

ShortCircuit435

📅 Thu, Aug 13, 2026 1:04PM ⌚ 47:44

SUMMARY KEYWORDS

Judicial review, Declaration of Independence, American Revolution, Pennsylvania Constitution, Council of Censors, Parliamentary supremacy, judicial engagement, federal courts, judicial power, constitutional rights, judicial history, American sovereignty, judicial review evolution, British Empire, judicial review justification.

SPEAKERS

Anthony Sanders, Sam Gedge



Sam Gedge 00:14

And for the support of this declaration, with a firm reliance on the protection of divine providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.

A

Anthony Sanders 00:27

This week, here on Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, director of the Center for Judicial Engagement at the Institute for Justice. We are recording this in late May 2026, but it will be going out on the eve of the Fourth of July, 2026, celebrating what happened 250 years ago. And that, dear listeners, is why we began this episode with those stirring words from Thomas Jefferson — actually from the Committee of Five, actually from Congress, actually from whoever you might say wrote the Declaration of Independence. But we're going to say today that it was my colleague Sam Gedge, who actually was the person reading those words. So Sam and I are here today for not what Sam is usually joining us for, which is recent opinions from the federal courts of appeals, but a special Short Circuit where we are going to celebrate in our own way America's Big 250. So if you're listening to this, you probably are shortly after it is dropped, and that means it's right around the time of America's Big 250, where there's all kinds of celebrations. I hope you're having a wonderful Fourth of July party. But we at IJ are celebrating the Fourth of July this year in our own special way, and that is how what happened in 1776 ties in with, among other things, judicial engagement. And that is, of course, through the mechanism of judicial review, which is a peculiarly American invention, although it's practiced all over the world now. And although people don't think about it this way, it really has its roots in what happened in 1776. So we're doing a little bit of an exploration of that on this Short Circuit. So the first half of the show is going to involve Sam, who you'll hear again in a moment, and some reflections that he has on his participation in a recent conference we had about 1776 and all that. And then the second half of the show, I'm going to be discussing how what happened in 1776 later had an impact on judicial review in an article that I have coming out later, that's currently in draft form, and how the institution of Parliament — right, this big bad Parliament that America broke away from — how it had a continuing reverberation in American law, and then how America eventually got past that by becoming top nation. So it all comes full circle. We're going to start this episode, though, with my colleague Sam. So Sam — you may not know from listening to Sam on normal Short Circuits, but you got a little inkling there at the beginning — Sam is actually British. In fact, I am British too, and this is actually a show of two British guys telling you about America's Big 250, which may sound weird, and also you may think I'm lying, because we do not sound all that British. Although, Sam, you sounded a lot more British than me with your opening. So tell me, how can we believe that you actually are British, and also how is your British accent?

S

Sam Gedge 04:18

Well, I think you just heard the best British accent I can I can muster so well.

A

Anthony Sanders 04:22

So if you're gonna fake one to someone on the street, you would use that voice.

S

Sam Gedge 04:26

Well, I probably could use my more Churchillian British accent, Anthony. But for for the Declaration of Independence reading, I felt like that would be an anachronism. But no, you're right. I guess I'm British in the loosest possible sense in that I was born in North Yorkshire and was brought over to America on the Queen Elizabeth II, the famous ocean liner, in early 1986. And one other slightly interesting tidbit is that. I believe it was the same crossing where one of my passengers was Robert Ballard, who had only recently discovered the Titanic the year before.

A

Anthony Sanders 05:11

Wow!

S

Sam Gedge 05:12

Yeah.

A

Anthony Sanders 05:13

But there were no icebergs on your bridge.

S

Sam Gedge 05:15

You jest, but in fact, the threat of icebergs caused the QE2 to change course. And instead of landing in New York, where we were supposed to land, we ended up going south and landing in Baltimore. And they had to apparently bus my parents and our dog and their six-month-old baby from Baltimore all the way up to Connecticut. And I believe my mother had some choice words for the Cunard, whatever the shipping company is that's in charge of the QE2.

A

Anthony Sanders 05:49

So that is a wonderful immigrant story. I'm glad you shared it with us. I am a little perplexed, though. So, 1986 is not that long ago. I actually remember 1986. As listeners may remember, I myself am British because my dad was British. He was born in the UK; I was not. But he used to go over to visit him and family over there on this thing called an airplane. I was even doing that before 1986. So why did you guys take a boat, you know, with icebergs?

S

Sam Gedge 06:22

That's a great question. We'll have to get my my parents on the next one. I think it might have been dog related. I am also told that like we were in like the equivalent of steerage class, but that the dog kennels were apparently up on the boat deck, so he had a far better far better crossing than than we did. It might it might have been dog related. My parents at the time also, I think, had a fondness for ocean crossings. Before I was born, they took a tramp steamer from California to New Zealand and and thence to Australia. So I think they just like the open ocean.

A

Anthony Sanders 06:56

Okay, well, well, blessed. So it's you and a bunch of Irishmen probably in the hold, and then your dog up on deck.

S

Sam Gedge 07:03

Yep, yep, precisely.

A

Anthony Sanders 07:05

Well, great. So yes, the other the other thing we're here to do, in addition to discuss your ocean voyages, is your experience with breaking from the British Empire and discovering judicial review — although your role in this was kind of anti-judicial review. So let me set this up for everybody. We had a conference a couple months ago called the Other Declarations of 1776. This was IJ's way of celebrating this anniversary, but in a way that intersects with what we do, because of course at IJ we're about vindicating constitutional rights in court. In 1776, not only did we break with the British Empire through the Declaration of Independence, but a lot of states adopted their own constitutions, which was a brand new thing at that time. Part of those constitutions were often these things called declarations of rights, which later became declarations or bills of rights in the federal constitution and every state constitution. So we talked all about these declarations of rights, and then at the end of the conference, we had a special session. By the way, all of these are available on video, and we'll put a link in the show notes to them. But the session that Sam was involved with — tell us about it.

S

Sam Gedge 08:27

So I was involved in a moot court that you and our colleague John Wrench orchestrated and somehow lured me into joining. And the premise of the moot court was that we were litigating a hoary old chestnut, the case of *Vanhorne's Lessee v. Dorrance*, I believe.

A

Anthony Sanders 08:48

Yeah, Vanhorne's Lessee. I can't remember who was first or second, but yeah.

S

Sam Gedge 08:53

Nor can I. It's lost to time. But the main question presented in the moot court was whether the 1776 Constitution for the Commonwealth of Pennsylvania allowed for judicial review of state statutes. And that was kind of the entire sprawling litigation crystallized down to that one question. We had three very distinguished moot court judges, and we had me playing the villain, I believe most would say, arguing against judicial review, and our colleague Diana Simpson standing up for the heroic role of advocating for the judiciary's role in evaluating the constitutionality of state statutes.

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Anthony Sanders 09:40

Right, and so we had these three judges. One of them was actually a former judge, Justice G. Barry Anderson, now retired of the Minnesota Supreme Court. And then we had Cate Stetson, noted appellate advocate, and Laurent Sacharoff, who is a law professor at the University of Denver, a friend of ours. So the three of them peppered both of you with questions. And a lot of it came down to: judicial review was a very new thing, because judicial review didn't really exist in jolly old England, because they didn't have a constitution in the first place. So how could you even have an unconstitutional law? I mean, that was basically kind of the setup, right?

S

Sam Gedge 10:24

Yeah, I think that's right. And my understanding is that the history from England was a little bit mixed, right? You have little tidbits here and there of Judge Coke, I think it was, suggesting that maybe the courts could void legislation here and there.

A

Anthony Sanders 10:39

Some people claim he said that, yeah. But yeah, it was very just a few tea leaves.

S

Sam Gedge 10:45

Yes, precisely. And I mean, I think your kind of bottom line is correct. The idea being, right, there is no written constitution in England, and there is this concept of parliamentary supremacy, such that anything Parliament does is necessarily constitutional. And so you don't have this concept of a co-equal, separate branch of government, namely the courts, acting as a check on Parliament. Really, judges were in a way a tool of Parliament. And you can correct me on this if I'm wrong, but my understanding is that the House of Lords themselves, this part of Parliament, was the ultimate judicial tier within the court system itself. So kind of all roads lead back to Parliament.

A

Anthony Sanders 11:32

Yeah, exactly. And when the Lords reviewed legislation, it it wasn't whether there's some higher law that it violates. I mean, they may do take liberties with you know statutory interpretation, like all judges do. But but this whole thing about a higher law just wasn't on their mindset.

S

Sam Gedge 11:53

Right, precisely.

A

Anthony Sanders 11:54

But it kind of was for your case, because you're reviewing — right, it was basically a land grant. The legislature of Pennsylvania rearranged who owned what, tried to settle this long-going feud, which has its own crazy history — some settlers, basically, who were fighting each other. And so they rearranged the land, and then the one group of settlers challenged this as unconstitutional under the Pennsylvania Constitution. And at first, right, when John was setting this up for you — John Wrench was setting this up for you — we were thinking, well, it's going to be about whether judicial review is a thing at all, because it was kind of novel at the time, even though to us it kind of makes sense. But it was novel at the time. But then there's this monkey wrench about the 1776 Pennsylvania Constitution itself. So explain that for folks.

S

Sam Gedge 12:55

Yeah, I guess that's right. And I mean, just to give a little bit of background, there was this apparently very bloody dispute between settlers from from Connecticut, my home state, and settlers of what would become Pennsylvania. Apparently, King Charles II had granted this single enormous tract of land to both both colonies in his infinite wisdom, and yeah, not a great move by King Charles II. But the way that it ultimately was found to be a part of the Commonwealth of Pennsylvania — in order to settle this strife, the Pennsylvania legislature passed a statute basically saying, okay, well, the land that's currently possessed by the Nutmeggers, the Connecticut natives, they're going to get to keep it. And because we want to do right by the competing Pennsylvania claimants, they can submit a claim to this commission, and they will be compensated in the form of land of similar value elsewhere in Pennsylvania. And the Pennsylvania folks were dissatisfied with this, I think understandably. They sued to eject one of the Connecticut landowners. The Connecticut landowner raises this statute as a defense, saying, "Hey, the statute says that I get this, and you get the land over there in the marsh." And that really tees up the fight of, okay, well, is this statute, this duly enacted state statute, consistent with the Pennsylvania Constitution? And more fundamentally, do Pennsylvania judges even have the power to consider whether it is consistent with the Pennsylvania Constitution?

A

Anthony Sanders 14:32

Right, because like ex nihilo at the beginning of written constitutions in America, you might say, "Well, the legislature itself should judge if it's constitutional or not." I mean, to us that sounds wrong, but it's not crazy to think that if you've never gone through this experience before.

S

Sam Gedge 14:53

Well, I think that's right. In much the same way, right, that you might say that Parliament judges whether the laws that it passes are consistent with the unwritten British Constitution. Now, the answer is, of course, well, we have a written constitution. It's the 1776 Pennsylvania Constitution. Obviously, it must mean something. And I suppose I should acknowledge that in our moot court, a sharply divided panel ruled against me and concluded that the 1776 Constitution did in fact allow for judicial review. But I think, to your point, it actually would be a really close question for a few different reasons. One, the framers of the 1776 Pennsylvania Constitution really didn't seem to be conceiving of their frame of government in this traditional tripartite separation of powers that we view as commonsensical 250 years later. Rather, they were deeply suspicious of any kind of entrenched power aristocracy in their frame of government. So they had an extraordinarily weak executive. They didn't even have a single chief executive. They had almost like an executive council that was very much answerable to the legislature. And they had an extraordinarily weak judiciary as well. In fact, there wasn't even a judicial branch as such. And so for all of those reasons, I think it's a really close question whether the people who ratified that 1776 Constitution and who deliberately gave a ton of power to the legislature and who deliberately made the legislature extraordinarily accountable to the people, whether those same people would have thought, "Oh, okay, well, yeah, we very much want the legislature to be answerable to us at every granular level, but we're also kind of fine with these unelected judges vetoing laws that our directly elected representatives have passed." Yeah, so there are a few other reasons too. We can talk about the Council of Censors, which is another data point, which I know that you enjoy a lot. But I think —

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Anthony Sanders 17:04

Well, it seemed like you enjoyed it a lot in your your argument.

S

Sam Gedge 17:07

Yeah, yeah. I mean, so this I think is kind of another data point suggesting that you know the 1776 Constitution really wasn't framed with anything resembling a Montesquieuian tripartite judiciary, executive, legislative scheme in mind. And this is that while the framers had a very weak judiciary, they had this really peculiar thing, which is like every seven years they said, "We're going to elect a Council of Censors," which is a bunch of folks whose job is to basically go through the statute books and decide if any of the statutes are unconstitutional at all. And then you send your report to the legislature, and they're duty bound — I think the framers would have understood, duty bound — to correct those constitutional infirmities in the statute. And we don't need to do Latin tags like *expressio unius*, Anthony, but the idea is, well, the framers clearly were acutely aware of the need to provide some potential check on the prospect of unconstitutional statutes. And they created a check with a textually explicit grant of power to this idiosyncratic Council of Censors. They didn't provide any kind of textually explicit grant of power to judges to do anything similar when it comes to reviewing the constitutionality of statutes. And indeed, to the extent the Constitution talked about judicial power at all, all it really said is that, yeah, judges of the Commonwealth of Pennsylvania, they get to exercise the same kind of powers that they have heretofore exercised. And so what does "heretofore exercised" mean? Well, it means the powers that the colonial judges in Pennsylvania would have exercised. And as we talked about, colonial judges operating under this auspice of parliamentary supremacy absolutely wouldn't have been understood to have any kind of power of judicial review over statutes.

A

Anthony Sanders 19:00

Right. They might have in the sense that, right, those Pennsylvania judges could have said that the act of the legislature did something that Parliament said they can't do through some legislation. I mean, during the Revolution, of course, there's all these terrible things Parliament's doing, like Navigation Acts, Townshend Acts, whatever. But there could have been more milquetoast legislation earlier, where the concept of a colony's law interfering with some higher law — whether it's an act of Parliament, or a royal decree, or the charter of the colony itself, right? — that was the thing. It's just that you didn't have this supreme higher law. So I guess part of the argument, right, is that, well, it's kind of akin to what judges might have done before. It's just now we have this notion of popular sovereignty and a constitution.

S

Sam Gedge 20:05

Yeah, I guess that might be right. I mean, I think even pre-1776, the colonial era judges themselves would not, I think, have been the last word on whether a colonial statute or what have you —

A

Anthony Sanders 20:19

They went to the Privy Council, right?

S

Sam Gedge 20:22

Exactly. That's right. And so, I think really the question here is, you know, okay, would the framers of the 1776 Constitution have had any have contemplated that the that judges, who they barely mention in the Constitution at all, would have had the last word on whether an act of the legislature comports with the Constitution? And obviously two of our three panelists disagreed. But I think there's a strong argument the answer is no, and I think that's doubly true when you look at the historical context as well. Because two years before, the Chief Justice of the Pennsylvania Supreme Court in 1774 had fled the Commonwealth and moved to England and spent his time writing these very rude pamphlets about how the Commonwealth of Pennsylvania should be resubjugated by the Crown. I mean, more broadly, judges at the time were overwhelmingly loyal to Mother England. And so I think, given that context as well, it's really kind of astounding to think that the rebels who are creating this new frame of government, with a ton of trust in themselves as people to act as a check on their directly elected representatives, that they would have thought, "Oh yeah, well, the overtly loyalist judge class, of course they're going to have the final say on whether the laws passed by our new legislature can go into effect."

A

Anthony Sanders 21:41

And so you and Diana had some interesting questions from the judges about this Council of Censors. I remember Laurent was particular — well, he was the one judge who ruled for you, but he had some —

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Sam Gedge 21:54

Very wisely, very astutely.

A

Anthony Sanders 21:56

Some pointed questions about the Council of Censors. But part of the trouble, I remember, was that there's this whole thing — the Council of Censors, it's almost like a constitutional convention that you elect every seven years that reviews — but it didn't actually change legislation. It seems like the setup was kind of weak. It just recommended stuff to the legislature. And so that seemed to be a problem when the judges were coming to terms with it.

S

Sam Gedge 22:23

Yeah, that's right. I mean, so the Council of Censors, as I recall, met only one time because you know in 1791 or some thereabouts —

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Anthony Sanders 22:32

Yeah, 1783 or something like that.

S

Sam Gedge 22:34

Oh, okay. Well, I was going to say — at some point, Pennsylvania completely revamped their constitution in mimicry of the U.S. Constitution, which is why we no longer have a Council of Censors in Pennsylvania. So you're right. They met once, and they did recommend that certain statutes were unconstitutional. As I understand it, the legislature at the next session took that very seriously and in fact acted on that. But I think more fundamentally, a lot of the questions that were posed about the Council of Censors were premised on the idea that it was this ridiculous, shambolic exercise. And I think there is a good argument that it was in fact a ridiculous and shambolic exercise. But it also was what the framers chose as their most textually explicit method for ensuring that statutes comply with the Constitution. And so the answer, if you think that that is the wrong way to go about reviewing the constitutionality of statutes, is to do what the Pennsylvania framers did 20 years later and amend the Constitution to create a stronger judicial branch. But if we really try to bring our minds back to 1776 and squeeze out from our mind juices all of these preconceptions we have about judicial review from the past 200 years or so, it's really not all that obvious that the framers in 1776 would have thought that you have this unelected, bewigged judicial class passing judgment on everything that the new legislature, the new rebel legislature, happens to pass.

A

Anthony Sanders 24:10

So having gone through that whole process of like thinking about a case that was argued over 200 years ago, how you would argue it, trying to get in the mind of that time period — anything surprise you or interest you in a way you didn't expect, or go sideways in getting ready for that?

S

Sam Gedge 24:34

I mean, I think that maybe the one thing that was — I don't know if it was surprising, but I completely bought into my side of the argument. So I'm going to keep working at IJ. I haven't come to question judicial review under the U.S. Constitution or under the many constitutions that follow in the U.S. Constitution's footprints. But looking back at it, the 1776 Pennsylvania Constitution was this extraordinarily peculiar document. It was inspired in large part by Thomas Paine, who obviously wrote *Common Sense* but had some pretty out-there views on a lot of things. You have John Adams up in Massachusetts, and he in classic John Adams fashion wrote some letter saying something like — "Good God!" — and that's a direct quote with the exclamation point. He says, "Good God," he just read the Pennsylvania Constitution, and he says, given this Constitution, in 10 years, folks in Pennsylvania are going to be begging for a reconciliation with the Crown, given the complete tyranny that will be worked upon them by this Constitution. Honestly, maybe he was right. It was a first shot. It was one of the very first constitutions, and it's not surprising that with 15 or 20 years' experience, the product that the federal Constitutional Convention comes up with in the late 1780s looks a lot different.

A

Anthony Sanders 26:00

Right. Well, maybe we can use that then to transition to talking about what happens later with judicial review, but also how that connects with 1776. Because you're right that Pennsylvania's Constitution is by far the most — what we might call radical, and it was considered radical at the time — Constitution. Really, it's just the legislature. Annual elections also was the thing. It's just this constant churning of democracy. Other state constitutions at the time were a little more what we might call standard. No one went the full Pennsylvania, but they had all different flavors. And most of the ones that were adopted right in 1776 did not actually last that long. And so by the time you get to the federal Constitution just 11 years later, you have a lot of states having their second or third draft of the Constitution that they're on. A few of them make it later, but actually I think no 1776 Constitution is still operative today. The oldest today is Massachusetts of 1780, that John Adams largely wrote, that kind of learned the lessons of those first few years. So you can see how things were changing so quickly, right, from 1776 to 1780 to 1787. So one thing I was interested in is we have this break from the old parliamentary system where Parliament is supreme. The people aren't supreme. It's not really even the king that's supreme. It's the king in conjunction with Parliament. And so you don't have judicial review because you don't really have a constitution. You just have this unwritten, partly written constitution and tradition. But Parliament can really do whatever it wants, as long as the king goes along with it, which they always do these days. So you get this new system of written constitutions and popular sovereignty. The people are sovereign, but also the people are not identified with the legislature. So it's not like the legislature itself is Parliament, right? Parliament is now the people, and they express themselves through a constitution, and then you have legislation. So that's the whole multi-tiered system that you were arguing about. And so the Council of Censors is just this weird thing that they had in Pennsylvania, and Vermont had it for a while too, but otherwise hasn't really existed.

S

Sam Gedge 28:41

Though I will say, Vermont, as I understand it, kept it until about the 1870s.

A

Anthony Sanders 28:45

They did, and I don't know the history of that. I do know that Vermont courts started doing judicial review just like everyone else. So I don't know how that all interplayed with each other. Maybe they didn't worry about it.

S

Sam Gedge 28:58

I don't know.

A

Anthony Sanders 28:59

Yeah. So that's a that's a different podcast. So what happened was early in American history, Sam, as you experienced firsthand, courts start doing this judicial review thing because they have a law the legislature passed, obviously unconstitutional under the state constitution, and then later the federal constitution. So they say, "Well, I'm just not going to enforce this law. It doesn't comport with this thing that everyone agrees is the higher law of our state," or what have you. So this is controversial at first, of course, and we all know the story of *Marbury v. Madison*, and that was controversial. But it's not nearly as controversial as you'd expect. And so judicial review kind of takes hold, right? So a lot of listeners know this story. What am I adding to it? What I added to it is I was interested in how a few cases, including the one you did — *Vanhorne's Lessee* — will contrast this system with the old system of parliamentary sovereignty. And they will say things like, "Well, in the old days, right, Parliament was omnipotent and still is in the British Empire. But we fought a revolution, damn it! And in our system, the people are sovereign, and they have this thing called the Constitution, and that empowers us as judges to just say we're not following that law because it violates the Constitution." And courts did this a lot. And so I called this in my paper — I'll put a link in the show notes if anyone's interested — it's called *Parliament's American Shadow*. And it's how this idea of Parliament as sovereign in the old days is contrasted with American popular sovereignty to justify judicial review. So courts did it a bit in the very early days of judicial review, like the 1790s, like the case you did. But then they keep doing it. So in, say, the 1800s, 1810s, 1820s, 1830s — you can find quite — it's not like they did it in every constitutional case, but courts would do this fairly frequently, where they'd say Parliament was omnipotent. They quote Blackstone and say Parliament's omnipotent in the old days, but we here in America, we're doing things differently. And this continued in a pretty robust way through the Civil War, like through that time period. Basically, there's a time period of almost 100 years where this is a pretty regular thing that courts do. And so I go through the numbers in my paper and say, how many per decade courts are doing it. It's hard to get the exact numbers on it, but I use a couple of proxies. Anyway, I think I show that this is a common thing. But then, say, the 1870s, 1880s, courts start using it less. It starts being less of a thing. And by the time of the early 20th century, it's much less a thing, and it really kind of disappears by the 1940s. So it's a very long

goodbye to this kind of use of Parliament, but it does eventually go away. Now, you can still find cases today in the 21st century that will use this old-timey "Parliament's omnipotent, but we're different, we're Americans," but it's very rare. It does not happen very often. The other interesting thing, though, is that sometimes American courts would use the shadow of Parliament to justify the legislature's powers. So they might say, at the Revolution, all the power and majesty of the British Parliament, which could legislate anything that's not impossible, was transferred into the little old legislature of New Hampshire, and it has all that power except what's denied to it by the state and federal constitutions. Now, that's kind of a big "but," right? Like, well, yeah, that's the whole point about constitutionally limited government. And that's technically the same. You could say the same thing by saying, "Well, here in America, government is limited because of our state and federal constitutions." But it's a point of emphasis, right? So if they're trying to say, "Well, the legislature needs a lot of power to do whatever it can — who am I? I'm just a judge. I'm not going to stop it" — you might put that formulation rather than the other one I was talking about. But that's more rare. But you do see it. And Parliament's used as a shadow in other ways, such as they'll say, "Well, legislature, I can't believe what you did. Even Parliament doesn't do that." And this could be in a few different contexts, but one is retroactive legislation, because there's this big faux pas about reading acts of Parliament to legislate retroactively. It can technically happen if Parliament's really explicit, but otherwise judges, like the House of Lords, they will read it to not be retroactive. And so if a legislature is explicitly retroactive, they say, "I can't believe you guys did this. Even Parliament doesn't do that." So there's kind of that too. But the interesting thing that I reflect on at the end of the paper, after laying out this history, and that I'd be curious about your thoughts on, Sam — how this happens — is this happens for a long time, right? As I said, American courts use this kind of background of Parliament — we're different, we're Americans — but then they stop using it as much, and it's a long time later. So just your speculation: what do you think might explain that, both the phenomenon of it lasting for a long time and of it kind of petering away?

S

Sam Gedge 35:13

Yeah, I mean, I wonder on the second point whether it just that you know once you're 150 years in, there's less need to justify it, right? Like by 1940, presumably, you know, everyone's kind of like, "Yeah, judicial review, Marbury v. Madison." Everyone's been taught from the hymnal at that point for over a century about how judicial review is great and the way it works in America, and Chief Justice Marshall invented it and all that — which obviously I know you will tell me is incorrect, but that's what everyone's taught. And so at that point, it's like, okay, well, maybe judges don't need to almost reinvent the wheel and justify the historical pedigree in that way anymore. You just kind of say, okay, we're still doing judicial review, just like we did 10 years ago and 20 years ago and 100 years ago. I don't know, that's just kind of my reaction. I'm sure you have thoughts.

A

Anthony Sanders 36:04

Well, I think that's I think I think that explains a large part of it, right? And that's not very shocking to anybody — that after you mature as a nation for a long time, you're going to stop thinking about the mother country and you're going to get used to your own traditions and ways. So I think that does explain some of it. If it had been a big phenomenon in, say, the 1790s when we're still figuring this stuff out, as you were figuring out at the moot court, but then there's a long goodbye after that of looking back to Parliament — that makes more sense. What I was intrigued by is this: it continued being a big thing for almost 100 years, and then it started having this goodbye. Anyway, the thought I had about this goes back to having both of us Brits on the show and thinking about British-American relations, not just 1776 or the surrender at Yorktown or any of that, but afterward. One thing that's interesting about when we reflect on the American Revolution is it was a big deal that these colonists, this ragtag band, later with some help from the French, beat the world's biggest empire. But the world's biggest empire, the British Empire of the 1770s, was only just getting started. They lose the colonies, but then the one amazing thing about the British Empire is it kind of just re-metastasizes and gets way bigger than it was before. I mean, you know all this history. They were already making inroads in India. They still had the West Indies. They still had Canada. And then a few decades go by. They beat the French again, this time in the form of Napoleon. They get their colonies. They also have this thing called the Industrial Revolution. They do it before everyone else, including America. And so, right, by the 1850s, which is traditionally thought of as when the British Empire is in its heyday — it's this massive behemoth. And so it was one thing to beat them in 1776 to 1783. It would have been a whole different thing to beat them in the 1850s, which I think the Sepoys in India learned the hard way, with the uprising there and numerous other places. So it's almost like it's good that George Washington had his revolution then and not later, because it might have been even harder. I mean, that's a counterfactual that we could spend all day with. But I think also what was going on is, as America was figuring itself out and courts were figuring out what constitutionalism means and judicial review and all that, they'd hearken back to 1776 and 1787 and beating the British. But they'd also be like, that is the world hegemon. Everyone's going to talk about the world hegemon when they're trying to figure out what they do. And so I think it was more of a thing to discuss in 1850, even though it's decades and decades — everyone who fought in the Revolution basically is gone at that point — and yet, Britain is still very much the big cheese. It's up there in Canada, even. Whereas in, say, the 1950s, Britain is a spent power that we just had a war that we fought alongside with, but they're not that much anymore. And so why would you think about them?

S

Sam Gedge 39:55

Yeah, that actually makes a good deal of sense. I wonder, too, if there are these inflection points throughout the first 100 years or so where we're antagonistic to the British. Yeah, true. War of 1812. There's the Fenian invasion of Canada in the 1850s.

A

Anthony Sanders 40:08

Yeah, true.

S

Sam Gedge 40:08

War of 1812. There's the Fenian invasion of Canada in the 1850s.

A

Anthony Sanders 40:11

Was that the Pig War? Is that a different thing?

S

Sam Gedge 40:14

I'm not sure if it was the same thing as the Pig War. But even in the in the American Civil War, right, there was a lot of tension because the British were suspected of aiding in the Confederacy. So I do wonder if, once you get to the late 1800s, we finally kind of reach this point where we're more viewing them as allies than we have for the first 100 years, right? Where you have Winston Churchill's mother, as you know, is an American. And there's perhaps more — they're less of an evil foil and more of a common country separated by whatever it is, a common language or something.

A

Anthony Sanders 40:52

Yeah, you would. I mean, then the like the language of empires— calling them an evil tyrannical empire that you might say in the early days — there's still an empire in the 1930s, but you don't get that rhetoric in the same way. So one parallel that I made — I don't put this in the paper, but I came up with it — Sam, are you a football fan?

S

Sam Gedge 41:16

Nope.

A

Anthony Sanders 41:17

Okay.

S

Sam Gedge 41:17

And I don't apologize for it.



Anthony Sanders 41:19

This may be lost — I'm guessing any kind of football, so American, soccer?



Sam Gedge 41:26

Correct. I felt no need to to ask you to clarify which. I was comfortable saying no.

A

Anthony Sanders 41:30

All right. Well, so for American football fans, I made a parallel where the the British Empire is like the '85 Bears. So the '85 Bears, Sam — for your edification, I'm sure most people listening to this know all this, but you perhaps don't — the '85 Bears may be the best NFL team of all time. They had Walter Payton, Mike Ditka the coach, the Fridge, Jim McMahon at quarterback. They had this amazing team, and they were on this huge run winning all their games. Then, though, they go down to Miami, and Dan Marino, quarterback for the Dolphins, finds a way to pick apart their defense, and the Bears lose. So that is the only game that they lost in '85. After that, they pick themselves back up, they learn from their defeat, and they go on to win, and then they waltz into the Super Bowl and steamroll over the Patriots. So I think the British Empire is like the '85 Bears, and George Washington is like Dan Marino, in that they beat this world empire, this behemoth, that then went on to even greater things, bigger things. But we were able to figure that out and do it. And so I think the shadow of that achievement, right — the Dolphins haven't won a Super Bowl since then, but I'm sure all Dolphin fans are very proud of this one game because they were able to crack that nut, even if it was just for that one time. So anyway, that is how I've described this in my paper. But I want to end on a note from another work of history, and that is this book that some of you may have heard of: 1066 and All That. So 1066 and All That is a spoof history that, if you grow up in England and you're into history, you will know about this book. It's quite old now; it came out in 1930. But it is basically what people remember from history. So what these guys did is they went around to places like golf clubs or pubs or whatever, and they just asked people, "What do you remember from history class?" It might be someone who's my age and they haven't thought about history since they were 15 and learned it in school. "What do you remember about Henry the Second?" And then people remember all kinds of weird stuff that's not exactly accurate, and they write it all down and they make it funny. Anyway, it's a funny book. It's not very long. You can find it online, people. I'm sure you can find a PDF somewhere. So you should check it out. It's quite good, especially the little tests they have in here that are quite ridiculous. Anyway, the arc of the story is that the English history is England becoming top nation. So if something was good, if it helped England become top nation and, say, beat the French, it's bad if it got in the way of that. So John was a bad king because he lost the lands to the French, et cetera. The very end is the Great War, as they call it, because again it came out in 1930. And they discuss how there was this big war, and then the American president, Woodrow Wilson, went to the peace conference, and there were bad things after that, and essentially America was getting as powerful as Britain. So here's the very last chapter. I'm going to read the entire chapter. Here it is. Chapter 62, A Bad Thing. "America was thus clearly top nation, and history came to a full stop." That's the end. So I think that the kind of the story of Americans justifying judicial review, having this revolution, is that we did that, we experimented with it, we justified it to ourselves in contrast to that old evil empire, and then we became top nation and just kind of forgot why we did it. But we kept doing it. And even today, although we have our struggles that we complain about every week on Short Circuit, we still have judicial review, we still have judicial engagement, and we're damn proud of it.

S

Sam Gedge 45:53

Hear, hear.

A

Anthony Sanders 45:57

So, Sam, any stirring words for our listeners as they they they go off to their Fourth of July picnics?

S

Sam Gedge 46:05

Well, we should not forget another important anniversary, which is the 150th anniversary of the Battle of the Little Bighorn, which I believe, when our listeners are listening to this, will have been last week. I believe it was in late June of 1876. Something to reflect on.

A

Anthony Sanders 46:24

Wow, that's right. I don't know a lot about that battle, but I did listen to The Rest Is History's seven-part series on General Custer, and there was quite a lot to the Battle of the Little Bighorn.

S

Sam Gedge 46:37

Yeah, I mean, I think you probably know more than most people. I too listened to the the 25 parts series, and I feel like I learned a lot, although I've forgotten most of it.

A

Anthony Sanders 46:45

Yeah, it was a great victory, but then it's like they they lost anyway six months later or whatever it is.

S

Sam Gedge 46:53

Yeah, unfortunate.

A

Anthony Sanders 46:54

That is a sad chapter from American history that we won't dwell on. But we'll leave you with a very happy chapter 100 years before that. Thank you for sharing this with Sam and me. Happy Fourth of July to everyone! Happy Independence Day! Happy America's Big 250! And until next time, please be sure to follow Short Circuit on YouTube, Apple Podcasts, Spotify, and all other podcast platforms. And remember to get engaged.