

KEN I. KERSCH

Review of *Law and Judicial Duty* by Philip Hamburger (Harvard University Press, 2010)

“The history of judicial review is one of America’s latter-day creation stories,” Philip Hamburger insists in this painstakingly intricate legal-historical excavation, recovery, and restoration (606). The creation myth holds that the power of judges to assess and void legislation for unconstitutionality was boldly invented—without clear authorization—by U.S. judges (*locus classicus*: John Marshall’s opinion in *Marbury v. Madison* [1803]). In *Law and Judicial Duty*, however, Hamburger argues that the focus on judicial review as a “power” held by judges is theoretically and historically misleading, since the practice is properly understood as only a small part of what really matters: the “duty” of the judge, as a function of his office, to declare government actions void as contrary to law. Hamburger’s big book is devoted almost entirely to parsing what many nonexperts will consider a small—and remarkably arcane—distinction between “a judicial power to hold statutes unconstitutional” and “a duty of judges to decide in accord with the law of the land” (2). Hamburger assembles almost seven hundred pages of evidence from English and early American legal history to demonstrate, again and again, this single point.

The practice was not expressly authorized because, in swearing an oath to do their duty, it was simply presumed—in the United States (pre- and post-independence), but also by the nation’s English progenitors—that judges were obligated to apply the law. Hamburger’s book documents “the frequency and unselfconscious ease with which judges [at all levels] handled constitutional law” (477), and considered themselves “obliged,” as matter of their routine duties, “to hold acts of governors and legislatures unconstitutional” (579).

Much of *Law and Judicial Duty* is devoted to demonstrating that there was a long-standing requirement in England that subordinate law—including not simply legislation (of which, the farther back one goes, the less there was), but customs, corporate bylaws, and so forth—be consistent with the (customary)

constitution: that is, lawful. While oath-taking, duty-bound judges did void that which was unlawful outright, most often (and less dramatically) they simply declined to give it effect—perhaps, subtly, in cases of uncertainty, by “discerning,” “expounding,” or interpreting it in ways that were consistent with lawfulness. Since traditional histories of judicial review look only at cases where judges explicitly voided legislation (and not royal acts, corporate charters, actions taken by other judges, low-salience local legislation, and so forth), they systematically miss judicial behavior of precisely the same *genus*, effected in these other, less visible ways. The unaccountably disregarded peculiarities of the English constitutional system are also relevant. The review of Acts of Parliament could never entail judicial review in the American sense because, besides being a legislature, Parliament was simultaneously the realm’s highest court. As such, its decision to enact a statute was functionally akin to a judicial assessment that that statute was constitutionally lawful. Judges duty-bound to apply the common law—of which the ancient, customary constitution was a part—moreover, evaluated subordinate acts by the “golden and straight metwand” of law, and reason (139), but had no authority to second-guess the reasonableness of acts of the sovereign (Parliament). “[A]t least by the last half of the seventeenth century,” Hamburger explains, “what distinguished sovereign acts was not that they could escape judicial scrutiny, but rather simply that they stood beyond reconsideration for their conformity to reason and justice.” As such (Parliamentary) sovereignty was a barrier to reconsideration in light of reason and justice, not law (396–97).

Hamburger emphasizes that, by the terms of their oaths and offices, judges had considerable authority—but only within a highly circumscribed sphere. They were charged with applying the law pursuant to “independent judgment”—“an exercise of intellect or understanding free from any intrusion of will” (101). Only “when the judges expounded the law, including the constitution, in the course of doing their duty . . . could [they] speak with the authority of their office.” The principle of judicial independence, by these lights, implicates not external considerations of the separation of “powers,” but rather the internal independence of the judge striving to extricate himself from his own will. Put otherwise, it is a matter of the judge’s soul, where the faculties of will and judgment are locked in eternal battle.

Hamburger reiterates the high—indeed, divine—nature of this duty. In taking their oaths, judges “united worldly law with sacred obligation,” he reminds us repeatedly (102), and thus bound themselves “by an obligation that reached from the law of the land all the way up to heaven” (106). Through the subjugation of their own will (as Hamburger notes in describing one

North Carolina judge), they “[find] an internal freedom within [their] duty.” When they did so, judges were “happy in the persuasion that [their] conduct met the approbation of . . . God!” (519). Common law judges worried incessantly about the intrusion of will or passion into their work, as exemplified by the anguished, anxious, but “sanctified” Matthew Hale, who constantly interrogated himself on the menace of his own passions, asking, “Was there never any . . . partiality in my heart?” (172).

This sense of divinely-ordained duty fortified the resolve of English judges, in applying the law, to stand up even to kings. This brought them into conflict with Tudor and Stuart monarchs, who understood the judges as subservient to the royal will in all things. Common lawyers, however, understood monarchs as enjoying authority only within compass of the law of the land. Common law judges, with their sense of “divine obligation to decide in accord with human law. . . [were bound to] rise above the king’s will and even above their own to decide in accord with their country’s law, including its constitution” (102). As the English kings inclined toward absolutism, English judges increasingly trumpeted their (internal) independence, with Edward Coke’s dismissal by James I in 1616 being a crucial episode. As part of the process of girding themselves in this fight, judges increasingly narrowed their field of operation to deciding (triadic) cases, while more confidently claiming greater authority within that sphere. The Revolution (1688) confined the Crown to lawful governance, and English judges were newly granted commissions on good behavior.

As the political threat from the Crown waned, common law ideals of judging were newly menaced by rival academic ideals rooted in the medieval, hierarchical, natural law tradition. Although these ideals, characterized by their strong universalistic claims, were of course long-standing, post-Glorious Revolution judges were uniquely free to integrate them into their rulings. Common law understandings, which considered man the source of law, arose out of modern concerns about the ability of mortals to discern, and to reach agreement on, the nature of the reasonable and the true. The fiction of the common law—the law of the land—was that it comprised “an ancient, original constitution” by which people had simultaneously authorized and limited their government “so deeply lost in the past that it survived only in later custom and statutes” (91).

Academic (“learned” or “scholarly”) ideals, by contrast, understood law as the embodiment of reason and justice—as moral principles—the same principles upon which all legal obligation rested. The exemplar in the English tradition of the academic judge, Lord Mansfield, was adept at spotting lacunae

in the law, which he seized upon voraciously to do what was right, just, and useful, beyond the common law's confines (see, for example, his antislavery opinion in *Somerset v. Stewart* (1772)—not mentioned by Hamburger—or his creative adoption of the common law to further the development of an emerging commercial society, for which he was, and is still, celebrated). Mansfield's scholarly débouché provoked spirited rejoinders from defenders of the common law, like Lord Camden, who (in judicial opinions in 1765 and 1766) insisted: "It is better to leave the Rule inflexible than permit it to be bent by the Discretion of the Judge." On the one hand, "the discretion of a judge," he warned, "is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper, and passion. In the best it is often times caprice, in the worst it is vice, folly, and passion to which human nature is liable" (145–146). On the other hand, "The common law vision of judicial duty," Hamburger reports, "often troubled Englishmen whose university education in civil and canon law had left them with a low view of national custom and high expectations for reframing it within academic generalizations. The common law, like other national customs, seemed to them necessarily incomplete, uncertain, unjust, and thus in need of learned explication" (116). So things stood in England at the time of American independence. Hamburger argues that Founding Era judges in the United States fell squarely into the common law camp—though he concedes that, from the outset, there were strong popular currents fed by both "academic" and "populist" appeals to higher, natural law—particularly in (ostensibly aberrant) revolutionary contexts. One critical difference of course was that, animated by fears that constitutional liberty could be lost through either desuetude, sociological development, or transient, popular whim, Americans adopted written constitutions, in which the intended obligation was made manifest. This is further evidence for the proposition that "even when Americans alluded to the 'principles' of their constitutions, they tended to assume that these should be fixed and inflexible" (306). Simply put, American judges were not authorized to hold government acts unlawful for being infelicitous, unreasonable, or unjust (336).

Hamburger shows that common law ideals of judicial duty were important in both colonial and post-Independence America. Americans eyed the courts' (more flexible) equitable powers warily, understanding equity as being bound (like the common law itself) by fixed standards, "within the framework of what was already settled" (339). "[R]eliance on natural law and equity was very appealing as a means of avoiding injustice within the bounds of authority," Hamburger explains, "but it was not a roving commission to do

justice beyond the law—whether beyond its particular rules or more generally beyond its domain” (339). The Tory Lord Mansfield was denounced by Americans who “often shared the English Whig reaction to Mansfield’s eager use of lacunae and exceptions to unravel long-settled common law doctrines,” and “his distaste for the hard boundaries of the common law” (340). Among the most worried was Thomas Jefferson, who complained of Mansfield’s endeavor to make English law “more uncertain under pretense of rendering it more reasonable” (341). While some untrained judges might have elevated their ignorance of the common law to an ideal, and instructed juries to rule by common sense, most—even on the frontier—stuck to forms and enlisted utilitarian considerations, mostly “as evidence of intent, equity, or the common law” (341–42).

Through illustrative case studies from four different states (which he suggests readers might peruse in the alternative) emphasizing “the conceptual breadth of judicial duty” (391), Hamburger adduces evidence of judges (federal, state, local) exercising their duty in the United States through a variety of means (such as through judicial resolutions and advisory opinions) and in an array of contexts (for example, including, consistently, and from the beginning, in assessing the constitutionality of legislation). He observes that in voiding legislation, Americans did not flag what they were doing as in any way extraordinary: they were not asserting some new power, but doing their diurnal duty (408). For this, they occasionally faced popular opprobrium (typically in the populist venues of the lower houses of state legislatures). But, while some succumbed to populist pressures or blandishments, most were steeped enough in the requisites of their office to stiffen their backbones and do their job.

Law and Judicial Duty is an impressive and important book. But it is also partial, and evinces a strange, pre-modern sensibility. Hamburger’s central point—that judicial review must be understood in a broader context that emphasizes the practice as part of a broader duty of judges to follow the law—is a major contribution. His comparative assessment of divergent constitutional positions of judges in the American and the English parliamentary system, and its relevance to the roots of judicial review, is also arrestingly insightful.

That said, its account of the American political tradition—especially if we extrapolate it forward beyond the (early republic) period that Hamburger discusses—is, I think, misleading. *Law and Judicial Duty* is a powerfully learned lawyer’s brief for one (admittedly strong) strain in that tradition, particularly as it was carried on through (the self-conceptions of) a mainstream

of practicing lawyers. Hamburger is a careful enough scholar to note contrary strains along the way, but these he minimizes unduly.

For example, the appeal by judges (not to mention others concerned with law in democratic politics) to “academic” natural law in the U.S. constitutional tradition, while not constant, started very early and was extremely important, particularly when it came to questions of political inequality. Slavery of course was immensely important in this regard (the supposedly reviled “academic” judge Lord Mansfield’s antislavery decision in *Somerset’s Case* [1772] over time became a touchstone). Hamburger is right that the American legal tradition placed heavy emphasis on that nature of law as fixed and on the limited nature of a judge’s discretion. But others have demonstrated American law’s remarkable mutability as well. Leaving aside constitutional matters, legal historians from J. Willard Hurst on down have shown the degree to which U.S. common law judges, who, while frequently professing their adherence to fixity and common law ideals, performed exactly the Mansfieldian function of adapting the common law to the “release of [commercial] energy.”

In its insistence that questions of law be (hermetically) separated from considerations of power, the book is hostile to political science—not just to the discipline’s contemporary incarnations, but even as James Madison understood it (and, for that matter, going all the way back to Hobbes). Both the Federalists and the Antifederalists debated the creation of the Constitution’s Article III courts (and the outlines of the Constitution more generally) with the assumption that matters of power were at stake. Their frameworks of understanding were carried forward as a major theme in American politics and political thought, particularly when the judges, who admittedly often understood themselves as doing their duty to God by enforcing the law objectively, were perceived by others, including powerful political party coalitions, as systematically issuing erroneous or biased decisions that, more than coincidentally, advanced some sectors of society at the expense of others. For example, the first appointments to the federal bench, with lawyerly high-mindedness, might have understood themselves as brooding omnipresences; others, however, saw them as Federalists.

In (brilliantly, and effectively) countering the myth of judicial review, Hamburger manufactures a myth of his own, a declension story involving the corruption and decline of duty-bound judging, and the substitution of power for duty in understandings of the judicial role. But, as Hamburger himself acknowledges, if this is the case, the rot starts early, and in high places. Among the corruptors are Montesquieu (and Locke) “who . . . made it easier for

Englishmen and Americans to talk about the separation of judicial and legislative power as part of the broader separation of three parts of government” (403). Hamburger reports that “no one more vigorously espoused this challenge to traditional ideals of judicial authority than James Madison,” who, although he did not abandon the common law and judicial office and authority, “was not deeply attached to the distinctive authority of judges” (551). Madison “emphasized [a] balance-of-power justification [for the Article III courts] and minimized the degree to which it detracted from the distinctive authority of judges in expounding law” (552). Although his celebrated opinion in *Marbury v. Madison* lucidly set out the law-as-duty approach, John Marshall is yet another agent of decline from the purity of the lawyerly ideal.

That said, the fact that the term “judicial review” itself (coined by Princeton political scientist Edward S. Corwin) and the ascension of *Marbury v. Madison* to canonical status in constitutional law are relatively new departures (both are Progressive Era phenomena) does tell us something about the ways in which questions of the opposition between the judicial and legislative wills (or, put otherwise, between the judges and the people) have become distinctively foregrounded by modern constitutional thought. This opposition-of-powers model of judicial decision making has informed the entire project of modern constitutional theory, in which law school professors either reject the power of judicial review directly as unauthorized or antidemocratic, or (more commonly) vie with one another to fashion academic models that set the appropriate terms of interpretation by which judges will limit themselves (so as not inappropriately to trample upon the people’s will). But many forces have underwritten this new emphasis, from the rise of the statutory state, to the development of (populist, mass) democracy, to the emergence of modern (academic) legal education—not to mention the political science and politics of the United States from the nation’s Founding on down—which are just as relevant as the decline of any sense of “duty” on the part of judges.

Hamburger stridently insists on the autonomy, and primacy, of the legal—that is, as Hamilton famously put it in Federalist 78, on judges as unique creatures in the polity who (though, admittedly, they might occasionally, out of weakness, fall short) exercise neither force nor will but only judgment. Not blind to the world around him, Hamburger laments that “perhaps unavoidably, the ideals discussed here flourished during a long but nonetheless transient period when European and American society was sufficiently fractured that men turned to ideals of authority and will, but not yet so fractured that they were unable to take them for granted” (616). “In America’s less cohesive society,” he mourns, “and especially in its

cosmopolitan, academic law schools, the old assumptions about law and judicial duty have lost their strength and clarity and today are scarcely understood, let alone inculcated” (615).

Although its focus is resolutely historical, like the work of any A-list constitutional law professor, *Law and Judicial Duty* is likely to have contemporary policy relevance (and was probably intended to). Its pesky criticisms of James Madison et al. notwithstanding, the book dovetails nicely with “new originalist” approaches to constitutional interpretation, which (in keeping with the ascendancy of conservatives to power on the bench) no longer tend to emphasize judicial restraint *simpliciter* (as “old originalist” approaches, fashioned at a time when liberals controlled the federal courts, did), but judicial restraint when judges are not guided by law, objectively understood, and a stiff spine to do their duty when they are . . . *So Help Them God!* To be sure, Hamburger’s emphasis on the positivistic core of the common law ideals will not appeal to conservative evangelical, Thomist, and (West Coast) Straussian constitutional theorists, who remain very much partisans of the scholarly ideals this book depreciates. But the (positivist) common law ideals that constitute our richest heritage, by Hamburger’s account, are (only?) reliably upheld by believing judges, sworn to their duty, and fearing the wrath of God. This reintroduction of the belief in divine judgment into the mix will be music to the ears of a theistic political coalition fervently devoted to the redemption of the U.S. constitutional tradition.

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