the Confederation forbade future confiscations and encouraged the states to pay restitution for those in the past, the state passed two forfeiture acts to expedite the sale of confiscated land.<sup>48</sup> The Forfeiture Commission generated state revenue for a decade.<sup>49</sup>

Loyalist personal property suffered, too. In 1782, the assembly passed a debt act that absolved debtors owing money to people who were within the British lines from paying any interest on loans after December 1775.<sup>50</sup> This was a moratorium on interest due loyalists for the duration of the war. In 1783, probably after news of the provisional peace treaty with Britain

43. Act of June 30, 1778, ch. 47, 1778 N.Y. Laws 87 (attempting “more effectually to prevent the mischiefs arising from the example and influence of persons of equivocal and suspected characters in this state”). This act carried forward a June 1776 act of its predecessor, the revolutionary Provincial Congress. See 1 J. PROVINCIAL CONGRESS 477 (1842).

44. Act of Oct. 9, 1779, ch. 12, 1779 N.Y. Laws 155 (providing that “attornies, solicitors and counsellors at law . . . [must] produce certificates of their attachment to the liberties and independence of America”); Act of Mar. 26, 1781, ch. 36, 1781 N.Y. Laws 355 (providing that “all public officers and electors, within this State, [must] take the test oath therein contained”).

45. Act of May 12, 1784, ch. 66, 1784 N.Y. Laws 772.

46. Act of Oct. 22, 1779, ch. 25, N.Y. Laws 173.

47. N.Y. CONST. of 1777, art. XLI.

48. Act of Apr. 6, 1784, ch. 20, 1784 N.Y. Laws 621 (providing for “the immediate sale of certain forfeited estates”); Act of May 12, 1784, ch. 64, 1784 N.Y. Laws 736 (providing for “the speedy sale of the confiscated and forfeited estates”).

49. See HARRY B. YOSHPE, *THE DISPOSITION OF LOYALIST ESTATES IN THE SOUTHERN DISTRICT OF THE STATE OF NEW YORK* (1939).

50. Act of July 12, 1782, ch. 1, 1782 N.Y. Laws 499.

had reached New York, the legislature passed a trespass act that enabled displaced persons to sue those who occupied their land during the war.<sup>51</sup> The key provision was that obedience to a military command could not be invoked as a defense against trespass, thus disallowing a standard defense under the law of nations. Basically, it created liability for military uses of property owned by civilians who left British-controlled territory. It also generated the case of *Rutgers v. Waddington*, in which Alexander Hamilton defended a loyalist in the Mayor's Court of New York City.<sup>52</sup>

In the 1783 Peace Treaty with Great Britain, the Confederation government had promised to stop this revenge justice and provide restitution. Article IV promised that the states would create no "lawful impediment" to the collection of debts and that creditors would receive "the full value in sterling money, of all bona fide debts."<sup>53</sup> Article V provided that Congress would "earnestly" request the state legislatures to "provide for the restitution of all estates, rights and properties, which have been confiscated, belonging to real British subjects" as well as to those who lived within British lines but did not bear arms.<sup>54</sup> This was a hedge. Congress knew it had no coercive authority over the states, but it appears that British diplomats did not fully understand just how weak this guarantee was. Article VI provided that there would be no future confiscations of property.<sup>55</sup>

Both houses of the New York state legislature refused to ratify the Peace Treaty because, they claimed, Britain had violated the law of nations during the war. Classically, however, the point of a treaty was to terminate such claims forever, while retaining only those listed in the treaty itself. There was, in short, a conflict between state law, on the one hand, and Confederation policy and the law of nations, on the other.

#### IV. ANTI-ANTILOYALISM AND FEDERALISM

Some revolutionary Americans saw that antiloyalist legislation endangered transatlantic relations. They responded first with the tools of popular constitutionalism—pamphlets and protests—and then they reconstituted the relationship between the states and the central government. Predominantly, they stayed within the boundaries of popular constitutionalism. In the end, these violations of the treaty contributed to the push for the new federal

51. Act of Mar. 17, 1783, ch. 31, 1783 N.Y. Laws 552.

52. For a discussion of *Rutgers v. Waddington*, see *infra* Part V.A.1.

53. Definitive Treaty of Peace Between the United States of America and his Britannic Majesty, U.S.-Gr. Brit., art. IV, Sept. 3, 1783, 8 Stat. 80.

54. *Id.* at art. V.

55. *Id.* at art. VI.

Constitution and its Supremacy Clause, declaring the federal Constitution, statutes, and treaties to be the “supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>56</sup> As Jack Rakove observes, the Supremacy Clause “marked an attempt to incorporate a principle of judicial review into all the state governments by the unilateral fiat of the Constitution.”<sup>57</sup> He adds that the delegates to the Convention “knew that the occasional efforts of state judges to exercise a power of judicial review had been bitterly contested by legislatures” during the 1780s.<sup>58</sup> The Supremacy Clause functioned like an amendment to each state constitution authorizing judicial review of state legislation against the standard of federal law. What is unexplored here is the way that, before the Philadelphia Convention, some revolutionary lawyers and judges had begun to engineer judicial review as yet another way to counter antiloyalist statutes, and how the Federalists, with the Supremacy Clause, incorporated that experimental practice into the Constitution. The Supremacy Clause did not, of course, end the matter. It only continued the debate, begun in the state courts in the 1780s, over whether and in what ways treaties were enforceable against domestic law.<sup>59</sup> This debate persists today.

The Confederation’s diplomats abroad were the first to disapprove of antiloyalist legislation, because reports of such statutes in Europe were interfering with negotiations. The problem was twofold. First, the Confederation’s inability to control the state governments belied the American diplomats’ claim to be representing the United States. Second, the antiloyalist laws seemed to violate the Peace Treaty and the law of nations. As John Jay negotiated the final draft of the Peace Treaty in Paris, he reported to New York’s attorney general that “[y]our irregular and violent popular proceedings and resolutions against the tories hurt us in Europe. We are puzzled to answer the question, how it happens that, if there be settled governments in America, the people of town and district should take upon themselves to legislate.” He reported that the “newspapers in Europe are filled with exaggerated accounts of the want of moderation, union, order, and government which they say prevails in our country” and concluded that

56. U.S. CONST. art. VI. For a good summary of the original understanding of the Supremacy Clause see RAKOVE, *supra* note 36, at 171–77.

57. RAKOVE, *supra* note 36, at 175.

58. *Id.*

59. In 1796, the Supreme Court declared that the federal courts also had the power to apply treaties as the supreme law of the land. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (refusing to recognize a Virginia statute that violated the 1783 Peace Treaty as a defense against debt collection by a British creditor).

“the people of America must either govern themselves according to their respective constitutions and the confederation, or relinquish all pretensions to the respect of other nations.”<sup>60</sup> Men like Jay were sympathetic to some loyalists: family, friends, and acquaintances. However, he counseled moderation in order to appeal to European opinion. He reported to New York’s chancellor that

the general opinion in Europe is that [the loyalists] have reason to complain, and that our country ought to manifest magnanimity with respect to them. Europe neither knows nor can be made to believe what inhuman, barbarous wretches the greater part of them have been, and therefore is disposed to pity them more than they deserve. I hope, for my part, that the States will adopt some principle of deciding on their cases, and it will be a one as, by being perfectly consistent with justice and humanity, may meet with the approbation, not only of dispassionate nations at present, but also of dispassionate posterity hereafter.<sup>61</sup>

It was difficult for Jay to explain to his British counterparts how local and state governments could continue to breach treaty provisions with impunity. European diplomats lacked the language to understand Confederation-state relations, and so did the Americans. A sympathetic correspondent reminded Jay that “it can hardly be expected that people will in a moment forget what is past and suddenly return to an interchange of friendly offices with those whom for years past they have considered as their most bitter enemies.”<sup>62</sup> It had been a civil war in two dimensions: the people within each state had divided, and some provinces had divided from the rest of the empire. None of these relationships—each state with the loyalists, the states with each other, and the states together with the British Empire—had been resolved.

As with almost all of its law, Congress had only the power to encourage the states to obey the treaty. In May 1783, Congress resolved that the states should adhere to the preliminary provisions of the treaty, which were agreed to in November of 1782 and finalized in September of 1783. The committee that drafted the resolution included future leading Federalists

60. Letter from John Jay to Egbert Benson (Sept. 12, 1783), in 3 Correspondence and Public Papers of John Jay, <http://www.columbia.edu/cu/libraries/inside/working/jay/temp2/letterpress/Jay-Vol3.htm> (last visited May 1, 2006) [hereinafter John Jay Papers]. The Columbia University Libraries Digital Program maintains a searchable database that contains scanned originals of much of John Jay’s correspondence. See Columbia University Libraries, John Jay Papers, <http://www.columbia.edu/cu/lweb/digital/jay/> (last visited May 1, 2006).

61. Letter from John Jay to Robert R. Livingston (July 19, 1783), in 3 John Jay Papers, *supra* note 60.

62. Letter from Charles Thomson to John Jay (Jan. 15, 1784), in 3 John Jay Papers, *supra* note 60.



such as Alexander Hamilton, Oliver Ellsworth, and James Madison.<sup>63</sup> Diplomacy abroad suffered while Congress awaited the outcome of diplomacy at home.

Again, several states refused to ratify the treaty. In response, men like Hamilton, Madison, and others began campaigning against the antiloyalist legislation. They wrote pamphlets decrying those laws, supported legislation to repeal them, and fought them in the courts. These were coordinated strategies. For example, Alexander Hamilton wrote his “Letters from Phocion” in 1784 to combat proposed state legislation that would declare loyalists to be aliens and to publicize some of the issues he was pleading in *Rutgers v. Waddington*, a New York City Mayor’s Court decision that bypassed New York’s antiloyalist Trespass Act.<sup>64</sup> Proto-Federalists like Hamilton coordinated their activities as legislators, pamphleteers, and advocates.

Writing as “Phocion,” Hamilton criticized the states for violating the procedural and property rights of loyalists in a way that was, in his words, not “humane.” He accused New York legislators of violating the “spirit of Whigism” in pursuit of “revenge” and “dark passions.”<sup>65</sup> But a larger problem was that their actions interfered with international relations. The legislature was

sacrific[ing] important interests to the little vindictive selfish mean passions of a few. To say nothing of the loss of territory, of the disadvantage to the whole commerce of the union, by obstructions in the fisheries; this state would lose an annual profit of more than [fifty thousand pounds] from the furr trade.

But not to insist on possible inconveniences, there is a certain evil which attends our intemperance, a loss of character in Europe. Our Ministers write that our conduct, hitherto, in this respect, has done us infinite injury, and has exhibited us in the light of a people, destitute of government, on whose engagements of course no dependence can be placed.<sup>66</sup>

Antiloyalist legislation was bad for New York’s commerce, and it was damaging the United States’ international reputation.

James Madison also decried violations of the treaty and the law of nations in his personal musings on the “Vices of the Political System of the

63. 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 222, 224 (Gaillard Hunt ed., 1922) (proceedings of Apr. 1, 1783), available at <http://memory.loc.gov/ammem/amlaw/lwjcLink.html> (follow “Volume 24 (pp. 1–528)” hyperlink; then follow “Page image” hyperlink).

64. Letter from Phocion to the Considerate Citizens of New York (Jan. 1–27, 1784), in 3 THE PAPERS OF ALEXANDER HAMILTON 483–97 (Harold C. Syrett & Jacob E. Cooke eds., 1962) [hereinafter 3 HAMILTON PAPERS]; See also Second Letter from Phocion (April 1784), in 3 HAMILTON PAPERS, *supra*, at 530–58.

65. Letter from Phocion to the Considerate Citizens of New York, *supra* note 64, at 484.

66. *Id.* at 492.

United States.” He attributed such violations to the sociology of the state legislatures: the representatives were simply drawn from a “sphere of life” in which international affairs were ignored.<sup>67</sup> Similarly, paper money schemes were the products of parochial minds. “Is it to be imagined,” he asked, “that an ordinary citizen or even an assemblyman of R[hode] Island in estimating the policy of paper money, ever considered or cared in what light the measure would be viewed in France or Holland; or even in M[assachusetts] or C[onnecticut]?”<sup>68</sup>

Madison again emphasized state violations of the law of nations at the Philadelphia Convention. Unless prevented, they would “involve us in the calamities of foreign wars.” Reports of violations were numerous. “The files of Congs. contain complaints already, from almost every nation with which treaties have been formed. Hitherto indulgence has been shewn to us. This cannot be the permanent disposition of foreign nations.”<sup>69</sup> Treaty violations were the first reason he listed when presenting his case for a federal veto on state legislation.

Before, during, and after the Philadelphia Convention, Madison talked of the “[i]njustice of laws of States,” their “[m]ultiplicity,” “mutability,” and “[i]mpotence.”<sup>70</sup> He also attributed much of the problem to local factions, which could be solved by enlarging the republic. Madison was a systematic thinker who tried to find a higher level of abstraction in which to categorize these troubles. Modern scholars who return to Madison see primarily the latter, when for Madison the problem was a specific set of legislative abuses at the heart of which were antiloyalist laws. Hamilton’s writing and advocacy made this clear. Kramer has demonstrated that Hamilton was one of the only people—at least among those leaving written records—who understood Madison’s more abstract political science concerning the optimum size of republics.<sup>71</sup> Hamilton, however, also understood the problems that inspired these musings. He understood them from his experience in the state legislature and as an advocate in the state courts of New York.

The point is that whether or not most readers of *Federalist No. 10* grasped how a larger polity might prevent political monopoly, all could understand the argument that antiloyalist legislation was impeding international commercial and diplomatic relations. That latter proposition is the

67. MADISON, *supra* note 36, at 349.

68. *Id.* at 355–56.

69. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (Max Farrand ed., 1911) [hereinafter FEDERAL CONVENTION RECORDS].

70. MADISON, *supra* note 36, at 353–58.

71. Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611, 612 (1999).

most consistent theme in the eighty-five letters that make up *The Federalist*.<sup>72</sup>

## V. ANTILOYALIST LEGISLATION IN THE STATE COURTS

Kramer provides a good account of most of the early cases in which state judges groped toward judicial review of state legislation.<sup>73</sup> Their jurisprudential meaning is not at all clear. “It has been argued that all of these cases were true judicial review cases,” William M. Treanor wryly notes, “and it has also been argued that none of them were.”<sup>74</sup> Rather than focusing on the nature of the review—whether nullification, avoidance, strong statutory interpretation—it is sufficient for present purposes to keep in mind that all these cases involved scrutiny of state legislation against some source of higher law. Similarly, the standard of review is not the present concern. Instead, the important fact is that some lawyers and state judges in the 1780s believed that courts had the power to measure state statutes against state constitutions and Confederation law.<sup>75</sup> Kramer rightly argues that these cases were only small bits of the constitutional ferment of the 1780s, that they were controversial, and that judicial review was only gradually accepted as one of several tools of constitutional construction.<sup>76</sup> With the cases arising in about seven states, there were just enough to make judicial construction of the constitution seem plausible, but not enough for anyone to think judicial review was the central way of defining constitutions. This is where the conventional wisdom on these cases rests. Missing is an element common to most of the cases that links them to the emerging Federalist movement: anti-antiloyalism. Five of the following seven cases involved loyalist defendants, meaning either colonial-born loyalists or British subjects who came to North America during the Revolution. The other

72. This can be demonstrated by turning the page after reading *The Federalist No. 10* and continuing on to *The Federalist No. 11*. There, Hamilton wrote of the “unequalled spirit of enterprise, which signalises the genius of the American Merchants and Navigators,” the commercial and diplomatic advantages of Union, and even the prospect of the states forming “one great American system, superior to the controul of all trans-atlantic force or influence, and able to dictate the terms of the connection between the old and the new world!” THE FEDERALIST NO. 11, at 69, 73 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

73. See KRAMER, *supra* note 1, at 93–127.

74. Treanor, *supra* note 11, at 473.

75. One reason for bracketing these jurisprudential issues is that they might be anachronistic because they demand more thoughtful and consistent rationalizations of the review process than the historical sources (and probably the historical actors could) supply. Cf. KRAMER, *supra* note 1, at 103 (arguing that early judges only questioned statutes that were clearly unconstitutional); Treanor, *supra* note 11, at 458–60 (finding varying degrees of scrutiny, which the author attributes to the different subject matters at issue rather than the different actors and courts involved in the decisions).

76. KRAMER, *supra* note 1, at 93–127.

two cases involved debtor-creditor legislation and almost all credit networks had transatlantic links. For convenience, these cases can be divided into three categories: those reviewing statutes relating to real and personal property, those reviewing statutes criminalizing loyalist status or insurrectionary behavior, and those reviewing debtor-creditor statutes.

### A. *Property Cases*

#### 1. *Rutgers v. Waddington*, New York Mayor's Court (1784): Limiting the Trespass Act of 1783

The case that best demonstrates the relationship of judicial construction of state constitutions to the larger project of reintegration into the Atlantic world is *Rutgers v. Waddington*, a 1784 case in the New York City Mayor's Court.<sup>77</sup> Documentation for this case is unusually full. Unlike most early state cases, the court published an opinion. Alexander Hamilton represented the Tory defendant, and his legal papers survived and are published.<sup>78</sup> Hamilton's practice papers make clear that he cut his professional teeth in the 1780s defending loyalists—both American and British Tories. “[L]egislative folly has afforded so plentiful a harvest to us lawyers,” he wrote Gouverneur Morris, “that we have scarcely a moment to spare from the substantial business of reaping [it].”<sup>79</sup> Private interest and political economy went hand in hand. Hamilton could embark “on the business of making my fortune” while contributing to what he called “the American empire.”<sup>80</sup> While litigating cases, he wrote essays criticizing antiloyalist legislation as “industrious efforts to violate, the constitution of this state, to trample the rights of the subject, and to chicane or infringe the most solemn

77. The case was heard by seven judges: Mayor James Duane, Recorder Richard Varrick, and five members of the city council. SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY, 1674–1784, at 302 (Richard B. Morris, ed., 1935).

78. This is a remarkable and unusual collection of practice papers. This published version includes Mayor James Duane's opinion. 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 282–419 (Julius Goebel Jr. ed., 1964) [hereinafter HAMILTON LAW PRACTICE]. For a more extensive analysis see HULSEBOSCH, CONSTITUTING EMPIRE, *supra* note 15, at 194–202.

79. Letter from Alexander Hamilton to Gouverneur Morris (Feb. 21, 1784), in 3 HAMILTON PAPERS, *supra* note 64, at 512. In three years, Hamilton “handled forty-five Trespass Act suits besides some twenty other suits under common law actions, the Confiscation Act, and the Citation Act.” HAMILTON LAW PRACTICE, *supra* note 78, at 525. In New York, Aaron Burr and Robert Troup also appeared frequently in such actions, though Hamilton seems to have represented more loyalist defendants than they.

80. Letter from Alexander Hamilton to Major General Nathanael Greene (June 10, 1783), in 3 HAMILTON PAPERS, *supra* note 64, at 376; Letter from Alexander Hamilton to George Washington (July 3, 1787), in 4 THE PAPERS OF ALEXANDER HAMILTON 224 (Harold C. Syrett & Jacob E. Cooke eds., 1962) [hereinafter 4 HAMILTON PAPERS].

obligations of treaty.” As he explained to the readers of one open letter, “’Tis with governments as with individuals, first impressions and early habits give a lasting bias to the temper and character.” It was important for America and all “mankind” that the states develop good political practices.<sup>81</sup>

Good practices included respecting the law of nations. Hamilton relied heavily on the law of nations to defend his client in this Trespass Act case. His client was a British merchant who, following a military order, occupied the New York City brewery of the plaintiff, who had fled the British-controlled area at the outbreak of the Revolution. In his briefs, Hamilton invoked Sir Edward Coke’s ambiguous opinion in *Bonham’s Case* that a statute against reason was “void,” but that case was not a strong precedent for judicial review and Hamilton did not put much weight on it.<sup>82</sup> Instead, he argued that the law of nations was incorporated into state law by way of the common law, which the state constitution declared “shall be and continue the law of this state, subject to such [legislative] alterations,”<sup>83</sup> or it was part of Confederation law and therefore trumped state law.

Under the law of nations, a military order was a valid defense to trespass during wartime. The question was whether that rule or the statutory exception to it bound the court. Hamilton put forward at least two separate arguments for why the court should adhere to the law of nations. First, he argued that the law of nations was federal law that bound the states. There were in turn two reasons for this. First, the Articles of Confederation themselves created a federal power to control foreign relations and implied that the states were bound to the law of nations that regulated foreign relations. Second, the Peace Treaty implicitly adopted the law of nations granting amnesty for all trespasses carried out under military orders, and the treaty was likewise a federal law that bound the states.

The second argument was that the state constitution incorporated the law of nations when it adopted the common law. Hamilton argued both that the state legislature could not violate the law of nations and also, more carefully, that it had not intended to do so.<sup>84</sup> The New York state constitution nowhere referred to the law of nations. Hamilton argued, first, that the law of nations was part of the common law, an increasingly common claim

81. Letter from Phocion to the Considerate Citizens of New York, *supra* note 64, at 484; Second Letter from Phocion, *supra* note 64, at 556.

82. In this draft, Hamilton cited Coke’s proposition in *Bonham’s Case* that “[a] statute against Law and reason especially if a private statute is void.” A court had the power, Hamilton asserted in these notes, to “render [such an] act Nugatory.” HAMILTON LAW PRACTICE, *supra* note 78, at 357–58.

83. 1 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 183 (1906).

84. HAMILTON LAW PRACTICE, *supra* note 78, at 382.

in the age of Lord Mansfield but not the most crystalline one.<sup>85</sup> Second, he argued that the common law reception clause in the state constitution also incorporated the law of nations. This logic ran into the problem that the common law reception clause also provided that the legislature could alter the common law so received. That is what it did in the Trespass Act.

Counsel for the landowner replied to this plea with a demurrer: the statute did not permit such a plea in justification, thus the plea was “not sufficient in Law to bar” the plaintiff’s trespass action.<sup>86</sup> Hamilton responded by again pleading that the justification was valid and did bar the claim. With this joinder of demurrer, the parties agreed that the case turned on a question of law for the judges rather than the jury: whether a military command was a valid justification for trespass.<sup>87</sup>

In a long and loose opinion, the Mayor’s Court of New York City agreed with at least some of Hamilton’s reasoning. It held that the law of nations’ amnesty rule for trespass operated in New York by force of the “foederal compact,” which “vested Congress with full and exclusive powers to make peace and war,” and the Peace Treaty. The court declared “that no state in this union can alter or abridge, in a single point, the feederal articles or the treaty.” In addition, the state constitution recognized and “legalized” this union. The court could not imagine that the state legislature had knowingly violated the law of nations because it was silent about the conflict.<sup>88</sup> Finally, prior conciliar review of the statute (the state Council of Revision had approved it) did not preclude judicial examination in individual cases. Thus, the Tory defendant could plead military justification.<sup>89</sup>

Kramer argues that the decision in *Rutgers* fits within the traditional power of common law courts to interpret statutes, and thus the decision was not an exercise of judicial review in any meaningful sense.<sup>90</sup> Although the court did not assert the power to set aside the statute because it conflicted with the state constitution or some other body of law, the Trespass Act did not leave much room for judicial interpretation. It expressly provided that

85. Hamilton cited Coke, Blackstone and Mansfield for the proposition that “[t]he *jus gentium* and *jus belli* are part of the common law.” *Id.* at 353. See Edward Coke, 1 THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON 11(b) (Philadelphia, Johnson, Warner & Fisher 1812); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 67 (Univ. of Chi. Press 1979) (1769) (stating that the law of nations “is here adopted in it’s [sic] full extent by the common law”); *Triquet v. Bath*, (1764) 97 Eng. Rep. 936, 937–38 (K.B.).

86. HAMILTON LAW PRACTICE, *supra* note 78, at 329–30.

87. The pleadings are printed in *id.* at 318–30.

88. *Id.* at 413–17.

89. *Id.* at 416.

90. See KRAMER, *supra* note 1, at 65–66.

military orders were no defense to a trespass action.<sup>91</sup> The provision comes at the end of the statute and is crystal clear. It is quite possible that the statute's drafters included it to defeat this conventional defense.

Duane most clearly embraced Hamilton's argument that the law of nations operated directly on the legislature by way of Confederation law, referring repeatedly to the "foederal compact."<sup>92</sup> In short, the advocate and judge went out of their way to constitutionalize the law of nations, and then ignored a provision that might have removed the constitutional issue. It did so, not just to obtain justice in this case, but also because New Yorkers needed to learn respect for that law. Echoing Hamilton's "Phocion" letters, Duane maintained that "in the infancy of our republic, every proper opportunity should be embraced to inculcate a sense of national obligation, and a reverence for institutions, on which the tranquility of mankind, considered as members of different states and communities depends."<sup>93</sup> Judicial examination of statutes was an opportunity to impart a civics lesson: New Yorkers had to consider not just their own interests but also "national obligation" and even "the tranquility of mankind." Applying the law of nations served those ends. While the Mayor's Court did not explicitly claim the power to nullify the statute, that is in effect what it did.

Members of the New York Assembly also saw it as judicial review rather than statutory interpretation. A group of them concluded that the court had "assumed and exercised a power to set aside an act of the state," and that it had "permitted the *vague and doubtful* custom of nations to be plead against, and to render abortive, a *clear and positive* statute."<sup>94</sup> They urged the landowner to seek a writ of error in the state supreme court, and they encouraged voters to elect state senators who, when sitting on the Council of Appointment, would select mayors and judges more respectful of state legislation and thus "protect us against judicial tyranny."<sup>95</sup>

These state legislators were not alone in viewing *Rutgers* as an attempt to nullify legislation. A decade later, leaders of the first federal administration interpreted *Rutgers* and the other examples of proto-judicial review in the same way. When British diplomats complained in the early 1790s that the states were still not adhering to the Peace Treaty, but rather had contin-

91. The statute is excerpted in HAMILTON LAW PRACTICE, *supra* note 78, at 201.

92. *See, e.g., id.* at 413.

93. *Id.* at 418.

94. Melancton Smith et al., An Address from the Committee Appointed at Mrs. Vandewater's on the 13th Day of September, 1784, to the People of the State of New York 6 (Sept. 13, 1784) (italics in original).

95. *Id.* at 14. The parties settled out of court. *See* Letter from Alexander Hamilton to Thomas Jefferson (Apr. 19, 1792), in 11 THE PAPERS OF ALEXANDER HAMILTON 316, 317 (Harold C. Syrett & Jacob E. Cooke eds., 1966).

ued to confiscate land and pass other statutes in derogation of the loyalists' rights, Secretary of State Thomas Jefferson cited *Rutgers* as "proof that the courts consider the Treaty as paramount the laws of the States." The British actually cited *Rutgers* first, arguing that the compromise decision, under which the British merchant had to pay rent for the first three years of occupancy, demonstrated that the states were violating the Peace Treaty. Diplomats in London had received news of a decision in the New York City Mayor's Court, proving that local antiloyalist litigation was an international event. Throughout negotiations to secure British adherence to the treaty, Jefferson wrote Hamilton and other New Yorkers to find out about New York's Trespass Act and what had happened in *Rutgers*. Their reports emphasized the other half of the decision, the part that restrained or nullified the statute in favor of the law of nations. Jefferson then appended Hamilton's statement of the case to his official reply.<sup>96</sup> In international negotiations, cases like *Rutgers* became the subject of controversy and, for U.S. officials, served as evidence that the United States adhered to the law of nations and the Peace Treaty.

*Rutgers* demonstrates the relationship between state court construction of constitutional law and the project of reintegration. Adjudicative review of statutes functioned not just as a brake on democracy or to serve elite interests, though it could do both. It also demonstrated to the Atlantic empires that the United States was an equal, law-abiding member of the civilized world.

## 2. *Holmes v. Walton* (N.J. 1780): Nullifying the Enemy Seizure Act of 1778

In *Holmes*, the New Jersey Supreme Court refused to apply the Enemy Seizure Act, which permitted seizure of all goods in transit to or from enemy lines, against a defendant accused of trading with the British military.<sup>97</sup> The problem was that the statute provided defendants a jury of six rather than twelve. The court reasoned that the common law always required a jury of twelve, not six.

96. See Letter from George Hammond to Thomas Jefferson (5 Mar. 1792), in 23 THE PAPERS OF THOMAS JEFFERSON 196–220 (Charles T. Cullen ed., 1990) (discussing New York antiloyalist statutes and citing *Rutgers*); Letter from Thomas Jefferson to George Hammond (May 29, 1792), in 23 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 551–63, 580. See also Letter from Alexander Hamilton to Thomas Jefferson (April 19, 1792), in 23 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 434–35 (describing *Rutgers*); Letter from Richard Harison to Thomas Jefferson (Dec. 4, 1790), in 18 THE PAPERS OF THOMAS JEFFERSON 125–30 (Julian P. Boyd ed., 1971) (surveying New York's antiloyalist laws and discussing *Rutgers*).

97. See Austin Scott, *Holmes v. Walton: The New Jersey Precedent*, 4 AM. HIST. REV. 456 (1899).



The New Jersey constitution contained a standard common law reception clause that adopted so much of

the Common Law of *England*, as well as so much of the Statute-Law, as have been heretofore practiced in this Colony, shall still remain in Force, until they shall be altered by a future Law of the Legislature; such Parts only excepted as are repugnant to the Rights and Privileges contained in this Charter.<sup>98</sup>

The clause added that “the inestimable Right of Trial by Jury shall remain confirmed, as a Part of the Law of this Colony without Repeal forever.”<sup>99</sup> The constitution did not provide for a jury of twelve. That, however, was the traditional number of jurors in a common law jury, and the court assumed that the constitution thus required a jury of twelve. The legislature soon amended the statute to provide for a jury of twelve.

The court left no opinion. For present purposes, the case represents the first instance of judicial review of a state statute. Apparently, the court measured the statute against the state constitution, found that the former violated the latter, and refused to apply it to the case at hand.

### 3. *Bayard v. Singleton*, North Carolina Supreme Court (1787): Nullifying the Confiscation Act of 1785

Like almost all states, revolutionary North Carolina confiscated many loyalist landholdings. A North Carolina statute protected buyers of confiscated estates from suits by loyalists, effectively preventing loyalists from challenging those confiscations in court.<sup>100</sup> When the estate of an attainted loyalist sued to repossess his land, the state supreme court refused to apply the statute because it denied defendants a jury trial.<sup>101</sup> North Carolina’s constitution of 1776 provided that “in all controversies at law, respecting property, the ancient mode of trial, by jury, is one of the best securities of the rights of the people, and ought to remain sacred and inviolable.”<sup>102</sup> In refusing to recognize the statute, the court placed much weight on the explicit guarantee. It explained that the legislators could not repeal the constitutional guarantee “because if they could do this, they would at the same instant of time, destroy their own existence as a Legislature, and dissolve the government thereby established.”<sup>103</sup>

98. N.J. CONST. of 1776, art. XXII (italics in original).

99. *Id.*

100. *See* *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 5 (1787).

101. *Id.* at 7.

102. N.C. CONST. of 1776, art. XIV, available at <http://yale.edu/lawweb/avalon/states/nc07.htm>.

103. *Bayard*, 1 N.C. (Mart.) at 7.

James Iredell was counsel for the plaintiffs. Like Hamilton, Iredell immigrated to the colonies from elsewhere in the British Empire (in his case, from England in 1768). His practice during the 1780s in North Carolina was also similar to Hamilton's in New York. Iredell represented several loyalists in the courts, shepherded others through the petition process in the state legislature, and gave advice to many more.<sup>104</sup> After serving as a Federalist in the North Carolina ratification convention, he was appointed to the United States Supreme Court in 1790, where he sat until his death in 1799.

In response to the public agitation over the North Carolina Supreme Court's decision, Iredell published a pamphlet defending judicial review that some scholars argue is the first full defense of the institution.<sup>105</sup> Iredell referred to judicial review as the judges' duty to enforce only those laws that are consistent with the constitution. "It will not be denied," Iredell explained,

that the constitution is a *law of the State*, as well as an act of Assembly, with this difference only, that it is the *fundamental* law, and unalterable by the legislature, which derives all its power from it. . . . An act of Assembly cannot repeal the constitution, or any part of it. For that reason, an act of Assembly, inconsistent with the constitution, is *void*, and cannot be obeyed, without disobeying the superior law to which we were previously and irrevocably bound. The judges, therefore, must take care at their peril, that every act of Assembly they presume to enforce is warranted by the constitution . . . .<sup>106</sup>

After laying out the doctrine of judicial review, Iredell addressed the claim that the people alone could enforce the constitution against unconstitutional legislative action. He arrayed judicial review along a spectrum with the instruments of customary constitutionalism. On the one hand, the right to petition the legislature was insufficient because it supposes "that the electors hold their rights by the *favor of their representatives*. The mere stating of this is surely sufficient to excite any man's indignation."<sup>107</sup> On the other hand, the right of resistance was too "dreadful [an] expedient" to protect the people from ordinary, legislative violations of the state constitu-

104. For information on Iredell's practice in the 1780s, see DON HIGGINBOTHAM, *THE PAPERS OF JAMES IREDELL* (1976) (vols. I & II), and LIFE AND CORRESPONDENCE OF JAMES IREDELL (Griffith J. McRee ed., New York, D. Appleton & Co. 1857) (vols. I & II). For Iredell's contribution to judicial review, see William R. Casto, *James Iredell and the American Origins of Judicial Review*, 27 CONN. L. REV. 329 (1995), and John V. Orth, *The Truth About Justice Iredell's Dissent in Chisholm v. Georgia (1793)*, 73 N.C. L. REV. 255 (1994).

105. See, e.g., Snowiss, *supra* note 4, at 45–46.

106. James Iredell, *To the Public* (1786), in 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL, *supra* note 104, at 145, 148 (italics in original).

107. *Id.* at 147 (italics in original).

tion.<sup>108</sup> In any case, only “*universal oppression*” would incite such resistance.<sup>109</sup> Iredell saw judicial review as an addition to these two alternatives, though where exactly judicial review lay between them on that spectrum was hard to say. Lawyers like Iredell and his opponents in the legislature were debating just that question. Judicial review lay somewhere between the petition and outright revolution, but closer to the former than the latter.

The North Carolina Supreme Court then decided that the defendants in the confiscation case could plead that the plaintiff was an alien and thus incapable of maintaining a real action based on inheritance.<sup>110</sup> This tended to negate the right to jury trial won by loyalist landholders. (Of course, unless the issue could be transformed into one of law for the court alone, only sympathetic loyalists would have gained much by a jury trial anyway.) The alienage rule was, however, ancient. The court could plausibly endorse that rule without running afoul of the law of nations or the Peace Treaty. The question of whether loyalists were aliens was debated throughout the new states, and several held that they were—with hard consequences for loyalists who tried to defend their landholdings in court.<sup>111</sup> In sum, the North Carolina court protected loyalist rights under the state constitution, but also found a traditional common law rule that made it difficult for them to vindicate their land rights without first being naturalized by the state legislature.

## B. *Criminal Statutes*

### 1. *The Case of Josiah Philips, Virginia Supreme Court (1778): Bypassing the Act of Attainder of 1778*

In the *Philips* case, the Virginia Supreme Court gave an “outlaw” a jury trial rather than proceed under a legislative act of attainder. According to a letter read in the Virginia legislature, the defendant had “commanded an ignorant disorderly mob, in direct opposition to the measures of this country [i.e., the revolutionary state of Virginia].”<sup>112</sup> Part of the complaint

108. *Id.*

109. *Id.* (italics in original).

110. *Bayard*, 1 N.C. (Mart.), at 9.

111. See William E. Nelson, *The American Revolution and the Emergence of Modern Doctrines of Federalism and Conflict of Laws*, in *LAW IN COLONIAL MASSACHUSETTS, 1630–1800*, at 419, 447 n.9 (Daniel R. Coquillette ed., 1984) (contrasting Massachusetts and New Hampshire decisions on the question). See also Letter from Phocion to the Considerate Citizens of New York, *supra* note 64 (opposing proposed bill in New York Assembly declaring loyalists as aliens). Article IX of the Jay Treaty resolved this question in favor of the loyalists.

112. Trent, *supra* note 18, at 445.

alleged that he was working in tandem with Lord Dunmore, the royal governor of the province during the war. The act of attainder, said to be drafted by Thomas Jefferson, accused Philips of being an “insurgent[.]” who had “levied war against this commonwealth.”<sup>113</sup> Attainder was warranted because the “delays” involved in the regular mode of outlawing a defendant “according to the usual forms and procedures of the courts of law, would leave the said good people for a long time exposed to murder and devastation.”<sup>114</sup> Philips appears to have been one of many opportunists who pillaged the marchlands between the territories controlled by the royal and revolutionary governments, respectively.<sup>115</sup> Still, the gravamen of the act of attainder was his adherence to the Crown and his disruption of the revolutionary cause. Although acts of attainder were common during the Revolution, they were rare in Virginia. There, the state legislature provided in 1775 that the usual “mode of punishment for the enemies to America”—that is, to attain and confiscate the property of loyalists—was to proceed by jury trial.<sup>116</sup> The legislature singled out Philips for special treatment. The state court, however, did not comply with the act of attainder. Instead, it tried Philips for robbery in front of a jury of his peers—revolutionary peers, at least. After Philips pleaded a commission from Dunmore in defense, the jury found him guilty, and he was hanged.<sup>117</sup>

The question is why the court tried Philips at all. Was it because the Virginia Attorney General disregarded the act of attainder and proceeded to trial? Did he do so because he knew the court would not enforce the act? Did the court persuade him to abandon the act? There is no clear evidence for why the trial occurred.<sup>118</sup> But the state’s legislative Bill of Rights of 1776 provided that all those accused of a crime had the right to receive a

113. Act to Attaint Josiah Philips and Others, Unless They Render Themselves to Justice Within a Certain Time, ch. 12 (1778), in 9 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 463, 463–64 (William Waller Hening ed., photo. reprint 1969) (1821) [hereinafter VIRGINIA STATUTES AT LARGE].

114. *Id.* at 463.

115. See Sung Bok Kim, *The Limits of Politicization in the American Revolution: The Experience of Westchester County, New York*, 80 J. AM. HIST. 868 (1993) (describing the example of Westchester County, New York).

116. Ordinance for Establishing a Mode of Punishment for the Enemies to America in This Colony, ch. 7 (1775), in VIRGINIA STATUTES AT LARGE, *supra* note 113, at 101, 106 (providing jury trials “as hath heretofore observed for the trial of civil causes in this colony”); amended by Ordinance to Amend an Ordinance Entitled an Ordinance for Establishing a Mode of Punishment for the Enemies of America in This Colony, ch. 7 (1776), in VIRGINIA STATUTES AT LARGE, *supra* note 113, at 130.

117. Trent, *supra* note 18, at 448.

118. See *id.* For a misinterpretation, see A.C. Goodell, Jr., *Four Fugitive Cases from the Realm of American Constitutional Law*, 49 AM. L. REV. 818, 827 (1915) (arguing that because Philips was in custody before the act became effective it did not apply, but misreading the dates in the statute to reach this conclusion).

jury trial.<sup>119</sup> Presumably, this provision played a role in the course of the *Philips* case. It is important to note, however, that the Virginia Constitution and Bill of Rights of 1776 were passed by the Virginia legislature. Thus, if the court assumed that the constitution was superior to statute law, it probably drew on the customary constitutionalism of the colonial period as reflected in the state constitution. In other words, the source of this higher law remained ambiguous.

Within a generation, however, St. George Tucker referred to the case as demonstrating “the importance of the separation of the powers of government, and of the independence of the judiciary; a dependent judiciary might have executed the law, whilst they execrated the principles upon which it was founded.”<sup>120</sup> Tucker deemphasized the revolutionary context of the *Philips* case. For him, the case stood for the abstract proposition that the judiciary was independent of the legislature. In other words, he viewed it as a precedent for judicial review in which a court went to trial despite a statute eliminating that option. For present purposes, the point is that this ambiguous incident turned on a decision by some attorney or judge—or both—to bypass an act attainting a loyalist and to proceed instead to a jury trial.

2. *Commonwealth v. Caton*, Virginia Supreme Court (1782): Examining, but Upholding, the Treason Act of 1776

In *Caton*, the Virginia Supreme Court upheld Virginia’s Treason Act against the challenge that it violated the state constitution of 1776.<sup>121</sup> The statute provided that only the two houses of the state legislature, together, could pardon a convicted traitor.<sup>122</sup> In this case, the lower house voted to pardon the defendants; the Senate refused. The lawyers arguing the case, including Edmund Randolph and St. George Tucker, believed that the court had the power to avoid or even strike down the statute because it violated the state constitution of 1776. The constitution provided that the governor had the power to pardon defendants except where the law directed otherwise, “in which cases, no reprieve or pardon shall be granted, but by resolve of the House of Delegates.”<sup>123</sup> Here, the statute required a joint resolution rather than just a resolution from the lower house. Tucker argued

119. VA. BILL OF RIGHTS § 8 (1776).

120. See BLACKSTONE’S COMMENTARIES app. at 293 (St. George Tucker ed., Philadelphia, Birch & Small 1803) (appended comments by St. George Tucker).

121. *Commonwealth v. Caton*, 8 Va. (4 Call) 5 (1782).

122. Act Declaring What Shall Be Treason, ch. 3 (1776), in VIRGINIA STATUTES AT LARGE, *supra* note 113, at 168.

123. VA. CONST. of 1776.

that the constitution “is the touchstone by which every Act of the legislature is to be tried. [I]f any Act thereof shall be found absolutely [and] *irreconcilably* contradictory to the Constitution, it cannot admit of a Doubt that such act is absolutely null and void.”<sup>124</sup>

Most of the judges on the court agreed that they possessed the power to strike down state legislation. But they found this statute constitutional. In announcing their decision, the judges discussed the statute’s constitutionality at length—and confirmed their power to review it. Justice Wythe stated the proposition most strongly:

[I]f the whole legislature . . . should attempt to overleap the bounds, prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further.<sup>125</sup>

*Caton* has received much analysis, despite the fact that all references to the judicial power to police violations of the constitution were dicta. But what has again not been noted is that this case also involved defendants loyal to the British Crown who had been convicted of treason under a state law passed at the outset of the Revolution. In Virginia, as elsewhere, the first articulate discussion of judicial review came in a heated case involving the trial of loyalists who aided the British military.

### C. *Debtor-Creditor Statutes*

The paper money and debt collection cases do not appear to have involved loyalists. But debtor-creditor law was a lightning rod because it affected interstate and international credit networks. The explicit purpose of many revolutionary era debtor-creditor statutes was to make it difficult for loyalist and British creditors to collect debts owed by patriots. Early Americans, however, were not divided sharply into debtors and creditors. Almost everyone involved in agriculture and trade was both. The real divide was between debtors with in-state creditors, who could vote to force these domestic creditors to accept paper money, and debtors with interstate and international creditors, who could not force them to accept state paper money. In this sense, the paper money and debt collection cases were about whether there should be an interstate and international system of law and credit, or whether each state would have its own.

In other words, the debt cases also raised the issue of whether the states would reintegrate themselves into the Atlantic world. Paper money

124. Treanor, *supra* note 11, at 491 (italics in original).

125. *Caton*, 8 Va. (4 Call) at 8. For an exploration of *Caton*, see Treanor, *supra* note 18.

fitted into a larger program of altering pre-revolutionary credit patterns. Some of the colonies had long pushed for paper currency, but such schemes were forbidden by Parliament and, when attempted, disallowed by the Privy Council.<sup>126</sup> Now the states felt as though they had free rein to experiment with paper money, interest moratoria, and debt cancellation. Some of these experiments targeted the loyalists; all affected British creditors at least indirectly.

1. *Trevett v. Weeden*, Rhode Island Supreme Court (1786): Refusing to Enforce a Paper Money Act

In *Trevett*, a butcher refused to accept paper money as payment for meat. The buyer brought an action against the butcher under a statute providing that those who rejected the state's legal tender could be convicted without a jury trial, with the 100-pound penalty divided between the informer and the state.<sup>127</sup> The butcher's attorney, James Varnum, argued that the act was "unconstitutional and void" because it established a "new-fangled jurisdiction[]" and denied the jury trial, a "sacred right" brought from England and still "the firm basis of our liberty."<sup>128</sup> The argument is noteworthy because Rhode Island did not adopt a state constitution in the revolutionary era. Like Connecticut, it retained its seventeenth-century charter. That did not stop Varnum: the birthrights of Englishmen were implicit in the charter, and the province was supposed to make no laws "contrary and repugnant unto" English law.<sup>129</sup> That clause had been enforced by the Privy Council rather than the provincial courts, which Varnum did not mention. Instead, he declared that it was the judiciary's duty not to make law ('God forbid!'), but rather simply to ignore any statute that was "against the constitution."<sup>130</sup> Once again, the constitutional argument derived from the customary constitution that colonists had long interposed against claims of imperial authority, whether made by the Crown, Parliament, or local imperial agents. Now such claims served to challenge state legislative authority.

The state supreme court dismissed the case without judgment, which suggested to most observers that it had refused to enforce the statute. Varnum took the decision as a victory and claimed that others did too. The

126. JOSEPH ALBERT ERNST, *MONEY AND POLITICS IN AMERICA, 1755-1775: A STUDY IN THE CURRENCY ACT OF 1764 AND THE POLITICAL ECONOMY OF REVOLUTION* 24-30 (1973).

127. JAMES M. VARNUM, *THE CASE, TREVETT AGAINST WEEDEN* 1-2 (Providence, John Carter 1787).

128. *Id.* at 3, 14.

129. *Id.* at 22.

130. *Id.* at 27.

commercial consequences of the decision, he wrote when he published his argument, were immediately apparent:

The shops and stores were generally opened, and business assumed a cheerful aspect. Few were the exceptions to a general congratulation, and lavish indeed were the praises bestowed upon the Court. The dread and the idea of informations were banished together, while a most perfect confidence was placed in judicial security. The paper currency obtained a more extensive circulation, as every one found himself at liberty to receive or refuse it. The markets, which had been illy supplied, were now amply furnished, and the spirit of industry was generally diffused. Every prospect teemed with returning happiness, and nothing appeared wanting to restore union and harmony among the contending parties.<sup>131</sup>

Rhode Island's legislators were less happy. They called the judges into the legislature to explain "'their reasons for adjudging an act of the General Assembly unconstitutional, and so void.'"<sup>132</sup> One judge responded that they were answerable only to God and their consciences. He added that he thought that the statute was "unconstitutional" and "could not be executed."<sup>133</sup> The legislature began proceedings to address the judges out of office. The judges responded that they held their offices by good behavior tenure, as in England, and could only be impeached. Impeachment failed, and the judges remained in office.<sup>134</sup> The important point here is that Varnum rested his case on customary liberties, which he saw as means to obtain ends that he identified as robust credit, industry, and markets.

## 2. New Hampshire "Ten Pound Act" Cases (1786): Refusal to Apply a Summary Debt Collection Statute

In 1785, the New Hampshire legislature gave justices of the peace summary jurisdiction to decide cases involving debts less than ten pounds without jury trials.<sup>135</sup> The purpose was to aid debtors, who would reap the benefit of less expensive process because the loser paid court costs and summary bench trials were cheaper than jury trials.<sup>136</sup> The state's Bill of Rights, adopted as Part II of the 1784 constitution, provided that all civil causes involving at least two pounds were to receive jury trials. In addition, the constitution declared that the legislature should not make laws "repug-

131. *Id.* at 37.

132. *Id.*

133. *Id.* at 38.

134. *Id.* at 53.

135. *See* Lambert, *supra* note 18, at 37.

136. *See id.* at 37-38 (describing "An Act for the Recovery of Small Debts in an Expeditious Way and Manner").



nant, or contrary to the constitution.”<sup>137</sup> It did not specify how this restriction was to be enforced.<sup>138</sup>

At least six New Hampshire courts, and possibly more, refused to enforce this act in 1786. The judges expressed concern about “the first bud-dings of Tyranny” and viewed the courts as “*the constitutional Barriers between the Power of the Legislature and the liberty of the People.*”<sup>139</sup> Lawyer William Plumer applauded the courts’ decisions. He linked debtor protection to the state’s commercial recession: “Money scarce, business dull and our Feeble government unhinged. [But] our courts of law are firm, and in these degenerate days dare to be honest.”<sup>140</sup> Pro-debtor representa-tives in the state legislature tried to impeach the judges who refused to enforce the Ten Pound Act, but the committee appointed to investigate the matter concluded that the judges should not be impeached. Instead, it called for the act’s repeal, which followed shortly.<sup>141</sup>

Legal historian William M. Treanor argues that because the New Jer-sey, Rhode Island, North Carolina, and New Hampshire cases dealt with denials of jury trials, and the New York case involved an evidentiary rule, the best way to understand these cases is in structural terms: the courts were policing the borders of their own branch against legislative infringeme-nt.<sup>142</sup> This quite possibly motivated some of the judges, though not all of the judges expressed their reasons in these modern structural terms. There were no doubt multiple causes for these cases, each of which alone seems over-determining. But the anti-antiloialist dimension remained prominent over the next several years as Federalists reconstructed the fed-eral Constitution and its judiciary.

There is also another way to understand the solicitude for juries. The jury was one of the central symbols of the pre-revolutionary protest and of claims for equal treatment as Britons. The imperial government’s denials of jury trials in the late colonial period had inspired both rebellion and the frequent inclusion of jury trial guarantees in the state constitutions.<sup>143</sup> Strong embrace of the jury trial by state judges therefore served more than

137. *Id.* at 39.

138. *Id.*

139. *Id.* at 44 (italics in original).

140. *Id.* at 47.

141. *Id.* at 49–50.

142. Treanor, *supra* note 11, at 473–97. *See also* Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1121 (2001) (arguing that early courts “could invalidate only those laws that fell within the special purview of the judiciary”). *But see* KRAMER, *supra* note 1, at 70 (observing that “it seems unlikely that anyone at the time was thinking in these terms”).

143. *See* HULSEBOSCH, *CONSTITUTING EMPIRE*, *supra* note 15, at 92–93, 114–22, 181–82.

one purpose: it signaled vindication of hard-won liberties, and it also signaled to audiences within the state and elsewhere that citizens of a republican state offered (almost) everyone the full and equal enjoyment of the “liberties of Englishmen.”

## VI. THE VIRTUES OF THE JUDICIAL SYSTEMS OF THE STATES

Many Federalists learned from these state cases that courts could play a role in holding the states to extra-jurisdictional ideals. When John Jay, the Confederation’s Secretary for Foreign Affairs, again asked state legislators to repeal laws violating the Peace Treaty in early 1787, Hamilton submitted a motion in the New York Assembly to repeal the part of the Trespass Act that violated the law of nations.<sup>144</sup> Later that spring, the Continental Congress passed a resolution and sent a circular letter to the state legislators asking them to repeal all laws repugnant to the treaty, without specifying which laws were repugnant, and then directing state courts to decide cases arising under suspect statutes “according to the true intent and meaning” of the treaty.<sup>145</sup> A few days later, Hamilton introduced a bill into the New York Assembly that simply declared all laws inconsistent with the Peace Treaty to be repealed. In response to complaints that a general repeal gave judges too much discretion to locate violations, Hamilton “insisted that their powers would be the same, whether this law was passed or not. For, that as all treaties were known by the constitution as the laws of the land, so must the judges act on the same, any law to the contrary notwithstanding.” He then expressed a new justification for judicial review that revealed his dissatisfaction with Mayor Duane’s compromising logic in *Rutgers*:

Cicero . . . lays it down as a rule, that when two laws clash, that which relates to the most important matters ought to be preferred. If this rule prevails, who can doubt what would be the conduct of the judges, should any laws exist inconsistent with the treaty of peace: But it would be impolitic to leave them to the dilemma, either of infringing the treaty to enforce the particular laws of the state, or to explain away the laws of the state to give effect to the treaty.<sup>146</sup>

144. Motion That a Committee Be Appointed to Consider a Letter from the Secretary for Foreign Affairs (Jan. 23, 1787), in 4 HAMILTON PAPERS, *supra* note 80, at 21–22; Remarks on an Act for Repealing Part of the Trespass Act (Mar. 21, 1787), in 4 HAMILTON PAPERS, *supra* note 80, at 121.

145. 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 124–25, 179 (Roscoe R. Hill ed., 1936) (proceedings of Mar. 21, 1787, and Apr. 13, 1787), available at <http://memory.loc.gov/ammem/amlaw/lwjclink.html> (follow “Volume 32 (pp. 1–384)” hyperlink; then follow “Page image” hyperlink).

146. Remarks on an Act Repealing Laws Inconsistent with the Treaty of Peace (Apr. 17, 1787), in 4 HAMILTON PAPERS, *supra* note 80, at 150, 152.

On the eve of the Philadelphia Convention, the Legislature passed the bill. At the same time, Hamilton was developing a fuller conception of judicial review.

After the Convention, Hamilton elaborated on judicial review in *Federalist Nos. 22 and 78*. He praised the state courts in *Federalist No. 78* for helping to constrain the state legislatures by remarking that “[t]he benefits of the integrity and moderation of the judiciary have already been felt in more states than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested.” He did not analyze exactly what those courts had done or call it judicial review. Instead, he stated only that they were “mitigating the severity, and confining the operation” of “unjust and partial laws.” But he was implicitly referring to the examples of strong statutory construction and nullification of the prior decade, including *Rutgers*. The benefit of an independent judiciary came not just in episodic adjudication. It also “operates as a check upon the legislative body . . . who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts,” would redraft their bills accordingly.<sup>147</sup> Judges were schoolmasters for legislators and the people.<sup>148</sup>

In *Federalist No. 22*, Hamilton also linked *federal* judicial review to this cause of negotiating in strength with the European empires. Those empires had so far found it “unwise” to make treaties with the United States because such agreements “might at any moment be violated by its members.”<sup>149</sup> A federal judiciary was needed to “avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories.” Without uniform interpretations of treaties, “foreign nations can [n]either respect [n]or confide in such a government.”<sup>150</sup> Useful as they were, state courts alone were insufficient. The upshot for Hamilton of recent experience in the states was that courts—all courts—were integral to the Federalist program. By the period of ratification, Federalists had come to view the state courts as actors that could help restrain the state legislatures, albeit supporting actors in a drama that focused on reconstructing the federal arrangement.

147. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 72, at 528.

148. See generally Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127.

149. THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 72, at 136.

150. *Id.* at 144. Cf. FEDERAL CONVENTION RECORDS, *supra* note 69, at 308 (Hamilton arguing that without a stronger central government, “[f]oreign Nations would not respect our rights nor grant us reciprocity”).

The Federalists also learned that they could demand even more support from the courts than they had already received—especially from federal courts. This applied learning did not end with ratification. Section 25 of the Judiciary Act of 1789 enacted what Hamilton had desired in *Federalist No. 22*: the Supreme Court would have the power to “re-examine[]” final judgments in state courts that turned on “the validity of a treaty or statute of” the United States, or that turned on the validity of a state statute bearing on the federal Constitution, federal treaties, or federal law.<sup>151</sup> Critics immediately grasped that, without any jurisdictional minimum, the clause would “embrace the Case of every British Creditor[.] And is it intended that they may drag every [debtor] for the most trifling sum first thro’ the State Courts & then by Appeal to the seat of Congress[?]”<sup>152</sup> No—just to the seat of the Supreme Court. And that seems to have been the drafters’ intention. Oliver Ellsworth, the primary drafter of the Judiciary Act, specified that the Supreme Court would have jurisdiction to review state cases that upheld state statutes against claims that they violated federal law or treaties, but not cases in which state courts struck down state law for violating federal law. In the latter cases, state citizens could not complain of bias. In other words, he assumed that a key purpose of the federal courts was to protect the out-of-state American citizens and foreigners from state courts, especially their juries. He reportedly believed that the delegates to the Philadelphia Convention

had in view the condition of foreigners when they framed the Judicial of the U. States. The Citizens were already protected by [the State] Judges & Courts, but foreigners were not. The Laws of nations & Treaties were too much disregarded in the several States. Juries were too apt to be biased agst. them, in favor of their own citizens & acquaintances: it was therefore necessary to have general Courts for causes in wch foreigners were parties or citizens of [different] States . . .<sup>153</sup>

For Ellsworth, even the Supremacy Clause’s injunction to state courts was insufficient to protect “foreigners.” The handful of state cases offering some protection were outweighed by the many more in which state courts and juries had not vindicated the law of nations and treaties. Accordingly, in the first instance of federal judicial review of state legislation, a federal court struck down a private bill granting a moratorium to a debtor as violat-

151. Act of Sept. 24, 1789, § 25, ch. 20, 1 Stat. 73, 85–86 (establishing United States judicial courts).

152. Commentary from Edmund Pendleton to James Madison (July 3, 1789), in 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: ORGANIZING THE FEDERAL JUDICIARY: LEGISLATION AND COMMENTARIES 444, 448 (Maeva Marcus ed., 1992) [hereinafter 4 ORGANIZING THE FEDERAL JUDICIARY].

153. Commentary from William Loughton Smith to Edward Rutledge (Aug. 9–10, 1789), in 4 ORGANIZING THE FEDERAL JUDICIARY, *supra* note 152, at 496, 498–99.

ing the Contract Clause at the request of British creditors.<sup>154</sup> In the federal courts, judicial review of state legislation for the benefit of Britons became uncontroversial.

Among the diplomats, it was also useful. When in late 1789 George Beckwith, who was Britain's unofficial minister to the United States, told Secretary of the Treasury Alexander Hamilton that it was time "to settle any matters, that may be supposed to respect the Treaty of Peace, still unadjusted," Hamilton agreed that it was indeed "proper."<sup>155</sup> Only two British complaints, Hamilton thought, remained. The first concerned state paper money laws that depreciated debts owed Britons, which the treaty promised would be repaid in "full value in sterling money."<sup>156</sup> This problem was "done away by the present Government, which has paid the most particular attention to this, in the formation and Establishment of its Judiciary branch; the District Courts will be in immediate operation, the Supreme Court very shortly."<sup>157</sup> Hamilton did not simply point to the prohibition on state currency in Article I, Section 10.<sup>158</sup> Instead, he invoked the judicial power to enforce the Constitution, as realized in the Judiciary Act of 1789. The second outstanding issue—state confiscation of loyalist property—was more complicated. Here Hamilton reminded the Briton that the Peace Treaty forbade only confiscations after the treaty, and there had been few of these. As far as restitution for confiscations during the war, Article V was "recommendatory" rather than mandatory.<sup>159</sup> It would take another controversial treaty negotiated by John Jay, and several years after that, before the Supreme Court finally enforced this prohibition against the states.<sup>160</sup>

## CONCLUSION

The experience of the loyalists presents a useful test for Larry Kramer's argument that the founding generation intended for the American

154. This 1792 case, *Champion & Dickason v. Casey*, is discussed in Treanor, *supra* note 11, at 518–19.

155. Conversation with George Beckwith (Oct. 1789), in 5 THE PAPERS OF ALEXANDER HAMILTON 482, 486 (Harold C. Syrett & Jacob E. Cooke eds., 1962). See Peace Treaty of 1783, arts. V and VI. (Direct quote: Beckwith, note 148 at P. 486).

156. Definitive Treaty of Peace Between the United States of America and his Britannic Majesty, U.S.-Gr. Brit., art. IV, Sept. 3, 1783, 8 Stat. 80.

157. Conversation with George Beckwith, *supra* note 155, at 486–87.

158. U.S. CONST. art. I, § 10.

159. Conversation with George Beckwith, *supra* note 155, at 487.

160. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (exercising review over state supreme court judgment under section 25 of Judiciary Act to measure state forfeiture legislation against the 1783 Peace Treaty). On the Jay treaty, see generally SAMUEL FLAGG BEMIS, *JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY* (2d ed. 1962).

people to rely primarily on the customary instruments of popular constitutionalism to interpret and enforce their constitutions. It largely supports his thesis because even the loyalists practiced popular constitutionalism before, during, and after the Revolution, in North America and in Britain. But the loyalist experience also demonstrates the limits of Kramer's historical argument and explains why at least some Americans began to demand a stronger role for judges in the construction of constitutions. Loyalists were like canaries in the coal mine: they were the first to suffer under localist legislation, but in the long run all would suffer—so thought those, at least, who could not imagine life outside the Atlantic world. Most Americans, however, had a different—also historically rooted—vision of how to treat the enemy in a civil war. In that vision, disloyal members of the polity were expropriated and banished. Neither vision predominated. Elements of both succeeded in the wake of the Revolution. But one upshot from the struggle between them was a new perception of the role that courts could play in policing legislative adherence to constitutions. An important by-product was the power that judicial review gave lawyers and judges to define constitutional law.

The anti-antiloyalist origins of judicial review, or more positively, its pro-Atlantic world origins, help explain why judicial review began to emerge when it did. Judicial review had some antecedents and models in English legal culture and imperial governance. But it has remained something of a mystery why the institution emerged in the 1780s and why so many people embraced the power of judges to set aside legislation by the time Congress passed the Judiciary Act of 1789. If one focuses on the domestic scene, it remains a puzzle that begs some socio-political explanation like the birth of a new aristocracy, elites against populists, partisan struggle, and so forth. If one steps back and looks at British imperial history, the idea of central institutions reviewing local ones seems almost inevitable, and the problem to explain is why so many state legislators could not accept that inevitability. But if one focuses on the intermediate range picture—on the states as they emerged from a British civil war and before they adopted the federal Constitution—and sees thirteen hapless provinces on the edge of a continent, yet who had the hubris to call themselves together in a Continental Congress, and who declared their independence and collective equality with the Atlantic empires,<sup>161</sup> sought wartime alliances with a few of those empires, and after the war tried to renew commercial relations with Europe, judicial review begins to make sense as a strategy for

161. For the diplomatic function of the Declaration, see generally David Armitage, *The Declaration of Independence and International Law*, 59 WM. & MARY Q. 39 (2002).

achieving international reintegration. When there was no strong central government, a handful of advocates and judges inserted the state courts into the vacuum of authority.

For Federalists, constitution-making was always relational. The point of establishing a self-governing polity was to ensure that it did not remain alone in the world, whether on the continent or in the surrounding environment of European empires. For them, the emergent genre of constitutional law was not just about restraining majorities and protecting minorities. It was about also fitting local, temporary majorities into a much larger world full of many more people. That was the original premise of judicial review as it was the premise of the political and cultural movement soon called Federalism. It was a contested premise. These precursors of judicial review of legislation were not exercises of popular sovereignty in the sense of vindicating the popular will against corrupt legislators or executives. They were not happy instances of holding the people to their better wills, whatever that might mean. They were hardly last stands before revolution. Instead, they were instances of lawyers using the tools at hand to wrest free outcomes that best served their clients and what they thought the people should want and perhaps might want if they knew all the facts to calculate their collective interest. From the beginning, judicial review offered an end-run around legislation.

Once created, judicial review could serve many interests and goals. Only jurisdiction, judicial tact, and public acceptance would limit the claims that parties could make and that judges could endorse in the courts.<sup>162</sup> But it began as a way for some parties to overcome local majorities to safeguard their lives and property. Those loyalists found a sympathetic hearing among young lawyers and some state judges who wanted to realize a particular vision of the Union. Deft diplomacy could prevent the old empires from divvying up this new pretender; healthy foreign relations required domestic diplomacy and reform, too. Kramer is correct that judicial review was not the central plank of this reform in the 1780s; the writing and ratification of the federal Constitution of 1787 was. But judicial review was part of the reform package. It existed from the beginning in an uneasy relationship with the principle of local representation, and it functioned to vindicate extra-jurisdictional interests and ideals—federal and transatlantic interests and ideals.

162. This is a key upshot of BARRY FRIEDMAN, *NEITHER FORCE NOR WILL: HOW THE COURT BECAME SUPREME* (forthcoming 2008).

More work on the causes of the origins of judicial review—and the power of early American judges generally<sup>163</sup>—should relocate judicial review, not back to the center of early American constitutional history, but at least back in from the periphery to which some enthusiasts of popular constitutionalism would banish it. Fitting judicial review into the variety of strategies Federalists used to reintegrate the states with each other and into the Atlantic world will help generate a neo-orthodox understanding of its important place in early American constitutionalism. In the 1780s, the American constitutions had domestic and international audiences. The plight of the loyalists, who lived in the borderland between those two constituencies, made some revolutionaries see that their constitutions should serve both.

163. This essay has not addressed this important question. For an overview of the issue, see generally, Wood, *supra* note 5. For detailed examination in one state, see JOHN PHILLIP REID, *CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE* (2004). See also JOHN PHILLIP REID, *LEGISLATING THE COURTS: JUDICIAL DEPENDENCE DURING THE ERA OF THE EARLY REPUBLIC* (forthcoming, 2007). For research casting doubt on the conventional thesis that colonial judges were weak, see William E. Nelson, *Government by Judiciary: The Growth of Judicial Power in Colonial Pennsylvania* 59 *SMU L. REV.* 3 (2006).



## APPENDIX

**Table. Judicial Review: Early State Cases.**

Case	Loyalist Defendant	Statute	Court's Action	Legislative Backlash
Philips VA, 1778	Yes	Act of Attainder (1778)	Tried defendant by jury rather than enforce legislative conviction	Yes
Holmes NJ, 1780	Yes	Trading with Enemy Act (1778)	Held that statute denied jury trial as required by constitution	Yes <sup>1</sup>
Caton VA, 1782	Yes	Treason Act (1776)	Held that constitution only limits pardon to House when House brings prosecution. Narrow construction of constitution to uphold statute; three judges claimed power to strike statutes	Yes <sup>2</sup>
Rutgers NY, 1784	Yes	Trespass Act (1783)	Upheld law of nations rule that military order is a defense to trespass action	Yes <sup>3</sup>
Trevett RI, 1786	No	Paper Money Forcing Act (1786)	Case dismissed; three judges asserted power to reform statute based on constitution's pardon provision	Yes <sup>4</sup>
Ten-Pound Cases NH, 1786-87	No	Ten-Pound Act (1785)	Held that statute denied jury trial as required by constitution	Yes <sup>5</sup>
Bayard NC, 1787	Yes	Confiscation Act (1784)	Held that constitution requires jury trial to deprive defendant (a citizen) of property	Yes <sup>6</sup>

---

1. Petitions against the decision were read in the legislature.

2. The House tried to revise the act to vest sole pardon power in itself; the Senate did not concur.

3. The Assembly passed a resolve against the decision; there was also an unsuccessful attempt to remove Judge Duane and Recorder Varick.

4. The judges were questioned before the legislature; those who claimed power to strike were not reappointed.

5. The House voted to reaffirm the constitutionality of the act, but after a failed motion to impeach the judges, it repealed the act.

6. The Assembly authorized an inquiry into the state of the courts and the administration of justice; there was talk of impeachment, but none actually occurred.