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SHIP-MONEY: THE CASE THAT TIME AND WHITTINGTON FORGOT

REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT. By Keith E. Whittington.¹ University Press of Kansas. 2019. Pp. xxi + 410. \$39.95 (Cloth).

*Mark A. Graber*²

King Charles I, when asking the King's Bench for an opinion on whether the king during an emergency could insist that all communities in England supply the Royal Navy with a ship or the money necessary to build a ship,³ set in motion a process that delayed the development of judicial review in the English-speaking world for more than a century. The King's Bench informed the King that he had the power to levy that exaction.⁴ Several years later, in the *Ship Money Case* or *The King v. Hampden*, the justices by an 8–4 vote declared the levy constitutional. Three justices issued opinions quite clearly affirming judicial power to strike down any Parliamentary statute that trenched on the royal prerogative. Neither that decision nor the assertions of judicial power proved lasting in England or the United Kingdom. When Parliament reconvened in 1640, the *Ship Money* decision was condemned.⁵ During the English Civil War, the surviving justices in the majority who did not flee the realm were imprisoned.⁶ By the end of the seventeenth century, parliamentary supremacy was becoming the law of the land.

Aided by Blackstone's *Commentaries*, commentators soon

1. William Nelson Cromwell Professor of Politics, Princeton University.

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3. See *The King v. Hampdon* (1637) 3, HOWELL'S STATE TRIALS 825, 844 (U.K.).

4. See *id.* at 844.

5. See *id.* at 1261, 1299.

6. For the information in this paragraph, see W. J. JONES, *POLITICS AND THE BENCH: THE JUDGES AND THE ORIGINS OF THE ENGLISH CIVIL WAR* (1971); STUART E. PRALL, *BOOK REVIEW*, 78 *THE AM. HIST. REV.* 432 (1973).

forgot the political struggles over the judiciary in the seventeenth century that placed England on the course of parliamentary supremacy. When scholars look for the English origins of judicial review, they debate the significance of *Dr. Bonham's Case*.⁷ *Ship-Money* is almost entirely absent from the judicial review canon, even from works as magnificently encyclopedic as Keith Whittington's *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present*.⁸ *Repugnant Laws* tells the conventional story of the rise of judicial power in the United States. Professor Keith Whittington goes directly from *Bonham* to the late 1760s, when some colonialists claimed that courts should declare unconstitutional laws permitting English authorities to use general warrants and when William Blackstone published *Commentaries on the Laws of England*,⁹ the second volume of which maintained that courts had no power to declare laws unconstitutional (p. 40). The English Civil War had a great impact on King Charles I's head, but apparently none on judicial power.

Whittington's failure to mention *Ship-Money* in his magisterial *Repugnant Laws* highlights the present obscurity of the case. Whittington, when writing *Repugnant Laws*, performed Herculean research tasks. He read and synthesized every case in which the Supreme Court of the United States considered declaring unconstitutional a federal law. The text comments on the Supreme Court's greatest hits and on every federal constitutional matter in which a justice ever hit a note. *Repugnant Laws* discusses *Marbury v. Madison*¹⁰ (pp. 80–82), as well as scores of other cases, such as *Pollard v. Hagan*¹¹ (pp. 98–100), that escaped the notice of almost all scholars previous to Whittington. This is not simply an exercise in judicial trivial pursuit. Whittington demonstrates such cases as *Hagan* play a vital role in understanding the development and role of judicial review as *Marbury*. If *Ship-Money* is missing from this study, that case and

7. 77 ENG. REP. 646 (C.P. 1610). For the debates over the significance of *Bonham's Case*, see especially, R. M. Helmholz, *Bonham's Case, Judicial Review and the Law of Nature*, 1 J.LEGAL ANALYSIS 325, 326 note 3 (2009) (citing numerous sources discussing *Bonham* and the origins of judicial review).

8. KEITH E. WHITTINGTON, *REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT* (2019).

9. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1799).

10. 5 U.S. 137 (1803).

11. 44 U.S. 212 (1845).

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the surrounding constitutional politics are likely to be absent from any history of judicial review in the English-speaking world, past, present, or future.

This Review employs a bait and switch strategy for restoring *Ship-Money* to the canon on judicial review that Whittington so lovingly fills out with respect to the United States. The bait is an alleged review of a seminal manuscript by one of the most prominent constitutional scholars in the academy. The switch is a focus on a neglected case in the English canon of judicial power rather than a discussion of what Whittington has to say about the canon in the United States. This bait and switch strategy is justified by the sheer impossibility of saying anything new or particularly interesting about the history of judicial review that Whittington has not covered.

Repugnant Laws is immune to the standard review critique. The review of cases is dimensionally more comprehensive than has ever occurred before. One might tinker at the margins with a case or theme here and there, but any proposed addition, subtraction, or modification is likely to take place at least six points to the right of the decimal place. Historical institutionalists can add little to *Repugnant Laws*' central thesis, that one cannot understand the work of the Supreme Court without a deep engagement with the law and politics of the time. This understanding that judicial review is politically constructed is becoming increasingly important in both political science departments and law schools.¹² *Repugnant Laws* documents how courts are political institutions. Whittington writes:

The Court has not stood apart from the forces that move American politics generally. The justices swim in the same political waters as other federal government officials. The Court acts within bounds set by other political actors, and it acts on goals shared by its political allies (p. 287).

Repugnant Laws details how the Supreme Court is a distinctive political institution that does not merely reproduce the rest of the political order. Whittington observes,

The justices . . . are not minions who simply do the bidding of party leaders. They are allies of coalitional leaders, not their agents . . . [Their] commitments may well be shared by others,

12. For one review of the literature, see Mark A. Graber, *The Collapse of the New Deal Conceptual Universe: The Schmooze Project*, 77 MD. L. REV. 108, 121–25 (2017).

and they may be advanced through party platforms and legislative debates, but the justices give them shape and effectiveness. The justices set their own priorities and, in many cases, have their own distinctive set of concerns (pp. 288–89).

Whether any scholar could state these points more clearly or defend them with more vigor and elbow grease is doubtful. For this reason, the better reviewing strategy is to make this barely adequate feint in Whittington's direction and then use the body of the review to discuss a related subject of interest to the reviewer.

The absence of *Ship-Money* from the canon of judicial review creates a lacuna in the scholarship on the theoretical foundations for judicial review. Part I of this Review briefly covers the facts of *Ship-Money*, the holding of the case, the majority opinions clearly asserting a judicial power to declare unconstitutional parliamentary laws, and the dissenting opinions clearly asserting a judicial power to declare illegal royal proclamations. Part II of this Review details how those majority and dissenting opinions provided Americans with two distinctive paths to a judicial power to declare laws unconstitutional. The majority opinions emphasized sovereignty. Judicial review serves to protect the will of the sovereign, be that the King, Parliament, or the people. The dissents emphasized fundamental law. Judicial review serves to protect higher law principles. *Marbury* grounded judicial review in a theory of sovereignty. James Otis, when protesting the Stamp Act¹³, grounded judicial review in higher law principles. Both approaches intertwine in American constitutional development.

The absence of *Ship-Money* from the canon of judicial review creates a lacuna in the scholarship on the political construction of judicial review. Increasing agreement exists among scholars of constitutional law in the United States that judicial review has political foundations and is not the countermajoritarian institution that Alexander Bickel and other scholars obsessed about in the late twentieth century.¹⁴ Ran Hirschl and Tom Ginsburg detail how the judicialization of politics outside the United States has similar political foundations.¹⁵ Talk of politics

13. Public Act, 5 George III, c. 12.

14. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

15. See RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004); TOM GINSBURG, *JUDICIAL*

disappears, however, when conversation turns to the rise of parliamentary sovereignty in England. *Repugnant Laws* and other distinguished histories begin with *Bonham's Case*, which scholars discuss as an intervention in the theory of judicial power. The English path ends with Blackstone declaring that courts have no power to declare laws unconstitutional. Parliamentary sovereignty appears to have just happened in England, or *Bonham* perhaps aside, been the rule from time immemorial. No politics here.

Ship-Money puts politics back into explanations for the rise of parliamentary sovereignty in England and the later rise of judicial power in the United States. The judicial opinions in *Ship-Money* demonstrate that judicial elites in the mid-seventeenth century had developed a conception of judicial power rooted in royal sovereignty that justified striking down parliamentary legislation inconsistent with royal prerogatives. Part III of this Essay explains why this conception of judicial power did not take hold in England. The political foundations of *Ship-Money* judicial review collapsed almost immediately. The judicial majority in *Ship-Money* placed the courts firmly on what would become, within a decade, the losing side of the English Civil War, when asserting that sovereignty was vested in the King, that one aspect of this sovereignty was royal power to levy exactions without parliamentary consent, and that laws that trenched on this regal prerogative were void. Institutional power after 1648 and 1688 flowed to Parliament, the institution on the winning side of the English revolution. The new understanding of judicial power, celebrated by Blackstone, maintained that courts could not strike down legislation because Parliament was sovereign, but that justices could declare illegal Royal decrees inconsistent with parliamentary sovereignty. Ultra vires judicial power and only ultra vires judicial power does not date from "time immemorial," but became during the late seventeenth and early eighteenth centuries the dominant philosophy of the members of Parliament who gained power after the English Civil War and the Glorious Revolution.

John Marshall learned well the lesson *Ship-Money* taught about judicial capacity to intervene in bitter political disputes. Marshall in *Marbury* and in other cases avoided making decisions

that unduly antagonized the dominant national coalition.¹⁶ Marshall might have engaged in considerable strategic voting simply because he was an astute politician. Given the centrality of the English Civil War to colonial revolutionaries,¹⁷ however, the fate of the English justices and tribunals that decided *Ship-Money* probably explains at least in part Marshall's reticence to challenge Jeffersonian constitutional presumptions until supporters of a Federalist/National Republic/Whig program had greater influence in the national government.¹⁸

I. THE CASE

Ship-Money arose out of the quarrels between King Charles I and Parliament that precipitated the English Civil War.¹⁹ Charles I dissolved Parliament in 1629 because he believed members were intruding on the Royal prerogative. This decision proved problematic. The main source of royal funding was the subsidy, which could only be voted on by Parliament. In 1634, Charles attempted to do a workabout by claiming the kingdom was threatened by pirates and other nations in ways that made necessary a demand that landowners supply the royal treasury with the money to build ships. John Hampden and other prominent political actors refused to pay the tax. They were arrested and brought before the combined King's Bench and Court of Exchequer.

The special tribunal sustained the royal levy by an 8–4 vote. Although nine of the twelve justices in their seriatim opinions maintained that such exactions were constitutional, Sir Humphrey Davenport voted against conviction because of a technical defect in the writ. The primary issue before the court was whether the King had acted legally. In declaring the *Ship-Money* levy illegal, the dissenting justices implicitly or explicitly took the position that

16. See Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 *STUD. AM. POL. DEV.* 229 (1998); Michael J. Klarman, *How Great Were the 'Great' Marshall Court Decisions*, 87 *VA. L. REV.* 1111 (2001); Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 *LAW & SOC'Y REV.* 87, 95 (1996).

17. See KEVIN P. PHILLIPS, *THE COUSINS' WARS: RELIGION, POLITICS, CIVIL WARFARE, AND THE TRIUMPH OF ANGLO-AMERICA* (1999).

18. See Graber, *supra* note 12; Klarman, *supra* note 16.

19. For the information in this paragraph and a good background on English constitutional politics in the seventeenth century, see 1 MARK A. GRABER & HOWARD GILLMAN, *THE COMPLETE AMERICAN CONSTITUTIONALISM* (2015); CHRISTOPHER HILL, *THE CENTURY OF REVOLUTION, 1603–1714* (1961).

courts of law could find that the King had acted illegally. The justices were not compelled to rule on whether courts could maintain Parliament had acted illegally. Parliament, being dissolved, had not acted at all. Nevertheless, at least three opinions made clear that, had Parliament attempted to interfere with the King's effort to raise money to defend the kingdom, the justices would have declared that effort illegal.

The central conclusion of the majority opinions, as expressed in a previous letter to the King when Charles I asked for an advisory opinion, was that "when the good and safety of the kingdom in general is concerned . . . , your majesty is the sole judge of the danger, and when and how the same is to be prevented and avoided."²⁰ The King was authorized to determine whether the realm was imperiled. Sir John Finch maintained, "the king is sole judge of the danger, and whether it be imminent."²¹ "[T]he danger being certified by his majesty," Sir Humphrey Davenport asserted, "I hold it not traversable."²² Once the King determined the realm was imperiled, the King was authorized to adopt whatever means would best defend the realm. Some justices grounded this conclusion in pragmatism. Sir Francis Weston stated, "Will you have forces on both sides, and restrain the king to his power by parliament, which may be so dilatory, that the kingdom may be lost in the mean time?"²³ The more common claim was that royal power was rooted in sovereignty. Sir Robert Berkley spoke of the "regal power to command provision (in case of necessity) of means from the subjects, to be adjoined to the king's own means for the defense of the commonwealth."²⁴

These royal powers could not be controlled by Parliament. Although Parliament had not passed a statute forbidding the Ship-Money levy, several opinions by justices in the majority made clear that courts would declare such a measure illegal. Finch described at length the constitutional limits on parliamentary efforts to tame royal power.

Acts of parliament may take away flowers and ornaments of the crown, but not the crown itself; they cannot bar a succession, nor can they be attained by them, and acts that bar

20. *In the Case of Ship-Money*, 3 Howell's State Trials at 844.

21. *Id.* at 1219 (opinion of Finch, J.).

22. *Id.* at 1213 (opinion of Davenport, J.).

23. *Id.* at 1075 (opinion of Weston, J.).

24. *Id.* at 1099 (opinion of Berkley, J.).

them or possession are void. No act of parliament can bar a king of his regality, as that no lands should hold of him; or bar him of the allegiance of his subjects; or the relative on his part, as trust and power to defend his people: therefore acts of parliament to take away his royal power in the defence of his kingdom, are void . . . ; they are void acts of parliament, to bind the kind not to command the subjects, their persons and goods, and I say their money too: for no acts of parliament make any difference.²⁵

Two justices explicitly agreed with this declaration of constitutional limits on parliamentary power to interfere with regal prerogatives. Davenport wrote, “if an act of parliament should be made to restrain such a charge on the subjects in case of necessity, it would be *felo de se*, and so void, for it would destroy the *regalejus*.”²⁶ Sir George Vernon insisted, “a statute derogatory from the prerogative doth not bind the king; and the king may dispense with any law in cases of necessity.”²⁷ No other majority opinion discussed the status of laws that trenched on the royal sovereignty, but other justices made assertions of royal power, connected with sovereignty, that implicitly indicated that parliament did not have the unlimited lawmaking authority that Blackstone celebrated a century later. Sir Robert Berkley described Parliament as “but a Concilium . . . ; the king may call it, prorogue it, dissolve it, at his pleasure; and whatsoever the king doth therein, is always to be taken as just and necessary.”²⁸

The three justices who maintained the tax was illegal did not rely on Blackstonian notions of parliamentary sovereignty. Those dissents were guided by the principle that the king lacked the specific power to tax without an act of Parliament. Sir George Crooke maintained, “It is against the common law of the land, which gives a man a freedom and property in his goods and estates, that it cannot be taken from him, but by his consent in specie, as in parliament, or by his particular assent.”²⁹ Sir John Denham agreed that “The king’s majesty being of a corporate capacity, can neither take any lands or goods from any of his subjects, but by and upon a judgment on record.”³⁰ No judge in

25. *Id.* at 1235 (opinion of Finch, J.).

26. *Id.* at 1215 (opinion of Davenport, J.).

27. *Id.* at 1125 (opinion of Berkley, J.).

28. *Id.* at 1101 (opinion of Hutton, J.).

29. *Id.* at 1129 (opinion of Crooke, J.).

30. *Id.* at 1201 (opinion of Denham, J.).

the dissent asserted a more general parliamentary supremacy. Sir Richard Hutton, after observing that “this power of assessing of money, being a great charge, cannot by the law at this day, unless in time of actual war, be imposed upon the people [but] by act of parliament,”³¹ then insisted that Parliament was not omniscient. He continued, “if an act of parliament should enact that he should not defend the kingdom, that the king should have no aid from his subjects to defend the kingdom, these acts would not bind, because they would be against natural reason.”³²

The opinions in *Ship-Money* demonstrate that Blackstone’s *Commentaries* described practice in mid-eighteenth century England and not time-honored practices or even the practice before the English Civil War. The justices in the majority that discussed judicial review located sovereignty in the King. They asserted a power to ignore legislation inconsistent with that sovereignty. The justices in the dissent, less clearly, indicated that the Common Law had devised a line between royal power and parliamentary power. Parliament was supreme within that limited jurisdiction. A royal edict that taxed people was an illegal intrusion on parliamentary power (not sovereignty) and could be so declared by the courts. For the same reasons, the dissenting opinions indicated that Parliament, in turn, could not trench on matters the Common Law entrusted to the King, such as the defense of the kingdom in real emergencies.

II. SHIP-MONEY AND SOVEREIGNTY

Ship-Money offers interesting variations on and an alternative to the connection between judicial power and sovereignty. Judicial review in the United States, Whittington notes, was initially grounded in the notion that the people are sovereign. The lack of judicial review in the United Kingdom, Blackstone points out, is grounded in the notion that Parliament is sovereign (p. 41). The justices in the *Ship-Money* majority who declared that courts could ignore laws inconsistent with the royal prerogative grounded judicial authority in the notion that the King was sovereign. The justices who believed the King had acted illegally, by comparison, did not ground judicial authority on parliamentary sovereignty or any other notion of sovereignty.

31. *Id.* at 1191 (opinion of Hutton, J.).

32. *Id.* at 1195 (opinion of Hutton, J.).

Instead, they emphasized Common Law understandings similar to those James Otis relied on during the 1760s when protesting general warrants.

Those Americans who defended judicial review immediately after the Constitution was drafted insisted that popular sovereignty justified the judicial power to declare laws unconstitutional. Alexander Hamilton in *Federalist* 78 declared: “Nor does this conclusion” that courts have the power to declare legislation unconstitutional

by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.³³

St. George Tucker, in his American edition of Blackstone’s *Commentaries*, reached the same conclusion. “[I]n America,” he pointed out, “the constitutions, both of the individual states, and of the federal government, being acts of the people, and not of the government . . . the legislature can possess, no power, or obligation over the other branches of government, in any case, where the principles of the Constitution, may be in any degree infringed by an acquiescence under the authority of the legislative department.”³⁴ John Marshall adopted this popular sovereign justification for judicial review in *Marbury v. Madison*. The first premise of his opinion was “That the people have an original right to establish for their future government, such principles as in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.”³⁵

Judicial power in the United Kingdom is as rooted in a theory of sovereignty. Blackstone invoked parliamentary sovereignty when denying the power of judicial or other institutions to declare unconstitutional acts of Parliament. His *Commentaries* maintained,

The power of parliament . . . is so transcendent and absolute

33. ALEXANDER HAMILTON, JAMES MADISON, & JOHN JAY, *THE FEDERALIST PAPERS* 467–68 (1961).

34. ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES WITH NOTES AND REFERENCES TO THE CONSTITUTION AND LAWS; OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND THE COMMONWEALTH OF VIRGINIA* 91 n.20 (1803).

35. *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

that it cannot be confined, either for causes or persons without any bounds It hath sovereign and uncontrollable authority in the making, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or crime; this being the place where that absolute despotic power,³⁶ which must, in all governments, reside somewhere, is entrusted by the constitution of these kingdoms.³⁷

This conception of parliamentary sovereign explains the English judicial practice of *ultra vires*. Courts in the United Kingdom may strike down administrative and executive decisions that they conclude are not warranted by parliamentary legislation, but they have no power to strike down legislative actions they believe inconsistent with the English Constitution.³⁸

The justices in the *Ship-Money* majority inverted Blackstone's analysis of judicial power and sovereignty. Rather than locate sovereignty in Parliament, the justices located sovereignty in the King. Sir John Finch declared, "Certainly there was a king before a parliament, for how else could there be an assembly of king, lords and commons? And then what sovereignty was there in the kingdom but this?"³⁹ Three conclusions followed from this assertion of regal sovereignty. First, the King had the power to determine when the kingdom was in sufficient danger to require revenue to be collected without parliamentary consent. Finch maintained, "the law that hath given the interest and sovereignty of defending and governing the kingdom to the king, doth also give the king power to charge his subjects for the necessary defence and good thereof."⁴⁰ Second, judges could strike down any parliamentary enactment that interfered with this sovereign prerogative. As noted above, Finch's opinion insisted, "No act of parliament can bar a king of his regality, as that no

36. At this point in his edition of Blackstone's *Commentaries*, Tucker added a footnote stating, "In the United States this absolute power is not delegated to the government: it remains with the people . . ."; TUCKER, *supra* note 34, at 160 n.21.

37. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 156 (1765).

38. For a good discussion of parliamentary sovereignty and judicial power in the United Kingdom, see Lori Ringhand, *Fig Leaves, Fairy Tales, and Constitutional Foundations: Debating Judicial Review in Britain*, 43 COLUM. J. TRANSNAT'L L. 865 (2005).

39. *Ship-Money*, 3 Howell's State Trials at 1226 (opinion of Finch, J.).

40. *Id.*

lands should hold of him; or bar him of the allegiance of his subjects; or the relative on his part, as trust and power to defend his people: therefore acts of parliament to take away his royal power in the defence of his kingdom, are void.”⁴¹ Third, royal edicts were the law of the land. Berkley declared, “The law is of itself an old and trusty servant of the king’s; it is his instrument or means which he useth to govern his people by.—I never read or heard, that Lex was Rex, but it is common and most true, that Rex is Lex.”⁴²

The dissenting opinions in *Ship-Money* did not ground judicial power to strike down a regal act on a theory of parliamentary or any other form of sovereignty. Hutton rejected both parliamentary and royal sovereignty when he insisted that the law of the land forbade kings from raising revenue without parliamentary consent and forbade Parliament from interfering with royal efforts to defend the kingdom.⁴³ Instead, the dissents appear to have grounded judicial authority in Common Law practice. Parliamentary “sovereignty” was limited to those matters the Common Law and traditional practice entrusted to the national legislature. Royal sovereignty was limited to those matters the Common Law and traditional practice entrusted to the King. The judiciary, the dissenting opinions in *Ship-Money* implied, determined how the common law and traditional practice balanced power between Parliament and the King.

The dissenting opinions in *Ship-Money* cast new light on the debate over whether *Bonham’s Case* belongs in the canon of judicial review. Conventional wisdom regarded *Bonham’s Case* as an important precedent for colonial calls for and early state exercises of judicial power.⁴⁴ A revisionist literature developed in the mid-twentieth century suggesting that Coke’s claim that “the common law will controul Acts of Parliament”⁴⁵ is an assertion about principles of statutory interpretation rather than about the structure of the legal hierarchy.⁴⁶ James Otis was inventing a new tradition rather than reviving earlier practice, in this view, when

41. *Id.* at 1235.

42. *Id.* at 1098 (opinion of Berkley, J.).

43. *See id.* at 1191 (opinion of Hutton, J.).

44. *See* Theodore F. T. Plucknett, *Bonham’s Case and Judicial Review*, 40 HARV. L. REV. 30, 61–68 (1926).

45. *Bonham’s Case*, 77 English Reports at 652.

46. *See* J. W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 35 (1955). Whittington takes this view (p. 40).

he cited *Bonham's Case* for the proposition that “the acts of Parliament against natural equity are void”⁴⁷ and called on courts to ignore legislation authorizing writs of assistance. The revisionist literature seems plausible because few instances appear to exist where English judges based decisions on constitutional norms. If *Bonham's Case* is an extreme outlier on a traditional reading, then the traditional reading may be wrong.

The *Ship-Money* dissents provide a missing link between *Bonham's Case* and Otis' claim that “An act against the constitution is void,”⁴⁸ suggesting far greater continuity between English fundamental law jurisprudence of the seventeenth century and colonial fundamental law jurisprudence of the eighteenth century than acknowledged by *Bonham's Case* revisionists. Crooke's claim in his dissenting opinion that the Ship-Money excise “is against the common law of the land”⁴⁹ echoes both *Bonham's Case* and Otis. Douglas Edlin details how many English judges during the seventeenth and eighteenth centuries remained faithful to this common law practice. Prominent judges, he details, understood the “common law [as] on ongoing enterprise of human reason, conceived as practical, ‘artificial’ reason. So any law that conflicts with reason controverts the common law.”⁵⁰ Several important Supreme Court opinions in the early republic continued this fundamental law practice. Justice Samuel Chase, in *Calder v. Bull*, asserted that “general principles of law and reason” justified striking down legislation inconsistent with “free republican governments.”⁵¹ Chief Justice Marshall insisted that “general principles which are common to our free institutions” provided an alternate ground for his ruling in *Fletcher v. Peck* that states could not rescind land grants.⁵² Justice William Johnson based his concurring opinion in that case on “the reason and nature of things: a principle which will impose laws even on the deity.”⁵³

47. JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED 72 (1764).

48. 2 JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 525 (1865) (quoting Otis).

49. *Ship-Money*, 3 Howell's State Trials at 1129 (opinion of Crooke, J.).

50. DOUGLAS E. EDLIN, JUDGES AND UNJUST LAWS: COMMON LAW CONSTITUTIONALISM AND THE FOUNDATIONS OF JUDICIAL REVIEW 77 (2008).

51. *Calder v. Bull*, 3 U.S. 386, 388, 389 (1798) (opinion of Chase, J.).

52. *Fletcher v. Peck*, 10 U.S. 87, 139 (1810).

53. *Fletcher*, 10 U.S. at 143 (Johnson, J., concurring).

The *Ship-Money* opinions suggest two paths to the American practice of judicial review. The first runs through the majority opinions in *Ship-Money* to Blackstone to *Federalist* 78 and *Marbury v. Madison*. This path treats judicial review as protecting sovereign power, whether that sovereign be the King, the national legislature or the people. Judicial review maintains the commands of the sovereign power against any institution that implicitly transgresses that authority. The second path runs through *Bonham's Case* to the dissenting opinions in *Ship-Money* to James Otis to the Chase opinion in *Calder* and the judicial opinions in *Fletcher*. This path treats judicial review as protecting the fundamental law of a regime, regime principles that may or may not be written down in a constitutional text. Judicial review maintains longstanding fundamental principles against transient efforts to challenge those norms. Both paths continue to structure American constitutionalism. Robert McCloskey's classic *The American Supreme Court* speaks of "the devotion of Americans to both popular sovereignty and fundamental law."⁵⁴

III. *SHIP-MONEY* AND THE PRACTICE OF JUDICIAL POWER

Ship-Money teaches as important if not more important lessons about the practice of judicial power. While far more research is necessary, English constitutional history suggests that the United Kingdom did not adopt parliamentary supremacy because, after centuries of contemplation, crucial English elites became convinced of the theoretical virtues of that allocation of constitutional authority. The English courts chose the wrong side in the English Civil War. Seventeenth-century English revolutionaries identified courts with the royal power the justices attempted to preserve. As Parliament struggled to tame royal power, part of the taming was also a taming of a court system perceived as a natural ally of royal power. Henry Parker's *The Case of Shipmoney*, published in 1640,⁵⁵ was one of the first documents in English constitutional history to champion

54. ROBERT MCCLOSKEY, *THE AMERICAN SUPREME COURT* 8 (6th ed., 2016). McCloskey thought judges responsible for upholding the fundamental law commitments of democratic constitutionalism and elected officials responsible for upholding the popular sovereignty commitment of democratic constitutionalism. *Id.* at. 6–8. As discussed, however, judicial review reflects both commitments.

55. HENRY PARKER, *THE CASE OF SHIPMONY BRIEFLY DISCOURSED, ACCORDING TO THE GROUNDS OF LAW, POLICY, AND CONSCIENCE* (1976) [1640].

parliamentary supremacy.⁵⁶ Had the justices ruled against Charles I, the course of English constitutional history might have changed.

The rise of parliamentary supremacy in England adds an important codicil to Professor Ran Hirschl's theory of hegemonic preservation. Hirschl observes that courts gain power in many regimes when weakened majority coalitions have reason to empower the judiciary as a bulwark against rising threats to their rule. "[W]hen their policy preferences have been, or are likely to be, increasingly challenged in majoritarian decision-making arenas," he maintains, "elites that possess disproportionate access to, and influence over, the legal arena may initiate a constitutional entrenchment of rights and judicial review in order to transfer power to supreme courts."⁵⁷ Jefferson's observation in 1801 that "the Federalists have retired into the judiciary as a stronghold . . . and from that battery all the works of republicanism are to be beaten down and erased"⁵⁸ could have been said of a great many regimes, including Stuart England, with only a change in the proper nouns. *Ship-Money* highlights how one practical problem with hegemonic preservation is that rising political forces will identify courts with the partisan forces that have empowered the judiciary. If those hegemons are toppled too quickly, the court may be toppled as well. Sometimes, as in contemporary Poland, the new regime replaces the old justices with newer justices allied with the regime.⁵⁹ The parliamentarians who triumphed in the English Civil War, recognizing the historical alliance of judges with the Crown, chose to abandon judicial review entirely, at least judicial review of parliamentary legislation. The benefits of hegemonic preservation, the Stuart and other examples suggest, may be transient. The cost to the initial hegemons may be far more significant.

Ship-Money helps explain the rise of judicial review in the United States. Scholars generally agree that Federalists were committed to increasing executive power, with disputes largely over the degree to which Federalists wanted a stronger executive than their anti-Federalist rivals.⁶⁰ A strengthened judiciary, the

56. See Michael Mendle, *The Ship Money Case, the Case of Shipmoney, and the Development of Henry Parker's Parliamentary Absolutism*, 32 HIST. J. 513 (1989).

57. HIRSCHL, *supra* note 15, at 12.

58. 10 THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 302 (1902) (in a letter from Thomas Jefferson to John Dickinson, December 19, 1804).

59. See WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN (2019).

60. For the most recent entry in this debate, see ERIC NELSON, THE ROYALIST

English experience taught the framers, went hand-in-hand with a strengthened judiciary. The Virginia Plan proposed a council of revision composed of executive and judicial branch officials authorized to reject federal legislation.⁶¹ That Council was rejected, but Federalists understood courts as far more closely allied with executive power than with legislative power. *Federalist* 78 indicated that courts would be toothless unless their decisions met with executive approval. Hamilton famously stated that the judiciary “may be truly said to have neither FORCE nor WILL, but merely judgment,” to which he added the less well-known point: “and must ultimately depend upon the aid of the executive arm even for the efficacy of judgment.”⁶²

Whittington’s *Political Foundations of Judicial Supremacy* details the special relationship between courts and executives throughout American history. That work details how “[p]residents and political leaders have generally preferred that the Court take the responsibility for securing constitutional fidelity.”⁶³ Presidents in times of normal constitutional politics “place like-minded judges on the bench”⁶⁴ as useful means for “regime elaboration and enforcement,”⁶⁵ particularly “against constitutional outliers”⁶⁶ in states controlled by factions that are in the national minority. Presidents who confront a hostile Congress may find promoting judicial power the lesser of two evils. Whittington points out: “In a hostile political environment, the law and the judiciary may be the best defense that a president has.”⁶⁷ Clashes between the White House and the Marble Palace tend to occur only during those rare moments in history when a new coalition has taken control of the elected branches of government, but the older justices have not yet left the bench.⁶⁸

Repugnant Laws tells the story of a chastened court that learned the political lesson of *Ship-Money*. Supreme Court

REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING (2014).

61. See 1 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 21 (rev. ed., 1966).

62. HAMILTON, MADISON & JAY, *supra* note 29, at 465.

63. KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY XI* (2007).

64. *Id.* at 87.

65. *Id.* at 117.

66. *Id.* at 105.

67. *Id.* at 166–167.

68. See *id.* at XI.

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justices in the United States from John Marshall to John Roberts have generally avoided tangling with powerful forces in American politics. Whittington points out, “Through . . . low-profile and routine cases, the Court has established itself as a constitutional actor on the national stage” (p. 294). The justices when wielding judicial power in more high-profile and extraordinary cases have been supported by powerful officials whose power, more often than not, proved more enduring than that of Charles I. “When the Court intervenes to vindicate . . . principles against an errant legislature,” *Repugnant Laws* concludes, “it is often doing the political work that political leaders want it to do” (p. 314). This may not be the heroic judiciary imagined by Ronald Dworkin⁶⁹ and sought by the *Ship-Money* majority, but what Whittington brilliantly describes is the judicial reality of a tribunal that has survived and thrived for more than two hundred years.

69. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 69–71 (1985) (describing the Supreme Court as the “forum of principle”).

