Book Reviews

Law and Judicial Duty

By Philip Hamburger

*Reviewed by Paul Horwitz**

Philip Hamburger's *Law and Judicial Duty* is an incredible book. Of the books I have reviewed in these pages in the last two years, it is simply the richest and best of the lot. Every constitutionalist, everyone interested in the history of the Anglo-American judicial craft, and everyone who cares not only about history but about contemporary debates over the nature and legitimacy of judicial review must read this book.

The debate over judicial review is not a uniquely American one, but it has reached dizzying heights (and, alas, depths) in this country. And it is not just an academic debate. In the United States, every judicial nomination, every landmark decision, and even many relatively trivial or momentary issues kick up the traces of the judicial review debate. Perhaps this is unsurprising in a nation about which Tocqueville once observed that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." And so questions that might have limited themselves to dry discussion in seminar rooms end up the stuff of sound-bites and blog comments. Do judges have the power to declare the law of the land? What gives them that right in the face of our representative system of government? Can courts overturn the duly arrived-at decisions of the political branches? And when they do, when are they being loyal to the Constitution, and when are they being "judicial activists?"

The discussion of these questions generally starts, if it does not stop—it never stops!—with Chief Justice John Marshall's opinion in *Marbury v. Madison*, which has traditionally been taken as the first decision setting out in full the power of the courts to hold both the executive and the legislative branches to their legal obligations, and to declare void an act of law that is "repugnant to the Constitution." For years, *Marbury* has been the case with which constitutional law professors begin their students' long journey into (and away from) the Constitution. That is not because *Marbury* states an unanswerable case for judicial review. To the contrary, constitutional law professors have begun with *Marbury* because they know a good target when they see one. Like many great (not good) constitutional law opinions, *Marbury* is magnificent but also deeply flawed. Any constitutional law professor worth his salt can easily spend a week belittling it, even if he comes to the conclusion (as most of us do) that there is something that just is *right* about it.

In recent years, a number of constitutional historians have questioned the received wisdom that *Marbury* is the germinal moment of American judicial review, finding traces of judicial review in a handful of federal and state opinions that preceded it. Hamburger thinks that is still not enough. His answer to the question of where judicial review began is like that of the lady in the Palmolive commercials: he looks at centuries of English and American jurisprudence and tells us, "You're soaking in it." Hamburger writes that his journey into English and American legal history convinced him that "'judicial review' is a misnomer and that what Americans in retrospect call 'judicial review' was a much broader and more interesting phenomenon."

Hamburger argues that Anglo-American judges have had an ancient "office or duty to decide in accord with the law of the land in all of their decisions." This did not just include what we would today think of as constitutional decisions, particularly in the American sense of decisions dictated by a supreme constitutional text. Rather, even before the birth of written constitutions as such, judges understood certain constitutional principles to be "the law of the land," and showed by their decisions that these principles could "render any unconstitutional government act unlawful and void." That did not include acts of Parliament, but it included many subordinate legal acts—and, once the scene shifted to the colonies and the new American nation, it brought legislative acts within the purview of the judicial office as well.

At the same time, in Hamburger's telling, the obligation to rule in accordance with the law of the land was not a freestanding license to do as judges wished. Implicit in the judicial office was a sense of "judicial duty." Judicial duty was at once "more general and more mundane than what has come to be understood as judicial review, and it therefore had greater authority and more balanced implications." Judicial duty simultaneously reminded judges of their duty to overturn unlawful actions and fortified them in the face of massive political pressure to the contrary, and "confined the judges to making such decisions in the same way they made any other decisions—in accord with the law of the land."

In marrying judicial duty to the judicial office, Hamburger reclassifies the question of judicial review not simply as a jurisprudential one, but as one that turns on "deeper anxieties about human nature." He places the judge as human subject at the center of debates over judicial review, in a way that is alive to both the judges' human virtues—their ability to "use their ideals to rise above their worst tendencies"—and their flaws, their final inability to "rise above the nature of men." If Hamburger's historical vindication of judicial review is not a perfectionist account, neither does it assume the impossibility of judges doing their duty as best they could in light of the obligations of their office.

Both the sense of authority and the sense of limitation that Hamburger finds in his judicial subjects are captured in a central idea—that of the judicial oath, which binds the judge to his duty in the very act of empowering him to decide. "A judge had a lonely task," Hamburger writes, "for by virtue of his oath, the obligation of judicial office rested on him as an individual. Not the judiciary, nor even a particular court, but each judge took the oath of office." Hamburger emphasizes the religious nature of the oath, and its consequences. The oath could not overcome all human imperfections, but it could straighten them, by reminding judges of a duty that "reached from the law of the land all the way up to heaven." Five centuries later, it is startling to see just how closely the judges' oaths, which required them "to administer justice indifferently, as well to

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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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