James Otis and *The Writs of Assistance* Case (1761)

Francisco Fernández Segado

1 Introduction: A Brief Approximation to the Dictum in *Bonham's Case*

The dictum pronounced by Chief Justice *Edward Coke* in *Bonham's Case* (1610) is well known by any constitutional law specialist. Nevertheless, I would like to discuss the basis upon which *Coke* formulated the constitutional theory of judicial review of legislation.

On April 30, 1606 *Thomas Bonham* was cited before the president and censors of the Royal College on a charge of practising medicine in London without a certificate to practise from the Royal College. Bonham was a Doctor of Philosophy and Physic, having graduated from Cambridge University. He did not, however, hold any degree or certificate from the Royal College. He was fined one hundred shillings and further forbidden – under pain of imprisonment – to practise medicine until he was first properly admitted to the Royal College.

The Royal College of Physicians was a unique institution in early modern England.[1] Chartered in 1518 under Cardinal Wolsey's Chancellorship, the College was founded by three royal physicians and three London physicians, all with academic doctorates of medicine. By an Act of Parliament confirming their charter passed during the reign of *Henry VIII*, the College had gained the right to sit as a court itself in order to judge all other practitioners. It had the power to admit those academically qualified to membership, to grant licenses to those without academic qualifications but proven practical experience, and to punish those practising negligently and/or without license. A statute of Queen Mary's first Parliament also allowed the officers of the College to imprison offenders at their pleasure. The juridical authority of the College thus flew in the face of the common law assumption that to practise medicine one needed only the consent of the patient.[2] Moreover, the College's power of medical licensing overlapped with one of the bishop's authority

[1] Cook 2004, p. 129.
[2] Cook 2004, p. 130.

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to grant licenses to physicians and surgeons, in addition to conflicting with the other universities' ability to issue licenses for the practice of physic and surgery (ancillary to their powers to grant degrees).

Bonham took the position that since he was a Doctor of Medicine at Cambridge University, the Royal College of Physicians had no jurisdiction whatsoever over him. As a consequence of this stance, Bonham was imprisoned for seven days. This case then, as it was brought before Justice *Coke*, was an action for false imprisonment by *Bonham* against *Henry Atkins*, *George Turner*, *Thomas Moundford*, and *John Argent*, doctors in physic, and *John Taylor* and *William Bowden*, both yeomen (leading members of the Royal College of Physicians). According to *Smith*[3], the defendants pleaded the Letters Patent dated from the 10th year of the reign of *Henry VIII*, which gave them the powers as a College to impose fines on practitioners in London who had not been duly admitted to practice medicine by them.

Coke analyses whether a doctor of physic of one university or another, be by the Letters Patents, and by the body of the Act of 14 Henry VIII, is restrained to practise Physic within the City of London. His reply is:

> They (the members of the Royal College) did rely upon the Letter of the grant, ratified by the said Act of 14 H. VIII which is in the negative, *scil. Nemo in dicta civitate et cetera exerceat dictam facultatem nisi ad hoc per praedict' praesidentem et communitatem, et cetera admissus sit, et cetera.* And this proposition is a general negative, and *Generale dictum est generaliter intelligendum;* and *nemo* excludeth all; and therefore a Doctor of the one University or the other, is prohibited within this negative word *Nemo.* And many cases were put, where negative Statutes shall be taken *stricte et exclusive,* which I do not think necessary to be recited.[4]

But later, *Coke* adds with a significant emphasis:

> The University is *Alma mater,* from whose breasts those of that private College have sucked all their science and knowledge (which I acknowledge to be great and profound) but the Law saith, *Erusbecit lex filios castigare parentes:* the University is the fountain, and that and the like private Colleges are *tanquam rivuli,* which flow from the Fountain, *et melius est petere fontes quam sectari rivulos.*[5]

Coke puts forth five arguments in support of his holding that the College had not properly exercised their general powers. The fourth argument is the true keystone in which *Coke* uttered what many[6] believe to be his most controversial dictum:

> The Censors cannot be Judges, Ministers, and parties; Judges, to give sentence or judgment; Ministers, to make summons; and Parties, to have the moiety of the forfeiture, *quia aliquis non debet esse Judex in propria causa, imo iniquum est aliquem sui rei esse judicem:* and one cannot be Judge and Attorney for any of the parties.

The idea that it takes three persons, a plaintiff, a defendant, and a judge, to make a case and reach a judgment, was clear to the earliest writers on English law[7],

[3] Smith 1966, p. 302.
[4] *Bonham's Case* may be seen in Sheppard 2003, p. 270.
[5] Sheppard 2013, p. 272.
[6] E. g. Bowen 1957, p. 315.
[7] Fleta had already written in this respect: "Est autem iudicium trinus actum trium personarum ad minus, actoris, iudicis et rei, sine quibus legitime consistere non potest", cf. Yale 1974, p. 80.

and implicit in such a proposition was the understanding that a judgement was not properly attainable unless the three persons of the trinity were kept distinct. On the matter, *Henry de Bracton*, in his very outstanding book *De legibus et consuetudinibus angliae,* wrote that a judge should be disqualified on such grounds as kindred, enmity or friendship with a party, or because he was subordinate in status to the party, or had acted as his advocate. However, this seems to have been borrowed from the doctrines of canon law, and while the church courts clearly applied these provisions for recusation of the *suspectus iudex,* there seems no case in which the yearbook lawyers who referred to *Bracton* had borrowed these principles.[8]

Of course, a fundamental idea of this nature has long been enshrined in the maxim that no one may be judge in his own cause. *Coke* adopted this notion into his reasoning. Just after the above-mentioned argument, he added in his celebrated dictum*:* "And it appeareth in our Books, that in many Cases, the Common Law doth control Acts of Parliament, and sometimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will control it, and adjudge such Act to be void."[9]

Many have considered this passage to be the birth certificate of judicial review of legislative acts. For Plucknett, a distinguished professor from Harvard University, *Coke*'s solution was in the idea of a fundamental law which limited Crown and Parliament. What that law was, was a question as difficult to answer as it was insistent – and, as subsequent events showed, capable of surprising solutions.[10] The nearest we find is the assertion of the paramount law of "reason". For the rest, the common lawyer's "reason" is left in as much uncertainty as he himself ascribed to the Chancellor's equity. Moreover, *Coke* was prepared to advance medieval precedent for his theory and it has thus evoked the criticism of later investigators. In Plucknett's opinion, *Coke*'s theory reaches its final expression in *The Case of the College of Physicians.* Nevertheless, Plucknett acknowledges that *Coke*'s challenging of both Crown and Parliament has provoked controversy up to his own time.[11]

Conversely, the interpretation given by *Thorne* is very different. *Coke*'s dictum is considered as a maxim of statutory interpretation. According to *Thorne*[12], *Coke*'s fourth argument was directed toward an interpretation of the statute which on its face seemed to make Bonham's imprisonment lawful. As the question of the legality of *Bonham*'s imprisonment was the only question before the Court, *Coke*'s fourth point is, according to Thorne, not a dictum*,* but a material portion of his argument. And finally, though *Coke*'s fourth argument is phrased in very wide terms, it foresees no statute as void because of a conflict between it and common law, natural law, or higher law, but simply a refusal to follow a statute as absurd on its face.

[8] Yale 1974, p. 81.
[9] Sheppard 2013, p. 275.
[10] Plucknett 1926–1927, p. 31.
[11] Plucknett 1926–1927, p. 34.
[12] Thorne 1938, p. 547 et seq.

In order to settle the matter, one may say that the interpretation given to his dictum in the American colonies would be the main characteristic of the constitutional theory of judicial review of legislation. *Sherry* may have correctly written that it seems to be widely accepted that *Coke* was one of the primary sources of the American institution of judicial review.[13] Likewise, *Schwartz* has underlined *Coke*'s fundamental contribution to American constitutionalism. He stated the supremacy of law in terms of positive law, and it was in such terms that the doctrine was of such importance to the Founders of the American Republic: "When they spoke of a government of laws and not of men, they were not indulging in mere rhetorical flourish."[14] Of course, there were other philosophical influences on the Founders, including *Locke*, continental Enlightenment philosophers, radical English Whigs, and the Scottish Common Sense School.[15]

It is necessary not to forget the peculiar political circumstances of the colonies, which were already quite predisposed against the British Parliament as it had been seen as an organ of oppression; such a situation would make it possible that *Coke*'s dictum soon be incorporated into the arsenal of weapons used to oppose the English Parliament. Therefore, the *Writ of Assistance Case* and the figure of *James Otis* are paradigmatic.

2 The Great Impact upon Juridical Colonial Thought by the Doctrine Established by Chief Justice Edward Coke in *Bonham's Case*

2.1 *Coke*'s juridical thinking would have a very remarkable impact on the colonies that went far beyond the doctrine of judicial review. The men of the American Revolution fed their appetite for new ideas by way of *Coke*'s writings, particularly his *Institutes.* Even more, for the Americans of the eighteenth century, *Coke* was the contemporary colossus of the law – "our juvenile oracle", *John Adams* termed him in an 1816 letter – who combined in his own person the position of highest judge, commentator on the law and leader of the parliamentary opposition to royal tyranny. It also contributed to considering *Coke* (whose more evident manifestation was his knowledge of ancient law) as a true antiquarian.[16] Furthermore, he contributed greatly to the opening of new fields of knowledge, always seen from his own viewpoint as genuine defender of the rule of law.

Coke's dictum was easily accessible since it appeared in the *Abridgments*[17] which were frequently studied by the lawyers of the colonies. It was repeated

[13] Sherry 1992–1993, p. 174.
[14] Schwartz 1993, p. 5.
[15] Michael 1990–1991, p. 427 et seqq.
[16] "(H)is learning, antiquarian to the core, opened up vistas and past crises as history scarcely could." Mullet 1932, p. 471.
[17] Most scholars agree that the three more important *Abridgments* were those of Bacon 1736, Viner 1741–1756 and Comyn's *Digest* 1762, cf. McGovney 1944–1945, p. 7.

in the *Abridgments* of *Viner*, *Bacon* and *Comyns* and as *Goebel* tells us,[18] *Coke*, *Strange*, *Keble* and *Salked* were frequently cited in common law cases, even into the late eighteenth century, and a lot of American law came out of *Bacon*'s and *Viner*'s *Abridgments.* In addition, a significant number of the colonial lawyers were educated in England. According to *Kramer*,[19] there was a time when it was popular to read *Sir Edward Coke*'s opinion in *Bonham's Case* and his reports of the proceedings in *Prohibitions Del Roy* and *Proclamations* as an early, albeit failed, effort to establish something along the lines of modern judicial review. In this respect, *Mullett*[20] reminds us that *Coke*'s reputation was even more gilded in the eighteenth century when he was the lamp by which young Aladdins of the law secured their legal treasures. Six weeks with him alone was sufficient to secure *Patrick Henry*'s admittance to the Virginia Bar. *Thomas Jefferson* must have spent a much longer time dutifully studying *Coke*'s writings. "I do wish", he wrote, "the devil had old *Coke*, for I am sure I never was so tired of an old dull scoundrel in my life." But in the days of the Revolution, *Jefferson* was more charitable, preferring the whiggish virtues of *Coke* to the "honeyed Mansfieldism" of *Blackstone*.

Examples of the influence of *Coke* upon colonial politicians and lawyers are manifold. *Jefferson* said that *Coke*'s *Commentary upon Littleton* "was the universal elementary book of law students and a sounder Whig never wrote, nor of profounder learning in the orthodox doctrines of . . . British liberties."[21] *John Adams* gained the belief from *Coke* that common law was common right, and the subject's best birth right, and without it there was no right. The law, he further argued, provided a remedy for every wrong and delighted in so doing. Particularly, the common law was a defence against the Stamp Act, for *Coke* himself had once held that acts of Parliament that were unreasonable should be judged void. *Samuel Adams*, who lost his desire to be a lawyer after a brief experience with the *Institutes,* found in *Coke* an irreproachable authority for questioning parliamentary supremacy with particular reference to taxation. The dictum that Parliament could not tax the Irish *quia milites ad Parliamentum non mittunt* was applied to America. *Mullett*[22] reminds us that *Coke*'s eulogy of *Magna Charta* as declaratory of the fundamental laws and liberties was interpreted to mean that an act of Parliament contrary to it was void whether *Coke* had "expressly asserted it or not." Finally, *Adams* found in *Coke* proof that colonies ought not to be ruled tyrannically.

The influence of *Coke* on other important pamphleteers of the epoch is also remarkable. *John Rutledge*, an important personage of South Carolina in the revolutionary era, wrote that *Coke*'s *Institutes* seem almost the grounds of our law. *John Dickinson* who ultimately became a home ruler, found in *Coke* justification for the theory that subjects ought not to have to contribute to wars outside the realm. *James Wilson*, Supreme Court Justice since 1789, was the most exhaustive colonial student

[18] Goebel, Jr. 1954, p. 455.
[19] Kramer 2001–2002, p. 24 et seq.
[20] Mullet 1932, p. 458.
[21] Schwartz 1993, p. 5.
[22] Mullet 1932, p. 468.

of *Coke*,[23] and it was from *Calvin's Case* that *Wilson* derived the blanket defence of colonial claims, namely that the colonies were not bound by English statutes.

The meaning of the dictum in *Bonham's Case* in colonial America was unequivocal. The germinal idea had evolved in colonial America and was effectuated in the doctrine that a court could void an act promulgated by a legislative assembly subject to a higher law when the court found that the law had transgressed its boundaries. Going even further, *Hall* writes[24] that in the eighteenth century, leaders of the incipient American Revolution extracted from *Coke*'s opinion that a judicially enforceable higher law limited their imperial masters' authority. This had important practical implications for judicial review because it meant that judges could legitimately claim a policy-making role without the necessity of direct popular support.

The dictum became the most important source of the concept of judicial review. In due time, *Coke*'s theory of parliamentary supremacy under the law was wholly merged into the notion of legislative supremacy. In 1915, *Smith*[25] reminds us of a committee report to the New York State Bar Association: "In short the American Revolution was a lawyers' revolution to enforce *Lord Coke*'s theory of the invalidity of Acts of Parliament in derogation of the common right and of the rights of Englishmen." *Lord Coke*'s theory of the supremacy of the fundamental law, while not engrafted to or enshrined in the English common law itself, did travel the seas and find fertile ground for ready expression in the American colonies.

2.2 The theory established in *Bonham's Case,* or at least its interpretation in the English colonies, would find in them an appropriate setting for its revival. The supremacy of a fundamental law found faithful supporters in the colonists beyond the Atlantic Ocean. According to *Corwin*,[26] the Cokian doctrine corresponded exactly to the contemporary necessities of many of the colonies in the earlier days of their existence, which explains how it represented the teaching of the highest of all legal authorities before *Blackstone* appeared on the scene.

Of course, the theory of legislative supremacy so ardently argued by *Blackstone* and shared by the Whigs, did not originally mean that legislative assemblies would exist for the elaboration of the laws, the settling of the politics or the integration of the different interests of a society becoming ever more commercialised. During the Glorious Revolution, the dogma of legislative supremacy was primarily aimed at preventing an arbitrary monarch from unilaterally making decisions without parliamentary consent. When this theory was transferred to the colonies, its meaning was made more patent: in order to provide for every executive's unilateral action, the governor, appointed from London, should guarantee that the expression of popular consent was what should really give legitimacy to the law. Conversely, the British Parliament found itself far from being the idealised hero of the colonists, who so far away from it considered it a distant body lacking comprehension for their problems

[23] Mullet 1932, p. 470.
[24] Hall 1985, p. 4.
[25] Smith 1966, p. 313; Boudin 1928–1929, p. 223. The only disagreement between both scholars is the date; whereas Boudin dates the report to 1915, Smith dates it as 1917.
[26] Corwin 1925, p. 515.

and in whose deliberations they no longer participated. Similarly, the deeply rooted ideal of the existence of a fundamental law, alongside the refusal to deal with Parliament's arbitrariness, in addition to a certain fear of abuse of power of colonial legislative assemblies would make the juridical colonial world turn its eyes towards *Coke* and his theory of judicial review. Even more, the colonists would come to the great English Chief Justice in order to ground their creed that this fundamental law warranted rights such as those of "no taxation without representation" or "trial by jury".

Coke had spoken of something beyond human invention; *Blackstone*, on the other hand, knew of no such limit on human law-makers.[27] The American lawyers, fervent followers of *Coke* for a long time, now found themselves faced with the theories of *Blackstone*. They placed all their confidence in *Coke*'s doctrine, which does not indicate that *Blackstone*'s influence was fugacious. As *Wood* tells us, it would be a devastating logic if we think that almost all eighteenth-century Englishmen on both sides of the Atlantic had recognised something called fundamental law;[28] it was a guide to the moral rightness and constitutionality of ordinary law and politics. Even a despot such as *Cromwell* could confidently declare a century and half before the *Marbury v. Madison* opinion that "[i]n every government there must be something fundamental, something like a *Magna Charta* which would be inalterable." And the colonists on the other side of the Atlantic found *Coke*'s ideas very attractive inasmuch as they synchronized with their view of what ought to be the law.

For that reason it is not surprising that during the revolutionary war the theoretical basis for judicial review was grounded in the constant appeals of the colonists for a higher law in order to support particular laws of the British Parliament or the King's provisions as being null and void. In this way, the North American system of judicial review "is nothing more than the absence of any special system"[29] and was closely linked with the colonial experience, and therefore prior to independence.

Coke's doctrine would be followed by the great dogmatic constructions of *Vattel*, *Burlamaqui* and *Pufendorf*, to mention but a few scholars. Their theories coincided with the less elegant, but equally fruitful *Coke*'s dicta. Namely, *Vattel*'s "The Constitution of the State, and the Duties and Rights of the Nation in this Respect"[30] is of particular interest in this regard.

According to *Vattel*, legislation was limited not only by the natural law but by any norm that the people would include in their constitution. For the Swiss theorist, respect for the constitution was as decisive as was respect of the law. "The constitution of a State and its laws are the foundation of public peace, the firm support of political authority, and the security for the liberty of the citizens. But this constitution is a mere dead letter, and the best laws are useless if they be not sacredly observed. It is therefore the duty of a Nation to be ever on the watch that the laws be

[27] Black 1987–1988, p. 694.
[28] Wood 1999, p. 794.
[29] Grant 1954, p. 189.
[30] Vattel 1964/1758, p. 17 et seqq.

equally respected, both by those who govern and by the people who are to be ruled by them." *Vattel* mints the idea that the written constitution is the basis, the ground of all public authority, and at the same time he makes clear the distinction between the fundamental law and ordinary laws. With regard to the question of legislative power in relation to the constitution, *Vattel* answers in astonishing modernity:

> The question arises whether their power extends to the fundamental laws, whether they (the legislative power) can change the constitution of the State. The principles we have laid down lead us to decide definitely that the authority of these legislators does not go that far, and that the fundamental laws must be sacred to them, unless they are expressly empowered by the nation to change them; for the constitution of a State should possess stability; and since the Nation established it in the first place, and afterwards confided the legislative power to certain persons, the fundamental laws are excepted from their authority. It is clear that the society had only in view to provide that the State should be furnished with laws enacted for special occasions, and with that object it gave to the legislators the power to repeal existing civil laws, and such public ones as were not fundamental, and to make new ones. Nothing leads us to think that it wished to subject the constitution itself to their will. In a word, it is from the constitution that the legislators derive their power; how, then, could they change it without destroying the source of their authority?[31]

Impeccably, the last reflection about the constitution's modification by the legislative is very conclusive since *Vattel* underlines that the constitution is a higher law, a superior law with regard to ordinary law and therefore it is a norm limitative of the legislative power's intervention. This idea would be further developed by *Alexander Hamilton*'s number LXXVIII of the *Federalist Papers.*

The transcendence of these theories would be enormous since, as *Plucknett* tells us,[32] it was due to the reception of *Vattel*'s theoretical discussions and also to the firm faith that "what my Lord Coke says in *Bonham's Case* is far from any extravagance" that we owe him the idea of the bold experiment of making a written constitution which should have judges and a court (the Supreme Court) for its guardians.

3 Approximation to the Figure of James Otis and to Some Other Personages of the Case

3.1 *James Otis* was born in 1725 at West Barnstable, in the spur of Massachusetts that bounded Cape Cod Bay. From 1739 to 1743 he attended Harvard College, and in 1748 he began his practice of law at Plymouth. That southern area of the province was his father's stamping-ground as a lawyer, and no doubt the influence of *Otis* senior helped him get started. He seems to have made reasonable progress, for as early as May 1751 the Superior Court on circuit in Bristol appointed him "attorney for the Lord the King at this Term, the Attorney General being assent".[33]

[31] Vattel 1964/1758, p. 19.
[32] Plucknett 1926–1927, p. 70.
[33] Smith 1978, p. 312 et seq.

In 1756 *Otis* was made a justice of the peace for Suffolk County, but this was largely an honorific mark of social advance.

In 1757 *Thomas Pownall* was appointed to the governorship of the province. The good relations between *Otis* and *Pownall* possibly meant nothing so much as a shared interest in the classics. His early taste for the genre had never left *Otis*. As late as 1760 he published *The Rudiments of Latin Prosody with a Dissertation on Letters and the Principles of Harmony in Poetic and Prosaic Composition.* A century after, *Tyler* considered the work as "a book which shows that its author's natural aptitude for eloquence, oral and written, had been developed in connection with the most careful technical study of details. No one would guess … that it was written by perhaps the busiest lawyer in New England."[34]

A short time before ceasing to practise law, in the fall of 1760, *Pownall* endorsed *Otis* for acting Advocate General. After *Pownall*'s demission, *Otis* still performed as Advocate General in the period of Governor *Hutchinson*'s caretaker administration, until Governor *Bernard* arrived on the scene. At first, there was no antipathy between the two men since *Otis* was not yet in politics. In 1761, he had swung into opposition against the governor, and the custom house, as *Smith* writes, was in the thick of the roughest common law assault the Vice-Admiralty Court had undergone in thirty years. In the elections of May 1761, the previously apolitical government lawyer had become one of the representatives for Boston in the House of Representatives and leader of an incipient anti-court party.

It is not exactly known when *Coke* resigned as Advocate General, but it can hardly have been later than the 24th of December 1760, for that day he was spokesman for the petition to the Assembly against lawful fees in the Vice-Admiralty Court. *Otis* was already situated in open conflict as opposed to the Vice-Admiralty Court. Relating how he had been asked to support the writ of assistance, the abstract shows *Otis* going on to speak of his resignation as acting Advocate General:

> I was solicited to argue this cause as Advocate-General, and because I would not, I have been charged with a desertion of my office; to this charge I can give a very sufficient answer, I renounced that office, and I argue this cause from the same principle; and I argue it with the greater pleasure as it is in favour of British liberty …[35]

These words convey the impression that it had been on account of the writ of assistance that he quit; even that he quit specifically in order to argue against it. If this was true, it would enhance even more the historical importance of the writs of assistance controversy, for when *Otis* moved out of the establishment circle and into opposition, a force of unique impact was loosed upon the pre-revolutionary American scene. But if *Otis* had sacrificed his job solely because he objected to arguing for the writ of assistance, one wonders why he did not say so more clearly and positively. The proposition is that *Otis*'s resignation was precipitated by hostile influences bearing down from on high.

[34] Tyler 1897, p. 37; cited by Smith 1978, p. 314.
[35] Smith 1978, p. 323.

3.2 It is worth mentioning something about *Hutchinson*, a very outstanding personage in the case and also in the history of Massachusetts. *Hutchinson* was destined to be the last civilian governor of the province of Massachusetts-Bay. Born in 1711, after his graduation from Harvard College in 1727 he spent several years exclusively in the family merchant business. His career as a public man appears to have begun in 1737, when he became a selectman of the town of Boston. Soon afterward he was elected to the province's House of Representatives. In 1740 *Hutchinson* went to England to argue the cause of Massachusetts in a boundary squabble with New Hampshire. In 1742 he was back in America and again in the House of Representatives, of which he was soon to be speaker. In 1749 he was elected, by the House itself, to the other branch of the General Court, the Council. Like the House of Representatives, the Council was a legislative branch of the General Court, the overall organ of government under the Massachusetts province charter; but it also did duty as the consultative body to whom the Governor looked for advice and consent in matters of executive action. In 1752, *Hutchinson* became a judge.

An important assignment for our personage was his appointment as one of the Massachusetts representatives at the Albany conference in 1754: the plan for a colonial union produced at that abortive gathering owed much to the work of *Hutchinson*.

At the end of his life *Hutchinson* wrote an outstanding work, *The History of the Colony and Province of Massachusetts-Bay.*

The customs officer whom *Hutchinson* came upon at the warehouse was *Charles Paxton*. *Paxton* was also to have a considerable future in the events leading to the American Revolution, if only for his part in the appointment and the affairs of the ill-starred American board of customs commissioners under the Townshend legislation of 1767. According to *Sabine*,[36] "as far as individual men are concerned ... Charles Townshend, in England, and Charles Paxton, in America, were among the most efficient in producing the Revolution". *Paxton* was born in New England in 1708. In his early twenties he was appointed marshal of the Vice-Admiralty Court at Boston. The responsibilities of the post – broadly, the execution of the court's decrees – involved *Paxton* naturally in the common law imbroglios that broke out between the court and the merchants around this time.

According to *Smith*,[37] *Paxton* went about his rewarding duties with such energy and resource that for an instant one might wonder whether Boston was not under visitation by the reincarnate spirit of *Edward Randolph*, its custom house tormentor of seventy years before. But *Paxton* was no *Randolph*. The architect of the customs regime in the colonies had been a man of considerable force of character. *Paxton* was above all a pussyfooter. To the world at large *Paxton* may have been "no man's friend"; but his relations with *Thomas Hutchinson* seem always to have been cordial. Indeed, in his account of the warehouse incident, *Hutchinson* referred to himself as a friend of *Paxton*.

[36] Sabine 1854, p. 154; cited by Smith 1978, p. 99.
[37] Smith 1978, p. 100 et seq.

4 The *Writ of Assistance* Case (1761)

In this case, *Coke*'s conviction reaches its zenith. As *Berger*[38] says, *Coke*'s statement became a rallying cry for Americans in 1761 when it was resoundingly invoked by *Otis*. *Schwartz* writes that the influence of *Coke* may be seen at all of the key stages in the development of the conflict between the Colonies and the mother country.[39] The *Writ of Assistance* case constitutes a historical milestone of the biggest transcendence in the revolutionary historical process that will ultimately culminate in the independence of the United States.

4.1 The Writ of Assistance's Institute

Under the common law, the judge-made jurisprudence that characterised the English legal system; the only things for which a legal search was available were for suspected stolen goods. If a legal search for anything else were to be recognized in the common law courts, it had to be legislated for in Parliament. Legislation for the legal search of smuggled goods in England was on the statute book when Parliament sought to duplicate the English customs regime in the colonies in 1696. Particularly in point were the two enactments of 1660 (*Act to prevent Frauds and Concealments of His Majesty's Customs*) and 1662 (*Act of Frauds*).

1660 appears to have been the first time that legislation for power of customs search was found necessary. With the Act of 1660 it would be legally possible to track down "any goods for which custom, subsidy or other duties" were "due or payable by virtue of the Act passed this Parliament", such goods having been "landed or conveyed away without due entry thereof first made, and the customer or collector, or his deputy agreed with". "Oath thereof" had to be made before the Lord Treasurer, a baron of the Exchequer, or the "Chief Magistrate of the … place where the offence shall be committed, or the place next adjoining thereunto", who would issue out a warrant to any person or persons, thereby enabling him or them with the assistance of a sheriff, justice of peace or constable, to enter into any house in the day-time where such goods are suspected to be concealed, and in case of resistance to break open such houses, and to seize and secure the same goods; and all officers and ministers of justice are hereby required to be aiding and assisting thereunto.

It is worthwhile to observe in some detail how common law sentiment affected the shaping of the legislative provision that first made mention of a customs writ of assistance. This was Sect. 5 (2) of the Act of Frauds of 1662, which read as follows:

> And it shall be lawful to or for any Person or Persons, authorized by Writ of Assistance under the Seal of his Majesty's Court of Exchequer, to take a Constable, Headborough or other Public Officer inhabiting near unto the Place, and in the Day-time to enter, and go into

[38] Berger 1974, p. 25.
[39] Schwartz 1993, p. 5.

> any House, Shop, Cellar, Warehouse or Room, or other Place, and in Case of Resistance, to break open Doors, Chests, Trunks and other Package, there to seize, and from thence to bring, any Kind of Goods or Merchandize whatsoever, prohibited and uncustomed, and to put and secure the same in his Majesty's Storehouse, in the Port next to the Place where such Seizure shall be made.

Smith[40] emphasises that a right to use force was essential if a power of entry to search for smuggled goods were to serve its purpose effectively. Section 5 (2) therefore neutralised the prospect of judicial disallowance of force by specifically providing for force.

Particularly significant was the limitation of Sect. 5 (2) power of entry to daylight hours; in this limitation the influence of common law thinking is reflected. *Sir Matthew Hale* commented on the common law provisions for power of entry:

> It is fit that such warrants to search do express, that search be made in the day-time, and tho I will not say they are unlawful without such restriction, yet they are very inconvenient without it, for many times under pretence of searches made in the night robberies and burglaries have been committed, and at best it causes great disturbance.[41]

Furthermore, this provision made the writ of assistance possible not only for the uncustomed goods.

In the colonies the documents – variously called writs or warrants of assistance – were known long before the controversies, first in Massachusetts and later almost everywhere else by the middle of the eighteenth century. However, while Sect. 5 (2) of the Act of Frauds of 1662 may have fretted customs officers in America into trying to mock up something similar, the 1662 Act did not apply in America in those early years until the passage of the Act of Frauds of 1696.[42]

In American colonial history responsibility for enforcement of the acts of navigation and trade still lay to some degree with governors. For the most part powers and duties of enforcement were however vested in the customs organization, presided over by the board of customs commissioners in London. The writ of assistance signified a seizure and that interpretation stuck. Needless to say that in pre-revolutionary Massachusetts it was not in the provincial courts of common law that condemnation could be obtained; the juryman was as unhelpful as ever. No one, *Smith* reminds us,[43] knew better than *Edward Randolph* – an Englishman of some fame in early American history, first appointed collector of customs in the region of

[40] Smith 1978, p. 25.
[41] Smith 1978, p. 26.
[42] Section 6 of the *Act of Frauds* of 1696 reads as follows: "And for the more effectual preventing of Frauds, and regulating Abuses in the Plantation Trade in America, be it further enacted by the Authority aforesaid, That all Ships coming into, or going out of, any of the said Plantations, and lading or unlading any Goods or Commodities, whether the same be His Majesty's Ships of War, or Merchants Ships, and the Masters and Commanders thereof, and their Ladings, shall be subject and liable to the same Rules, Visitations, Searches, Penalties and Forfeitures, as to the entering, lading or discharging their respective Ships and Ladings, as Ships and their Ladings, and the Commanders and Masters of Ships, are subject and liable unto in this Kingdom, by virtue of an Act of Parliament made in the fourteenth Year of the Reign of King Charles the Second, intituled, *An Act for preventing Frauds, and regulating Abuses in His Majesty's Customs"*.
[43] Smith 1978, p. 53.

New England (1676) and later promoted surveyor general of customs (1692) – the frustrations of a customs officer seeking condemnation of a seizure before an American jury. *Randolph* was entrusted with resolving this question. It seems that his idea was not for Vice-admiralty jurisdiction but for colonial courts of Exchequer. This formula was rejected. Thus, the condemnation jurisdiction that sustained the regime of seizure was in the Boston Court of vice-admiralty. This Court had its origin in the system of colonial Vice-Admiralty Courts inaugurated soon after the Act of Frauds of 1696, and was in trouble practically from the start. It quickly found an enemy in the courts of common law. With the establishment of a proper admiralty jurisdiction, the provincial common law courts stood to lose much of their ordinary marine business and they did not delay in making their displeasure felt.

In Massachusetts the merchants had the inveterate habit of having an arrogant disdain for the provided requirements of the customs and navigation's legislation. This proclivity was habitually known as smuggling. By the end of the 1750s it was commonplace for Boston newspapers to carry advertisements by the register of Vice-Admiralty Court about custom house seizures, either calling upon an unknown owner to put in a defence against condemnation proceedings, or telling of the condemnation of a seizure and offering the goods for sale.

4.2 The Facts of the Case

4.2.1 A concise description[44] demands a reminder that in 1759 the British ministry received dispatches from General Amherst, announcing the conquest of Montreal and the consequent annihilation of the French government in America. They immediately conceived the design, and passed a resolution subjecting the English colonies of these territories in the north to the unlimited authority of Parliament. This objective required the gathering of resources. With this view and intention they sent orders and instructions to the collector of the customs in Boston, *Charles Paxton*, to apply for the civil authority for writs of assistance, to enable the customs house officers to command all sheriffs and constables to help them break open houses, stores, shops, cellars, ships, bales, trunks, chests, casks, and packages of all sorts, in the search for goods, wares, and merchandise, which had been imported against the prohibitions or without paying the taxes imposed by certain acts of Parliament, called the Acts of Trade. For justification, it was alleged that the special search warrants had been ineffective.

Prior to the above-mentioned date, the Superior Court of Massachusetts had already granted several writs of this character. In March 1760, the Court granted two writs of assistance, one in Boston and another in Salem. Furthermore, after the death of *King George II* (25th October 1760), it was necessary to request the Superior Court of Massachusetts to grant some new writs of assistance in the name of *George III*, since the old writs ceased to be good six months after the death of

[44] For the facts cf. Grinnell 1917, p. 443 et seqq.

a monarch.[45] Although in March 1760 the granting of the two above-mentioned writs would not provoke a public refusal, ten months afterwards the situation was different and public dissent was massive and clamorous.

Under these circumstances, *Paxton* began his operations in Boston. For obvious reasons, he instructed his deputy collector in Salem, Mr. *Cockle*, to apply by petition to the Superior Court in November 1760 for writs of assistance. Chief Justice *Sewall* expressed great doubts of the legality of such a writ, and of the authority of the Court to grant it. After consultation the Court ordered the question be argued at the next February term (1761) in Boston.

In the meantime *Sewall* died, and Lieutenant Governor *Hutchinson* was appointed Chief Justice of the Court. *Adams* writes[46] that everyone knew that this appointment was made for the purpose of deciding the question in favour of the Crown.

An alarm was spread far and wide, because this could not have been more incompatible with the conception of the colonists, since the writs infringed on their maxim that "a man's house is his castle". Thus, the merchants of Salem and Boston immediately applied to the advocate *Pratt*, who refused and to *Otis* and *Thatcher*, who offered to defend them. Great fees were offered, but *Otis*, and, according to *John Adams*, also *Thatcher*, would accept of none. "In such a cause", said *Otis*, "I despise all fees."

4.2.2 The hearing began in February 1761. *Hutchinson*, in his *History of Massachusetts-Bay,* describing the progress of the hearing before himself and his fellow judges, tells of an objection to writs of assistance that were "of the nature of general warrants". The existence of precedents for writs of this kind was conceded, "but it was affirmed, without proof, that the late practice in England was otherwise, and that such writs issued upon special information only". To this there was appended a footnote: "The authority was a London magazine".[47] As *Smith* writes,[48] if *Hutchinson* had made this footnote a little more communicative, the illumination it affords to the origins of the *Writs of Assistance* case would have shone forth long ago. The reference was not to some unidentified periodical from London but to a quarterly publication carrying topical and general interest, *The London Magazine.* Particularly in point was an article in the issue of March 1760.

This article was concerned with an act that had recently been passed at Westminster "for the more effective prevention of the fraudulent importation of cambrics and French lawns". In the words of the act, cambrics and French lawns which had been improperly brought into Great Britain "shall be forfeited, and shall be liable to be searched for and seized in like manner as other prohibited and uncustomed goods are . . . ". When this legislation was still going through Parliament, the article re-

[45] McLaughlin 1935, p. 25.
[46] Grinnell 1917, p. 445.
[47] The *London Magazine* article was copied in full in the *Boston Evening-Post* for 19 January 1761, in nice time for the public hearing on writs of assistance only four or five weeks ahead. But it would have been circulated privately long before that.
[48] Smith 1978, p. 132.

lated, merchants trading in draperies petitioned the House of Commons that "they might have leave to be heard by their counsel" in protest against the measures envisioned in the bill, notably with regard to search of premises.[49] The merchants got their hearings, but the bill went through anyway. Consisting as they did simply of a blanket adoption of pre-existing provisions for search and seizure of "prohibited and uncustomed goods", they struck the *London Magazine* writer as a subject for explanatory comment, including a brief disquisition upon the writ of assistance.

In the above-mentioned publication it was reported[50] that on the 21st May, several merchants, wholesale drapers, and traders in linens in the city of London, whose names were thereunto subscribed, presented a petition to the House, alleging:

> That by the Bill then depending, all persons who should have any cambrics or French lawns in their possession after the time to be therein limited, were subject to several penalties and forfeitures, all warehouses and dwelling-houses were made liable to search, and the persons accused, directed to be held to special bail without any previous accusation upon oath, and in case of any doubt with respect to the species or quality of the goods, or where the same were manufactured the proof was to lie upon the owner, and not upon the prosecutor; and that the petitioners conceived, several of the provisions in the said bill, if the same should be passed into a law, would be greatly detrimental to the petitioners and other traders in linens.

The publication argued in the following manner:

> It is very true, that by our laws of customs and excise, there are many houses and places in this kingdom which may be entered and searched by an officer whenever he pleases, and without any accusation upon oath, or so much as a suspicion upon oath; but then those houses or places are such as in obedience to some act of parliament, have been entered by the possessor, as a house or place where he made or kept such goods as were by that act subjected to a duty; for as to any other house or place he might be possessed of, no officer can enter or search it, without a writ of assistance from the Exchequer, or a warrant from the commissioners, or from a justice or justices of the peace.
>
> As to a writ of assistance from the Exchequer, in pursuance of the Act of the 13th and 14th of Charles II. cap. 11. I believe it never was granted without an information upon oath, that the person applying for it has reason to suspect that prohibited or uncustomed goods are concealed in the house or place which he desires a power to search; and as to a search warrant from the commissioners, or a justice or justices of the peace, we must, from the Act of the 10th of his late Majesty, cap. 10, and the Act of the 11th of the same reign, cap. 30, conclude that they ought, before granting such a warrant, to have such an information: nay, that information ought to set forth the informer's grounds of suspicion; and if those grounds appear to be groundless, no such warrant ought be granted; for if such a warrant should be granted without any reasonable or solid ground of suspicion, and no such goods should upon search be found, I am apt to suspect, that an action would lie against the grantors, and that the plaintiff, in that action would recover damages & costs.

It is no wonder that *Hutchinson* would make such a reference to the above-mentioned information because the underlying question in the judicial controversy was the lawfulness of the general search warrants.

[49] Smith 1978, p. 133.

[50] The extract of the *London Magazine* may be seen in Smith 1978, p. 537 et seqq.

4.2.3 *Jeremiah Gridley*, in name of the Crown, said everything that could be said in favour of *Cockle*'s petition, but it all depended on the answer to the question "if the Parliament of Great Britain is the sovereign legislature of all the British empire".[51]

Thatcher followed him on the other side, and argued with the softness of manners, the ingenuity and cool reasoning, which were remarkable in his amiable character.

But *Otis*, in the words of *Adams*,[52] was "a flame of fire", with a promptitude of classical allusions, a depth of research, a rapid summary of historical events and dates, a profusion of legal authorities, a prophetic glance of his eyes into futurity, and a torrent of impetuous eloquence, he buried away everything before him. At the sight of so extraordinary a plea, *Adams* would express his prediction that "American independence was then and there born".

4.2.4 *Adams* was present for the entire trial and joined *Hutchinson* in compiling his impressions about the development of the trial.[53] "That council chamber," wrote John Adams over half a century after the event "was as respectable an apartment as the House of Commons or the House of Lords in Great Britain … In this chamber, round a great fire, were seated five Judges, with Lieutenant Governor *Hutchinson* at their head, as Chief Justice, all arrayed in their new, fresh, rich robes of scarlet English broadcloth; in their large cambric bands, and immense judicial wigs."[54] For it was in this chamber that *Otis* delivered his landmark attack in *Lechmere's Case* against general writs of assistance. It inspired *Adams* deeply, whose great ability soon conferred him an importance comparable to that one of his master. It is not surprising that *Adams* was one of the leaders of the opposition to the Stamp Act of 1765. Later he always remained belligerent in the face of those British actions that he esteemed to the detriment of the colonists' liberties. The second President of the United States frequently reiterated that the case was the true starting point of the movement towards independence. He stated that *Otis*'s plea "breathed into this nation the breath of life", adding that "then and there the child Independence was born." And as *Corwin* would add near a century and half after, "he might well have added that then and there American constitutional theory was born."[55] *Otis* went straight back to *Coke*, as the Supreme Court Justice *Gray* would additionally write in an 1865 comment: "His main reliance was the well-known statement of Lord Coke in *Bonham's Case*." In *Gray*'s words, *Otis* "denied that (Parliament) was the final arbiter of the justice and constitutionality of his own acts; and … contended that the validity of statutes must be judged by the courts of justice; and

[51] Grinnell 1917, p. 445.
[52] Grinnell 1917, p. 446.
[53] Smith collects in an Appendix of his book (*Appendix* I) the Notes written by John Adams, under the following title: "John Adams's contemporaneous notes of the writs of assistance hearing in February 1761". Smith 1978, p. 543 et seqq. As "*Appendix* J" of the same book is collected which Smith letters as "John Adams's Abstract", p. 548 et seqq.
[54] Schwartz 1993, p. 5 et seq.
[55] Corwin 1910–1911, p. 106.

thus foreshadowed the principle of American constitutional law, that it is the duty of the judiciary to declare unconstitutional statutes void."[56]

4.3 The Brilliant Otis's Plea

4.3.1 The hard core of the problem that *Otis* faced in the case was the extent to which the concept of "constitution" could be conceived of as a limitation on the power of law-making bodies. *Otis* faced the question in an epoch in which the doctrine of legislative supremacy was still dominant at least in England, although such a doctrine scarcely reflected the real juridical thinking in the colonies. Nevertheless, the primacy between the English judicial organs of the legislative supremacy's doctrine and the composition of the Superior Court of Massachusetts explain why *Otis* would, by no surprise, lose the suit.

Concerning the intervention for the Crown by *Jeremiah Gridley*, *Adams* reveals[57] that *Gridley* mainly argued that the granting of the writs was legal because it was protected by statutory norms, adding immediately after: "And the power given in this Writ is no greater Infringement of our Liberty than the Method of collecting Taxes in this Province. – Every Body knows that the Subject has the Privilege of House only against his fellow Subjects, not vs. the King either in matters of Crime or fine."[58]

In his attack on the general search warrant, *Otis* acknowledged firstly the lawfulness of some kind of writs, particularly the special writs. His basic position is the following:

> I will proceed to the subject of the writ. In the first, may it please your Honours, I will admit, that writs of one kind, may be legal, that is, special writs, directed to special officers, and to search certain houses & c. especially set forth in the writ, may be granted by the Court of Exchequer at home, upon oath made before the Lord Treasurer by the person, who asks, that he suspects such goods to be concealed in those very places he desires to search. The Act of 14th Car. II. which Mr. Gridley mentions proves this. And in this light the writ appears like a warrant from a justice of the peace to search for stolen goods. Your Honours will find in the old book, concerning the office of a justice of peace, precedents of general warrants to search suspected houses. But in more modern books you will find only special warrants to search such and such houses especially named, in which the complainant has before sworn he suspects his goods are concealed; and you will find it adjudged that special warrants only are legal.[59]

Otis subsequently argued that the controversial writs were not in agreement with the mentioned precedents since they are of the nature of general writs, not special writs. For *Otis*, a form of writ of assistance "special" to the occasion would be acceptable. In his "History of Massachusetts-Bay" *Thomas Hutchinson* recorded:

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[56] Schwartz 1993, p. 6.
[57] "John Adams's contemporaneous notes of the writs of assistance hearing in February 1761" in Smith 1978, p. 543 et seqq.; "John Adams's Abstract" in Smith 1978, p. 548 et seqq.
[58] Smith 1978, p. 545.
[59] Smith 1978, p. 331.

> It was objected to the writs, that they were of the nature of general warrants; that, although formerly it was the practice to issue general warrants to search for stolen goods, yet, for many years, this practice had been altered, and special warrants only were issued by justices of the peace, to search in places set forth in the warrants; that it was equally reasonable to alter these writs, to which there would be no objection, if the place where the search was to be made should be specifically mentioned, and information given upon oath. The form of a writ of assistance was, it is true, to be found in some registers, which was general, but it was affirmed, without proof, that the late practice in England was otherwise, and that such writs issued upon special information only.[60]

The Bostonian advocate emphasised the argument that only special warrants are legal. It is significant that *Otis* would be well-disposed toward the acceptance of the questioned writs of assistance in case of their transformation into special warrants. As to the unlawfulness of a general warrant, *Adams*'s *Notes* contain the following:

> This Writ is against the fundamental Principles of Law. – The Privilege of the House. A Man, who is quiet, is as secure in his House, as a Prince in his Castle – notwithstanding all his Debts, & civil processes of any Kind. – But for flagrant crimes, and in Cases of great public Necessity, the Privilege may be (encroached?) on. – For Felonies an officer may break, upon Process, and oath. – i. e. by a Special Warrant to search such a House, (susp.) sworn to be suspected, and good Grounds of suspicion appearing.[61]

According to *Otis*, in the first place, the writ is universal, being directed "to all and singular justices, sheriffs, constables and all other officers and subjects &c." i. e. to every subject in the king's dominions; everyone with this writ may be a tyrant. In the next place, it is perpetual; there is no return, a man is accountable to no person for his doings, every man reigns secure in his petty tyranny, and spreads terror and desolation around him. In the third place, a person with this writ, in the daytime may enter all houses, shops, etc. at will, and command all to assist. As *Smith*[62] reminds us, the source for this was the Superior Court's 1755-type writ, which spoke of the customs officer and his men searching "at his or their will" and "in the day time". But the accentuation is odd. That the power of entry and search with writ of assistance was available only in the daytime and not round the clock was a point in its favour, one would have thought. For that reason, *Otis* would have done better to confine his emphasis to "at will", for he was trying to point out that entry of houses and so forth with the general writ of assistance was entirely at the discretion and pleasure of the holder. Fourthly, by this not only deputies, etc. but even their menial servants are allowed to lord it over us. What is this but to have the curse of Canaan with a witness on us, to be the servant of servants, the most despicable of God's creation? Consequently, *Otis* would qualify the general search warrant as "the worst instrument of arbitrary power; the most destructive of English liberty and the fundamental principles of law that ever was found in an English law-book".[63]

[60] Smith 1978, p. 332.
[61] Smith 1978, p. 339, 544.
[62] Smith 1978, p. 343.
[63] Haines 1932, p. 59.

4.3.2 In his defence of the Bostonian merchants, a century and half after *Bonham's Case,* and in his attack against the general writs of assistance, *Otis* finally invoked *Coke*'s holding which he had become familiar with through the *Bacon* and *Viner* "Abridgments". In *Adams*'s summary of the crucial position of *Otis* it reads: "As to acts of Parliament. An act against the Constitution is void: an act against natural Equity is void: and if an act of Parliament should be made, in the very words of the petition, it would be void. The Executive Courts must pass such Acts into disuse".[64] The duty of the courts of ruling laws null and void, had as a base the consideration about which "the reason of the common law controls every law of Parliament", which was not the case but which *Coke* had already pointed out. In his reasoning he affirmed that "the writ is against the fundamental principles of law (...) the privilege of house".[65]

It fits that *Otis* did not use the actual words from *Bonham's Case.* Though clearly his "Reason of the Common Law to control an Act of Parliament" corresponds to *Coke*'s dictum, it is not quite the same. According to *Smith*,[66] it suggests a sharpening of focus by which something else from *Coke* is brought into view: his report of *Prohibitions del Roy,* in 1607. In any case, on *Otis*'s argument that a writ of assistance search should be preceded by a specific court determination, a general writ, which by its nature precluded such process, could be protested as making the customs officer *iudex in propria causa.*

But what was the "constitution" which an act of Parliament could not infringe? In the opinion of *Bailyn*,[67] *Otis*'s answers were ambiguous, and proved to be politically disastrous. The main authority for his statement in the writs case that an act of Parliament against the constitution was void was *Coke*, reinforced by later judges expounding the great Chief Justice's dictum. But according to *Thorne*, in that pronouncement *Coke* had not meant "that there were superior principles of right and justice which Acts of Parliament might not contravene".

Opposite to such a consideration, it is necessary to say that *Otis* doesn't seem to have been confined to *Coke*'s authority because there is no doubt that he seemed to have in mind also another dictum, one that *Lord Hobart* expressed in *Day v. Savadge:* "Even an act of Parliament made against natural equity, as to make a man judge in his own case, is void in itself."[68] The appearance of the canon of the natural equity that *Otis* links in an inextricable way with the immutable principles of reason and the justice, leaves no doubt about this last influence since *Hobart* converted the principle *nemo iudex in propria causa* in canon of the natural equity, and this, at

[64] Corwin 1928–1929, p. 149 et seqq., 365 et seqq.
[65] Letter from John Adams to William Tudor, dated March 29th, 1817, cf. Grinnell 1917, p. 446 et seq.
[66] Smith 1978, p. 359.
[67] Bailyn 1976, p. 176 et seq.
[68] Additionally, Otis mentioned another no less known jurisprudential holding, that of Lord Holt in the case *City of London v. Wood* (1702): "What my Lord Coke says in Dr. Bonham's case in his 8 Rep. is far from any extravagancy, for it is a very reasonable and true saying, that if an act of Parliament should ordain that the same person should be party and judge, or what is the same thing, judge in his own cause, it would be a void act of Parliament.".

the same time, is the standard through which to judge if a law of Parliament was respectful with those principles of law and justice which had so taken root in the common law and which personified this fundamental law.

When *Otis* argued that the general writs of assistance were contrary to the "fundamental principles of law", I think he wanted to express that the laws of Parliament were limited by the fundamental principles of British freedom[69], and he used the word "constitution" probably as used in Britain at the time. To him, the British constitution must have been something real and tangible, fairly direct and conclusive in its limitations. The logical conclusion from his statement is that an unconstitutional law is not necessarily a bad law, or an inappropriate law, or even a law running counter to endeared traditions; an unconstitutional law is not a law at all. From this optic, *Otis*'s argument is so impressive and so prophetic of the constitutional system which was to come that we are in danger of overestimating its actual effect or of thinking of him as the creator of a fundamental American doctrine.[70] We can well believe, however, that the doctrine was as precocious as it was prophetic, though it was by no means altogether without historical background. It was for the moment ahead of its time.

Nevertheless, scholars such as *Bowen*[71] critically stated that the English justice system would have been astonished at the uses to which *Bonham's Case* was put. Even if we admit that *Otis* and his followers went far beyond anything *Coke* had intended, *Otis* made something similar to *Coke*: "Let us now peruse our ancient authors, for out of the old fields must come the new corne."[72] That is precisely what Americans have done in using *Coke* as the foundation for the constitutional edifice which, starting with *Otis*'s argument, they have erected.

Nevertheless, there is no doubt about the great impact of *Otis*'s position. As *Berger* reminds us,[73] sound or not, *Coke*'s statement became a rallying cry for Americans in 1761 when it was resoundingly invoked by *Otis*. If an Act of Parliament had the effect claimed for it, it would be "against the Constitution" and therefore void, an argument that *Adams*, concurring with *Otis*, repeated in opposition to the Stamp Act. On the 12th of September, 1765, Governor *Hutchinson*, referring to the opposition to the Stamp Act, wrote as follows: "The prevailing reason at this time is, that the act of Parliament is against *Magna Charta*, and the natural rights of Englishmen, and therefore, according to Lord Coke, null and void"[74], in adding afterwards: "This, taken in the latitude the people are often enough disposed to take it, must be fatal to all government, and it seems to have determined great part of the colony to oppose the execution of the act with force."[75] And as regards to the doctrine of judicial review, *Nelson* reminds us that, although not without their ambiguities, the *Writ of Assistance* case appeared at least to some

[69] McLaughlin 1935, p. 26.
[70] McLaughlin 1935, p. 27.
[71] Bowen 1957.
[72] Schwartz 1993, p. 6.
[73] Berger 1974, p. 25.
[74] Corwin 1910–1911, p. 106.
[75] Plucknett 1926–1927, p. 63.

American lawyers in the 1780s as a clarion call for judicial review and a clear challenge to the then dominant doctrine of legislative supremacy.[76]

In the margin of the previous reflections, *Otis*'s argument in the *Writs of Assistance* case is also perhaps the main piece of evidence for the claim that *Bonham's Case* was a significant source of colonial thinking about judicial review and an important building block in its development. According to *Kramer*,[77] such a consideration contrasts with the following fact: while *Bonham's Case* makes an occasional appearance, its absence from the case law and literature of the 1770s and 1780s is striking. It is why *Kramer* relativizes the specific weight of *Coke*'s opinion: "So far as I could tell, there is little basis for believing that Coke's opinion had much of anything to do with the development of an argument for judicial review, whatever it later became the American judicial mythology." This is an appraisal that I don't share.

The fact that *Coke*'s dictum should be revived as described, provoked very significant adherences. In a letter to Justice *Cushing* in 1776, *Adams* wrote: "You have my hearty concurrence in telling the jury the nullity of acts of Parliament. I am determined to die of that opinion, let the *ius gladii* say what it will."[78] This seems to have been the prevailing opinion, when in 1779 Massachusetts framed what became the model for the various state constitutions. *Adams* should have an outstanding role close to *Jefferson* in the preparation of the more important documents and it is logical to suppose that at the basis of the American constitutional law he would try to establish the point of view of *Coke* as it had been implicitly seen in Boston by *Otis*. As *Elliott* tells us, in this memorable instrument is found the first embodiment of the conception of three co-ordinate departments of government. With the preconceived idea of judicial power, it was inevitable that the duty of construing and protecting the new constitution should fall to the courts; and this seems to have been the intent of the men who drafted the constitution.[79]

Cushing, Justice of the first United States Supreme Court, in 1776, addressed a jury in Massachusetts, urging them to ignore such a law of the British Parliament as contrary to the fundamental law and for that reason null and void. The *Otis* formulation would be brought up often in the course of the political and juridical pre-revolutionary discussions. In 1773, a Boston newspaper reproduced the famous dictum. Otherwise, the *Writ of Assistance* case created a state of opinion that would later have a concrete reflection in the Massachusetts Bill of Rights whose article XIX begins as follows: "Every person has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions."[80]

[76] Nelson 2000, p. 36.
[77] Kramer 2001–2002, p. 31.
[78] Elliott 1890, p. 232.
[79] Elliott 1890, p. 232 et seq.
[80] The Massachusetts Constitution, 1780 may be seen in Chafee, Jr. 1963, p. 237 et seqq.

4.4 The Suspension of the Trial and the Posterior Court's Sentence (November, 1761)

Coming back to the development of the trial we must be made aware that after the plea of *Otis*, according to the version given by *Hutchinson* in his *History of Massachusetts-Bay,* some of the judges manifested well-founded doubts. "The court", tells us *Hutchinson*, "was convinced that a writ or warrant, to be issued only in cases where special information was given upon oath, would rarely, if ever, be applied for, as no informer would expose himself to the rage of the people." Otherwise, "the statute of the 14th Charles II authorised issuing writs of assistance from the court of Exchequer in England. The statutes of the 7th and 8th of William III required that aid to be given to the officers of the customs in the plantations, which was required by law to be given in England." "Some of the judges, notwithstanding, from a doubt whether such writs were still in use in England, seemed to favour the exception, and, if judgment had been given, it is uncertain on which side it would have been. The chief justice was, therefore, desired, by the first opportunity in his power, to obtain information of the practice in England, and judgment was suspended."[81] The impression next conveyed by the *History* is of *Hutchinson*'s perplexed colleagues asking him to send to England for what really was the practice there. This perspective is a little at odds with *Hutchinson*'s account in a private letter written October 1st, 1765:

> In the year 1761 application was made by the Officers of the customs to the superior court of which I was then chief justice for writs of assistance. Great opposition was made … and the court seemed inclined to refuse to grant them but I prevailed with my brethren to continue the cause until the next term & in the meantime wrote to England & procured a copy of the writ & sufficient evidence to the practice of the Exchequer there.[82]

Hutchinson wrote a letter dated March 5th, 1761, to *William Bollan*, still nominally Advocate General in the Boston Vice-Admiralty Court, lately displaced absentee collector of customs at Salem and Marblehead and since 1746 resident in Great Britain as the Massachusetts agent. *Bollan* sent him a copy of the writ of assistance taken out of the Exchequer, with a note thereon, setting for the manner of its issuing. At the sight of the reply, the writ was undoubtedly still in use in contemporary England.

On November 12th, two days before the Superior Court went back to the *Writ of Assistance* case*,* several letters and accompanying papers from agent *Bollan* were considered in the Council and the House of Representatives. What these were about is not stated in the records; but it is not impossible that one of them was *Bollan*'s letter to *Hutchinson* on the English writ of assistance.

On November 14th, 1761 the Superior Court of Massachusetts "entr'd up Judgment according to the verdicts and then adjourned to Wednesday next". The *Boston Gazette* from November 23th wrote: "Wednesday last, a Hearing was had before the Hon. Superior Court … upon a Petition of the Officers of the Customs for a Writ of

[81] Smith 1978, p. 387.
[82] Smith 1978, p. 386.

Assistance . . . ". The completion of the *Writ of Assistance* case seems to have been all there was for the court on November 18th. In his *History of Massachusetts-Bay, Hutchinson* is very laconic in the account of the decision: "The chief justice was . . . desired . . . to obtain information of the practice in England, and judgment was suspended. At the next term, it appeared that such writs issued from the Exchequer, of course, when applied for; and this was judged sufficient to warrant the like practice in the province".[83] *Otis* could be mistaken in his empirical appreciation but this didn't weaken its juridical argument.

According to *Quincy*'s summary of the hearing's development from November 18th, 1761[84], *Hutchinson* reminded the court that the custom house officers had frequently applied to the Governor for this writ, and have had it granted by him, and therefore, though he had no power to grant it, the argument of non-user had been removed. *Gridley* minimised the transcendence of the writs arguing that "this is properly a writ of assistants, no assistance; not to give the officers a great power, but as a check upon them. For by this they cannot enter into any house, without the presence of the sheriff or civil officer, who will always be supposed to have an eye over and be a check upon them." In contrast, *Otis* reaffirmed his position:

> Let a Warrant come from whence it will improperly, it is to be refused, and the higher the Power granting it, the more dangerous. The Exchequer itself was thought a Hardship in the first Constitution . . . It is worthy Consideration whether this Writ was constitutional even in England; and I think it plainly appears it was not; much less here, since it was not there invented till after our Constitution and Settlement. Such a Writ is generally illegal.

The hearing finished with the unanimous decision of the judges that the writ might be granted and soon after the writ was effectively granted. The only argument specifically mentioned in the *Boston Gazette* from November 23rd affords confirmatory evidence of where the emphasis in the November debate lay: "that such Writs by Law issued from the Court of Exchequer at home; and that by an Act of this Province, the Superior Court is vested with the whole Power and Jurisdiction of the Exchequer; and from thence it was inferr'd, that the Superior Court might lawfully grant the Petition".[85]

It is unnecessary to mention the political dissatisfaction with the result of the *Writ of assistance case,* which found expression a few weeks later in the province legislature. On February 20th, 1762, the Council set down a bill for the concurrence of the House of Representatives "for the better enabling the Officers of his Majesty's Customs to carry the Acts of Trade in Execution". Far from "better enabling" customs officers, the bill was designed to promote the very sort of frustration urged for them by *Otis* a month before. The general writ of assistance recently affirmed and issued by the Superior Court would be displaced by a "Writ or Warrant of Assistance" good for the one sworn occasion only.

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[83] Smith 1978, p. 395.
[84] "Report of the resumed writs of assistance hearing, 18 November 1761, by Josiah Quincy junior", reprinted in Smith 1978, p. 556 et seqq.
[85] Smith 1978, p. 402 et seq.

The *writs of assistance bill* did not pass into law; Governor *Bernard* vetoed it and declared the bill to have been "so plainly repugnant and contrary to the Laws of England ... that if I could overlook it, it is impossible it should escape the penetration of the Lords of Trade ..."[86] According to *Smith*,[87] there was more to his delay in killing the bill than his report to the Board of Trade could have respectably disclosed. His chronic money problems gave him a special interest in maximizing the efficiency of customs law enforcement. The wider the liberty of customs officers to search out seizures the greater the personal profit to the Governor, from his entitlement to one-third of the proceeds. Whether or not *Bernard* had had a hand in his friend *Cockle*'s application for a writ of assistance in October 1760, and to whatever extent his appointment of *Hutchinson* to the Superior Court had been aimed at a satisfactory decision on this, the writ of assistance at last affirmed by the Superior Court was rich in promise of gubernatorial gravy. A legislative bill to displace this invaluable instrument by something that rendered effective customs search impossible and extinguished *Bernard*'s rosy expectations of augmented income was doomed from the start.

References

Bailyn, B. (1976). *The Ideological Origins of the American Revolution* (13th edn.). Cambridge (Massachusetts): The Belknap Press of Harvard University Press.

Berger, R. (1974). *Congress v. the Supreme Court* (2nd edn.). Cambridge (Massachusetts): Harvard University Press.

Black, B. A. (1987–1988). An Astonishing Political Innovation: the Origins of Judicial Review. *University of Pittsburgh Law Review*, *49*, 691–697.

Boudin, L. B. (1928–1929). Lord Coke and the American Doctrine of Judicial Power. *New York University Law Review*, *6*, 223–246.

Bowen, C. D. (1957). *The Lion and the Throne. The Life and Times of Sir Edward Coke* (pp. 1552–1634). London: Hamilton.

Chafee, Z. Jr. (Ed.). (1963). *Documents on Fundamental Human Rights. The Anglo-American Tradition*. New York: Atheneum.

Cook, H. J. (2004). Against Common Right and Reason: The College of Physicians v. Dr. Thomas Bonham. In A. D. Boyer (Ed.), *Law, Liberty and Parliament. Selected Essays on the Writings of Sir Edward Coke* (pp. 127–149). Indianapolis: Liberty Fund.

Corwin, E. S. (1910–1911). The Establishment of Judicial Review (I). *Michigan Law Review*, *9*(4), 102–125.

Corwin, E. S. (1925). The Progress of Constitutional Theory between the Declaration of Independence and the Meeting of the Philadelphia Convention. *The American Historical Review*, *30*(3), 511–536.

Corwin, E. S. (1928–1929). The "Higher Law" Background of American Constitutional Law (I and II). *Harvard Law Review*, *42*(2 and 3), 149–185 and 365–409, respectively.

[86] Smith 1978, p. 426.
[87] Smith 1978, p. 427 et seq.

Elliott, C. B. (1890). The Legislatures and the Courts: the Power to Declare Statutes Unconstitutional. *Political Science Quarterly*, *5*(2), 224–258.

Ferguson, J. R. (1979). Reason in Madness: The Political Thought of James Otis. *The William and Mary Quarterly*, *36*(2), 194–214. 3rd Series

Fernández Segado, F. (2013). *La evolución de la justicia constitucional*. Madrid: Dykinson.

Goebel Jr., J. (1954). Ex Parte Clio (Book Review). *Columbia Law Review*, *54*, 450–483.

Grant, J. A. C. (1954). Judicial Control of Legislation. *The American Journal of Comparative Law*, *3*(2), 186–198.

Grey, T. C. (1977–1978). Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought. *Stanford Law Review*, *30*(5), 843–893.

Grinnell, F. W. (1917). The Constitutional History of the Supreme Judicial Court of Massachusetts from the Revolution to 1813 (chapter IV of "The Anti-Slavery Decisions of 1781 and 1783 and the History of the Duty of the Court in Regard to Unconstitutional Legislation"). *Massachusetts Law Quarterly*, *2*(5), 437–456.

Haines, C. G. (1932). *The American Doctrine of Judicial Supremacy* (2nd edn.). Berkeley: University of California Press.

Hall, K. (1985). *The Supreme Court and Judicial Review in American History. Bicentennial Essays on the Constitution*. Washington, D.C: American Historical Association.

Kramer, L. D. (2001–2002). We the Court (The Supreme Court 2000 Term. Foreword). *Harvard Law Review*, *115*(1), 5–169.

McGovney, D. O. (1944–1945). The British Origin of Judicial Review of Legislation. *University of Pennsylvania Law Review*, *93*(1), 1–49.

McLaughlin, A. C. (1935). *A Constitutional History of the United States*. New York, London: D. Appleton Century Company.

Michael, H. K. (1990–1991). The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights? *North Carolina Law Review*, *69*, 421–490.

Mullet, C. F. (1932). Coke and the American Revolution. *Economica*, *38*, 457–471.

Nelson, W. E. (2000). *Marbury v. Madison. The Origins and Legacy of Judicial Review*. Lawrence: University Press of Kansas.

Nelson, W. E. (2002). Marbury v. Madison and the Establishment of Judicial Autonomy. *Journal of Supreme Court History*, *27*(3), 240–256.

Plucknett, T. F. T. (1926–1927). Bonham's Case and Judicial Review. *Harvard Law Review*, *40*, 30–70.

Schwartz, B. (1993). *A History of the Supreme Court*. New York, Oxford: OUP.

Sheppard, S. (Ed.). (2003). *The Selected Writings and Speeches of Sir Edward Coke*. Indianapolis (Indiana): Liberty Fund.

Sherry, S. (1992–1993). Natural Law in the States. *University of Cincinnati Law Review*, *61*, 171–222.

Smith, G. P. I. I. (1966). Dr. Bonham's Case and the Modern Significance of Lord Coke's Influence. *University of Washington Law Review*, *41*, 297–314.

Smith, M. H. (1978). *The Writs of Assistance Case*. Berkeley, Los Angeles, London: University of California Press.

Thorne, S. E. (1938). Dr. Bonham's Case. *Law Quarterly Review*, *54*, 543–542.

De Vattel, E. (1964). *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*. New York, London: Oceana Publication Inc., Wildy & Sons Ltd. translation of the edition of 1758 by Charles G. Fenwick; reprinted

Wood, G. S. (1999). The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less. *Washington and Lee Law Review*, *56*, 787–817.

Yale, D. E. C. (1974). Iudex in propria causa: An Historical Excursus. *The Cambridge Law Journal*, *33*, 80–96.