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INTRODUCTION

Several of the nation's most influential constitutional law scholars have been arguing for the better part of a decade that judicial review should be sharply limited, or eliminated altogether. The list includes such prominent thinkers as Professor Mark V. Tushnet of Harvard Law School, Professor Cass R. Sunstein of the University of Chicago Law School, and Dean Larry D. Kramer of Stanford Law School. In place of the doctrine made famous by Chief Justice John Marshall in *Marbury v. Madison*,¹ these leading voices of the legal academy call for "popular constitutionalism": a constitutional law that is defined *outside* of the courts by the people themselves, "whether we act in the streets, in the voting booths, or in legislatures as representatives of others."²

The purpose of this Article is to demonstrate that popular constitutionalism is wrong and should be rejected. It is difficult to

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

2. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 181 (1999). See also LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). Sunstein, who is moving to Harvard Law School in the fall of 2008, focuses on the judicial, rather than the popular, side of the question and calls his theory "judicial minimalism." He agrees with Tushnet and Kramer that the people, not the Court, should enjoy the primary responsibility for determining what the Constitution means.

overstate the importance of doing so, given how influential Tushnet, Sunstein, and Kramer are to current thinking about the Supreme Court's role in American life. For example, both Sunstein and Kramer previewed as separate Forewords to the *Harvard Law Review's* annual survey of the Court's term what they would later explore in their major books on popular constitutionalism.³ There is no more prestigious a platform for a constitutional law scholar than a *Harvard Law Review* Foreword.⁴

In addition, symposia have been dedicated to discussing the popular constitutionalism of Tushnet and Kramer,⁵ and book reviews published in the nation's leading law journals have commented on each of the three major books.⁶ And while it is not uncommon for books by law professors at elite law schools to be greeted by the legal academy with almost as much hoopla as a new Steven Spielberg film is greeted by Hollywood, the popular constitutionalism tomes of Tushnet, Sunstein, and Kramer have transcended the ivy tower and permeated the larger world of ideas. Not only have their books been reviewed in history and political theory journals,⁷ but leading national magazines and newspapers such as *The New Republic*, *The New York Review of Books*, and *The Wall Street Journal* have devoted pages to them.⁸ If that were not enough, Kramer pled his case for popular constitutionalism to television viewers across the land in the final

3. See generally Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4 (2001); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6 (1996). Tushnet also has penned a *Harvard Law Review* Foreword, albeit on a different subject than popular constitutionalism. See generally Mark V. Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29 (1999).

4. See, e.g., Mark Tushnet & Timothy Lynch, *The Project of Harvard "Forewords": A Social and Intellectual Inquiry*, 11 CONST. COMMENT. 463, 463-67 (1994).

5. See, e.g., Symposium, *Commentaries on Mark Tushnet's Taking the Constitution Away from the Courts*, 34 U. RICH. L. REV. 359 (2000); *A Symposium on The People Themselves: Popular Constitutionalism and Judicial Review*, 81 CHI.-KENT L. REV. 809 (2006).

6. See, e.g., Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005) (reviewing KRAMER, *supra* note 2); Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971 (1999) (reviewing SUNSTEIN, *supra* note 2); Saikrishna B. Prakash, *America's Aristocracy*, 109 YALE L.J. 541 (1999) (reviewing TUSHNET, *supra* note 2).

7. See, e.g., Corey Brettschneider, *Popular Constitutionalism and the Case for Judicial Review*, 34 POL. THEORY 516 (2006) (reviewing KRAMER, *supra* note 2); Stephen B. Presser, *Book Review*, 110 AM. HIST. REV. 1565 (2005) (same).

8. See, e.g., John O. McGinnis, *Whose Constitution Is It, Anyway?: Judicial Review Has Its Limits*, WALL ST. J., Aug. 10, 2004, at D8 (reviewing KRAMER, *supra* note 2); Edmund S. Morgan & Marie Morgan, *Bill of Wrongs*, N.Y. REV. BOOKS, Mar. 10, 2005, at 31 (reviewing KRAMER, *supra* note 2); Jeffrey Rosen, *The Age of Mixed Results*, NEW REPUBLIC, June 28, 1999, at 43 (reviewing SUNSTEIN, *supra* note 2).

segment of the recent PBS documentary *The Supreme Court*,⁹ while Sunstein repackaged the argument he made in his academic treatise so that it would be accessible to a popular audience.¹⁰ Tushnet, a past president of the Association of American Law Schools, likewise continues to trumpet the virtues of popular constitutionalism.¹¹

Despite all of the attention popular constitutionalism has received in recent years, no one has presented a systematic critique of the underlying *idea*. This Article attempts to fill that void by engaging in a much-needed exegesis in the history of ideas. Indeed, the one popular constitutionalist who endeavors to describe the intellectual origins of popular constitutionalism, Kramer, cuts into the seamless web of history near the end of the story—seventeenth century England and colonial America—rather than at the beginning. This Article tells the story from the beginning.

To make the point somewhat differently, this Article maintains that popular constitutionalists have paid too much attention to political outcomes and too little to political philosophy. By exposing the work of Tushnet, Sunstein, and Kramer for what it is—a series of lawyers’ briefs about policy results—this Article attempts to prove that the Court, as originally conceived, was expected to do what most of us still want it to do today: vigorously exercise judicial review to protect individual rights from—to borrow the title of Kramer’s book—“the people themselves.”

Part I of this Article discusses the popular constitutionalism of Tushnet, Sunstein, and Kramer to illustrate why they need to spend less time reacting to recent high Court decisions and more time studying the ancient, medieval, and modern political philosophers of centuries past. Included in the discussion as a case study of popular constitutionalism is Michigan’s recently enacted anti-affirmative action amendment: a *practical* example of popular constitutionalism rejected by proponents of the *theory* of popular constitutionalism. Part II chronicles how a line of political philosophy running from Aristotle’s theory of a mixed constitution through John Adams’s modifications of Montesquieu culminated in the judicial institution embodied in Article

9. See *The Supreme Court, Program Four: The Rehnquist Revolution* (PBS television broadcast Feb. 7, 2007). See generally Scott D. Gerber, *The Supreme Court, Part I: The Least Dangerous Branch*, 93 J. AM. HIST. 971 (2006) (reviewing the PBS series about the Supreme Court).

10. See generally CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005).

11. See, e.g., Posting of Mark Tushnet, mtushnet@law.harvard.edu, to conlawprof@lists.ucla.edu (Nov. 29, 2006) (on file with the Vanderbilt Law Review) (discussing the origins of popular constitutionalism).

III of the U.S. Constitution. It is a complicated story, but a story that needs telling. Part III explains how the political theory of an independent judiciary investigated in Part II made the doctrine of judicial review possible, and how it committed that doctrine to the protection of individual rights. Part III thereby calls into question the central tenet of popular constitutionalism discussed in Part I—that judicial review should be drastically limited, or eliminated altogether—and provides support for the traditional understanding that judicial review, robustly practiced, is an indispensable mechanism for protecting the individual rights guaranteed by the Constitution. The Article concludes with a caveat about the enterprise of constitutional law scholarship.

I. POPULAR CONSTITUTIONALISM AND THE CONTEMPORARY ASSAULT ON JUDICIAL REVIEW

Scholars have been opining about the Supreme Court's role in the American constitutional order since at least 1893, when James Bradley Thayer published *The Origin and Scope of the American Doctrine of Constitutional Law*.¹² In his article, which has been described as “the most influential essay ever written on American constitutional law,”¹³ Thayer argued that legislators rather than judges should be the primary arbiters of the Constitution's meaning and that judges should invalidate only those laws predicated on clearly erroneous interpretations of the Constitution.¹⁴

Thayer, a political liberal,¹⁵ was not writing in a vacuum. Rather, he was reacting to what he perceived as the emerging judicial activism on behalf of economic liberties that was to culminate in *Lochner v. New York*, the 1905 decision in which the Court ruled that a New York law regulating the hours of bakery workers violated the

12. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

13. Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 7 (1983). See generally *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993).

14. Thayer, *supra* note 12, at 138-42.

15. See Jay Hook, *A Brief Life of James Bradley Thayer*, 88 NW. U. L. REV. 1, 6-7 (1993) (noting that while “little is known of Thayer's political activities or sympathies,” he was a leader of a group of intellectuals who in the election of 1884 sparked a national crossover movement from the Republican party to the Democratic party). Tushnet characterizes Thayer as a “moderate conservative.” Mark Tushnet, *Thayer's Target: Judicial Review or Democracy?*, 88 NW. U. L. REV. 9, 23 (1993). Tushnet, however, is a Marxist and most policy positions seem conservative from a Marxist perspective. See Mark Tushnet, *A Marxist Analysis of American Law*, 1 MARXIST PERSP. 96 (1978).

Due Process Clause of the Fourteenth Amendment.¹⁶ As law professor Barry Friedman has demonstrated in a series of recent articles, constitutional law scholars have been “obsessed” with the Court’s role in the American regime ever since.¹⁷ And in typical Thayerite fashion, a particular scholar’s opinion on the subject has turned almost exclusively on whether the Court in question—the Warren Court, the Rehnquist Court, etc.—is comprised of a majority of Justices who share the scholar’s political views.¹⁸ This Part of the Article reveals that popular constitutionalism is simply the latest reincarnation of partisan constitutional theorizing that dates from Thayer’s famous essay.

A. *Tushnet’s Taking the Constitution Away from the Courts*

Mark Tushnet’s *Taking the Constitution Away from the Courts*¹⁹ is the most extreme of the leading works on popular constitutionalism. The book’s title means what it says: the author calls for a constitutional amendment overruling *Marbury v. Madison*,²⁰ the landmark 1803 decision by Chief Justice John Marshall that is widely credited with establishing the Court’s power of judicial review.²¹ In its place, Tushnet asks that we reorient ourselves towards “populist constitutional law,” in which the people and their elected representatives interpret, and enforce, the Constitution.²²

Tushnet divides *Taking the Constitution Away from the Courts* into eight chapters, together with a preface and a prologue. Chapter One, “Against Judicial Supremacy,” is devoted to establishing his basic framework, with particular attention being afforded to differentiating between the “thin Constitution” (rights questions) and the “thick Constitution” (powers questions). Although the book is primarily about the “thick” question of judicial review, Tushnet spends most of his time addressing “thin” questions of individual rights,

16. 198 U.S. 45 (1905).

17. See, e.g., Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

18. See Barry Friedman, *The Cycles of Constitutional Theory*, 67 LAW & CONTEMP. PROB. 149 (2004).

19. TUSHNET, *supra* note 2.

20. 5 U.S. (1 Cranch) 137 (1803).

21. See TUSHNET, *supra* note 2, at 175. For a revisionist account of the significance of both *Marbury* and Chief Justice Marshall, see Scott Douglas Gerber, *Introduction: The Supreme Court Before John Marshall*, in *SERIAM: THE SUPREME COURT BEFORE JOHN MARSHALL* 9-11 (Scott Douglas Gerber ed., 1998) (arguing that pre-Marshall Court Justices both understood and exercised judicial review).

22. TUSHNET, *supra* note 2, at 181-82.

which suggests that his real objective—as explained in Section D below—is to protect Leftist rights precedents.

In Chapters Two (“Doing Constitutional Law Outside the Courts”), Three (“The Question of Capability”), and Four (“The Constitutional Law of Religion Outside the Courts”), Tushnet describes how we can contemplate the Constitution without judicial decisions to guide us. In Chapters Five (“The Incentive-Compatible Constitution”) and Six (“Assessing Judicial Review”), he maintains that the abolition of judicial review would not mean less protection for individual and minority rights. This is perhaps the most counter-intuitive portion of the book—most of us were taught that the judiciary’s principal function is to *protect* rights—but Tushnet’s position is not without precedent in the scholarly literature.²³

Chapter Seven (“Against Judicial Review”), likely the book’s most important chapter, suggests how the courts can be denied any role in constitutional interpretation whatsoever. In Chapter Eight (“Populist Constitutional Law”), Tushnet summarizes his argument—a law professor’s “argument” in the literal sense of the word—for populist constitutional law.

At the heart of Tushnet’s project is his belief that the Constitution is not so much a collection of written provisions as it is a set of aspirational principles expressed in the document’s preamble and in the Declaration of Independence that preceded it.²⁴ Here, Tushnet sounds very much like Clarence Thomas, a Supreme Court Justice whose confirmation he strongly opposed and whose service on the Court he seeks to delegitimize. Tushnet is on record as suggesting that the American people not regard cases decided by the Court by a 5-to-4 vote, with Justice Thomas in the majority, as binding law.²⁵

Justice Thomas stated his commitment to the principles of the Declaration of Independence most dramatically in his concurring opinion in *Adarand Constructors, Inc. v. Pena*,²⁶ the Rehnquist Court’s 1995 broadside against affirmative action. He wrote:

23. See, e.g., Henry Steele Commager, *Judicial Review and Democracy*, in JUDICIAL REVIEW AND THE SUPREME COURT: SELECTED ESSAYS 64, 73 (Leonard W. Levy ed., 1967) (“Congress, and not the courts, emerges as the instrument for the realization of the guarantees of the Bill of Rights.”).

24. See TUSHNET, *supra* note 2, at 11-12.

25. See Mark V. Tushnet, *Clarence Thomas: The Constitutional Problems*, 63 GEO. WASH. L. REV. 466, 477 (1995) (reviewing JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* (1994)). Tushnet softened his position on Justice Thomas in a later work. See MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 71-72 (2005).

26. 515 U.S. 200 (1995).

There can be no doubt that the paternalism that appears to lie at the heart of this [affirmative action] program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness”).²⁷

Tushnet certainly does not want to follow Justice Thomas that far. In fact, Tushnet’s writings are replete with support for affirmative action and other egalitarian policies. For example, in his most recent biography of Thurgood Marshall, Tushnet declares that Justice Marshall’s “opinions on equality and fair procedures stand as exemplars of Great Society jurisprudence.”²⁸ However, Tushnet fails to explain how the colorblind principles articulated in the Declaration of Independence can be reconciled with the color-conscious policies promoted by Justice Marshall and the other members of the Warren and Burger Courts whom he so admires.²⁹

B. Sunstein’s One Case at a Time

Like Tushnet, Cass Sunstein attempts to assimilate the language of judicial restraint into the politics of legal liberalism. His *One Case at a Time*³⁰ is subtler than Tushnet’s *Taking the Constitution Away from the Courts*. Sunstein argues for what he calls “judicial minimalism,” a theory of judicial review that limits the Court to the specific questions posed by a particular case and discourages it from handing down broad rulings with sweeping social consequences.³¹ He insists that the broad questions—for example, the

27. *Id.* at 240 (Thomas, J., concurring in part and concurring in the judgment); *see also* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007) (Thomas, J., concurring) (stating that affirmative action in public primary and secondary education assignment plans is unconstitutional); *Grutter v. Bollinger*, 539 U.S. 306, 351, 357, 378 (2003) (Thomas, J., concurring in part and dissenting in part) (stating that affirmative action in public higher education admissions programs is unconstitutional and invoking the Declaration of Independence). *See generally* SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* (expanded ed. 2002).

28. MARK V. TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961-1991*, at 196 (1997).

29. *See* SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 173-75* (1995) (arguing that the Declaration of Independence mandates colorblind constitutionalism).

30. SUNSTEIN, *supra* note 2.

31. *Id.* at ix-xi. The prolific Sunstein has repeated his argument for a minimalist approach in many places in recent years. *See, e.g.*, Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 355-56 (2006).

legality of abortion—should be left for the people to decide through the process of “deliberative democracy.”³²

In brief-like fashion, Sunstein organizes his book into three sections: “Argument,” “Applications,” and “Antagonists.” The “Argument” section is itself divided into four chapters in which he describes, respectively: (1) what his theory of judicial review entails (although he claims that minimalism is not a “theory” at all); (2) why his theory is “democracy promoting”; (3) how judicial minimalism can mitigate the burdens of judicial decisions and the costs of mistakes; and (4) the “substance” of the decisionmaking “process” he advocates.

Chapter Four is the most troubling of the “Argument” section: Sunstein formulates “minimalism’s substance” in such broad terms (e.g., “the right to vote,” “the rule of law,” and “no torture, murder, or physical abuse by the government”)³³ as to render it both meaningless and infinitely malleable by judges, be they “minimalists” or “maximalists.” As explained below, the “Applications” section, where Sunstein applies his theory of judicial minimalism to several substantive areas of constitutional law, and the “Antagonists” section, where he defends it against prospective critics, make plain just how malleable his theory is.

Sunstein does not argue merely that the Court *should* be minimalistic; he also insists that a majority of the Rehnquist Court—the Justices in power at the time Sunstein’s book was published—*were* minimalists.³⁴ He applauds these Justices—Sandra Day O’Connor, Anthony Kennedy, David Souter, Ruth Bader Ginsburg, and Stephen Breyer—for it.³⁵ This should not be surprising because the Justices Sunstein names are liberal on most social issues.³⁶

Contrast Sunstein’s praise for these five Justices with what he says about Justice Thomas. He labels Justice Thomas a judicial “maximalist”:³⁷ a jurist who “often urges the Court to provide wider judgments and clearer guidance.”³⁸ This does not sound so bad, does it? What is wrong with clear guidance? It sounds bad to Sunstein,

32. SUNSTEIN, *supra* note 2, at 24-45.

33. *Id.* at 63-68.

34. *See id.* at 9.

35. *See id.*

36. A recent book on the Rehnquist Court by a respected legal journalist characterizes Justices O’Connor and Kennedy as liberal on social issues. *See* JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 29-30 (2007).

37. SUNSTEIN, *supra* note 2, at 11. Sunstein also attaches the “maximalist” label to Justice Scalia. *Id.*

38. *Id.*

though. In an interview published in *Legal Times* shortly after his book was released,³⁹ Sunstein singled out Justice Thomas for his “astonishing” concurring opinion in *44 Liquormart, Inc. v. Rhode Island*,⁴⁰ an opinion in which the Justice maintained that commercial speech should be treated the same as noncommercial speech.⁴¹ Liberals, of course, disdain commercial speech. Burt Neuborne, a law professor and the former legal director of the American Civil Liberties Union, for one, complained after the Court’s decision in *44 Liquormart* that the First Amendment right to free speech—for decades a favorite among liberals—is now “the favorite argument for corporations and advertisers.”⁴²

Justice Thomas got it right, though, when he observed in his concurring opinion that the “[f]ramers’ political philosophy equated liberty and property” and that there was no “philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial’ speech.”⁴³ Put directly, the subordination of commercial speech to noncommercial speech in the hierarchy of judicial protection—like the subordination of economic rights to “personal” rights in general—has been a political decision by Supreme Court Justices who prefer speech about politics, art, and science to speech about commerce.⁴⁴

Sunstein spends little time on commercial speech. Instead, he devotes chapters in his “Applications” section to the right to die, affirmative action, discrimination based on gender and sexual orientation, and the regulation of communications technologies such as the Internet. He argues that the nation is currently in “moral flux” on these issues and that the Court should, and correctly does, leave the “fundamental questions undecided” in these areas.⁴⁵

39. Interview by Ted Leventhal with Cass R. Sunstein, Karl N. Llewellyn Distinguished Serv. Professor of Jurisprudence, Univ. of Chicago, in Chicago, Ill. in Ted Leventhal, *On Theory-Builders and Threats*, LEGAL TIMES, June 28, 1999, at 62.

40. 517 U.S. 484 (1996).

41. *Id.* at 522-23 (Thomas, J., concurring in part and concurring in the judgment).

42. David G. Savage, *1st Amendment Rulings are Out of Order, Liberals Complain*, L.A. TIMES, Dec. 18, 1996, at A5 (quoting Professor Neuborne).

43. *44 Liquormart*, 517 U.S. at 522 (Thomas, J., concurring in part and concurring in the judgment).

44. GERBER, *supra* note 27, at 161.

45. SUNSTEIN, *supra* note 2, at xi-xiv. After the publication of Sunstein’s book, the Court inserted itself into the fundamental values debate in the Michigan affirmative action cases and the Texas gay rights case more than Sunstein’s theory would suggest it should, although Sunstein himself was almost certainly pleased with the liberal results of those cases. *See, e.g.*, Cass R. Sunstein, *Liberty After Lawrence*, 65 OHIO ST. L.J. 1059 (2004). *See generally* Lawrence v. Texas, 539 U.S. 558 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

Predictably, however, Sunstein objects when the democratic process—the process in which he suggests the “fundamental issues” should be defined—decides these issues in a conservative way. The issue of affirmative action provides the best example. Remember Proposition 209, the California referendum that outlawed preferential treatment based on race? Sunstein certainly does. But he declares that it does not encompass what he means by democracy. He writes:

Political processes in California on this issue did not appear to be deliberative In the context of affirmative action in particular, there is a danger that referendum outcomes will not be based on a careful assessment of facts and values, but instead on crude “we-they” thinking. This is a particular danger in the context of race.⁴⁶

In short, Sunstein appears willing to put decisions about fundamental issues of constitutional law in the hands of the American people, unless the people reach decisions he dislikes. Indeed, in his “Antagonists” section, Sunstein criticizes Justice Scalia’s jurisprudence, which, like Sunstein’s, manifests a preference for leaving as many decisions as possible to the democratic process,⁴⁷ for failing to promote democracy “rightly understood.”⁴⁸

C. Kramer’s *The People Themselves*

Robert Bork could have written Larry Kramer’s book. As Bork did before him in *The Tempting of America*,⁴⁹ Kramer offers a historical argument in *The People Themselves*⁵⁰ for a limited judicial role in constitutional interpretation. There is one notable difference between the two books: the conservative Bork was arguing against the liberal activism of the Warren and Burger Courts,⁵¹ whereas the liberal Kramer argues against the conservative activism of the Rehnquist (and now Roberts?⁵²) Court.⁵³ Kramer closed a 2001

46. SUNSTEIN, *supra* note 2, at 133.

47. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 1, 22 (Amy Gutmann ed., 1997) (arguing that it is “simply not compatible with democratic theory . . . that [unelected judges decide] that laws mean whatever they ought to mean”).

48. SUNSTEIN, *supra* note 2, at 211-12, 261-62. Sunstein reprises his critique of the conservative federal judiciary in, among other places, RADICALS IN ROBES, *supra* note 10.

49. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

50. KRAMER, *supra* note 2.

51. See BORK, *supra* note 49, at 129-32. The Burger Court was a liberal court, too. It gave the nation *Roe v. Wade*, 410 U.S. 113 (1973) (legalizing abortion), and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (permitting the use of race in public higher education admissions programs).

52. See Michael J. Gerhardt & Larry D. Kramer, *Protect Our Rights, Keep the Filibuster*, PITTSBURGH TRIB. REV., May 1, 2005, available at <http://www.pittsburghlive.com/x/>

Harvard Law Review Foreword about *Bush v. Gore*⁵⁴ that served as a “preliminary version of the history”⁵⁵ in his book with a call to arms: “The Supreme Court has made its grab for power. The question is: [W]ill we let them get away with it?”⁵⁶

What makes Kramer’s book so significant—Tushnet opines on the dust jacket that *The People Themselves* “is perhaps the most important work of constitutional theory and history in a generation”⁵⁷—is that it attempts to provide the historical evidence for the policy arguments of Leftist scholars who wish to limit (Sunstein) or eliminate (Tushnet) the federal judiciary’s role in constitutional interpretation. Kramer opens by presenting three episodes from the early American Republic that he claims reveal how our forefathers “understood their role in popular government in ways that we, who take so much for granted, do not.”⁵⁸ The episodes are (1) popular celebrations from Maine to Georgia in 1793 over the jury acquittal of Gideon Henfield on charges that he violated the law of nations by serving as a French privateer; (2) a popular protest in New York City against the Jay Treaty in which the crowd shouted down Alexander Hamilton and hit him with a rock; and (3) public meetings in Virginia, Kentucky, and other Middle Atlantic states protesting the Alien and Sedition Act of 1798.⁵⁹ As a novelist,⁶⁰ I applaud Kramer’s attention-grabbing Introduction. As a student of the history of ideas, I find the story he is trying to tell unconvincing.

The heart of Kramer’s historical account is Chapter One’s description of the “customary constitution,” the notion in English constitutional history that customs, statutes, common law institutions like the jury, and certain edicts such as the Magna Carta comprised the regime’s fundamental law.⁶¹ Kramer’s animating principle is that England’s fundamental law was enforced primarily by “the people themselves”—hence the title of his book—given how malleable an

pittsburghtrib/s_329413.html (arguing, at the dawn of the Roberts Court era, for the legitimacy of the filibuster in the confirmation process for judicial nominees).

53. See KRAMER, *supra* note 2, at 225-30.

54. 531 U.S. 98 (2000).

55. KRAMER, *supra* note 2, at 249.

56. Kramer, *supra* note 3, at 169.

57. KRAMER, *supra* note 2 (quoting Mark Tushnet).

58. *Id.* at 5.

59. *Id.* at 3-5.

60. See generally SCOTT DOUGLAS GERBER, *THE IVORY TOWER: A NOVEL* (2002); SCOTT DOUGLAS GERBER, *THE LAW CLERK: A NOVEL* (2007).

61. KRAMER, *supra* note 2, at 9-34.

unwritten constitution was.⁶² For example, he describes how “clear, convulsive expressions of popular will” were responsible for the Glorious Revolution of 1688 that ousted King James II and replaced him with William and Mary.⁶³ Prior to the American Revolution, Kramer insists, Americans, as British colonial subjects, shared this orientation to customary—and, in Kramer’s hands, popular—constitutionalism.⁶⁴

By far the most provocative part of Kramer’s discussion of popular constitutionalism in colonial America is his description of the forms it took: voting, petitioning, pamphleteering, jury service, and mobbing.⁶⁵ Kramer’s characterization of mobbing is particularly startling, in large part because of how casually he approaches the practice. He writes:

And then there was the mob, or “crowd,” as historians have relabeled it to capture its rediscovered respectability Mobbing was an accepted, if not exactly admired, form of political action—common in England and on the Continent as well as in America. Crowd action represented a direct expression of popular sovereignty, justified as a last resort in the writings of Grotius, Pufendorf, and Locke, not to mention by long tradition Mob action followed implicit, customary rules about how much violence was appropriate and which targets were permissible, making it possible for contemporaries to distinguish constitutional mob action from a simple riot.⁶⁶

I confess to being uncertain about whether colonial mobs had “rules”⁶⁷—the Ultimate Fighting Championship is now said to have “rules,” too⁶⁸—but I have read enough Locke to know that when “the people themselves” were behaving in the manner that Kramer describes, they were *revolting* against the Constitution, not *interpreting* it. In fact, Lockean liberalism posits that the principal purpose of constitutional government is to protect the people from the sorts of behavior Kramer endorses. When a constitution proves incapable of doing that, the people are instructed to *replace* it. The Declaration of Independence, a Lockean document if there ever was one,⁶⁹ makes this point in unmistakable terms:

62. *Id.* at 24.

63. *Id.* at 15.

64. *Id.* at 34.

65. *See id.* at 25-27.

66. *Id.* at 27.

67. Kramer is not the first historian to claim that colonial mobs followed “rules.” *See, e.g.,* PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765-1776, at 32-34 (1972).

68. *See* Ultimate Fighting Championship, UFC Rules, <http://www.ufc.com/index.cfm?fa=LearnUFC.Rules> (last visited Mar. 6, 2008).

69. *See* Scott D. Gerber, *Whatever Happened to the Declaration of Independence? A Commentary on the Republican Revisionism in the Political Thought of the American Revolution*,

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.⁷⁰

Chapter Two finds Kramer considering one of the most frequently debated questions among constitutional law scholars: the origins of judicial review.⁷¹ He acknowledges that, in the years between the American Revolution and the framing and ratification of the U.S. Constitution, some lawyers and judges identified clearly a judge's power to declare void laws that were contrary to a state's constitution. But he insists that this was a minority view—and that even for lawyers, such as James Iredell, who subscribed to this view, “interpretive authority remained with the people.”⁷²

Kramer's characterization of the origins of judicial review is implausible, to put it generously, and it also is inconsistent with the wave of state constitution-making that preceded the federal Constitution. Kramer asserts that “putting constitutions into writing was not seen as a profound innovation.”⁷³ Nothing could be further from the truth.⁷⁴ Indeed, as John Marshall appreciated in *Marbury* itself, the founders' decision to reduce their organic laws to writing was arguably their most significant contribution to the history of ideas, because it made interpreting organic laws easier, and it signaled that the judiciary was to be the government institution

26 POLITY 207, 230-31 (1993) (arguing that the founders relied on Locke's writings in drafting the Declaration of Independence).

70. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

71. KRAMER, *supra* note 2, at 35. The debate over the origins of judicial review remains as vibrant as ever. *See, e.g.*, Mary Sarah Bilder, *Why We Have Judicial Review*, 116 YALE L.J. POCKET PART 215, 215 (2007), <http://thepocketpart.org/2007/01/09/bilder.html> (arguing that the origins of judicial review lie in corporate law); Scott D. Gerber, *The Political Theory of an Independent Judiciary*, 116 YALE L.J. POCKET PART 223, 223 (2007), <http://thepocketpart.org/2007/01/09/gerber.html> (disagreeing with Professor Bilder about the roots of judicial review); William Michael Treanor, *Original Understanding and the Whether, Why, and How of Judicial Review*, 116 YALE L.J. POCKET PART 218, 219 (2007), <http://thepocketpart.org/2007/01/09/treanor.html> (discussing why judicial review exists). *See generally* Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006).

72. KRAMER, *supra* note 2, at 58-65.

73. *Id.* at 55.

74. Kramer backs off his statement as soon as he makes it. *See id.* (acknowledging that reducing constitutions to writing “gave a powerful boost to the new awareness of popular sovereignty”).

ultimately charged with the interpretive function.⁷⁵ A number of state constitutions adopted after the Declaration of Independence contained stirring testaments to the judiciary's emerging role—emphasis on *emerging*, as Part II will explore—in the founders' political architecture. The Maryland Declaration of Rights of 1776 exclaimed, for example, that “the independency and uprightness of Judges are essential to the impartial administration of justice, and a great security to the rights and liberties of the people,”⁷⁶ and the Massachusetts Declaration of Rights of 1780 proclaimed that “[i]t is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.”⁷⁷ And while the early state constitutions were revised many times, the frequency of the revisions provides more, not less, evidence of the founders' commitment to institutional solutions to the question of how best to protect individual rights—the question that the Declaration of Independence announces as the central concern of the American regime.⁷⁸ Nowhere was this more forcefully stated than in the preamble to the Massachusetts Constitution of 1780, written by John Adams:

The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights, and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.⁷⁹

Not surprisingly, Kramer's infatuation with popular constitutionalism also colors his discussion of the framing and ratification of the U.S. Constitution, the subject that occupies Chapter Three of his book. He insists that, in 1787, the notion of judicial review remained fuzzy at best, that the debates surrounding the framing and ratification of America's second national constitution were ambiguous on the matter, and that the text of the Constitution was silent on it.⁸⁰ Kramer once again fails to appreciate the significance of political architecture to the men who wrote the Constitution. He barely mentions in the chapter the theory of separation of powers, which the framers considered the edifice of the

75. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

76. MD. CONST. OF 1776, Declaration of Rights art. XXX.

77. MASS. CONST. OF 1780, Declaration of Rights art. XXIX.

78. See THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT 16-18 (Scott Douglas Gerber ed., 2002); GERBER, *supra* note 29, at 1-3.

79. MASS. CONST. pmbl.

80. See KRAMER, *supra* note 2, at 73-77.

Constitution's structure. The President has, among other checks, a veto over congressional bills⁸¹ and the power to nominate federal judges.⁸² Congress has, among other checks, the power to override presidential vetoes⁸³ and to control the size and jurisdiction of the federal courts,⁸⁴ as well as the power to impeach all federal officials.⁸⁵ Without the power of judicial review, what check—what “constitutional control,” in the words of *The Federalist*⁸⁶—would the federal judiciary have on the President or Congress? The answer is: none. As a consequence, judicial review is an inevitable component of the Constitution's commitment to checks and balances.

D. The Judicial Brezhnev Doctrine

It does not take a rocket scientist—or a celebrated law professor, for that matter—to figure out what is going on here. Kramer,⁸⁷ Tushnet, and Sunstein are afraid that the now-conservative federal judiciary is rolling back too many of their preferred liberal rulings. They are announcing, if you will, a kind of judicial Brezhnev Doctrine: “What we have, we keep.”⁸⁸

Nothing if not honest, Tushnet is unambiguous on the matter. He writes in Chapter Seven (“Against Judicial Review”) of *Taking the Constitution Away from the Courts*:

Of course I have many views about what the Constitution means. So do you. And of course if I could guarantee that five justices held exactly the views I have, I would be wildly in favor of judicial review. So would you. The problem, of course, is that your

81. U.S. CONST. art. I, § 7.

82. *Id.* art. II, § 2.

83. *Id.* art. I, § 7.

84. *Id.* art. III, § 1.

85. *Id.* art. I, § 2.

86. THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

87. The remainder of Kramer's book is dedicated to post-ratification episodes of popular constitutionalism, such as President Andrew Jackson's refusal in the 1830s to enforce the Court's decision that Cherokee Indians could not be removed from their land by the government of Georgia, and to the rise of so-called judicial supremacy during the heyday of the Warren Court. These episodes are irrelevant to the original understanding of the Constitution.

88. The “Brezhnev Doctrine” was announced in November 1968 by then-Soviet leader Leonid Brezhnev to justify the Soviet invasion of Czechoslovakia. Brezhnev declared that the Soviet Union had a duty to maintain a “correct” vision of socialism in countries within the Soviet sphere of influence. The doctrine was extended to countries not already within the Soviet sphere of influence in 1979 by the invasion of Afghanistan. It was renounced by Mikhail Gorbachev in 1989. See MATTHEW J. OUMET, THE RISE AND FALL OF THE BREZHNEV DOCTRINE IN SOVIET FOREIGN POLICY 2-4, 66-88 (2003).

views and mine might be rather different, and neither of us can guarantee that the judges will agree with us all the time.⁸⁹

Tushnet repeats this theme elsewhere. For example, in a 1998 article for *Dissent* magazine (reprinted as Chapter Six in *Taking the Constitution Away from the Courts*), he explains at length how judicial review may have been good for the Left during the heyday of the Warren and Burger Courts, but not under the Rehnquist (and now Roberts?) Court.⁹⁰ Tushnet returns to the subject of affirmative action—the sacred cow of the Left—to illustrate his point. He writes: “On race discrimination law, it is enough to note that [*Brown v. Board of Education*⁹¹] no longer is the central case dealing with race. Now the Court’s anti-affirmative action decisions are central.”⁹²

Sunstein is careful not to criticize the federal judiciary’s conservative politics in *One Case at a Time*. However, he did so in a *New York Times* op-ed when the book first appeared in print. He wrote:

Conservative politicians often complain about the decisions of liberal Federal judges who, they say, do not respect the judgments of elected officials But judicial activism on the part of conservative judges is a much more serious problem, as some Reagan and Bush appointees have proved far too willing to invalidate decisions made by Congress and the executive branch.⁹³

To prove his point, Sunstein described a 1999 D.C. Circuit Court ruling that struck down a provision of the Clean Water Act⁹⁴ and a series of Fourth Circuit decisions⁹⁵ (the same circuit that called

89. TUSHNET, *supra* note 2, at 155.

90. Mark Tushnet, *Is Judicial Review Good for the Left?*, DISSENT, Winter 1998, at 65.

91. 347 U.S. 483 (1954).

92. Tushnet, *supra* note 90, at 66. Tushnet’s anti-judicial review book was written before the Court decided the University of Michigan and Seattle and Louisville affirmative action cases. See generally *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Seattle and Louisville cases); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (University of Michigan law school case); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (University of Michigan undergraduate school case).

93. Cass R. Sunstein, Op-Ed., *The Courts’ Perilous Right Turn*, N.Y. TIMES, June 2, 1999, at A25.

94. See *Am. Trucking Ass’ns, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *aff’d in part and rev’d in part sub nom.*, *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001).

95. See *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820 (4th Cir. 1999) (en banc) (holding that the provision of the Violence Against Women Act creating a private right of action for victims of gender-motivated violence exceeded Congress’s powers under the Commerce Clause and Section 5 of the Fourteenth Amendment), *aff’d sub nom.*, *United States v. Morrison*, 529 U.S. 598 (2000); *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998) (holding that the Driver’s Privacy Protection Act violated the Tenth Amendment and exceeded Congress’s power under Section 5 of the Fourteenth Amendment), *rev’d*, 528 U.S. 141 (2000); *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997) (striking down a provision of the Clean Water Act as applied in EPA regulations because it exceeded Congress’s power under the Commerce Clause).

*Miranda v. Arizona*⁹⁶ into serious question⁹⁷) on behalf of states' rights.⁹⁸ "All too often," Sunstein insisted, "conservative judicial activists ignore other reasonable interpretations of the Constitution to entrench their own and do so at the expense of democratic self-rule."⁹⁹ If that were not enough, in 2005 Sunstein repackaged *One Case at a Time* as *Radicals in Robes*,¹⁰⁰ an updated and unabashed polemic against the conservative federal judiciary.

Leftist politics likewise drive Kramer's efforts to minimize the federal judiciary's role in the American constitutional order. For example, I mentioned above how Kramer's anger at the Court's decision in *Bush v. Gore* fueled his historical narrative.¹⁰¹ L.A. Powe, Jr., who is himself sympathetic to the notion of popular constitutionalism, is similarly unimpressed with Kramer's history:

By jumping ninety years from Jackson to FDR, Kramer omits and ignores the most stunningly successful example of popular constitutionalism in American history. That, of course, is the white South's combined use of terrorism and the ballot, first to overthrow the Reconstruction governments and then to nullify the Fourteenth and Fifteenth Amendments for generations. In one of the most egregious historical errors I have seen in law reviews, Kramer (without citations) places the blame for the end of Reconstruction at the feet of the Court. Seldom does a theory—in this case, people good, Court bad—beget such a wrong-headed factual conclusion. Omitting Reconstruction and the Trail of Tears, plus all of the modern examples [chronicled in Powe's review essay], offers evidence that Kramer sees popular constitutionalism only when he approves of the cause.¹⁰²

E. The 2006 Michigan Anti-Affirmative Action Amendment

Kramer, Sunstein, and Tushnet are not the only popular constitutionalists whose unshakeable dedication to the Left's political agenda casts doubt on the strength of their commitment to popular constitutionalism. This was made abundantly clear following the November 2006 amendment to the Michigan Constitution banning state-sponsored affirmative action in Michigan.

The amendment, commonly known as "Prop 2," provides that "[t]he state shall not discriminate against, or grant preferential

96. 384 U.S. 436 (1966).

97. See *United States v. Dickerson*, 166 F.3d 667, 684-92 (4th Cir. 1999) (holding admissibility of confessions in federal court to be governed by statute, which allowed admission of voluntary confessions, rather than by the rule of *Miranda*), *rev'd*, 530 U.S. 428 (2000).

98. See Sunstein, *supra* note 93.

99. *Id.*

100. SUNSTEIN, *supra* note 10.

101. See *supra* text accompanying notes 54-56.

102. L.A. Powe, Jr., *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855, 887 (2005) (reviewing KRAMER, *supra* note 2).

treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.”¹⁰³ Given that Prop 2 appears to be a textbook example of popular constitutionalism, I was curious to learn how proponents of the theory felt about it. In a column I wrote for Findlaw.com, I discussed my attempts to do just that.¹⁰⁴

The campaign for the passage of Prop 2 was spearheaded by Ward Connerly and Jennifer Gratz. Connerly is a wealthy African American Republican who helped pass a similar amendment to the California Constitution a decade before. Gratz was one of the plaintiffs in the 2003 U.S. Supreme Court decisions that held, as a matter of federal constitutional law, that the University of Michigan may consider the race of applicants as a factor in admissions decisions, provided that race is not used too mechanically and that all applicants are evaluated on an individualized basis.¹⁰⁵

Gratz, a white applicant, won her lawsuit against the University of Michigan undergraduate college to which she had been denied admission.¹⁰⁶ The Court concluded that it was unconstitutional for the college’s admissions process to award an applicant a set number of points solely because the applicant was not white.¹⁰⁷ Barbara Grutter, another white applicant, lost her lawsuit against the University of Michigan Law School.¹⁰⁸ The Court decided that race was only one factor among many in the law school’s admissions process and endorsed the approach articulated by Justice Lewis Powell in his famous separate opinion in *Regents of the University of California v. Bakke*:¹⁰⁹ Race may be so used in order to achieve “diversity” in higher education.¹¹⁰

By enacting Prop 2, the people of Michigan rejected the use of state-sponsored affirmative action as a matter of state constitutional law and thereby nullified the U.S. Supreme Court’s decisions in the University of Michigan cases in the state of Michigan.

103. MICH. CONST. art. I, § 26, cl. 2.

104. The discussion that follows in this Section draws from Scott D. Gerber, *Michigan’s Controversial Proposition 2, Eliminating Affirmative Action in the State: A Good Example of Popular Constitutionalism?*, FINDLAW.COM, Nov. 16, 2006, http://writ.news.findlaw.com/commentary/20061116_gerber.html.

105. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

106. *Gratz*, 539 U.S. at 251.

107. *Id.* at 271-72.

108. *Grutter*, 539 U.S. at 343-44.

109. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 269 (1978) (opinion of Powell, J.).

110. *Grutter*, 539 U.S. at 324-25.

I became interested in learning how proponents of popular constitutionalism felt about Prop 2 after a colleague posted on ConLawProf that a pro-affirmative action group called By Any Means Necessary (“BAMN”) had filed a lawsuit requesting that a *court* invalidate the November 7 decision by the *people* of Michigan. On the one hand, Prop 2 is precisely what popular constitutionalists had envisioned: the people of Michigan had defined what the state’s constitution means. On the other hand, most popular constitutionalists are on the political left and are strong supporters of affirmative action.

I believed that the BAMN litigation was destined to fail because the Court had ruled in the University of Michigan cases that Michigan may—not *must*—consider race in its admissions decisions under federal equal protection law, but the merits of the litigation were not what interested me. I posted to ConLawProf: “Separate and apart from the merits of the argument presented to a court, I would be curious to learn what proponents of popular constitutionalism feel about this effort to ask a *court* to declare an amendment by ‘the people themselves’ unconstitutional.”

I spent much of the next day and a half pouring through the dozens of replies to my query. The first reply maintained that Prop 2 merely was part of an “ongoing” debate “over the place of race and gender conscious diversity programs in public institutions.” Under that interpretation of what happened on November 7, popular constitutionalism means that some people—for example, administrators at the University of Michigan—can ignore what the majority of the people have said if they do not want to hear it. I informed the list that the proffered definition seemed strange to me. After all, what was passed on November 7 was a popularly enacted amendment to the state’s constitution.

Another reply insisted that Prop 2 was not a legitimate exercise of popular constitutionalism because its language was “so confusing, many people voted to ban affirmative action, believing that they were voting in favor of it.” But this particular reply failed to appreciate that the amendment unambiguously prohibits “preferential treatment” on the basis of, among other things, “race.” The idea of preferential treatment is easy to understand, and the reply gave Michigan voters—educated by numerous ads and counter-ads about Prop 2—much too little credit.

Still another reply insisted that there was no reason why a popular constitutionalist should think that the people of Michigan should have the last word on the meaning of the federal Constitution,

“which is what the opponents of the amendment are relying on.” But, of course, the people of Michigan amended their *state* constitution, not the federal Constitution—and as to the meaning of their state constitution, they surely do have the last word.

Moreover, as one of the small handful of opponents of affirmative action in the legal professoriate replied, such a position is elitist. In other words, this conservative law professor explained, Prop 2 is

based in large part on a notion that constitutional guarantees of equality (even if the public isn't aware specifically of the 14th Amendment's [equal protection] clause) prohibit government discrimination based on race, period. Just like much of the opposition to gun control is based on a notion that there is a constitutional right to bear arms, even among people who've never read the Second Amendment. If “popular constitutionalism” is restricted to individuals specifically studying specific parts of the Constitution and coming to informed conclusions about the wrongness of specific [U.S. Supreme Court] decisions, that would mean that “popular constitutionalism” would mean “law professor (and a few others) constitutionalism.”

I could not have said it better myself.

Another reply characterized what happened in Michigan as a mere “policy” judgment by the people of Michigan. No one seemed to take this post seriously. The Michigan *Constitution* was changed on November 7.

Yet another reply suggested that a popular constitutionalist is simply opposed to judicial supremacy, not judicial review. Under this strand of popular constitutionalism, the author of the reply insisted, judges are permitted to interpret the constitution, but legislators have the final say.

I posted two reactions to this reply: (1) popular constitutionalists who seek to eliminate, rather than limit, judicial review—Tushnet, for example—cannot be characterized in such a fashion; and (2) the Michigan *legislature* had nothing to do with what happened in Michigan on November 7—again, the *people* of the state amended their constitution.

Arguments in favor of both popular constitutionalism and the BAMN litigation continued to flood my inbox like ads from amazon.com during the height of the holiday shopping season. I found none of them persuasive.

Finally, one response did give me pause. A poster whom I know to be an African American proponent of affirmative action reported that “only 14% (or something similar to that) of minority voters supported it. So [affirmative action] was rejected essentially by white voters.” She remarked that this made her “question whether this vote was popular constitutionalism, or simply self-interest by whites who

assume (falsely) [that] their opportunities will be substantially limited by affirmative action.”

For me, this post captured why the popular constitutionalist assault on judicial review is misguided. As John Hart Ely reminded the legal academy a generation ago in his classic book *Democracy and Distrust*, judicial review must be available to ensure that the political process is functioning properly.¹¹¹ When “discrete and insular minorities”¹¹² are prohibited from participating fairly in the political process, a court must step in to eliminate the barriers to democratic participation.

Unfortunately for the opponents of Prop 2, the BAMN litigation is not about leveling barriers to democratic participation in Michigan on November 7. There were not any barriers. Instead, the litigation is about asking a judge to tell the people of Michigan that they cannot define what their constitution means through their state’s constitutional amendment process. No judge is likely to say that to “the people themselves.”

II. FROM ARISTOTLE’S THEORY OF A MIXED CONSTITUTION TO JOHN ADAMS’S MODIFICATIONS OF MONTESQUIEU

There has to be a better way for deciding what the Court’s role in the American constitutional order should be than the politically motivated arguments of popular constitutionalism, the “constitutional theory *du jour*.”¹¹³ I believe there is a better way, and I believe it is discernable through an exegesis in the history of ideas. After all, the founders of the American regime were steeped in the history of ideas, and the Constitution they created expressed their commitment to the power of ideas.¹¹⁴ As I mentioned in the Introduction, it is a complicated story, but a story that needs to be told: especially when a leading popular constitutionalist such as Kramer claims to be exploring the intellectual origins of the Court’s role in American life, yet takes up the story near the end—seventeenth century England and colonial America—rather than at the beginning.¹¹⁵ The story

111. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

112. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

113. Alexander & Solum, *supra* note 6, at 1594.

114. The American founders were widely read in political philosophy. *E.g.*, H. TREVOR COLBURN, *THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION* (1965); Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189 (1984).

115. *But see* Daniel J. Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653, 666 (2005) (reviewing KRAMER, *supra* note 2) (“Every work of history must cut into the seamless web

starts with Aristotle and the theory of a mixed constitution. The next chapter is written by Polybius in his characterization of the Roman Constitution, and Polybius is followed by Marsilius of Padua's famous critique of Pope John XXII during the Middle Ages, Sir John Fortescue's writings about fifteenth century English political institutions, and Gasparo Contarini's paean of praise to the Venetian Constitution during the sixteenth century. The story takes a dramatic turn when King Charles I commits Anglo-American constitutional theory to balance among government institutions, rather than dominance by one, and reaches its climax with Montesquieu's famous idea that political power should be divided among the legislative, executive, and judicial branches of government. John Adams writes the concluding chapter when he develops the political architecture of an independent judiciary in his 1776 pamphlet, *Thoughts on Government*. The epilogue is penned by the framers of the U.S. Constitution when they memorialize Adams's political architecture in Article III, and by John Marshall and other early American judges when they engage in the ultimate expression of judicial independence: judicial review.

A. Aristotle

Aristotle (384-322 B.C.), born in northern Greece, was the most notable of Plato's students.¹¹⁶ He devoted his life to researching, teaching, and writing about philosophy.¹¹⁷ Although the *Politics* is the work on which the present discussion will focus, Aristotle concluded his *Nicomachean Ethics* by advising that the correct way to live is virtuously and that government should be structured in a manner so as to allow it.¹¹⁸ The *Politics* addresses the question of government structure.¹¹⁹

Eight books comprise the *Politics*. Three are particularly relevant to understanding Aristotle's conception of what is now regarded as the separation of powers. Book 3, entitled "Definition and

somewhere. Kramer does so in Chapter 1 by portraying a 'customary constitution' shared on both sides of the Atlantic before the American Revolution."). As Part II will suggest, Hulsebosch's otherwise insightful review of Kramer's book commits a fatal error by failing to appreciate how important earlier contributions to the history of ideas were in identifying the Court's place in the American constitutional order.

116. *E.g.*, GEORGE GROTE, ARISTOTLE 1-9 (2d ed. 1880).

117. *Id.*

118. *See generally* ARISTOTLE, THE NICOMACHEAN ETHICS xxii (David Ross trans., 1998) (350 B.C.) (arguing that "well-being . . . consist[s] in good activity").

119. PETER L. PHILLIPS SIMPSON, A PHILOSOPHICAL COMMENTARY ON THE *POLITICS* OF ARISTOTLE 14 (1998).

Division of Regime,” details many of Aristotle’s concerns about the vulnerabilities of a form of government that leaves people to do as they please.¹²⁰ Aristotle never refers to the separation of powers in the book, but many of the points he makes in this portion of the *Politics* illustrate why he later divides government into different parts. Book 4, “The Best Regime,” explores, at a general level, the aspects of proper government that can protect the people from tyranny.¹²¹ Book 6, “Division and Description of the Other Regimes,” is the most significant of the books with respect to the separation of powers because it explains how government power should be allocated.¹²²

In Book 3, Chapter 16, Aristotle writes:

Now, anyone who bids the law to rule seems to bid god and intellect alone to rule, but anyone who bids a human being to rule adds on also the wild beast. For desire is such a beast, and spiritedness perverts rulers even when they are the best of men. Hence law is intellect without appetite.¹²³

Here, in a passage from a chapter entitled “Arguments against Total Kingship,” Aristotle succinctly presents the rationale that the framers of the U.S. Constitution would employ when explaining the need for the separation of powers: the inevitable tendency of rulers to abuse their power and the concomitant necessity that the rulers “should be many and not one alone.”¹²⁴

Book 4 finds Aristotle explaining how the citizenry should be composed in the “best regime.”¹²⁵ He envisions a city-state in which all citizens are educated and, therefore, are equally suitable to participate in government, albeit at different levels.¹²⁶ The concern raised in Book 3 regarding the tyranny of a total kingship is thus avoidable, provided that government can be divided among the educated citizenry in a

120. Scholars disagree about how to order the eight books of the *Politics*. The present discussion adopts the ordering of ARISTOTLE, *THE POLITICS OF ARISTOTLE* (Peter L. Phillips Simpson trans., 1997) (350 B.C.), upon whose translation this Section relies.

121. Tyranny is, of course, inconsistent with a regime committed to the protection of individual rights. See FRED D. MILLER, JR., *NATURE, JUSTICE, AND RIGHTS IN ARISTOTLE’S POLITICS* 157, 212-13 (1995) (noting that the tyranny regime promotes the “advantage” of the monarch).

122. ARISTOTLE, *supra* note 120, at 6.14.1297b35-1299a1.

123. *Id.* at 3.16.1287a28-31.

124. *Id.* at 3.16.1287b23; see also *id.* at 3.17.1287b43-44 (“[I]t is neither advantageous nor just for one man to have control over everything . . .”).

125. *Id.* at 4.1.1323a14-20.

126. *Id.* at 4.13.1332a38. Aristotle acknowledges in Book 6 that it is impractical for all citizens to be educated. Those who are not, he advises, should be responsible for supplying necessities and luxuries to the city-state. *Id.* at 6.4.1290b37-40, 6.4.1291a6-21.

proper fashion. As mentioned above, the allocation of government power is the theme of Book 6.¹²⁷

Aristotle maintains in Book 6 that three parts of government are common in all regimes. He writes:

Let us, with regard to what comes next, discuss each regime again both together and separately, taking as our beginning what is appropriate to the subject. All regimes have three parts, and the serious legislator must study by reference to them what is of advantage to each regime. As long as these parts are in a noble condition, the regime must necessarily be in a noble condition, and regimes differ from each other by the way each of these differs. One of the three is what deliberates about common matters, a second is what concerns the offices (that is to say, which offices there should be, with control over what things, and in what way they should be chosen), and a third is what decides law suits.¹²⁸

Obviously, these three parts of government do not coincide precisely with the legislative, executive, and judicial powers contained in the U.S. Constitution. The “deliberative” part is most similar to Congress, in that it is charged with making the laws. However, this part also presumably includes the ruler—the president, or in Aristotle’s case, the king—a state of affairs not unlike the modified theory of separation of powers (i.e., checks and balances) actually embodied in the Federal Constitution of 1787. The deliberative part likewise would take on a judicial role with respect to “common matters” (defined below). The “offices” part is similar to the administrative component of the Constitution’s executive power. The “law courts” part is seemingly on all fours with the judicial power, given that it “decides law suits.”

Turning to the “deliberative” part in more detail, this is to be the controlling part of the city-state,¹²⁹ and it is to decide all “common matters,” which Aristotle defines as war and peace, alliances and their dissolution, laws, death, exile, confiscation, and the selection and auditing of offices.¹³⁰ Although the deliberative part controls the city-state, the laws are superior to this part, and all parts, because otherwise there would be tyranny.¹³¹ The composition of the deliberative part depends on which regime is in place: free-born citizens (democracy), the rich (oligarchy), the virtuous (aristocracy), or a combination of these groups (mixed regimes such as polity and so-

127. In Book 5, “Education in the Best Regime,” Aristotle argues that understanding the law is a key component of education in the best regime. *Id.* at 5.1.1337a11-17.

128. *Id.* at 6.14.1297b35.

129. *Id.* at 6.14.1298b34.

130. *Id.* at 6.14.1298a3-8.

131. *Id.* at 7.8.1308a3-34. For more on Aristotle’s commitment to the rule of law, see MILLER, *supra* note 121, at 82-84.

called aristocracy).¹³² The power of the deliberative part is checked in the mixed regime, at least in theory, by its membership and by the fact that all the different parts of the city-state are supposed to be represented in it.¹³³

With respect to the “offices,” this part’s role is to address the “cares of the city.”¹³⁴ By “offices,” Aristotle means those “assigned certain matters for deliberation, judgment, and the issuing of commands” over “certain matters.”¹³⁵ He admits that it is impossible to define each office precisely, because there are always different concerns depending on which city-state is being analyzed. However, he does identify three general types of offices, which are presumably necessary in every city-state: political (e.g., military general), economic (i.e., an office concerned with the supply and distribution of food to the city-state), and offices “to do with deliberation on common affairs” (e.g., police).¹³⁶ Appointment to a particular office occurs through election or lot.¹³⁷

The *Politics* identifies eight different “law courts,” listed by jurisdiction: audits, crimes involving “common matters,” matters affecting the regime, disputes between rulers or magistrates and private persons over fines, private transactions of “some magnitude,” homicides, foreigners, and small claims.¹³⁸ Whether Aristotle intends this list to be exhaustive is not clear, and the composition of the law courts depends on the nature of the regime. Aristotle writes: “The first of these courts, those appointed from all deciding all cases, are popular; the second, those appointed from some deciding all cases, are oligarchic; the third, some courts are appointed from all and others from some, are aristocratic and proper to polity.”¹³⁹

Aristotle’s power distribution schema is certainly not identical to that embodied in the U.S. Constitution. There is much more commingling of powers in Aristotle’s system. For example, Aristotle provides that the deliberative part of the city-state has the authority to remove a “common matter” of great concern from the law courts and decide the matter itself.¹⁴⁰ Congress, in contrast, could never take a

132. ARISTOTLE, *supra* note 120, at 6.14.1298a28-b10.

133. *Id.* at 7.8.1308b24-30.

134. *Id.* at 6.15.1299a14-30.

135. *Id.* at 6.15.1299a27-29.

136. *Id.* at 8.8.1322b29-36; *see also id.* at 6.15.1300b9-12.

137. *Id.* at 6.15.1300a9-21.

138. *Id.* at 6.16.1300b19-37.

139. *Id.* at 6.16.1301a11-14.

140. *See id.* at 6.14.1298a1-2 (noting that the deliberative part is concerned with “common matters”).

case from the Supreme Court and issue its own decision.¹⁴¹ However, the two systems are not as dissimilar in this regard as generally is perceived. If Congress does not like a particular Supreme Court decision involving the interpretation of a federal statute, Congress is free to change the statute. Moreover, the only occasion in Aristotle's schema in which the deliberative part is permitted to trump the law courts' power is when common matters of great concern are at issue.¹⁴² In short, the deliberative part is *not* free to take any matter it wants from the law courts and decide it.

This said, there is a major difference between Aristotle's approach to the distribution of government power and that embodied in the U.S. Constitution. The focus throughout the *Politics* is on the distribution of power pursuant to class structure, rather than government function. For example, Aristotle criticizes the two "traditional" types of regimes, oligarchy and democracy, because they fail to address adequately the tensions between the poor and the rich.¹⁴³ In an oligarchy the few (the rich) rule over the many (the poor), while in a democracy the many rule over the few. Because the rich and the poor are at odds in both types of regimes, and because it is impossible for one person to be rich and poor at the same time, these regimes are deviant.¹⁴⁴ In contrast, the "best regime"—alternatively called "kingship" or "aristocracy"—finds the different classes of the city-state represented in the previously described governmental parts.¹⁴⁵ (Precisely how each class is represented in the government depends on the type of regime the city-state can create.¹⁴⁶) It is this emphasis on *class* rather than *function*—the so-called Aristotelian theory of mixed government—with which the *Politics* is most closely associated.¹⁴⁷ The mixed constitution—the "*mikte*"—is not the *ideal* form of government in Aristotle's political science, but it is the best attainable, combining as it does aspects of democracy, oligarchy, and

141. *But see* U.S. CONST. art. III, § 2, cl. 2 (granting Congress an "exceptions" power over the Court's appellate jurisdiction); *Ex parte McCordle*, 74 U.S. 506 (1868) (upholding Congress's repeal of the Court's statutory appellate jurisdiction in a habeas corpus case before it and then dismissing the case for lack of jurisdiction); Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts*, 66 HARV. L. REV. 1362, 1364-65 (1953) (arguing that the exceptions clause, as interpreted by *McCordle*, leads to the result that Congress may eliminate the Court's appellate jurisdiction).

142. ARISTOTLE, *supra* note 120, at 8.2.1317b17-1318a2.

143. *Id.* at 7.9.1310a2-11.

144. *Id.*

145. *Id.* at 6.4.1290a1-b20.

146. *Id.* at 6.4.1290a5-12.

147. *E.g.*, KURT VON FRITZ, THE THEORY OF THE MIXED CONSTITUTION IN ANTIQUITY 81 (1956). Aristotle adapted his classification scheme from Plato's *Statesman*. *Id.*

monarchy so that no group of citizens is able to abuse the rights of others.¹⁴⁸

B. Polybius

In his 1999 book about the origins of checks-and-balances theory, political historian Scott Gordon denies that Aristotle, or any other ancient Greek philosopher, contributed anything significant to the modern theory of separation of powers embodied in the U.S. Constitution.¹⁴⁹ Instead, Gordon credits the Greek-Roman historian Polybius with providing the idea's genesis.¹⁵⁰

Polybius (203-123 B.C.) was influential in Greek politics. However, his lasting contribution to constitutional theory is *The Histories*, a multi-volume account of the rapid, almost unprecedented rise of Roman power in the world.¹⁵¹ Polybius was held hostage in Rome for seventeen years and lived in Rome for several more years after he was freed.¹⁵² He therefore acquired extensive personal insight into the Roman system of government.¹⁵³ Book 6 of his forty-volume history is where separation of powers scholars have focused their attention.¹⁵⁴ Polybius does not develop a constitutional theory of his own in the book. He describes the Roman Constitution from the fifth century B.C. until the fall of the Roman Republic and characterizes

148. See generally MILLER, *supra* note 121, at ch. 7 (discussing Aristotle's acceptance of a "second-best" constitution as one that is achievable in practice).

149. SCOTT GORDON, CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY 83-84 (1999).

150. *Id.* Many scholars disagree. *E.g.*, M.I. FINLEY, POLITICS IN THE ANCIENT WORLD 58 (1983) (noting that Aristotle sketched the basic outlines of separation of powers theory "after the fact"); MILLER, *supra* note 121, at 259-61 (arguing that it is an "exaggeration to deny Aristotle has any idea of checks and balances"); M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 23-26 (2d ed. 1998) (same). As Section II.A indicates, I agree with those scholars who maintain that the origins of modern separation of powers theory can be found in Aristotle's *Politics*. Simpson adds an interesting twist: "Aristotle might even see the modern separation of powers as another (oligarchic) sophistry to deceive the populace. For under color of dividing power into different parts, it actually concentrates all of it into the same hands." SIMPSON, *supra* note 119, at 342. Simpson is probably correct as a matter of political *practice*—American politics is usually dominated by the rich—but the *theory* of the American Constitution is to the contrary.

151. F.W. Walbank, *Introduction* to 1 POLYBIUS, THE HISTORIES vii, vii-viii (Evelyn S. Shuckburgh trans., 1962) (146 B.C.).

152. GORDON, *supra* note 149, at 107-08.

153. *Id.*

154. *E.g.*, FRITZ, *supra* note 147, at 306; GORDON, *supra* note 149, at 107-10; see also ANDREW LINTOTT, THE CONSTITUTION OF THE ROMAN REPUBLIC 16-26 (1999); E.P. PANAGOPOULOUS, ESSAYS ON THE HISTORY AND MEANING OF CHECKS AND BALANCES 16-21 (1985).

the Roman Constitution as the type that all civilizations should aspire to emulate.¹⁵⁵

Polybius applies the Aristotelian theory of mixed government in his analysis of the Roman Constitution.¹⁵⁶ This schema—government by the one, the few, and the many—was reflected in the Roman Constitution in the following manner: monarchy was represented by the consuls, oligarchy by the senate, and democracy by the people (i.e., all of the full citizens of Rome participating in the assembly).

There were two consuls (technically, then, it was government by the “two,” rather than the “one”).¹⁵⁷ Each was elected by the assembly for a one-year term and each, at least until the end of the Republic, was required to be a member of the aristocracy. Consuls, “as masters of all public affairs,” had considerable power. All other magistrates, with the exception of the plebeian tribunes, were subject to their commands. Consuls were responsible for bringing urgent matters before the senate. They convoked the assembly. They introduced bills on which the assembly was to vote. They executed the assembly’s decisions. They had unfettered discretion to dispense funds from the public treasury. They also enjoyed total control of the military, including the power to punish those who served under their command.

The senate was comprised of members of the aristocracy.¹⁵⁸ Senators served for life. They controlled the public treasury (expenditures by the consuls excepted). They managed relations with foreign embassies, investigated crimes committed in Italy, and were responsible for settling disputes arising in Italy that were of public interest.

The people elected all public officers. They also had the power to confer honors and inflict punishment, “the two devices by which monarchies and republics, and in fact all human societies, are held together.”¹⁵⁹ They possessed the power to impose the death penalty, to try men for fines in certain cases, and to approve or reject legislation proposed by the consuls. The popular assembly exercised considerable decisionmaking authority regarding war and peace and had the final say over whether treaties with foreign states would be ratified.

155. See FRITZ, *supra* note 147, at 384-85. This source has been used as the translation of *The Histories* throughout this Section.

156. For the relevant text, see *id.* at 367.

157. Polybius discusses the powers of the consuls at part 12 of Book 6. *Id.*

158. Polybius discusses the senate at part 13 of Book 6. *Id.*

159. Polybius discusses the powers reserved to the people at part 14 of Book 6. *Id.* at 369-70.

Scholars long have debated the accuracy of Polybius's characterization of the powers of the three "branches" of the ancient Roman government.¹⁶⁰ However, they agree that Polybius explicates a checks-and-balances approach to the Roman Constitution.¹⁶¹ Gordon makes the point in particularly strong terms: "Whether or not one should regard Polybius as correct in interpreting Rome (or Sparta) in terms of a model of countervailing powers, he was the first writer to make a clear statement of that model and, as such, occupies a place of exceptional importance in the history of constitutional theory."¹⁶²

Polybius describes the checks and balances of the Roman Constitution as possessing the following characteristics.¹⁶³ The senate can check the consuls' power by, among other methods, withholding resources the consuls need to wage war (e.g., food, equipment, and compensation for soldiers) and refusing to extend a consul's command over a particular military campaign when his consul term expires. The people can check the consuls' power by annulling treaties or other agreements a consul may have negotiated with an enemy or foreign nation, insisting on a full accounting of actions taken by the consuls, and controlling who is elected to which magistracies, including to the consulship itself. The people can check the senate by, among other means, reducing the privileges, public honors, and powers of the senate and the private possessions of the senators (provided a bill to these effects was introduced in the assembly by a consul or senator) and by forbidding the execution of senate decrees (provided a plebeian tribune requested it). The senate can check the people via its control

160. *E.g., id.* at 161 (providing a specific example where Polybius's description of "legal and actual powers" seems inconsistent); LINTOTT, *supra* note 154, at 17 (noting that Polybius himself "warns us that his account is a simplification").

161. *E.g.,* LINTOTT, *supra* note 154, at 23 (noting that as Polybius describes it, any "overambitious element" of the Roman regime "finds that it is not independent but is checked by the countertension and opposition of the other elements"). Fritz is in notable disagreement. FRITZ, *supra* note 147, at 217-19 (arguing that "the political order of the Roman Republic can neither be called a mixed constitution nor a system of checks and balances" during the period Polybius describes).

162. GORDON, *supra* note 149, at 109; *see also* LINTOTT, *supra* note 154, at 24 ("The idea that the constitution is not only mixed, but founded on checks and balances, does not emerge gradually from the discussion, but is a presumption at the start or, if you like, a theorem which is proved"); VILE, *supra* note 150, at 40 (Polybius "provided the pattern for the transformation of the theory of mixed government into a theory of checks and balances, in which the agencies of government might not all have a distinct 'class' to represent, but might, of themselves, provide an institutional check within the government structure").

163. Polybius discusses the ways in which the powers retained by the Roman consuls, senate, and people can act as a check on one another at parts 15, 16, and 17 of Book 6. FRITZ, *supra* note 147, at 370-72.

over public contracts, and the consuls can check the people pursuant to their absolute control over persons engaged in military service.

Before turning to the specific question of judicial power, the focus of the present Article, it is important to note that the allocation of all government power under the Roman Constitution was changing frequently.¹⁶⁴ For example, at the beginning of the Roman Republic, consuls seemingly had absolute power over political decisions, whereas later the senate exercised many of the powers formerly held by the consuls, like the foreign affairs power.¹⁶⁵ In other words, while occupants of American constitutional offices have expressly defined functions (at least in formalistic terms), government officials under the Roman Constitution did not necessarily occupy offices with prescribed functions (e.g., when the consuls were preoccupied with war, the senate exercised some of their other powers).

All three “branches” of the Roman government possessed some degree of judicial power. The consuls, along with lesser magistrates appointed by them, exercised the majority of the judicial functions.¹⁶⁶ Prior to a couple of events explained below, there were only two exceptions to this allocation of judicial power. First, in trials concerning capital crimes, the accused could be convicted only by a majority vote of the people.¹⁶⁷ Second, the senate was endowed with jurisdiction over disputes of great public importance.¹⁶⁸ In these disputes, senators would serve as trial judges. However, what constituted a dispute of great public importance was determined through a majority vote of the people.¹⁶⁹ Kurt von Fritz concludes in his exegesis on Polybius’s political ideas that the judicial power was distributed in this manner to protect the people from oppression by their social superiors.¹⁷⁰

Historical events impacted the allocation of the judicial power described above. The most notable event was the passage of the Valerio-Horatian laws in or about 449 B.C. These laws, the enactment of which is arguably the single most important event in Roman history with respect to the separation of powers, established the inviolability

164. See generally LINTOTT, *supra* note 154, at 208-13 (describing changes over time in the balance of power among the various elements of the Roman Republic).

165. *Id.*

166. FRITZ, *supra* note 147, at 367.

167. *Id.* at 369. *But see* LINTOTT, *supra* note 154, at 150-56 (finding Polybius’s description inconsistent both internally and given external evidence of the practices of the period).

168. FRITZ, *supra* note 147, at 368.

169. *Id.* at 371.

170. *Id.* at ch. 9.

of the plebeian tribunes.¹⁷¹ The tribunes were elected by the people, and those elected were the most respected people of their class. Under the Valerio-Horatian laws, a plebeian tribune could intervene in any judicial proceeding in which it believed a plebeian was being treated inappropriately.¹⁷² In effect, this meant that the tribune, although not officially a judicial body, could decide the plebeian's fate, provided that the tribune reached its decision with the best interests of Rome in mind. Significantly, the tribune's decision could not be reversed by the consuls or the senate.¹⁷³

Another event that affected the judicial power in the Roman Republic occurred during the aftermath of the Gauls' conquest of Rome in 388 B.C.¹⁷⁴ After Rome reclaimed its territory, many property disputes ensued. In fact, there were so many disputes to resolve that the consuls had little time for their other responsibilities. As a result, praetorships were established to perform the consuls' judicial duties. Praetors were elected by the people, but the senate and the consuls could summon them to military service, if necessary.

As the preceding analysis of Book 6 of *The Histories* suggests, Polybius was describing a system of government in which power was distributed among different elements of government in a fashion that permitted each element to check and balance the others. He writes in an oft-quoted passage that the Roman Constitution was "so equally and harmoniously balanced, both in the structure of the political system and in the way it functioned in everyday practice, that even a native could not have determined definitely whether the state as a whole was an aristocracy, a democracy, or a monarchy."¹⁷⁵ Polybius's description of the Roman Constitution therefore seems similar to the standard characterization of the U.S. Constitution. However, the two constitutional systems are markedly different in that the institutions comprising the Roman Constitution were evolving constantly, whereas the institutions established by the U.S. Constitution always have performed designated core functions (at least in formalistic terms). With respect specifically to the judicial power, although there never existed in ancient Rome a branch of government whose sole responsibility was to adjudicate disputes, the Romans recognized that

171. *Id.* at 326-27.

172. *Id.* at 174.

173. *Id.* The Valerio-Horatian laws also empowered the plebeian tribunes to make laws binding upon the whole people. *Id.* The laws were named for two consuls who supported them. *Id.* at 174-75.

174. For the relevant text, see *id.* at 180-81.

175. *Id.* at 367.

disputes needed to be adjudicated in a reasoned and unbiased manner. This, as will be discussed below, also helps to explain why the U.S. Constitution establishes an independent federal judiciary. But unlike the U.S. Constitution, and much like the Aristotelian theory of mixed government, Rome distributed the judicial power among different *classes* of the Republic, instead of assigning it to a specific *institution* of government. Revealingly, by distributing power among the different social classes as it did, the Roman Constitution eventually failed in at least one crucial respect in which the U.S. Constitution was designed to succeed: the Roman Constitution permitted the majority in the assembly to trample the rights of individuals. The independent judiciary embodied in the U.S. Constitution, at least according to most non-popular constitutionalist accounts, is designed to protect individuals and minorities from overreaching by the majority.¹⁷⁶

C. Marsilius of Padua

The medieval period—the epoch dating from the fall of the Roman empire in the fifth century until the rise of national monarchies, the start of European overseas exploration, the humanist revival, and the Protestant Reformation—generally is regarded as a dormant time in the history of separation of powers, at least as far as political theorizing is concerned. Scott Gordon insists that, after Polybius, Venetian Gasparo Contarini (1483-1542) was the next political theorist of note, while M.J.C. Vile focuses on several theorists active during the English Civil War.¹⁷⁷ However, dismissing the medieval period neglects the contributions of Marsilius of Padua (1275-1342).¹⁷⁸

Little is known about Marsilius's early life, other than that he was rector of the University of Paris for a time.¹⁷⁹ He rose to prominence when the Holy Roman Emperor Louis IV enlisted his assistance in the Emperor's struggle with Pope John XXII over whether the Emperor could rule without the Pope's approval.¹⁸⁰ The

176. Cicero, the other prominent constitutional theorist of ancient Rome, did not articulate the countervailing interpretation of the Roman Constitution as strongly as Polybius did, but he appreciated the power of the plebeian tribunes to check the consuls. See CICERO, *DE RE PUBLICA, DE LEGIBUS* 169 (C.W. Keyes trans., 1988) (51 B.C.).

177. GORDON, *supra* note 149, at 158; VILE, *supra* note 150, at 34.

178. Vile discusses Marsilius briefly. VILE, *supra* note 150, at 29-31. Gordon does not mention him.

179. C. Kenneth Brampton, *Marsiglio of Padua: Part I. Life*, 37 *ENG. HIST. REV.* 501, 504 (1922).

180. See *id.* at 506-07.

result was the publication, in 1324, of Marsilius's treatise *Defensor Pacis* (*The Defender of the Peace*).¹⁸¹ The treatise concludes that all power is derived from the people; that the ruler is only the people's delegate; that there is no law but the popular will, as expressed in the ruler; that the church has no authority apart from the people; and that the power of the Holy See is self-arrogated.¹⁸²

Marsilius frequently references Aristotle's *Politics* in Discourse 1 of *Defensor Pacis*, the portion of the treatise dedicated to describing how government should be set up.¹⁸³ (Discourse 2 is devoted to criticizing the church, while Discourse 3 is a summary of the findings of the first two discourses.¹⁸⁴) As noted earlier, Aristotle's "best regime" consists of rule by the virtuous; it can be either kingship (rule by a supremely virtuous person) or aristocracy (rule by a group of virtuous citizens).¹⁸⁵ Marsilius, in contrast, argues for popular sovereignty.¹⁸⁶ It is unclear whether Marsilius wants the entire citizenry to rule—a form of government that Aristotle criticizes—or simply the aristocracy. Intellectual historian Otto Gierke concludes that Marsilius prefers the entire citizenry to rule, while Alexander Passerin D'Entreves maintains that Marsilius favors aristocratic rule.¹⁸⁷ The answer probably resides somewhere in the middle: Marsilius's *ideal* state is one in which all citizens legislate. His *realistic* state finds a smaller group representing the full citizenry.

With respect to the separation of powers, Alan Gewirth, another leading authority on Marsilius's political philosophy, maintains, as Gordon and Vile did years after him, that Marsilius is not a separation of powers theorist. Gewirth writes:

For Marsilius, political authority is unilinear: it moves in a straight line from the legislator, to the ruler who judges by authority of the legislator and thereby "executes" the law, to the military or police which exercises compulsion ultimately through the legislator's authority but immediately through the ruler's, and thereby itself "executes" the ruler's judgments. For Montesquieu, on the other hand, political authority moves in a circular direction, for each power—legislative, executive, judicial—is checked by the others, and no one is ultimate in the sense of controlling the others while not being controlled by them Marsilius' differentiation of the legislative and executive

181. Marsilius of Padua, in THE COLUMBIA ENCYCLOPEDIA (6th ed. 2007), available at <http://www.bartleby.com/65/ma/Marsiliu.html>. See generally MARSILIUS OF PADUA, THE DEFENDER OF THE PEACE (Annabel Brett ed. & trans., 2005) (1324).

182. MARSILIUS OF PADUA, *supra* note 181, at xxii–xxx.

183. *Id.* at 11-27, 30, 38-42, 45-50, 57-64, 66-70, 74-77, 83-95, 99-100, 105-07, 125-28, 135-36.

184. *Id.* at 139, 545.

185. See *supra* text accompanying note 125.

186. MARSILIUS OF PADUA, *supra* note 181, at 65-72.

187. ALEXANDER PASSERIN D'ENTREVES, THE MEDIEVAL CONTRIBUTION TO POLITICAL THOUGHT 54-57 (1959); OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE 46-47 (Frederic William Maitland trans., 1900).

functions is not, then, a separation *in radice* but rather a utilitarian device of economy, a division of labor for the sake of greater efficiency [T]his is only a methodological principle, and is not given the status of an absolutely necessary condition of political freedom such as Montesquieu makes of his separation of powers.¹⁸⁸

In my judgment, Gewirth fails to appreciate both the evolving nature of separation of powers theory—from Aristotle’s theory of mixed government to John Adams’s modifications of Montesquieu—and the role Marsilius’s most famous contribution to political theory—the separation of church and state—plays in the development of the theory. Given that this Article is devoted to exploring the *development* of separation of powers theory, especially as it concerns the origins of an independent judiciary, I will defer addressing Gewirth’s first oversight until later. It is appropriate to address his second oversight now.

As is well known, religion dominated all spheres of medieval life, including government.¹⁸⁹ However, Marsilius argues that no Pope or other churchman possesses coercive power, let alone plenitude of power.¹⁹⁰ In any state, there can be no more than one government, which must be secular (as the clergy has no coercive power, and government is coercive).¹⁹¹ From the single secular government all coercive power in the territory is derived.¹⁹² This, of course, is the doctrine of the separation of church and state, and Marsilius is credited with originating it.¹⁹³ But the doctrine has relevance for more than matters of American First Amendment law, for Marsilius presents his argument for the separation of church and state in *functional* terms (specifically, that the function of government is to keep peace on earth, while the role of the church is to prepare people for the afterlife)¹⁹⁴—a notable departure from Aristotle’s class-based taxonomy.¹⁹⁵ In fact, Marsilius also takes a functional approach to the

188. ALAN GEWIRTH, MARSILIUS OF PADUA AND MEDIEVAL POLITICAL PHILOSOPHY 234-35 (1951).

189. See, e.g., James Russell Gordley, *Law and Religion: An Imaginary Conversation with a Medieval Jurist*, 4 J.L. & RELIGION 193, 193 (1986) (“[Medievalists] lived in an Age of Faith while we live in a secular society.”).

190. GEWIRTH, *supra* note 188, at 275-76.

191. *Id.*

192. *Id.*

193. Gewirth argues that Marsilius can be read to fall on both sides of the church/state divide: “[T]he Marsilian system, viewed in its totality, provides the considerations which in modern times were to lead to the disestablished church and freedom of religion as well as to the established church and politically enforced religion.” *Id.* at 301-02.

194. *Id.* at 263.

195. See generally HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 536-37 (1983) (suggesting that the West’s understanding of the

allocation of government power: the ruler's responsibility is to execute the laws enacted by the people.¹⁹⁶ And while Marsilius does not speak directly to the independence of the judiciary—that would be left to Montesquieu and John Adams, with early assistance from Sir John Fortescue—the executive's function is judicial in nature, in that the ruler's role is to apply a statement of the people's law to a particular case.¹⁹⁷

D. John Fortescue

Sir John Fortescue (1394-1476) was an English jurist and political theorist who lived during the Renaissance, the historical age that followed the medieval period.¹⁹⁸ He was Chief Justice of the Court of the King's Bench from 1442-1461.¹⁹⁹ He also served as justice of the peace in twelve counties and on dozens of judicial commissions.²⁰⁰ He has been called "the most outstanding and original political writer in England in the fifteenth century."²⁰¹ He wrote several books examining the political theory of the English Constitution, *De Natura Legis Naturae*, *De Laudibus Legum Anglie*, and *Monarchia, or Governance of England*.²⁰² Fortescue's judicial career almost certainly explains why he emphasizes the judicial function in his description of government power more than his predecessors did, and this emphasis marks his contribution to the development of separation of powers theory in general and to the political theory of an independent judiciary in particular.

In his famous lectures on the history of constitutionalism, political scientist Charles Howard McIlwain rejected the notion that Fortescue contributed anything of consequence to modern separation of powers theory. McIlwain asserted that "there is nothing in Fortescue's words, or in the political institutions or ideas of the age he describes, of our modern doctrine or practice of 'checks and balances.' Government, so far as it was strictly government, was then a

separation of church and state was essential to the development of the constitutional doctrine of separation of powers).

196. GEWIRTH, *supra* note 188, at 168-69, 172.

197. *Id.* at 229-30.

198. H.J. Randall, *Sir John Fortescue*, 16 J. SOC'Y COMP. LEGIS. 248, 249-50 (1916).

199. *Id.*

200. ANTHONY GROSS, *THE DISSOLUTION OF THE LANCASTRIAN KINGSHIP: SIR JOHN FORTESCUE AND THE CRISIS OF MONARCHY IN FIFTEENTH-CENTURY ENGLAND* 70 (1996).

201. A.E. Levett, *Sir John Fortescue*, in *THE SOCIAL & POLITICAL IDEAS OF SOME GREAT THINKERS OF THE RENAISSANCE AND THE REFORMATION* 61, 61-62 (F.J.C. Hearnshaw ed., 1949).

202. GROSS, *supra* note 200, at 41-43.

discretionary power concentrated in a single hand.”²⁰³ McIlwain is incorrect. In fact, Fortescue anticipated Montesquieu, John Adams, and the framers of the U.S. Constitution in recognizing a special role for judges in a healthy constitutional regime.

Fortescue writes in support of what he calls a *dominium politicum et regale*, a kingdom both political and royal that he believes describes the England of his day.²⁰⁴ Note in the following passage what Fortescue says about the role of judges in this mixed regime:

For in the kingdom of England the kings make not laws, nor impose subsidies upon their subjects, without the consent of the three estates of the Realm. Nay, even the Judges of that kingdom are all bound by their oaths not to render judgment against the laws of the land, although they should have the command of the sovereign to the contrary.²⁰⁵

The uncommon emphasis Fortescue places on the judge’s role is not limited to his theoretical writings. In *Thorpe’s Case*, a controversy that concerned the imprisonment of the Speaker of the House of Commons for alleged criminal acts, Fortescue declines, in the name of all the judges of the King’s Bench, to answer the House of Lords’s question about whether the speaker’s imprisonment was legal.²⁰⁶ Chief Justice Fortescue writes:

[T]hey [the judges] ought not to answer to that question; for it hath not been used aforetime that the justices should in any wise determine the privilege of the High Court of Parliament; for it is so high and mighty in its nature that it may make law, and the determination and knowledge of that privilege belongeth to the Lords of the Parliament, and not to the justices.²⁰⁷

Fortescue is *not* arguing in either of the two quoted passages for the independence of the judiciary in the American conception of the institution. He plainly recognizes in the first passage that the courts of law are the crown’s, and in the second that Parliament, not the judges, makes the law. Nevertheless, Fortescue’s view of the courts is significant in the *development* of the concept of judicial independence. The first passage makes clear that Fortescue believes, as Sir Edward Coke did after him,²⁰⁸ that the ruling institutions of England are subject to the constraints of law, and that judges are charged with

203. CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM, ANCIENT AND MODERN* 92 (1940).

204. *E.g.*, J.H. Burns, *Fortescue and the Political Theory of Dominium*, 28 *HIST. J.* 777, 780 (1985).

205. Levett, *supra* note 201, at 69 (quoting JOHN FORTESCUE, *DE NATURA LEGIS NATURAE*).

206. *Id.* at 81.

207. *Id.* (quoting Fortescue).

208. *E.g.*, WILLIAM ARCHIBALD DUNNING, *A HISTORY OF POLITICAL THEORIES: FROM LUTHER TO MONTESQUIEU* 205 (1905) (describing Fortescue’s influence on Coke); JOHN MAXCY ZANE, *THE STORY OF LAW* app. III (2d ed. 1998) (same).

identifying what the law is.²⁰⁹ The second passage is an appreciation of the fact that judicial power has limits—it is, in effect, an early statement that judges have no constitutional authority to issue advisory opinions.²¹⁰ In both passages, then, Fortescue addresses, albeit briefly, the judiciary's role in a properly functioning constitutional regime.

E. Gasparo Contarini

Gasparo Contarini, a sixteenth century Italian diplomat, cardinal, and political theorist,²¹¹ was the next major figure in the origins of modern separation of powers theory—and, hence, in the political theory of an independent judiciary—because of his ability to wed the concept of mixed government to the notion of checks and balances among government institutions. Gordon credits Contarini as a transformative figure in this regard:

The notion of mixed government did not, of itself, denote a system of dispersed power. In its classical Greek formulation, the basic idea was that each of the pure forms of government had certain inherent properties that could be preserved in a mixed polity: the unity of the one, the wisdom of the few, and the liberty of the many. It is not a large step from this perspective to view these properties as associated with different political institutions, representing the three “elements.” It is a much greater step to construe these institutions as competing or mutually controlling centers of political power. Indeed, the grafting of this notion onto the concept of mixed government had no logical foundation. Nevertheless, it is clear from Gasparo Contarini's book on the government of Venice that, by the mid-sixteenth century, this interpretation of mixed government had begun to appear.²¹²

De magistratibus et republica Venetorum (The Commonwealth and Government of Venice) was written in or about 1523 and

209. For Coke's statement, see *Dr. Bonham's Case*, (1610) 77 Eng. Rep. 646, 652 (K.B.) (“In many cases the common law will controul acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void . . .”).

210. For a similar statement from the U.S. Supreme Court, see *Correspondence Between the Justices of the Supreme Court and President Washington* (Aug. 1793), in 3 *CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY* 488-89 (Henry P. Johnston ed., 1893) (“There being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to . . .”).

211. *E.g.*, ELISABETH G. GLEASON, *GASPARO CONTARINI: VENICE, ROME, AND REFORM* ch. 1 (1993).

212. GORDON, *supra* note 149, at 221.

published in 1543.²¹³ Contarini's treatise is an amalgam of the actual and the ideal: he describes Venice as it existed at the time of the treatise and he suggests how it can regain its mythical status as the perfect state.²¹⁴ *De magistratibus* is divided into five books. Book 1 addresses the location and origins of Venice and its basic political institution, the great council.²¹⁵ Book 2 focuses on the office of the *doge* (i.e., the chief magistrate),²¹⁶ and Books 3 and 4 describe the senate, the council of ten, and the *savi* (i.e., the heads of major executive boards).²¹⁷ Book 5 discusses the government of the Venetian *terraferma*.²¹⁸

Contarini extols the confluence of the monarchic, aristocratic, and democratic elements of the Venetian Constitution. He refers frequently to Aristotle and Polybius in the treatise,²¹⁹ but he also compares the Constitution to the harmony of beautiful music. He writes:

For as every mixture dissolves if any one of the elements (of which the mixed body is composed) overcomes the others; and as in music the tune is marred where one string keeps a greater note. By like reason, if you will have your commonwealth perfect and enduring, let not one part be mightier than the other, but let them all (in as much as they may be), have equal share in the public authority.²²⁰

Contarini identifies the monarchical principle operating in the *doge*; the aristocratic in the senate, the council of ten, and the *savi*; and the democratic in the great council.²²¹ The central, and original, part of Contarini's analysis is his claim that no single element is able to assume a dominant role in the government.²²² He sometimes employs the language of a "mixed constitution," but he is actually describing a system of checks and balances. According to Gordon, the significance of the checks-and-balances character of Contarini's analytical scheme "for the history of constitutional theory has yet to be fully appreciated."²²³ Historian Jutta Sperling agrees. She writes: "In

213. GLEASON, *supra* note 211, at 110-11. An English translation of Contarini's book is available at GASPARO CONTARINI, THE COMMONWEALTH AND GOVERNMENT OF VENICE (Lewes Lewkenor trans., 1599) (1543), <http://dewey.library.upenn.edu/SCETI/PrintedBooksNew/index.cfm?TextID=contarini&PagePosition=1>.

214. GLEASON, *supra* note 211, at 113.

215. CONTARINI, *supra* note 213, at 1-36.

216. *Id.* at 37-63.

217. *Id.* at 64-125.

218. *Id.* at 125-49.

219. *Id.* at 11, 34, 39, 43, 64-65, 69-70, 138-39, 141.

220. *Id.* at 67.

221. GLEASON, *supra* note 211, at 116.

222. *Id.* at 117.

223. GORDON, *supra* note 149, at 161.

struggling to apply Polybius's concept of a 'mixed constitution' to his analysis of the political system of Venice, Gasparo Contarini was among the first to formulate a new political rhetoric based on conflating antagonisms."²²⁴

Contarini, as Fortescue did before him, recognizes the importance of the courts in a well-functioning regime. He points out that, whereas the Romans left the prosecution of crime to private citizens, Venice employs a public prosecutor:²²⁵

In this matter our ancestors must be seen as having better imitated the nature of things and more wisely provided for concord among the citizens than the Romans. For since anyone who commits a crime primarily harms the laws and the Republic, he should especially be punished by the Republic.²²⁶

All of this said, Contarini was not Montesquieu, let alone John Adams or John Marshall. His system continued to be class-based, rather than function-specific.²²⁷ He subscribed to the conventional wisdom of his day that Venice's greatness was attributable to the virtue of its patrician class.²²⁸ Nobles had shaped the city; only they were full citizens, and only they could be permitted to govern.²²⁹ Because political office was the exclusive province of the nobility, Contarini's political theory was limited to the democratic, oligarchic, and monarchical elements within that class alone.²³⁰

F. Charles I

Charles I (1600-1649) was king of England, Scotland, and Ireland from March 27, 1625, until his execution in 1649 for high treason or, more specifically, for his purported efforts to wield absolute power.²³¹ Although it might seem strange to credit a monarch beheaded for tyranny as an influential figure in the origins of modern separation of powers theory, Charles I merits this distinction, both for

224. Jutta Sperling, *The Paradox of Perfection: Reproducing the Body Politic in Late Renaissance Venice*, 41 COMP. STUD. SOC'Y & HIST. 3, 15 (1999).

225. WILLIAM J. BOUWSMA, *VENICE AND THE DEFENSE OF REPUBLICAN LIBERTY: RENAISSANCE VALUES IN THE AGE OF THE COUNTER REFORMATION* 152 (1968).

226. *Id.* (translating GASPARO CONTARINI, *THE COMMONWEALTH AND GOVERNMENT OF VENICE* (1543)) (internal citation omitted).

227. See GLEASON, *supra* note 211, at 114-16.

228. *Id.* at 114-15.

229. *Id.* at 115.

230. *Id.* at 114-17.

231. History of the Monarchy: Kings & Queens of the United Kingdom (from 1603), Charles I, <http://www.royal.gov.uk/output/Page76.asp> (last visited Mar. 13, 2008).

his political theorizing about the subject and for the reaction to his theory.

The relations between King Charles and Parliament were always strained, to put it mildly.²³² Indeed, the House of Commons was responsible for Charles's eventual execution.²³³ However, before that fateful event, Parliament sent to the king *Nineteen Propositions* articulating Parliament's constitutional opinions and desires.²³⁴ Parliament demanded, among other concessions, that ministers in the king's government and senior judges be subject to parliamentary approval, that judges be afforded security of tenure, that members of Parliament be immune from arrest, that the crown's prerogative not include personal command of armed forces, and that privy councillors and judges take an oath to support the principles of the Petition of Right of 1628 (a statement of civil liberties sent by Parliament to Charles).²³⁵

King Charles's *Answer to the Nineteen Propositions* makes no mention of the divine right of kings.²³⁶ Instead, following Aristotle, Charles identifies three principal forms of government, notes their "conveniences and inconveniences," and declares England to be a perfect amalgam of the three.²³⁷ He writes:

There being three kinds of government among men, absolute monarchy, aristocracy and democracy, and all these having their particular conveniences and inconveniences, the experience and wisdom of your ancestors hath so moulded this out of a mixture of these as to give to this kingdom (as far as human prudence can provide) the conveniences of all three, without the inconveniences of any one, as long as the balance hangs even between the three estates.²³⁸

Intellectual historian J.G.A. Pocock concludes that with these words Charles I instituted a paradigm shift in Anglo-American constitutional theory—from absolute rule by a monarch to mixed government among checking and balancing political institutions.²³⁹ Charles goes on in his *Answer* to insist that Parliament's existing

232. *Id.*

233. *E.g.*, THE POLITICAL WORKS OF JAMES HARRINGTON 27 (J.G.A. Pocock ed., 1977).

234. The Nineteen Propositions (June 1, 1642), *reprinted in* THE STUART CONSTITUTION, 1603-1688: DOCUMENTS AND COMMENTARY 222, 222-26 (J.P. Kenyon ed., 1986).

235. *Id.*

236. The King's Answer to the Nineteen Propositions (June 18, 1642), *reprinted in* THE STUART CONSTITUTION, *supra* note 234, at 18-20.

237. *Id.* at 18.

238. *Id.*

239. THE POLITICAL WORKS OF JAMES HARRINGTON, *supra* note 233, at 20. *See generally* CORINNE COMSTOCK WESTON, ENGLISH CONSTITUTIONAL THEORY AND THE HOUSE OF LORDS, 1556-1832, at 44 (1965) (discussing the use of mixed government concepts in King Charles I's *Answer*).

authority is “sufficient to prevent and restrain the power of tyranny,” and thereby declines to accede to Parliament’s demands so as to preserve the balance of England’s “excellent constitution.”²⁴⁰

The practical consequence of King Charles’s refusal to accept Parliament’s propositions was noted above: he was executed. The significance of his theoretical account of the English Constitution as the perfect mix of monarchy, aristocracy, and democracy was the virtually uncontested notion of the balanced constitution that characterized English constitutional theory from the Glorious Revolution of 1688 forward. In fact, the seventeenth and eighteenth centuries are widely regarded as the golden age of English political theorizing about what, exactly, the balanced constitution was.²⁴¹ Two English theorists merit brief mention here because of what they had to say about the judiciary’s role in this constitutional schema—a role that Charles himself seemed to appreciate when he observed in his *Answer* that “the Lords, being trusted with a judicatory power, are an excellent screen and bank between the prince and people, to assist each against any encroachment of the other, and by just judgments to preserve that law which ought to be the rule of every one of the three”²⁴²

Most of the seventeenth and eighteenth century English separation of powers theorists focused on the separation of executive and legislative functions. John Locke was, of course, the most notable theorist of this type.²⁴³ The judicial function was considered a part of the executive power. Although it had been recognized since the writings of Sir John Fortescue that the judicial power was in some sense different from the other powers of government,²⁴⁴ the view that

240. The King’s Answer to the Nineteen Propositions, *supra* note 236, at 19.

241. See generally W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION 23-27 (1965) (discussing mixed government’s re-emergence as a prominent currency of European political thought); VILE, *supra* note 150, at 43-82 (exploring the boundaries and meaning of the balanced constitution). The Act of Settlement of 1701 was enacted during this period. It specified the line of succession to the throne and, most important for present purposes, established that English judges were to enjoy life tenure during good behavior. 12 & 13 Will. 3, c. 2, § 3 (Eng.).

242. The King’s Answer to the Nineteen Propositions, *supra* note 236, at 19.

243. On whether Locke, given his commitment to legislative supremacy, was a separation of powers theorist at all, see GWYN, *supra* note 241, at 66-81.

244. Sir Edward Coke echoed Fortescue’s position on a number of occasions, including in a 1607 statement:

[T]hat the King in his own person cannot adjudge any case, either criminal, as treason, felony, etc., or betwixt party and party, concerning his inheritance, chattels, or goods, etc., but this ought to be determined and adjudged in some court of justice according to the law and custom of England.

there were three *separate* powers of government emerged during the English Civil War, which began during the reign of Charles I and ended when Charles II ascended to the throne in the Restoration of 1660.²⁴⁵ The clearest expressions during this period of the distinct nature of the judicial power are found in Charles Dallison's *The Royalists Defence* (1648) and John Sadler's *Rights of the Kingdom* (1649).²⁴⁶ The thesis of Dallison's work anticipated the "celebrated"²⁴⁷ Montesquieu's *The Spirit of the Laws*, discussed below, by one hundred years: a proper government was one in which the three functions of government were in separate hands so that "every one is limited, and kept within his owne bounds."²⁴⁸ Dallison insisted that neither the crown nor Parliament had the authority to judge the laws—that was the responsibility of "the office of the Judges of the Realme."²⁴⁹ Parliament's function was "only to make new laws,"²⁵⁰ and the crown was "our onely Supream Governour."²⁵¹

A year later, John Sadler expressed a similar view. He wrote:

For, if *Lawmakers*, be *Judges*, of Those that break their Laws; they seem to judge in their Own Causes: Which our Law, and Nature it self, so much avoydeth and abhorreth. So it seemeth also to forbid, both the *Lawmaker*, and the *Judg*, to *Execute*: & by express Act of Parliament, it is provided, that *Sheriffs* be not *Justices*, where they be *Sheriffs* And besides All that was said before; This seemeth One Reason, why our Ancestors did so willingly follow the Voyce of *Nature*; in placing the Power *Legislative*, *Judiciall*, & *Executive*, in 3 distinct Estates; (as in *Animals*, *Aerials*, *Etherials*, or *Celestials*, 3 regions; and 3 Principles in *Naturals*;) that so, they might be forced to Consult Often, and Much; in All they did.²⁵²

G. Baron de Montesquieu

Charles-Louis de Secondat, Baron de La Brede et de Montesquieu (1689-1755), a French noble, jurist, and political

Id. at 6. Coke's focus in the quoted passage is on matters in which the crown is a party. (George Buchanan and Richard Hooker anticipated this position in the sixteenth century. VILE, *supra* note 150, at 34.) Coke's opinion in *Dr. Bonham's Case*, (1610) 77 Eng. Rep. 646 (K.B.), is an illustration of his commitment to the more expansive view expressed by Fortescue during the fifteenth century.

245. VILE, *supra* note 150, at 34.

246. CHARLES DALLISON, *THE ROYALISTS DEFENCE* (1648); JOHN SADLER, *RIGHTS OF THE KINGDOM; OR, CUSTOMS OF OUR ANCESTOURS* (1649). Vile emphasizes Dallison and Gwyn stresses Sadler. VILE, *supra* note 150, at 50-52; GWYN, *supra* note 241, at 54-56.

247. THE FEDERALIST NO. 47 (James Madison), *supra* note 86, at 301.

248. DALLISON, *supra* note 246, at 126.

249. *Id.* at 47-48.

250. *Id.* at 56.

251. *Id.* at 60.

252. SADLER, *supra* note 246, at 87, 92.

philosopher, was the author of two influential books: *The Persian Letters* (1721), a novel that established his literary reputation, and *The Spirit of the Laws* (1748), a seminal work of political science that is universally regarded as playing a pivotal role in the development of modern separation of powers theory.²⁵³

By “*The Spirit of the Laws*” (in the original French, “*De l’esprit des lois*”),²⁵⁴ Montesquieu means the rational basis for the existence of laws. The work’s objective is to explain human laws and social institutions, and the author’s methodology is largely sociological.²⁵⁵ He concludes that the type of government that exists in a particular regime is the result of the specific circumstances of that regime, both physical (e.g., climate, geography) and social (e.g., mores, religion).²⁵⁶ He identifies as the main species of government the republic (either democratic or aristocratic), monarchy, and despotism.²⁵⁷ He claims that each form of government has an animating principle—a set of “human passions that set it in motion”—and that each form can be corrupted if its animating principle is undermined.²⁵⁸ In his analysis of the one government that had liberty as its animating principle—England—Montesquieu penned one of the most famous passages in the history of political ideas:

When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that same monarch or senate that makes tyrannical laws will execute them tyrannically. Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor. All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.²⁵⁹

253. M. DE MONTESQUIEU, PERSIAN LETTERS (Mr. Flloyd trans., 4th ed. 1792) (1721); M. DE MONTESQUIEU, THE SPIRIT OF THE LAWS (Anne M. Cohler et al. eds. & trans., 1989) (1748). Vile insists that Montesquieu’s influence cannot be attributed to any “originality” on his part, but rather to the “manner and timing of the doctrine’s development in his hands.” VILE, *supra* note 150, at 83. Vile contends that the “fertile ground” of the British colonies in North America was largely responsible for Montesquieu’s subsequent acclaim. *Id.* at 85.

254. All translations in this Section are from MONTESQUIEU, THE SPIRIT OF THE LAWS, *supra* note 253.

255. Herbert Spencer (1820-1903) is regarded as the founder of modern sociology, but Montesquieu’s methodology in *The Spirit of the Laws*, which preceded Spencer’s work, is unquestionably sociological. See generally MONTESQUIEU, THE SPIRIT OF THE LAWS, *supra* note 253; HERBERT SPENCER, SOCIAL STATICS (1851).

256. MONTESQUIEU, THE SPIRIT OF THE LAWS, *supra* note 253, at 7-9.

257. *Id.* at 10.

258. *Id.* at 21, 30.

259. *Id.* at 157.

Perhaps the best way to understand Montesquieu's schema is to compare it to Aristotle's analysis of government powers.²⁶⁰ As described earlier, Aristotle writes of the deliberative, magistrative, and judicial functions of government.²⁶¹ The deliberative function covers important common affairs, including war and peace, lawmaking, appointing magistrates, and the adjudication of major crimes. The magistrative function concerns the issuance of instructions and orders in more limited areas, including strategy and finance. The judicial function involves adjudicating disputes that are not major crimes. Aristotle does not distribute the legislative, executive, and judicial powers of government among different people, as his deliberative function indicates. Of course the distribution of legislative, executive, and judicial powers is at the heart of Montesquieu's theory for safeguarding liberty. Indeed, as the above-quoted passage makes clear, it *is* Montesquieu's theory.

This said, Montesquieu's characterization of government power is not the same as that embodied in the U.S. Constitution, despite the conventional wisdom to the contrary.²⁶² The preferred system of checks and balances that Montesquieu describes in *The Spirit of the Laws* is not the three famous powers—legislative, executive, and judicial—but the established English scheme of king, lords, and commons.²⁶³ He writes: “Among the three powers of which we have spoken that of judging is in some fashion, null.”²⁶⁴ He maintains that “only two” powers truly matter—the legislative and the executive—and that the “part of the legislative body composed of the nobles is quite appropriate” for checking legislative abuse.²⁶⁵

Likewise overlooked is that Montesquieu identifies the judicial power—“that of judging the crimes or the disputes of individuals”—with petit juries, rather than with a judge in a robe.²⁶⁶ “In England,” Montesquieu proclaims in a much-neglected passage, “the jury decides whether the accused is guilty or not of the deed brought before it; and,

260. David Lowenthal, *Montesquieu*, in *HISTORY OF POLITICAL PHILOSOPHY* 513, 523 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987).

261. For the relevant text, see *supra* Part II.A.

262. For expressions of the conventional wisdom, see SAMUEL KERNELL & GARY C. JACOBSON, *THE LOGIC OF AMERICAN POLITICS* 51 (3rd ed. 2006); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 149 (7th ed. 2004).

263. MONTESQUIEU, *THE SPIRIT OF THE LAWS*, *supra* note 253, at 160.

264. *Id.*

265. *Id.*

266. *Id.* at 157.

if he is declared guilty, the judge pronounces the penalty imposed by law for this deed; and he needs only his eyes for that.”²⁶⁷

Although Montesquieu did not afford the judiciary the independent status that it eventually would enjoy in the United States, he did contribute more to the political theory of an independent judiciary than the preceding paragraphs might suggest. In fact, Vile argues that Montesquieu’s treatment of the judicial power is where his “greatest innovatory importance lies.”²⁶⁸ First and foremost, Montesquieu placed the judicial power on analytical par with the legislative power and the executive power, and he likewise emphasized the trinity of the branches of government. Theorists, including the American founders, almost always benefit from analytical categorization. Montesquieu also insisted that judges—again, he meant petit juries—should interpret the law, rather than make it: “it is in the nature of the constitution for judges to follow the letter of the law. No law can be interpreted to the detriment of a citizen when it is a question of his goods, his honor, or his life.”²⁶⁹ Similarly, Montesquieu recognized that due process was at the heart of the judicial power and essential to liberty itself:

If you examine the formalities of justice in relation to the difficulties a citizen endures to have his goods returned to him or to obtain satisfaction for some insult, you will doubtless find the formalities too many; if you consider them in their relation to the liberty and security of the citizens, you will often find them too few, and you will see that the penalties, expenses, delays, and even the dangers of justice are the price each citizen pays for his liberty.²⁷⁰

Finally, Montesquieu objected vigorously to the notion that executive officials (in England, royal ministers) should sit as judges because “tribunals of the judiciary must . . . be . . . neutral in all matters of business.”²⁷¹

H. John Adams

John Adams (1735-1826) of Massachusetts—a leader of the American Revolution, an influential diplomat, the Vice President of the United States under George Washington, and the successor to Washington as President of the United States—was the American

267. *Id.* at 76.

268. VILE, *supra* note 150, at 96.

269. MONTESQUIEU, THE SPIRIT OF THE LAWS, *supra* note 253, at 76.

270. *Id.* at 74.

271. *Id.* at 80. Of course England is not America, and the judicial power continues to be wielded by the upper house of the English legislature in a manner that the Federal Constitution of 1787 would not permit (i.e., the House of Lords is the highest court in the land).

founding's most sophisticated political theorist.²⁷² Adams's most systematic work on government was the three-volume treatise, *A Defence of the Constitutions of Government of the United States of America*, published in 1787.²⁷³ A dramatic departure from his earlier writings, it extolled the English theory of a balanced constitution and was criticized by James Madison for being out of touch with the constitutional thinking of the day.²⁷⁴ But no theoretical writing on political architecture penned by an American founder was more influential than Adams's 1776 pamphlet, *Thoughts on Government*.²⁷⁵ Indeed, *Thoughts on Government* was to be the final step in the political theory of an independent judiciary eventually embodied in Article III of the U.S. Constitution.²⁷⁶

Adams had been writing about the need for an independent judiciary since at least January and February of 1773, when he engaged in a series of exchanges on the matter in the Boston press with William Brattle.²⁷⁷ Brattle, a Tory, insisted that proposed payment of judicial salaries by the crown should not concern the people of Massachusetts Bay, as the judges of the colony's superior court, like their brethren in England, enjoyed tenure so long as they behaved well. Adams, after conducting an extensive historical review of the subject, countered that Brattle was wrong to suggest that judges in England, let alone in America, held their offices during good behavior. Consequently, Adams perceived the crown's proposed control over judicial salaries as an additional threat to the independence of the Massachusetts judiciary.

272. *E.g.*, C. BRADLEY THOMPSON, *JOHN ADAMS AND THE SPIRIT OF LIBERTY* xii-xix (1998); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 567-69 (1969). *See generally* DAVID McCULLOUGH, *JOHN ADAMS* (2001).

273. JOHN ADAMS, *A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA* (1971) (1787).

274. Letter from James Madison to Thomas Jefferson (June 6, 1787), in 10 *THE PAPERS OF JAMES MADISON* 28, 29-30 (Robert A. Rutland et al. eds., 1977).

275. JOHN ADAMS, *THOUGHTS ON GOVERNMENT* (1776), reprinted in 4 *THE WORKS OF JOHN ADAMS* 193, 193-200 (Charles Francis Adams ed., 1851). For commentary on the work's influence, see McCULLOUGH, *supra* note 272, at 101-03; THOMPSON, *supra* note 272, at 298 n.8; WOOD, *supra* note 272, at 568.

276. Sir William Blackstone anticipated Adams on the importance of independent and professional judges, rather than ad hoc juries, to the preservation of liberty. WILLIAM BLACKSTONE, 1 *COMMENTARIES ON THE LAWS OF ENGLAND* 259-60 (Stanley Nader Katz ed., 1979) (1765-69). However, Blackstone, unlike Adams, was strongly committed to the doctrine of legislative supremacy. *Id.* at 91.

277. The letters are available in *THE PAPERS OF JOHN ADAMS VOLUME 1: SEPTEMBER 1755-OCTOBER 1773*, at 252-309 (Robert J. Taylor ed., 1977).

Adams revisited the matter of an independent judiciary in *Thoughts on Government*.²⁷⁸ The pamphlet—a clarion call for separation of powers written in response to Thomas Paine’s recommendation in *Common Sense* that all government power be vested in a unicameral legislature—was influential in a number of state constitutional conventions beyond Massachusetts, including those in New Jersey, New York, North Carolina, and Virginia.²⁷⁹ Adams maintains that the pamphlet was inspired by a number of the great political theorists of his day, specifically by Harrington, Sydney, Hobbes, Nedham, and Locke.²⁸⁰ (Surprisingly, no mention is made of Montesquieu, although Adams does discuss him in *A Defence of the Constitutions of Government of the United States of America*.)²⁸¹

Adams argues in *Thoughts on Government* for a bicameral legislature: a representative assembly, “an exact portrait in miniature of the people at large,” and a smaller “council” chosen by the assembly and designed to “check and correct [the assembly’s] errors.”²⁸² The executive, the “governor,” should be chosen by the two houses of the legislature on an annual basis, and he should be endowed with the authority to veto legislation.²⁸³ Most important of all, as far as the political theory of an independent judiciary is concerned, Adams explains in no uncertain terms the significance of judicial independence to any form of government dedicated to the preservation of liberty. He writes:

The dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that.²⁸⁴

278. ADAMS, *supra* note 275.

279. *E.g.*, JOHN ADAMS, *Autobiography of John Adams*, in 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 330-35 (L.H. Butterfield ed., 1961). Adams wrote several versions of the pamphlet. He also pushed through the Continental Congress in May of 1776 a resolution urging that states adopt frames of government to facilitate the transition to independence. The resolution recommended

to the respective Assemblies and Conventions of the United Colonies, where no government sufficient to the exigencies of their affairs hath been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.

2 THE WORKS OF JOHN ADAMS, *supra* note 275, at 489.

280. ADAMS, *supra* note 275, at 194.

281. ADAMS, A DEFENCE OF THE CONSTITUTIONS, *supra* note 273, at 153-58.

282. ADAMS, *supra* note 275, at 195.

283. *Id.* at 196-97.

284. *Id.* at 198.

Adams thus recommends that judges be “nominated and appointed by the governor, with the advice and consent of council.”²⁸⁵ However, he argues for more than merely making the judiciary a separate branch of government. He calls for stable judicial compensation and tenure so long as judges behave well: “[T]hey should hold estates for life in their offices; or, in other words, their commissions should be during good behavior, and their salaries ascertained and established by law.”²⁸⁶ He also insists that judges who misuse their offices should be impeached by the “house of representatives . . . before the governor and council” and, “if convicted, should be removed.”²⁸⁷

The Federal Constitution of 1787 excluded the executive from the impeachment process, but otherwise contained principles identical to Adams’s proposal. Article III, Section 1, provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.²⁸⁸

As David McCullough puts it in his Pulitzer Prize winning biography of John Adams, “[l]ittle that Adams ever wrote had such effect as his *Thoughts on Government*.”²⁸⁹

III. JUDICIAL INDEPENDENCE, JUDICIAL REVIEW, AND INDIVIDUAL RIGHTS

A. Judicial Independence and Judicial Review

Government institutions do not spring fully formed from the pen of constitutional framers like Athena from the brow of Zeus. They develop over time, and they are shaped by political theorists. The judicial institution embodied in the U.S. Constitution is no different. Part II of this Article argued that the political theory of an independent judiciary is the culmination of the work of eight political

285. *Id.*

286. *Id.*

287. *Id.* at 198-99.

288. U.S. CONST. art. III, § 1.

289. MCCULLOUGH, *supra* note 272, at 103. Adams was in Europe on a diplomatic mission during the Federal Convention of 1787. However, as Zoltan Haraszti concludes in his classic study of Adams’s bibliographic influences, Adams “exerted an enormous influence on the debates of the Federal Convention.” ZOLTAN HARASZTI, JOHN ADAMS & THE PROPHETS OF PROGRESS 31 (1952). Adams’s extensive personal library contained the works of the political theorists who preceded him. *Id.* at ch. 2.

theorists writing over the span of twenty-two centuries, with each building on the contributions of the others. It all began with Aristotle's theory of a mixed constitution, a theory that divided government into three parts, with each part representing a political class of the regime. Next came Polybius, who emphasized the checking and balancing of government power, albeit power still divided along class, rather than institutional, lines. Marsilius of Padua was the initial political theorist to focus on the function of particular institutions, while Sir John Fortescue was the first to appreciate the unique role of the judiciary. Gasparo Contarini was responsible for marrying the Aristotelian theory of mixed government to the concept of checks and balances, and Charles I took the pivotal step of committing Anglo-American constitutional theory to the notion of balance among political institutions, rather than dominance by one. Montesquieu contributed the most famous idea of all: that political power should be divided among the legislative, executive, and judicial branches of government so as to ensure the people's liberty. Finally, John Adams argued that judges, and not simply temporary juries (as Montesquieu had argued), need to be independent from the executive and legislative branches, and that this independence would be possible only if judges were afforded tenure so long as they behaved well and were paid adequate and stable salaries. In sum, although political architecture is not solely the provenance of political theorists, without political theory America's constitutional framers could not have used the lessons of history to create a judicial branch whose independence plays such an essential role in the preservation of freedom.

But where does judicial review—the object of popular constitutionalists' ire—fit into the political theory of an independent judiciary explored in Part II? The answer is not difficult to explain. First, as Part I.C described, without judicial review the Supreme Court would have no “constitutional control” over the President and Congress.²⁹⁰ As a consequence, judicial review is an inevitable component of the Constitution's commitment to checks and balances. To make the point somewhat differently, while most scholars emphasize what might be called the “vertical” origins of judicial review—the notion that there exists a hierarchy of laws and that when a court finds an inferior law repugnant to a superior law, it ought to invalidate the inferior law²⁹¹—an investigation into the origins of judicial review that takes seriously the history of ideas reveals that the doctrine's genesis is more accurately traced to the

290. THE FEDERALIST NO. 48 (James Madison), *supra* note 86, at 308.

291. *E.g.*, Bilder, *The Corporate Origins of Judicial Review*, *supra* note 71.

“horizontal” idea of separation of powers. Second, judicial review is the ultimate expression of judicial independence, because without judicial independence no court could safely void an act of a coordinate political branch. Bluntly stated, the risk to a judge who exercises judicial review when he is not independent of the executive and the legislature is either removal from the bench or a reduction in salary. John Adams knew this, and so did the framers who met in Philadelphia during the summer of 1787 when they wrote Adams’s theory of judicial independence into Article III.

B. Judicial Review and Individual Rights

Equally important, the political theory of an independent judiciary likewise suggests *how* judicial review should be exercised: to protect individual rights *from* “the people themselves.” An examination of the handful of pre-Federal Constitution precedents for judicial review makes plain that early American lawyers and judges understood this, and popular constitutionalists need to understand it today. Given the present Article’s focus on political development, the analysis of the pre-Federal Constitution precedents will not be confined to cases in which a court declared an executive or legislative act unconstitutional. It also will examine cases in which a court was asked to do so, or considered doing so, but ultimately did not.²⁹²

The first recorded statement of judicial review in America is generally thought to have been made by James Otis before the Massachusetts Superior Court in 1761 in the famous writs of assistance case, *Paxton v. Gray*.²⁹³ According to a young John Adams,

292. William Michael Treanor claims to have located “more than six times as many cases [of judicial review] from the early Republic as the leading historical account found.” William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 455 (2005). Sylvia Snowiss, the author of that leading historical account, found five pre-*Marbury* precedents for judicial review. SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990). However, Treanor fails to consider the early cases in which a court was asked to exercise judicial review, or considered doing so, but ultimately did not. This oversight causes him to misunderstand *how* judicial review was expected to be practiced. He insists that the original understanding of judicial review was to protect the structural integrity of the judicial process and the national political process, rather than individual rights. Akhil Reed Amar appears to agree with Treanor’s conception of the original understanding of judicial review but, in an otherwise intriguing discourse on America’s Constitution, he too neglects to consider cases in which a court was asked to exercise judicial review, or considered exercising it, but declined. See AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 212-13 (2005).

293. For the relevant facts of the case, see James Otis, Speech on the Writs of Assistance (Feb. 24, 1761), in 2 THE WORKS OF JOHN ADAMS, *supra* note 275, at 521-24. For compelling discussions of two earlier cases, both from South Carolina, see JAMES LOWELL UNDERWOOD, THE CONSTITUTION OF SOUTH CAROLINA: VOLUME I: THE RELATIONSHIP OF THE LEGISLATIVE, EXECUTIVE, AND JUDICIAL BRANCHES 30, 147-48 (1986), which discusses *Dymes v. Ness* (1724),

who chronicled the case, in dispute was a request by the royal customs office that the court issue general search warrants, or writs of assistance, because particular search warrants had proved ineffective in the customs office's efforts to curb smuggling. Nothing was more repugnant to the colonists' conception of individual rights than general searches, violating as they did the cherished maxim that "a man's house is his castle." Otis was so strongly opposed to the idea of general search warrants that he not only refused to argue the case on behalf of the customs office, as was his charge as the king's advocate in the province, but he decided to represent the local merchants instead. Significantly, Otis's argument against the general search warrants centered on the power of a court to void legislation that conflicts with the constitution. In Otis's words: "As to acts of Parliament. An act against the Constitution is void; an act against natural equity is void; and if the act of Parliament should be made, in the very words of the Petition, it would be void. The executive Courts must pass such acts into disuse."

When Otis argued the writs of assistance case, the doctrine of legislative supremacy held sway. It therefore should come as no surprise that he lost the case. This fact notwithstanding, Otis's argument for judicial review as a means for protecting individual rights was a milestone in American history, portending as it did events to come. According to Adams, Otis's argument about the unenforceability of legislative acts that contravene constitutional rights was so influential that with it "the child of independence was born."²⁹⁴

Robin v. Hardaway (1772) is another noteworthy pre-Revolution case that illustrates that the principal purpose of judicial review is to protect individual rights.²⁹⁵ In that case, George Mason, an influential Virginia lawyer who later opposed the ratification of the Federal Constitution because it did not contain a bill of rights, argued that a 1682 Virginia law giving slave traders the right to sell the descendants of Native Americans as slaves violated the Native Americans' natural rights—the philosophical foundation for individual rights in classical liberal political theory—and was, therefore, void.²⁹⁶ In Mason's words:

and Robert Cook, *Judicial Review and Legislative Power*, in *SOUTH CAROLINA LEGAL HISTORY* 81, 83-96 (Herbert A. Johnson ed., 1980), which discusses *Rex v. Mellichamp* (1736). Historians likely will discover still more precedents in future research.

294. Letter from John Adams to William Tudor (Mar. 29, 1817), in 10 *THE WORKS OF JOHN ADAMS*, *supra* note 275, at 248.

295. 1 Jeff. 109 (Va. 1772).

296. *Id.* at 113.

[A]ll acts of the legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void. The laws of nature are the laws of God; whose authority can be superseded by no power on earth. A legislature must not obstruct our obedience to him from those whose punishments they cannot protect us. All human constitutions which contradict his laws, we are in conscience bound to disobey. Such have been the adjudications of our courts of justice.²⁹⁷

A forceful advocate, Mason no doubt overstated the frequency with which judges in 1772 were striking down legislation they deemed violative of higher law. In fact, the judges in *Robin v. Hardaway* worked hard to avoid commenting on the legitimacy of the statute in question. In a maneuver reflective of the still widespread commitment to legislative supremacy,²⁹⁸ the judges concluded that the statute had been repealed in 1705.²⁹⁹ They were not, therefore, required to assess the statute's constitutionality as Mason had requested.³⁰⁰ Nevertheless, Mason's argument, like Otis's before it, was representative of the bar's growing willingness to challenge legislative power that infringed on individual rights by invoking the power of a court to curb it.

This trend continued after the colonists declared independence. For example, in *Commonwealth v. Caton*, the Virginia Court of Appeals, the state's highest tribunal, addressed the constitutionality of a 1776 Virginia statute that moved the pardon power from the executive to the legislature.³⁰¹ The statute was before the Virginia court because a dispute arose when the lower legislative house pardoned three men condemned to death for treason, and the upper house refused to concur. The Attorney General, seeking to enforce the death sentences, insisted that the pardons were ineffective because the statute required the assent of both legislative houses. The condemned men disagreed, arguing that the statute granted the pardoning power to the lower house alone or it was unconstitutional. The judges sided with the Attorney General. More significantly, they held that they had the power to strike down laws that violated the Constitution. Although individual rights were at stake—the condemned men's right not to be killed—*Caton* was chiefly about the allocation of governmental power: specifically, about where the pardon power resided. Nevertheless, Judge George Wythe's opinion in the

297. *Id.* at 114.

298. Colonel Bland, arguing the case for the defendants, emphasized legislative supremacy. *Id.* at 118.

299. *Id.* at 123.

300. *Id.*

301. For the relevant facts of the case, see 8 Va. (4 Call) 5, 5-8 (Va. 1782).

case reveals that these early judges were well versed in political theory generally and in separation of powers theory specifically:

Among all the advantages, which have arisen to mankind, from the study of letters, and the universal diffusion of knowledge, there is none of more importance, than the tendency they have had to produce discussions upon the respective rights of the sovereign and the subject; and, upon the powers which the different branches of government may exercise. For, by this means, tyranny has been sapped, the departments kept within their own spheres, the citizens protected, and general liberty promoted.³⁰²

Judge Wythe, who was John Marshall's law teacher, also indicated that it is a *judge's* responsibility to check overreaching by the political branches. He wrote:

[I]f the whole legislature, an event to be deprecated, should attempt to overleap the bounds, prescribed to them by the people, I, in administering the public justice of this 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.³⁰³

One of the most intriguing of the early state court cases is *Rutgers v. Waddington*, argued by Alexander Hamilton.³⁰⁴ At issue was whether Hamilton's client, a British citizen named Joshua Waddington, committed a trespass by occupying plaintiff Elizabeth Rutgers's property during the American Revolution. Rutgers sued Waddington pursuant to a New York statute that entitled any person who vacated his or her property under threat of the war to recover in trespass against any person who occupied or destroyed the property. Hamilton, like Otis and Mason before him, emphasized in his argument the need for the judiciary to protect his client's individual rights: "The enemy having a right to the use of the Plaintiffs property & having exercised their right through the Defendant & for valuable consideration he cannot be made answerable to another without injustice and a violation of the law of Universal society."³⁰⁵

The court was fully aware of the thrust of Hamilton's argument. The judges noted that Hamilton's defense centered on the claim that "statutes against law and reason are void."³⁰⁶ And the court appeared to accept Hamilton's position:

[W]e profess to revere the rights of human nature; at every hazard and expence we have vindicated, and successfully established them in our land! and we cannot but reverence

302. *Id.* at 7.

303. *Id.* at 8.

304. For the relevant facts of the case, see 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 393-419 (Julius Goebel Jr. ed., 1964).

305. *Id.* at 373.

306. *Id.* at 395.

a law which is their chief guardian—a law which inculcates as a first principle—that the amiable precepts of the law of nature, are as obligatory on nations in their mutual intercourse, as they are on individuals in their conduct towards each other; and that every nation is bound to contribute all in its powers to the happiness and perfection of others!³⁰⁷

But despite this strong language about the importance of protecting individual rights, the court upheld the statute, explicitly acknowledging the supremacy of the legislature.³⁰⁸ The court did, however, deny the plaintiff relief.³⁰⁹ The court's inconsistent actions suggest that the judges were torn between their increasing awareness of the need for judges to protect individual rights and their lingering commitment to the doctrine of legislative supremacy.

In a Connecticut decision the following year, such inconsistency was conspicuously absent. The *Symsbury Case* involved a land dispute between two neighboring towns.³¹⁰ Originally, title to a plot of land was held by the town of Symsbury. Subsequently, the town of New Hartford performed a survey and found that the land was located within its town limits. The state legislature agreed and granted title to New Hartford. The proprietors of Symsbury sued, demanding that title be returned to them. The court ruled in favor of Symsbury. In the court's judgment, the act of the state legislature granting title to New Hartford "could not legally operate to curtail the land before granted to the proprietors of the town of Symsbury, without their consent."

Brief though it is, the court's decision in the *Symsbury Case* is important for two related reasons. First, the decision is plainly an early example of judicial review. Second, the decision is further evidence of a growing awareness among judges that they must serve as a check against legislative power when individual rights—such as the right to property—are at stake.

Trevett v. Weeden is another landmark case in the development of judicial review. As is so often true of cases from the early days of the American Republic, the opinion of the court has not been found. However, a widely read account of the case by James Varnum, the lead defense attorney, is available.³¹¹ At issue was a controversial Rhode Island statute that required local merchants to accept paper money as legal tender—a requirement that, given the inflationary

307. *Id.* at 400.

308. *Id.* at 415.

309. *Id.* at 419.

310. For the relevant facts of the case, see 1 Kirby 444, 444-47 (Conn. 1785).

311. JAMES M. VARNUM, THE CASE, *TREVETT AGAINST WEEDEN: ON INFORMATION AND COMPLAINT, FOR REFUSING PAPER BILLS IN PAYMENT FOR BUTCHER'S MEAT, IN MARKET, AT PAR WITH SPECIE* (1787). The discussion of the case is drawn from *id.* at 1-2, 11, 27, 35.

pressures of the day, the merchants opposed. Merchants who refused to accept paper money were subject to arrest and to trial without the benefit of a jury. Varnum's client was one such merchant.

Varnum made a variety of arguments in defense of his client but, according to Varnum himself, "by far the most important" was a direct challenge to the statute's constitutionality. Varnum claimed both that the statute was unconstitutional and that the judges must declare it so:

The true distinction lies in this, that the legislative have the uncontrollable power of making laws not repugnant to the constitution; the judiciary have the sole power of judging of those laws, and are bound to execute them; but cannot admit any act of the legislative as law, which is against the constitution.

Just as important as Varnum's comments about the existence of the power of judicial review was his argument about how that power should be exercised: to protect individual rights. Varnum's substantive attack on the statute was that trial by jury is an "unalienable right" that the legislature cannot justly infringe, and his argument to the court was replete with references to the sanctity of individual rights and to the fact that the American regime was founded to secure them.

Unfortunately, because the court's opinion has not been found, the court's reaction to Varnum's argument is somewhat unclear. Newspaper reports suggest that most judges were receptive to Varnum's position. Resolutions passed by the Rhode Island legislature condemning the judges' handling of the case provide additional evidence of this fact.³¹²

The most famous of the pre-Federal Constitution precedents for judicial review is *Bayard v. Singleton*.³¹³ Like most states during the American Revolution, North Carolina confiscated property held by individuals who remained loyal to the British. At issue in the case was a statute that required judges to dismiss, without regard to merit, any action brought by an individual seeking to recover title to confiscated property. In a short opinion, the North Carolina Court of Conference—the predecessor to the North Carolina Supreme Court—unanimously declared the statute unconstitutional on the ground that an individual seeking to recover title to confiscated property was entitled to a jury trial on the merits of his claim.

312. *E.g.*, IRWIN H. POLISHOOK, RHODE ISLAND AND THE UNION: 1774-1795, at 133-42 (1969).

313. For the relevant facts of the case, see 1 N.C. 5, 5-10 (1787).

The court undoubtedly was influenced by a widely discussed letter “To the Public,” published in a local newspaper.³¹⁴ The letter was written by James Iredell, the plaintiff’s co-counsel and a future member of the pre-*Marbury* U.S. Supreme Court. Iredell emphasized the need to curb the legislature, and he did so by drawing on the lessons of the American Revolution. He wrote:

It was, of course, to be considered how to impose restrictions on the legislature, that might still leave it free to all useful purposes, but at the same time guard against the abuse of unlimited power, which was not to be trusted, without the most imminent danger, to any man or body of men on earth. We had not only been sickened and disgusted for years with the high and almost impious language from Great Britain, of the omnipotent power of the British Parliament, but had severely smarted under its effects. We felt in all its rigor the mischiefs of an absolute and unbounded authority, claimed by so weak a creature as man, and should have been guilty of the basest breach of trust, as well as the grossest folly, if the moment when we spurned at the insolent despotism of Great Britain, we had established a despotic power among ourselves.³¹⁵

After the court’s decision declaring the confiscation statute unconstitutional—the direct check on legislative overreaching on individual rights for which Iredell had argued—Richard Dobbs Spaight, then serving as a North Carolina delegate to the constitutional convention in Philadelphia, wrote a letter to Iredell severely criticizing him for encouraging the court to engage in such a “usurpation” of power.³¹⁶ Iredell held his ground. He responded to Spaight in a letter that expanded on his earlier letter “To the Public.” Specifically, Iredell insisted that judicial review was necessary because, without it, individual rights such as the right to property would not be adequately protected.³¹⁷

Last but far from least, I recently uncovered a non-judicial precedent for judicial review that is consistent with the judicial precedents discussed in this Section. That precedent is a July 25, 1781, objection by Governor Thomas Burke of North Carolina to a court bill that would have created a special treason tribunal “composed of persons chosen at the Will and Pleasure of the Governor and altogether dependent on him and the General Assembly.”³¹⁸ Governor Burke insisted that such a bill violated the 1776 North

314. James Iredell, To the Public (Aug. 17, 1786), in 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 145 (Griffith J. McRee ed., 1858).

315. *Id.* at 145-46.

316. Letter from Richard Dobbs Spaight to James Iredell (Aug. 12, 1787), in 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL, *supra* note 314, at 169-70.

317. Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), in 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL, *supra* note 314, at 172.

318. Thomas Burke, Questions and Propositions by the Governor (July 25, 1781), in 19 THE STATE RECORDS OF NORTH CAROLINA 862-63 (Walter Clark ed., 1901).

Carolina Declaration of Rights provision that required the judiciary to be a separate and independent branch of the North Carolina government.³¹⁹ In short, the governor objected to the bill—although he had no authority to veto it—because it gave him too much power over the judiciary. He wrote:

Convinced as I am that the execution of this power would afford a dangerous precedent, and that the General Assembly had no Constitutional authority to invest me with it, and if they had, sensible as I am of the Imperfections of human nature, I dare not undertake it. I feel myself under the necessity of declining the execution of a power so repugnant to my principles as a Citizen of a free Republic and so contrary to my Ideas of the duty I owe the people as their Chief Magistrate.³²⁰

Moreover—and this is the critical point—Governor Burke recognized that judicial review was the ultimate expression of judicial independence and a necessary expression in any constitutional order committed to protecting individual rights. He argued against the court bill in question because “civil liberty would be deprived of its surest defences against the most dangerous usurpations, that is the independency of the Judiciary power and its capacity of protecting Individuals from the operation of Laws unconstitutional and tyrannical.”³²¹

CONCLUSION

The survey of early cases could go on,³²² but suffice it to say that an examination of a number of the pre-Federal Constitution precedents for judicial review reveals that, the popular constitutionalists’ assault on the Supreme Court notwithstanding, the original understanding of judicial review was on all fours with the traditional understanding: The primary purpose of judicial review is to protect individual rights from—for want of a better phrase—“the

319. *Id.* at 863.

320. *Id.* at 864.

321. *Id.* at 863. See generally Scott D. Gerber, *Unburied Treasure: Governor Thomas Burke and the Origins of Judicial Review*, 8 HISTORICALLY SPEAKING 29 (July/Aug. 2007).

322. For example, in May of 1786 the Inferior Court of Common Pleas for the County of Rockingham, New Hampshire became the first court in the United States to void as unconstitutional an act of a coordinate branch of government (and it did so numerous times). Richard M. Lambert, *The “Ten Pound Act” Cases and the Origins of Judicial Review in New Hampshire*, 43 N.H. B.J. 37, 37 (2002). The court invalidated New Hampshire’s Ten Pound Act, which permitted justices of the peace sitting without juries to decide disputes involving less than ten pounds, as inconsistent with the constitutional right to trial by jury guaranteed by Article XX of the New Hampshire Bill of Rights. *Id.* at 38.

people themselves.” To argue otherwise is to forget why we have a Constitution in the first place.³²³

Of course, popular constitutionalists are not the first group of scholars to try to situate the Court’s role in the American constitutional order on the basis of the decisions a particular Court has issued, or might soon be issuing. The best example of how partisan most constitutional law scholars long have been on the subject appeared during the Warren Court era, when influential law professors such as Charles L. Black, Jr. and Eugene V. Rostow argued that the Court spoke *for* the people when it exercised judicial review in *Brown v. Board of Education* and other cases.³²⁴ These pro-Warren Court scholars, like the popular constitutionalists of the present day who are endeavoring to minimize the conservative Court’s role in constitutional interpretation, were on the political left. Clearly, Al Smith got it right when he quipped in the simpler days of yore that everything—at least everything in politics—“depends [on] whose ox is being gored.”³²⁵

It should not be so, at least with respect to a question as significant as the Court’s place in American life. Laurence H. Tribe, the most prominent constitutional law scholar of the last several decades, agrees. Tribe, a political liberal, published a blistering review of Kramer’s *The People Themselves* that concluded with the following observation:

In succumbing to the trendy siren song of those who would have the fleeting “constitutional” sentiments of a temporarily controlling faction bring the court to heel, Larry Kramer risks playing Pied Piper to a large and potentially impressionable

323. Amazingly, for all of the attention devoted to *Federalist No. 78*, scholars never seem to appreciate that this most famous precedent of all for judicial review centers on the protection of individual rights. Alexander Hamilton wrote:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 86, at 466.

324. CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* (1960); EUGENE V. ROSTOW, *THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST OF LAW* (1962). *See generally* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

325. HENRY J. ABRAHAM & BARBARA A. PERRY, *FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES* 6 (8th ed. 2003) (quoting Al Smith). Smith served four terms as Governor of New York from 1918 to 1928 and then lost the 1928 presidential election to Herbert Hoover.

universe of readers and students. Meanwhile, he sadly misses the whole point of Chief Justice Marshall's great reminder: It is "a constitution we are expounding."³²⁶

While I have disagreed with Tribe on questions such as Clarence Thomas's use of the Declaration of Independence in constitutional interpretation,³²⁷ the exegesis in the history of ideas undertaken in the present Article suggests that Tribe is correct about the most important constitutional law question of all. Put directly, constitutional law scholars should feel free to disagree all they want with the Court's decisions in hot buttons cases such as *Bush v. Gore*, but they are treading on dangerous ground when they try to suggest that it is not the Court's place to make those decisions.

With any luck, popular constitutionalism will prove but a passing fad: law professors have notoriously short attention spans. In contrast, the contributions of Aristotle, Polybius, Marsilius of Padua, John Fortescue, Gasparo Contarini, Charles I, Montesquieu, and John Adams endure. The Court and the Constitution are better for it.

326. Laurence H. Tribe, *The People's Court*, N.Y. TIMES, Oct. 24, 2004, § 7 (Book Review), at 32 (reviewing KRAMER, *supra* note 2). For Kramer's response to Tribe's review, see Larry D. Kramer, Letter to the Editor, *Kramer vs. Tribe*, N.Y. TIMES, Nov. 21, 2004, § 7 (Book Review), at 6. For Tribe's reply to Kramer's response, see Laurence H. Tribe, Letter to the Editor, *Kramer vs. Tribe*, N.Y. TIMES, Nov. 21, 2004, § 7 (Book Review), at 6.

327. GERBER, *supra* note 27, at 40-41.