

A MOOT COURT EXERCISE: DEBATING JUDICIAL REVIEW PRIOR TO *MARBURY v. MADISON*

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On August 31, 1797, student members of the Moot Court Society at Tapping Reeve's law school in Litchfield, Connecticut¹ suspended a rule requiring issues for argument to be put in hypothetical cases, to permit their debating in the abstract a question which especially interested them: *Have the judiciary a right to declare laws, which are unconstitutional, void?* This moot court proceeding provides a rare pre-*Marbury* record of an actual argument and decision about what has come to be called the power of judicial review.² This article is the means of first publication of that record.

Judicial review was a debatable but not yet widely debated constitutional question in 1797. How it was that American law students came to it then, as an issue for moot court argument,

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1. For the history of the school, see generally Samuel H. Fisher, *The Litchfield Law School, 1774-1833* (Yale U. Press, 1933) ("*The Litchfield Law School*"), and Marian C. McKenna, *Tapping Reeve and the Litchfield Law School in 21 Connecticut Tercentenary Pamphlet Series* (Oceana Press, 1986) ("*Tapping Reeve*").

2. For cases which stand as early examples of judicial review of state legislation, see Julius Goebel, Jr., *Antecedents and Beginnings to 1801*, in 1 *History of the Supreme Court of the United States* 125-142 (MacMillan, 1971). Notably lacking from records and accounts of virtually all such cases are arguments of counsel in opposition to claims that courts were empowered to pass on the constitutionality of laws. In *State v. Parkhurst*, 9 N.J.L. (4 Halstead) 427 (1802), for example, counsel's submissions are not reported despite Justice Kirkpatrick's noting that the case was "very ably and fully argued" and that the question "of late years has been considerably agitated in these United States," and "has enlisted many champions on both sides." *Id.* at 434, 443.

presents an intriguing inquiry for study in the history of early American legal education. As developed here, that inquiry will extend to the Litchfield Law School, its curriculum and methods of instruction, the practice in its Moot Court, the student advocates who appeared in this case, and possible extracurricular sources of their interest in the issue they debated.

I. THE LAW SCHOOL AND ITS MOOT COURT

Tapping Reeve had lived in Litchfield since his admission to the Connecticut bar in 1772.³ For a time, like other lawyers, he taught students who apprenticed in his office; one of his first pupils was his brother-in-law, Aaron Burr.⁴ The transformation of that office teaching practice into a law school may be dated either from 1782, when Reeve began developing what would become a highly structured, fifteen month course of lectures, or from 1784, when he constructed a small classroom building next to his home to accommodate a growing number of students.⁵ Over the ensuing five decades of its operation the school would enjoy a national reputation and following. Reeve's appointment in 1798 as judge of the Superior Court⁶ prompted his taking James Gould into partnership, and they divided the lecture curriculum.⁷ In 1820 Gould succeeded as sole proprietor,⁸ and he ran the school until 1833 when his illness and rapidly declining attendance forced its closing.⁹ For its time, the program at Litchfield was "the best professional instruction available in the United States."¹⁰ A remarkably

3. McKenna, *Tapping Reeve* at 32 (cited in note 1).

4. *Id.* at 41.

5. Fisher, *The Litchfield Law School* at 3-4 (cited in note 1). About 20 x 22 feet in size, and unheated, the building had been moved to another location when it was acquired in the 1930's by a group of lawyers (including Chief Justice William Howard Taft), who restored it to its original site next to Reeve's home on South Street. McKenna, *Tapping Reeve* at 59-61 (cited in note 1). Both structures are now owned by the Litchfield Historical Society, and are open to visitors except during winter months.

6. McKenna, *Tapping Reeve* at 89 (cited in note 1).

7. *Id.* at 93. See also Fisher, *The Litchfield Law School* at 4 (cited in note 1).

8. McKenna, *Tapping Reeve* at 166 (cited in note 1).

9. *Id.* at 172.

10. Arthur E. Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817-1967* at 29 (Belknap Press of Harvard U. Press, 1967). Twelve other proprietary law schools established between 1784 and 1828 are listed in Craig Evans Klafter, *The Influence of Vocational Law Schools on the Origins of American Legal Thought*, 37 *Am. J. Legal Hist.* 307, 323 n. 83 (1993). But Litchfield was the leader, and the 1,016 students it attracted over the entire period of its existence were at least as many as the others' combined total. Klafter estimates "over sixteen hundred" for all of the schools. *Id.* at 323, 324.

great number of the school's alumni had distinguished public careers.¹¹

The Litchfield students took extensive notes of the lectures, which they later transcribed "in a more neat and legible hand"¹² into bound notebooks comprising as many as five volumes, which they took with them for use in their practices. Passed down as heirlooms, the Litchfield student notebooks are a rich, though surprisingly neglected source for the early history of American legal education. More than fifty sets are now preserved.¹³ The earliest are notes made by Eliphalet Dyer in 1790.¹⁴ With the next set, taken in 1794 by Asa Bacon,¹⁵ the general scheme of topical organization which the Litchfield lectures were to have for the duration of the school's existence is clearly seen. From then coverage is continuous, with intervals between sets seldom exceeding three or four years.¹⁶

The lecture notes reflect development of study routines. Asa Bacon's 1794 notebooks, as well as all of the notebooks by the end of the century, contain marginal citations to the books, mostly English works, in Reeve's library. After mornings in the lecture hall, the students spent the remainder of the school day "examining the authorities cited in support of the several rules, and in reading the most approved authors upon those branches of the Law, which are at the time the subject of the lectures."¹⁷

11. In a prodigious work of biographical research, the late Samuel H. Fisher counted two Vice Presidents of the United States (Aaron Burr and John Caldwell Calhoun), three U.S. Supreme Court Justices (Henry Baldwin, appointed in 1830; Levi Woodbury, in 1845; Ward Hunt, in 1873), six cabinet members, 28 U.S. Senators, 101 Members of Congress, 14 Governors, 34 members of highest state courts, and 16 chief justices of such courts, as Litchfield alumni. Samuel H. Fisher, *Litchfield Law School, 1774-1833, Biographical Catalogue of Students* 3-4 (Yale U. Press, 1946) ("*Biographical Catalogue*").

12. Quoted from James Gould's *Advertisement in Catalog of the Litchfield Law School, from 1793 to 1827 Inclusive* iii (1828) ("*Advertisement*"). The "Advertisement" is reprinted as the frontispiece of the catalog's third edition, George M. Woodruff and Archibald M. Howe, eds., *The Litchfield Law School, 1787-1833* (Press of the Litchfield Enquirer, 1900).

13. Appendix IV of McKenna, *Tapping Reeve* at 183-86 (cited in note 1), the "List of Students at Litchfield Law School and Location of Notebooks Extant," includes almost all of the notebooks found in archives open to researchers.

14. The Dyer notes are at the Connecticut Historical Society in Hartford. Their date, 1790, is the earliest of any listed by McKenna. *Id.*

15. Asa Bacon, [Litchfield Law School Notes, untitled] ("*Notes*") (1794). Bacon was "the last member of the bar of Litchfield County to discard the powdered hair and queue." Fisher, *Biographical Catalogue* at 14 (cited in note 11). His notes are in the Litchfield Historical Society archives.

16. While a researcher interested in following the curricular development of a particular topic may have to travel to several locations to find all the notebooks spanning a period of interest, the topic will likely be found quite readily once a notebook is in hand, for in most cases it will appear consistently in the same place as lectures were repeated.

17. Gould, *Advertisement* at iii (cited in note 12).

Use of Reeve's library was subject to strict rules, which prohibited borrowing of all but a few "privileged" works.¹⁸

Besides lecture attendance, reading, and notebook writing, moot court exercises were a significant component of the learning experience throughout the school's existence. Eventually the Litchfield Moot Court would come to operate in the same way as other such tribunals, then and nowadays, with hypothetical cases put by faculty sponsors and argued by students, appearing as opposing counsel before professors or other members of the legal profession, sitting as judges. The moot court George Wythe founded as an adjunct to his law lectures at William and Mary was run on those lines: "Mr. Wythe & the other professors sit as Judges, Our Audience consists of the most respectable of the Citizens, before whom we [students] plead Causes given out by Mr. Wythe."¹⁹ But for a time which included at least the years 1796 through 1798, arguments at Litchfield were conducted quite differently.

Modelled after undergraduate debating societies at Yale College,²⁰ from which many of its members had graduated, the Litchfield Moot Court was entirely student run, with students serving as judges²¹ as well as counsel, and choosing for themselves the questions they would argue. In December, 1796, they adopted a constitution which provided for wide sharing of leadership functions, with officers elected for terms of only four weeks.²² At arguments held every Thursday evening the president and two other members appointed in rotation would sit as

18. *Laws of the Office*, reprinted in Appendix I of McKenna, *Tapping Reeve* at 177 (cited in note 1).

19. Letter of John Brown, a student at William and Mary College, to his uncle, William Preston, July 6, 1780, reprinted in *Glimpses of Old College Life*, (*Continued*), 9 Wm. & Mary College Q. Historical Magazine Ser. 1, 75, 79 (1900).

20. Virtually all Yale undergraduates belonged to one or the other of two debating societies—Linonia, or Brothers in Unity—and some of the brightest were also members of Phi Beta Kappa. All these organizations had extensive self-administered programs of debate and oratory. See, e.g., Edmund S. Morgan, *The Gentle Puritan, a Life of Ezra Stiles, 1727-1795* at 365-66 (Yale U. Press, 1962) ("*The Gentle Puritan*"); Lewis R. Packard, *The Phi Beta Kappa Society*, in William L. Kingsley, *1 Yale College, a Sketch of its History* 324, 326 (Holt & Co., 1879).

21. Samuel H. Fisher, *The Litchfield Law School* 8 (Yale U. Press, 1933) (cited in note 1). The moot court at Henry St. George Tucker's law school in Winchester, Virginia also had student judges. Among the Charles James Faulkner Papers on deposit at the Virginia Historical Society in Richmond, in Box 47 of the collection, are examples both of arguments Faulkner made as counsel, and of decisions he rendered as "president" of the court in 1826 while he was a student. The decisions were appealable to the society's other members who attended the arguments; Faulkner frequently notes their actions of affirmation and reversal.

22. McKenna, *Tapping Reeve* at 181 (cited in note 1). Litchfield Moot Hall Society "Constitution," Arts. 1st, 2d, 6th, 7th (December 8, 1796). The Constitution is reprinted

judges, and members in alphabetical order would take turns as counsel.²³ The Moot Court clerk, an elected officer, had the important duty of “report[ing] such cases as shall be brought before the Society, with the decisions thereon and the grounds of those decisions.”²⁴ The reports which survive are found in two copybooks, entitled, respectively, “Reports of Cases Disputed and Determined in Mr. Reeve’s Office, from 8th December, 1796 to July 28th, 1797,” and “Continuation of Reports of Cases Argued and Determined in Moothall Society from August 5th 1797 to July 12, 1798.”²⁵ Each report begins with a statement of the case and ends with a summary of the judges’ opinions, delivered *seriatim* from the bench, with a lengthy middle portion consisting of apparently complete transcripts of arguments of counsel, probably copied from drafts written out in advance.²⁶ Reeve did not routinely attend the arguments, but his subsequent comments were sometimes noted.

Issues for argument were chosen by agreement of the counsel assigned for each session, and framed with “writs, pleadings, etc. in the same manner as a suit or the like Question would be bro’t before a regular Court.”²⁷ Confident of their ability to articulate theory and policy, student advocates often put questions of first impression, and cases which explored sources of law in the new republic, and limits of judicial power.²⁸ The imaginativeness and sophistication of these choices were also products of college debate experience, notably in required academic exercises at Yale, where “[d]isputations were the keystone of [Yale

sub nom. Rules of the Debating Society in Mr. Reeve’s Office, 1796-97, in McKenna, *Tracking Reeve* at 181-82 (cited in note 1).

23. *Id.*

24. Moot Hall Society “Constitution,” Art. 5th (cited in note 22).

25. Hereinafter cited as 1 *Litchfield Moot Ct. MS* and 2 *Litchfield Moot Ct. MS*, the manuscripts are in the archives of the Litchfield Historical Society’s Henga J. Ingraham Memorial Library. The Society has kindly granted permission to quote from or transcribe the portions which appear in this article.

26. Preparing written drafts of oral arguments was also a practice of students at Henry St. George Tucker’s law school in Winchester. But at the end of one of the drafts he had prepared, Charles James Faulkner ruefully noted: “The above remarks were not advanced by me, as I discovered after entering the Moot Court, that I was ranged upon the opposite side.” Charles James Faulkner Papers (cited in note 21).

27. Moot Hall Society “Constitution,” Art. 8th (cited in note 22).

28. For an argument held February 23, 1797, the question whether recovery on a wagering contract—a right of action under English common law, and not denied by any Connecticut statute—might be had in a Connecticut court, was the vehicle for exploring the freedom of American courts to disregard British precedents and fashion new rules of substantive law on matters as to which American legislatures had not yet spoken. That case was decided by split decision, two judges holding that English common law should be followed until altered by legislation, and a dissenter arguing that “we have no authority to bind us, but rules of good policy.” 1 *Litchfield Moot Ct. MS* at 51, 64 (cited in note 25).

president Ezra] Stiles's curriculum"²⁹ and many of the topics upon which he challenged his students to deliberate were matters of current political and constitutional significance.³⁰ And at Litchfield, of course, the Moot Court rule requiring adversaries to agree on issues they would argue discouraged selection of any with pat answers. Indeed the issue for the first argument reported on, held the night the Moot Hall Society's constitution was adopted, still has no definite answer in American commercial law:

A sells a horse to B that has a secret disorder & affirms him to be sound to B. B before he discovers the disorder sells him to C; in the hands of C the horse dies. Can C have an action directly against A?³¹

II. THE STUDENT ADVOCATES

By the time judicial review was argued on Thursday evening, August 31, 1797, the Moot Court Society constitution's provision for alphabetical order in members' taking turns as counsel was not being followed strictly. But nothing in the Moot Court record suggests any departure from the practice of allowing counsel for each session to choose the question they would argue. They put the question of judicial review as a debate proposition, to be argued in the abstract: "Have the judiciary a right to declare laws, which are unconstitutional, void?" This avoided the two-issue argument that a hypothetical case concerning a particular law's claimed unconstitutionality would have presented.³²

29. Morgan, *The Gentle Puritan* at 397 (cited in note 20).

30. In earlier years Stiles's assigned debate topics had included amnesty for the Tories (in 1783); whether a Constitutional convention should be held, and then, whether its product should be ratified (both in 1787). Morgan, *The Gentle Puritan* at 396-97 (cited in note 20). In 1794 and 1795, years when the students who would argue judicial review in the Litchfield Moot Court were Yale upperclassmen, Stiles's assignments for debates for which they prepared arguments included the French Revolution, direct vs. indirect taxation, exemption of clergy from taxation, the usury laws, the probability of future federal government encroachment on the rights and powers of states, and emancipation of slaves held in Connecticut. Debate copybooks of George Tod, in Box 1 of his papers, Collection No. 3203 of the archives of Western Reserve Historical Society Archives, Cleveland, Ohio. Stiles died in office, in May, 1795. Morgan, *The Gentle Puritan* at 461 (cited in note 20).

31. 1 *Litchfield Moot Ct. MS* at 5-8 (Dec. 8, 1796) (cited in note 25). "[W]hether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain" remains a topic of "developing case law." Uniform Commercial Code § 2-318, Official Comment 3.

32. The Moot Court clerk who reported the argument was careful to note the membership's permission to present the question "in a form different from that prescribed by the constitution." 2 *Litchfield Moot Ct. MS* at 33 (Aug. 31, 1797) (cited in note 25).

The students who chose judicial review as an argument topic were three of the Moot Court's ablest advocates: Stephen Twining for the affirmative side and George Tod and Thomas Scott Williams for the negative. All were from Connecticut; all were Yale graduates. Twining and Tod had been presidents, respectively, of the college's two debating societies³³, and as fellow members of its chapter of Phi Beta Kappa³⁴ they had participated in that organization's extensive program of forensic activities.³⁵ Twining, a former schoolmaster, was 30 at the time of the argument, 28 when he graduated from Yale. Tod, six years younger, had been president of the Moot Court Society when the constitution was adopted. Williams was the youngest: 17 when he graduated from Yale, in 1794, a year ahead of Twining and Tod. He was an exceptionally brilliant law student: Reeve would later call him "the best scholar ever sent out from Litchfield."³⁶

III. THE LITCHFIELD LECTURE CURRICULUM: A MYSTERIOUS DISAPPEARANCE

Reeve's lectures began with an introduction to law and the legal process³⁷ taken directly from the first chapter of Sir William Blackstone's *Commentaries*.³⁸ In the third section of that chapter, "Of the laws of England," Blackstone laid down ten enumerated "rules to be observed with regard to the construction of statutes."³⁹ The tenth rule, which received a great deal of attention in America, was his pronouncement on *Bonham's Case*.⁴⁰ In that decision, rendered nearly two centuries before, Sir Edward

33. *Catalogue of the Graduated Members of the Linonian Society of Yale College, during One Hundred Years from its Foundation in September, 1753* at 24 (Linonian Society, 1853); *Catalogue of the Society of Brothers in Unity, Yale College* 8 (New Haven, 1854).

34. *Phi Beta Kappa Society, Alpha of Connecticut, Minutes of Meetings, August, 1787 - June, 1801*, MS in the Archives and Manuscripts Division, Sterling Memorial Library, Yale University, entry for June 23, 1794.

35. Some Phi Beta Kappa debate topics were remarkably forward looking. For a meeting held the day after Twining and Tod were initiated, the question was: "Ought the Education of Females to be more assimilated to that of the Males?" *Id.*, entry for July 1, 1794.

36. Fisher, *Biographical Catalogue* at 137 (cited in note 11).

37. As given November 4, 1794, the lecture with this introduction is recorded beginning on page 1 of the fourth volume of Bacon, *Notes* (cited in note 15). Daniel Sheldon recorded it under the title "Of Municipal Law" when he heard Reeve give the lecture in January, 1798: that record begins on the first unnumbered page of Sheldon's one-volume notebook, now in the Litchfield Historical Society's archives.

38. Sir William M. Blackstone, 1 *Commentaries on the Laws of England* (Clarendon Press, 1st ed. 1765) ("*Commentaries*").

39. *Id.* at *87-91.

40. *Id.* at *91. *Bonham's Case*, 77 Eng. Rep. (8 Co. Rep.113b (Hil. 7 Jac. 1)) 646 (1900).

Coke had proclaimed the subordination of statutory enactments to fundamental tenets of the common law, and had claimed for courts the power to enforce that subordination: “[W]hen an Act of Parliament is against common right and reason, or repugnant . . . the common law will controul it, and adjudge such Act to be void.”⁴¹ Not surprisingly, *Bonham’s Case* was frequently cited in American courts in support of challenges to the validity of acts of Parliament or early state legislation.⁴² But its authority was undermined by Blackstone’s restrictive restatement—amounting in principle to rejection—of Coke’s doctrine. Blackstone’s tenth rule allowed courts to reject unreasonable application of statutes only under circumstances which the legislature presumably had not foreseen.⁴³ But if judicial power over statutes were thus limited to granting dispensations in exceptional cases to which judges were satisfied that a law had not been meant to apply, then courts might only implement, never thwart, legislative intent, and no principle of subordination of legislative power to fundamental or other higher law could be recognized. Thus, said Blackstone,

. . . if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it; and the examples usually alledged in support of this sense of the rule do none of them prove, that where the main object of a statute is unreasonable the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government.⁴⁴

As recounted in the Litchfield lecture curriculum, this passage became the setting for interstitial discussion of whether American courts might invalidate statutes for conflict with the higher law of a written constitution. The first mention of this in student notebooks is found in Asa Bacon’s notes of a lecture Reeve gave in November, 1794. The “maxim that statutes made against natural justice are void” is bad law, Reeve said, for if “admitted with its full sense [it] enables [the courts] to reject whatever statutes they please.”⁴⁵ That much is vintage Black-

41. 77 Eng. Rep. (8 Co. Rep.118a (Hil. 7 Jac. 1)) 652 (1900).

42. Theodore F.T. Plucknett, *Bonham’s Case and Judicial Review*, 40 Harv. L. Rev. 30, 61-68 (1926).

43. “But where some collateral matter arises out of the [statute’s] general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it.” Blackstone, 1 *Commentaries* at *91 (cited in note 38).

44. *Id.*

45. Bacon, 4 *Notes* at 9 (cited in note 15).

stone. But then Reeve added, "*If a statute is past [sic] by the Legislature, derogatory to the established constitution the judiciary need not carry it into execution but may declare it void. See the Eng. ideas upon this subject.*" And here Reeve cited *Bonham's Case*, together with other English decisions the students could read in his library.⁴⁶

But *Bonham's* and the few other cases that echoed its doctrine⁴⁷ were the decisions Blackstone had deprecated, as "examples usually alledged" to support, but which "*do none of them prove*" claims of judicial power to invalidate legislation.⁴⁸ No American lawyer ever succeeded in reconciling Blackstone's tenth rule with any hypothesis of judicially enforceable limitations on legislative power, where such limitations were derived from sources apart from the organic instrument—if there were such—from which the legislature itself derived its authority.⁴⁹ As Mr. Justice Iredell would come to observe a year after judicial review was argued at Litchfield, "the consequence" of not having a constitution which sets limits on a legislature's authority "would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void."⁵⁰ But where legislative authority was both derived from and restricted by a constitution,

46. Id. (emphasis added). As noted by Bacon, Reeve's citations were "Hobt 87" [*Day v. Savadge*, 80 Eng. Rep. (Hobart 85-87 (Brownlow. Tr. 12 Jac. Rot. 619)) 235, 237 (1900)]; "8 Coke 118, 107" [*Bonham's Case*, 77 Eng. Rep. (8 Co. Rep. 107a (Mich. 6 Jacobi 1)) 638 (1900), 77 Eng. Rep. (8 Co. Rep. 113b (Hil. 7 Jac. 1)) 646 (1900)]; and "1 Lev. 73" [*Wheatly v. Thomas*, 83 Eng. Rep. (1 Levinz 73 (K.B. 1662)) 303 (1900)]. Bacon's note of a fourth citation is illegible.

47. These cases, which include *Day v. Savadge*, are chronicled in Plucknett, 40 Harv. L. Rev. at 49-53 (cited in note 42).

48. Blackstone, 1 *Commentaries* at *91 (cited in note 38).

49. Citing Blackstone's exception for relieving against enforcement of a statute in unusual circumstances to which the legislature presumably had not intended it to apply, Hamilton argued in *Rutgers v. Waddington* that application in that case of a principle of international law, "higher" at least in the sense of its addressing "the most important concerns," should *always* be presumed to have been the legislature's intention, *regardless of what its statute might provide*—unless a purpose to interdict such application was expressly declared. *Rutgers v. Waddington*, New York City Mayor's Court, 1784, excerpted in Richard B. Morris, ed., *Select Cases in the Mayor's Court of New York City* 302, 326 (American Historical Association, 1935). Julius Goebel, Jr., ed., 1 *The Law Practice of Alexander Hamilton* 305, 381-83 (Columbia U. Press, 1964) ("*Law Practice*"). Persuaded by the argument, Mayor James Duane held that "[w]hoever then is clearly exempted from the operation of this statute by the law of nations, . . . could never have been intended to be comprehended within it by the Legislature." *Rutgers*, New York City Mayor's Court in Morris, *Select Cases in the Mayor's Court of New York City* at 326. But Duane's opinion was widely condemned, and Hamilton's client settled, unwilling to risk an appeal. Goebel, *Law Practice* at 311-13 *supra*; Charles Grove Haines, *The American Doctrine of Judicial Supremacy* 201-04 (MacMillan, 1914).

50. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398 (1798) (Iredell, J., concurring).

the courts would enforce such restrictions—not as supervening, but as inherent limitations on lawmaking power.

This distinction, fundamental to American claims about the power of judicial review,⁵¹ was not expounded by Reeve to his students. Whether one of them might have challenged him, pointing out that no such power could be inferred from *Bonham's* and the other cases Reeve cited, as Blackstone read those cases, is conjectural. What is apparent is that after its maiden appearance in 1794 in the lecture recorded in Asa Bacon's notes,⁵² judicial review disappeared for a time from the Litchfield curriculum. When Tod heard the lecture in 1796, the year before judicial review was argued, he noted Reeve as saying only that the assertion that "courts are not bound to decide upon the Statutes, contrary to reason and the law of God" was "hollow," and would "at once set [the courts] above the legislature."⁵³ Daniel Sheldon, who had served as clerk of the Moot Court, carefully recorded the lecture when Reeve next gave it in 1798, the year after judicial review was argued. On that occasion Reeve again simply paraphrased Blackstone: "[t]he Cts. are bound by the acts of the Legislature, & once give them the power of saying that a Stat. is contrary to reason or the law of God, & they are exalted above the Legislature."⁵⁴ Thus, it is fair to conclude that when Twining, Tod and Williams chose judicial review as a question to argue in the Moot Court, they had heard nothing about it in the classroom apart from Reeve's seconding Blackstone's denunciation of the doctrine of *Bonham's Case*.

51. In the same opinion, Mr. Justice Iredell went on to say, "If any act of Congress, or of the Legislature of a state, violates [Federal or state] constitutional provisions, it is unquestionably void. . . . If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. . . . There are then but two lights in which the subject can be viewed: 1st. If the Legislature pursue the authority delegated to them, their acts are valid. 2d. If they transgress the boundaries of that authority, their acts are invalid." *Id.* at 399.

52. Bacon, 4 *Notes* at 9 (cited in note 15).

53. George Tod, 1 *Notes from Tapping Reeve Esq.'s Lectures, on the Laws of England and Connecticut, taken in the Years 1796 and 1797* at 3 (1796). A three volume manuscript set, these notes are now in the Western Reserve Historical Society's archives. They are not listed in Appendix IV of McKenna, *Tapping Reeve* at 183-86 (cited in note 1).

54. Daniel Sheldon, *Notes Taken from Judge Reeve's Lectures upon Law* 4b (1798). Sheldon's notes comprise one manuscript volume, now in the Litchfield Historical Society archives.

IV. WHAT THE STUDENTS MIGHT HAVE READ: THE BEGINNINGS OF PUBLIC DISCOURSE

The first three appointments to law professorships in American universities were George Wythe's at William and Mary in 1779,⁵⁵ U.S. Supreme Court Justice James Wilson's at the College of Philadelphia in 1789,⁵⁶ and future New York Chancellor James Kent's at Columbia in 1793.⁵⁷ All were advocates of judicial review. But it is doubtful that the Litchfield students who argued that question would have read anything written by Wythe or Wilson, containing their pronouncements on it. Wythe's was made from the bench, as one of the judges of the Virginia Court of Appeals, an office he occupied concurrently with his professorship. But the report of the case containing his opinion, *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 13 (1782), was not published until 1827, many years after his death. His lectures, never published, have been lost.⁵⁸ Wilson's lecture⁵⁹ was first published in 1804.

Kent's endorsement was a principal topic of the inaugural lecture he delivered at Columbia in November, 1794, and pub-

55. For George Wythe's appointment at William and Mary, see Imogene E. Brown, *American Aristides, a Biography of George Wythe* 200-01 (Associated U. Press, 1981).

56. The circumstances of Wilson's appointment are recounted in the entry for him in Dumas Malone, ed., 10, part 2 *Dictionary of American Biography* 326, 329 (Charles Scribner's Sons, 1936). In 1791, by a name change, the College of Philadelphia became the University of Pennsylvania. Martin Meyerson and Dilys Pegler Winegrad, *Gladly Learn and Gladly Teach: Franklin and His Heirs at the University of Pennsylvania, 1740-1976* 240 (U. of Pennsylvania Press, 1978).

57. As to Kent's appointment, see John Theodore Horton, *James Kent, a Study in Conservatism 1763-1847* at 86-87 (D. Appleton-Century Company, Inc., 1939) ("*James Kent*"). Kent's course failed to attract students, and he resigned his professorship in 1797. Appointed again to a Columbia professorship after leaving the bench in 1823, he began a second course of lectures from which came his celebrated *Commentaries on American Law*, first published in 1826. Horton, *James Kent* at 95, 269 *supra*.

58. For the circumstances of the loss, see Brown, *American Aristides* at 224-26 (cited in note 55).

In Professor Crosskey's judgment the *Caton* opinion posthumously reported for Wythe was "tall talk, hardly in character . . . hard to credit as authentic." William Winslow Crosskey, 2 *Politics and the Constitution in the History of the United States* 954 (U. of Chicago Press, 1953). But Professor Treanor has recently established that, at least as to the fact of Wythe's explicitly endorsing judicial review, the report is supported by notes of another member of the court, its presiding judge, Chancellor Edmund Pendleton. William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. Pa. L. Rev. 491, 530-34 (1994). Remaining, however, is the question whether the reporter, Daniel Call, might have warmed up the rhetoric of Wythe's endorsement—"pointing to the constitution" and saying to the legislature, "here is the limit of your authority; and, hither, shall you go, but no further," *Caton*, 8 Va. (4 Call) at 8. As to that question, the missing record of Wythe's professorial utterances might have been conclusive.

59. Bird Wilson, ed., *The Comparison of the Constitution of the United States, with that of Great Britain, 1 The Works of the Honourable James Wilson, L.L.D.* 425, 460-62 (Lorenzo Press, 1804).

lished shortly thereafter at the request of the College trustees.⁶⁰ The number of copies which today may be found in American research libraries⁶¹ suggests that it had some substantial circulation, and it would have found interested readers in New Haven⁶² and at Litchfield. Comparison with Twining's submission for the affirmative side in the Moot Court case reveals at least one intriguing similarity: both arguments for judicial review began by identifying the doctrine as peculiar to governments under written constitutions.⁶³ But if Twining had read Kent's lecture he missed the most prescient of Kent's points: judicial review's indispensability for protecting constitutional rights of political minorities.⁶⁴

In 1795 and 1796 Zephaniah Swift, a Connecticut lawyer, published the two volumes of his *A System of the Laws of the State of Connecticut*,⁶⁵ stating in his introduction that he had "not scrupled to take advantage of the writings of all who have preceeded [sic] him."⁶⁶ That advantage was considerable, for Swift appropriated from the *Commentaries* all of Blackstone's topics and topical organization and much of his text, adding references to Connecticut law and practice that would have attracted the Litchfield students' attention. Reeve's library had

60. James Kent, *An Introductory Lecture to a Course of Law Lectures, Delivered November 17, 1794* (Francis Childs, 1794), reprinted as *Kent's Introductory Lecture*, 3 Colum. L. Rev. 330 (1903).

61. The American Library Association's *National Union Catalog* locates eleven copies in current collections. *American Library Association, 293 National Union Catalog* 477 (Balding & Mansell, Ltd., 1973).

62. Kent graduated from Yale in the 1781. His contacts among the New Haven bar included his friend and classmate Simeon Baldwin, who sent Kent a gift of books during the first year of his professorship. Letter of James Kent to Moss Kent, March 1, 1795, reprinted in William Kent, *Memoirs and Letters of James Kent, LL.D. Late Chancellor of the State of New York* 74, 75 (Little Brown, 1898).

63. Kent said: "The doctrine I have suggested is peculiar to the United States. In the European World, no idea has ever been entertained (or at least until lately) of placing constitutional limits to the exercise of the legislative power." Kent, 3 Colum. L. Rev. at 334 (cited in note 60).

Twining began by stating: "A written Constitution binding the powers of Government is a novel thing; it is known only in France and the United States. Other nations have the name of a constitution without the thing - from what has taken place under such Governments we can therefore argue nothing." 2 *Litchfield Moot Court MS* at 33 (cited in note 25) (argument held August 31, 1797).

64. "Without [constitutional rights being] . . . constantly protected by the firmness and moderation of the judicial department, the equal rights of a minor faction, would perhaps very often be disregarded in the animated competitions for power, and fall a sacrifice to the passions of a fierce and vindictive majority." Kent, 3 Colum. L. Rev. at 335 (cited in note 60).

65. Zephaniah Swift, *A System of the Laws of the State of Connecticut* (John Byrne, 1795-96) (in 2 volumes) ("*A System*").

66. Swift, 1 *A System* at 5 (cited in note 65).

several copies of Swift's *System*;⁶⁷ it was one of the few "privileged" works that students were allowed to borrow.⁶⁸

Like Reeve, Swift used Blackstone's tenth rule as an introduction for addressing the claim that American courts might pass on the constitutionality of legislation. But in Swift's view only legislators and those who had elected them were competent to judge the conformity of legislative enactments with constitutional limitations: "the majesty of the people, and the supremacy of the government"⁶⁹ were concentrated in the legislature, whose members "stand in the place of the people, and are vested with all their power, within the constitution."⁷⁰ Since "[p]reviously to their [the legislators'] passing any act, they must consider and determine whether it be compatible with the constitution," the supremacy of their authority would make it a "manifest absurdity, and . . . degrading to the legislature, to admit the idea, that the judiciary may rejudge the same question which they have decided."⁷¹ Swift would have such determinations submitted to electoral, not judicial review: "[o]n this power of the people over the legislature, depends their security against all encroachments, and not on the vigilance of the judiciary department."⁷² A consequence of exercising such judicial "vigilance" which especially troubled Swift was the prospect that lower courts "may decide differently, and [so] the obligation to obey a law may be uncertain, till some individual brings the question before the supreme tribunal for ultimate decision."⁷³ The legislature would "lose all regard and veneration in the eyes of the people, when the lowest tribunals of judicature are permitted to exercise the power of questioning the validity, and deciding on the constitutionality of its acts."⁷⁴ If, as seems quite likely, Twining, Tod and Williams had read these passages, they would have found in Swift's attack

67. Three sets are listed in the inventory of the library filed in Reeve's estate. A manuscript copy of that inventory, dated February 14, 1824, is in the Litchfield Historical Society archives.

68. *Laws of the Office*, Law III, reprinted in Appendix I of McKenna, *Tapping Reeve* at 177 (cited in note 1).

69. Swift, 1 *A System* at 35 (cited in note 65).

70. *Id.*

71. *Id.* at 52.

72. *Id.* at 53. Justice John Gibson of the Pennsylvania Supreme Court would reach the same conclusion in *Eakin v. Raub*, 12 Serg. & Rawle 330, 354 (Pa. 1825). His dissent in that case may have been the last occasion when the constitutionality of judicial review was disputed by an American jurist. Subsequently, as Chief Justice, he withdrew from that opinion. *Menges v. Wertman*, 1 Pa. 218, 222 (1845); *Norris v. Clymer*, 2 Pa. 277, 281 (1846).

73. Swift, 1 *A System* at 53 (cited in note 65).

74. *Id.*

on judicial review an exhilarating topic for a Moot Court argument.

That the students read two other possibilities as sources of their interest in that topic must be discounted. For the *Symsbury Case*,⁷⁵ a 1785 Connecticut decision which some legal historians have claimed and others, more convincingly, have rejected as a precedent for early exercise of the power of judicial review,⁷⁶ there is no evidence of contemporary recognition of the case's having any such significance.⁷⁷ That the students read *The Federalist* seems unlikely. At least there is no evidence of that work, with Alexander Hamilton's claim of judicial review as an attribute of federal jurisprudence,⁷⁸ ever coming to their notice. Nor was it mentioned in Wilson's or Kent's lectures. Perhaps these omissions reflect a temporary eclipse. Infrequently cited in judicial opinions published during the first decade of government under the Constitution,⁷⁹ *The Federalist* would not have a second edition until 1799.⁸⁰

V. THE U.S. SUPREME COURT AND THE PENSION ACT CASES: A CONNECTICUT CONNECTION

Coming finally to ask whether the Litchfield students' interest in judicial review as a debate topic might have been sparked by some current legal development in the world beyond Litchfield, we start with a surprise. Twining began his argument

75. 1 Kirby 444 (Conn. Super. Ct. 1785).

76. The court held for claimants under the earlier of two conflicting legislative grants of land, who had not consented to an adjustment of grant boundaries, provided for in a survey subsequently commissioned by the legislature in an attempt to resolve the conflict. The report does not indicate that the legislature had sought to impose the survey without consent, nor did the court address in dicta the power of the judiciary to invalidate legislation on any ground. Citations of the case as a precedent for judicial review have properly been challenged. Compare, e.g., Edwin S. Corwin, *The Establishment of Judicial Review*, 9 Mich. L. Rev. 102, 114 (1910), and Haines, *American Doctrine* at 88 (cited in note 49), with Crosskey, 2 *Politics and the Constitution* at 961 (cited in note 58).

77. Corwin's suggestion that "we may well believe" that Connecticut delegate Oliver Ellsworth "had the decision in the *Symsbury* case in mind" when he observed at the Constitutional Convention that "there was no lawyer . . . who would not say that *ex post facto* laws were of themselves void," Corwin, 9 Mich. L. Rev. at 114 (cited in note 76), is farfetched. Zephaniah Swift did not mention the case in denouncing the doctrine of judicial review, although his book has numerous citations to Kirby's Reports. See generally, Swift, 1, 2 *A System* (cited in note 65).

78. See generally, *The Federalist* No. 78 (Hamilton).

79. The earliest cases in Dallas' Reports are *Commonwealth v. Schaffer*, 4 U.S. (4 Dall.) xxvi, xxviii, xxx (Phila. Mayor's Court, 1797), and *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798) (Chase, J., concurring). *The Federalist* was not cited in *Marbury v. Madison*.

80. *The Federalist: a collection of essays, written in favour of the new Constitution, as agreed upon by the Federal convention, September 17, 1787* (J. Tiebout, 1799).

noting that he would rely on "principle," and that "tho the Supreme Court of the USA have [sic] determined this question - their [sic] opinion will be made no use of in the present case."⁸¹ This is the only mention by any of the participants in the Moot Court argument of a United States Supreme Court ruling. What was the ruling? And how may Twining's reference to it be reconciled, say, with the judicial memory of Justice Samuel Chase, who would come a few years later to observe that while some of his colleagues had "individually, in the Circuits, decided, that the Supreme Court can declare an act of congress to be unconstitutional, and, therefore invalid . . . there is no adjudication of the Supreme Court itself upon the point"?⁸²

Twining was not the only one who thought, prior to *Marbury*, that the Court already had claimed the power of judicial review.⁸³ Perhaps he confused a widely held expectation that the Court would do so.⁸⁴ Or he might have had in mind the rulings of individual Justices sitting as members of the federal circuit bench, to which Mr. Justice Chase later referred.⁸⁵ It is remotely possible that Twining had heard of a case in which the Court had exercised the power by rejecting on the merits a challenge to the constitutionality of a federal tax on carriages.⁸⁶ But there is yet

81. Twining's argument is reported in full beginning on page 347 below. He began by saying:

A written Constitution binding the powers of Government is a novel thing: it is known only in France and the United States. Other nations have the name of a Constitution without the thing - from what has taken place under such Governments we can therefore argue nothing. We must then resort to principle to determine this case and tho the Supreme Court of the USA have [sic] determined this question - their [sic] opinion will be made no use of in the present case.

2 *Litchfield Moot Court MS* at 33 (cited in note 25) (argument held August 31, 1797).

82. *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 18 (1800) (Chase, J. concurring).

83. In 1802, the year before the *Marbury* decision was announced, New Jersey Supreme Court Justice Andrew Kirkpatrick cited unspecified "reported decisions involving the same question in the Supreme Court of the United States of America" as supporting his ruling upholding the power under state law. *State v. Parkhurst* 9 N.J.L. (4 Halstead) 427, 444-45 (1802).

84. Both the Framers, or some of them, and the Anti-Federalists had that expectation. For extensive citations, see David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 *Duke L.J.* 279, 284 n.9 (1992).

85. The rulings are chronicled in Goebel, *Antecedents and Beginnings* at 589-91 (cited in note 2).

86. *U.S. v. Hylton*, 3 U.S. (3 Dall.) 171 (1796). Dallas' report, not published until 1799, makes no mention of counsel or any of the Justices addressing any question concerning the Court's power to make such a ruling. Explaining to the Circuit Court why he would not contest the point when the case was heard there below, the attorney who represented the United States cited "information I have received from the bench" that "though never solemnly decided by the supreme court, it has come before each of the judges in their different circuits, and they have all concurred in [claiming the power]"—a consensus which enabled him "gladly [to] waive the investigation of a subject, that de-

one other possible explanation for Twining's assertion that "the Supreme Court of the USA have [sic] determined this question," which merits brief attention.

In 1792 Congress provided for pensions for disabled Revolutionary War veterans, requiring claims first to be submitted to the federal circuit courts for approval, then forwarded to the Secretary of War for allowance or, if disapproved by the Secretary, to Congress for final determination.⁸⁷ But the constitutionality of that procedure was widely questioned, either for requiring federal judges to perform duties not judicial in character, or, if the duties were of that character, for making the judges' determinations improperly subject to revision by the executive and legislative branches.⁸⁸ An amended Pension Act adopted the following year eliminated those objections by substituting a different adjudicative process.⁸⁹ Meanwhile, in some of the circuits, judges who denied the propriety of their executing the Act in a judicial capacity had concluded that they might hear disability pension claims as self-styled "commissioners,"⁹⁰ and in that purported capacity had acted to approve and forward over two hundred such claims.⁹¹ Declining simply to ratify those actions, Congress provided in the amended Act that "it shall be the duty of the Secretary at War, in conjunction with the Attorney General, to take such measures as may be necessary to obtain an adjudication of the Supreme Court of the United States" on entitlement to pen-

mands more leisure than I have been able to devote to it, and a greater share of abilities and information than has fallen to my lot." John Wickham, *The Substance of an Argument in the Case of the Carriage Duties, Delivered before the Circuit Court of the United States, in Virginia, May Term, 1795* at 15 (Augustine Davis, 1795).

87. Pension Act, §§ 2-4, 1 Stat. 243 (1792). The Act's subsequent legislative history is chronicled in Maeva Marcus et al., eds., 4 *The Documentary History of the Supreme Court of the United States, 1789-1800* at 725-26 (Columbia U. Press, 1985) ("*Documentary History*").

88. Chief Justice Jay and Justices Cushing, Wilson, Blair and Iredell all expressed this view in letters and rulings set forth in lengthy footnotes to *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410-414 (1792).

89. Act of February 28, 1793, §§ 1-2, 1 Stat. 324.

90. Opinion of the New York circuit court, by Chief Justice Jay, Justice William Cushing and District Judge James Duane, quoted in Dallas' report of *Hayburn's Case* 2 U.S. (2 Dall.) at 410 n (cited in note 88). Other judges who heard pension claims as "commissioners" included Justice James Iredell, whose doubts as to the propriety of that course are reflected in correspondence cited in Susan Low Bloch and Maeva Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 Wis. L. Rev. 301, 305 n.16 (1986).

91. The approved claims were certified to Congress in a "Statement of all claimants to be placed on the pension list of the United States, who have obtained certificates from the circuit courts, signed as commissioners," forwarded by letter of Secretary of War Henry Knox, April 25, 1794, 9 *American State Papers: Claims* 107-122 (Gales and Seaton, 1834).

sion benefits by virtue of "the determination of certain persons styling themselves commissioners."⁹²

Of the disabled Revolutionary War veterans whose benefit claims were thus drawn in question, one hundred sixteen, more than half the total, were from Connecticut⁹³ where the news that federal circuit judges had held the Pension Act to be unconstitutional had been proclaimed a matter of "great political moment."⁹⁴ So wrote "Hambden," a pseudonymous advocate for Connecticut's adopting a state constitution to replace its colonial Charter of 1662, whose dialogue with "Philopatritae" in the pages of the Middletown *Middlesex Gazette* over the summer of 1792 included a lively debate over judicial review.⁹⁵ And when the validity of "commissioners'" pension claims approvals came up for the Supreme Court adjudication, on which Congress had insisted, Connecticut war veterans represented by Connecticut lawyers were parties in the test cases.

There were two such cases, brought, heard and disposed of during two weeks in February, 1794.⁹⁶ Counsel for John Chandler,⁹⁷ whose claim had been forwarded with "commissioners'" approval and awaited action by the Secretary of War, moved for an order of mandamus requiring Chandler to be placed on the pension list.⁹⁸ Yale Todd (who neither attended Yale College nor was related to George Tod)⁹⁹ was already on the list; he was sued by the Attorney General on behalf of the United States for re-

92. Act of February 28, 1793, § 3, 1 Stat. 324 (cited in note 89).

93. The count is compiled from the "Statement of all claimants . . .," 9 *American State Papers: Claims* at 107-22 (cited in note 91).

94. *Middlesex Gazette*, July 21, 1792.

95. The "Hambden-Philopatritae" exchanges began with "Hambden's" letter in the *Gazette's* weekly issue of June 16, 1792, and ran continuously through the issue of September 8, 1792. The debate over judicial review extended over the July 7th through August 11th issues.

96. Both proceedings are carefully recounted in Bloch and Marcus, 1986 *Wis. L. Rev.* at 307-310 (cited in note 90). As Professor Goebel notes, "[t]here was no constitutional warrant for assumption of original jurisdiction" in these cases. Goebel, *Antecedents and Beginnings* at 565 n.57 (cited in note 2).

97. Chandler was Colonel John Chandler, of Newtown, a veteran of Valley Forge. Franklin Bowditch Dexter, 2 *Biographical Sketches of the Graduates of Yale College* 575 (Henry Holt and Co., 1896) ("*Biographical Sketches*"). He was represented by his son-in-law, William Edmund. Both were Yale graduates. *Id.* at 576.

98. The motion is recorded in minutes of the Court's February, 1794 Term, published in Marcus, et al., 1 *Documentary History* at 222 (cited in note 87).

99. The "List of Certificates for Connecticut" ranks Yale Todd as a private. "Statements of All Claimants . . ." 9 *American State Papers: Claims* at 113 (cited in note 91). His representation by William Hillhouse is shown in the transcript of the certified copy of the Supreme Court record, as found in the papers of *United States v. Ferreira*, 54 U.S. (15 How.) 40, 52n (1851), Appellate Case File No. 2968, in the National Archives and reprinted in Wilfred J. Ritz, *United States v. Yale Todd (U.S. 1794)*, 15 *Wash. & Lee L. Rev.* 220, 227 (1958). William Hillhouse was the brother of James Hillhouse, member of Con-

fund of benefit payments received, and that action was heard on stipulated facts.¹⁰⁰ In neither case did the Court or any Justice provide an explanation for the ruling, and the judgments were recorded only by minute entries: in Chandler's case, "that a *Man-damus* cannot issue to the Secretary of War for the purposes expressed in the said motion,"¹⁰¹ and in Yale Todd's case, that the Court "are of opinion that Judgment be entered for the plaintiff [United States, for recovery of the payments]."¹⁰²

Commentators disagree as to whether, in these cases, the Court held the 1792 Pension Act unconstitutional.¹⁰³ Brinton Coxe was first to point out that its rulings might have had a statutory ground, for the Act did not establish the office of "commissioner" and provided no legal warrant for judges acting in that capacity.¹⁰⁴ On the other hand it might have been argued that whatever the judges who approved the claims were pleased to have called themselves,¹⁰⁵ they had in fact acted in their judicial capacity, the only official capacity they had—a submission that would have reached the question whether the Pension Act's mandate for their so acting was constitutional. Contending that

gress and Treasurer of Yale College. Malone, ed., 5 *Dictionary of American Biography* at 52 (cited in note 56) (entry for James Hillhouse).

100. The Court's minutes contain but a single entry on the Yale Todd case, under a caption describing it as an "Amicable Action." The entry notes, as having taken place, the reading and filing of pleadings and an "agreement" of the parties, the argument of the case and its being taken under advisement, and then states the judgment rendered. Marcus, et al., 1 *Documentary History* at 228 (cited in note 87). The "agreement," a stipulation, was among original papers in the case, published in a footnote inserted "by order of the Court" at the end of Chief Justice Taney's opinion in *U. S. v. Ferreira*, 54 U.S. (13 How.) 40, 52 n. (1851). The papers themselves are now reported lost. Bloch and Marcus, 1986 *Wis. L. Rev.* at 308, n.33 (cited in note 90).

101. Marcus, et al., 1 *Documentary History* at 226 (cited in note 87).

102. *Id.* at 228.

103. The claim that the Court had ruled to hold the Act unconstitutional was made for *Chandler* in Gordon E. Sherman, *The Case of John Chandler v. The Secretary of War*, 14 *Yale L.J.* 431, 431-32 (1905), and for *Yale Todd* in William M. Meigs, *The Relation of the Judiciary to the Constitution*, 19 *Am. L. Rev.* 175, 186 (1885), and in Ritz, 15 *Wash. & Lee L. Rev.* at 227 (cited in note 99). It was recently reasserted in an article by Engdahl, 42 *Duke L.J.* at 279, 284 n.9 (cited in note 84).

The opposing view, denying that claim, has distinguished adherents. See, e.g., Goebel, *Antecedents and Beginnings to 1801* at 564-65 n.57 (cited in note 2); David P. Currie, *The Constitution in the Supreme Court: 1789-1801*, 48 *U. Chi. L. Rev.* 819, 825-28 (1981); Charles Warren, 1 *The Supreme Court in United States History* 81 (Little Brown and Company, 1926); James Bradley Thayer, 1 *Cases on Constitutional Law* 105 n.1 (Charles W. Sever, 1895).

104. Brinton Coxe, *An Essay on Judicial Power and Unconstitutional Legislation*, 13-14 (Kay and Brother, 1893).

105. As to their self-style as "commissioners," "Philopatriae" chortled, "This is like the case of a Bishop, who at the same time was a general, and much addicted to swearing profanely. He swore not as a *bishop* but as a *military officer*." *Middlesex Gazette*, July 28, 1792.

such a submission was in fact made, and accordingly that the Court's judgments in the two cases stand as pronouncements on the Act's constitutionality, Professor Engdahl cites a minute entry identifying the circuit judges' determination approving Chandler's claim as an "Order and Adjudication of the Honorable James Iredell and Richard Law¹⁰⁶ Esquires *Judges* of the Circuit Court of the United States,"¹⁰⁷ and asserts that the Court was bound by that "pleaded" characterization.¹⁰⁸ But weighing strongly against Professor Engdahl's contention is the framing of the stipulated question in the *Yale Todd* case, where the parties agreed that the Court's judgment should turn on whether "the said judges of the Circuit Court, *sitting as commissioners, and not as a Circuit Court*" had authority to approve Todd's claim.¹⁰⁹ Max Farrand's conclusion that it is "altogether probable" that "the Court simply avoided the issue"¹¹⁰ may be the best, and all that can be said.

But for our purposes as we consider the possibility that Stephen Twining was referring to the Pension Act cases when he spoke of the Supreme Court's having "determined this question," an inquiry more pertinent than what those cases actually held about the Act's constitutionality is what they were perceived to have held. Here again the evidence is conflicting. A House Committee's report recommending legislative relief for claimants deprived by the *Chandler* and *Yale Todd* rulings asserted that the judges' certificates approving the claims "are in every respect valid, excepting that they are signed by commissioners, and not by the Circuit Court."¹¹¹ And the Attorney General advised that the rulings did not apply to determinations made by the District Judge in Maine, who was specially empow-

106. Judge Law was U.S. District Judge for the District of Connecticut. Harold Chase et al., eds., *Biographical Dictionary of the Federal Judiciary* 160 (Gale Research Company, 1976).

107. February 5, 1794 Minute Entry, Marcus, et al., 1 *Documentary History* at 222 (cited in note 87) (emphasis added).

108. Engdahl, 42 *Duke L.J.* at 287-88 n.18 (cited in note 84).

109. Transcript of the certified copy of the Supreme Court record, Appellate Case File No. 2968, reprinted in Ritz, 15 *Wash. & Lee L. Rev.* at 230 (cited in note 99) (emphasis added).

110. Max Farrand, *The First Hayburn Case*, 13 *Am. Hist. Rev.* 281, 283 (1908). Concurring, Professor Currie asserts not only that the cases "tell us nothing about the Constitution, but they say much about the early Court's attitude toward explanation and dissemination of its decisions." Currie, 48 *U. Chi. L. Rev.* at 828 (cited in note 103).

111. House Committee report on petition of Josiah Witter, March 5, 1794, 9 *American State Papers: Claims* at 78 (cited in note 91).

ered to act as a circuit court and had approved pension claims in that judicial capacity, not as a "commissioner."¹¹²

But citation of the Chandler and Yale Todd rulings as precedents for claiming the power of judicial review was not long in coming. In March, 1802, during the debate on repeal of the Judiciary Act of 1801,¹¹³ Connecticut Congressman Samuel Dana quoted from the record and legislative history of those cases to maintain that "the authority of the judges to decide questions arising under the Constitution was fully recognized."¹¹⁴ And when the Court acted many years later to publish the Yale Todd case, Chief Justice Taney concluded that, in the light of opinions a majority of the Justices had expressed on circuit, its "result" was that "the power proposed to be conferred" by the 1792 Act on the circuit courts "was not judicial power within the meaning of the Constitution, and was, therefore, unconstitutional, and could not lawfully be exercised by the courts."¹¹⁵

So Twining, had he known of the Chandler and Yale Todd cases,¹¹⁶ might well have understood that "the Supreme Court of the USA have [sic] determined [the] question" of the legitimacy of the power of judicial review. But the Court had given him nothing he could use in arguing for that power before a tribunal insistent on hearing reasons for it: he would have to "resort to principle."

VI. THE MOOT COURT ARGUMENT

As framed by agreement, the proposition to be argued in the Moot Court did not specify whether judicial review was to be addressed as a matter of federal or state constitutional law. The choice was significant, for the affirmative of the proposition was formidably difficult to maintain under the then law of Connecti-

112. Letter from Attorney General William Bradford to Secretary of War (June 2, 1794), John W. Wallace Collection, Vol. III, Pennsylvania Historical Society, quoted in Bloch and Marcus, 1986 *Wis. L. Rev.* at 316, n.56 (cited in note 90).

113. Judiciary Act, 2 Stat. 89 (1801).

114. *Annals of Congress*, 7th Cong., 1st Sess., 903-04, 920-25 (1802).

115. *U.S. v. Ferreira*, 54 U.S. (13 How.) 40, 53n. (1851).

116. Since Yale president Stiles encouraged students interested in pursuing legal careers to seek out local lawyers, Morgan, *The Gentle Puritan* at 391 (cited in note 20), we may suppose that, while undergraduates, all three Moot Court advocates had become acquainted with members of the Connecticut bar. And they would have met members of the judiciary at public Phi Beta Kappa exercises. In January, 1795, during Twining's and Tod's senior year, the anniversary of the Society's founding was celebrated at a meeting at the New Haven State House, "attended by the Hon'ble Judges of the Superior Court and a large number of other respectable gentlemen." *Phi Beta Kappa Society, Alpha of Connecticut, Minutes of Meetings, August, 1787-June, 1801*, MS in the Archives and Manuscript Division, Sterling Memorial Library, Yale University.

cut, where, with the Charter of 1662 still the organic instrument of government, there was no constitutionally ordained principle of separation of powers,¹¹⁷ and judges were appointed annually by the legislature.¹¹⁸ Thus Twining would avoid, and Tod and Williams would include state law references in their respective arguments.

The second manuscript volume of the Litchfield Moot Court reports begins by listing the Society's members and officers as they were on August 5, 1797, the date of the first argument reported in that volume. Society offices were newly filled, as the constitution required. Cyrus Swan was president and *ex officio* Chief Judge; for the argument on judicial review he sat with Elijah Hubbard and John Starke Edwards as Associate Judges. Hubbard had graduated from Yale in Tod's class, and was a fellow member of Phi Beta Kappa. Edwards, a Princeton graduate, was a son of Pierpont Edwards, a prominent lawyer and political figure, and a grandson of Jonathan Edwards.¹¹⁹

Thomas Scott Williams was clerk, as well as one of the counsel. His entire report of the case follows:¹²⁰

* * *

Thursday, August 31, 1797

Messrs. HUBBARD, SWAN, EDWARDS, upon the bench.

By leave of the society the case came up in a form different from that prescribed by the constitution—viz. by way of question - "Have the judiciary, a right to declare laws—which are unconstitutional—void?"-

MR. TWINING in support of the affirmative. A written Constitution binding the powers of Government is a novel thing; it is known only in France and the United States. Other nations have the name of a Constitution without the thing - from what has taken place under such Governments we can therefore argue nothing. We must then resort to principle to determine this case and tho the Supreme Court of the USA

117. See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 395, 398 (1798) (separate opinions of Paterson and Iredell, JJ.) (cited in note 50); Wesley W. Horton, *The Connecticut State Constitution* 8 (Greenwood Press, 1993).

118. Dwight Loomis and J. Gilbert Calhoun, eds., *The Judicial and Civil History of Connecticut* 133 (The Boston History Co., 1895).

119. Samuel H. Fisher, *Biographical Catalogue*, 47 (Yale U. Press, 1946) (cited in note 11); McKenna, *Tapping Reeve* at 3-26 (cited in note 1).

120. The report begins on page 33 of the "Continuation of Reports of Cases Argued and Determined in Moot Hall Society from August 5th 1797 to July 12, 1798," (cited in note 25). Bracketed references here inserted in the text mark the beginning of succeeding pages.

have [sic] determined this question - their [sic] opinion will be made no use of in the present case. If the Legislative & judicial powers are vested in the same body of men, this question would not arise, but as the Legislature of [34] the USA do [sic] not possess judicial powers this question may with propriety be made. It will be proper to consider where this power should be Lodged, and the consequences of the Legislatures exercising it.

Admitting that the Legislature have [sic] the same integrity as the judges, if they were of equal capacity it would be immaterial which of them possessed this power, but it cannot be denied that in point of judgment the judiciary are [sic] superior to the Leg'r. Greater abilities are requisite for the discharge of their office than to perform the duties of a Legislator. By their exercises, and their habits, they are better fitted to judge with coolness & deliberation what laws interfere with the Constitution than the Leg'r, in which Laws are sometimes passed rather from the heat of party than the strength of reason. But are there not motives, which will induce the one body to act wrong, which will not operate upon the other—Do we not find that Legislatures are always endeavoring to extend their power, and is it safe to entrust a body of men with power to extend their power? [35] In England the House of Commons and the King have been constantly endeavouring to encroach upon each other - and in their struggles for power the rights of the people were little regarded.—But can the same be said of the judicial department? It is impossible for them to encroach upon the Legislative, upon whom they depend for even their very existence—and it is an object to which their ambition would not aspire.

Admitting that Congress have [sic] this power - The Constitution limits the power of the Legisl'e and from that do [sic] they [sic] derive all the power which they [sic] possess. - When then Congress pass [sic] a law, they [sic] show that in their [sic] opinion it is agreeable to the Constitution - if contrary to the Constitution how is it to be prevented from operating? It must operate until new members are chosen who perhaps will not repeal it, and if they do, the people may have suffered great inconveniences from it before its repeal.

Thus the limitations of the powers of Government, by the Constitution will be considered [36] as merely advisory and we at once adopt the doctrine of the omnipotence of the Legislature. And if they are to be the sole judges of the unconstitutionality of their own acts their power cannot be said to be limited by the constitution - for to a limited power it is essential that there be some man or body of men who may declare when the limits prescribed are exceeded.—

It is incident to the Legislature to make laws, to the judiciary to interpret them. The Constitution is the law of the land. If then one statute contradicts it the judges must decide which shall stand - else they are only judges of statute law - not of the supreme law of the Land. When two statutes are contradictory, no one disputes but that the judges may declare which of them shall operate. - When then a statute is contrary to any other branch of the law, there is the same reason that the judges should declare which should be considered as law.

It is said that this power elevates the judges above the Legislature and that it makes them Legislators. [37] But this is not true, for by exercising this power the judges do not make laws, they only declare what is law.

It is more safe to entrust this power in the hands of the judiciary - they [sic] cannot extend it, but can only curtail the power of others. - It is a power which in their hands cannot be abused. It is a power to the proper exercise of which they alone are adequate.

MR. TOD AND [MR.] WILLIAMS on the negative -

The right of the judiciary to this power is argued from the necessity of checks upon the Legislature - for this the Constitution has made proper provision, by giving each branch of the Legislature a negative upon the doings of the other. As to the omnipotence of the Legislature they are [sic] for a time omnipotent - they are the representatives of the people, & while they continue so they have all the power of the people in their hands. If they abuse this power - if they exercise it in a manner they ought not - for this too the Constitution has provided [38] a remedy, and nothing is more easy than for the people by a change of men, to effect a change of measures. In this consists the superiority of our constitution, that while the Legislature possesses all the energy of a British parliament, yet they are so dependent upon their constituents, that they cannot or dare not misuse their power. But supposing this otherwise, is it not absurd that they who depend upon the Legislature for their seats, should have the Authority to controul, to check & restrain the power of the Legislature? If the Legislature are so corrupt as to need the checks gentlemen wish to impose, will they not appoint men to fill the seats of justice, who will be subservient to their pleasure, who will declare only those laws void which the Legislature are willing should be annulled?

But it becomes here important to determine by what authority the judges claim a right to this power, do they derive it from the Constitution? This has not even been pretended. Have the people given them this power?

[39] The people have spoken by the constitution, in which it is not claimed that there is any such authority given. - It is

plain then that it must be an assumption of power by the judges if they pretend to any such Authority.

Much has been said concerning the desire Legislatures have to extend their power - this is granted to be true, but is this rage for power confined to Representatives of the people? Do not we find it extend[s] itself to other classes of men? Can we at once determine that the judicial department are, [sic] & will continue to be free from it? No! Whenever the judiciary of the USA assume [sic] the power, which it is now contended they [sic] ought to assume, they will show to the world that the judicial department are [sic] not less free from a desire to increase the power which they [sic] now enjoy [sic] than any other department of the Government. And by their eagerness to grasp at power, they will demonstrate that they are the men least fit to be entrusted with it.

It is true that inconveniences may result to the people if the Legislature will act contrary to the Constitution, but they may have this to console them that such a law will soon be repealed, [40] perhaps by the very men who framed it, when they find it disagreeable to the people. But where is our security if this power is in the hands of the judges? If they declare a law void, because unconstitutional, which is not so, how are the people ever to receive the benefit of that law? As judges are bound by precedent if new ones should be appointed, they would consider themselves as bound by the adjudication of the old, so that by the error of one set of judges the people might be deprived of a law calculated solely for their benefit.

But if the judges have a right to determine the constitutionality of a law they have the same right to determine whether it is a just, moral, or politic law - for it is as much against the duties of congress to pass such a law, as it [sic] to pass an unconstitutional one. If then a law is passed which is immoral or unjust in its tendencies or impolitic in its effects, the judges, by the rule which it is now contended they ought to adopt - may intervene, & prevent the carrying into execution any law which they may think likely to be injurious to the public.

[41] This will in fact put all the power of the Legislature into their hands, and our Legislature [sic] will become mere cyphers [sic] in the government - not an act can they [sic] pass but must be scrutinized by the judges and receive their sanction before it can be considered as a Law obligatory upon the people. - - - Not only the highest tribunals, but the lowest Courts of judicature throughout the USA, as it respects those within their jurisdiction, may declare any law enacted by the supreme Legislative authority to be void, because their minds are not sufficiently enlarged to discover the design of the Leg-

islature in passing it. Thus the business of our Courts will be entirely changed & instead of declaring what is law, they will declare what ought not to be Law.

* * * * *

HUBBARD JUSTICE was of opinion that the judiciary had a right to declare laws void when unconstitutional. He did not think it followed however that because they [sic] had this power they [sic] must have the power of declaring them void because immoral or impolitic - neither did he see any absurdity, as had been contended, in investing them with such power, because appointed by the Legislature.

[42] The judges being brought up to the study of law being men of the greatest eminence, and generally superior to the same number of men in the Legislature, must be better fitted for the exercise of this power than the legislative body - and to preserve the Constitution from encroachments it is necessary that they exercise such power - and tho it is said that the people by a change of the Legislature may prevent the effects of innovations, yet by a law passed in the first session of a new Congress infinite mischief might be effected before a repeal could be obtained.

EDWARDS JUSTICE. The Constitution has given to the Legislature the power of making Laws - to the judges a right of interpreting them - but we do not find that it has given to them the power which it is now contended they ought to have, & we can hardly suppose that if it had been designed to invest them with a power so great and important, it would not have been mentioned in the Constitution.

SWAN, CHIEF JUSTICE gave his opinion with diffidence as he knew it was opposed to that of men to whose opinions the greatest deference ought to be paid - not however because the lowest Courts would [43] decide upon the validity of an act of Congress [-] this could have no weight seeing their [sic] decisions were liable to be reversed by the Supreme Court. Neither did he think the case of two opposing statutes compared with this, as here the question was whether the judges had a right to determine that there was such an opposition - and whether they might act in direct opposition to a positive act of the supreme Legislature.

The right of judging of the Constitutionality of their [sic] own acts is a power which the Legislature may abuse, and this is the case with all the power which they possess. This is a power which the judges may likewise misuse, and [it] could be but of little service to take power from one body of men &

place it in the hands of another sett [sic] of men, if they were equally likely to abuse it.

Test. T. S. WILLIAMS, CLERK

* * *

VII. POSTSCRIPT

Despite its two-to-one rejection in the Moot Court, judicial review was restored to the curriculum at Litchfield when James Gould took over Reeve's introductory lecture. Two students who heard Gould in 1802 each noted him as saying that it was "universally acknowledged" that statutes conflicting with constitutional mandates are void, and that courts "may, and *must*" pronounce them so.¹²¹

The Moot Court fell into decline, and eventually its practice changed. By the summer of 1798 arguments were being carelessly and perfunctorily reported, and some had to be put over when counsel came to sessions unprepared.¹²² By 1803 the Court had been taken over by the faculty, with Gould presiding over most of the arguments, assigning the questions, and issuing rulings on the merits.¹²³ Eventually the rulings became predetermined "right answers." By 1822, when Horace Mann's classmates elected him the Court's "attorney general," Gould was "reading the arguments to sustain his decision[s]," and not welcoming challenges.¹²⁴ Not surprisingly there was a revival of interest in student-run organizations. "[S]ocieties established for improvement in forensic exercises, which are entirely under the

121. Aaron Burr Reeve, 3 *Manuscript Notes of Lectures by Tapping Reeve at Litchfield Law School, taken down by Aaron Burr Reeve, 1802-3* at 30 (1802); William Van Duersen, 1 *Lectures taken down by our father, William Van Duersen while at Litchfield Law School somewhere about 1800* at 28 (1802-03). Aaron Burr Reeve was Tapping Reeve's only son; his notebooks are now at Yale in the Beinecke Rare Book Library. Van Duersen's notebooks are in the Connecticut State Library at Hartford. Both record Gould as citing Alexander Hamilton's argument in No. 78 of *The Federalist*, which had just been republished in a third edition, *The Federalist on the New Constitution* (George F. Hopkins, 1802). Gould would add other citations as he repeated the lecture in subsequent years. His manuscript lecture notes, "A system of municipal law, comprised in a course of lectures delivered at Litchfield in the State of Connecticut," are in the archives of the Litchfield Historical Society.

122. The record simply peters out. The last entry concludes by naming counsel assigned for the next session. 2 *Litchfield Moot Court MS* at 180 (July 12, 1798) (cited in note 25).

123. Bound with volume 4 of William Van Duersen's notes (cited in note 121), is a very cursory record of questions argued from February, 1803 to August, 1803, with one or two sentence summations of Gould's and, in a few of the cases, Reeve's rulings.

124. Mary Tyler Mann, *Life of Horace Mann* 30-32 (Walker, Fuller and Company, 1865) (quoting a letter from his classmate, Jessup W. Scott).

control of the students" are mentioned as existing in addition to the Moot Court, in the "Advertisement" for the school, which Gould published in 1828.¹²⁵

The students who participated in the argument over judicial review had widely different postgraduate careers. Cyrus Swan, who presided as Chief Judge, went on to a small town practice in Sharon, Connecticut.¹²⁶ Elijah Hubbard became Middletown's leading banker, and was "repeatedly mayor" of that Connecticut city.¹²⁷ John Starke Edwards was a pioneer of the Connecticut Western Reserve; elected to Congress from Ohio in 1812, he died before he could take his seat.¹²⁸ Stephen Twining spent the remainder of his life in New Haven, in private practice, in various city offices, in Yale's financial administration, and as Steward of the college.¹²⁹ Thomas Scott Williams fulfilled the promise of his youth, gaining distinction in a legal career which culminated on the Connecticut Supreme Court, from which he retired in 1847 at the mandatory age of seventy after thirteen years as Chief Justice.¹³⁰

In August, 1807, almost ten years to the day after he had argued against the power of judicial review in the Litchfield Moot Court, George Tod took an opposite position as a judge of the Supreme Court of Ohio. Joining with Chief Judge Saumel Huntington in a two-to-one decision which they sought to explain to the citizenry in separate opinions published in newspapers,¹³¹ Tod held first to recognize the power, then to exercise it by holding unconstitutional a popular law which permitted justices of the peace to determine civil claims for amounts not exceeding fifty dollars.¹³² Solely for this ruling the Ohio House voted overwhelmingly to impeach Judge Tod, and he was tried by

125. Gould, *Advertisement* (cited in note 12).

126. Loomis and Calhoun, *Judicial and Civil History* at 325 (cited in note 118).

127. Dexter, 5 *Biographical Sketches* at 152 (cited in note 97).

128. Fisher, *Biographical Catalogue* at 47 (cited in note 11).

129. Dexter, 5 *Biographical Sketches* at 173 (cited in note 97).

130. *Id.* at 122.

131. The case was *Rutherford v. M'Faddon*, decided by the Ohio Supreme Court sitting in Steubenville, Jefferson County, Ohio, on August 21, 1807, the fifth year of Ohio statehood. The Huntington and Tod opinions were published in Ohio newspapers some months later; they are reprinted in Ervin H. Pollack, *Ohio Unreported Judicial Decisions Prior to 1823* at 71-94 (A. Smith Co., 1952). No opinion was written by the court's third member, Daniel Symmes, whose dissent was noted in a news item carried in the following day's Steubenville *Western Herald*. Regular official reporting of Ohio Supreme Court decisions began with volume 1 of the Ohio Reports, published in 1824.

132. Act of February 12, 1805, § 5, 3 Ohio Laws 14, 21. The fifty dollar limit was held to infringe the Ohio constitution's guarantee of an "inviolable" right to jury trial. Ohio Constitution of 1802, Art. VIII, § 8. Justices of the peace were not empowered to summon juries.

the Senate, Huntington having meanwhile resigned from the bench upon his election as governor. Fifteen of twenty four Ohio senators, one short of the required two thirds majority, voted for Tod's conviction.¹³³

Fortunately for Tod, the prosecutors at his impeachment trial never learned of his argument in the Litchfield Moot Court. But the tactical skill and the eloquence he had gained as a debater were well employed in his defense. Sensing that his opponents would not expose themselves to a charge that they sought legislative reversal of a court's judgment of a legal question it was competent to decide, he answered the indictment by tendering only the claim of such competence—the claim to the power of judicial review—resting, as he concluded his prayer for acquittal, on “his hopes, that the issue will give stability and value to our rights and liberties.”¹³⁴

133. An article by the late William T. Utter, *Judicial Review in Early Ohio*, 14 *Mississippi Valley Hist. Rev.* 3 (1927) is still the most complete published narrative. William T. Utter, *The Frontier State* 44-61 in Carl Wittke, ed., 2 *The History of the State of Ohio* (Ohio State Archaeological and Historical Society, 1942), and Andrew R. L. Cayton, *The Frontier Republic: Ideology and Politics in the Ohio Country, 1780-1825* at 99-108 (Kent State U. Press, 1986) provide briefer accounts in a broader context of Ohio political history.

134. Answer to the Article of Impeachment, *Record of the Proceedings of the High Court of Impeachment on the Trial of George Tod*, Ohio Senate, 7th (misprinted “sixth”) General Assembly, 59, 74, (December 7, 1808) (published as an Appendix).