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JUDGING IN THE DAYS OF THE EARLY REPUBLIC: A CRITIQUE OF JUDGE RICHARD ARNOLD'S USE OF HISTORY IN *ANASTASOFF v. UNITED STATES*

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In a recent Eighth Circuit panel decision, Judge Richard S. Arnold wrote for the court on the precedential value of an unreported decision found to control the case under consideration.[1] In doing so, he found Eighth Circuit Rule 28A(i), which allowed panels to avoid the precedential effect of unpublished opinions, to be unconstitutional.[2] He reasoned that the doctrine of precedent was well established at the time of the framing of the Constitution and created a limit on judicial power, which was written into Article III.[3] Judge Arnold recited the theory of precedent as laid out by a series of seventeenth and eighteenth century judicial scholarly works, especially

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1. *Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc) (citing *Christie v. U.S.*, No. 91-2375MN (8th Cir. Mar. 20, 1992) (per curiam)). The actual issue in *Anastasoff* was whether the appellant was due a refund on overpaid federal income taxes when she mailed the claim within three years of the overpayment, but the claim was received by the Internal Revenue Service three years and a day after overpayment. In *Christie*, the court had rejected a similar taxpayer's claim. *Id.* at 899. The taxpayer argued that since the earlier opinion was unpublished, the Eighth Circuit was free to reconsider its position, but the court disagreed. *Id.* at 899, 905. On the taxpayer's petition for rehearing, after learning that the IRS had capitulated to the claim on the basis of a case in another circuit, the en banc court held that the tax issue was moot, vacating the panel decision, but further declaring that the precedential value of unreported opinions remains an open question in the Eighth Circuit. *Anastasoff v. U.S.*, 235 F.3d 1054, 1056 (8th Cir. 2000). Judge Arnold's reasoning is bound to be incorporated in later briefs and judicial opinions addressing this issue, and so is still worthy of scholarly analysis.

2. *Anastasoff*, 223 F.3d at 899.

3. *Id.* at 900.

Blackstone's *Commentaries* and *The Federalist Papers*,[4] and capped his argument with a long quotation from Justice Story.[5]

Judge Arnold's reasoning that Article III of the United States Constitution prohibits judges from designating certain opinions as unpublished, and thus not precedential, relies on two main arguments. The first argument is that the doctrine of precedent limits judges, so that they cannot avoid precedent in order to "make" law, but instead must "find" law.[6] The implication of this argument is that statutes and precedents are the only available sources of law. The second argument is that limiting the judiciary's power to select which precedent to follow is an essential bulwark of the doctrine of separation of powers. Since precedent binds judges, judges are differentiated from the legislature by their inability to choose which law to follow. Judges must obey prior law while legislatures can reject prior law by statute.[7]

Judge Arnold's argument fails to take into account the historical complexity of establishing the role of state and federal judges in a democratic republic. A crucial factor that Judge Arnold's analysis fails to address is the role of the common law in colonial America and during the years of the early Republic.

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4. *Id.* at 901-02.

5. *Id.* at 903-04:

> The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice or will of judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.
>
> This known course of proceeding, this settled habit of thinking, this conclusive effect of judicial adjudications, was in the full view of the framers of the constitution. It was required, and enforced in every state in the Union; and a departure from it would have been justly deemed an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority.

Id. (quoting Joseph Story, *Commentaries on the Constitution of the United States* §§ 377-78 (1833)).

6. *Id.* at 901.

7. *Id.* at 901-02.

While Blackstone may have claimed that judicial review was an established tradition of the common law, Blackstone himself was of the opinion that the common law did not apply to the American colonies.[8] Addressing the issue of when the English common law was the law of an English colony, Blackstone said that there were two types of colonies. In the first type, English subjects discovered and populated an otherwise uninhabited country. In such colonies, English colonists brought with them all the English laws, which were immediately in force. But even in those colonies, the laws were only in force to the extent that they were applicable as the situation and condition of the infant colony dictated. Many of the details of the English common law were not in force because they were "neither necessary nor convenient for them."[9]

The second type of colony existed where the English conquered an indigenous people or where the prior government ceded the land to England by treaty. In those colonies, the laws of the preceding government continued in effect until the king changed them. Blackstone considered the American colonies as principally of this latter sort, since they were obtained either by treaty from other European nations (e.g., New York, which England acquired from the Netherlands) or by conquest of the natives. Blackstone concluded,

> Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives . . . or by treaties. And therefore the common law of England, as such, has no allowance or authority there . . . .[10]

Far from providing support for Judge Arnold's claim that the colonial judiciary was bound by common law precedent, Blackstone's thesis was just the opposite. The course of colonial affairs supports Blackstone's claim that the English government

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8. William Blackstone, *Commentaries* vol. 1, *109.

9. *Id.* at *108.

10. *Id.* at *109. Note that I am not arguing that Blackstone did not claim that a form of judicial review existed. It did, and the Framers knew the basics of that philosophy. However, the exact power of specific precedents to control American law was far from undisputed. Since Judge Arnold based his claims about Article III power on background assumptions of judicial review, not specific claims that the Framers made in the Convention, this ambiguity about what precedents formed American law undermines his claim of a unitary agreement about the nature of precedent at the time of the framing.

did not extend common law rights to the colonies. One of the complaints that led to the revolution was that the mother country did not recognize the colonists' rights as English subjects to invoke the laws' protection.[11]

Of course, Blackstone's opinion as to the power of the common law in the American colonies is not determinative of that question in the early Republic. His opinion does, however, establish the important point that lawyers, judges, and legal commentators contested the question of just what body of law judges should use to decide cases in the early Republic. Some important American commentators disagreed with Blackstone. In his appendix to the American edition of Blackstone's *Commentaries*, St. George Tucker argued that the English colonists in America fit into the first category since they established their colonies in areas where the natives had either ceded the land or withdrawn from the territory.[12] Tucker then drew the next logical step, that the English immigrants who came out to settle in America brought with them their birthright as English citizens, including the common law. Tucker's conclusion was that "[t]he laws of the parent state would from this circumstance acquire a tacit authority, and reception in all cases to which they were applicable."[13] Note that even Tucker agreed that English precedents had to be applicable to American conditions to be law. This brief analysis of the applicability of the common law to the new states immediately begins to show that Judge Arnold's claim that the Framers had a uniform and widely accepted vision of the limits of judicial power is not borne out by the complexity of the legal history of the early Republic.

Whether Blackstone was correct or Tucker was correct, both legal scholars recognized that the conditions in the New World modified the extent to which English precedents bound

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11. The literature on the complaints of the colonists that their rights as English citizens were being violated is truly voluminous. The starting point for the modern version of this story is Bernard Bailyn, *The Ideological Origins of the American Revolution* (Belknap Press, Harvard U. Press 1967). *See also* Gordon S. Wood, *The Creation of the American Republic 1776-1787* (U.N.C. Press 1969) (commenting on the implication for the revolutionary ideology for the state-building that occurred after the Revolution).

12. St. George Tucker, *Appendix*, in William Blackstone, *Commentaries* vol. 1, 382 (St. George Tucker ed., Augustus M. Kelley Publishers 1969) (originally published 1803).

13. *Id.* at 384.

American judges. The decision as to what aspects of the common law were received into the laws of the new states was neither uniquely legislative nor uniquely judicial. Many of the reception statutes (statutes passed by state legislatures adopting the common law as the law of the new states) specifically left open for judicial interpretation the question of which common law precedents and statutes modifying this law were applicable to the conditions of the new states.[14] The story of the reception of the common law into the states contradicts mightily Judge Arnold's vision of a unitary meaning of judicial review at the time of the founding and during the days of the early Republic.

This story contradicts Judge Arnold's in three ways. First, judges often did pick and choose which English statutes and common law precedents were binding within their states.[15] Second, judges took it upon themselves to use the customs of the common citizens of the states as an alternative source of law to the common law.[16] Third, even those judges who looked to the common law as the source of American law felt that the judicial power included the right to decide whether an American statute complied with the common law. These judges held state statutes

14. An example of a reception statute that left to the judiciary the discretion to decide what parts of the common law to adopt can be found in 1797 Acts and Resolves of Vermont 71, which provided that "so much of the common law of England as is applicable to the local situation, and circumstances, and is not repugnant to the constitution." would be the law of the Republic. The Vermont court used this license to reject a common law rule that required animal owners to fence in their animals. *See Mooney v. Maynard*, 1 Vt. 470 (1829) (available in 1829 WL 1057). *See also* Elizabeth Brown, *British Statutes in American Law 1776-1836* (U. Mich. L. Sch. 1964). Brown's work attempts to determine which English statutes were in effect in the various states. Although this information is very interesting, Brown does not use it to make any particular argument about the reception of the common law. The literature on reception of the common law is not comprehensive, although some states have had their stories told. *E.g.* Ray F. Bowman, Student Author, *English Common Law and Indiana Jurisprudence*, 30 Ind. L. Rev. 409 (1997); Ernest G. Mayo, *Rhode Island's Reception of the Common Law*, 31 Suffolk U. L. Rev. 609 (1998). In Illinois, the reception of the common law has become an issue in that state's tort reform, spawning articles more interested in modern day issues than historical objectivity. *See e.g.* Philip H. Corboy, Curt N. Rodin & Susan J. Schwartz, *Illinois Courts: Vital Developers of Tort Law as Constitutional Vanguards, Statutory Interpreters, and Common Law Adjudicators*, 30 Loy. U. Chi. L.J. 183 (1999); Victor E. Schwartz, Mark A. Behrens & Mark D. Taylor, *Illinois Tort Law: A Rich History of Cooperation and Respect between the Courts and the Legislature*, 28 Loy. U. Chi. L.J. 745 (1997).

15. *See infra* Section I.

16. *See infra* Section II.

void if they, in the judges' opinion, violated the common law.[17] Thus, the highly contested nature of the power of the judiciary to find the law from a variety of sources contradicts Judge Arnold's claim that a clear vision existed of the extent of judicial power at the time of the framing of the Constitution and during the early days of the Republic.

This article will examine examples of the judiciary's decisions on the reception of the common law, the use of custom as a source of law, and the use of the common law as a means of voiding state legislation. The article will then argue that this complex history of the appropriate role of the judiciary contradicts Judge Arnold's claim that the role of the judiciary was well settled at the time of the founding. By looking at the actions of judges during the early years of the Republic, we will see that much disagreement existed over the role of the judiciary.[18]

I. THE MULTIPLICITY OF SOURCES OF LAW

The uncertainty of what law should control in the new states of the United States led judges to examine a wide variety of possible sources of law. In this process, the judges had to pick and choose from various sources of law and decide which sources were superior.[19] This process involved extensive judicial

17. *See infra* Section III.

18. My argument does not address some of the other possible weaknesses in Judge Arnold's analysis, such as his claim that American judges find law instead of make law or even that the original intent of the Framers imbues Article III with specific meanings or is even discernible. *See Anastasoff*, 223 F.3d at 901, 903. Both of these assumptions may be challenged, but I will leave them for others to address.

19. *See e.g. Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 204-05 (1848) (available in 1848 WL 1547). There, the court stated:

> The laws of Georgia may be thus graduated, with reference to their obligation or authority. 1st, The Constitution of the United States. 2d, Treaties entered into by the Federal Government before, or since, the adoption of the Constitution. 3d, Laws of the United States, made in pursuance of the Constitution. 4th, The Constitution of the State. 5th, The Statutes of the State. 6th, Provincial Acts that were in force, and binding on the 14th day of May, 1776, so far as they are not contrary to the Constitution, laws and form of government of the State. 7th, The Common Law of England, and such of the Statute Laws as were usually in force before the revolution, with the foregoing limitation. It is the peculiar province of the Courts to ascertain and declare when any two of these several species of law conflict with each other; and then it follows, as a matter of course, that the *less* must yield to the *greater*.

discretion, contradicting Judge Arnold's characterization of judicial review as a fairly transparent process of merely following precedents. Several early cases exemplify the choices that judges faced in deciding what law controlled and who could make that decision; they also show how little precedent actually controlled judicial decisionmaking.

A. Connecticut

In 1805 the Connecticut Supreme Court had to decide whether a married woman, a "feme covert" as it were, had the power to devise real estate.[20] In order to decide this question, the court worked its way through all the various sources of law that might allow a married woman to claim such a right. First, the court stated that the common law had no force in the Republic except as it had been made the law of the Republic by "practical adoption."[21] Still, the first place the court looked for a married woman's power to devise real estate was the common law. The court examined whether the common law gave her that power and whether Connecticut had adopted that portion of the common law. The court easily concluded that the common law of feme covert forbade married women from devising property. In searching the common law, the court looked at unspecified "elementary writers" and "other authorities"—not specific precedents.[22]

Since the married woman could not derive any solace from the common law, the court next looked to see if any English statute altered the common law on this issue. The only applicable English statute specifically exempted married women from its terms.[23] The Connecticut court next turned to state statutes to see if they had conferred to married women the power to devise real estate. The pertinent statute stated:

> [A]ll persons of the age of twenty-one years, of right understanding and memory, whether excommunicated or other, shall have full power, authority and liberty to make

20. *Fitch v. Brainerd*, 2 Day 163 (Conn. 1805) (available in 1805 WL 203).

21. *Id.*, 1805 WL at *15.

22. *Id.*

23. *Id.* (citing 32 & 34 Hen. VIII).

> wills and testaments, and all other lawful alienations of their land and other estates.[24]

The court reasoned that this statute did not give all persons over twenty-one such power, but only those over twenty-one who otherwise could convey their land; the statute merely set the age of competency.[25]

However, even the search for a state statute did not exhaust the possible sources of law that would empower a married woman to devise her property. The court next examined whether a Connecticut practice or custom allowed such acts. The court could find neither "memorials" nor "traditions" of such a custom.[26] Furthermore, the court noted that Connecticut law was founded on the word of God and any custom that so trespassed on the unity of the married couple would be unlikely to emerge in a Christian state.[27]

Notice that in this rundown of possible sources of the power of a married woman to devise real property, the court failed to look to precedents. England had, in a case decided by no less a legal light then Lord Mansfield, changed its matrimonial law and given to wives the power to devise their property.[28] Furthermore, a 1788 Connecticut case had adopted Lord Mansfield's position.[29] In the brief opposing the wife's position, counsel had admitted these precedents' existence, but argued that they were not correct, adding: "Nothing is more common in England, than for judges to declare, that former precedents are not law."[30] The Connecticut Supreme Court of Errors agreed and ratified the attorney's argument by holding that the opinion of the divided court in 1788 "was not law."[31]

Interestingly, the court did not recognize its refusal to follow precedent as a breach of the separation of powers. Rather, it viewed the question whether the benefit of giving married

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24. *Id.* (citing Conn. Stat. 265).

25. *Id.*

26. *Id.* at *18.

27. *Id.*

28. *Corbett v. Poelnitz*, 1 Term Rep. 8, *cited in Fitch*, 1805 WL 203, at *5 (argument of "plaintiff in error").

29. *Kellogg v. Adams* (Conn. 1788), *cited in Fitch*, 1805 WL 203, at *8 (argument of plaintiff in error).

30. *Fitch*, 1805 WL 203, at *8 (argument of plaintiff in error).

31. *Id.* at *18.

women the power to devise real estate outweighed "its obvious mischiefs" as a legislative and not a judicial question.[32] Thus, this court saw nothing unjudicial in declaring counsel's cited precedents as "not law."[33]

This case well exemplifies the problem with Judge Arnold's analysis of the state of judicial review in the late eighteenth and early nineteenth centuries. Anti-British sentiment warred with practical necessity when courts were forced to look to the common law. Moreover, the content of the common law, for American judges, was often not seen as specific precedents, but rather the law as practiced in the specific colony. Thus specific English precedents were not binding.[34] Further, the doctrine of precedent was so weak that this court had no problem declaring an earlier decision as "not law" without explanation.

B. New York

Similarly, the complex problem of deciding what body of law should control in the new republican states led other state judiciaries to set themselves up as the ultimate arbiters of the question. In New York, a court refused to abide by the edict of the state constitution or the state statutes and retained for itself the power to determine which law should control.[35] The New York Constitution of 1821 provided that the common law and statutes of the colony of New York as of April 19, 1775, would be the law of the Republic.[36] However, parts of the common law and other acts that were "repugnant to this Constitution" were abrogated.[37] The Constitution of 1821 referred to an earlier legislative session in which the legislature rephrased and adopted as New York statutes a number of British statutes.[38] The legislation then provided that after May 1, 1788, none of the

32. *Id.*

33. *Id.*

34. *See infra* Part I.B (discussing New York jurisprudence).

35. *Bogardus v. Trinity Church*, 4 Paige Ch. 178 (N.Y. Ch. 1833) (available in 1833 WL 2989)

36. N.Y. Const. of 1821, art. VII, § 13.

37. *Id.*

38. 1788 N.Y. Laws 88 (2 Jones and Varrick).

statutes of England would be laws in New York.[39] So by the time of the later constitution, no English or colonial statutes had been the formal law of the Republic for twenty-three years. In order to make this point extremely clear, in 1828 the legislature passed a statute reiterating that no statutes of England would be law or have effect after May 1, 1788, and, further, that none of the colonial statutes of New York were law after that date.[40] Despite a clear constitutional and legislative intent that English statutes and colonial statutes have no power within the Republic, the New York judiciary circumvented this mandate.

In 1833, a chancellor was deciding an adverse possession case that raised the issue whether certain English statutes setting the time for barring actions to recover real property were the law in New York.[41] In deciding whether New York courts of equity would enforce these statutes, the chancellor held that despite the "technical difficulty" that the state constitution and statutes declared them not to be, the common law of England as modified by the statutes of England had become the common law of New York.[42] While admitting that these English statutes, as statutes, could not be a part of the law of New York because of the New York statutory and constitutional provisions, the chancellor nonetheless proclaimed the statutes could still be part of the state common law, reasoning that judges controlled the content of the state common law, thus not subjecting state common law to the limitation that the legislature and the constitution had attempted to put on these statutes.[43]

While the difference between enforcing a statute as positive law and enforcing it as a statement of common law rights might seem a fine distinction, this distinction gave the judiciary the power to decide which English statutes and colonial New York acts the courts would enforce. Thus, despite the constitutional drafters' and the legislators' clear intent, this ruling allowed judges to control the substance of New York law. Thus *Bogardus* and the later New York decisions that followed its

39. *Id.*
40. 1828 N.Y. Laws 66.
41. *Bogardus*, 1833 WL 2989, at *5.
42. *Id.*
43. *Id.*

reasoning[44] enabled the judiciary to avoid legislative and constitutional attempts to limit the law that the judges could consider. However, the judges saw themselves as free to pick and choose from among English and colonial statutes and decide which had been incorporated into the New York common law. This audacious belief violates our current understanding of separation of powers. But, contrary to Judge Arnold's analysis, such trampling on the boundary between legislative and judicial powers was commonplace as the outlines of our governmental system were emerging during the early Republic.

c. Pennsylvania

Courts were not alone in their belief that judges and not legislatures should decide what law prevailed in a state. Pennsylvania provides an excellent example of the relationship between the legislature and the courts in deciding what law would form the controlling law of a state. In Pennsylvania, the legislature turned over to the judiciary the task of identifying which English statutes had become part of the Pennsylvania common law.[45]

In an act passed in 1777,[46] the Pennsylvania legislature stated that the common law and the statutes of England that had been in force in the colony before independence would be in force in the new Commonwealth.[47] In 1782, the Chief Justice of the Pennsylvania Supreme Court took it upon himself to clarify that statute. In a charge to a jury, Chief Justice McKean stated that the common law of England had always been in force in Pennsylvania. However, the statutes of Great Britain enacted before the settlement of Pennsylvania had no effect within the Republic unless they were "convenient and adapted to the circumstances of the country."[48] Statutes passed after the

44. *See Miller v. Miller*, 18 Hun. 507 (1879); *Lansing v. Stone*, 37 Barb. 15 (N.Y. Gen. Term 1862) (available in 1862 WL 4474); *DeRuyter v. Trustees of St. Peter's Church*, 3 Barb. Ch. 119 (N.Y. Ch. 1848) (available in 1848 WL 4429), *aff'd*, 3 N.Y. 238 (1850).

45. *See Report of Judges*, 3 Binn. app., at 533-36 (Penn. 1808) (1807 statute reported at 3 Binn. 532).

46. Act of Jan. 28, 1777, 46 Pa. Stat. § 152. This statute is discussed in *Commonwealth v. O'Brien*, 124 A.2d 666, 671 (Pa. Super. 1956).

47. *Id.*

48. *Morris's Lessee v. Vanderen*, 1 Dall. 64, 67 (Pa. 1782).

settlement of Pennsylvania had no effect within the Republic unless the colonies were specifically mentioned.[49]

The legislature was uncomfortable with this state of affairs and on April 7, 1807, passed an act requiring the judges of the state supreme court to report to the next legislature those English statutes that were in force in the Commonwealth. Thus, the legislature certified the power of the judiciary to make specific decisions regarding which statutes were in force within the Republic of Pennsylvania. The supreme court judges also had no doubt they were empowered as judges to examine the history of the settlement of Pennsylvania and decide which statutes the colonial courts had used. The judges not only examined the history of Pennsylvania usage, but also ruled on the usefulness of English statutes since only those statutes "as are useful in their new situation, and none other" were part of the Pennsylvania common law.[50] Thus, the judges culled the English statutes that did not meet the conditions of the New World or the sensibilities of a republican government.

The actions of the legislature and the judiciary strongly indicate that neither branch viewed choosing among English statutes to be outside the bounds of the judicial power. However, in 1833, a federal district court judge sitting in Pennsylvania was called upon to decide the validity of a devise to a group of Quakers who refused to incorporate themselves under state law.[51] The common law did not allow such a devise, and the Judges' Report of 1808 had specifically rejected incorporating certain English statutes that amended the common law to allow such devises. A series of precedents had ratified the Judges' Report and held that unincorporated religious bodies could not be the beneficiaries of a devise.[52]

The federal judge acknowledged that he had to follow Pennsylvania law,[53] but he took it upon himself to review the history of the English legislation, English common law,

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49. *Id.*

50. *Report of Judges*, 3 Binn. at 534.

51. *Magill v. Brown*, 16 F. Cas. 408 (E.D. Pa. 1833).

52. *Id.* at 412 (citing *Methodist Church v. Remington*, 1 Watts 218 (Pa. 1832); *M'Girr v. Aaron*, 1 Pen. & W. 51 (Pa. 1829); *Leazure v. Hillegas*, 7 Serg. & Rawle 319 (Pa. 1821)).

53. *Id.* at 427.

Pennsylvania legislation, and Pennsylvania custom to discover the true state of law in Pennsylvania. After this examination, the federal judge claimed that he had the power to determine the law of Pennsylvania and was not bound by the state supreme court precedents.[54] He analyzed the various sources of Pennsylvania law and concluded that the Quakers could receive the devise, but his opinion then continued, "We should have rested satisfied with results so satisfactory to our minds as these if they had not been in some respects at variance with the understanding of the supreme court of the state."[55] He then proceeded to ignore the cited precedents. This judge fully thought it within his Article III powers to examine Pennsylvania legal history and ascertain Pennsylvania common law, even in contradiction of the Pennsylvania Supreme Court.

In Pennsylvania, we see once again that the doctrines of precedent and separation of powers did not spring fully formed into existence after 1789. The Pennsylvania legislature acknowledged the judiciary's power to decide which statutes were part of the law of Pennsylvania and which statutes should have no force. Moreover, the federal judge did not feel that he was violating his Article III powers when he ignored Pennsylvania precedents and instead chose to reconstruct Pennsylvania law. He showed, to his own satisfaction, that the usage and custom of Pennsylvania had incorporated the principles of certain English statutes into Pennsylvania law even though the Pennsylvania Supreme Court had explicitly excluded them. Thus, the course of reception of the common law in Pennsylvania refutes Judge Arnold's narrow vision of American judges willingly following prior precedents. Instead, the story is a much more textured one of the relationship between the legislature, the state judiciary, and even the federal judiciary in choosing which precedents should be followed and which should be ignored. In the next section, we shall see that judges not only were involved in deciding which parts of the common law were binding, but also that they felt free to reject the common law altogether.

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54. *Id.* at 425.

55. *Id.* at 427.

II. CUSTOM AS A SOURCE OF LAW

The state judiciary in the early Republic did not feel bound to follow the common law if the common law did not fit the conditions of the Republic. In 1825, the Pennsylvania Supreme Court faced the problem of deciding whether to continue the punishment of the ducking stool for women found to be "common scolds."[56] A prosecutor had two very strong arguments for applying the punishment. First, the practice of ducking scolds had a long history as part of the English common law. Furthermore, ducking was the punishment for scolds at the time of the settlement of Pennsylvania. Since the usual rule was that the common law as it existed at the time of settlement was the law that the colonists brought with them, the law sanctioning the use of ducking should have been received in Pennsylvania.[57]

Second, ducking had been incorporated into the common law of Pennsylvania. As illustrated in the New York cases discussed earlier, actual practices in the colonial courts could became part of a state's common law, separate and apart from a state's statutory reception of the English common law. The prosecutor in *James* discovered a 1769 case in the Philadelphia quarter sessions in which a woman was sentenced to ducking and the sentence was carried out.[58] In 1779, the sentence was again adjudged and enforced.[59] In 1781, the Philadelphia court continued a case of scolding until the woman finally agreed to leave the jurisdiction.[60] The prosecutor argued that since these cases took place in Philadelphia, the General Assembly must have known of them.[61] Yet in revising the penal code in 1790, the Assembly had not abolished this punishment when it abolished other common law punishments. The general savings clause of the penal statute thus protected ducking when it stated, "[E]very other felony or misdemeanor whatsoever, not specifically provided for by that act, may and shall be punished

56. *James v. Commonwealth*, 12 Serg. & Rawle 220, (Pa. 1825) (available in 1825 WL 1899).

57. *Id.*, 1825 WL 1899, at *3-5.

58. *Id.* at *12 (citing *The King v. Mary Conway* (no additional citation information furnished in the opinion)).

59. *Id.* (citing *State v. Ann Maize*).

60. *Id.* (discussing, but not citing, the case of Mary Swann).

61. *Id.* at *4.

as heretofore."[62] Thus, from the prosecutor's point of view, the penal clause had incorporated ducking into the law of Pennsylvania.

The Pennsylvania judiciary was faced with a punishment well established in English common law and with verified colonial and state usage. Furthermore, the legislature, at least by implication, had ratified this punishment. Judge Duncan, writing for the court, acknowledged that ducking, although a "cruel, unusual, unnatural and ludicrous judgment,"[63] must be enforced if it was the law of the land. The court's job was to determine, then, what the law was. Judge Duncan reasoned that ducking had been repealed by "a kind of silent legislation."[64] He explained that a custom of long non-use could amend the common law. Despite the unquestionable existence of ducking in the common law, the court had the power to determine whether the common law fit the time and circumstances of the people. As time and circumstances change, the courts can recognize this change by ignoring old precedents.

However, this analysis still left unresolved the problem that ducking had been practiced in Pennsylvania less than fifty years previously. The quarter session judges had been following what they thought was the law of the land. Judge Duncan was sure, however, that the panel that continued the woman's case until she left town was trying to avoid inflicting the punishment. He noted that "this highly respectable court whose decision we are now revising, were probably governed by these precedents, considering them conclusive evidence of the adoption of this punishment, and making it the law of the land."[65] Judge Duncan concluded that ducking had never been part of the common law of Pennsylvania and that the quarter sessions' judgments were not evidence that it had been received. "I cannot give to the two

62. *Id.*

63. *Id.* at *5.

64. *Id.* at *8.

65. *Id.* at *12. Of course, no one argued that the court was bound by the decisions of the quarter session judges. The issue was whether the use of ducking by these judges had incorporated ducking into Pennsylvania's common law. The doctrine seemed to be that such a usage would make the punishment part of the State's common law. The court, however, refused to give the older judgments such weight.

precedents from the quarter sessions of Philadelphia, the weight of decisions."[66]

Interestingly, Judge Duncan never reached the questions whether this punishment was part of the statutory law or whether the constitutions of the United States or the State forbade it. The prosecutor had argued that Pennsylvania penal law had incorporated the statute. The defense had argued that the punishment violated constitutional guarantees. The court did not need to address any of these issues.[67] Because this punishment was not part of Pennsylvania law, ducking could not be revived by the legislature nor did it need to be weighed against constitutional protections.

This case further exemplifies the subtlety of judicial review and of judicial power in the early Republic. Contrary to Judge Arnold's claims that precedent bound judges, judges in the early Republic saw their job as including the power to decide—from a wide variety of sources—what the law was. Judges had the power to pick and choose between sources of law in fulfilling that duty.[68]

Courts did not just use their power to establish the law to rid the American law of arcane punishments. American courts also used their power to choose between sources of law in order to reject vital, living common law concepts. In *Seely v. Peters*,[69] the Illinois Supreme Court rejected a well-established line of English and American precedents on the ground that these precedents contradicted the customs of Illinois agriculturists. The issue in *Seely* was who had the duty to fence land—cultivators who grew crops or stockowners who ran their animals on the extensive unfenced range of this frontier state? This issue was important to the agricultural community, and therefore the attorneys argued all the possible sources of law to the Illinois Supreme Court: English precedents, American precedents, legislative acts, and customary practices. This wide-ranging argument was necessary because judges, as seen earlier, were used to searching for law in a wide variety of sources.

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66. *Id.*

67. *Id.*

68. *See Tucker v. Adams*, 14 Ga. 548 (1854) (concluding that Georgia had never adopted the Rule in Shelley's Case into its law).

69. 10 Ill. 130 (1848) (available in 1848 WL 4133).

Contrary to Judge Arnold's claims, judicial power extended well beyond merely applying precedents. The judges in *Seely* considered all the possible arguments that could be derived from a variety of sources of law, an inquiry that went to decide a case in which the damages were four dollars and ten cents.

In this case, Samuel Seely's hogs broke through William Peters's fence and damaged his crops. Seely argued that because Peters's fence did not conform to statutory requirements, Seely was not responsible for the damage the animals inflicted. The trial court instructed the jury that the common law required animal owners to fence in their animals. The hog owner appealed the resulting verdict against him, arguing that the common law rule did not apply in Illinois. William Herndon, Abraham Lincoln's law partner, argued for the landowner, citing a string of twelve American cases that had used the common law to invalidate statutes requiring farmers to fence.[70] He cited cases from Massachusetts and New York, as well as a Maine case, *Little v. Lathrop*, but failed to mention that a later Maine case, *Gooch v. Stephenson*, had overruled the holding that the common law was superior to Maine's statutes on this issue.[71] Herndon argued that the existence of Illinois's reception statute proved that the legislature had adopted the common law.[72]

Peters argued that the common law remained in effect unless explicitly overturned by statute and that the Illinois statute describing legal fences merely provided cumulative relief alongside the common law relief.[73] His counsel offered an intensive statutory analysis, as well as arguing that English and American precedents required animal owners to fence in their stock. They conducted a section-by-section search of the fencing statute, attempting to prove that the extensive legislative regulation of this issue had not preempted the common law, concluding that the statute was only meant to apply to partition fences, that is, fences dividing one person's land from another person's land.[74] From this conclusion, Peters claimed that the statute could not apply to fences bounding the range or the

70. *Id.*, 1848 WL 4133, at *1.

71. *Id.* at *1, 12.

72. *Id.* at *1-2.

73. *Id.* at *2 (citing an unnamed Illinois statute enacted Feb. 4, 1819).

74. *Seely*, 1848 WL 4133, at *3 (discussing Ill. Rev. Stat. 51).

roadways, and therefore the statute could not give animal owners the right to run their animals on the range. He concluded that the statute, instead of voiding the common law, provided an additional remedy in certain situations. Under that theory, the common law existed as a completely separate remedy for landowners.[75]

The court decided in favor of the stock owner. The majority opinion engaged in an extensive analysis of the legislative history and the contemporary legislation. Judge Lyman Trumbull rejected Herndon's argument that the court must strictly construe the statute so as to avoid a conflict with the common law. Instead he stated that the common law, and all the English and American precedents interpreting it, did not apply in Illinois since the reception statute only adopted the common law "so far as the same is applicable."[76] Illinois courts had interpreted this provision to allow them to choose which parts of the common law acted as law within the Republic. Courts were only bound to follow the common law to the extent that the common law met the needs of the Republic. Judge Trumbull examined the customary agricultural practices of Illinois and asserted that "[i]t has been the custom in Illinois so long, that the memory of man runneth not to the contrary, for the owners of stock to suffer them to run at large."[77] The judge not only denied the requirement to follow the common law, but he also pointed out that Illinois statutes differed from the statutes in northeastern states, a difference which further allowed Illinois's courts to ignore such precedents.[78]

Moreover, custom could serve as an independent limit on using the common law and common law precedents as a source of law. Judge Trumbull noted the custom in Illinois of allowing stock to run at large. "Settlers have located themselves contiguous to prairies for the very purpose of getting the benefit of the range. The right of all to pasture their cattle upon the

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75. *Id.* at *1.

76. *Id.* at *7.

77. *Id.* at *9. Although the court used the age-old common law formula for prescription, it could not have meant to rely on that doctrine. European settlement in Illinois was not old enough to meet the common law requirements for prescription. This statement must have been just a rhetorical flourish.

78. *Seely*, 1848 WL 4133, at *10-11 (citing, among others, *Studwell v. Ritch*, 14 Conn. 292 (1841)).

uninclosed ground is universally conceded."[79] He further noted that this custom was, itself, an independent source of law. This "universal understanding . . . is entitled to no little consideration in determining what the law is, and we should feel inclined to hold, independent of any statutes upon the subject," that the common law does not apply.[80] The custom of the land was a powerful enough source of law that, even without statutory reinforcement, it could overcome the common law rule.

The majority well knew that its use of custom and the reception statute to ignore English and American precedent violated the common law theory of judicial powers. The dissenter, Judge John Caton, scolded the majority for taking upon itself the power to decide which part of the common law was applicable under the reception statute. Judge Caton argued that such judicial infringement on legislative power was "too dangerous to admit of defense."[81] Judge Caton then attempted to protect the common law as the sole source of law, but even he could not limit himself to only looking to precedent for the source of law. He argued on the one hand that "the common law is most unquestionably the law of natural justice."[82] On the other hand, intermixed with such assertions about the origin of law, he made instrumentalist claims: "One acre in tillage is of more value than many acres of wild grass. . . ."[83]

Judge Caton even made arguments based on custom. His dissenting opinion disagreed with the majority both as to what Illinois custom was and as to custom's role as a source of law. He argued, "It is within my personal knowledge, that in many portions of the State . . . it has never been the custom to allow swine and sheep to go at large."[84] Judge Caton relied on his own trial court experience as a source of custom: "I have been for about sixteen years constantly engaged in the courts of this State, and this is the first decision . . . where the common law has not been held to apply."[85] But even more important, custom

79. *Id.* at *9.
80. *Id.*
81. *Id.* at *12 (Caton, J., dissenting).
82. *Id.* at *13.
83. *Id.*
84. *Seely,* 1848 WL 4133, at *14 (Caton, J., dissenting).
85. *Id.*

should not be a source of law; because it leads to anarchy and chaos:

> When the principle becomes established that the courts shall construe the law as the people understand it, then will a Cleon be justified in taking an appeal from the decision of the judge upon the bench, to the multitude in the court house yard.[86]

No common lawyer better expressed the slippery slope that allowing custom to overcome the common law could lead to, or the implicit fear of too much democracy. His very vehemence, however, suggests that use of custom as a source of law was common practice.

In the same paragraph in which he cited his knowledge of agricultural practices, Judge Caton attacked the majority's notions of agricultural practice in deciding what the law should be, apparently oblivious to the contradiction. The explanation for this blindness is that Judge Caton used a common law analysis, and within this vision, the common law was not the willed intent of the judiciary, but was a set of "well settled rules."[87] Popular will and long-lived customs, far from being the basis of law, were its greatest enemies.

> Who does not see, if we start out with the principle of making our decisions conform to public opinion, and for a justification, say that the genius of our people, and their customs and habits demand it, we shall soon end in making our notions of their wants and interests, rather than the common law or the express statute, the rule of determination . . . we shall be left to our own arbitrary notions of what is best adapted to the public good.[88]

Long before the legal realists or the critical legal studies movement, Judge Caton looked the indeterminacy of judicial decisionmaking in the face and recoiled from what he saw.

The *Seely* opinion once again shows that Judge Arnold's version of the role of judicial review in limiting judicial powers during the early Republic was based on an overly-simplified

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86. *Id.* Cleon was an Athenian general who came to power through popular acclaim after winning a battle against the Spartans. His corruption was ridiculed in two plays by Aristophanes.

87. *Id.*

88. *Seely*, 1848 WL 4133, at *14.

view of American legal history. Judges looked to a wide variety of sources, not merely to judicial precedents, in deciding what the law should be. As our legal system matured, as more American precedents were available in published reports, and as legislatures addressed more specific problems with statutory solutions, the idea that courts should limit their inquiries to cases and statutes became heard more often. Judges like Caton in *Seely* and Story in his *Commentaries on the Constitution of the United States*,[89] argued that judges should limit themselves in their search for sources of law. However, we must remember that these judges were engaged in an active debate with judges of different sensibilities. They were not stating the consensus about judicial power, but were engaged in an ongoing debate. Within this debate, Caton and Story were the ones trying to transform the judiciaries' view of the appropriate role of judges in the Republic. Far from reflecting the Framers' view of judicial power, they reflected the next wave of formalistic, scientific jurisprudence that saw its high-water mark in Christopher Columbus Langdell's scholarship and pedagogy.[90]

III. COMMON LAW AS FUNDAMENTAL AND SUPERIOR TO STATE STATUTES

As we have seen in the first two sections, the parameters of judicial power were highly contested in the late colonial and early Republic periods. One group of judges did tend to look to the common law as the sole source of judicial authority, seemingly in line with Judge Arnold's claims about the power of the judiciary under Article III. However, even those judges who saw precedents as binding had a much different view of judicial power than Judge Arnold insists. For these judges, the common law was not just the source of all judicial power, but was the source of all law. The common law was fundamental to the law

89. Joseph Story, *Commentaries on the Constitution of the United States* (Hilliard, Gray & Co. 1833); *see also supra* n. 5 (Justice Story was quoted by Judge Arnold in *Anastasoff*, 223 F.3d at 903-04).

90. *See* Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Harv. U. Press 1977) (arguing that formalism triumphed in American courts after the 1840s). Horwitz's visions of courts' partiality toward economic interest has been challenged. Peter Karsten, *Heart Versus Head: Judge-Made Law in Nineteenth-Century America* (U.N.C. Press 1997).

of the Republic and preceded the founding documents of the Republic. The most controversial claim of judges who took this view of the power of precedent was that legislatures did not have the power to alter this fundamental law. Judges who took this view exercised the power to void legislation, not because a statute violated the state constitution, but because it violated the judicial vision of what the law "was." These judges exercised the power to declare legislative acts void because they violated the "fundamental law."

A good example of this claim for judicial power arose in the case of *Stackpole v. Healy*,[91] where the court ruled that if a Massachusetts statute allowed animal owners to turn animals out to graze, then it was void as violating the fundamental law.[92] A herder had turned his cattle out to graze along the highway. While grazing, the animals broke into the plaintiff's land through a fence that failed to meet statutorily prescribed standards. When the landowner brought a trespass claim against the herder, the herder responded that under the Massachusetts fence statute, his cattle had a right to be on the highways. The herder further argued that since a Massachusetts statute required landowners to build fences sufficient to turn cattle, the failure of the landowner to have such a fence was a defense against the claimed trespass.

The court rejected the herder's argument. Justice Samuel Putnam cited the common law and Massachusetts statutes for the proposition that the owner of property maintains all rights in a highway. The landowner's grant of land to the Republic for the road merely granted to the public a right of passage. The court then ruled that statutes that claimed to allow animals to run at large could not change the common law rule that animal owners had a duty to fence in their animals.[93] Therefore the statute, despite its plain terms, did not give animals the right to graze on the road. Since the cattle were on the highway grazing, they were violating their license and thus were trespassing. Applying an earlier precedent, *Rust v. Low*,[94] which held that a landowner had no duty to fence against these animals if they were

91. 16 Mass. 33 (1819) (available in 1819 WL 1457).

92. *Id.*, 1819 WL 1457, at *3-4.

93. *Stackpole*, 1819 WL 1457, at *4.

94. 6 Mass. 90 (1809) (available in 1809 WL 1119).

wrongfully on the adjacent land, this court ruled for the landowner.[95]

The reasoning in *Stackpole* reflects the assumption of the judges who were wedded to the power of the common law that the common law preceded the founding of the Republic. The herder's interpretation of the relevant Massachusetts statute was reasonable and could have led to a decision favoring the animal owner. The true importance of the earlier *Rust* case, relied upon in *Stackpole*, was not its narrow holding about fencing animals. The true importance was that *Rust* adopted the common law protection of property. *Stackpole* elevated *Rust*'s protection of real property to the status of fundamental law, which the legislature could not modify.

The dicta in *Stackpole* made the common law judge's position perfectly clear. After Justice Putnam informed the plaintiff that his interpretation of the Massachusetts statute on allowing animals to run at large was incorrect, he examined the hypothetical result of the plaintiff's position. If the legislature intended to allow animals to run at large on the highway, then the legislation would be void as violating the fundamental rights of property owners. Land ownership included the absolute right to all usage of the land. The legislature could not divest the property owner of any aspect of ownership. The common law protected the property owner's rights to all parts of the land, including the herbage on the side of the road. For the legislature to allow animals to graze this herbage would violate the fundamental law.[96] Thus the court declared a practice that had been commonplace for two centuries to violate the basic rules of civilization and to be beyond the power of a democratically elected legislature to decree. Justice Putnam never referred to the state constitution to support this ruling. Instead the court found the limitations on legislative power in the fundamental law.

This vision of the power of judges to use common law to limit legislative power fails to confirm Judge Arnold's analysis of the meaning of judicial review in the early national period. Instead of raising a bulwark between judicial and legislative

95. *Stackpole*, 1819 WL 1457, at *2.

96. *Id.* at *3.

power, this view of the precedential analysis tramples on that distinction. These judges found that their power to "find" law gave them a complementary power to protect that law from legislative encroachment, without any reference to constitutional limitations.

New York judges also adopted the view that fundamental law limited the powers of the state legislature without a need to refer to the state constitution. In New York a case involving a cow with a fatal sweet tooth set the stage for the conversion of *Rust* and *Stackpole* into black letter law.[97] A man named Bush owned an unfenced maple forest that he tapped, at the appropriate time of year, to make maple syrup. During the syrup season Bush left buckets of syrup in an open shed on his property. Brainard's cow found its way to the shed and proceeded to drink the syrup. Acting in a manner more swinish than bovine, the cow drank to such an excess that it died. Brainard sued for the value of the animal. Bush interposed the defense that the cow was wrongfully on his property so he owed it no duty. The court, in a very brief opinion, analogized this case to an English case where a horse fell in a pit and destroyed itself. In that case the horse's owner did not recover since the horse should not have been on the land containing the pit.[98] Since common law prevailed in New York, animals could not run at large unless a town regulation so allowed, and neither party had introduced evidence of a town regulation. Chief Justice John Savage thus deduced that, although Bush had been grossly negligent in leaving the syrup where the cow might have access to it, the cow owner could not recover because he had illegally let his cow run at large.[99]

The opinion itself filled just two pages of the New York reports, but reporter Esek Cowen's footnote proving that the common law prevailed in the Republic and that the cow was illegally at large flowed on for thirteen pages. In the footnote, Cowen set out his version of New York fencing law. The common law required everyone to keep his beasts on his close. Exceptions to the common law rule existed if a statute, prescriptive duty or contract required the landowner to fence his

97. *Bush v. Brainard*, 1 Cow. 78 (N.Y. 1823) (available in 1823 WL 1765).

98. *Id.*, 1823 WL 1765, at *1 (citing *Blyth v. Topham*, Cro. Jac. 158, 9).

99. *Id.* at *2.

land. Cowen adopted the reasoning of the Massachusetts precedents that only animal owners whose animals are rightfully on adjoining land can raise objections to the state of a landowner's fences. Cowen concluded "that [a landowner] is not bound to fence, except against such cattle only as are lawfully in the adjoining close. . . ."[100]

Cowen did not stop with this conclusion, however. Because an animal owner might claim that cattle on the highway are legally at large, Cowen closed this loophole by examining three common law cases. He deduced that cattle can lawfully be in the road only if they are in transit and accompanied by a herder. If the cattle are grazing in the road, then they are not rightfully in the highway and landowners do not have to fence against them.[101] The proposition that cattle cannot run free on the highway seemed to contradict a New York statute that gave towns the power to allow animals to run at large.[102] So Cowen took the next logical step and said that the legislature could not "take the property of one man and give it to another," i.e., allow grazing on the highway.[103] To avoid this violation of fundamental law, Cowen interpreted the statute in question as only allowing towns to regulate animals running at large in the

100. *Id.* at *1. Nothing in the report indicates that Cowen, and not Justice Savage, was the author of this footnote. None of the many cases citing this footnote acknowledged that the footnote was merely a reporter's annotation. Later, lawyers and judges treated the footnote as a correct and complete statement of New York law, even in New York. Not until 1849 did a New York court specifically reject Cowen's reasoning that the legislature could not authorize the towns to allow animals to run at large, and in that context point out that the reporter wrote the footnote. *Griffin v. Martin*, 7 Barb. 297, 301 (N.Y. Sup. Gen. Term 1849) (available in 1849 WL 5230). We also know that Esek Cowen wrote the note because in the second edition of *A Treatise on the Civil Jurisdiction of Justices of the Peace in the State of New York*, which Sidney Cowen revised after his father's death, he quoted from a "note of the reporter" in *Bush v. Brainard*. *See* Esek Cowen, *Treatise on the Civil Jurisdiction of the Justices of the Peace in the State of New-York* vol. 1, 427 (O.L. Barbour, ed., 3d ed., Wm. & A. Gould & Co. 1844) (incorporating the additions and corrections made in the second edition by Sidney J. Cowen). This example of the power of the reporters to integrate their legal theories into opinions in a seamless manner warns us against the danger of assuming that judges alone controlled the substance of the law.

101. *Bush*, 1823 WL 1765, at *1.

102. Note that the probable purpose of this statute had been to allow towns to close the range in the midst of a general open range countryside. Thus the original intent, to give real property owners more control over their property, ironically became the chink in the armor of real property rights.

103. *Bush*, 1823 WL 1765, at *1.

common lands of the town, an interpretation that effectively voided it.

The footnote in *Bush* was not unique in finding a judicial power to void statutes that violated fundamental law. In 1829, the New York high court used common law reasoning to nullify a statute that allowed a landowner to give three months' notice that he would no longer maintain a partition fence.[104] After the time ran, the landowner could throw down his fence and leave his lands open. An animal owner followed these procedures and, after the three-month waiting period, took down his fence. His cattle predictably wandered into a neighbor's field. The adjacent landowner sued in trespass, and the herder raised the statute as a defense, saying that his neighbor had three months to take steps to avoid the damage. The trial court rejected this defense, the jury found for the plaintiff, and the defendant moved for a new trial.

On appeal, Justice Savage agreed that the statute could not give the herder the right to let his animals run at large. According to Savage's narrow interpretation of the statute, only if the land was next to a town commons and the town allowed animals to run at large on that commons would the notice provisions allow a herder to let his animals run free.[105] The problem with this reasoning is that if the land adjoined a town commons then there would be no need for notice, since no one would be harmed if the landowner removed his fence and enlarged the commons. In effect, this decision made the statute a dead letter: a herder could throw down his fences but would still be responsible for restraining his animals.[106]

Thus, by 1830 the New York judiciary, with a hefty assist from reporter Cowen, seemed to have set the stage for declaring void the New York legislation that allowed towns to regulate animals running at large. In 1830 the New York state legislature intervened to reassert its rights.[107] The legislature amended the township fence statute to allow the town council to determine the sufficiency of all fences, not just partition and circular

104. *Holladay v. Marsh*, 3 Wend. 142 (N.Y. 1829) (available in 1829 WL 2393).

105. *Id.*, 1829 WL 2393 (no star pagination available).

106. *Id.*

107. *See Griffin*, 7 Barb. at 301 (available in 1849 WL 5230) (interpreting the relevant statute, 1 N.Y. Rev. Stat. 340, 341, § 5, *sub.* 11).

fences. The legislature also added a phrase authorizing the towns to regulate the times and manner of allowing animals to run "at large on the highways."[108] By adding the phrase "at large on the highways," the legislature directly challenged the *Bush* holding by requiring landowners to fence against animals ranging on the roads. The courts, however, did not lightly accept this usurpation of their prerogative. The validity of the legislative enactment became the focal point of the next round of anti-range, anti-legislative judicial statements.

Esek Cowen refused to accept the legislature's attempt to limit the common law rights of property owners and he attacked this legislation in his *Treatise on the Civil Jurisdiction of Justices of the Peace.*[109] Cowen's stature as a legal scholar could greatly influence the often-untutored justices of the peace to whom he directed this work. So Cowen attempted to arm the justices of the peace with a variety of arguments for striking down the town ordinances that attempted to use the renewed legislative grant of power, and he successfully persuaded at least some lower level judges. A Court of Common Pleas reversed a jury that had found a defendant not liable for his animals' trespass because an ordinance allowed stock at large on the highway and the plaintiff had not fenced along the highway. The justices of the peace ruled that the by-law was void as violating the common law despite the explicit legislative authorization.[110]

These justices were not the only ones to strike down the New York legislation as violating the common law. The issue also arose in the context of an accident between a bull and a train.[111] When a Tonawanda train came through the town of Gates at midnight, traveling at eight or nine miles per hour, it ran upon some oxen owned by Mr. Munger, killing them, but also derailing the engine. The oxen were legally at large since

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108. *Id.*

109. *See* Cowen, *supra* n. 100, vol. 2, 418-33. The second edition, edited by Sidney Cowen, was probably the one where the attack on the 1830 statute first appeared. In *Griffin,* the court noted that the legislature amended this statute to rescue it from the construction of Esek Cowen in his *Bush* note and treatise. 1849 WL 5230. Therefore the first treatise must have merely echoed *Bush,* and the second treatise must have launched the attack on the amended statute.

110. *See* Cowen, *supra* n. 100, at vol. 2, 431 n. 7.

111. *Tonawanda R.R. Co. v. Munger,* 5 Denio 255 (N.Y. Sup. Ct. 1848) (available in 1848 WL 4485).

the town of Gates, by town ordinance, allowed livestock to run at large. The ordinance specifically required all landowners to enclose their property with legal fences.[112]

The trial court judge instructed the jury that under the regulations of the town of Gates, the oxen were not trespassers on the railroad's right-of-way. The jury found in favor of Mr. Munger, awarding him the value of the oxen. On appeal, Judge Samuel Beardsley rejected the instruction that the oxen were not trespassers. The appellate court ignored the town's power to allow livestock to roam and held that the railroad company's ownership of the land made any unwarrantable entry a trespass.[113] The court ruled that the common law controlled, despite a New York statute that permitted towns to allow animals to run at large.[114] In order to avoid requiring the railroads to fence, the Court had to take the step only hinted at in *Stackpole* and *Bush*: it had to declare the township statute unconstitutional. The court adopted the hypothetical reasoning found in *Stackpole* and that of Cowen's note used in *Bush*. If cattle could roam at large under the terms of the town regulation, then they had the right to graze. If they had the right to graze, the court reasoned, the government had authorized an illegal taking of the grass and herbage from the property owner. Such a taking legalized the transfer of property—grass—from the landowner to the stockowner, and the legislature had no power to authorize this transfer. The court never cited any New York constitutional provision, but instead cited precedents, including *Stackpole*, to hold this action by the state legislation void as violating fundamental law.[115]

This example of the jurisprudence of the judges who subscribed to the theory that common law precedent was the sole source of law still does not support Judge Arnold's claim that subservience to precedent protects the doctrine of separation of powers. Instead, these judges interpreted the power of the common law to allow them to sit in judgment on the legislature. Judicial review of legislation was not just a matter of judging whether legislators followed constitutional procedure. Instead,

112. *Id.*, 1848 WL 4485, at *4.
113. *Id.* at *2.
114. *Id.* at *3 (citing 1 N.Y. Rev. Stat. 341, § 5, sub. 11).
115. *Id.* at *2, 5.

judicial review consisted of measuring legislative enactments against the fundamental law, a law that only judges could ascertain. If the legislation violated this fundamental law, it was void, even if the legislature had fully complied with the constitution in passing it. Far from limiting the courts to their proper sphere, this power to determine the fundamental law by interpreting precedents gave courts the power to violate separation-of-power doctrines and invade the legislative sphere. Precedential analysis, according to these judges, expanded the judiciary's power to allow them to void statutes. Thus, the complexity of the history of judicial review in the early Republic fails to support Judge Arnold's claims that the doctrine of precedent, as understood in the late twentieth century, was a background assumption for the Framers of Article III of the Constitution.

IV. CONCLUSION

At the time of the framing of the Constitution, no one knew the exact role that judges would have in the new experiment in government that formed the United States. While the British example was foremost in the minds of constitutional framers, state and federal, many differences in material circumstances and governmental structure would prohibit the emergence of a judiciary that strictly adhered to that model. These examples from the history of judging during the years of the early Republic show that not only the relative roles of judges and the legislature, but also the sources of law, and even the meaning of allowing judges the power to "find" law, were all contested issues. Judge Arnold can probably take the most solace from this history by realizing that American judges have always been quick to experiment with different styles of judging when faced with changed conditions. The Internet age confronts the modern judiciary with many changes, among them the increased access that all attorneys have to previously unavailable opinions. Perhaps instead of looking to the past for an answer to this conundrum, the answer lies in the present and in the future.