Response

The Lost Origins of American Judicial Review

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Introduction

Philip Hamburger's *Law and Judicial Duty*[1] is a considerable achievement. This Essay later undertakes some criticism of it, but this should be understood as engagement with a provocative and substantial piece of work. Hamburger's research in American archives has been dogged and ingenious; the book, notwithstanding its reliance on arcane sources, is accessible to generalists and well written; and Hamburger's central thesis is revisionist of conventional wisdom. Although this Essay points out some difficulties with the way in which Hamburger frames issues and the way in which he reads historical sources, those remarks should be understood in the context of my very favorable general reaction.

This Essay begins by situating *Law and Judicial Duty* in a line of counter-Progressive historical work, which is nearing the status of orthodoxy in American legal history. It then sketches the relationship of Hamburger's approach to the history of judicial review in America to other influential work on that subject. Finally, it seeks to extract the particularistic vision of the relationship between English and American constitutionalism that informs Hamburger's conclusions in

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1 PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008).

Law and Judicial Duty, as well as the normative premises embedded in that vision.

I. The Historiographic Setting of Law and Judicial Duty

At first glance, the idea that a book centered on the pre-American and Founding-era history of judicial review should have something in common with the recent literature described as "*Lochner* revisionism"[2] may sound wildly counterintuitive. But if one widens the historiographic lens, *Law and Judicial Duty* can be seen as within an emerging literature of counter-Progressive historical interpretation. That literature has been in existence since the late 1960s,[3] but has only recently become so prevalent that one might say it is poised to become a new orthodoxy.

In order to describe a counter-Progressive historiographical perspective, it is first necessary to describe a Progressive one. Progressive legal and constitutional historiography began as early as the 1920s,[4] and can in some respects be seen as a byproduct of sociological jurisprudence and Realism, which came to be the dominant jurisprudential perspectives of the 1930s and beyond.[5] For the most part, Progressive historiography was written by historians or political scientists who either had no legal training or had chosen to attach themselves to history or political science departments. The classic legal and constitutional history works of the period from the late 1940s through the 1950s[6] were all written from a Progressive perspective.

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2 "*Lochner* revisionism" is a shorthand term for a series of historical works that have sought to detach themselves from an established characterization of the majority decision in *Lochner v. New York*, 198 U.S. 45 (1905). That characterization has portrayed *Lochner* as the embodiment of a now-discredited judicial approach to police power/due process cases in which the Justices engaged in substantive glosses on the Due Process Clause, creating doctrines such as "liberty of contract" to prevent Congress and state legislatures from regulating economic activity or redistributing economic benefits. *Lochner* revisionist works seek to strip a line of early twentieth-century substantive due process decisions of their notoriety by recovering the jurisprudential attitudes that informed them. The best general survey of the literature of *Lochner* revisionism is DAVID E. BERNSTEIN, REHABILITATING *LOCHNER* (forthcoming 2011).

3 *See, e.g.*, Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751 (1967); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, 61 J. AM. HIST. 970 (1975).

4 *See, e.g.*, HOWARD LEE MCBAIN, THE LIVING CONSTITUTION (1927) (arguing that the Constitution is not a fixed document, but changes over time based upon the views of those who interpret it).

5 *See* G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 99–135 (1978).

6 These include Oscar and Mary Handlin's and Louis Hartz's studies of the relationship between law and economic development in the early nineteenth century, James Willard Hurst's celebrated works on private law and economic growth, Alpheus Mason's biography of Brandeis,

Although Progressive historiography produced studies that were multifaceted in their emphasis, its practitioners held shared starting assumptions. American history was a clash of interests and classes.[7] Judging was an instrumental, ideological exercise.[8] Behavioralist analysis was the key to understanding judging.[9] Law was a "mirror of society": legal doctrine was a purposive (or unconscious) response to social conditions filtered through the lenses of political ideology.[10]

Progressive legal historiography was mainly about judicial decisions. Willard Hurst's work focused on statutes and administrative decisions as well,[11] but Hurst was an exceptionally gifted legal academic without professional training as a historian. In the standard Progressive narrative—made richer and more complex by the best practitioners—judicial decisions revealed the political biases of judges, their conservative ideologies, their identification with professional elites, and their general disdain, with some exceptions, for the common herd. The authorial voice in Progressive historiography was often an exposing, accusing voice, revealing that behind doctrinal cant and obfuscation lay powerful judicial urges to maintain the established order and to prevent outsiders from unsettling it.[12]

Arnold Paul's work on political ideology and constitutional law in the "Gilded Age," Carl Swisher's biographies of Chief Justice Taney and Justice Field, and Max Lerner's influential essay on the Marshall Court. *See* OSCAR HANDLIN & MARY FLUG HANDLIN, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774–1861 (1947); LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776–1860 (1948); JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS (1950) [hereinafter HURST, THE GROWTH OF AMERICAN LAW]; JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956) [hereinafter HURST, LAW AND THE CONDITIONS OF FREEDOM]; JAMES WILLARD HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836–1915 (1964) [hereinafter HURST, LAW AND ECONOMIC GROWTH]; ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE (1946); ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887–1895 (1960); CARL BRENT SWISHER, ROGER B. TANEY (1936); CARL BRENT SWISHER, STEPHEN J. FIELD, CRAFTSMAN OF THE LAW (1930); Max Lerner, *John Marshall and the Campaign of History*, 39 COLUM. L. REV. 396 (1939).

7 *See* CHARLES GROVE HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY (2d ed., rev. & enl. 1959).

8 *See* HANDLIN & HANDLIN, *supra* note 6; HARTZ, *supra* note 6.

9 *See* C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937–1947 (1948).

10 LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 10 (1st ed. 1973).

11 *See* HURST, THE GROWTH OF AMERICAN LAW, *supra* note 6; HURST, LAW AND THE CONDITIONS OF FREEDOM, *supra* note 6; HURST, LAW AND ECONOMIC GROWTH, *supra* note 6.

12 *See, e.g.*, HAINES, *supra* note 7; HARTZ, *supra* note 6.

A caricatured version of a Progressive narrative may incline one to doubt how such a perspective could have ever had any influence. But the dominance of Progressive historiography came at a deeper level. Seeing law as a "mirror of society," judges as political ideologues, American culture as a shifting clash of social classes and interest groups, and the whole process as elitist and alienating was quite natural to American academics whose formative political experiences had been the Great Depression, the New Deal, World War II, the Fair Deal, the New Frontier, and the Great Society. The Progressive historiographical paradigm so perfectly complemented the New Deal and post–New Deal political paradigms that it seemed beyond dispute. To take just one example, the claim that the Roosevelt Administration's effort to pack the Supreme Court in 1937 caused a "constitutional revolution" in which the Court abandoned *Lochner*-era scrutiny of progressive legislation for more deferential scrutiny, and at the same time altered its role from being opposed to the protection of civil rights and civil liberties to being their champion, is still routinely advanced in twenty-first-century popular history.[13] That the claim is empirically wrong in every particular[14] does not seem to matter because it has been so resonant. Progressive historiography assumed a connection between a threat to the Court from other branches and the Court's altered posture in constitutional cases because its practitioners took for granted that Justices exhibit the same sensibility as elected officials.[15]

As early as the 1970s, legal and constitutional historians began to question Progressive orthodoxy.[16] The earliest studies received considerable attention among specialists, but did not penetrate the canons of legal and constitutional scholarship, particularly among political scientists and legal scholars, until many years later. Morton Horwitz's celebrated first *Transformation* volume[17] was a departure from Progressive orthodoxy, but, in another sense, it cemented that orthodoxy because it recast Progressive assumptions from the mild liberal-cen-

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13 *See* BURT SOLOMON, FDR V. THE CONSTITUTION: THE COURT-PACKING FIGHT AND THE TRIUMPH OF DEMOCRACY (2009).

14 There was arguably no "constitutional revolution" at all in the late 1930s and early 1940s, and certainly none in 1937. Moreover, the Court's shifting posture on civil-rights and civil-liberties cases between the late 1930s and the early 1960s was not any more marked than shifts in decades prior to the 1930s. *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 5, 105 (1998); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 1, 4 (2000).

15 One of the more able Progressive commentators, the political scientist C. Herman Pritchett, stated that explicitly. PRITCHETT, *supra* note 9, at 19–20.

16 *See supra* note 3.

17 MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977).

trist form they had come to take in the late 1960s and early 1970s to a harder-edged, more radical form.[18] It would be nearly another decade—during which Critical Legal Studies had begun to lose its footing in the legal academy—before the assault on Progressive historiography began in earnest.

With Michael Les Benedict's 1985 article[19] on the *Lochner* line of cases, counter-Progressive revisionism began to stake out a position in one of the three most famous areas of American constitutional history, the substantive due process decisions of the allegedly conservative Court in the early twentieth century.[20] From that place, the growth of revisionism, when totaled up, has been astonishing. Nearly every major period in American constitutional history from the 1930s backward—the "*Lochner* era,"[21] the "Gilded Age,"[22] the Antebellum period,[23] the Marshall Court years[24]—has been reexamined; Progres-

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18 *See id.*

19 Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985).

20 *See id.* (arguing that laissez-faire constitutionalism received wide support in the late nineteenth century not because it protected economic privilege, but because it was based upon an accepted concept of American liberty). Benedict generalized insights that initially appeared in Jones, *supra* note 3 (depicting Thomas Cooley as a supporter of equal rights, rather than one motivated by economic liberty or the protection of property rights), and McCurdy, *supra* note 3 (asserting that Justice Field's government-business jurisprudence was based upon the American ideal of individual liberty).

21 The "*Lochner* era" is typically thought to extend until at least the late 1930s, so it encompasses part of the New Deal period. Revisionist works on that period include BERNSTEIN, *supra* note 2; CUSHMAN, *supra* note 14; OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910 (Stanley N. Katz ed., 1993); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993); Charles W. McCurdy, *The "Liberty of Contract" Regime in American Law*, *in* THE STATE AND FREEDOM OF CONTRACT 161–97 (Harry N. Scheiber ed., 1998); and WHITE, *supra* note 14. Horwitz published a sequel, THE TRANSFORMATION OF AMERICAN LAW 1870–1960 (1992), whose perspective was far more counter-Progressive than Progressive.

22 *See* MARK WARREN BAILEY, GUARDIANS OF THE MORAL ORDER: THE LEGAL PHILOSOPHY OF THE SUPREME COURT, 1860–1910 (2004); JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888–1910 (Herbert A. Johnson ed., 1995); FISS, *supra* note 21.

23 *See* CHARLES W. MCCURDY, THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839–1865, at 104–27 (2001) (analyzing depression-era constitutionalism in the 1830s and 1840s); *see also* Alfred S. Konefsky, *"As Best to Subserve Their Own Interests": Lemuel Shaw, Labor Conspiracy, and Fellow Servants*, 7 LAW & HIST. REV. 219 (1989) (analyzing Shaw's decisions in *Hunt* and *Farwell* as assertions of equal rights and freedom of contract, rather than as anti- or pro-labor); Alfred S. Konefsky, *Law and Culture in Antebellum Boston*, 40 STAN. L. REV. 1119 (1988) (book review) (discussing the role of lawyers during the Antebellum period as impacted by the economic, social, and intellectual climate of the time). An earlier revisionist perspective on judicial review in the Antebellum period appeared in William E. Nelson's *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790–1860*, 120 U. PA. L. REV. 1166 (1972). Carl Swisher's THE TANEY PERIOD 1836–64 (Paul A. Freund ed.,

sive assumptions have been challenged; and Progressive historiography has been revised. Only the Civil War and Reconstruction remain, and work is taking shape in those areas.[25]

Essentially, counter-Progressive scholarship is work that rejects outright, or seeks to qualify, *all* of the starting assumptions of Progressive literature. Counter-Progressive work assumes that describing American society as a shifting clash of classes and interests is simplistic and potentially pejorative, imposing anachronistic post–New Deal categories on past epochs. It assumes that judging is more than what the judge ate for breakfast or an imposition of the judge's instinctive

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1974), reveals the evolution of Swisher's perspective from his earlier biography of Taney, SWISHER, *supra* note 6.

24 R. Kent Newmyer's successive studies on the Marshall Court provide a good illustration of the decay of the Progressive perspective since the 1970s. The approach taken by Newmyer in THE SUPREME COURT UNDER MARSHALL AND TANEY (1st ed. 1968) was firmly within the canons of orthodox Progressive historiography. By contrast, Newmyer's biography of Justice Joseph Story, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985), was at least partially revisionist, and his JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT (2001) is a thoroughly revisionist treatment. Revisionist impulses can be seen as early as Robert Kenneth Faulkner's THE JURISPRUDENCE OF JOHN MARSHALL (1968) and the author's THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 14–34 (1st ed. 1976). See also the two volumes on the Marshall Court in the Oliver Wendell Holmes Devise History of the Supreme Court of the United States series, GEORGE LEE HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–15 (Paul A. Freund ed., 1981) and G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35 (Paul A. Freund & Stanley N. Katz eds., 1988), both of which discarded the Progressive approach.

25 Of all the periods in nineteenth-century American legal and constitutional history, that of the Civil War has been the least studied, in part because of the difficulty in determining what the Civil War era is, and in part because attention has been focused on military operations and a series of wartime cases. By far the leading treatment is SWISHER, *supra* note 23, and Swisher's coverage artificially ends in 1864, when Taney died and President Abraham Lincoln appointed Salmon P. Chase as his successor, *id.* at 577–88. Because no clearly discernible Progressive scholarship on the legal and constitutional history of the Civil War exists, revisionist work, for now, remains in the shadows. *But see* MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006); *see also* HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835–1875 (1982) (the first major effort to emphasize connections between Antebellum constitutional thought and the Reconstruction era).

As for Reconstruction itself, revisionist approaches include WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988), and, more recently, RONALD M. LABBÉ & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT (2003), and MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA (2003), a biography of Justice Samuel Freeman Miller, who served on the Court from 1862 to 1890. *See also* Pamela Brandwein, *A Judicial Abandonment of Blacks? Rethinking the "State Action" Cases of the Waite Court*, 41 LAW & SOC'Y REV. 343 (2007).

and class biases on public policy.[26] It assumes that judges are importantly constrained by legal doctrine, so that the relationship between law and current political ideology is delicate and complex.[27] And it assumes that law, far from being simply a "mirror of society," is, at any moment in time, in a dialectical relationship with American culture at large, so that law is both constitutive and reflective of its cultural setting.[28]

None of the counter-Progressive works cited above can be said to give each of those assumptions comparable weight in its coverage, nor to have explicitly endorsed each of the assumptions. If one reads between the lines, however, all of the assumptions can be said to be present. Historiographic orthodoxies are typically of very long duration. It has taken nearly a century for Progressive orthodoxy to crumble. But it is surely crumbling—perhaps on the verge of disintegration—in American legal and constitutional history.

What does *Law and Judicial Duty* have to do with all this? It is, quite simply, the first major counter-Progressive, revisionist history of judicial review in the Framing period. Of the three leading tropes of American constitutionalism—substantive versus procedural due process, race relations, and judicial review—only the race relations trope remains thus far mainly unscathed from counter-Progressive revisionism, although that is coming as well.[29] With *Law and Judicial Duty*, the counter-Progressive perspective invades, in a synthetic, comprehensive form,[30] perhaps the leading trope of all.

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26 *See, e.g.*, BAILEY, *supra* note 22 (asserting that the conservativism of the Supreme Court between 1860 and 1910 was based upon the Justices' beliefs in Enlightenment ideas and moral philosophy).

27 *See, e.g.*, GILLMAN, *supra* note 21 (arguing that judges striking down economic and social legislation after the Civil War were observing what they took to be a constitutional prohibition against class legislation, rather than simply promoting laissez-faire ideologies).

28 *See, e.g.*, MCCURDY, *supra* note 23 (demonstrating that law shaped the anti-rent movement in New York during the early nineteenth century, rather than merely reflecting the social changes that helped stimulate that movement).

29 *See* TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT (forthcoming Jan. 2011); RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007); ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM (2000); ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA (2008); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

30 As subsequently noted, several of Hamburger's insights about judicial review have been anticipated by other scholars, but not in the form of a comprehensive book-length synthesis. *See infra* notes 38–49 & accompanying text.

II. Law and Judicial Duty *and the Conventional Accounts of American Judicial Review*

Hamburger begins his book by describing the conventional "story"[31] about the history of judicial review in America. The story is an attempt to explain the puzzle at the heart of that history. That puzzle arises out of the decision on the part of the Framers of the United States Constitution to create a new form of government, a federal republic with separate tripartite branches, including a judicial branch, personified by a Supreme Court. They took pains to enumerate the powers of the respective branches and to design some of those enumerated powers to allow one branch to impose checks on the actions of others.[32] Then, having established a form of government that emphasized checks and balances and included a judicial department, the Framers said nothing about the power of the judiciary to review the actions of other branches on constitutional grounds. Did this mean that they did not *anticipate* the judiciary exercising constitutional review powers, or did it mean that they thought judicial review *beyond dispute* and thus unnecessary to particularize in a constitutional provision? Hamburger seeks to discover what the Framers "thought"[33] about judicial review and begins his analysis with an overview of previous historical accounts of that topic.

There are several versions of the story, Hamburger notes, but each of them rests on "the fragile assumption that there is little evidence of [the practice of] judicial review [being in place in America] from the decade and a half after 1776."[34] Hamburger finds that assumption anachronistic. He argues that the conventional narratives rest on a projection of the post–*Marbury v. Madison*[35] framework for

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31 Use of the term "story" in discussions of historical works typically suggests that the user of the term is seeking to undermine the claims being made as historical interpretation afforded the status of conventional wisdom. As Morton Horwitz once put it in reference to one of his own interpretations: "Is it just my story, with all the connotations of skepticism and subjectivity that the word 'story' implies?" HORWITZ, *supra* note 21, at viii.

32 *See, e.g.*, U.S. CONST. art. II, § 2, cl. 2 (delineating the role of the Senate in confirming judicial appointments and ratifying treaties made by the Executive).

33 I am placing that term in quotes because, of course, "the Framers" were not a unified group, and they "thought" multiple things about multiple issues. The term "thought," as Hamburger employs it, more properly refers to the set of background epistemological and intellectual assumptions which established a tacit framework from which they viewed jurisprudential issues. For more on the role of background assumptions in shaping the "thought" of historical actors, see G. Edward White, *The Text, Interpretation, and Critical Standards*, *in* INTERVENTION AND DETACHMENT: ESSAYS IN LEGAL HISTORY AND JURISPRUDENCE 35 (1994).

34 HAMBURGER, *supra* note 1, at 1–2. By "judicial review," Hamburger means "a concept of a judicial power to hold statutes unconstitutional." *Id.* at 2.

35 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

analyzing judicial review issues—a framework which posits that judges themselves decide the meaning and scope of their review powers—onto the world of Anglo-American jurisprudence prior to *Marbury*.[36] Hamburger's argument that the history of judicial review in American constitutionalism has been constructed by commentators over the course of American constitutional history is not novel,[37] but his detailed attention to a "lost history" of the concept of judicial review in seventeenth- and eighteenth-century England and America is unique.

Other scholars have sought to investigate the origins of judicial review in America, but none has produced so detailed an analysis of English and American sources as Hamburger.[38] In the course of developing that analysis, Hamburger criticizes four alternative accounts of judicial review's origins.

The early twentieth-century historian Charles Beard claimed that the Framers of the Constitution clearly intended to invest federal judges with the power to oversee the activities of state legislatures, but did not specifically authorize them to review state and congressional legislation on constitutional grounds, and so late eighteenth- and early nineteenth-century judges created their own review powers.[39] Beard's analysis bristled with the core assumptions of Progressive historiography. In his view, politically motivated elites, such as the Framers of the Constitution and federal and state judges, used their power over the course of the Founding period to restrict the potentially leveling tendencies of legislatures.[40] Judicial review allowed judges to participate in the restricting process.[41]

Another influential account of the history of judicial review, Hamburger concludes, is more sophisticated, but nonetheless anachronistic. The account, largely the product of constitutional historians, focuses on state cases in the years between the Declaration of Independence and the Constitution, particularly after 1781, when Ameri-

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36 HAMBURGER, *supra* note 1, at 8.

37 *See, e.g.*, Davison M. Douglas, *The Rhetorical Uses of* Marbury v. Madison*: The Emergence of a "Great Case,"* 38 WAKE FOREST L. REV. 375, 375–78 (2003); G. Edward White, *The Constitutional Journey of* Marbury v. Madison, 89 VA. L. REV. 1463, 1468–71 (2003).

38 There is a comparable but even more detailed analysis of English seventeenth- and eighteenth-century legal sources in PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010).

39 *See* CHARLES A. BEARD, THE SUPREME COURT AND THE CONSTITUTION 15 (1912); Charles A. Beard, *The Supreme Court—Usurper or Grantee?*, 27 POL. SCI. Q. 1, 1–3 (1912).

40 *See* Beard, *supra* note 39, at 31–33.

41 *See* sources cited *supra* note 39. For a more sophisticated version of Beard's thesis, see JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND LAW IN THE MAKING OF THE CONSTITUTION 175–76 (1997).

can political theorists, reacting to the close of the Revolutionary War, began to address the weaknesses of state governments and the Articles of Confederation.[42] In the account, the creation of judicial review is seen as part of a more general reassessment of the allocation of state and federal power, and of judicial and legislative power, in a republic.[43]

A third account of the history of judicial review that Hamburger finds inadequate is one constructed by legal scholars. It rests on the logic of judicial review, given the structure of the Constitution and assumptions about the way it was designed to function.[44] The account reasons that when the Constitution gave the judiciary the explicit power to decide "cases and controversies,"[45] it presupposed a body of law to apply to those cases, and the Constitution was itself a source in that body of law.[46] It followed that where another branch of government acted in a fashion that apparently controverted a provision of the Constitution, the judiciary, as Marshall put it in *Marbury*, could hardly close its eyes to the Constitution and see only the law,[47] as the Constitution had been designed not only to be law, but supreme law.[48] Hamburger finds the "logic of the Constitution" argument inadequate as well because it rests on a judicial interpretation of the Constitution from 1803, rather than on any provision from 1787, and thus only demonstrates what Marshall believed the Framers may have thought about judicial review rather than what they actually thought.[49] Hamburger wants pre-Framing evidence, not post-Framing judicial constructions, to establish judicial review.

The last account associates the origins of judicial review in America with the importance of natural law—that is, a body of foundational, moral, and political principles transcending positive acts by

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42 *See* HAMBURGER, *supra* note 1, at 4.

43 The most influential proponent of that view has been Gordon Wood. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 (1969); Gordon S. Wood, *Judicial Review in the Era of the Founding*, *in* IS THE SUPREME COURT THE GUARDIAN OF THE CONSTITUTION? 153, 154–60 (Robert A. Licht ed., 1993); Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787 (1999); *see also* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990).

44 *See* HAMBURGER, *supra* note 1, at 7–8.

45 U.S. CONST. art. III, § 2, cl. 1.

46 *See* HAMBURGER, *supra* note 1, at 7–8.

47 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

48 *See id.* at 178–79; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 3 (1959).

49 *See* HAMBURGER, *supra* note 1, at 8.

legislators and executives—in the jurisprudence of the Framers.[50] In his discussion of the natural law version of the conventional origins account, Hamburger previews his own interpretation:

> There is much to be said for considering judicial review in the context of higher laws—but not necessarily only natural law . . . . Of course, the historians who think judges could hold statutes void under natural law seize upon such hints as they can find to anchor their account in English law, but their strained understanding of the English sources . . . only reinforces the suspicion that there is little English evidence. . . . [I]f judicial review was suggested by English judges, it apparently became a practical phenomenon only in the hands of American judges—occasionally in the colonies, more substantially in the states, and most decisively in federal courts, culminating in *Marbury* in the U.S. Supreme Court.[51]

Hamburger pledges to correct the "strained understanding of . . . English sources"[52] by plowing through the colonial and pre-Framing, Revolution-era American cases in which the idea of judicial review surfaced. He also suggests that natural law serves as an important component of that idea.

There is more in Hamburger's introduction: a word on the evidence he will be consulting, another word or two on the contemporary implications of his findings, and a brief summary of the conclusion of *Law and Judicial Duty*. It is clear that Hamburger regards his introduction as his best opportunity to demonstrate the originality and plausibility of his thesis before plunging into some obscure historical sources.[53]

III. Merging the Ancient English and American Constitutions

So what is the critical reader to do at this point? Hamburger has given the reader some options. One could grant the validity of Hamburger's findings—after all, he has done impressive archival research in a number of obscure places—and focus on his interpretations. One could grant the plausibility of his interpretations as well and suggest there are other equally plausible alternative readings of his sources. Or one could simply assume, as many readers of *Law and*

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50 *See id.* at 6.

51 *Id.* at 6–7 (footnotes omitted).

52 *Id.* at 6.

53 See WHITE, *supra* note 14, at 1–10, for a similar approach.

Judicial Duty may, that Hamburger's thesis about the origins of judicial review in America is largely correct, and we will henceforth not be able to think about that topic without consulting Hamburger's impressive work.

But there is a line of potential criticism. It is not possible to develop that line without some detail, and space limitations will not permit too much. Therefore, this Essay simply sketches out the line and leaves most of the details for some possible time in the future.

Let us begin by recalling the four alternative accounts of the origins of judicial review in America that Hamburger sets forth in his introduction.[54] Then, let us ask whether Hamburger's account is a clear alternative to those accounts, or whether it largely builds on them. Finally, let us pay close attention to the ways in which Hamburger seeks to distinguish his account from the others.

Hamburger takes pains to distinguish his view of the origins of judicial review from the Beardian, state-centered, "logic of the Constitution," and natural law interpretations that represent versions of conventional wisdom he seeks to revise.[55] But when one reads his introduction closely, all of those versions of conventional wisdom end up getting subtly interspersed into his account.

Take one illustration. In a passage previously quoted,[56] Hamburger states that natural law arguments were not much invoked in seventeenth- and eighteenth-century English cases; they "became a practical phenomenon only in the hands of American judges."[57] He then goes on to say that natural law arguments appeared "more substantially" in American state courts after the Revolution and "most decisively in federal courts, culminating in *Marbury*."[58] His point is that it was in eighteenth-century American state courts and lower federal courts where natural law arguments really got off the ground.

Which of the alternative accounts disputes that claim? All, in fact, would seem to reinforce it. Judicial review developed in American state courts and culminated in *Marbury*; there is not much evidence of natural law jurisprudence, except on a highly abstract level, in seventeenth- and eighteenth-century English cases; judicial review may have developed in America because of partisan disputes about the proper allocation of power in a republic. When Hamburger states

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54 HAMBURGER, *supra* note 1, at 2–7.

55 *See id.* at 16–18.

56 *See supra* note 51 & accompanying text.

57 HAMBURGER, *supra* note 1, at 6.

58 *Id.* at 6–7.

that "the historians who think judges could hold statutes void under natural law seize upon such hints as they can find to anchor their account in English law,"[59] one might ask why they should not seize upon such hints. When Hamburger then says that the historians have a "strained understanding of the English sources,"[60] how does one know?

Or consider one other effort on Hamburger's part to distinguish his interpretation of judicial review's origins from the conventional accounts he is criticizing. He takes up the most common account made available to legal scholars and law students: since the Constitution speaks of the judicial branch's deciding "cases and controversies,"[61] it follows that judges would need to articulate legal rules by which the cases and controversies were to be decided.[62] As Hamburger puts it, "[g]enerations of law students have been taught . . . to regard judicial review as the logical outcome of cases."[63]

Hamburger finds the "logic of the Constitution" argument flawed because it rests on a case decided fourteen years after the Constitution was ratified by a Justice who was arguably interested in aggrandizing his own power.[64] But Hamburger's alternative claim—judicial review was already in existence when *Marbury* was decided[65]—seems plausible only if one accepts Hamburger's conclusion that judicial review was the outgrowth of an already established judicial duty to uphold the law of the land.[66] Hamburger refers to "the old, foundational ideals that would allow one to understand the degree to which Marshall was engaged in very traditional judicial reasoning."[67] "[T]he inquiry about *Marbury*'s logic," Hamburger claims, "makes Marshall's opinion seem an act of intellectual prowess in which he and his brethren largely established their own power."[68]

By now it should be clear what Hamburger is up to. He believes that the origins of judicial review in America lie in what J. G. A. Pocock once called the "ancient constitution" of early modern English

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59 *Id.* at 6.

60 *Id.*

61 U.S. CONST. art. III, § 2.

62 HAMBURGER, *supra* note 1, at 9 & n.16.

63 *Id.* at 8.

64 *Id.* at 8–9.

65 *Id.* at 9.

66 *Id.* at 2.

67 *Id.* at 8–9.

68 *Id.* at 9.

jurisprudence.[69] Pocock argued that the English "ancient constitution" was composed of a blend of tradition, custom and practice, ancient memories about conduct, the "common law" (that is, the expectations about justice shared by "common folk"), and the law handed down by the royal prerogative courts.[70] That medley of sources of law constitutes Hamburger's "law of the land," and it is the broad and deep conception of English law embodied in that phrase that anchors judicial review.[71]

The crucial step in that anchorage is Hamburger's concept of judicial duty. In his view, the foundational appeal of the "law of the land" as a justification for decisionmaking in early modern English jurisprudence resulted in judges, who were appointed by the Crown or Parliament and thus regarded as not necessarily supportive of the common folk, being thought obligated to "follow the law"—that is, identify and apply the "law of the land" by which cases in the King's Bench, or the courts of common pleas, were to be decided.[72]

Hamburger's broad-ranging concepts of law and the judicial obligation to follow law—what he calls "judicial duty"—provide him with an explanation for *all* Anglo-American judicial decisions around the time of the American Framing.[73] That is, every time judges provided a justification for their decisions—whether common law decisions, decisions involving prerogative writs, or, in America, decisions containing constitutional issues—the implicit basis of those justifications was the obligation of judges to follow the law of the land.[74] This means, for

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69 *See* J. G. A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY, A REISSUE WITH A RETROSPECT (1987). The term "early modern" may mislead American readers. Because of the much longer timespan of English history, English historical scholars conceptualize "modern" periods as beginning with the Renaissance, when feudal ideas were largely abandoned in English thought. The "modern" period in English history is posited as being of extremely long duration—from the late sixteenth century to the present—and hence "early modern" is applied to, essentially, the seventeenth and eighteenth centuries. In contrast, some recent American historical scholarship has associated "modernity" and "modern" historical periods with the early twentieth century. *See* WHITE, *supra* note 14, at 5–6.

70 *See* POCOCK, *supra* note 69, at 46–51. For more detail on the interaction of the common law courts with royal prerogative writs of action in the seventeenth and eighteenth centuries, see Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 608–09 (2008). *See also* DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830, at 5–6 (Thomas A. Green et al. eds., 2005).

71 *See* HAMBURGER, *supra* note 1, at 103–04.

72 *See id.* at 17.

73 *See id.*

74 *See id.*

Hamburger, that any time late eighteenth-century American judges scrutinized the actions of other branches or, for that matter, made decisions in ordinary common law cases, they were exercising a kind of judicial review.[75] Judicial review, in its original American form, was simply an exercise in implementing the judicial duty to follow the law.[76]

In the introductory section of *Law and Judicial Duty*, Hamburger previews what the evidence he has culled from eighteenth-century English and American judicial decisions will demonstrate. The evidence "reveals the importance of the common law ideals of law and judicial duty."[77] It "shows that these two ideals, taken together, required judges to hold unconstitutional acts unlawful."[78] Before American Independence, "many English lawyers understood that the law made by the people, their 'constitution,' was of higher authority and obligation than other human law in their jurisdiction."[79] That constitution was "the most fundamental part of the law of the land," and "many other[ ] [English lawyers] understood it to limit Parliament and thus to render any unconstitutional government act unlawful and void."[80]

This meant that American judges after Independence "did not have to create for themselves a power over constitutional law, for already in England judges had a duty to decide in accord with the law of the land, including the constitution."[81] Thus judicial duty, in the English tradition, was "both more general and more mundane than what has come to be understood as judicial review" in America.[82] The idea that there was "a distinctive judicial power of review," as distinguished from the ancient judicial obligation to uphold the law of the land, is thus "of questionable authority" in Anglo-American jurisprudence.[83] Moreover, the American idea of judicial review "has even led to the conclusion that judges, *having created the power*, can exercise it with either restraint or vigor, as seems to them required by different circumstances."[84] But that conclusion, Hamburger believes, is wrong. The ancient idea of judicial duty only allowed judges to make

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75 *See id.* at 16.

76 *See id.*

77 *Id.* at 17.

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.* at 17–18.

84 *Id.* at 18 (emphasis added).

"decisions about the constitutionality of government acts . . . the same way they made any other decisions—in accord with the law of the land."[85]

Something seems to be missing from Hamburger's logic. If the American version of judicial review is exactly the same as the English judicial duty to follow the law under the ancient constitution, why did the American Framers write a new constitution with a different form of government and a different allocation of powers among branches of government from the English unwritten version? Why did they explicitly reject the authority of the King and Parliament in the Declaration of Independence? Why did they take pains to ensure that the Justices appointed to the new Supreme Court of the United States would be from different states and regions of the nation? What would be the need to do all this if the English ancient constitution was to be the law of the land for Americans? In fact, the evidence suggests that although the Framers of the Constitution may well have drafted that document with a consciousness of the English ancient constitution, they were signaling that their Constitution was going to be different.

So when Hamburger finds abundant evidence that American judges were making decisions that resembled the decisions of British judges following the law of the land, does that help support his thesis that judicial review in America should have been nothing more than judicial duty in early modern English jurisprudence and, thus, was a bit of a usurpation? Only if one grants Hamburger his premise that the ancient English constitution and the 1789 American Constitution were jurisprudentially *identical* documents. That premise seems startlingly counterintuitive. If the rights of common folk in America were being adequately protected by judges following the law of the land in the manner of their English counterparts, why did British colonists in America sever relations with the British Empire, denounce the King and Parliament, fight a war against the British, and write a new constitution?

Law and Judicial Duty ends up being an example of legal triumphalism, with history ending up at the end of the parade. In his conclusion, Hamburger reveals his normative commitments in a stark paragraph:

> [A]fter the power above the law of the land finally shifted from government to the people [in America], it has come to be at least partly relocated in the judges. In taking up this

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85 *Id.*

> power, . . . American judges have acquired a taste for power above the law. Perhaps every society needs this sort of power, but in denying absolute power to Parliament, Americans did not give it to the judges, and although it is questionable whether the people, being merely human, will always act wisely and justly in exercising their power above the law of the land, it is even more doubtful whether the judges . . . can be trusted with such a power . . . . [I]t is therefore all the more important for judges to recall the common law ideals of law and judicial duty.[86]

Conclusion

The term *tour de force* renders itself imperfectly in English. A "forceful tour" of a subject, opinionated but seemingly all-encompassing, is a far less satisfactory description. That, however, is what *Law and Judicial Duty* is: erudite, challenging, and normatively driven all at once. If one grants Hamburger his premises, the work, with its detailed research, painstaking analyses of myriad English and American cases, and sophisticated critiques of alternative theories of the American origins of judicial review, appears authoritative. Surely it will have to be reckoned with by anyone seriously investigating that subject. The confident tone of its prose suggests a masterful scholar at work. It is timely, mindful of the contemporary implications of its findings, and squarely within an emerging counter-Progressive perspective in American legal and constitutional history. Its impact is likely to be considerable.

But *tours de force* have a magical quality as well. Magical in the sense that their interpretive frameworks, their clever exposition, and the dogged persistence of their normative premises can cloud the reader's understanding of precisely what is going on. When one is finished with *Law and Judicial Duty*, a sense of dissatisfaction struggles with one of satisfaction. One feels satisfaction for the production of a "big" book, using that term in multiple ways, and for the scholarly acumen of the author. At the same time, however, one is left with a sense of uneasiness—of alternative interpretations not fully considered, of evidentiary complexities ironed out in the analysis of data, of the creation of houses of cards and mirrors. All in all, *Law and Judicial Duty* is a book well worth one's sustained attention.

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86 *Id.* at 620–21.