

BOOK REVIEW

LAW AND JUDICIAL DUTY. Philip Hamburger
(2008).

ALLEN BOYER*

| | |
|--|-----|
| I. INTRODUCTION | 368 |
| II. JUDICIAL DUTY AND JUDICIAL REVIEW | 368 |
| III. THE MEDIEVAL ORIGINS OF JUDICIAL DUTY | 372 |
| IV. THE AMERICAN INHERITANCE OF JUDICIAL DUTY..... | 375 |
| V. CONCLUSION..... | 382 |

* Senior Appellate Counsel, Department of Enforcement, Financial Industry Regulatory Authority; B.A., Vanderbilt University; J.D., University of Virginia; and Ph.D., University of St. Andrews. Opinions expressed in this review are solely those of the author and do not necessarily represent the opinions of the Financial Industry Regulatory Authority or any of its officers.

I. INTRODUCTION

Philip Hamburger's remarkable study essays nothing less than to provide an alternative legal history of the origins of judicial review. "Almost every day," Hamburger writes, "a judge in the United States holds a statute unconstitutional. This is 'judicial review,' and it often seems the central feature of American constitutional law."¹ As the coolness of this observation suggests, Professor Hamburger feels that the idea of judicial review has been too easily received. It is not in the exercise of judicial review, he suggests, that the proper and principal role of the judge consists.² Judges do not sit to strike down laws, and that should not be seen as their proper and principal role. Rather, the true work of a judge is to be found in the active and intelligent fulfillment of "judicial duty."³

II. JUDICIAL DUTY AND JUDICIAL REVIEW

Judicial duty is the obligation of a judge to decide cases according to the law of the land.⁴ It is not a doctrine of renunciation and restraint. Like judicial review, the ideal of judicial duty contemplates that the judge may, upon occasion, be required to hold statutes unconstitutional.⁵ The ideal of judicial duty may be traced into the medieval common law, and it had long supplied a basis upon which judges constructed and limited royal decisions and Parliamentary enactments. Judicial duty was the source of the authority upon which Chief Justice Marshall relied when, in *Marbury v. Madison*, he chose expressly to articulate a power of judicial review.⁶ That the newer doctrine has eclipsed the older, Hamburger argues, has

1. PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 3 (2008).

2. *See id.* at 2 (challenging the received history of judicial review, which implies that the justification for judicial review is based upon an understanding of the proper role of the judge).

3. *See id.* (foreshadowing the argument that the proper role of the judge is the fulfillment of "judicial duty").

4. *Id.* at 16, 17.

5. *Id.* at 17.

6. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803). *See also* Philip Hamburger, *Law and Judicial Duty*, 72 GEO. WASH. L. REV. 13 (2003).

dangerously weakened the constraints under which the common law had successfully operated:

The point is not simply that judicial review was different and older than traditionally imagined, but rather that there was a more general judicial duty. Instead of having a power specifically relating to constitutional decisions—a power developed through their own exertions and thus of indeterminate duty and scope—the judges had a broader power that was neither more nor less than their duty. This duty was but an aspect of their office, and it required them to decide in accord with the law of the land, including any relevant constitution. The generality of this duty was what gave strength and balance to their constitutional decisions, for it authorized and bound the judges with the same ideals that elevated and confined them in their more mundane decisions. Their duty thus anchored an otherwise extraordinary power within the quotidian exercise of their office, and the result was a judicial power both more authoritative and less dangerous than that which prevails today.⁷

The prehistory of constitutional law, which focused on the origins of judicial review, has been explored by scholars for over a century.⁸ Hamburger's emphasis on judicial duty frames the issue in different terms. After reading his study, one approaches with greater circumspection the central operative paragraph upon which *Marbury* turns:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.⁹

Hamburger's research has put considerable substance back into this invocation of "judicial duty." If by this Chief Justice

7. HAMBURGER, *supra* note 1, at 617.

8. *Id.* at 2.

9. *Marbury*, 5 U.S. (1 Cranch) at 177–78.

Marshall meant that the power of the judge was an aspect of the office of the judge—that is, if judicial review was a function of judicial duty—it would suggest that judicial power is shaped and constrained by the restraint that accompanies judicial authority. On the other hand, if Marshall was using this language to announce the assertion of a power that would go beyond judicial duty—the traditional understanding of the judge’s role—the adoption of judicial review must be understood as a departure. To understand the work of the judge within the context of a tradition of judicial duty illumines, and not necessarily in a positive light, the idea of the judge as the agent of judicial review. Where judges once chose to work from a vantage point within the framework of the laws, it appears to be more arrogant for other judges to insist that they enjoy the power to override the law. And, if *Marbury* marked a determined departure from judicial duty, judicial review lacks the authority that would be conferred by the tradition and continuing practice of common law adjudication.

Hamburger feels that the concept of judicial duty has largely been forgotten.¹⁰ He writes, when the Constitution was drafted:

the ideals of law and judicial duty were so deeply ingrained that they could simply be taken for granted When, for example, the U.S. Constitution mentioned the law of the land and the judges, it did not need to spell out the nature of legal obligation or the office and duty of judges, for such things were obvious.¹¹

This has made it difficult to appreciate the origins of judicial review and the change in our understanding of the judges’ proper role. Herbert Wechsler’s quixotic search for “neutral principles” of constitutional interpretation was fatally misguided because Wechsler insisted that authority for judicial review could, and necessarily had to be, “grounded in the language of the Constitution.”¹² What the Constitution does not provide for, Hamburger observes, the Constitution can hardly be counted on to define or restrain.¹³ The rules that would govern judicial

10. *Id.* at 16.

11. *Id.* at 618.

12. *Id.* at 12 (discussing Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 3, 10 (1959)).

13. *Id.* at 11.

review—were they rightly to be observed—are to be found not in the language of Article III, but in the heritage of judicial duty.¹⁴

Hamburger's observation on the jurisprudential role of judicial duty reflects a measured admission of what we may have lost and a dogged insistence on what may yet be regained:

Far from being simply ideas about government, the common law notions of law and judicial duty developed in response to problems arising from human nature, especially as it came to be understood in an increasingly disjointed society. To be sure, the authority of the people and the obligation of the law of the land do not form the only possible solution to the problems arising from discordant reasoning about justice Nonetheless, the ideals that formed the common law solution were not merely the arbitrary preferences of a local culture, but were the common law version of a familiar response to one of the most basic features of modernity—the use of legal authority to redress the peculiarly fractured character of humanity in modern circumstances.¹⁵

In the increasingly complex society produced by modernity, the common law ideals served to provide the order necessary for freedom. As Hamburger observes, “[t]he truth may be whole, but it is apt to be variously perceived in the modern world, and one reason the common law ideals have flourished is that they have avoided the danger of asking discordant individuals, including judges, to decide what is reasonable and just.”¹⁶

To emphasize judicial duty is to ask that judges approach their work in terms of resolving a case in the light of all the laws, both those statutes drafted by the Legislature, and those doctrines formulated by the legal community.¹⁷ This may yield better results for the law and for society than treating as paradigmatic a system that invites the individual litigant to ask the judge to pass judgment on an isolated law. Judicial review approaches judgment as a matter of categorical assertions, and judging as a wilderness of single instances.

Hamburger considers that judicial review has come to be regarded as the centerpiece of American constitutional law because Americans have abandoned the idea that laws might be

14. *Id.* at 9.

15. HAMBURGER, *supra* note 1, at 618.

16. *Id.* at 619.

17. *See id.* at 618.

enacted and applied to unify society, and instead have come to consider that judges sit to second-guess the legislature: to strike down laws that affected parties find objectionable. American post-modern litigiousness demands nothing less from post-modern American law.

III. THE MEDIEVAL ORIGINS OF JUDICIAL DUTY

Hamburger traces the duty of common law judges to its medieval origins. As early as the reign of Edward III, he finds, the perennial debate between realism and idealism had taken shape.¹⁸ In the early weeks of 1345, Judge Roger Hillary asserted that the law “is the will of the justices,” only to be corrected by Chief Justice John Stonore: “No, the law is that which is right.”¹⁹ Assigning duty and responsibility offered a way of managing the risks of judicial power. Judicial commissions specified the judges’ duty: “*facturi quod ad iustitiam pertinet secundum legem, et consuetudinum Angliae,*” to do justice according to the law and the custom of England.²⁰ In the Elizabethan decades, which saw the creation of the modern common law, any lawyer who read Cicero—and all Elizabethan lawyers read Cicero—would have known that duty and office could define the same obligation.²¹ To take up judicial office, thus, inherently obliged the judge to carry out the duties of that position.²² Sir Edward Coke articulated the connection of judicial office and judicial duty: “Offices are duties, so called, to put the officer in mind of his duty.”²³

18. *See id.* at 135.

19. *Id.* at 134–35 n. 78 (quoting YEAR BOOK, 19 Ed. III, 375, pl. 3 (1345)).

20. SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 442 (Robert H. Small, 1853) (1643).

21. HAMBURGER, *supra* note 1, at 104. Cicero’s *De Officiis* was a standard text in the Tudor and Stuart grammar schools, and for some the study proved life-long. William Cecil, Lord Burghley, is said always to have carried on his person a duodecimo edition of *De Officiis*, for consultation in moments of leisure, rather in the same way that Justice Hugo Black customarily carried in his pocket a pamphlet copy of the United States Constitution. *See* EDWARD NARES, 2 MEMOIRS OF THE LIFE AND ADMINISTRATION OF THE RIGHT HONOURABLE WILLIAM CECIL, LORD BURGHLEY 335 (Colburn & Bentley 1830); *see also* Allen D. Boyer, *Sir Edward Coke, Ciceronianus: Classical Rhetoric and the Common Law Tradition*, in LAW, LIBERTY, AND PARLIAMENT: SELECTED ESSAYS ON THE WRITINGS OF SIR EDWARD COKE 224, 242–43 n.68 (Allen D. Boyer ed., 2004).

22. HAMBURGER, *supra* note 1, at 112.

23. SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 185 (W. Clarke, 1871) (1681).

The judges bound themselves to follow the wisdom of their profession, not to yield to their individual will.²⁴ They developed tests of discretion, recognizing the limits within which they could legitimately act.²⁵ Although sworn to serve and counsel their monarch, they learned to be independent, even to resist royal pressures and blandishments.²⁶ Coke faithfully served King James I, but, in 1615 when James's Attorney General, Sir Francis Bacon, asked the judges to seriatim approve a new and expansive definition of treason in *Peacham's* case, Coke resisted.²⁷ Coke found this "auricular taking of opinions . . . new and dangerous."²⁸ Opinions should be produced in conference.²⁹ He defined law as the "artificial reason" of the judges, the professional consensus of those learned in the law—a blend of wisdom and craft, perhaps even of art—that could only be ascertained through judicial debate and resolution.³⁰

As he reviews the history of judicial duty, Hamburger also takes a sidelong glance at a group whose criticism of the common law lawyers is almost as deeply rooted in history: "the learned critics."³¹ There are reflections of contemporary issues in his portrait of the civil lawyers, men whose great patrons were Archbishop Richard Bancroft (1544–1610) and Archbishop William Laud (1573–1645). As Hamburger explains:

The common law vision of judicial duty 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. Of course, these men with academic visions of law denied that judges should decide on the basis of their personal views, but they tended to doubt whether any judge could decide merely in accord with

24. HAMBURGER, *supra* note 1, at 152.

25. Discretion had also been defined by Coke, who stated, "discretion is to discern by law what does justice." HAMBURGER, *supra* note 1, at 136 (quoting SIR EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 41 (W. Clarke, 1817) (1681)).

26. See HAMBURGER, *supra* note 1, at 152–53.

27. *Id.* at 153.

28. *Id.* (quoting *Letter From Francis Bacon to James I (Jan. 31, 1614)*, in 5 LETTERS AND THE LIFE OF FRANCIS BACON 107 (James Spedding ed., 1869)).

29. *Id.*

30. *Id.* at 139–41, 223–24.

31. *Id.* at 116.

national custom, and they therefore expected even the common law judges to engage in a sort of moral and politic discernment beyond the law of the land—an exercise of judgment by which the judges would render English law more complete and rational.³²

The learned critics found the common law “necessarily incomplete, uncertain, unjust”³³—Hamburger stops just short of saying *indeterminate*, the pejorative that the modern academy has so often applied to law. His précis of English legal history offers a parable of modern jurisprudence, where shortcomings in legal doctrine have frequently been invoked as a reason to amend legal doctrine through the application of lessons from other learned disciplines. It also reflects a concern for the independence of the common law, for the ecclesiastical tribunals in which English civilians found employment were institutions through whose powers the English bishops sought to enforce religious and intellectual conformity.³⁴

Against such challenges, Hamburger finds, the common law judges successfully maintained the honor of their profession:

They were not blind to the realities of incompleteness and discretion, but they hoped to limit these realities. Although many of them found it satisfying to observe the relationship of the law of the land to the broader universe of laws, they generally refused to allow academic analysis to undermine their duty or their authority of English law. Their stance can easily be caricatured as a sort of anti-intellectualism—an obstinate blindness to both reality and justice. In fact, the common law posture was a highly effective defense against the threat from academic law, and this defense was essential for limiting government power and preserving liberty.³⁵

32. *Id.*

33. *Id.* (emphasis added).

34. It may not be wholly coincidental that in 2002 Hamburger published *Separation of Church and State*, a book that did not shrink from observing that Thomas Jefferson’s suggestion of a “wall of separation” between religion and government became a familiar constitutional metaphor because it served so well the ends of those who wished to turn the First Amendment against Roman Catholic believers. See PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002).

35. *Id.* at 611.

IV. THE AMERICAN INHERITANCE OF JUDICIAL DUTY

The core of this book focuses on the jurisprudence of the first years of the American republic.³⁶ Much of the material reviewed here has become familiar to students of constitutional law—much of the material that Hamburger adds to the debate is new—and the perspective that he develops adds much to the debate.

Long before *Marbury*, Hamburger argues, and in many courtrooms across the new American states in the years prior to *Marbury*, it had been common for judges to rule on constitutional matters.³⁷ Early constitutional rulings often reflected transatlantic doctrines.³⁸ A common standard for assessing the validity of local enactments, the test of “law and reason,” had been developed in early modern England to assess the validity of local customs and the bylaws of corporate bodies.³⁹ In the colonies, the test was applied when questions arose about local customs, and proved so useful that courts continued to apply it after the Revolution.⁴⁰

So often had colonial judges been required to measure colonial enactments against colonial charters and English laws, that the courts had developed the doctrine of “manifest contradiction,” which allowed for the flexible recognition of practical local rules while preserving the supremacy of the mother country’s laws and institutions.⁴¹ This standard also survived to influence the constitutional analyses of St. George Tucker⁴² and Alexander Hamilton.⁴³ Other familiar doctrines

36. *Id.* chs. 10–19.

37. Studies in this area include Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 *YALE L. J.* 523 (2006); Barbara Aronstein Black, *An Astonishing Political Innovation: The Origins of Judicial Review*, 49 *U. PITT. L. REV.* 962 (1988); Allen Dillard Boyer, *Understanding, Authority, and Will: Sir Edward Coke and the Elizabethan Origins of Judicial Review*, 39 *B. C. L. REV.* 43 (1997); Philip Hamburger, *Revolution and Judicial Review: Chief Justice Holt’s Opinion in City of London v. Wood*, 94 *COLUM. L. REV.* 2140 (1994); Hamburger, *supra* note 6, Dudley Odell McGovney, *The British Origin of Judicial Review of Legislation*, 93 *U. PA. L. REV.* 8 (1944).

38. See HAMBURGER, *supra* note 1, at 179–80.

39. See *id.* at 256–57 & n.1.

40. *Id.*

41. *Id.* at 313–16.

42. See, e.g., *Commonwealth v. Caton*, 8 Va. 5 (Sup. Ct. App. of Va. 1782). In *Caton*, St. George Tucker argued “[i]f any Act’ of the General Assembly ‘shall be found absolutely & irreconcilably [sic] contradictory to the Constitution, it can not admit of a Doubt that such act is absolutely null & void.” HAMBURGER, *supra* note 1, at 313 & n.71 (discussing Tucker’s argument before the Virginia Court of Appeals in *Caton* and referencing the collection of Tucker’s papers held at William and Mary College Library).

and methods of interpretation were employed in the new courts, most notably applying “the equity of a statute” to broaden or narrow its terms.⁴⁴ In New England, a reading along these lines was employed to free black men who enlisted with the revolutionary forces from slavery: as only freemen were to be enlisted, so it was concluded that to have served in the Continental Army meant that any black veteran had been emancipated.⁴⁵

It is not only in cases in which the courts struck down statutes that one finds early evidence of judges, following their obligation to rule correctly in the light of all the relevant law, exercising constitutional authority.⁴⁶ In an early Massachusetts case, when a question of to what extent the commonwealth recognized slavery arose, the Massachusetts Supreme Court relied on the state’s Declaration of Rights, saying: “our Constitution of Govmt, by w^{ch} y^e people of he Commonwealth have solemnly bound themselves,” to hold that slavery had been a recognized “usage” but not authorized by certain superannuated statutes.⁴⁷ The constitution had been studied in order to ascertain the state of the law and to support a determination that references to slavery in the law of the state reflected “European usage rather than Massachusetts common law.”⁴⁸ In another decision, *Whitney v. Peckham*,⁴⁹ which involved

43. See, e.g., THE FEDERALIST NO. 78, (Alexander Hamilton); See also HAMBURGER, *supra* note 1, at 312 (discussing Hamilton’s views on which law should prevail when there is “evident opposition” between legislative enactments and the Constitution).

44. HAMBURGER, *supra* note 1, at 344.

45. *Id.* at 345 n.35. In South Carolina, perhaps unsurprisingly, judges applied the doctrine to a different end. In 1789, two children, aged four and eight, arrived in the state on a ship from Honduras, whence they had traveled with their slaves. A South Carolina statute of 1788 forbade the importation of slaves. Rather than rule that the slaves should be taken from the children (a conclusion argued for by the Attorney General), the judges concluded that a loose “construction of the statute, consistent with justice and the dictates of natural reason,” was necessary to prevent an injustice that would make the law “null and void.” The court ruled that the legislature must be presumed to have intended an exception in the case of slaves in transit to South Carolina at the time of the law’s passage. The children were allowed to keep their slaves. *Ham v. McClaws & Wife*, 1 S.C.L. (1 Bay) 91, 91–94 (S.C. Super. Ct. 1789); See also HAMBURGER, *supra* note 1, at 344–45 (discussing *Ham*).

46. HAMBURGER, *supra* note 1, at 474–75.

47. *Id.* at 482.

48. *Id.* at 476–83, discussing the *Quock Walker* cases. See also, e.g., Emily Blanck, *Seventeen Eighty-Three: The Turning Point in the Law of Slavery and Freedom in Massachusetts*, 75 NEW ENG. Q. 24 (2002); Robert M. Spector, *The Quock Walker Cases—Slavery, Its Abolition, and Negro Citizenship in Early Massachusetts*, 53 J. NEGRO HIST. 12 (1968); Arthur Zilversmit, *Quok Walker, Mumbet, and the Abolition of Slavery in Massachusetts*, 25 WM. & MARY Q. 614 (1968).

not the rights of slaves to resist capture by slave-owners, but the right of legislators to avoid arrest for debt, the judges again looked to the constitution to gain an understanding of the law.⁵⁰ They concluded that the relevant article of the constitution had not repealed a colonial statute that offered members of the legislature immunity from arrest at the time of legislative sessions.⁵¹ As Hamburger observes, the decision to vindicate a statute against constitutional challenge is just as much a constitutional decision as a determination to invalidate the statute.⁵²

What appear to be controversies that are limited to purely legal issues often prove to be much more substantial. In the aftermath of the Revolutionary War, Virginia judges held that conditions could not be placed on pardons.⁵³ On its face, the contretemps that resulted was a quarrel over legal doctrine between the courts and the governor, but the dispute had political and jurisprudential implications as well. Governor Patrick Henry had offered conditional pardons to certain felons, offering to spare each prisoner execution on condition that he agree to spend three years at hard labor.⁵⁴ This action by the Governor was consistent with recommendations made by a law reform committee at the time, headed by Thomas Jefferson, which was working toward replacing the harsh traditional punishments with a system of graduated sanctions.⁵⁵ The judges' resistance, supported by legislative reluctance to go

49. See The Honorable William Cushing, Notes of Cases Decided in the Superior and Supreme Judicial Court of Massachusetts from 1772 to 1789, fols. 51[r]-53[r] (manuscript report in archives of Harvard Law School, Ms. 4083) (discussing *Whitney v. Peckham*, decided by the Hampshire County Supreme Judicial Council, May term 1785).

50. HAMBURGER, *supra* note 1, at 484-86, 486 n.16.

51. *Id.*

52. In North Carolina, in the case of *Bayard v. Singleton*, 1 Mart. 45 (N.C. Super. Ct. 1787), judges delayed decision on a law that prevented Tory landowners from suing to reclaim their confiscated estates. See HAMBURGER, *supra* note 1, at 449-61. Despite threats of impeachment, the judges deferred to the legislature, inviting it to revise the law. *Id.* After a delay of two years, the judges finally held the statute unconstitutional, citing "the obligations of their oaths, and the duty of their office . . ." *Id.* at 459. Hamburger finds that although "*Bayard v. Singleton* is usually taken to show how judges on the eve of the Constitutional Convention were exploring a new judicial power over legislation, it was actually an example of how judges with all too human foibles eventually rose to the level of their ideals." *Id.* at 449-50.

53. HAMBURGER, *supra* note 1, 380-83.

54. *Id.* at 381.

55. *Id.* at 380.

forward, forced the abandonment of these ambitious plans to reform the criminal law.⁵⁶

Episodes in which controversies were addressed by “resolutions of the judges” can be particularly suggestive. Such incidents usually represent junctures at which the judges felt compelled to assert their understanding of their court’s authority (in any sense—identity, role, jurisdiction, or power).⁵⁷ Because the judges typically asserted their authority against other organs of government, these episodes reflect early decisions on constitutional matters. The best-known judicial resolutions arose in 1792 in a cluster of judicial pronouncements and remonstrances relating to the Invalid Claims Act and its direction that circuit court judges were to rule on claims by disabled veterans.⁵⁸ There was nothing unfamiliar about this. Before the Revolution, in Virginia, the Justices of the

56. *Id.* at 380–83; see also Kathryn Preyer, *Crime, The Criminal Law and Reform in Post-Revolutionary Virginia*, 1 LAW & HIST. REV. 53 (1983). The judges had previously addressed wartime pardons for Tory partisans that had been granted by the Virginia House of Delegates. HAMBURGER, *supra* note 1, at 487–96; see also William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491 (1994).

In the 1780 case of *Holmes & Ketcham v. Walton*, the New Jersey Supreme Court disallowed a statute that required six-man juries in confiscation cases. *State v. Parkhurst*, 9 N.J.L. 427, 444 (1802) (discussing the unpublished opinion in *Holmes v. Walton*); see HAMBURGER, *supra* note 1, at 407–22. The court did not formally assert that the law was unconstitutional—but at the time it was clearly understood that the judges had reached that conclusion. HAMBURGER, *supra* note 1, at 416–20. This precedent has long drawn attention, not least because it seemed to scholars that members of the Constitutional Convention must have known of these decisions and implicitly written into the Constitution an assumption that other judges would follow these examples. See Louis Boudin, *Precedents for the Judicial Power: Holmes v. Walton and Battle v. Hinkley*, 3 ST. JOHN’S L. REV. 173 (1929); Austin Scott, *Holmes v. Walton: The New Jersey Precedent: A Chapter in the History of Judicial Review and Unconstitutional Legislation*, 4 AM. HIST. REV. 459 (1899). Rhode Island also generated litigation in which the judges’ vision of constitutional legislation brought on a conflict with the legislature. See JAMES M. VARNUM, *THE CASE, TREVETT AGAINST WEEDEN* (John Carter, 1787) (discussing the unpublished *Trevett v. Weeden*); see also Patrick T. Conley, *Rhode Island’s Paper Money Issue and Trevett v. Weeden*, 30 R.I. HIST. 95 (1971); Irwin H. Polishook, *Trevett vs. Weeden and the Case of the Judges*, 38 NEWPORT HIST. 45 (1965); Charles Warren, *Earliest Cases of Judicial Review of State Legislation by Federal Courts*, 32 YALE L.J. 20 (1922).

57. HAMBURGER, *supra* note 1, at 383–91.

58. These resolutions cluster around *Hayburn’s Case*, 2 U.S. 409 (2 Dall.) 410 (1792). Chief Justice Marshall was considering this precedent when he took his greatest step.

It must be well recollected that in 1792, an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him, by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional; but some of the judges, thinking that the law might be executed by them in the character of commissioners, proceeded to act and to report in that character.

Marbury, 5 U.S. (1 Cranch) at 171.

Peace of Northampton County had declared that they conceived the Stamp Act to be unconstitutional.⁵⁹ In Caroline County, in the same turbulent weeks, J. P. Edmund Pendleton explained to James Madison's father that a declaration that the use of stamped paper was unnecessary was promptly needed, so that the courts could proceed with the business of the people:

As a majestrate, I thought it my duty to sit, and we have constantly opened court, and I shall not hesitate to determine what people will desire me and run the risque of themselves, and having taken an oath to determine according to law, [I] shall never consider that act as such for want of power (I mean constitutional authority) in the Parliament to pass it.⁶⁰

The connection between following judicial duty and denying the validity of measures that were unconstitutional had already been drawn.

A remarkable range of courts and government bodies were prepared to rule on constitutional issues.⁶¹ In 1784, when the New York state legislature passed the uncompromising Trespass Act—which gave patriots the right to sue for harm to property damaged or occupied during seven years of British occupation and forbade defendants from pleading that the British authorities had authorized their actions—the Mayor's Court of New York City ruled that, if the legislature had passed a law that proved unjust, the courts would imply an exception consistent with the law of nations and allow British authorization to be pleaded.⁶²

59. HAMBURGER, *supra* note 1, at 276.

60. *Id.* at 277.

61. "The duty of the Power I conceive, in all cases, is to decide according to the Laws of the State," wrote James Iredell (whose vision and eloquence are frequently displayed in this book), arguing for the authority of courts to hold statutes unconstitutional. HAMBURGER, *supra* note 1, at 464 (quoting An Elector [James Iredell], To the Public (Aug. 1786), Duke University Rare Book, Manuscript, and Special Collections Library, James Iredell Papers, Box 1). "But it is said, if the Judges have this power, so have the County Courts. I admit it. The County Courts, in the exercise of equal judicial power, must have equal Authority." *Id.* at 379 (quoting An Elector [James Iredell], To the Public (Aug. 1786)). Iredell's letter "To the Public" is also discussed in BRINTON COXE, AN ESSAY ON JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION BEING A COMMENTARY ON PARTS OF THE CONSTITUTION OF THE UNITED STATES 256 (Kay and Brother, 1893).

62. HAMBURGER, *supra* note 1, at 348–55; *see also* ARGUMENTS AND JUDGMENT OF THE MAYOR'S COURT OF THE CITY OF NEW YORK IN A CAUSE BETWEEN ELIZABETH RUTGERS AND JOSHUA WADDINGTON 23 (New York: 1784). Materials on this litigation were edited by Henry B. Dawson in the nineteenth century and, more recently, in JULIUS GOEBEL JR., 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 282 (1964).

The Inferior Courts of the counties comprising New Hampshire, were modest institutions but proved anything but humble. They fought tenaciously against what they saw as unconstitutional legislation. New Hampshire's Ten Pound Act of November 1785 allowed a justice of the peace, sitting without a jury, to try any case where the value in question did not exceed £10.⁶³ This act "was ostensibly designed to ensure 'the recovery of small debts in an expeditious way,' but it might also be said to impose summary process on the collection of small debts."⁶⁴ The New Hampshire constitution guaranteed a jury trial where more than 40 shillings was at issue.⁶⁵ Many of the Inferior Court judges were not lawyers,⁶⁶ but few judges have ever defended the constitution as fiercely as they did: arresting judgments,⁶⁷ non-suiting plaintiffs,⁶⁸ quashing proceedings,⁶⁹ dismissing cases,⁷⁰ and even disciplining justices of the peace.⁷¹ The Inferior Courts repeatedly set down in their records that the Ten Pound Statute was "Manifestly Contrary to the Constitution of this State."⁷² The judges weathered calls for their impeachment and eventually won repeal of the statute.⁷³

Some of these judicial and government bodies were exercising traditional powers. The Court of the Mayor of New York City was modeled on British municipal institutions: Mayor James Duane sat on it with the city recorder and various aldermen.⁷⁴ In New Hampshire, by contrast, there was no doubt that revolution was afoot. The judges there broke with established practice by recording the grounds for their decisions. The Ten Pound Act had been adopted during post-war hard times and their campaign against it was waged in a city almost besieged by unemployed veterans.⁷⁵

63. HAMBURGER, *supra* note 1, at 423–24.

64. *Id.* at 423.

65. *Id.*

66. *Id.* at 422.

67. *Id.* at 426.

68. *Id.*

69. *Id.* at 432.

70. *Id.* at 431.

71. *Id.* at 429–31.

72. *Id.* at 428.

73. *Id.* at 422–35; see also Richard M. Lambert, *The 'Ten Pound' Cases and the Origins of Judicial Review in New Hampshire*, 43 N. H. BARJ. 37 (2002).

74. HAMBURGER, *supra* note 1, at 348.

75. *Id.* at 423.

Previous work in American legal history, Hamburger argues, has accepted too easily that these cases foreshadowed a doctrine of judicial review—indeed, that any legal development of the early Federalist era that bears upon constitutional interpretation represents a footnote to the history of judicial review. Commentators “assume that the judicial creation of judicial review was but a singularly important example of an inevitable judicial discretion over constitutional law.”⁷⁶ Hamburger challenges both the jurisprudential model of judicial review and the history that has been adduced to support it:

At a minimum, the evidence calls into question any reliance on the history of “judicial review.” The speculation about how judges developed judicial review has always rested on the paucity of evidence—in particular, the shortage of evidence from the 1780s and earlier—but in light of the evidence about law and judicial duty presented in this book, the history of judicial review looks rather dubious. Of course, the sort of judicial power that draws authority from the history of judicial review may nonetheless remain appealing to some observers, but it should stand on its own legs rather than rest on the crutches provided by an imaginative historicizing of modern preconceptions.⁷⁷

“[T]he common law ideals of law and judicial duty can be considered attempts to secure a firm footing at the edge of a chasm of lawlessness,” Hamburger writes.⁷⁸ “A body that was the final judge”—as some English kings considered themselves, and as Parliament did after them—“might come to view itself as above the law of the land and thus absolute.”⁷⁹ Contemporary legal theory may be able to prevent abuses of power by the people: the counter-majoritarian bias of the modern course in Civil Rights and Liberties has effectively fenced in the principle of majority rule. Even in this brave new world, however, familiar political temptations remain.

76. *Id.* at 10. Studies taking such a perspective include CHARLES A. BEARD, *THE SUPREME COURT AND THE CONSTITUTION* (Paisley Press 1938) (1912); Bradford Clark, *Unitary Judicial Review*, 72 *GEO. WASH. L. REV.* 219 (2003); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 *U. CHI. L. REV.* 893 (2003); Jack N. Rackove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 *STAN. L. REV.* 1031 (1997); William Michael Treanor, *Judicial Review Before Marbury*, 58 *STAN. L. REV.* 473 (2005); Gordon S. Wood, *The Origins of Judicial Review*, 22 *SUFFOLK U. L. REV.* 1995 (1988); and Gordon S. Wood, *The Origins of Judicial Review Revisited*, 56 *WASH. & LEE L. REV.* 787 (1999).

77. HAMBURGER, *supra* note 1, at 617.

78. *Id.* at 620.

79. *Id.*

[M]any Americans, in their desire to prevent the people from abusing the power above law, have invited their judges to exercise it In taking up this power, the judges have found sophisticated support in the old academic sensibilities, and not unlike some kings and Parliament when they claimed to be the final arbiter, 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.⁸⁰

V. CONCLUSION

In a work that challenges received ideas concerning judicial review, but nonetheless maintains that judges should measure laws against constitutional provisions, it may be difficult to explain how changes wrought in the law through the obligations of judicial duty would differ from changes imposed on the law from above by judicial review.⁸¹ But the best example of a judge who wrought broad changes in the law, working from within the system of the law and not from a pedestal above them, may be Benjamin Cardozo. Each of Cardozo's great opinions, Karl Llewellyn wrote, left a new precedent "in clear harmony with the authorities—duly explained; *in such harmony that on the point in hand it supersedes them.*"⁸² To supersede rather than overrule—that is the mark of a jurist working respectfully within the tradition of the common law. Cardozo's achievement was well worth the labor, and it suggests what judicial duty may accomplish.

The doctrine of judicial review has taken hold of American law as strongly as any of the justices who voted in *Marbury* might have hoped. Judicial duty has now found an eloquent advocate

80. *Id.*

81. The power of the judiciary under either approach is a formidable one. The present reviewer believes that what Learned Hand observed about "the authority" of the federal courts "to review the decisions of Congress" applies to judicial duty as well as to judicial review. Hand wrote:

[S]ince this power is not a logical deduction from the structure of the Constitution but only a practical condition upon [the Constitution's] successful operation, it need not be exercised whenever a court sees, or thinks it sees, an invasion of the Constitution. It is always a preliminary question how importunately the occasion demands an answer.

LEARNED HAND, *THE BILL OF RIGHTS* 10, 15 (1958). This approach acknowledges the power that a judge can wield, while at the same time it reflects the same respect and self-conscious restraint for which Hamburger argues.

82. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 443 (1960) (emphasis added).

as well. *It is emphatically the province and duty of the judicial department to say what the law is.*⁸³ Thanks to Hamburger, those phrases take on a singular new importance. It is no small task to identify in a judicial decision what was always there. The prehistory of judicial review, for more than a century now, has been explored and interpreted by scholars.⁸⁴ This book promises to alter the terms of that debate.

83. *Marbury v. Madison*, 5 U.S. (1 Cranch) at 177.

84. See HAMBURGER, *supra* note 1, at 2 (summarizing scholarship regarding the history of judicial review).