the poor as the rich," in the words of Lord Chancellor Wolsey, resemble our own.

It is equally evident from the roll call of names and deeds that Hamburger summons forth from the past that the oath was never a perfect guarantor of judicial duty, and we might conclude for that reason that some of this was always window dressing, even when the religious aspects of the oath were at their most commanding for the judges who took them. But Hamburger still performs a signal service, both in reviving the importance of the oath in capturing a sense of individual judges' duties and pressures, and in resisting the conclusion that judges were and are governed only by will without constraint.

Although this is simply a magnificent book, it leaves the reader with one major regret. It is truly a shame that Hamburger's history draws to a close more or less in the age of *Marbury*. Hamburger makes a convincing case that it is a mistake to date the American experience of judicial review from 1803. But to evaluate some of the broader lessons about judicial review that Hamburger appears to want to take from the pre-*Marbury* history, it would help to know what has happened to judges' conception of their office and their duties in the two centuries since then. At more than 600 pages, Hamburger's book is perhaps long enough, but it would be dangerous to draw contemporary conclusions too strongly from this magisterial work without filling in that important gap. Perhaps we can hope for a sequel.

As this suggests, there is also room to cavil at Hamburger's conclusions, which are vague enough to be difficult to engage on their own terms but strong enough to leave room for doubt. Hamburger aptly observes that "the common law ideals of law and judicial duty" were less likely to flourish in an extended and diverse society like that of modern America. Our society may have less room for, and a murkier vision of, a set of "inexplicit assumptions" about "the authority of the people, the obligation of their intent, and the duty of the judges." And in a society in which the oath and other obligations are more bureaucratized, less personal, and less religiously grounded than they once were, words like "judicial duty" may become "little more than verbal snippets."

But it is a little too easy, I think, and a little too unhelpful, to simply conclude by lamenting that today's judges have lost sight of the "ideals of law and judicial duty," that "American judges have acquired a taste for power above the law." Hamburger is clear that yesterday's judges were not always paragons of judicial duty, and that the sticking power of their oaths can be appreciated only after viewing their work in a longer historical time frame. Certainly most judges today, a century after the rise of Legal Realism, still believe that they are attempting to do their duty and not simply exercise their will, even if the religious force of the oath no longer binds them as forcefully as it once might have. If they are wrong about this, so be it; but we might give today's judges, too, a couple of centuries before we are ready to speak too confidently about that. Nor will Hamburger's lament for the lost power of the oath, and of the concept of judicial duty, be very helpful if readers conclude that the remedy can only lie in retrieving an unrecapturable past. It may be that we can find new ways of hearing, understanding, and living up to the judicial oath. I believe we can. But that will take an act of imaginative reconstruction, building a new sense of the oath on a mix of ancient and decidedly modern values; it will not succeed by dint of mere nostalgia.

Still, there can be no doubt that *Law and Judicial Duty* is a monumental work. Anyone who wants to enter today's debates over judicial review would be well advised to first share Hamburger's journey into the old debates on these very questions.

The Law Market

By Erin A. O'Hara & Larry E. Ribstein

*Reviewed by Thom Lambert**

French political economist Frederic Bastiat once had a "market epiphany" of sorts. In chapter 18 of *Economic Sophisms*, he describes a thought he had on a visit to Paris:

> I said to myself: Here are a million human beings who would all die in a few days if supplies of all sorts did not flow into this great metropolis. It staggers the imagination to try to comprehend the vast multiplicity of objects that must pass through its gates tomorrow, if its inhabitants are to be preserved from the horrors of famine, insurrection, and pillage. And yet all are sleeping peacefully at this moment, without being disturbed for a single instant by the idea of so frightful a prospect.

The Parisians slept soundly, Bastiat realized, because they had confidence that markets—individual actors' exchanging goods and services for the primary purpose of benefiting themselves—would supply precisely what they needed for survival and comfort. Indeed, in a modern market economy, a consumer can buy just about any commodity or service she needs or desires, and a supplier can accumulate tremendous wealth by catering to consumers' wishes.

With this view in mind, the message of *The Law Market*, a new book by law professors Erin O'Hara (Vanderbilt) and Larry Ribstein (University of Illinois), is fundamentally optimistic. O'Hara and Ribstein argue that under contemporary choice-of-law rules, individuals and businesses are largely able to choose the law governing their lives, that this ability to choose puts pressure on governments to supply desirable legal regimes, and that this combination of demand and supply generates what is effectively a market for law. Because markets generally enhance human welfare, the law market's emergence seems worthy of celebration.

The bulk of the authors' argument, however, is positive rather than laudatory. First, they purport to show that people do, in fact, largely choose the law that will govern their affairs. They do so in at least two ways. First, they select their location—that is, they avoid those jurisdictions whose law they dislike or would like to avoid, and they pursue contacts with jurisdictions whose law they favor. Second, they design the laws that govern them by inserting choice-of-law or choice-of-forum clauses into their contracts. Nowadays, such clauses are widely enforced.

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This second act forms one of the most interesting discussions in the book. One might expect that forum courts would be reluctant to apply foreign law (pursuant to a choice-of-law clause) or to cede jurisdiction (pursuant to a choice-of-forum clause). But courts face pressure from exit-affected interest groups--local groups whose interests will be adversely affected if businesses exit or avoid the state because they cannot bargain for the legal rules they find desirable. Local lawyers specializing in franchising, for example, would lose business if franchisors avoided their state because its franchise laws were deemed unfavorable and the franchisors were unable to contract for another state's law. Those exit-affected lawyers would lobby for enforceable choice-of-law clauses. Their pressure may generate legislation requiring judges to enforce such clauses, and even absent such legislation, judges would likely respond to the exit-affected group's political pressures because the judges are beholden to the state legislature and, in many states, are themselves elected.

Moreover, there is the availability of arbitration as an alternative to adjudication. The Federal Arbitration Act (1925) binds both state and federal courts to enforce arbitration provisions in contracts. Because parties have a broad right to opt for arbitration (in which they can largely choose their governing law) if they disfavor a state's substantive law and are not permitted to choose the law of another state, state courts have little incentive to insist upon applying their own law. Doing so will simply motivate parties to include arbitration provisions in their contracts. Thus, in a world with liberal rights to select arbitration, state courts are more likely to honor parties' other choices concerning judicial forums and applicable law.

The downside of a broad ability to opt out of a forum state's law is that it impairs the state's ability to impose even sensible, "good" regulations. Thus, O'Hara and Ribstein maintain, "the challenge is to foster the beneficial aspects of the law market with enforcement of choice-of-law clauses while simultaneously protecting states' ability to impose reasonable regulation." Current choice of law rules attempt to strike the appropriate balance by taking into consideration parties' contacts with the state whose law is selected and the public policy limitations of states with a greater interest in the parties' dispute. The governing choice-of-law principles are, however, clumsy and unpredictable, providing parties with little ex ante guidance.

O'Hara and Ribstein therefore conclude by proposing a federal choice-of-law statute that would enhance predictability while striking an appropriate balance between parties' desire to select their governing law and states' need to regulate. Under the proposed statute, states would be required to enforce contractual choice-of-law provisions unless a state statute explicitly provided otherwise. This approach, the authors argue, would permit state legislatures to declare certain state laws "super-mandatory" (i.e., incapable of evasion by a contractual choice to be regulated by another state's law). At the same time, the presumption is that choice-of-law and choice-of-forum clauses are enforceable, and the requirement that exceptions to that presumption be set forth in statutes rather than by judges making decisions in particular cases would "provide[] clear notice to companies that a particular state will not allow them to choose their governing law" on a particular matter. Armed with such notice, firms may "respond by altering their business practices or exiting that state's product markets." The proposed statute, in short, would make the existing law market more efficient by reducing the costs of adjudicating whose law governs and providing predictability to parties.

Given the obvious and substantial benefits markets provide, one might expect *The Law Market* to assert the normative argument that individuals *should* be able to employ choice-of-law clauses to "buy" their governing laws from competing jurisdictions. But O'Hara and Ribstein aim to speak positively rather than normatively. They describe the existing law market, highlight the difficulty it can create for states desiring to regulate harmful activities, and explore how parties choose, or could choose, applicable law on a number of matters ranging from corporate governance to payday loan terms to same-sex marriage. The only major normative argument expressly asserted by the authors is that the U.S. Congress ought to streamline the existing and inevitable law market by enacting the federal choice-of-law statute mentioned above. Notably, the authors do not take a position on whether parties *should* be able to opt out of state laws they find overly chafing.

Yet one cannot read *The Law Market* without detecting an affinity for private ordering over regulation. Indeed, in a recent discussion of *The Law Market* on the popular Conglomerate weblog (http://www.theconglomerate.org), University of Virginia law professor Paul Stephan referred to "the normative impulse that lies at the heart of *The Law Market,*" confessing, "the extent of the normative ambition of *The Law Market* leaves me breathless." He then went on to discuss the authors' normative "argument that individuals ought to be free to form the kinds of family unions they wish in jurisdictions that allow them to do so, and that other states should respect those choices when members of those unions later move." Similarly, Professor Joel Trachtman of Tufts observed that O'Hara and Ribstein "do not argue that free choice should be the rule, but they argue … that it should be the rule more often (implicitly asserting that under current conditions it is not the rule enough)."

Responding to these characterizations of *The Law Market*, Professor Ribstein, purporting to speak for his co-author as well, wrote that "[t]he book is almost entirely a *positive* analysis of the market that we in fact have—*not* a *normative* argument in favor of having such a market." He continued:

> The central question in the book therefore is *not* whether parties *should* be able to *choose* the applicable law, but whether and to what extent they should be able to make that choice *by ex ante contract*. The book's sole normative conclusion is not that choice is good, but that contract is a better analytical starting point in making this choice than any other alternative that has come along.

This reluctance to concede the normative commitments that Professors Stephan and Trachtman (and I) inferred is curious. In his Conglomerate response, Professor Ribstein maintained that he and O'Hara had eschewed an assertion that parties should be able to contract for their governing law because the authors "were not prepared to offer the normative framework that would support that conclusion." (Indeed, Professor Stephan's primary criticism was that O'Hara and Ribstein had not adequately

defended the book's implicit normative commitment by "fully assembling the case for liberty and autonomy.") It seems to me, though, that O'Hara and Ribstein have made a fundamentally normative argument, that the normative position they endorse is both right and necessary to support the federal statute they propose, and that clarifying the scope of the law market would have eased the authors' burden of justifying their implicit normative commitment.

Currently, contractual choice-of-law clauses are generally enforceable unless the parties have no connections to the jurisdiction whose law is chosen or unless enforcement would undermine a fundamental policy of the jurisdiction whose law would govern but for the contractual provision. O'Hara and Ribstein have argued for a rule that would presume the enforceability of choice-of-law clauses unless the legislature of the forum state has provided by statute that its own substantive law on the matter at issue is "super-mandatory." If, as seems likely, the O'Hara/Ribstein statute would result in the enforcement of more choice-of-law clauses than does the currently applicable approach, then the recommended statute implicitly favors expansion of parties' ability to choose their own law.

Moreover, to the extent O'Hara and Ribstein seek to justify their proposed choice-of-law rule on grounds that it will generate jurisdictional competition that will produce better laws, they are at least implicitly setting forth a normative argument that parties generally *should* be able to choose the law governing their affairs. In his comments on the Conglomerate weblog, Professor Ribstein insisted that the book did not assert "that regulatory competition results in 'superior' law." But consider this passage from the book's final chapter:

> We have shown how this market can discipline lawmaking by forcing states to compete with each other. Moreover, contractual choice of law better enables states to experiment with alternative solutions to difficult policy problems. Enforcing choice-of-law clauses will help legal improvements to evolve more quickly and effectively.

Is that not a (compelling!) normative argument in favor of enhancing individuals' ability to choose their governing law? And do the authors not *need* some sort of "law improvement through jurisdictional competition" argument to justify the fairly significant federal intrusion their proposed federal choice-of-law statute represents? Absent the benefits of jurisdictional competition, the case for the proposed statute rests on the benefits of easier adjudication and enhanced predictability for contracting parties. Those are, of course, substantial benefits, but the case for the proposed statute becomes far more persuasive if supplemented with the normative argument that it will ultimately facilitate law-improving jurisdictional competition.

While I would have preferred that the authors embrace more fully the benefits of the law market whose existence they document, I am admittedly inclined toward private ordering and skeptical of state intervention in private affairs. (My own skepticism arises primarily from two sources: a Hayekian belief that centralized regulators are not privy to the time- and place-specific information needed to direct resources in a way that maximizes human welfare and a Public Choice-informed belief that legislators and regulators remain rational self-interest maximizers when they step into the public arena and therefore make decisions that inure to their own, and not necessarily the public's, benefit.) Perhaps O'Hara and Ribstein wanted to avoid "preaching to the choir" and therefore sought to craft an argument that would appeal to readers who, unlike me, are not generally skeptical of government efforts to regulate private affairs. The back-and-forth between Professors Stephan and Ribstein on the Conglomerate weblog suggests that that impulse may have motivated the authors to temper their praise for the law market.

But the authors probably could have asserted normative arguments that would have appealed even to non-libertarians had they more explicitly defined the law market's domain. To see its limited, albeit quite broad, domain, consider the various ways legal duties arise. Some duties (e.g., most tort duties, criminal law obligations, health and safety regulations, and property use restrictions) are imposed from the "top down" by judges or legislators seeking to protect the interests of innocent potential victims who do not have the opportunity and/or ability to engage in ex ante contracting with their potential victimizers. Other duties (e.g., contract obligations, marital duties and rights, the obligations of members of business organizations, property transfer duties, even product liability and medical malpractice duties, which may be conceived of as creatures of contract) are created from the "bottom up" as parties assent to be bound in a certain manner. Contractual choice of law permits parties to select their duties falling into the latter category, in which ex ante contracting over duties is possible, but not the former, in which it is not. Thus, the law market's domain is limited to the realm of "bottom up" legal duties that are created by assent. Those duties generally are not aimed at protecting third parties who lack the opportunity to protect their interests via contract. The upshot of this limited domain is that, even with a vigorous law market, states have largely unfettered freedom to regulate to prevent harmful third-party effects.

The sort of regulation that cannot be impaired by the law market—that aimed at protecting innocent third parties (or preventing negative externalities)—probably represents the "most legitimate" species of regulation, the type of regulation that most people would agree lawmakers ought to be able to impose. Once one has removed such regulation from the scope of party choice, so that it is clear that the law market impairs states' abilities only to impose rules not aimed at protecting innocent third parties, the normative superiority of both the law market and the proposed federal choice-of-law statute becomes more apparent. Laws and regulations not aimed at avoiding adverse third party effects—e.g., those positing default rules for business organizations or purporting to shape citizens' preferences in some particular manner—are less likely to be welfare-maximizing than are the externality-regulating laws that parties cannot avoid via contractual choice of law. Thus, those more suspect rules should be immune from contractual evasion only where the legislature has mustered the political will to declare them super-mandatory (i.e., incapable of being evaded via a choice-of-law clause).

One of the most important metrics for evaluating the success of an academic work is the degree to which it sparks further questions. (Consider, for example, the scores of scholarly inquiries inspired by Ronald Coase's articles *The Nature of the Firm* and *The Problem of Social Cost*.) Evaluated along this dimension, *The Law Market* must be deemed a smashing success. Among the many questions it inspires are: To what degree have law markets, like commodity markets, accommodated the needs and desires of niche groups? How have law markets "punished" suppliers of inferior products? By what precise mechanisms are judges, especially those who are not elected, motivated to honor parties' choices of governing law? Can we better articulate substantive criteria for when courts should refuse to apply selected law? Inspired by *The Law Market*, I look forward to pondering those questions as I continue my own exploration of the law.

Judgement Calls: Principle and Politics in Constitutional Law

By Daniel A. Farber & Suzanna Sherry

*Reviewed by Donald A. Daugherty, Jr.**

Although it claims to reject interpretive schools on both the left and the right in favor of a "middle ground," *Judgment Calls* is another effort to propose a way to interpret the Constitution without relying on the publicly-understood meaning of the document's express provisions at the time they became law. The authors, Daniel A. Farber of the University of California-Berkley and Suzanna Sherry of Vanderbilt University, assert that they seek a way between strict constructionist theories, in which judges are wholly constrained by objective criteria, and a cynical legal realism, in which judges act as quasi-legislators reading the founding document in the way that satisfies their political preferences. Although *Judgment Calls* offers some interesting discussion, the book ultimately fails to deliver the promised middle way.

Farber and Sherry attempt to show an approach to constitutional interpretation that is both principled and flexible, and one that reconciles the democratic rule of law with the inevitability that judges will have some discretion. The book offers various examples of the strict, "overly principled" end of the spectrum (e.g., originalism, intratextualism, minimalism), but it is unclear who follows the "overly flexible," political school. In any event, Farber and Sherry explain how they believe judicial discretion can be exercised responsibly in constitutional decisionmaking, they describe the existing constraints that guide and contain such discretion, and recommend various improvements (e.g., favoring foxes on the bench over hedgehogs; enlarging the mandatory jurisdiction of the Supreme Court; emphasizing actual practice experience in hiring law school faculty).

The authors do not review the text of the Constitution in *Judgment Calls*, which could be explained by the fact that the book is an extended essay on the decisionmaking process generally, not a close consideration of what specific portions of the founding document mean as a legal matter. The authors write, however, that the absence of any textual analysis in their book is because the text "usually does not offer much in the way of either guidance or constraint;" this remarkable assertion reveals the authors' bias towards an overly flexible, political approach, undermining their claim of seeking some "middle ground."

A major assumption of *Judgment Calls* is that "[m]any key constitutional cases leave judges with leeway because the results are not clearly dictated by any source of constitutional authority, whether the language of the Constitution, its history or precedent." At the same time, the authors believe that "this leeway does not preclude reasoned decision making."

The authors write that when a constitutional question cannot be answered by the Constitution itself, the process must safeguard against judges "either freely imposing their own values or deciding cases on a purely ad hoc basis." Of course, they do not consider whether the Constitution's silence may mean that the issue is not "constitutional" as a threshold matter, but is left to the political processes and/or states for resolution. Nonetheless, *Judgment Calls* provides a worthwhile review of the constraints on judicial discretion that exist apart from the law itself, such as our hierarchical court structure, the give-and-take among members of appellate courts during the deliberative process, the public and scholarly scrutiny of judicial decisions, and the institutional pressure towards transparency in the reasoning that supports a court's holding. Under an originalist approach, these constraints serve to reinforce the law, which is what judges are supposed to be interpreting in the first place. But the safeguards identified by Farber and Sherry are useful, additional deterrents against judges who would otherwise be prone to follow their personal notions of the best policy.

The authors' thesis is that judicial decisions can be judged on the basis of "[a] standard of reasonableness—whether their readings of text are plausible, whether they consider all of the relevant factors (but not others), whether they acknowledge and adequately account for competing considerations, whether they articulate plausible distinctions and intelligible standards—in short, on the basis of the strength of their legal reasoning." However, the rub is whether that reasoning must adhere to the text's original meaning or, with the help of the many other "tools" purportedly available to the judge, can diverge from that meaning.

Where originalists believe in the primacy of the text as it was generally understood, *Judgment Calls* treats textual meaning as merely another tool in a judge's toolbox. As Justice Breyer has pointed out, he uses the same tools as Justice Scalia to arrive at a decision, but just has some additional ones.[1] Thus, the judge's toolbox may also contain, for example, "'evolving standards of decency,'"[2] rights that migrate into the Constitution without need of the Article V amendment process,[3] empathy for particular categories of litigants over others,[4] or foreign law.[5] Without fail, these extra tools help to construct decisions that happily coincide with the judge's own view of what the Constitution requires.

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