A RENAISSANCE HALL BY DIRCK VAN DELEN (1605-1671) © THE GALLERY COLLECTION/CORBIS

Going Courting
Part 2

Where We Got Courts and the Rule of Law

BY ROBERT J. McWHIRTER

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.

U.S. CONST., ART. III, §1.

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☛ Look for Part I of *Going Courting* in the October issue of ARIZONA ATTORNEY.

Charles I
As a modern commentator states,

> The most interesting thing about King Charles the First is that he was five feet six inches tall at the start of his reign, but only four foot eight inches tall at the end of it.[1]

In 1625 James' second son Charles took over and ruled until he got his head chopped off in 1649.[2] Like dad, he was another big fan of the divine right of kings, leading to a fruitless power struggle with Parliament.[3]

Much of Charles' problem was really just modernization. During the Middle Ages, the human condition limited the king's power. Thus, the idea of a divinely appointed king was not such a difficult pill—you probably never had to even see him. Instead you would seek justice from your local lord or Church court and only then voluntarily seek appeal to the king's common law courts. But, with the gradual development of modern taxing and bureaucracy, the monarch could control everything directly. By Charles' time, divine right was going out the door—people were starting to agree to government only if they had a stake in it. Charles just never "got it."[4]

In 1642 the English Civil Wars began, and Parliament eventually defeated his royalist forces for good in 1648.[5] Kings had been deposed before, but Parliament specifically tried Charles for high treason.[6] At his trial, Charles refused to enter a plea, claiming that no court had jurisdiction over a monarch and that the court's power was nothing more than what grew out of a barrel of gunpowder. This defense sealed his fate.[7]

Judicial Independence at Last

One of the great grievances against the Stuarts was their lack of respect for judicial independence.[8] In 1688 the Glorious Revolution removed the final Stuart King, James II. Parliament gave the realm to William III and Mary, but only under the condition that they agree to the Act of Settlement of 1701. Among many rights, it provided that only both houses of Parliament in

1. *Oliver Cromwell* from MONTY PYTHON SINGS (1991) to the tune of Frédéric Chopin's Polonaise Op. 53 in A flat major. Actually, he was 5'4".

2. As Levy comments, "If supreme political stupidity in a king merits his execution, Charles richly deserved his fate." LEVY at 266.

3. Charles was compensating for something; he was Britain's shortest king. FRASER at 181. His elder brother Henry was the heir apparent, but he died of typoid in 1612.

Anthony van Dyck, in his famous **"Charles I, King of England, from Three Angles"** (1636), masked Charles I's small stature and also solved Charles' problem of deciding between his three favoite suits for the portrait.

4. As he awaited death, Charles argued that he too wanted the people's liberty, "but I must tell you, that their Liberty and Freedom consist in having government … . It is not their having a share in the government—that is nothing appertaining to them." *Quoted in* Harold W. Wolfram, *John Lilburne: Democracy's Pillar of Fire*, 3 SYRACUSE L. REV. 213, 227 (1952).

5. **King Charles I and Oliver Cromwell** After defeating Charles, Cromwell turned out to be just as despotic as a king—perhaps more so because he was capable and more intelligent than the hapless Charles.

6. **Trial of Charles I** In short order, the English Parliament, which had fought against an absolutist monarch, became an absolutist body. The trial of King Charles in an "extraordinary court" made just for the occasion was an example.

7. Execution of Charles 1 (contemporary German print)

Charles II

James II

8. After Cromwell, Charles I's son, Charles II, was restored to the monarchy. His brother James II succeeded him as king and vetoed the Act of 1692 that allowed for judicial independence. *See* George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L. REV. 575, 617-18 and n. 163 (1997). James II was ousted, in large part for his abuses of the judiciary. The Settlement Act of 1701 established once and for all Parliamentary Supremacy and the independence of judges from the king. Judges' pay was also guaranteed. This is the precursor of the same protections for federal judges in the U.S. Constitution, Art. III Sec. 1.

The movie RESTORATION (Miramax 1995) tangentially dealt with the Charles II monarchy.

agreement could remove a judge.[1] Moreover, it provided that judges would keep their job *quamdiu se bene gesserint* ("during good behavior").

Judges at last were free to follow the law, not just the whim of a monarch, as William Blackstone noted some decades later:

> [T]he court must pronounce that judgment [sentence] which the law has annexed to the crime, and which has been constantly mentioned, together with the crime itself, in some or other of the former chapters.[2]

The struggle for judges now would be the outlines of their power from Parliament, or, in the modern American context, from Congress. When judges were the king's men, they had gained considerable discretionary power to exercise "the king's" prerogative pardon powers.[3] Now, despite the fact that English courts are still the "King's" or "Queen's" bench,[4] it is Parliament that ultimately reviews them.

Any modern court views "the rule of law" as ultimate authority. Certainly, law comes from Parliament or Congress, but judges must be free to apply the law. This idea goes far back to Aristotle and his requirement that judges apply the law:

> to redress the inequality which is this kind of justice identified with injustice.[5]

To Aristotle, an equitable or just decision is what the legislator would have decided in these particular circumstances if he had been present.

Leaving their law enforcement/inquisitorial role allowed judges to become umpires. As an umpire enforces the rules of the game, judges' main discretion is in enforcing the rules of the court. And these rules are the law of evidence.

Rise of the Law of Evidence

With the expanded role of lawyers and the change in the jury from self-informed to ignorance of the case, judges regulate the evidence the jury will hear.[6] But evidence law did not start with the new adversarial trials of the 19th century, as the history of the hearsay rule shows.[7]

Ancient Jewish law had a hearsay rule.[8] Roman law also had a highly developed hearsay rule as far back as the classical period. Specifically, the courts of Cicero's day distrusted *testimonium ex auditu* (testimony from hearing). In the later Roman period, Justinian's code incorporated the same rule and generally excluded *ex auditu testimony*, though trials in this period were inquisitorial without a jury.[9]

Much of Roman law and Justinian's code passed into the law of the Catholic Church. Pope Gregory the Great was very concerned about defining the elements of a fair trial. Judges, according to Gregory, were only to consider live testimony under oath of witnesses with direct knowledge of the facts. Any reliance on hearsay, again using the term *testimonium ex auditu*, was not good judging.[10]

From the church, the hearsay rule passed into the *ius commune*

1. **Act of Settlement** (12 & 13 Wm 3 c.2) also settled succession to the English throne on the Electress Sophia of Hanover, a granddaughter of James I, and her Protestant heirs. It remains the main Act of Parliament governing the succession to the United Kingdom's thrones.


Blackstone

2. 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 369-72 (1st ed. 1769).

3. On judges gaining the king's discretionary power over pardons, *see* Thomas A. Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 MICH. L. REV. 414, 425 (1976). During the Middle Ages this had much to do with practicality. A convict was hanged within hours of conviction. Thus, for the king's pardoning power to work, the king's representative (the judge) in conjunction with the jury had to decide then and there whether the defendant deserved pardon.

5. The following is Aristotle in context: "The law never looks beyond the question, what damage was done? And it treats the parties involved as equals. All it asks is whether an injustice has been done or an injury by one party on another. Consequently, what the judge seeks to do is to redress the inequality which is this kind of justice identified with injustice. Thus in a case of assault or homicide the action and the consequences of the action may be represented as a line divided into equal parts … . What the judge aims at doing is to make the parts equal by the penalty he imposes." ARISTOTLE, ETHICS 148-49 (Penguin Classics ed. 1955).

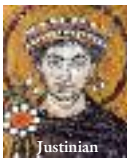
6. For example, the Romans had rules related to competency, summoning witnesses, privileges, leading questions, corroboration and related to documents and authentication. *See* C. A. Morrison, *Some Features of the Roman and the English Law of Evidence*, 33 TUL. L. REV. 577, 579-81 (1958-59) for an extensive list. *See also* POUND at 47-48.

7. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." F.R.EVID. 801(a)(c).

8. Frank R. Herrmann, S.J., *The Establishment of a Rule Against Hearsay in Romano-Canonical Procedure*, 36 VA. J. INT'L L. 1, n. 285 (1995). Under Jewish law, one who bases his testimony on what others said is a false witness violating the Eighth (or Ninth) Commandment "Thou shalt not bear false witness against thy neighbor," from Exod. 20.13.


Moses with the Ten Commandments—Rembrandt (1659)

9. Herrmann at 17-18, Morrison at 587.


Justinian

Justinian's Code, the ***Corpus Juris Civilis*** (Body of Civil Law) is the modern name for a collection of laws and written procedures issued 529-534 under Justinian I, Byzantine Emperor. *See also* Wigmore at 437, focusing on the Germanic and Anglo-Saxon roots of the hearsay rule. *But see* Morrison at 590, noting that Wigmore "more often than not" writes of the Roman law of evidence.


Pope Gregory

10. Herrmann at 21– 26. A precursor of Gregory, St. Augustine, in a sermon cautioned that only eyewitness testimony was valid. He used the biblical example of the soldiers guarding Christ's tomb. The Pharisees wanted to bribe the soldiers into saying that when they were asleep, the Disciples had taken Christ's body. This would have been hearsay, according to Augustine, because if the soldiers were asleep, how could they see anything? Herrmann at 30.


Christ Risen from the Tomb—Piero della Francesca

4. The **Queen's Bench** (or **King's Bench** for a male monarch) is now a division of the High Court of Justice of England and Wales. Subdivisions include the Commercial Court, the Admiralty Court and the Administrative Court. It is also the name of the superior court in the Canadian provinces of Saskatchewan, Alberta, New Brunswick and Manitoba. The Law Reports use the abbreviation QB (or KB) in legal citations.

and medieval law. Cases could move forward on belief of the community or common fame (*fama*). But this was only sufficient to begin investigations.[1] From there, the inquest court had to produce actual witnesses who could testify to matters within their direct knowledge.

In England, the Constitutions of Clarendon of 1164 specified, "Laymen are not to be accused save by proper and legal accusers and witnesses in the presence of the bishop."[2] The reference to the bishop shows the direct source of the hearsay rule from canon law all the way back to old Roman law. In the early days of the English common law jury trial, a hearsay rule would not have made much sense. The jurors were self-informed—they would generally have known who said what before the case went to court.[3] Because the jurors were the witnesses as well, a hearsay rule limiting witness testimony would have made no sense.

By the 1600s hearsay started to be excluded only if the statement stood alone. But hearsay could corroborate other testimony.[4] By the beginning of the 1700s, however, the rule had become a fundamental principle of the common law.[5]

Much of the hearsay rule's growth in the common law came about because of the old reliance on the power of oaths as the basis for legitimizing the system. Today hearsay is not good evidence because it is not subject to cross-examination and violates the Sixth Amendment's Confrontation Clause. But for the lawyers and judges of the 17th and 18th century, hearsay was not the best evidence because it was not under oath.[6]

In the early days of the English common law jury trial, a hearsay rule would not have made much sense. The jurors would generally have known who said what before the case went to court.

Now, the trained lawyer's cross-examination has become the guarantor of truth and the basis for the system's legitimacy—not oaths.[7] But, this guarantee assumes both the presence of trained lawyers and a system of procedure that gives them the scope to work.

It assumes also the rule of law.

The Framers and the Rule of Law

The entire premise of the American Revolution was to "re-establish" the rule of law from a despotic king.[8] Or, as Thomas Paine was to forcefully extol in COMMON SENSE (1776):

> … the world may know, that so far as we approve of monarchy, that in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law OUGHT to be King; and there ought to be no other.

The Framers read Aristotle:

1. Herrmann at 27-29 and 47; Fraher at 34.

2. *Quoted in* LEVY at 45.


St. Augustine

3. *See* Robert Popper, *History and Development of the Accused's Right to Testify*, 1962 WASH. U. L. Q. 454, 455 (1962) (noting jurors were the witnesses).

4. Wigmore at 443.

5. *Id.* at 458.

6. For Baron Jeffrey Gilbert's evidence treatise, THE LAW OF EVIDENCE (1754), and the best evidence principle, its relation to oaths and the importance of the oath as basis for hearsay rule rather than lack of cross examination, *see* John H. Langbein, *Historical Foundations of the Law of Evidence: A View From the Ryder Sources*, 96 COLUM. L. REV. 1168, 1173-76, 1194 (1996) (Langbein, *Evidence*); Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 592 (1990) (Landsman, *Contentious Spirit*); Stephan Landsman, *From Gilbert to Bentham: The Reconceptualization of Evidence Theory*, 36 WAYNE L. REV. 1149 (1990).

7. Wigmore's famous statement is that cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth." *Quoted in* Langbein, *Evidence* at n. 32. Langbein counterargues, "Cross-examination in the hands of a skilled and determined advocate is often an engine of oppression and obfuscation, deliberately employed to defeat the truth." On cross-examination and lawyers as the basis for system legitimacy, *see id.* at 1197-98. For cross-examination replacing the oath as guarantor of truth, *see* Wigmore I at 448. For more on hearsay in the 18th century, *see* John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 301 (1978).

8. Jacob Reynolds, *The Rule of Law and the Origins of the Bill of Attainder Clause*, 18 ST. THOMAS L. REV. 177, 187 (2006).

The DECLARATION OF INDEPENDENCE shows the import of the rule of law. After the preamble, THE DECLARATION indicts King George III for failing to follow the rule of law:

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.

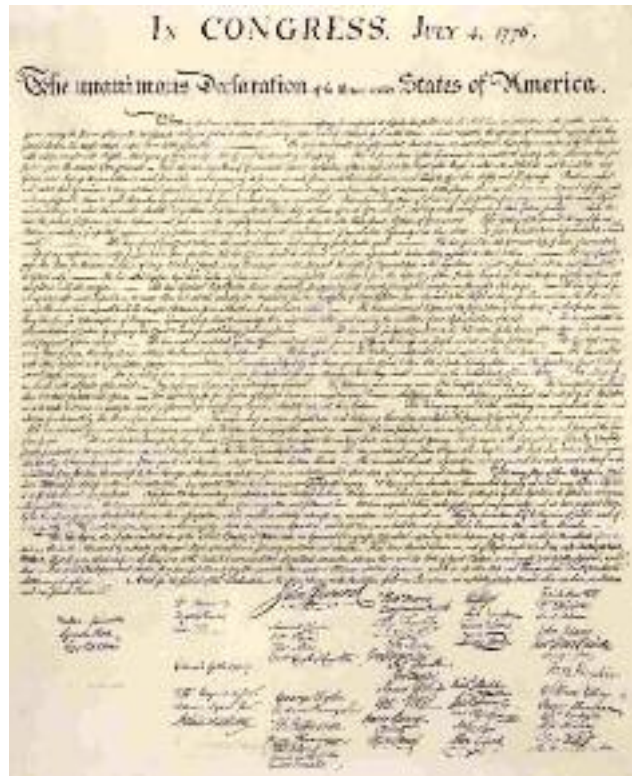
He has dissolved Representative Houses repeatedly, for opposing with manly firmness of his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected, whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries.


IN CONGRESS. JULY 4, 1776.

The unanimous Declaration … States of America.

> It is more proper that the law should govern than any of the citizens [and] persons holding supreme power should be appointed only guardians and servants of the law.[1]

They read the Enlightenment thinkers, including John Locke:

> Freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where that rule prescribes not: and not to be subject to the inconstant, uncertain, arbitrary will of another man.[2]

And the Framers put it all together to make a democratic republic:

> to the end that it may be a government of laws and not of men,

as John Adams provided in the Massachusetts Constitution of 1780[3] or as Madison's FEDERALIST NO. 51 notes:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[4]

With the possible exception to Madison's reference to "angles," Adams, Madison, Locke and Aristotle could have written each other's sentences.

Law and Courts in America

This tradition of courts and judges came to America with the colonists. They set up "courts of common pleas" in Pennsylvania and Courts of *Oyer and Terminer* in Virginia.[5] The power struggle that had played out in England between the king and his judges often played again in the colonies between royal governors and courts. The American Constitution was born from this history.[6]

The Framers wanted to protect not only the rights and court system that they won in the Revolution, but the tradition that came with it: courts where people could seek redress, a place and procedure where the accused could have a fair trial, judges with the independence to ensure it.[7]

Indeed, the entire constitutional structure, including the later-added Bill of Rights, presupposes a functioning and independent court system. Although the Constitution and Bill of Rights may guide legislators and presidents when making law,

1. *Quoted in* Reynolds at 185 and n. 45.

2. Locke quoted in Reynolds at 179. In addition to Locke, the founders read Samuel Rutherford's LEX, REX ("The Law is King") (1644), giving the theoretical foundation of the rule of law. Rutherford in turn influenced Charles Montesquieu's THE SPIRIT OF THE LAWS (1748). From there came the United States Constitution, which provided the subject of Alexis de Tocqueville's study of American society, DEMOCRACY IN AMERICA.

John Locke

John Adams

3. John Adams' Massachusetts constitution stands as the famous exposition of separation of powers as the basis for the rule of law: *In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them**: to the end it may be a government of laws and not of men.*** MASSACHUSETTS CONSTITUTION, Part The First, art. XXX (1780)

de Tocqueville

Montesquieu

Rutherford

4. For a discussion of antecedents to the American Rule of Law tradition, *see generally* Steven G. Calabresi, *The Historical Origins of the Rule of Law in the American Constitutional Order*, 28 HARV. J. L. & PUB. POL'Y 273 (2005). Regarding the law in the early colonies, *see, e.g.*, William E. Nelson, *Authority and the Rule of Law in Early Virginia*, 29 OHIO N.U.L. REV. 305 (2003), and/or William E. Nelson, *The Utopian Legal Order of the Massachusetts Bay Colony, 1630-1686*, 47 AM. J. LEGAL HIST. 183 (2005).

5. KEMPIN at 45. *See also* William E. Nelson, *Government by Judiciary: The Growth of Judicial Power in Colonial Pennsylvania,* 59 SMU L. REV. 3 (2006). Regarding jurisdictional issues related to the exercise of court powers both in English history and the early republic *see* Anthony J. Bellia, *The Origins of Article III "Arising Under" Jurisdiction*, 57 DUKE L.J. 263 (2007). For a discussion of the common law methodology in America, *see* Herbert Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6 (1911); *but see* Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L. J. 765 (2005) (the difficulty of the common law methodology in America).

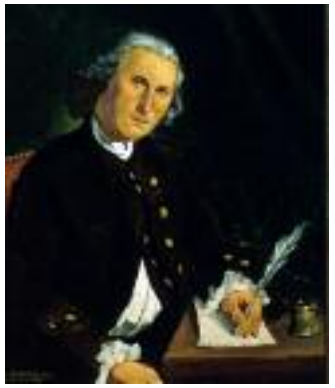
6. THE DECLARATION OF INDEPENDENCE indicted King George for his treatment of the colonies through the courts:

> *He has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries.*

Aaron Burr

7. On the concept of judicial independence established in the early republic within the context of Justice Samuel Chase's impeachment trial, *see* WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 595 (1992); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 588 n. 20 (1939).

Samuel Chase (April 17, 1741 – June 19, 1811) remains the only Supreme Court justice ever impeached. This signer of the Declaration of Independence was a Federalist partisan. The Jeffersonian Republicans who controlled Congress served Chase with six impeachment articles in 1804. The political motivation of the impeachment was clear. Jefferson wanted to bring the Judicial Branch, which the Federalists still controlled, in line. After Chase, the next target would have been Chief Justice John Marshall, Jefferson's cousin. The Senate, sitting as a court like the *Witenagemot* of old, heard the case. Vice-President Aaron Burr, under indictment for having killed Alexander Hamilton, presided over the trial. Although a Republican, Burr conducted the trial with fairness and impartiality. Fortunately for Chase, and for the concept of judicial independence, the Senate acquitted him in early 1805. The Senate Republicans, led by Burr, crossed over to protect the principle despite the fact that many detested Chase and his politics. An independent judiciary could survive partisan politics.



Samuel Chase

the enforcement of the rights usually happens in the courts.[1] And courts, for their part, cannot exist without a legal culture and power structure that allows them to function.[2]

The writers of the Constitution and Bill of Rights wrote them to provide us that structure. AZ AT


Jefferson in 1791


Jefferson in 1800

1. Jefferson wrote Madison on March 15, 1789, arguing for a bill of rights because of the "legal check which it puts into the hands of the judiciary." Levy, *Bill of Rights* at 279. An independent judiciary, believed Jefferson, would shield against majority impulses by holding acts unconstitutional.

Jefferson, however, seemed not to believe in "the hands of the judiciary" when he was the majority! Jefferson rode a wave of popular Republicanism to become the third president in 1801. The Supreme Court under his distant cousin, John Marshall, was the last branch of government under the Federalists. In 1803 Marshall wrote *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), for the first time finding a congressional Act unconstitutional—the Judiciary Act of 1789, because it expanded the original jurisdiction of the Supreme Court. Thus, by holding that the Act could not add to its power, the Supreme Court established the greater power of judicial review. *See generally* George L. Haskins, *Law Versus Politics in the Early Years of the Marshall Court*, 130 PENN. L. REV. 1 (1981). Jefferson's reaction stands in contrast to his belief a decade earlier as he lamented that the Constitution was "a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please." Jefferson, Letter to Spencer Roane at http://press-pubs.uchicago.edu/founders/documents/a1_8_18s16.html (last visited Mar. 16, 2008). For but a small sampling of all that has been written on Jefferson and the early federal courts, *see, e.g.*, Melvin I. Urofsky, *Thomas Jefferson and John Marshall: What Kind of Court Shall We Have*, 31 J. SUP. CT. HIST. 109 (2006); Kent R. Newmyer, *Thomas Jefferson and the Rise of the Supreme Court*, 31 J. SUP. CT. HIST. 126 (2006); Henry J. Abraham, *President Jefferson's Three Appointments to the Supreme Court of the United States: 1804, 1807, and 1807*, 31 J. SUP. CT. HIST. 141 (2006).

The power of judicial review, though not explicit in the Constitution, was part of the constitutional structure. Hamilton in FEDERALIST 78 extensively discussed the power: "*It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.*" For the full text of Federalist No. 78, *see* http://thomas.loc.gov/home/histdox/fed_78.html (last visited Mar. 16, 2008).

2. The power of judicial review, as discussed at note 1 on this page, is an embodiment of the rule of law. The political branches—Congress with the money and the president with agencies and armies—have accepted it as a key part of our government's power structure. For its origins, *see* John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2008) (noting the activism of the Rehnquist court); William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005). For an interesting discussion of how Washington and Adams selected the first justices and how it furthered the judiciary's role and rule of law, *see* Maeva Marcus, *Federal Judicial Selection: The First Decade*, 39 U. RICH. L. REV. 797 (2005).

Coke also established the principle of judicial review over acts of Parliament in Dr. Bonham's Case stating that "when an Act of Parliament is against Common right and reason, the Common Law will control it and adjudge such Act to be void." *Quoted in* KEMPIN at 92. This is the basis of the principle of judicial review in Chief Justice John Marshall's *Marbury v. Madision*, 5 U.S. (1 Cranch) 137 (1803).

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