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## Iredell Reclaimed: Farewell to Snowiss's History of Judicial Review

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## IREDELL RECLAIMED: FAREWELL TO SNOWISS'S HISTORY OF JUDICIAL REVIEW

GERALD LEONARD\*

An unfortunate distortion has crept into the recent historiography of judicial review. This distortion is not the doing of Larry Kramer, the honoree of this symposium, but his accomplished history of the origins of judicial review does its little bit to perpetuate it. I refer to the idea that the early theorists of judicial review saw that practice as distinctively “political-legal”<sup>1</sup> or a “substitute for revolution,”<sup>2</sup> rather than a straightforwardly legal or purely judicial practice. The modern source of this idea is Sylvia Snowiss’s influential book, *Judicial Review and the Law of the Constitution*.<sup>3</sup> Snowiss argues that virtually no one thought of the Constitution as a source of judicially expoundable law until well into the nineteenth century, after some decades of John Marshall’s working his magic on the United States Supreme Court.

The political scientist Dean Alfange methodically exposed many of Snowiss’s misreadings of evidence and corrected her major claims shortly after the book’s publication,<sup>4</sup> but that review has had surprisingly little effect. Scholars have continued to echo Snowiss’s argument right through to the present and even, as in Kramer’s case, when their own arguments need not rely on any of Snowiss’s claims.<sup>5</sup> I will not recapitulate Alfange’s

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1. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 63 (2004).

2. SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 50 (1990).

3. *Id.*

4. Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 333–49 (1993).

5. In addition to Kramer, see, e.g., Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73, 80–81 (2003); William R. Casto, *James Iredell and the American Origins of Judicial Review*, 27 CONN. L. REV. 329 (1995); Matthew P. Harrington, *Judicial Review Before John Marshall*, 72 GEO. WASH. L. REV. 51, 88 (2003); Samuel R. Olken, *The Ironies of Marbury v. Madison and John Marshall’s Judicial Statesmanship*, 37 J. MARSHALL L. REV. 391, 405 (2004); Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 WASH. & LEE L. REV. 787 (1999). Harrington’s momentary echoing of Snowiss is especially perplexing because he otherwise offers a sensible reading of Iredell not so different from my own.

article here, but I do want to correct a part of Snowiss's book that Alfange ignored and that Kramer implicitly endorses: Snowiss's treatment of James Iredell of North Carolina, the man widely regarded as the most compelling early theorist of judicial review. This essay is meant to reclaim what I think is the proper and simple meaning of Iredell's work from Snowiss's needless complications. In the process, perhaps it can reinforce Alfange's more general effort to correct Snowiss's distortion of the early history of judicial review.

I will take the first few pages below to criticize Kramer just a bit but mostly to critique Snowiss's book. Then I will spend the balance of the essay explicating Iredell's famous 1786 essay "To the Public." My reading of Iredell will echo some traditional views of his work, clearing away what I think are Snowiss's distortions, and then I will add what I hope are some original insights into the meaning of his work.

## I. KRAMER AND SNOWISS

Kramer rightly attributes to Iredell the "most thoughtful presentation of this new principle," the principle that courts might be relied on for "constitutional enforcement."<sup>6</sup> He then goes on to offer a characteristically sensible reading of Iredell's famous essay, "To the Public," in which he emphasizes Iredell's premise that the judiciary, the same as the legislature, acted as the people's constitutional agent and thus was required to implement only constitutional statutes.<sup>7</sup> So far, so good. But I lose Kramer when he says that judicial review was therefore understood by Iredell and his like as a substitute for revolution: "Judicial review, in other words, was not an act of ordinary legal interpretation. It was a political—perhaps we should say a 'political-legal'—act of resistance."<sup>8</sup> Of course, there is a grain of truth in this characterization, in the sense that all authorized acts of government are substitutes for revolution; if the sovereign people did not have their three branches exercising their delegated powers, they would be left to a sort of permanent state of revolution. But there is not much indication in Iredell's essay that he thought judicial review "political-legal" rather than just "legal"—a straightforward judicial exercise of the constitutional authority delegated to that branch.<sup>9</sup>

6. KRAMER, *supra* note 1, at 60.

7. *Id.* 60–63.

8. *Id.* at 63.

9. Kramer inserted into the argument a nice quotation from the early case of *Trevett v. Weeden*, which serves him comparatively well, at least better than Iredell's essay does, but that doesn't much affect my point. See *id.* at 63 (citing JAMES M. VARNUM, *THE CASE, TREVETT AGAINST WEEDEN* 26 (Providence, John Carter 1787)).

Happily, not much in Kramer's argument actually rides on the suggestion that Iredell thought judicial review "political-legal." His more general history of the early, extrajudicial development of American constitutionalism stands strong, leaving this distortion of Iredell as a somewhat marginal mischaracterization. For Snowiss, however, on whom Kramer relies only for this section, the distortion of Iredell played an important and telling role.

Snowiss sought to show that, before Marshall, judicial review was not thought a matter of applying law at all, at least not in any conventional sense. For her, Iredell's argument is neatly of a piece with what she calls "period 2" judicial review, characterized by the notion that the judiciary should never expound but only notice the Constitution, exercising review only as the first line of revolutionary resistance; judicial review was an act of political resistance—not legal interpretation—by men who just happened to be judges, compelled to come face to face with a legislative usurpation.<sup>10</sup> If they refused to apply a statute to a case on constitutional grounds, it was not because they had carefully expounded the law of the Constitution and found it to preclude implementation of the statute at issue. Rather, barred from expounding the Constitution at all, the judges could refuse to implement a statute only when the legislative act flouted the Constitution so flagrantly that its usurping character could be seen by all without the least need for constitutional interpretation.<sup>11</sup>

This version of judicial review directly implied, for Snowiss, the "doubtful case rule," the rule that declared the judiciary's unwillingness to strike down a statute in any but the clearest cases of unconstitutionality.<sup>12</sup> This rule was frequently endorsed then (and more even today than is normally recognized<sup>13</sup>), but it was rarely, if ever, explained by the judges and often ignored.<sup>14</sup> For Snowiss, the rule was merely a corollary of the assumption that judicial review was political rather than legal. If judges could not construe or expound the Constitution (a legal activity), but could refuse to implement statutes only when necessary as an act of political resistance, then such an act—open resistance to constituted authority—

10. See, e.g., SNOWISS, *supra* note 2, at 73–74.

11. *Id.* at 45–89.

12. *Id.* at 63–65.

13. See Caminker, *supra* note 5, at 85–86.

14. For examples, see the line of Pennsylvania cases endorsing the rule with little explanation: *Moore v. Houston*, 3 Serg. & Rawle 169, 178 (Pa. 1817); *Commonwealth ex rel. O'Hara v. Smith*, 4 Binn. 117, 126 (Pa. 1811); *Emerick v. Harris*, 1 Binn. 416, 423 (Pa. 1808); *Respublica v. Duquet*, 2 Yeates 493, 498 (Pa. 1799).

could only be justified in such clear cases of usurpation as would justify any faithful citizen's resistance.<sup>15</sup>

Snowiss's argument is clever, but there is an alternative and much simpler version of the early history. It is that judicial review rapidly gained adherents by force of the legal logic of the Revolution, not by the positing of some extra-legal, quasi-revolutionary role for the judges. As the fundamental transition from legislative to popular sovereignty began to be understood,<sup>16</sup> the legal logic of judicial review became quite powerful, although never, of course, unanswerable. The new American constitutions abandoned the legislative sovereignty that had made judicial review unthinkable (more or less<sup>17</sup>) under the English "constitution." With sovereignty removed to the people, there was no necessary reason why the legislatures should be immune to the judiciary's coordinate review, although new arguments against judicial review would emerge in due course.<sup>18</sup> Of course, there was a political aspect to such legal arguments as there is to every legal argument. But Iredell's articulated claims for judicial review were just the sort of legal and judicial arguments later made by Marshall and others and generally taught in law schools today; they did not justify the practice in political terms or in terms of revolutionary action but simply as a product of the legal logic of popular sovereignty. As I will argue below, Iredell actually contended that constitutional review grew more or less naturally out of the judicial office, out of the most pedestrian, uncontroversial understanding of a judge's work. He did not fail to see what was special about this aspect of judging: that it was bound to attract much more attention from the political branches than would most judicial actions. But that did not alter his view that constitutional review lay necessarily within the responsibilities of a judge as a matter of simple,

15. SNOWISS, *supra* note 2, at 63–65.

16. The standard and definitive study is GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* (1969).

17. Curiously, Iredell himself resists the weight of modern constitutional historiography by suggesting that, although contrary to the general principles of the English constitution, even English judges claimed they could control Parliament when a statute conflicted with "*natural justice*." See Letter from James Iredell to Richard Spaight (Aug. 26, 1787), in 2 *LIFE AND CORRESPONDENCE OF JAMES IREDELL* 172, 172 (Griffith J. McRee ed., New York, D. Appleton & Co. 1858) [hereinafter *LIFE AND CORRESPONDENCE*].

18. The most thorough and powerful argument against judicial review in the early republic, although it failed completely in the end, was that of Pennsylvania's Justice John Gibson, dissenting in *Eakin v. Raub*, 12 Serg. & Rawle 330, 343–58 (Pa. 1825) (Gibson, J., dissenting). Other resistance to and arguments against judicial review from the period are collected in RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* (1971); KRAMER, *supra* note 1, at 65–72, 145–56; DONALD F. MELHORN, JR., "LEST WE BE MARSHALL'D": JUDICIAL POWERS AND POLITICS IN OHIO, 1806–1812 (2003).

honest, legal reasoning, not as a matter of political calculation nor implied by the right of revolution.

Before developing Iredell's positive argument, though, I want to explain the problems with Snowiss's use of evidence. Analyzing Iredell's public letter, Snowiss points to the "core of Iredell's defense of judicial authority over legislation" and acknowledges that one "could easily" read it "as part of a single line of reasoning leading to *Marbury* and the doctrine we accept today."<sup>19</sup> After all, Iredell took it for granted that "the constitution is a *law of the State*," in the same way "as an act of Assembly," except that the Assembly may repeal the latter but not the former.<sup>20</sup> More or less innovative at the time,<sup>21</sup> that reasoning became very familiar very quickly and remains so today.<sup>22</sup> The Constitution was just like a statute, a "law of the state," except that it happened to be superior, controlling law, much as a later statute controls an earlier statute.<sup>23</sup>

But Snowiss asserts that Iredell, understood in proper historical context, meant something different—that judges must take notice of the Constitution but never treat it as they would ordinary law by actually interpreting it.<sup>24</sup> Iredell never suggests this latter limitation on constitutional review in any way in his argument, but Snowiss resorts to this quotation from the essay: "The great argument [against judicial review] is, that though the Assembly have not a *right* to violate the constitution, yet if they *in fact* do so, the only remedy is, either . . . petition . . . or . . . universal resistance."<sup>25</sup> Snowiss seems to imply that Iredell's choice of the

19. SNOWISS, *supra* note 2, at 49.

20. *Id.* at 48 (quoting James Iredell, To the Public (1786), in LIFE AND CORRESPONDENCE, *supra* note 17, at 145, 148).

21. Iredell's essay is generally thought foundational, but it did not come out of thin air. Willis Whichard, for example, notes that Iredell's friend and mentor, Samuel Johnston, had put similar arguments on paper a few years earlier. See WILLIS P. WHICHARD, JUSTICE JAMES IREDELL 12 (2000). And Mary Sarah Bilder argues convincingly that the judicial role in reviewing statutes for repugnancy to constitutions was widely presumed well before Iredell wrote. Mary Sara Bilder, *The Corporate Origins of Judicial Review*, YALE L.J. (forthcoming 2006). Moreover, while admitting to Spaight that many people shared an opposition to the practice, Iredell believed that, "Most of the lawyers . . . are of my opinion . . ." Letter from James Iredell to Richard Spaight, *supra* note 17, at 175–76.

22. See Marshall's famous passage in *Marbury*, noting that "[t]he question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest." Marshall goes on, of course, to argue simply that the Constitution is law, just as a statute is, but that the Constitution is superior in authority, just like Iredell's argument. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–80 (1803). As William Nelson argues, that part of Marshall's opinion raised little excitement at the time, and, of course, it remains a standard citation for the legitimacy and logic of judicial review today. See WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* (2000).

23. Iredell, *supra* note 20, at 148.

24. SNOWISS, *supra* note 2, at 51.

25. *Id.* at 48 (quoting Iredell, *supra* note 20, at 147).

phrase “in fact” somehow suggested that he excluded from judicial review those cases where the legal meaning of the Constitution would actually need expounding, and included only those where the obvious popular meaning of the Constitution—the “in fact” of constitutional meaning?—rendered a statute unconstitutional.<sup>26</sup> Her other source of comfort is that Iredell worked off a case—a denial of jury trial—in which the unconstitutionality was indeed, she thinks, so clear as to obviate all interpretive activity.<sup>27</sup> But the obviousness of that case—if it was so—hardly alters the apparent meaning of Iredell’s characterization of the Constitution as a “law of the state,” judicially cognizable like any other law of the state. Nor does Iredell’s use of the merely intensifying phrase “in fact.” Snowiss nevertheless asserts without evidence that, for Iredell, “[e]nforcement of fundamental law was a political act, a peaceful substitute for revolution presented as a superior alternative to petition or universal resistance,”<sup>28</sup> not the straightforward application of law that Iredell’s language seems to imply. She rightly suggests that nothing in Iredell implied that judges had exclusive control over the Constitution.<sup>29</sup> But that is irrelevant to the claim that Iredell justified judicial review only as an act of political resistance.

The odd, forced character of Snowiss’s reading of Iredell continues with her recognition that Iredell derived the power of judicial review specifically from the judges’ obligation to decide lawsuits, the core of (apolitical) judicial power. To decide cases, of course, the judge had to figure out how any ostensibly applicable laws (cases, statutes, constitutional provisions) actually interacted to produce a governing rule for the case at hand. Presumably, this obligation would entail interpreting all the plausibly applicable laws. Snowiss recognizes that that is true of sub-constitutional law,<sup>30</sup> and Iredell never suggested otherwise for constitutional law. But Snowiss just asserts that, “Restriction of judicial review to a lawsuit underscored the point that [judicial review] grew out of the judiciary’s exclusive responsibility to expound *ordinary* law.”<sup>31</sup> It is hard to see why she decides to insert the adjective “ordinary” here; Iredell never used that adjective or any equivalent. Why did she not say instead that judicial review grew out of the judge’s obligation to apply all relevant law, “ordinary” or constitutional, and thus to expound all of that law in

26. *Id.* at 50.

27. *Id.*

28. *Id.*

29. *Id.* at 50–51.

30. *Id.* at 53.

31. *Id.* (emphasis added).

order to decide the cases? Certainly, that is the easiest understanding of Iredell.

At the risk of straying beyond my topic, I might observe that Snowiss's forced readings continue with a discussion of St. George Tucker's opinion in *Kemper v. Hawkins*.<sup>32</sup> In rhetoric much like Iredell's, Tucker explicitly identified the Constitution as "*the first law of the land*" and therefore pertinent whenever the judiciary must "*expound what the law is. . . . [H]ow can any just exposition be made, if that which is the supreme law of the land be withheld from [the judges'] view?*"<sup>33</sup> The natural reading of this passage, of course, is that Tucker, as a judge, must expound all the plausibly applicable law—cases, statutes, constitutions—to figure out "what the law is" that will govern the case.<sup>34</sup> Tucker could have gone on to say that he meant only sub-constitutional law when he said "law," except that he had already identified the Constitution itself as "the first law of the land" and did not suggest that he meant to distinguish it from other sorts of "law" except in terms of hierarchical position. Snowiss was kind enough to do it for him, though, inserting "ordinary" as a qualifier of law where Tucker had not.<sup>35</sup>

The one consideration I can imagine that could make Snowiss's argument plausible is that the exposition of cases and statutes might not have seemed as readily the joint property of the three branches as the development of constitutional law did. Perhaps that would serve to limit Iredell's and the judiciary's understanding of the scope of permissible judicial review. But it is easy enough to make the argument that every branch must expound ordinary law in carrying out its duties in the same way it must expound constitutional law. More importantly, Tucker and Iredell simply did not employ this line of reasoning or articulate the distinction that Snowiss asserts.

## II. IREDELL'S ESSAY

Contrary to Snowiss's account of Iredell, I think the easy and natural reading of Iredell is that a judge should act exactly as a judge: applying the operative law as he understands it. Even more than today (a few modern ultra-formalists aside), constitutional thinkers in the founding years worried obsessively about the problem of distinguishing between legislative and judicial (and executive) power. Resistance to judicial review in the 1780s

32. 3 Va. (1 Va. Cas.) 20 (1793).

33. *Id.* at 78–81.

34. SNOWISS, *supra* note 2, at 54 (quoting Tucker's opinion in *Kemper*, 3 Va. (1 Va. Cas.) at 78).

35. *Id.* at 55.



often rested on the grounds that to void a statute was to perform a legislative rather than a judicial act.<sup>36</sup> Iredell argued instead that refusal to implement a legislative act on constitutional grounds was a strictly judicial act.

He began with a vigorous rehearsal of the basic principle of American constitutionalism: that the power of the legislature to make laws extended just as far as “the deliberate voice of the people,” manifested in the constitution, had determined it should and no farther.<sup>37</sup> Specifically, the people of North Carolina, like those of every other state, had revolted against “the omnipotent power of the British Parliament” and would then “have been guilty of the basest breach of trust, as well as the grossest folly, if in the same moment . . . we had established a *despotic* power among ourselves.”<sup>38</sup> On this point, he expected no controversy. All agreed that “the power of the Assembly is limited and defined by the constitution,” that “the Assembly have not a *right* to violate the constitution.”<sup>39</sup> There remained disagreement, however, on the question of what was to be done when the Assembly “*in fact* do so.”<sup>40</sup> Iredell’s own answer, of course, was that judicial review must play at least an important part. But he first had to dispose of “[t]he great argument” that the only options were the leftovers of British Whig constitutionalism, “a humble petition that the law may be repealed, or a universal resistance of the people,” leaving the Assembly’s ostensible “law” to control the judges in the meantime.<sup>41</sup>

The first of these Lockean<sup>42</sup> options he deemed an absurdity in a system where the people, not the legislature, were sovereign. In England, a people’s petition with appropriate marks of humility might be the only legal alternative to revolutionary upheaval. But the point of the Revolution, as Iredell had made clear in his preamble, was to remove sovereignty—the ultimate lawmaking authority—from the legislature to the people. In America, it was entirely within the people’s legal rights to disregard an unconstitutional law and entirely inappropriate for them to petition their inferiors in the lawmaking process.

So, as a practical matter, what were the people to do? What, to put it another way, had their constitutions already marked out as the remedy in such a circumstance? Yes, the “whole people may resist” when necessary.

36. See, e.g., KRAMER, *supra* note 1, at 58.

37. Iredell, *supra* note 20, at 145–47.

38. *Id.* at 146.

39. *Id.* at 146–47.

40. *Id.* at 147.

41. *Id.*

42. See Casto, *supra* note 5, at 334.

But that was neither a practical remedy nor, consequently, the one that the people themselves had chosen. Not only was universal resistance a “dreadful expedient,” but even the most flagrantly unconstitutional measures would not engender it as long as their ill effects stung only a minority, as long as they fell short of “*universal oppression*.” Iredell observed that “[a] thousand injuries may be suffered, and many hundreds ruined, before this can be brought about.”<sup>43</sup> Certainly, the people had not chosen an enforcement mechanism that must necessarily leave a thousand usurpations unredressed.

In subsequent paragraphs, Iredell continued to develop the absurdities of universal resistance as an enforcement measure, but only as a prelude to his main theoretical point: such a Lockean right of revolution, like the alternative of a humble petition to the legislature, belonged to the abandoned constitution of England, not to the constitutions adopted since the Revolution. Reliance on “universal resistance,” he said, “is evidently derived from the principle of *unbounded legislative power*, that I have noticed before, and that our constitution reprobates. . . . As little, I trust, is the government of Great Britain to influence in other things, equally inconsistent with our condition, and equally preposterous as these.”<sup>44</sup> That is, the whole notion of universal resistance as a device for the enforcement of justice came from Britain and from the prior British assumption that sovereignty lay in the legislature, an assumption foreign to the American system. So the difficulty was not just a matter of the practicalities of enforcement but a matter of proper interpretation of the people’s revolutionary history and their choice to implement their newly won sovereignty in a constitution of separated, delegated, limited powers.

Finally, in a subsequent letter to Richard Spaight, then sitting as a member of the 1787 Convention, Iredell acknowledged that frequent elections might prove a valuable enforcement mechanism for the people’s constitution. But even Spaight, an opponent of judicial review, had despaired of the adequacy of elections. So Iredell deemed them

of very little consequence, because this would only secure the views of a majority; whereas every citizen in my opinion should have a surer pledge for his constitutional rights than the wisdom and activity of any occasional majority of his fellow-citizens, who, if their own rights are in fact unmolested, may care very little for his.<sup>45</sup>

This passage brings out Iredell’s special sensitivity to the problem of individual rights, which reinforced the idea that the Constitution needed the

43. Iredell, *supra* note 20, at 147.

44. *Id.* at 147–48.

45. Letter from James Iredell to Richard Spaight, *supra* note 17, at 175.

judiciary to expound its meaning, not just popular majorities. But it also remained consistent with his understanding of the Constitution as a matter of popular sovereignty. Elections might be perfectly appropriate enforcement mechanisms under a popular constitution, but they were far from perfect expressions of the abiding constitutional will of the people, and in any case there was no reason to think elections the exclusive mechanism.

Once more, then, Iredell returned to the question of what the constitution did contemplate as an enforcement mechanism and, more particularly, “whether the judicial power hath any authority to interfere in [a constitutional] case.”<sup>46</sup> When so put, the answer seemed obvious (even if in these early days few had “extended their ideas” to all the nuances of judicial review<sup>47</sup> under popular sovereignty). After all, the “duty of [the judicial] power . . . is to decide according to the *laws of the State*.”<sup>48</sup> And, “[i]t will not be denied, I suppose, that the constitution is a *law of the State*” just like “an act of Assembly, with this difference only, that it is the *fundamental* law, and unalterable by the legislature, which derives all its powers from it.”<sup>49</sup> For Snowiss, the adjective “fundamental” imports something irreducibly political that makes the law of the Constitution immune to judicial interpretation, but Iredell explained the significance of a law’s being “fundamental” quite differently and quite explicitly. For him, in the context of a lawsuit, the “only” difference between “fundamental law” and “an act of Assembly” was the former’s hierarchical superiority, such that the latter could not be taken by a judge to control his decision in the face of contrary constitutional law. The point became all the more unmistakable by virtue of Iredell’s analogizing it to the problem of conflicting statutes. Faced with clashing statutes, the judge simply had to determine which one controlled the case, the judicial rule generally being that the later statute would control. A constitutional case presented an analogous instance of conflicting laws and was resolvable by a different but analogous rule: constitutional law controls statutory law.

The argument did not rest on an idea that “fundamental” law was somehow “political” rather than ordinarily legal, nor on the idea that judges might serve as a revolutionary avant-garde. Rather, it rested simply and clearly on an understanding of judicial power within a popular constitution:

46. Iredell, *supra* note 20, at 148.

47. See KRAMER, *supra* note 1, at 62 (quoting *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 17 (1782)).

48. Iredell, *supra* note 20, at 148.

49. *Id.*

"The judges, therefore, must take care at their peril, that every act of Assembly they presume to enforce is warranted by the constitution, since if it is not, they act without lawful authority. This is not a usurped or a discretionary"—read "political"—"power, but one inevitably resulting from the constitution of their office, they being judges *for the benefit of the whole people, not mere servants of the Assembly*."<sup>50</sup> In short, the judges must decide cases—their characteristically judicial function—according to state law, not least the controlling law of the people's constitution, and so they could hardly avoid engaging in constitutional review whenever a litigant raised a constitutional question. Snowiss's contrary position may have been taken by someone at the time, but Iredell at least treated "fundamental" law as entirely "ordinary"—and thus presumably subject to interpretation by judges—in all respects except its hierarchical superiority to statute law.<sup>51</sup>

It may be worth observing in this connection that Iredell also seems to have assumed a fairly broad scope for judicial review, not one overly cramped by fears that the power was an extra-judicial one. For example, historians have sometimes thought that the early practice of judicial review was meant to extend no further than the judiciary's defense of its own constitutional "rights"—language that might suggest a very narrow power in no way comparable to later judicial review's concern with constitutional rights more generally.<sup>52</sup> But Iredell pretty clearly indicated a broad power of review, not unlike the modern practice. For him, the issue was explicitly the rights of individual citizens, not just those of the judiciary as such. And his quite explicit focus on judicial protection for the legal rights of the individual was entirely consistent with Kramer's and William Treanor's<sup>53</sup>

50. *Id.*

51. Iredell immediately went on to reply to several anticipated objections. First, he pointed out that the de facto dependency of the judges on legislative good will for retention of their offices and salaries made the judicial power of constitutional review no serious threat to the legislature's own rights. In fact, the judiciary probably remained too dependent to carry out all its functions with sufficient impartiality. Second, anticipating arguments that took Iredell's apparently departmentalist position to an extreme (for a modern example of extreme departmentalism, see Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994)), he seemed to implicitly accept that the executive, too, must have a power of considering the constitutionality of any acts it was asked to perform by other branches. But he rejected the idea that the executive might reconsider the judiciary's judgments. Because "*the power of judging rests with the courts*," the sheriff "and other ministerial officers" must accept those judgments and carry out their offices accordingly. Iredell, *supra* note 20, at 149. Presumably, although Iredell did not elaborate, the sheriff might, in effect, review a judicial order that impinged on executive power, such as the decision precisely how he would enforce a judgment, but he could not reconsider a "judicial" judgment in a case any more than a court could reconsider a legislative policy choice made within constitutional bounds.

52. See, e.g., William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 470 (2005).

53. *Id.* at 498–503, 541–46.

demonstrations that the pattern of early judicial review included many cases that had little to do with the judiciary's own rights—that is, little to do with questions of judicial process or even jury rights.

Not only does Iredell's argument help bury the idea that early judicial review was narrowly about the judiciary's own rights, but his precise language helps explain the true meaning of the sources that have suggested that supposition. What did James Wilson and others mean when they said that the judiciary must have the power of "defending their constitutional rights"?<sup>54</sup> Iredell said that the judges act "at their peril" if they fail to ensure the constitutionality of every statute they enforce, lest they find themselves coercing litigants "without lawful authority."<sup>55</sup> He thereby reminded the judges that, should legal authorization be lacking, their every coercion of a litigant was itself a violation of the law. To hide behind the legislature's mere assertion that it had enacted a law, notwithstanding its actual unconstitutionality, was to act in both a cowardly and an illegal fashion. I think it is easy enough, then, to see how the exercise of judicial review could be understood as the defense of a judicial "right" to exercise only judicial power and not to be reduced to a slave of a usurping legislature. The defense of the judge's own liberty and dignity—the judiciary's own rights—thus became equivalent to the defense of every individual's liberty and dignity, every individual's constitutional rights.

Finally, conspicuously missing from Iredell's pathbreaking argument for judicial review was any mention of the doubtful case rule, the corollary of Snowiss's political theory of period 2 judicial review. Kramer suggests that Iredell's (and others') later embrace of the rule should be understood as a "logical corollary" of the rationale for judicial review itself,<sup>56</sup> but I don't think so. The logic of Iredell's argument, in fact, might well suggest *de novo* review of constitutionality for several reasons: the Constitution's status as paramount law presumably called for it to have its full scope rather than contracting before the inferior law of the legislature; Iredell treated the Constitution simply as ordinary (though paramount) law, fully within judicial competence; and even practical considerations suggested that the real danger lay in usurpations by legislative majorities rather than by too bold judicial use of constitutional review.<sup>57</sup> But Iredell simply did not consider the issue until responding to objections from a correspondent the following year, and that delay is important.

54. See *id.* at 470 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 73 (Max Farrand ed., 1911)).

55. Iredell, *supra* note 20, at 148.

56. KRAMER, *supra* note 1, at 65.

57. Iredell, *supra* note 20, at 148–49.

In 1787, a three-judge panel in *Bayard v. Singleton* vindicated Iredell's argument for judicial review and invalidated the statute at issue.<sup>58</sup> Writing to Iredell from Philadelphia that August, where he represented North Carolina in the Constitutional Convention, Richard Dobbs Spaight objected vigorously to the judges' action.<sup>59</sup> He must not have known Iredell's position on the matter, because he walked right into Iredell's previous arguments as if he had never heard them before. Denying that there was "any thing in the Constitution, either directly or impliedly, that will support them, or give them any color of right to exercise that authority" and decrying the absurdity of any judiciary's having "an absolute negative on the proceedings of the Legislature," he complained that the judges' exercise of constitutional review "united in their own persons the legislative and judiciary powers, which no monarch in Europe enjoys."<sup>60</sup> Spaight did not doubt the legislature's tendency to enact oppressive and unconstitutional measures, but he could not conceive that judicial review, an innovation that was "contrary to the practice of all the world"—as if popular sovereignty were not—might be the answer. He saw the state constitution's provision for annual elections as the only remedy, although he acknowledged its inadequacies.<sup>61</sup>

There are, of course, weighty arguments for Spaight's bottom line. But Spaight, at this point, had not grappled with Iredell's more sophisticated arguments for judicial review as a vindication of the separation of powers. He remained stuck on the idea that it was instead a violation of that principle, a consolidation of "the legislative and judiciary powers." Older models of sovereignty persisted in Spaight's mind as they did in the minds of so many who nominally embraced popular sovereignty but translated that principle immediately into a *de facto* legislative sovereignty.<sup>62</sup> That translation rested on the legislature's status as the branch closest to the people, but it also rested, intentionally or not, on the heritage of legislative sovereignty that had provided Americans with their main model of governance. Iredell tried to point out that the Revolution and the subsequent years of constitution-making had rejected the heritage of parliamentary sovereignty in favor of an entirely new set of principles that could not be informed by simple importation of "the practice of all the

58. 1 N.C. (Mart.) 5 (1787).

59. Letter from Richard Dobbs Spaight to James Iredell (Aug. 12, 1787), in *LIFE AND CORRESPONDENCE*, *supra* note 17, at 168, 169.

60. *Id.*

61. *Id.* at 169–70.

62. *Cf.* KRAMER, *supra* note 1, at 58–59.

world.”<sup>63</sup> But even Founders like Spaight were having trouble with the new principles.

In any case, Iredell responded to Spaight mainly with a reiteration of the points made in his newspaper essay but also with several important additional nuances touching on the doubtful case rule. First, he made all the more explicit his contention that judicial review, far from being an exercise of *legislative* power, was inevitably implied in any exercise of *judicial* power: because the Constitution was a “*fundamental law*, and a law *in writing* . . . , the judicial power, in the exercise of their authority, must take notice of it as the groundwork of that as well as of all other authority.” It simply made no sense for the judges, as the people’s agents, to attempt to enforce a law “to which . . . the people owe no obedience.” And he emphasized that this judicial power did not elevate the judiciary above the legislature by giving the former a free-ranging, political power to review the latter’s work. “It is not that the judges are appointed arbiters, and to determine as it were on any application, whether the Assembly have or have not violated the Constitution; but when an act is necessarily brought in judgment before them, they must, unavoidably, determine one way or another.”<sup>64</sup> Here, as in his essay, Iredell offered a logic that suggested not a rule of deference to the legislature but full judicial power over constitutional meaning just insofar as the constitution bore on the outcome of a litigation.

But, second, out of nowhere, Iredell did produce and embrace a doubtful case rule. Having noted again the inevitability of judicial review and the unlikelihood of its abuse, he suddenly observed that “[i]t is a subject indeed of great magnitude, and I heartily lament the occasion for its discussion. In all doubtful cases, to be sure, the Act ought to be supported: it should be unconstitutional beyond dispute before it is pronounced such.”<sup>65</sup> Why? He had previously acknowledged that the power of judicial review, like any power, was susceptible to abuse and that “in a doubtful matter [the danger of abuse] may be of great weight.”<sup>66</sup> But, rather than derive a general rule of restraint from that susceptibility to abuse, he went on to show how little susceptibility there really was, largely because of the judiciary’s *de facto* dependence on the legislature.<sup>67</sup> Then, when he did endorse a doubtful case rule in these remarks to Spaight, he rested simply

63. Letter from Richard Dobbs Spaight to James Iredell, *supra* note 59, at 169.

64. Letter from James Iredell to Richard Spaight, *supra* note 17, at 173 (containing all the quotations cited in this paragraph).

65. *Id.* at 175.

66. *Id.* at 173–74.

67. *Id.* at 175.

on the concession that the whole subject was of “great magnitude.” I can only read this as a practical concession to win over an opponent. He understood that, although most lawyers saw the issue as he did, “many [non-lawyers] think as you [Spaight] do upon this subject,” and so he offered up a doubtful case limitation. He thus implied that the judges should not use the power very aggressively lest they face the sorts of political consequences that he had described in explaining their dependency on the legislature. To Spaight, he was saying that the judges’ dependency rendered them safer than Spaight supposed—probably too safe for the just protection of individual rights—and that in any case the judges should and would restrict themselves to very clear cases. To himself, he was making the merely pragmatic argument that the judges might best reserve the power for the clearest cases until the public had come around to the inevitability of judicial review. To that end, perhaps the judges should only fire when broad political support might be expected. Conspicuously lacking was any basis for deference in the principles of separation of powers and popular sovereignty that had driven his argument for judicial review in the first place.

### CONCLUSION

To understand the early days of judicial review accurately, it is important to see that Iredell’s foundational argument was a straightforward explication of a change in the location of sovereignty and its legal implications. The transition from British, Lockean, Whig constitutional theory, locating sovereignty in the legislature, to American constitutional theory, locating sovereignty in the people, impelled a shift in the relations between legislative and judicial power. The central implication for the courts was that they could no longer hide behind legislative authority; the legislature was no longer sovereign and could neither immunize nor coerce the judges, except as authorized by the people themselves. The judiciary now had to ensure its own authority to act—protect its own “rights”—by reference to the people’s constitutions. It had to intervene, as necessary, to protect the people’s rights against legislative overreaching, lest it act illegally itself. And there was nothing in such a theory to suggest deference to the legislature, a doubtful case rule. Or, if there was, it was to be developed somewhat later (a story for another article). For the time being, the doubtful case rule appeared not as a “corollary” of the more general theory of judicial review, but as a pragmatic accommodation to Americans’ lingering resistance to Iredell’s lawyerly logic.



The evidence from Iredell, therefore, suggests that there never was a “period 2” in the history of judicial review. There was indeed a very political history of constitutional review, forcefully told and firmly substantiated in Kramer’s book. Then, as now, constitutional issues were hashed out in popular and legislative politics as much as in the courts.<sup>68</sup> Then, as now, judicial decisions confined themselves to the rhetoric of law even as they obviously made substantive political judgments in order to decide cases where the law was not clear (or sometimes even when it was). When Iredell and others worked out a compelling legal argument for judicial review, it did not mean that politics was irrelevant to the cases or that they thought it was. But it did mean that, contrary to Snowiss’s claim, the history of judicial review rested on the early establishment of a cogent legal argument for that power as an ordinary, utterly conventional aspect of the judiciary’s obligation to expound the law in order to decide cases—ordinary and conventional at least once the transition from legislative to popular sovereignty was well understood.

Neither Iredell’s writings nor most of the rest of Snowiss’s evidence supports her claim that the early theorists of judicial review thought the application of constitutional law categorically more political and less judicial than the application of other sorts of law. Nothing suggests that judicial review was any more a “substitute for revolution” than any other exercise of governmental power was. Nor can I find any reason to suppose that the “doubtful case” rule expressed this quasi-revolutionary quality of judicial review rather than mere political prudence or pragmatic deference to the legislature.<sup>69</sup> Fortunately, we now have Larry Kramer’s *The People Themselves*, which should be taken generally to supplant Snowiss. Though not without its faults, Kramer’s book is helping to launch a far more productive round of research into the history of judicial review than we have seen in quite some time.<sup>70</sup>

68. See, among many others in the recent spate of works on the history of constitutionalism outside the courts, DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829–1861* (2005); GERALD LEONARD, *THE INVENTION OF PARTY POLITICS: FEDERALISM, POPULAR SOVEREIGNTY, AND CONSTITUTIONAL DEVELOPMENT IN JACKSONIAN ILLINOIS* (2002); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999); Gerald Leonard, *Party as a “Political Safeguard of Federalism”*: *Martin Van Buren and the Constitutional Theory of Party Politics*, 54 RUTGERS L. REV. 221 (2001); Gary D. Rowe, *Constitutionalism in the Streets*, 78 S. CAL. L. REV. 401 (2005).

69. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 138–52 (1893).

70. Among the most recent and exciting advances in the historiography of early American constitutionalism are MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* (2004), and DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830* (2005).