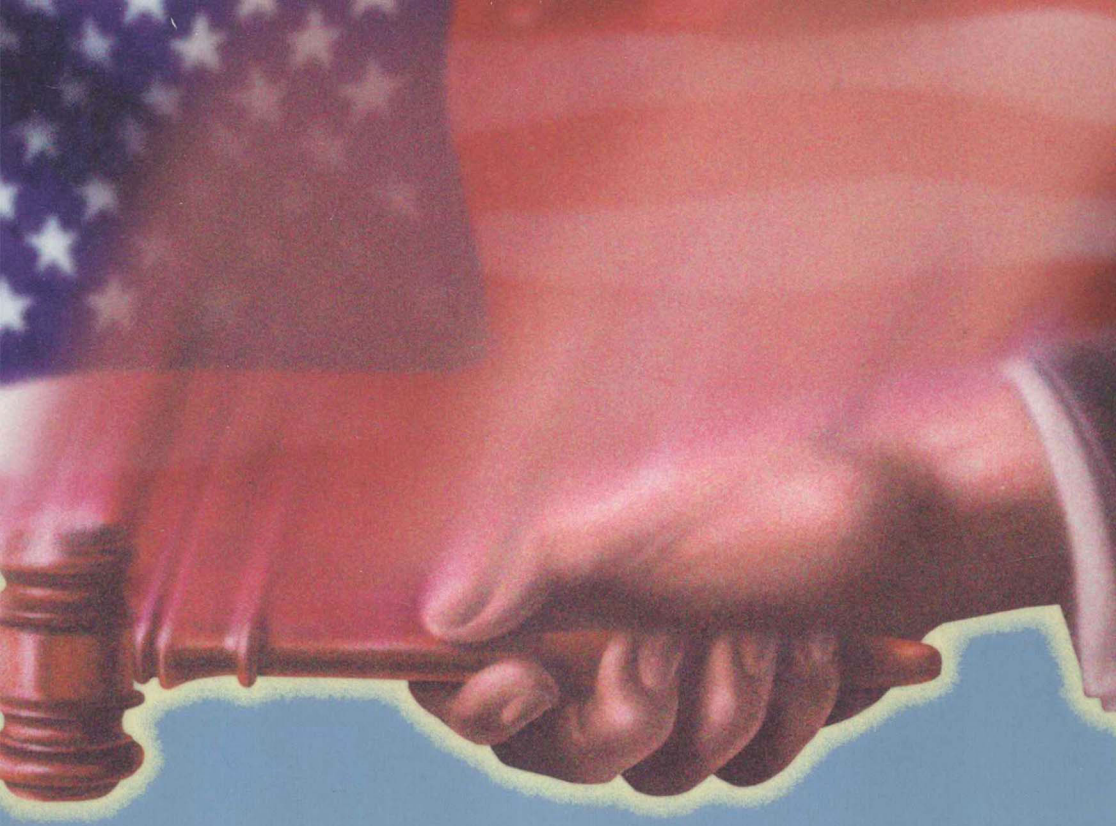

JUDICIAL MONARCHS

Court Power and the Case for Restoring Popular Sovereignty in the United States

WILLIAM J. WATKINS, JR.

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Foreword by William J. Quirk

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Foreword

by William J. Quirk

"Who is to decide?" is always the critical question. If you know *who* is deciding the question, you have a pretty good idea *how* it will be decided. America's law schools teach that the Supreme Court is the decider in constitutional questions. It interprets the Constitution for the other branches and the rest of us. It is the last word, it is the law of the land. If you don't like a Court ruling you have only two long-shot chances to reverse it: (1) convince the Court to reverse itself, or (2) get the Constitution amended. For all practical purposes, then, the Court's rulings are final.

Is this what the Founders intended? Bill Watkins, in his new book *Judicial Monarchs*, answers the question. He examines the evolution of sovereignty in the seventeenth and eighteenth centuries tracing the history from (1) Divine Right Sovereignty — the Stuart Kings, the Civil War, the beheading of Charles I, the Rule of Cromwell, and the dissenters; to (2) Parliamentary Sovereignty — coming to full form with the Glorious Revolution of William and Mary; to (3) Popular Sovereignty — from the seventeenth century English dissenters to the Declaration of Independence. Each of these stories is rich and fascinating in itself and together they enable Watkins to answer the question: Did the Founders intend our present system? Did they intend for the Court to have the last word? The big surprise is that the Founders intended exactly the opposite.

Watkins sets out to solve the biggest mystery surrounding the Founders' work in Philadelphia. There was no question the Constitution was to be written — England's unwritten constitution placed ultimate power in Parliament and the colonies were ill-served by it. But if everyone agreed the new Constitution was to be written that leaves open the big question:

Who is to interpret the words? The Founders were well aware of the power of interpretation, that the interpreter of a document — not the author — controls its meaning. So why were the Founders silent? Why did they fail to spell out who was supposed to interpret the Constitution?

What were the possibilities? They could have written down the system we now have. The Supreme Court interprets the Constitution and the other branches and the people follow. That would have been easy to draft and would have settled the issue without any further question. But there was something wrong with that approach. No one at the Convention believed it.

Another possibility, consistent with separation of powers theory, was that each branch interprets the Constitution for its own purposes. Thus, the Court, if necessary to decide a case, could rule on the constitutionality of a law. That finding, however, had no impact on the other branches unless they agreed with it. The point of the Revolution was not to replace a set of parliamentary rulers with judicial ones — it was to establish an experiment in self-rule. The Founders were not sure the experiment would succeed but as Jefferson said of Washington's view, "he would give his life to see it got a fair chance."

But the puzzle remains — if some form of judicial review was to be expected with a written constitution, why not specify what kind in the Constitution? The role of the judiciary on constitutional issues in England was simple — it was zero. What would it be here? Watkins' new scholarship is particularly helpful here. He has uncovered some state court decisions which answer the question. In several Virginia cases, the judges outlined their different approach of judicial review.

In *Caton* (1782), Edmond Pendleton noted that the separation of powers found in the Virginia Constitution required each branch of government to stay within its delegated powers. Could the judiciary exercise legislative power by overruling what the legislature passes? "[H]ow far this court ... shall have the power to declare the nullity of a law passed in its forms by the legislative power, without exercising the power of that branch contrary to the plain terms of that constitution, is indeed a deep, important, and, I will add, a tremendous question..." (*Commonwealth v. Caton*, 8 Va. [4 call] 5 [1782]). Judicial review, to Pendleton, appeared to violate separation of powers theory. Many Republicans believed exactly that.

Spencer Roane, in the 1793 *Kamper* decision, put judicial review in a different setting — since the Revolution the people were "the only sovereign power" and the legislature was subordinate to the people and constitution (*Kamper v. Hawkins*, 1793 WL 248, at *6 [1793]). The people had a right to alter the Constitution by a convention, but the legislature

enjoyed no such power. The legislature has no power to change the fundamental law. St. George Tucker, in the same decision, wrote that since the Revolution the people possessed "*sovereign, unlimited* and *unlimitable* authority" (*Kamper*, 1 Va. Cas. at 21 [emphasis in original]). Governments possessed only that authority delegated by the people. It followed, he thought, that the legislature cannot alter the Constitution "without destroying the foundation of their authority" (*Id.* [quoting Vattel, *The Law of Nations: Book I*, ch. III, § 34]). The judiciary, he thought, was obligated to find such laws a nullity.

Alexander Hamilton in *Federalist* No. 78, described judicial review in simple terms. It was a matter of principal-agent. The legislature, as the people's agent, could not exceed the principal's instruction. The Court, according to Hamilton, assumed the role and stood for the people to assure their instructions were followed. Hamilton offered the example that supposed the legislature passed a law requiring only one citizen to prove treason while the Constitution requires two. How could such a law stand? Hamilton does not, however, respond to the separation of powers issues raised by Pendleton. Of course, judicial review, if limited to the simple Hamilton-type example, would not be controversial. But nothing on the Supreme Court docket is simple.

The Convention's silence on the question, in view of Watkins' discoveries, is understandable. It set out each branch — Article I, the Legislative; Article II, the Executive; and Article III, the Judiciary. Separation of powers theory requires each branch to stay within its delegated powers. The judiciary is not authorized to exercise a legislative function — such as altering or repealing a law. If the Convention intended a result inconsistent with separation of powers theory, it would need to expressly provide for that. The Hamilton view, for example, would need to be spelled out since allowing one branch to perform functions belonging to another contravenes separation of powers theory. No special provision was needed if the Constitution intended to incorporate normal separation of powers theory, meaning each branch exercises the powers granted and interprets the Constitution for its own purposes.

Under separation of powers theory, each branch receives its power from the people delegated by them through the Constitution. The holder of a delegated power, of course, before he acts must decide whether or not the proposed action is within his grant. He may be wrong, but if he is, he's accountable to the grantor and no one else. The branches are separate and coequal and the grantor is the people; the executive and legislature are directly accountable to the grantor.

An example of separation of powers theory is Thomas Jefferson and the Alien and Sedition laws. In 1798 the Adams administration enacted the Alien and Sedition laws. The laws made criticism of the administration a crime — a number of newspaper editors were imprisoned. Jefferson, upon his election, released every person in jail or being prosecuted under the Alien and Sedition Laws. He later wrote to Abigail Adams that the law was a "nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image; and that it was as much my duty to arrest its execution in every stage, as it would have been to have rescued from the fiery furnace those who should have been cast into it for refusing to worship the image" (Letter from Thomas Jefferson to Abigail Adams [July 22, 1804], reprinted in 11 *The Writings of Thomas Jefferson* 42, 43–44 [Andrew A. Lipscomb & Albert Ellery Bergh, eds., 1904]). Nothing in the Constitution, Jefferson wrote to Abigail Adams, gave the judges power "to decide for the Executive, more than to the Executive to decide for them" (Letter from Thomas Jefferson to Abigail Adams [Sept. 11, 1804], reprinted in 8 *The Writings of Thomas Jefferson* (Paul L. Ford, ed., 1897]).

We know a good deal about the Founders. Is it plausible that they would want to create a judicial oligarchy? Madison's Notes of the Convention do not record Ben Franklin one day standing up and saying "I've got a good idea: Let's find nine really bright people and turn over most of our important decisions to them." Would the Convention authorize an institution that defines its own powers? Watkins' constitutional history makes this seem unlikely.

The Founders all referred to the Baron de Montesquieu as the "celebrated" Montesquieu. Montesquieu wrote *The Spirit of the Laws* which sets forth the theory of the separation of powers (1748). Montesquieu wrote, "Of the three powers..., the judiciary is in some measure next to nothing: there remain, therefore, only two..." (Baron de Montesquieu, *The Spirit of the Laws* bk. 11, ch. 6 [1748]).

The Divine Right of Kings, wrote the first Stuart King, James I, placed him just under God in the great chain of being. The people should realize that the King is "a Judge set by God over them, having the power to judge them but to be judged only by God..." (*King James VI & I: Selected Writings* 268 [Neil Rhodes et al. eds., 2003]). These beliefs led to the beheading of his son, Charles I, in 1649.

Following Cromwell, and the brief return of the Stuarts, the English brought in William and Mary for the Glorious Revolution in 1688. The Revolution established parliamentary sovereignty in its full form. Blackstone described it:

> It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations; ecclesiastical or temporal; civil, military, maritime, or criminal; this being the place where that absolute despotic power which must, in all governments, reside somewhere, is intrusted by the Constitution of these kingdoms....

The colonies' bitter experience with parliamentary sovereignty shaped our response. American theory denied the existence of any central ultimate sovereign power. Power could be separated and each branch so constructed that each branch would limit the other's power. Where there was conflict — the branches disagreed — it would have to be worked out. The Founders experiment involved two unique ideas: (1) can you limit power by words on a piece of paper?; and (2) the nature of power had always been indivisible — could it be divided into three parts that would not impinge on one another? Henry Adams, writing in the late nineteenth century, called the Founders' experiment the most fascinating in history even if it failed.

A major contribution of Watkins is his deconstruction of *Marbury v. Madison* (1803). Our law schools teach that this case establishes judicial supremacy. Watkins, however, explains that Marshall intended only to establish that the Court could rule on constitutionality to decide the case before it. He made no claim that the other branches needed to consider his ruling. Had he claimed any such thing, he would probably have been impeached. He answered the Pendleton question. Courts could declare laws unconstitutional if it was necessary to decide the case in front of the them. Marshall, in short, simply followed separation of powers theory. Our law schools need to assign the Virginia cases Watkins has discovered when students read *Marbury*. It is only understandable when placed in its historical context.

Watkins' book should change the way constitutional law is taught in our law schools. The Founders would be astonished to learn that their Constitution is currently interpreted to establish judicial supremacy. Watkins believes, like Jefferson, that the people are "the only safeguard of the public liberty." His book gives the people a roadmap on how to go about exercising their power.

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Preface

Who has the final say on what the Constitution means? Most citizens, lawyers, and judges will respond, "The Supreme Court of the United States." From high school civics to law school, Americans are taught that the Framers of the Constitution designed the Court to be the ultimate arbiter of constitutional issues and that Chief Justice John Marshall recognized this when deciding *Marbury v. Madison* in 1803. Lest anyone doubt these self-evident truths, the modern Supreme Court has expressly held that "the federal judiciary is supreme in the exposition of the law of the Constitution."[1]

Via judicial supremacy, the judiciary enjoys the final word on a host of "constitutional" issues. The courts make the ultimate decision on such diverse matters as affirmative action, abortion, and capital punishment. But is this role of the judiciary congruent with the first principles of America's creation?

To answer this question, we must travel back to our English roots and the constitutional framework that existed when the first English settlers began constructing the Jamestown colony in 1607. In the early seventeenth century, most English subjects recognized the king as the ultimate sovereign. James I and the Church of England emphasized that kings ruled by divine right and that subjects should dutifully submit to all of the king's decrees.

The Stuarts' abuses of power impelled many Englishmen to reexamine the locus of sovereignty. In the turbulent years of the English Civil War, heterodox opinions surfaced pointing to Parliament or the people as the source of power. After Oliver Cromwell's reign, these opinions were suppressed once the English monarchy was restored in 1660. Royal abuses, however, continued and England rejected divine-right theory in the Glorious Revolution of 1688. With the Glorious Revolution, Englishmen

recognized Parliament as the ultimate sovereign. To paraphrase the eminent jurist William Blackstone, Parliament could make or undo any law as it saw fit.

Parliamentary sovereignty became the bedrock of British liberty. But when Parliament began to meddle in the internal affairs of the North American colonies in the 1760s, the colonists challenged conventional ideas about ultimate power. On the eve of the American Revolution, Thomas Jefferson and other leaders contended that the colonial legislatures possessed ultimate sovereignty and that the king was the glue that held the empire together. Because neither George III nor Parliament would accept this formula, the American War of Independence began.

With the advent of independence, and based on prior American arguments, most assumed that the legislatures of the newly independent states would act as mini-parliaments and exercise ultimate power. Instead, ideas about the people's sovereignty, which were first concretely expressed during the English Civil War, took root in America. Americans rejected the notion that an artificial body such as a legislature could wield ultimate sovereignty. Starting in Massachusetts, the people used popular conventions to ratify written constitutions. Under these constitutions, legislatures, governors, and judges were but servants of the people exercising delegated powers.

At first, state court judges were unsure how popular sovereignty affected judicial functions. Blackstone had taught that Parliament was the master of the British constitution. British judges did not review Parliament's acts to determine constitutionality. Parliament, in some sense, was the constitution.

Moving cautiously, state court judges accepted that popular sovereignty mandated a form of judicial review, that is, the power of the courts to review decisions of other departments of government. The judiciary realized that it was a coequal branch of government bound to take note of relevant constitutional provisions when adjudicating a particular case.

By the time *Marbury* was decided in 1803, judicial review was widely accepted in the American states. If we read Chief Justice Marshall's opinion in the context of popular sovereignty and published state cases adopting judicial review, we see that *Marbury* did not declare the Supreme Court to be the final arbiter on the meaning of the United States Constitution. Following in the footsteps of state court judges, Marshall simply held that, as a coequal branch, the Supreme Court must take note of constitutional provisions when deciding a case or controversy. He also suggested that the Court must show deference to the elected branches of government.

Marshall's modest holding in *Marbury* has been twisted to cloak the

Supreme Court with preeminent power in the federal system. Beginning in the late 1800s, the Court claimed the power to judge the reasonableness of laws passed by the national and state legislatures. If the laws were unpalatable to a majority of the Court, they were struck down as unconstitutional. Little has changed in the twenty-first century.

Modern judicial supremacy has turned the clock back regarding sovereignty. Rather than a coequal branch of government, the Supreme Court resembles a divinely anointed monarch of the 1600s or the omnipotent British Parliament of the 1700s. Popular sovereignty — the legacy of the American Revolution — has been forgotten.

To remedy this situation, Americans must remember that judicial independence, to the founding generation, never meant independence from the people. State and federal judges are not high priests of the constitutional order. Just like governors, senators, and representatives, judges are mere agents of the people. When judges begin to make public policy decisions, they rebel against their masters and usurp power.

What can Americans do to end this rule of the judges? The final chapter offers several suggestions, including a revival of judicial restraint, augmenting the power of juries, mechanisms for the removal of activist judges or the nullifying of their policy determinations, term limits, popular selection of the Supreme Court, and use of jurisdiction-stripping provisions already in the Constitution. Some combination of remedies is needed to return the people to their proper place in our constitutional order.

CHAPTER 1

The Divinely Anointed Stuarts

In *Federalist No. 2*, John Jay marveled that Providence had blessed the people of the former colonies with a common ancestry, similar customs, and attachment "to the same principles of government."[1] Jay did not define the origin of these commonalties; such was unnecessary for his late-eighteenth-century audience. The majority of Americans traced their lineage to England, Scotland, Wales, and Ireland.[2] In the beginning of the struggle against George III, the colonists staked claims to liberty on "the rights of Englishmen." They invoked the British constitution and precedents from English history.

Although Americans took pride in their connection with British political and constitutional ideals, they did not desire to, nor did they, simply adopt British institutions and theories when setting up state governments or the national government. The most patent example is the executive branch of government. No independent state established a hereditary executive modeled on the British monarchy. The terms of state governors were limited and the state legislatures took on tasks formerly performed by royal executive officials. America's first national constitution, the Articles of Confederation, had no president exercising executive power. Congress performed all legislative and executive functions. Even the Constitution of 1787, although it established an executive branch, limited the president's term to four years.

Perhaps the most glaring departure from British theory and practice was the locus of sovereignty, that is, ultimate power. At the time of the American Revolution, sovereignty rested in the British Parliament. Parliament could make or repeal laws as it saw fit. This principle applied not only to statutory law, but to what we recognize today as fundamental law or constitutional law. America, however, took a different course and accepted popular sovereignty. The people, not the legislatures or other

artificial bodies, possessed ultimate power. Authority could be delegated to agents such as governors, representatives, or judges, but true sovereignty rested with the people.

The acceptance of popular sovereignty in the United States cannot be understood outside the context of English history and the conflict between Crown and Parliament. The English Civil War and Glorious Revolution set the stage for the American Revolution and radical ideas about the power of the people. Principles of popular sovereignty were first seriously debated during the 1640s in England. With the defeat of royalist forces and execution of the king, Englishmen examined the tenets of monarchical and republican theory. But for the instability of the Interregnum, theorists and soldiers arguing for popular sovereignty could have taken a tremendous leap forward in the realm of political science. Although unsuccessful in England, these heterodox theorists put forward ideas that would later take hold in America.

The 24th day of March in 1603 marked the end of an era. Elizabeth I had ruled England since her succession to the throne in 1558.[3] The daughter of Henry VIII, she was the last monarch of the Tudor dynasty. Her four decades of rule are associated with exemplary statecraft, exploration, imperial expansion, and myriad literary and cultural achievements. Under Elizabeth, Englishmen defeated the Spanish Armada, Shakespeare wrote masterpieces of the English language, Sir Francis Drake circumnavigated the globe, and the population enjoyed economic prosperity. Matching and maintaining the success of the Elizabethan Age would be a challenge for any successor.

Because Elizabeth had no children, her cousin James Stuart of Scotland was proclaimed James I of England shortly after her death.[4] At first glance, James appeared to be an excellent choice. Having ruled Scotland for 18 years before succession to the English throne, he did not begin his reign as a novice monarch. This long rule in Scotland made James at his ascension the most experienced English monarch since William the Conqueror. Subjects hoped that he could maintain the upward trajectory that the kingdom enjoyed under good Queen Bess.

James, however, brought much baggage along with him. He had been raised in a turbulent and dangerous period in Scottish history. When James was an infant, the Scottish nobility forced his mother, Mary, Queen of Scots, to abdicate.[5] The removal of Mary did not quell the dynastic rivalries. James lived under three regents before attaining the age of five, while the Scottish nobility fought for control over his person so they could govern

in his name.[6] From a young age, he realized just how precarious his existence and rule were. His mother's execution in 1587 further imprinted the uncertainty of life on James' psyche and he took to wearing padded clothes to aid his chances of surviving an assassination attempt.

James underwent a classical humanist education with an emphasis on politics, Greek, and history. In his religious studies, he received heavy doses of Protestant theology and the heroes of the Reformation. Two of James' tutors were close confidants of Reformation icon Theodore Beza, who followed John Calvin as the leader of the church in Geneva, Switzerland. Unquestionably, James' caretakers were grooming him as a possible successor to the Protestant Elizabeth.

Approximately two weeks after Elizabeth's death, James set off for London. As he traveled, the people greeted him with cheers, gifts, and bonfires. The English nobility also warmly received him and had high hopes for his reign. First impressions at court were favorable. Elizabeth's circle of advisors described James as alert, intelligent, and educated. The Act of Succession, obsequiously and somewhat correctly, described him as "a Sovereign adorned with the rarest gifts of mind and body in such admirable peace and quietness."[7] While these impressions were accurate, it did not take long for other characteristics to surface.

James quickly proved to be improvident with money. In 1604, he spent £47,000 on jewels — an amount that equaled his annual revenue as King of Scotland. James' entourage dwarfed that of Elizabeth and caused many to take note of his extravagant living.[8] Always one to take care of his friends, he spent approximately £30,000 per year on pensions for his favorites. Jewels, pensions, and other forms of reckless spending soon caused the government to accumulate extraordinary annual deficits.[9] Englishmen were also unhappy that many of the beneficiaries of James' munificence were Scots who had followed him to London. These Scots were soon the only individuals with ready access to the king.[10] Even high-ranking government officials complained about the difficulty in gaining an audience with their monarch.

Officials accustomed to the hands-on rule of Elizabeth were further disappointed to find the able James detached from the day-to-day affairs of government. The king made clear that he preferred not to be bothered with details or paperwork. In fact, James spent many weeks away from court, in the country, hunting. Horses and hounds were far more interesting to him than the affairs of state. The new king described hunting as "the most honorable and noblest" activity "in making a man hardy and skillfully ridden in all grounds."[11] Frequent trips to the country, according

to James, were necessary to maintain his health. He found London to be a dirty city and could not bear to spend long intervals there. He expected the Privy Council to keep the government running while he sojourned in his various hunting lodges.

The Stuarts and Divine Right

The government James inherited in England was based on the theory that the king exercised unlimited dominion over his subjects' lives and property.[12] This suited him inasmuch as he was a firm believer in the divine right of kings[13] and expected total obedience from his subjects.[14] James saw the realm as one great chain of being[15] in which he occupied a spot just under God. His brand of divine right consisted of four elements: indefeasibility of hereditary right, accountability of kings to God alone, nonresistance of subjects, and divine ordination of monarchy as a governing institution.[16]

In 1598, James wrote *The True Law of Free Monarchies*, in which he discussed at length the relationship between a king and his subjects. He began his treatise by describing monarchy as the form of government "resembling divinity" and "approach[ing] nearest to perfection."[17] James reasoned that the institution of monarchy was founded by "God himself" with "the erection of ... monarchy among the Jews" in the Old Testament.[18] Accordingly, only monarchy is suitable for a Christian people expressing allegiance to Yahweh and his Son.[19] A king was no mere man, but served as "God's lieutenant in earth."[20] Subjects should realize that the king is "a judge set by God over them, having the power to judge them but to be judged only by God."[21] In other words, the people had no power to call a monarch to account for misdeeds — this power was reserved to God alone.[22] "I grant, indeed," lectured James, "that a wicked king is sent by God for a curse to his people and a plague for their sins; but that it is lawful to them to shake off that curse at their own hand, which God hath laid on them, that I deny and may do so justly."[23]

James' view of sovereignty and kingship was not novel. Many of his points had earlier been made by Jean Bodin in *Les Six Livres de la République*, which was first published in 1576.[24] This book is the earliest known comprehensive discussion of the doctrine of sovereignty[25] and should serve as a starting point whenever the supreme power of governance is discussed.[26] In *République*, Bodin began with the proposition that a ruler "is absolutely sovereign who recognizes nothing, after God, that is greater

than himself."[27] Sovereign princes were, in Bodin's words, God's "lieutenants for commanding other men"; therefore, "[c]ontempt for one's sovereign prince is contempt toward God, of whom he is the earthly image."[28] For Bodin, there were seven prerogatives of sovereignty: (1) declaring war and peace, (2) hearing appeals from inferior officials, (3) removing and appointing government functionaries, (4) imposing taxes, (5) granting pardons, (6) coining money, and (7) requiring subjects to swear loyalty oaths.[29] One who could exercise the prerogatives was a sovereign or lawgiver.[30]

Bodin recognized that a sovereign might delegate certain functions to others. Such delegation, however, could not make the possessor of the authority "sovereign." These officials "are but trustees and custodians of power until such time as it pleases" the true sovereign to reclaim the grant.[31] "For just as those who lend someone else their goods remain its owners and possessors, so also those who give power and authority to judge or to command, either for some limited and definite period of time or for as much and as long as it shall please them."[32] If it were otherwise, Bodin argued, then the subject could control his lord — an "absurd" result.[33]

Importantly, Bodin believed that the prerogatives of sovereign power were "indivisible."[34] Only one entity could possess the seven prerogatives and this sovereign authority could "not [be] limited in either power, or in function, or in length of time."[35] If sovereign prerogatives were divisible, the supposed co-sovereigns would clash until one prevailed as the ultimate sovereign. Bodin did recognize that the sovereign entity could be one man (monarchy), a few elite (aristocracy), or the entire people (democracy).[36] But the tenor of his work is geared to that of a monarchy — the system with which he and his contemporaries were most familiar.

Although Bodin spoke of absolute sovereignty, he believed that natural law placed certain limits on the sovereign's power.[37] Precise natural law principles are difficult to define, but Bodin claimed that at a minimum the natural law required a sovereign to respect the property of his people. According to Bodin, "If the prince, then, does not have the power to overstep the bounds of natural law, which has been established by God, of whom he is the image, he will also not be able to take another's property without just and reasonable cause — as by purchase, exchange, lawful confiscation."[38] If the king did violate the natural law by wrongfully depriving a subject of his property, the only remedy was a polite remonstrance. The real wrong, in Bodin's mind, was to God. Thus, the subject was forbidden to resist the sovereign prince in cases where natural law had been violated.[39]

The Bodin and Stuart view of royal authority and its association with the Creator of the universe was hammered home by the English clergy.