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Philip Hamburger's Law and Judicial Duty: The Origins of Judicial Review (book review)

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To the extent that there is a flaw in the book, it is in the author's failure to grapple with the fact that judicial supremacy continues to be the dominant view. If constitutional meaning really is the product of political competition mediated by structure, then why do so many people accept the Court's self-serving statements to the contrary? The author does take a stab at this problem in his conclusion by discussing *Brown* and pointing out (as Michael Klarman has at length) that the desegregation cases did not become settled law for many years until other institutions evaluated those decisions. Nevertheless, that is not how most law students or citizens understand *Brown*. This gap between practice and theory is perhaps the leading conundrum in constitutional law today.

In the end, we need a framework that reaches beyond *The Madisonian Constitution* to incorporate subsequent institutional developments. By pointing out that many of our modern assumptions about higher law rest on a shaky foundation, this book makes a useful contribution to that effort.

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Philip Hamburger's *Law and Judicial Duty* is a magnificent book, comprehensively researched and beautifully argued. In truth, it is difficult to do it justice in a short review, but let me attempt briefly to summarize its argument, necessarily omitting much of its nuance and detail, before going on to state my reservations.

The nub of Hamburger's argument is that American judicial review did not represent a significant constitutional innovation when American judges in a number of states first began to engage in the practice during the 1780s, in spite of the fact that in neither England nor America had there been a judicial doctrine or practice quite like it before. In Hamburger's telling, when these state judges began to declare acts of their legislatures unconstitutional and null and void, they were doing no more than acting upon a centuries-old common-law ideal of judicial duty. Hamburger demonstrates in amazing detail that English judges had long considered themselves bound by a sacred oath of office to decide disputes brought before them "according to the law of the land." He contends that constitutions, even the customary English Constitution, had long been viewed as part of the "law of the land"—indeed, a part of "the law of the land" superior to every other. In deciding cases,

moreover, judges were routinely confronted with conflicting rules of law. When two statutes conflicted with one another, for example, or the common law with a statute, judges were regularly forced to decide which of these “laws of the land” should determine the outcome of the case, and as part of their duty had developed rules to guide their judgment in such situations. A later statute, for example, should ordinarily be preferred to an earlier one because it represented the more recent will of the legislature. When it came to conflicts between constitutions and statutes, the duty of the judge was to prefer the superior law (constitution) to the inferior one (statute) in rendering a decision “according to the law of the land.” Hence, Hamburger insists, American judicial review did not represent a great leap in the common-law tradition; indeed, we should not think of it as a separate development at all, but merely an expression of the traditional common-law ideal of judicial duty in an altered constitutional context. More on this altered constitutional context later.

In making this argument for continuity, Hamburger is forced to confront one significant problem. Common-law tradition had long barred English judges from declaring acts of Parliament null and void. Indeed, no English judge ever had declared an act of Parliament null and void by judicial review. This is not to say that judicial review was unknown in England. On the contrary, a well-established tradition empowered English common-law judges (as part of their duty) to declare the bylaws of municipalities and other corporate entities null and void in so far as their enactments exceeded the legislative powers granted to them in their charters, or otherwise conflicted with the law of the land. The King’s Privy Council, on occasion, had exercised a similar power to declare statutes null and void in the course of reviewing cases appealed from American colonial courts. Today, it is commonly thought that this English tradition of judicial review rested principally on the idea that a superior jurisdiction (and its courts) enjoyed the power to strike down laws enacted by the limited and dependent jurisdictions that were politically subordinate to it. Another way of putting the matter is to say that while the English had developed a clear theory of “vertical” review, it is not at all apparent that they had developed a doctrine or practice of “horizontal” review. And given the principal rationale for “vertical” review, the development of “horizontal” review would have been no simple matter, for it posed deep and profound constitutional issues. If the common-law courts had possessed the authority to strike down acts of Parliament, they would, in effect, have been exercising a jurisdiction “superior” to Parliament’s—they, rather than Parliament, would have wielded the final, unappealable judgment on what the law of the land was to be. But it was precisely this kind of unprecedented “horizontal” review in which American state court judges began to engage in the 1780s.

Hamburger is fully aware of this problem and presents a great deal of evidence to establish two principal points. The first is that English judges had in

fact engaged in “horizontal” review. They had decided a number of cases holding that the monarch’s prerogative power was limited by boundaries established by the English Constitution. Judicial duty had certainly extended to “horizontal” review in this domain. Hamburger’s second point is even more crucial to his enterprise. He seeks to limit to its facts the common law tradition that precluded English judges from reviewing parliamentary statutes. He contends that this doctrine rested entirely on two peculiar characteristics of English constitutional life. The first was that the English Constitution was customary (although certain written documents had been incorporated into it) and given its customary nature “Parliament was the court in which the entire realm was presumed to be present to declare or alter their custom” (238). But I take it the more important reason that Parliament’s acts were final was that Parliament served as the highest court in the land; no appeal from its decisions could be taken to an inferior court. There could be no “horizontal” judicial review of parliament’s acts because those acts “explained” the constitution, and were the final, unappealable judgments of the highest court in the realm.

In America by contrast, Hamburger argues, these two peculiarities of the English constitutional system were absent. Americans had adopted express constitutions during the Revolution, and had in most states made supreme courts (rather than legislative bodies) courts of final appeal. Under these different constitutional circumstances the traditional common-law ideal of judicial duty—to decide “according to the law of the land”—led naturally and unproblematically to what we call judicial review.

My allotted space is limited, but let me attempt to state a few of my reservations about Hamburger’s argument. The first is technical but important. Hamburger tells us that one significant way in which American legislatures differed from Parliament was that “American legislatures were not high courts, to which judges had to defer, and one way this became evident was through the differentiation of judicial and legislative courts” (400). What Hamburger fails to tell us is that Parliament itself had undergone a centuries-long development. By the eighteenth century, the judicial and legislative functions of Parliament had largely been separated. Strictly speaking, only the upper house of Parliament, the House of Lords, still operated as a “judicial court,” the highest court in the realm. But Parliament as a whole, as a consequence, had now evolved into what Hamburger calls a “legislative court,” on the face of it not so different from the way he describes the status of American legislatures. Indeed, in several states—New York, Connecticut, and New Jersey—the similarities between the English and American systems were even closer. For decades after the Revolution in these states, the elected upper house of the legislature also sat as part of the highest “judicial court” of the state, from which no appeal could be taken. When acting together with the lower house, these upper houses also functioned as part of the “legislative court” of the state, operating almost exactly in the way Parliament did.

In New Jersey, the “judicial court” of “last resort in all causes of law” was “the Court of Appeals” composed of “the Governor and Council” (the Council also functioned as the upper house of the legislature). But despite these close similarities, New Jersey’s supreme court judges, unlike their English common-law counterparts, apparently did not believe themselves constrained to defer to the judgments of a body to which their own decisions could be appealed, declaring unconstitutional the judgment of their legislature, in which both houses had concurred, as early as 1780 (*Holmes v. Walton*).

But there is a more serious problem with Hamburger’s account, I think. It leaves out constitutional politics almost entirely. The judges may well have believed it to be their duty to strike down laws that were in conflict with express constitutions. These constitutions, however, had been established by the people and purported to express the people’s *de novo* judgment about how they wished their governments to be organized and operated. Written constitutions were an entirely novel form, part social contract part fundamental law. One would think that the question of how written constitutions were to be enforced would also be entirely new and one that had to be answered politically, given that different answers would produce quite different constitutional systems. Indeed, the question was taken up in several early constitutions, Pennsylvania’s, Vermont’s, and New York’s among them. But there is not the slightest hint in any of these constitutions that the people wished the judges, sitting as judges, to enforce their constitutions for them (or on many occasions against them), and many indications they assumed that they themselves would enforce their constitutions, primarily through the mechanism of frequent (annual) elections. In taking it upon themselves to enforce constitutions, the judges were in effect creating a revolutionary new constitutional system. Because many early state constitutions did not provide an amendment process, for example, a judicial judgment striking down a law that had received overwhelming popular support would wrest from the people the ultimate decision about the laws by which they would be governed. Except in states in which the elected upper house of the legislature continued to serve as part of the highest court of the state, the judges rather than the people would have the final word on the laws, unappealable even by the people themselves, except through revolution. Leaving out this part of the story, it seems to me, is no small matter, even in an otherwise comprehensive and magnificent volume.

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J. William Harris, *The Hanging of Thomas Jeremiah: A Free Black Man’s Encounter with Liberty*, New Haven, Conn.: Yale University Press, 2009.