# *The Surprising Origins of Judicial Review Living in the Court's Library*

By Julia Logue

In the Rare Books Room of the Florida Supreme Court's Library live two near-sacred texts that reveal a little-known secret regarding the American tradition of judicial review. These books are Lord Edward Coke's *Institutes of the Laws of England* and Sir William Blackstone's *Commentaries on the Laws of England*.

Most American lawyers have heard of Blackstone. He wrote his great treatise *Commentaries* in the decade leading up to the American Revolution. In the tradition of the first encyclopedias, it organized the sprawling body of common law. This treatise—of which the Library owns an 1899 copy—played a critical role in the legal education of our nation's founders.

During the United States' formative years, "nearly as many copies of *Commentaries* were sold on the American as on the English side [of the Atlantic.]"[1] Chief Justice John Marshall read *Commentaries* 4 times by age 27.[2] Later in the 1850s, President Lincoln advised law students to begin their studies by reading *Commentaries* at least twice.[3] And in present day, Justice Charles Canady of the Supreme Court of Florida described Blackstone as someone "whose work James Madison said was in every man's hand during the creation of the Constitution."[4]

When Justice Canady—speaking on the floor of the U.S. Senate as one of the House prosecutors during the impeachment trial of President Bill Clinton—needed to establish that perjury had long been classified as one of the "offenses against the public justice," he cited to an unimpeachable source: Blackstone.[5] Indeed, the Florida Supreme Court has cited Blackstone 18 times in the past 21 years.[6]

What is surprising then—given Blackstone's outsized influence on American law—is that he forcefully and expressly rejected the concept of judicial review, the cornerstone of America's legal tradition.

In *Commentaries*, Blackstone wrote that "to set the judicial power above the legislature . . . would be subversive of all government."[7] He went on to claim that Parliament "*hath sovereign and uncontrollable* authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations."[8] The unwritten English Constitution, he wrote, vested sovereignty in Parliament and accordingly granted it "*absolute despotic power*."[9]

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[1] Edmund Burke, *Speech on Moving His Resolutions for Conciliation with the Colonies* (Mar. 22, 1775), in THE WORKS OF EDMUND BURKE WITH A MEMOIR 222, 250 (New York, Harper & Brothers 1855).
[2] Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 757 (1976).
[3] Letter from Abraham Lincoln to John M. Brockman (Sept. 25, 1860), in 4 COLLECTED WORKS OF ABRAHAM LINCOLN, at 121, 121 (Roy P. Basler et al. eds., 1953).
[4] Rep. Charles Canady, Address at the Senate Impeachment Trial of President Bill Clinton (Jan. 16, 1999).
[5] *Id.*
[6] A January 30, 2022, search of the WestLaw database of Florida Supreme Court cases yielded this result.
[7] 1 WILLIAM BLACKSTONE, COMMENTARIES *91.
[8] *Id.* at *61.
[9] *Id.*

Blackstone's work was the product of the Glorious Revolution, which solidified the supremacy of Parliament over the crown. So in Blackstone's view, no king—nor judge—could set aside an act of Parliament.

So where did the American tradition of judicial review originate? Surprisingly, it stems from Lord Edward Coke—centuries before Blackstone—who lived in the mid-1600s during a power struggle between Parliament and the Stuart kings. In this great struggle, Coke reinvented the Magna Carta, placing the King and even Parliament under the reason reflected in the common law.

Coke's argument for judicial review took shape in *Dr. Bonham's Case*.[10] An act of Parliament gave the Royal College of Physicians the power to fine any doctor in London and to keep half of the fines levied. Coke noted that the law made the College both a judge and a party to the case, which was "against the common right and reason;" and in such circumstances "*the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void*."[11] This sentence laid the foundation for what would become American judicial review.

With the advent of Parliamentary supremacy, Coke's view of judicial review died out in Great Britain. Blackstone, writing about 130 years after Coke, went so far as to reject the holding of *Dr. Bonham's* Case: "if a cause should arise in which he himself is a party," and "if we could conceive it possible for the parliament to enact [this], *there is no court that has the power to defeat the intent of the legislature*."[12]

But before Coke's judicial review waned in England, it was transplanted to the United States via *Institutes*, where it flourished in American soil. *Institutes* is considered the first textbook of English common law. Thomas Jefferson once claimed it was the "universal law book of students."[13] In 1761, James Otis cited Coke to argue against writs of assistance imposed on the colonists of Boston, which granted British officials the authority to search anyone, anywhere.[14] Otis pointed to *Dr. Bonham's Case* for the principle that "if an act of Parliament should be made in the very words of this petition, it would be void."[15]

And years later, Alexander Hamilton's *Federalist 78* persuaded colonists to ratify the Constitution by discussing judicial review as a safeguard to balance the branches of government.[16] Hamilton derived his vision for the proposed government from Coke, declaring that "it belongs to the judges to ascertain [the constitution's] meaning, as well as the meaning of any particular act proceeding from the legislative body."[17] This in turn led to Chief Justice Marshall's great pronouncement that "any act of the legislature, repugnant to the Constitution, is void."[18] By asserting the power to declare acts of Congress unconstitutional—a concept established by Coke—the chief justice positioned the Court as the interpreter of the Constitution.

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[10] George P. Smith II, *Dr. Bonham's Case and the Modern Significance of Lord Coke's Influence*, 41 WASH. L. REV. 297 (1966).
[11] *Dr. Bonham's Case*, 8 Co. Rep. at 118a, 77 Eng. Rep. at 652.
[12] 1 BLACKSTONE, supra note 7, at *82.
[13] Roland S. Morris, *Jefferson as a Lawyer*, 87 PROC. OF THE AM. PHIL. SOC'Y 211 (1943).
[14] *Paxton's Case*, Quin. 51 (Mass. Super. Ct 1761).
[15] *Id.*
[16] THE FEDERALIST NO. 78 (Alexander Hamilton).
[17] *Id.*
[18] *Id.* at 177.

"Our edition of Coke's *Institutes* is from 1669. It's older and rarer than the Library of Congress's," explained Teresa Farley, the Court's librarian. The copy was purchased in 1926 in Chancery Lane, London, and was donated to the Library in 1929 upon the election of Justice William Glenn Terrell.

Coke and Blackstone's legacies paved the way for the foundation of America's democratic balance of power—a sacred influence which lives on in the Rare Books Room of the Florida Supreme Court's Library.