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The Conflicted Assumptions of Modern Constitutional Law

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Most scholarly ambition involves speaking to a particular area of knowledge, and the reader identifies success by the author's creation of a new way of looking at a problem, or the establishment of a benchmark against which further work in the area must be judged. Rarer perhaps, but of equal importance, is scholarly work that succeeds by the light it sheds, or the disquiet it evokes, in areas beyond its immediate topic. On occasions rarer still, a work of scholarship is successful on both of these very different levels. Philip Hamburger's *Law and Judicial Duty*[1] is, I think, a clear example of such an exceptionally rare work. It is a signal contribution to the literature concerning the historical origins of what we have long called the American institution or practice of judicial review. Most of that literature focuses on the same familiar and by this point rather shelf-worn cases, personalities and questions: *Dr. Bonham's Case*[2] and *Marbury v. Maryland*,[3] James Otis[4] and John Marshall,[5] the absence of a judicial review clause[6] and the presence of the counter-majoritarian difficulty.[7] All of these elements are present in one way or another in Hamburger's account,[8] but they have been transformed, and sometimes renamed, in what has to be one of the most remarkable pieces of archival research in recent American constitutional history . . . though I hesitate over characterizing Hamburger's research that way, since one of his most striking discoveries is the sheer depth of the very English and quintessentially common law background to this country's alleged invention of judicial review. Perhaps we did invent what now passes under that label, but if we did, it was not so much by the genius of our founders as by our post-founding loss of a world of assumptions and understandings that the founders themselves understood and assumed.

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

[2] 77 ENG. REP. 638 (C.P. 1610).

[3] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[4] The Boston attorney and Revolutionary War pamphleteer (1725–1783) whose arguments against the pre-Revolutionary "writs of assistance" marked a significant development in the American history of judicial review. *See* HAMBURGER, *supra* note 1 at 274–75.

[5] *See* Marbury, 5 U.S. (1 Cranch) at 137 (John Marshall, C.J.).

[6] The term judicial review does not appear in the United States Constitution. *See* U.S. CONSTITUTION Art. III.

[7] A term first coined by Alexander Bickel. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 203 (1961).

[8] *See, e.g.* HAMBURGER, *supra* note 1, at 2, 7–8, 11–13, 275, 278–80.

Law and Judicial Duty is a book so rich in detail as to defy adequate summary. We shall be discussing its contribution to legal and constitutional history for a long time to come. Other historians will no doubt debate some of Hamburger's specific conclusions, but I don't intend to explore or evaluate his contribution to that important substantive area. Instead, I want to respond to the book's other sign of greatness, its power to excite reflection on the normative questions that hover around the history Hamburger recounts, most, though not all, of the time, just off-stage. It is my primary claim in this essay that *Law and Judicial Duty* invites, and indeed compels, a fresh look at the basic intellectual structure of constitutional law. It does this not by describing constitutional law directly, but instead by offering an account of the predecessor legal culture, early-modern common law, out of which American constitutional law was formed. The common law (as I shall simply call it) is in its forms of thought and practice, as Hamburger discerns them, at once familiar and startlingly strange in the assumptions it makes about the issues of authority and governance that become in the post-revolutionary American setting questions of constitutional law. This latter familiarity encourages and facilitates comparison, but the often surprising differences Hamburger finds between the common lawyers' world view and that of later American constitutionalists throws into sharp relief the underlying assumptions and patterns of thought that shape contemporary debates. The story Professor Hamburger tells, for all its complexity, returns again and again to certain basic ideas that Hamburger finds to have been salient in early modern common law, and that remained central to the world view and professional self-understanding of American lawyers and judges in the founding era. As he notes in some brief but very interesting remarks in the preface, *Law and Judicial Duty* is "a historical inquiry about [the] pair of ideals" indicated in its title.[9] Despite the risk of appearing "somewhat whiggish, both for focusing on ideas and for studying them as ideals," Hamburger insists (rightly I think) that we cannot understand the past without understanding how those in the past perceived "their circumstances and [expressed] their associated fears and hopes."[10] The ideals that early modern common lawyers and judges espoused were not mere slogans, though as Hamburger points out it would not do to confuse these ideas with "the motivations felt by judges or the reality of how they behaved."[11] The ideals of the common law were "responses to the problems contemporaries considered significant," and we cannot truly understand our legal past, or how our present came to be, if we insist on ignoring or dismissing as epiphenomenal our predecessors' responses to their problems because we find them crude or unsophisticated, or premised on assumptions that we think mistaken or outmoded.[12]

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[9] *Id.* at xii–xv.
[10] *Id.* at xii.
[11] *Id.* at xiii.
[12] *Id.* at xii.

Professor Hamburger's history of ideals is, then, a critical element in any satisfactory account of the history (or prehistory) of American law and especially American constitutional law. But the ideals he uncovers are more than that, they are a challenge to how we think about law today. However differently the common lawyers thought about their problems, they were in fact responding "to enduring anxieties about human and social fractures," anxieties we fully share even if we tend to use different templates for thought, sociological rather than theological for example. Furthermore, it is a sort of debased Marxism to treat ideas as lacking purchase on reality. Ideals have the "capacity to shape reality," as do other, less aspirational patterns of thought.[13] The common lawyers and judges lived in a significantly different world than the one we inhabit precisely because their ideals led them to think about it differently in certain fundamental ways. Turn that around, and it's obvious that our constitutional reality is shaped by assumptions that we seldom question but that profoundly affect what we find possible and implausible.

Law and Judicial Duty suggests to me the presence in our contemporary constitutional law of certain basic oppositions or, as I shall call them today, antinomies—contradictions between concepts or principles each of which seems an unavoidable aspect of constitutional law, but which did not exist in such stark opposition in the common law as Professor Hamburger has reconstructed it.[14] I want to discuss three such antinomies that, I believe, characterize and structure modern American constitutional thought. First: There is no agreement in contemporary America over how to understand, or even speak about, what judges should be doing when they make constitutional decisions. In public and political settings, presidents, judicial nominees as well as others often insist that the judge's role should be that of interpreting rather than making law, governed by an ideal of judgment free of political discretion or ideological partiality, and the rhetoric of judicial opinions often invokes that same ideal. Meanwhile, both lawyers and observers of the courts regularly assume that in practice constitutional law is a profoundly politicized exercise of power, and the public ideals a noble lie or a pious fiction, if not simply an embarrassing exercise in misleading public relations. But for the common lawyers, the ideals of law and of the judicial duty to say what the law is—not to make it so—were not source of embarrassment but of intellectual challenge and moral courage. What for us is the antinomy of ideals and practice was for them the affirmative relationship between the goal of a human social practice and the virtues necessary to achieve that goal.

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[13] *Id.* at xiii, xv.

[14] While I am obviously drawing on Professor Hamburger's book not only for my ideas but also for much of my language, I should acknowledge that my terms for the antinomies I am discussing are in the end mine rather than his, and he might not endorse them. It is worth noting, as well, that I going to use some other terms—government, the state, political decision and political actor—in ways that are somewhat anachronistic in a discussion of English law as it was understood particularly in the earlier part of the period Hamburger discusses. The anachronism is mine rather than his, and not really anachronistic anyway, since my real concern is not with the important historical issues but with the light Hamburger sheds on our problems.

Second, the possibility of conflict between true justice and human law is not a recent discovery, but a central theme in Western culture. Think of Antigone, or of the trials of Socrates or Jesus. The common lawyers, as Professor Hamburger reads them, held respect for the authority of positive law together with a commitment to reason and justice: they did so by means of a rather complicated set of assumptions and rules about how authority and reason relate in different sorts of cases involving a claim of government unlawfulness. These assumptions and rules rendered judicially manageable the logical possibility that the claims of authority and the demands of reason and justice could be in opposition. With the disappearance (or transformation) of the common law perspective, our constitutional law all too often seems caught in the dilemma of appearing compelled to affirm the judicial enforcement of injustice and unreason, in the name of democracy, or the judicial subversion of the law, in the interests of the judges' own ideologies. An antinomy of authority and reason runs throughout our law, and we are left with no clear or satisfactory response to it.

Third, the common lawyers understood the role of the judiciary in the constitutional ordering of the state quite differently than have American lawyers for some considerable time now. Modern American lawyers see courts exercising the power of judicial review, a power parallel to, and necessarily in competition with, the contrary claims to power of the legislative and executive branches. We worry over how to establish the judicial power's legitimacy as well as its limitations. The common lawyers, in contrast, saw the judges carrying out the duties of an office distinct in kind from the exercise of political power. King and Parliament exercised their discretion to make rules binding on others, while judges expounded a law binding on themselves as well as others. In principle, therefore, the judicial office of judgment complemented, rather than contradicted the offices of will and force that belonged to political actors. This sense of the difference between judicial exposition and political will has faded in modern American constitutional law, now accustomed to the antinomy of power and exposition underlying much of our thought.

'Ideals *and* practice', 'authority *and* reason', 'power *and* exposition': Philip Hamburger's book enables us to see that assumptions and patterns of thought relating to these antinomies shape contemporary constitutional law, not as unavoidable necessities built into the very logic of constitutionalism, but as contingencies, products of a specific history, and as features of our current law that can and perhaps should be changed.

I. The Antinomy of Ideals and Practice

Professor Hamburger is not very happy with what he calls "the history of judicial review,"[15] the standard account of how it came to be that the Supreme Court of the United States enjoys or at least exercises the power to render inoperative acts of

[15] HAMBURGER, *supra* note 1, at 2.

Congress because (for example) the justices don't think there was enough of a problem to make it appropriate for Congress to pass the legislation it did.[16] There is no need for me to rehearse that supposed history at the moment; Hamburger thinks that it is really just "another account, so satisfying to Americans, of how their distinctive experiences, more than any inherited ideas, gave rise to a significant innovation in government."[17] He aims to show that the historical truth was quite different. Now, if *Law and Judicial Duty* were merely a debunking of the oft-exploded legend that *Marbury v. Madison* invented judicial review, its prodigious erudition might seem like overkill, but Hamburger's thesis is far more subtle and interesting. On the one hand, he argues that nothing new and startling was happening when decisions in the early Republic, like *Marbury*, held acts of legislation to be unlawful so that it is quite unsurprising that the United States Constitution makes no mention of the matter except, partially and obliquely, by providing that state judges are to follow federal law as the supreme law of the land. He asserts that those early judges were but doing their duty, a duty understood for centuries by English-speaking lawyers to be an incident of the judicial office: decisions such as *Hayburn's Case*[18] and *Marbury* have long been "considered the beginnings of a new judicial power" but in fact were only "evidence of how the judges [in founding era America] could do their duty" as they and their predecessors had understood it.[19]

On the other hand, those founding-era judges were in a real sense acting in the twilight of a tradition rather than its noontime. When John Marshall wrote that it is "emphatically the province and duty of the judicial department to say what the law is,"[20] he affirmed both duty and law in the sense that his English and colonial predecessors had understood those concepts as ideals to which the judicial office was specially pledged.[21] Others came in Marshall's wake, who rejected, or perhaps more often simply didn't grasp, his meaning. The consequence is that our courts now wield a power Marshall never dreamt of and understand the words "to say what the law is,"[22] in ways quite alien to the legal tradition that produced them. Neither bold American innovation nor simple institutional continuity is the true story, according to Hamburger. What actually happened is very different: the ideals of the common law about the obligation of law and the duty of the judge simply faded away.

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[16] *See* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 645 (1999) (holding that a statute enacted pursuant to Section 5 of the Fourteenth Amendment was unconstitutional because, in the Court's judgment, the state could cite insufficient "history of 'widespread and persisting deprivation of constitutional rights'" to warrant its provisions).

[17] HAMBURGER, *supra* note 1, at 255.

[18] Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) (sitting on circuit, the majority of the justices on the Supreme Court declared an act of Congress unconstitutional because it assigned issues for resolution to federal courts that failed the test of justiciability; the matter became moot before the Supreme Court could address it); Marbury, 5 U.S. (1 Cranch) at 137.

[19] HAMBURGER, *supra* note 1, at 605.

[20] *Marbury*, 5 U.S. (1 Cranch) at 177.

[21] *Id.*

[22] *Id.*

What were those ideals? Professor Hamburger's discussion establishes that the changing relationships among eternal justice and reason, and human will and authority, over the course of the late medieval and early modern eras were complex,[23] but we do not need to explore their details: crucially, it was settled in the early modern common law that the law of the land, evident in custom and declared by Parliament, is supreme over other laws and sources of authority, and that the constitution is part of the law. He reminds us:

> Long before Americans declared their independence, many English lawyers understood that the law made by the people, their "constitution," was of higher authority and obligation than other human law . . . . Not merely the arrangement of government, this sort of constitution was the most fundamental part of the law of the land.[24]

He tells us that this ideal of law informed the common law ideal of judicial duty:

> [A]lready in England judges had a duty to decide in accord with the law of the land, including the constitution . . . . Judges therefore assumed that they had no choice but to decide in accord with the law of the land [and] even in England they sometimes had to hold unconstitutional acts unlawful.[25]

The absence from English practice of judicial decisions rejecting as unconstitutional and thus unlawful acts of Parliament was the result of specific legal impediments to courts, rather than the mere fact that Parliament had passed the act. This limitation was not, therefore (as we generally have thought) because of some conceptual or logical difficulty with describing an act of Parliament as unconstitutional: judges refrained from holding parliamentary statutes unlawful for specific legal reasons which their duty to decide according to law made obligatory—not because Parliament was above the law.[26] The impression of most modern American lawyers that judicial review (to use our term) appeared in the early Republic almost out of thin air results

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[23] Even so, the discussion is too brief for this reader. I hope that Professor Hamburger returns to this topic and gives us another work, this time tracing in detail the story of the breakdown of the medieval synthesis—and its surprisingly limited sway in medieval England even before its erosion—that he necessarily only sketches in *Law and Judicial Duty*. *See generally* HAMBURGER, *supra* note 1, at 21–69.

[24] *Id.* at 17.

[25] *Id.*

[26] The specific legal impediments were the customary nature of the English constitution (which Parliament as the highest court could declare) and the fact that Parliament was itself the highest court in the realm from which there was no tribunal to appeal save the people. For a discussion, *see id.* at 237ff., and for a statement of the conclusion that the only appeal from Parliament lay "to the people and ultimately to God," *see id.* at 280.

There were disagreements over just how to understand apparently unlawful acts by a legally paramount Parliament from which lay no appeal, but for a fascinating (and telling) example of what apparently was a generally-conceded constitutional limit on Parliament, see *id.* at 249–50 (no act of Parliament could put legal limits on the scope of the King's pardoning power). Professor Hamburger breaks new ground in his discussion of the well-known American flirtation, immediately before the Revolution, with Dr. Bonham's Case, 77 Eng. Rep. 638, 652 (C.P. 1610) (asserting, controversially, that "in many cases, the common law will controul Acts of Parliament and sometimes adjudge them to be utterly void"), and with the possibility that a judge, consistently with his office's duty, could hold invalid an act of Parliament. Blackstone, it appears, put that challenge to parliamentary authority to rest as a legal matter, with the ironic result that Americans had no legal place to turn but revolution. *See* HAMBURGER, *supra* note 1, at 274–80. *Cf.* 1 WILLIAM BLACKSTONE, COMMENTARIES *90–91 ("[I]f the parliament will positively enact a thing to be done that is unreasonable, I know of no power . . . [that can] control it.").

from the fact that the ideals of law and judicial duty were viewed as presuppositions about the legal system that, as such, were usually taken for granted, rather than as specific legal rules or doctrines that needed to be stated.[27]

The judicial practice of declaring governmental actions unlawful or unconstitutional, as Professor Hamburger has reconstructed it, was the product of the common law judges' intention of governing themselves by the common law ideals. The justification for the practice, then, was intrinsic or moral in character rather than functional. Common law judges understood, of course, that setting aside or refusing to follow a political decision was an exercise of power, and further that the existence of such a judicial power had "functional benefits . . ., such as its protection of liberty."[28] These benefits, however, were understood to be the (happy) consequence of a practice that was fundamentally grounded in a social and moral reality more basic than positive law: "they understood it more basically to be part of their office, to which they were bound by their oaths."[29] Since they understood themselves to be bound as a matter of conscience and morality in the exercise of their office—"[b]eing bound to God to decide in accord with English law" as Hamburger puts it[30]—the judges were undeterred by the skepticism of theorists such as Locke about their ability actually to decide cases against the demands and pressures of political power. No doubt in practice they often failed in the discharge of their duty out of fear, prudence or the desire to be politic (a matter Hamburger discusses in several contexts). But where the theorists with their functional analyses of power regarded such events as predictable, the common lawyers viewed them as deviations from the standard of conduct obligatory on those exercising an office of judgment different in kind from the "offices of will and force" belonging to legislators and executives.[31] Since "ideals [have the] capacity to shape reality,"[32] Hamburger suggests that this understanding of judicial duty had a real effect on judicial performance: it gave the common law judges "reason to think that they should neither rise above [the] law nor stoop below it, and they therefore often felt little choice but to do what seemed improbable" among the theorists.[33]

Living in accordance with such stringent ideals could never have been easy. The common lawyers were not in the least naive, and one important aspect of the history of the common law courts was the long struggle to secure their judges against the threat posed by external power to their ability to perform their duty: This explains all

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[27] "The ideals of law and judicial duty . . . were presuppositions *about* law rather than doctrines *of* law, and Americans could therefore usually take these ideals for granted in thinking about their constitutions and judges." *Id.* at 577.

[28] *Id.* at 17.

[29] Professor Hamburger makes it clear that as he understands the common law ideal, "[t]he duty of English and American judges had never been so much a requirement of law as an office to which they bound themselves by their oaths." *Id.* at 578.

[30] *Id.* at 114.

[31] *Id.* at 536. It is on this basis that Professor Hamburger contrasts the functional view of separation of powers held by Madison and Wilson with the "more conventional" common-law expectations of other founders. *See id.* at 509 n.4.

[32] *Id.* at xv.

[33] *Id.* at 114.

the familiar concerns about the tenure of judges, their remuneration and the location of the power to remove them from office. But the common lawyers believed external independence, while useful, to be only of subordinate importance because the external threat to the judges' positions and proceedings was, in the end, the lesser danger. The deeper threat to the conscientious discharge of their duty was the risk that the judge would come to decision not out of duty and bounded by duty, but as an act of will, shaped by the judge's own fears, passions or theories. By internalizing the performance of their office as a moral ideal, however, the judges could sufficiently "put aside" their "anxieties" as to do their "duty."[34] Inheritors as they were of the common law tradition, founding-era Americans placed strong institutional protections for judges' tenures and salaries into their written constitutions all the while recognizing that "the independence that ultimately mattered was internal." The judges and their courts thus depended for their independence not merely on their constitutional protections, but more basically on their individual internal independence in doing their duty—on their interior capacity to exercise judgment free from their own will.[35] What then does contemporary constitutional law look like when seen through the prism provided by the common law's reconciliation of ideals and practice?

Sophisticated modern American lawyers, children that they are of the Legal Realists, tend to be faintly embarrassed, at least when talking among themselves, by what is often the perceived need to insist publicly that ideally "a judge's job is to 'interpret the law and not to make it.'"[36] The current Chief Justice of the United States stated, at his appearance before the Senate Judiciary Committee considering his nomination to that office, that "[j]udges are like umpires. Umpires don't make the rules; they apply them." Although the statement has been severely criticized, the point of the metaphor was rather obviously to state—in a vivid, earthy and no doubt over-simplified manner, the ideal of impartial judgment in judicial decision, an ideal that I

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[34] *Id.* at 177.

[35] *Id.* at 535.

[36] The quotation is attributed to Judge Robert Bork, a sophisticated lawyer indeed, but one who was at the time testifying before the Senate Judiciary Committee. *See* Edward Walsh & Al Kamen, *Judge Bork Pledges 'to Interpret Law and Not to Make It'*, WASH. POST, Sept. 20, 1987, at A16. My point is not in the least to suggest that Bork was being insincere; his judicial opinions, a matter of public record, made it clear that like virtually every other sophisticated lawyer he thought the process of constitution decision-making to be much more complicated than the 'interpret-don't-make' slogan suggests. *See, e.g.*, Ollman v. Evans, 750 F.2d 970, 995 (D.C. Cir. 1984) (en banc) (Bork, Cir. J., concurring), cert. denied, 471 U.S. 1127 (1985) (where the "outer reach and contours" of a constitutional provision are "ill-defined," judges "face the never-ending task of discerning the meaning of the provision from one case to the next."). The problem, which is not Bork's in particular but everyone's, is to figure out what one might mean by talking about judges interpreting *and therefore* not making law given that we all know that Justice Holmes was simply being honest when he said that "I recognize without hesitation that judges do and must legislate," even if (as he went on) "they can do so only interstitially; they are confined from molar to molecular motions." S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). It isn't clear to me that Holmes's reservation limiting judicial legislation to the interstitial has much force, particularly in constitutional law, if by it one means that new judicial decisions can never represent a startling break with past understandings: there appear to be too many counter-examples. Think of Baker v. Carr, 369 U.S. 186 (1962), and legislative districting, or New York Times v. Sullivan, 376 U.S. 254 (1964), and the first amendment implications of defamation actions.

doubt many people would contest if stated in the abstract terms I have just used.[37] The controversy over Chief Justice Roberts's words is probably most important because of what it reveals about contemporary American perceptions of constitutional decision-making by the Supreme Court: an acute discomfort over any effort to state an ideal of judicial decision according to law even in the face of awareness that the Court's practice seems remote from any plausible statement of an ideal. That discomfort is evident in the odd literalism with which both defenders and critics of Roberts usually treat his image of the judge as umpire.This discomfort is by no means confined to politicians or writers for popular media. The "attitudinalist model" of the Court's decisions whereby the ideological commitments of the justices are assumed to be the primary determinants of their votes may predominate among political scientists studying the Court's decision-making,[38] while even less dogmatic scholars, political scientists and lawyers alike, have little choice but to concede what any journalist covering the Court assumes in a heartbeat—that factors other than formal legal ones are hugely significant in the conclusions the justices reach in constitutional cases.[39] Given the evidence of what our practice truly is, how can we talk about ideals? Decision according to law rather than the justices' ideologies—the only substantive ideal our society could possibly agree upon—seems hopelessly disconnected from our practice.[40]

The suspicion that our ideals and our practice are radically at odds is not limited to scholars and journalists who, after all, might be applying an external perspective to a social practice that is best described (for most purposes) from an internal one. (Maybe

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[37] Justice Sotomayor's confirmation appearance before the Committee showcased the way in which Chief Justice Roberts's reliance on this figure of speech had become a focus of controversy about the judicial role. Members of the Committee fought vigorously, and for the most part predictably, over the propriety of the metaphor. It is telling, to me, that one of the Committee's most thoughtful members, Ted Kaufman (D.-Del.), focused on the metaphor's import rather than wrangling over how exact a correspondence there is between umpiring baseball and deciding constitutional cases: "A judge, or a court, has to call the game the same way for all sides. Fundamental fairness requires that in the courtroom, everyone comes to the plate with the same count of no balls and no strikes." *See* Kristina Moore, *Box Score: Calling "balls and strikes" at Sotomayor's Confirmation Hearing*, at http://www.scotusblog.com/2009/07/box-score-calling-balls-and-strikes-at-sotomayors-confirmation-hearing/ (including as well Roberts's statement and references to it in the Sotomayor hearing).

[38] *See, e.g.*, Paul Horwitz, *Judicial Character (And Does it Matter)*, 26 CONST. COMMENT. 97, 105 n.25 (2009) (book review) (reviewing *inter alia* RICHARD A. POSNER, HOW JUDGES THINK (2008) [hereinafter HOW JUDGES THINK] ("The attitudinalist model is still the prevailing model in political science, if we count strategic models of judging as a more nuanced subset of attitudinalism.").

[39] *See, e.g.*, KEITH J. BYBEE, ALL JUDGES ARE POLITICAL EXCEPT WHEN THEY'RE NOT 5 (2010) (asserting that scholarship and public opinion alike see "the modern judicial process really [as] an uneasy mix of legal and political factors").

[40] HAMBURGER, *supra* note 1, at 148, 159, 520, 535 n.19. I am letting the word "substantive" in the sentence in the text cover a very important reservation. There is a societal consensus, I think, over some ideals about judicial judgment that are no means trivial in significance, particularly when considered in an historical or comparative perspective. Americans, including American judges, agree that judges should not make decisions out of personal bias or favoritism, for payment, to curry favor with the politically powerful, in crassly partisan political ways, and so on. These ideals, which most of us think characterize the vast majority of American judges, are of the greatest importance and in societies where they are not recognized or are regularly flouted, the courts necessarily play a very different role than they do in the United States. But these are, to borrow Professor Hamburger's useful term, an external threat, and our success in defeating them, while a cause for celebration, does nothing to address what he believes the common lawyers thought the more serious, internal threat to the ideal of decision according to law.

they're like a monomaniacal physicist who insists on discussing the quantum mechanics of local reality when you ask him to explain the game of chess.) But close internal observers appear to hold similar views of judicial decision making, particularly on the level of the Supreme Court. Justice Antonin Scalia is as systematically committed to the proposition that judges are not lawmakers as any prominent lawyer now active, and yet listen to how he has described the role of the courts in a perhaps unguarded, but certainly official moment: "I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it as *judges* make it, which is to say *as though* they were 'finding' it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be."[41] The opinion of Justice Scalia I've just quoted gives typographic emphasis to the words "as though," which rather strengthens one's sense that, even for Scalia, the claim that judges discern the law rather than make it is more a rhetorical ideal, or even a necessary fiction, than a substantive description of the judicial function in practice.[42] Justice Bryon White certainly read Justice Scalia along these lines, and responded sardonically that Scalia's comment amounted to the assertion that although "judges in a real sense 'make' law . . . judges (in an unreal sense, I suppose) should never concede that they do and must claim that they do no more than discover it, hence suggesting that there are citizens who are naive enough to believe them."[43] In the post-Realist world, of course, what matters in the final analysis must surely be the reality of practice rather than the rhetoric of ideals. With statements such as Scalia's we seem perilously close to an American constitutional version of Plato's noble lie.[44]

What is most interesting, and from some perspectives most disconcerting about Justice Scalia's remarks, is their suggestion that the underlying sense of contradiction between ideals and practice—between what we officially say courts should do and what we know that they actually do—is practically universal. There are, to be sure, a number of ways in which the members of a social group can respond to the existence of a significant gap between the ideals the group professes and its actual practices. Members of the group can ignore the gap, or deny it, or exploit it, and without doubt there are many American lawyers who adopt one or the other of these pragmatic if cynical stances. There are, however, more interesting approaches to the inconsistency. Justice White read Justice Scalia's comments, probably unfairly, to suggest one such approach. Perhaps verbal obeisance to an ideal of disinterested judgment according to

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[41] James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment) (concluding that "when the Court has applied a rule of law to the litigants in one case it must do so" retroactively "with respect to all others not barred by procedural requirements or res judicata").

[42] *Id.* at 546 (White, J., concurring in the judgment).

[43] *Id.* at 547.

[44] PLATO, THE REPUBLIC 177 (Desmond Lee trans., Penguin Classics 1955); admittedly, I'm not sure that I understand what Justice Scalia believes that he is saying. *Cf.* Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE. W. RES. L. REV. 581, 589 (1989–1990) (confessing that "I never thought Oliver Wendell Holmes and the legal realists did us a favor by pointing out that all these legal fictions were fictions: Those judges wise enough to be trusted with the secret already knew it.").

law is in fact necessary in order to secure public acceptance of the courts' decisions. Widespread knowledge of how far this ideal is from what the courts necessarily and beneficially do in fact would serve no purpose other than to undermine the vital role that the judiciary plays in our society's public life. This need not be the conclusion of cynicism but in its own way a kind of complex idealism, an idealism of service by those burdened with knowledge too dangerous for most of us. Plato was no cynic.[45]

The fundamental problem with the noble lie as a basic feature of American law is not that it is cynical but that it is morally unacceptable. Viewed from the standpoint of the public as a whole, this approach is demeaning, infantalizing, a clear pronouncement that the Declaration of Independence and the Gettysburg Address were absurd errors in claiming to ground American government in the consent of the governed. When the great Judge Learned Hand wrote that "[f]or myself it would be most irksome to be ruled by a bevy of Platonic Guardians," he was expressing a central element of the American constitutional ethos.[46] Viewed from the standpoint of the judges, the idea that they should use an ideal as a cloak for a very different reality is simply a counsel of deceit.

The other really interesting response to the antinomy of ideals and practice in constitutional law is quite different. Rather than reducing the ideals to a sort of camouflage for the practice, most constitutional theorists propose to revamp the practice to meet the ideals. The problem, as the theorists see it, is that traditional legal thought is too flexible, too amenable to disingenuous manipulation, too unconstraining. Judges, the theorists assume, can be expected to cheat on the ideal of decision according to law if we let them—this assumption becomes unintentionally humo rous when the theorist is him or herself on the bench—and we must therefore find constraints that will prevent cheating. Being to the last man and woman intellectuals, the theorists propose complicated theories as the proper safeguards against judicial cheating. The theories are many: representation-reenforcement,[47] originalism,[48] dualistic democracy,[49] deliberative democracy,[50] and on and on, each (we are told by its proponents) will constrain the judges if they will only follow the

[45] Nor was Dostoevsky's Grand Inquisitor, that other great literary incarnation of the proposition that public ideals require those in the know to sugarcoat public practices. *See* FYODOR DOSTOEVSKY, THE BROTHERS KARAMAZOV 228–43 (Constance Garnett trans., Barnes & Noble Classics 2004) (1879–1880). Anyone doubtful about the existence of this perspective in contemporary American legal thought need only read the distinguished Judge Richard Posner's justification of the actions of some of the majority justices in Bush v. Gore, 531 U.S. 98 (2000). *See* RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 161–69 (2001) (praising three justices for joining an opinion stating a rationale they did not believe persuasive because it would have damaged public acceptance of the Court's decision to let that be known). To be fair, I think that Posner's current views are somewhat different. *See* HOW JUDGES THINK, *supra* note 38, at 253 (discussing Bush v. Gore and stating that a "pragmatic judge must play by the rules of the judicial game, just like other judges").

[46] LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES 73 (1958).

[47] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 101–102 (1980).

[48] *See* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004).

[49] *See* 1 BRUCE ACKERMAN, WE THE PEOPLE [FOUNDATIONS] 13, 15 (1993).

[50] *See* Robert Justin Lipkin, *Progessivism as Communitarian Democracy*, 4 WIDENER L. SYMP. J. 229, 242 (1999).

rules the theory supplies rather than use the traditional modalities of legal argument that have, very sadly, turned out to be of no use for the purpose of constraint.

The fundamental flaw in this approach to the antinomy of ideals and practice—in addition to the practical difficulty that the theorists disagree among themselves over which theory we should adopt!—is that it mismatches problem and solution. The theorists identify the antinomy, I believe correctly, as a moral problem at heart: judges are manipulating, or are tempted to manipulate, the traditional forms of legal argument in order to exercise will, rather than conscientiously applying those traditional forms in order to exercise judgment. The theorists want to address this moral problem, however, by insisting (loudly) that judges follow some theoretically justified algorithm so as to avoid the dangerously unconstrained activity of making judgments altogether. This idea combines, as Professor Hamburger notes, "a dismissive realism about . . . the capacity of judges to decide in accord with [the law] and . . . a high idealism about rational academic models of human law and how judges should follow such models."[51] In basing their views on this odd mixture of pessimism and "rational, academic idealism," the theorists are simply reflecting the intellectual fashions of their day and their social group.[52] "It is the illusion of our Age," Philip Bobbitt has written, "that men and women can create tools to solve moral and political problems, much as we have created technologies that solve physical problems."[53] It is an illusion, the trick cannot be done. If the scientific researchers are falsifying their data, no theoretical account of the scientific method will make any difference, save perhaps in providing the cheaters with ideas about how to cover up their frauds. The search for an algorithmic constraint that will stop judicial cheating by judges bent on following their own wills is equally a will-o'-the-wisp.

Professor Hamburger's book suggests an alternative to our failed solutions to the antinomy of ideals and practice. Ideals and practice could come apart in early-modern English common law just as they have in contemporary American constitutional law. Hamburger's common-law judges, you will recall, addressed that danger by conceiving of the ideal of judgment according to the law of the land as a moral duty. What they needed to live up to that duty wasn't a theory of legal decision to constrain their choices but the personal character to carry out their duty: the courage and what Hamburger calls the "inner independence" to exercise judgment and not will.[54] This all seems naive or romantic, of course, from many perspectives, and indeed the assumption that "the egotistical nature of men" is such that "even in conscience [they] must give way to their will" is self-fulfilling when lawyers think of judging in that light.[55] Such a mere assumption about reality is not, however, a self-evident truth.

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[51] HAMBURGER, *supra* note 1, at 612.

[52] *Id.*

[53] PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 186 (1991).

[54] For my own, similar understanding of the inner dimension of judicial independence, *see* H. Jefferson Powell, *The Three Independences*, 38 U. RICH. L. REV. 603 (2004).

[55] HAMBURGER, *supra* note 1, at 612.

There is abundant evidence supporting Hamburger's claim that ideals can shape reality, that, as the ethicist Patrick Dobel puts it:

> Ideals possess a unique role in moral life. They do not dictate deductively clear principles or action based upon reason, nor must they possess logical rigor . . . . Ideals do, however, embody moral imperatives: they place strong claims upon the way we live our lives . . . . The moral energy and direction of idealism fuels the motivation and commitment of individuals.[56]

Our law's antinomy of ideals and practice is the product of our choices and equally of the assumptions we adopt without even making a choice.

Law and Judicial Duty does not, I believe, suggest an impossibly naive and romantic solution to the antinomy. Instead, it shows that the solution lies right before us, overlooked because we don't take seriously our own language. Let us simply re-adopt, and hold ourselves and the justices, to the ideal of decision according to law, not as rhetoric for public consumption, but as direction and goal for thought, energy and decision. Doing so would require more than making a New Year's Resolution, to be sure. We live, as Professor Bobbitt says, in an intellectually technocratic era resistant to concepts such as that of disinterested practical judgment.[57] Resisting the assumptions of one's time and place is always hard, and unlearning the bad lessons we have internalized will take effort and time. The opposition between ideals and practice has impoverished our thinking in more ways than one, and much work needs to be done to restore it. But we cannot begin to address these difficulties, vitally important as they, until we can at least imagine the possibility of resolving the antinomy of ideals and practice. Professor Hamburger's book opens a window onto just that possibility.

II. The Antinomy of Authority and Reason

In his fascinating discussion of the medieval background to early modern common law, Professor Hamburger sets out a central anxiety with which the common lawyers were dealing, the problem of how to relate eternal justice and human authority. In the high middle ages, thinkers such as Aquinas envisioned a hierarchy of law that enabled them to make coherent sense of the moral and practical issues posed by conundrums such as the unjust law,[58] Yet, rather oddly medieval English lawyers seem to have been skeptical about synthetic solutions like that of Aquinas even before the late medieval period saw a more general shift in thought across Western Catholicism as a

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[56] J. Patrick Dobel, *The Alchemy of Power and Idealism: Dostoevsky's Grand Inquisitor*, *in* THE MORAL OF THE STORY: LITERATURE AND PUBLIC ETHICS 152, 149 (Henry T. Edmondson III ed. 2000). Dobel's rich study of Dostoevsky's great parable has a great deal to say about our topic that I cannot discuss here beyond acknowledging Dobel's warnings about the complexity and risks of moral action based on ideals of public duty.

[57] BOBBITT, *supra* note 53.

[58] HAMBURGER, *supra* note 1, at 22–25.

whole, a shift that the Reformation and the social stresses of early modernity only reinforced.

Europeans and especially Englishmen increasingly became skeptical as to whether mere mortals could adequately discern, let alone agree about, what was reasonable, and thus they came to view the obligation of law as resting on the authority of the lawmaker, whose will was binding as law. This ". . . thoroughly altered the posture of law, for whereas law had once leaned toward intellect and justice, it now in the late medieval and early modern era began to incline toward authority and will, and from this would follow modern law, including constitutions . . . . [T]he will of men had come to seem obligatory within the scope of their authority."[59]

At the same time, this "shift toward authority," as Hamburger labels it,[60] must not be thought of in overly neat categories with medieval natural law giving way entirely to modern legal positivism. The shift was one of emphasis that left early-modern common lawyers still concerned with issues of substantive justice and reason, just as their medieval predecessors had given serious attention to the claims of positive authority.[61]

Authority and reason thus come to be an antinomy (if indeed they ever were otherwise), and a potential contradiction emerged between two principles, neither of which could simply be thrown overboard. Unsurprisingly, the lawyers advanced a variety of arguments intended to ease or avert the contradiction. They insisted, for example that the law of the land conforms (for the most part anyway) to reason and justice, and that in circumstances of ambiguity it is within scope of the judicial office to interpret the law to accord with reason and justice.[62] In the final analysis, however, the common lawyers gave law as authority a lexical priority over reason and justice when they defined judicial duty. As Lord Coke put it, interpreting the famous chapter 29 of Magna Carta, "the end . . . is Justice" but "the meane, whereby we may attaine to the end . . . is law," and a judge's exercise of discretion in judgment is "unlawfull, unlesse you take it, as it ought to be, 'Discretion is to discern by law what is just.'"[63] The judge's office might have as its hoped-for goal the execution of justice, but the judicial duty was not to pursue justice in whatever way the judge thought best but solely through his obedience to the law. Coke's famous assertion to King James I that legal controversies are to be decided by the artificial reason of the law rested on the premise that law defined and limited the office of judge as much as it did the very different office of the king: a judge is no more entitled to decide a case based on his

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[59] HAMBURGER, *supra* note 1, at 31, 299.

[60] *Id.* at 299.

[61] "[J]ust as Aquinas and the men who followed him had to accommodate authority within their conception of reason and justice, so [the common lawyers] had to pursue reason and justice within their account of authority." *Id.* at 327. The quotation specifically refers to late eighteenth-century Americans but a major theme in Professor Hamburger's book is the presence of an essentially uncompromised common law mindset in late-colonial and Revolutionary-era America.

[62] *Id.* at 339.

[63] 2 EDWARD COKE, INSTITUTES *56. *See also* HAMBURGER, *supra* note 1, at 38.

own ideas about justice than was James I.[64] In a conflict between authority and reason, the ostensible rule was that authority must prevail, at least with judges.

In fact, however, the story was considerably more complex. The common law judges addressed the lawfulness of claims to authority by many different institutions and individuals, from Parliament and the monarch down to chartered corporations and localities with customary rules, and the judges did not approach the question of lawfulness in a uniform manner. Whose claim to authority was being evaluated mattered greatly. Thus, "[t]he common law requirement for the lawfulness of a subordinate law, whether a corporate by-law or a local custom, was a test of law and reason."[65] Even if, as Professor Hamburger insists, the issue of "reason" was not one about which the judges employed "an open-ended, abstract measure of reason or natural law," the test was (probably) "a domesticated version of natural law,"[66] and it did require the judges to examine the substance of the by-law or custom for its justice in the narrow sense of its convenience, its compatibility with the liberties of the people and the rights of particular persons, and its fit within the broader law. A by-law or local custom that failed to satisfy this judicial test was unlawful and void.[67] The claims of authority by subordinate lawmakers were subject to the exercise of reason by judges, even if this exercise of reason was defined and limited.[68]

The role of the judges was quite different in response to sovereign acts of authority: "[t]he essence of sovereignty was an exercise of discretionary will—an exercise of will in which the sovereign had the final judgment as to what was reasonable."[69] There could be no judicial test for the reasonableness of a sovereign act, since by definition the absence of such "judicial second-guessing"[70] "was an essential element of sovereignty;"[71] "sovereign acts were thought by their nature to be beyond reconsideration for their rationality or justice."[72] "'Sovereign power,' Chief Justice Holt wrote in 1702, binds [a]bsolutely without any dispute to be made of its 'Justice or Equity.'"[73] The discretion—"will, power, or choice"—of the sovereign over its decisions[74] encompassed the exclusive authority to determine whether those decisions satisfied the demands of reason and justice.[75]

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[64] *Id.* at 112.

[65] *Id.* at 180.

[66] *Id.* at 182 & n.7.

[67] In contrast, while the judges also used a "law-and-reason measure" in answering questions about the substance of the common law itself, the role of law and reason there was quite different, not as a test of the lawfulness of the common law but instead as a means of resolving ambiguity about what the common-law rule in a given case was.

[68] *Id.* at 185.

[69] Id. at 208.

[70] *Id.* at 209, 211.

[71] *Id.* at 185.

[72] *Id.* at 209, 211, 185, 328.

[73] City of London v. Wood, 12 Mod. 669, 687–88, 88 Eng. Rep. 1592, 1602 (K.B. 1702) (quoted in HAMBURGER, *supra* note 1, at 396).

[74] *Id.* at 132–33.

[75] HAMBURGER.*supra* note 1, at 132–33. Hamburger observes that "although Parliament was subject to natural law, it had absolute discretion in judging whether its own acts accorded with natural law." *Id.* at 209. He notes further that "[t]he

If this were the entirety of the story, common law judicial reason would be entirely subordinate to sovereign authority. But the medieval principle of Bracton that Coke quoted to James I, that the king is *sub Deo et Lege*, "under God and the law," found a place in early modern common law despite that law's high view of the authority of sovereignty. Sovereignty, for many of the common lawyers, was not absolute.[76] It was, to be sure, inconsistent with "judicial second-guessing" about the reasonability or justice of the sovereign's exercise of discretion, but *not*, as a conceptual matter, with the exercise of the judicial office to say what the law, setting the boundaries of that discretion, was. The authority of any institution of government, even one possessing sovereign discretion, was subject to determination by law. At least with respect to the king's exercise of his personal—and sovereign—prerogatives, after the mid-seventeenth century, this conceptual possibility was a legal reality. While the courts could not question or second-guess the reasonableness of the monarch's acts, those acts "were now clearly under the constitution, as judged in the common law courts."[77] The law set the bounds defining the limits of the king's prerogatives, and thus the judges in fulfillment of their duty to say what the law is might be obliged in duty to declare an act of the king unlawful, without their decision intruding their views of reasonableness or justice into his sphere of sovereign choice. Even here, reason's role in determining the lawfulness of authority was indirect. Judges defined the boundary of the king's prerogative and employed reason in resolving ambiguities in the common law defining the scope of sovereign authority, but not by ruling on the lawfulness of the sovereign's acts within that scope.[78] As a conceptual matter, furthermore, some lawyers thought that the constitution as law defined the limits of the sovereign Parliament as well, although as we have seen, the common law courts were constrained by other rules of law not themselves to declare acts of Parliament unlawful.[79]

In England, then, the common law understanding of authority and reason included both a realistic grasp of the distinction between the two terms, a distinction carrying with it the possibility that an act of authority can be both legitimate and unjust, and a set of practical rules about how judicial decisions might reconcile that tension. In

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king's personal absolute prerogatives . . . were part of his sovereignty, within which he judged the reasonableness of his acts." *Id.* at 210.

[76] There were, in fact, "two conceptions of sovereign power—the one a power above the law, and the other a discretionary power within the law." *Id.* at 397. On the struggle over the absolute and discretion interpretations of sovereignty, *see id.* at 249–54.

[77] *See id.* at 249–54. In America, Professor Hamburger points out that "the abstract question of sovereignty" was generally, and in the early Republic almost entirely, resolved in favor of understanding sovereignty in government simply as a quality of absolute discretion the exercise of which was bounded by judicially expounded law. In fact, being keenly aware of the claims made by the Crown in the seventeenth century and by Parliament in their own century, American lawyers and judges tended to draw the lesson that even absolute, sovereign power, although discretionary, had to be kept subject to law, and this certainly seemed to be the approach taken by Americans in their constitutions. *Id.* at 397.

[78] *See supra* note 45.

[79] *See, e.g., id.* at 395 ("[T]his is not to say that on either side of the Atlantic sovereignty by itself was much of an obstacle to judicial decisions holding statutes unconstitutional."). *See also supra* note 26 for the interesting exception (at least in theory) for acts of Parliament infringing the king's pardoning power.

colonial North America, this understanding could be applied without significant conceptual change simply by treating the colonial assemblies as enjoying one more form of local authority, i.e. the making of statutes parallel in legal status to corporate by-laws and local English customs. As Professor Hamburger observes, "colonial enactments were subordinate and thus were generally subject to the common law test of law and reason."[80] This view of the status of local statutes changed, according to Hamburger, with the Revolution and the creation of the state and federal constitutions. Americans "had rejected Parliamentary notions of absolute . . . power and had only granted limited authority to their legislatures,"[81] but they did so presupposing, at least for the most part, the common law understanding of sovereignty.

The American state legislatures (and executives too), unlike their colonial predecessors, were sovereign by popular delegation. Their authority was defined by law but within its scope was free from judicial reconsideration on grounds of justice or reason. American courts could hold unconstitutional state statutes unlawful not because the state legislatures were less sovereign than Parliament but because the specific legal impediments to doing so in England were absent in America.[82] The United States Constitution also reflected the specifically American adaptation of the traditional understanding of authority and reason to the circumstances of a written constitution and a legislature shorn of Parliament's role as the highest court in the land.[83] In the exercise of their judicial duty, American courts would, as before, say what the law is, now including what the Constitution says in defining the scope of Congress's and the President's powers. The courts would still not examine those acts for their reasonableness or require the legislature or executive to satisfy the judiciary's views of justice: "legislative power, like executive power, was absolutely within the discretion of its part of government but under the constitution."[84] The earliest period of American constitutional law, including what we now perceive wrongly as the "invention" of "judicial review," continued the common law's practical reconciliation of the claims of authority and reason.

In contemporary constitutional law, authority and reason have come apart, transmuted into conflicting principles locked in an antinomy that we have found no way to resolve. We are caught between Creon and Antigone, and unhappy about siding with either.[85] To be sure, we often discuss the problem in other, and

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[80] *Id.* at 330.

[81] *Id.* at 397.

[82] *See id.* at 329–36. As Hamburger observes, up until 1818, Connecticut, with its customary constitution differed from other states in its recognition of common law impediments to judicial second guessing of legislative acts: "In Connecticut . . . judgments about the constitutionality of enactments belonged to the legislature rather than the judges." *Id.* at 503.

[83] *See, e.g., id.* at 334–36.

[84] *Id.* at 335–36.

[85]
Creon
Now, Antigone, tell me shortly and to the point,
did you know the proclamation was against your action?

misleading, ways, and one of Professor Hamburger's great contributions is to suggest a fruitful line of thought and reflection about our difficulties. The very language of "interpreting not making" the law that I discussed earlier is part of the problem. This language appears in American public and legal discussion in the form of laments and accusations about judicial behavior that are unrevealing except as slogans or slurs. Let me briefly mention a couple. Take the contrast often drawn between judicial restraint and judicial activism, with the related charge that a decision or a court is politicized. A telltale sign that this is the language of polemic rather than analysis lies in the fact that no one uses "restraint" as a criticism and few people use "activism" as a compliment. There is a pattern, of course, to the way in which the terms get thrown around. Broadly speaking, "judicial restraint" is associated with justices such as William Rehnquist, Antonin Scalia, and John Roberts, while the critics of William Brennan, John Paul Stevens and Stephen Breyer, frequently label those justices as practitioners of "judicial activism." But as tools of fair description or of analysis the labels are almost useless. Chief Justice Rehnquist, for example, thought that the Court should strike down acts of Congress that he conceded to be within the scope of a textually enumerated power of Congress on wholly non-textual grounds, which hardly seems "restrained" either in terms of method or outcome.[86] Justice Stevens, by contrast, has been willing to uphold governmental actions that he thinks badly wrong because he did not think the relevant constitutional provisions said otherwise, which isn't quite what "activist" connotes.[87] My point is not that Rehnquist was wrong and Stevens was right but only that "judicial restraint" isn't an illuminating way of describing most viewpoints in current constitutional law.[88]

Antigone
I knew it; of course I did. For it was public.

Creon
And did you dare to disobey that law?

Antigone
Yes, it was not Zeus that made the proclamation;
nor did Justice, which lives with those below, enact
such laws as that, for mankind.

Sophocles, *Antigone, in* 2 THE COMPLETE GREEK TRAGEDIES 159, 178 (ll. 490–96) (David Grene trans., 1992).

[86] *See, e.g.,* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 69 (1996) (opinion of Rehnquist, C.J.) (criticizing a "blind reliance upon the text of the Eleventh Amendment" in deciding state sovereign immunity issues); *see also* Fry v. United States, 421 U.S. 542, 557 (1975) (Rehnquist, J., dissenting) (federalism limitations on Congress and the federal courts are not based on "the Eleventh Amendment by its terms" or "the Tenth Amendment by its terms" but on "the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects.").

[87] *Compare* Gonzales v. Raich, 545 U.S. 1 (2005) (Stevens, J., for the Court, upholding validity of federal prohibition on medical use of marijuana), *and* Kelo v. City of New London, 545 U.S. 469 (2005) (Stevens, J., for the Court, upholding property taking for private commercial development as having the constitutionally required public purpose), *with* Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 975 n.3 (2009) (Justice Stevens has characterized the outcomes in *Raich* and *Kelo* as "unwise" but explained that "in each I was convinced that the law compelled a result that I would have opposed if I were a legislator" (quoting Linda Greenhouse, *Justice Weighs Desire v. Duty (Duty Prevails)*, N.Y. TIMES, Aug. 25, 2005, at A1 (quoting remarks delivered by Justice Stevens at a bar association meeting))).

[88] It is possible, to be sure, to imagine a judicial stance that was genuinely and deeply restrained in its exposition of the law of the Constitution, but its American advocates have been few and far between of late, and none of them has served on the Supreme Court in recent memory. Robert F. Nagel and Jeremy Waldron are rare, very distinguished proponents of this

Or take another familiar term: "strict construction." As an historical matter, "strict construction" originally described a perfectly coherent constitutional position: we should construe the Constitution's delegations of power to the federal government as strictly as the text will permit.[89] That position is substantive, not methodological; it cannot be demonstrated to be correct on the basis of the text itself, which can also be read in other ways (as, famously, by Chief Justice Marshall). For reasons I cannot stop to discuss, the meaning of the phrase "strict construction" gradually shifted into a methodological register: we should adhere strictly to the text of the Constitution. Either usage is intelligible; the problem is that in recent decades neither usage has had *any* adherents on the Supreme Court (except perhaps for Justice Thomas) and scarcely any elsewhere.[90] The term has become a mere compliment (or slur), with no real content.

Law and Judicial Duty gives us a way past our stale and endless debates by unveiling the real source of our difficulty—the ways in which contemporary constitutional law is structured by the antinomy of authority and reason. Within the domain of constitutional law, the Constitution possesses authority quite apart from any individual's views about the reason and justice of its commands. Impassioned dissents by angry justices to the contrary, no one, or at least no one responsible, claims that the courts should invalidate laws or overturn executive actions simply because the judges think the laws unwise or the actions unjust. What we call judicial review, at least in the federal system, is conceptually limited to situations in which there are plausible arguments that the law or action violates the Constitution,

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position within, respectively, constitutional-law scholarship and legal and political philosophy—and Waldron is not American. *See, e.g.*, ROBERT F. NAGEL, UNRESTRAINED: JUDICIAL EXCESS AND THE MIND OF THE AMERICAN LAWYER (2008); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

[89] Jefferson's 1791 bank opinion is the *locus classicus* of the position and St. George Tucker's 1803 constitutional treatise its most important early systematic statement. *See* Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), *in* H. JEFFERSON POWELL, LANGUAGES OF POWER: A SOURCE BOOK OF EARLY AMERICAN CONSTITUTIONAL HISTORY 41–43 (1991); 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND app. Note D, at 154 (1803) ("the powers delegated to the branches of the federal government are, in all cases, to receive the most strict construction that the instrument will bear . . . .").

[90] There are clearly almost no strict constructionists in the older, substantive sense: In recent years the justices with narrower views of federal power have all been wild-eyed nationalists by Jefferson's or Tucker's standards. Proof of this is legion. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 207 (1987) (majority opinion by Rehnquist, C.J.) (concluding that Congress may use the spending power to achieve "objectives not thought to be within Article I's 'enumerated legislative fields'"); *Raich*, 545 U.S. at 35 (Scalia, J., concurring in the judgment) ("[w]here necessary to make a regulation of interstate commerce effective" Congress may regulate activities that are not themselves commerce and do not substantially affect interstate commerce). An argument can be made that Justice Thomas is a strict constructionist in the substantive sense. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 584-602 & especially 601 n.8 (1995) (Thomas, J., concurring) (indicating a willingness to rethink the basic legal underpinnings of the modern federal regulatory state). In this as in some other jurisprudential respects, Thomas is a strongly independent thinker.

On methodological strict construction, consider Chief Justice Rehnquist's opinion for the Court in *Seminole Tribe*, which expressly, indeed scornfully, rejected a strict-construction view of the constitutional text in question in that case. *See* Seminole Tribe v. Fla., 517 U.S. at 69 (asserting that the dissent's textual argument was attacking "a straw man"). Justice Scalia is often described as a textualist, despite his repeated acceptance (or authorship) of opinions that cannot be defended on textual strict-construction grounds. *See, e.g.*, J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009) (criticizing Justice Scalia's opinion for the Court in Heller v. District of Columbia, 128 S.Ct. 2783 (2008), for its lack of "commitment to textualism"). In any event, Justice Scalia himself usually refers to his approach to constitutional decision making as originalist, which is not a synonym for strict-constructionist.

arguments that have to be put in terms recognizable as arguments about the Constitution's meaning or application. We all agree, in principle, that a court is powerless to invalidate a law or executive action on "constitutional" grounds unless the legal arguments—arguments grounded in the authority of the Constitution that the court should and therefore must do so—, are persuasive.[91] There are no proponents—or none who have a serious voice in the world of responsible judicial decision and commentary thereon—of the proposition that legislative and executive choices are subject to judicial second-guessing simply on the basis of reason alone in Professor Hamburger's sense, which of course includes beliefs about justice and utility.

Where our disagreements actually lie is elsewhere, in the answer to the question whether American judges may re-examine the choices of political actors, under some modern American constitutional version of what Professor Hamburger calls the old common law measure of "law and reason." Many contemporary constitutionalists, on and off the bench, think that American legislatures and executives are sovereign in Hamburger's sense, that their choices are bounded by constitutional rules, and are properly subject to judicial review, to ensure that they do not go beyond the scope defined by the rules. But there judicial duty, and therefore judicial power, end. Courts have nothing to say about political decisions that are within the scope of political power merely because the politicians have made unreasonable or unjust choices. Constitutional doctrines such as substantive due process that invite judges to inquire into reasonability or injustice are, in principle, illegitimate, and at least much of the time, the same is true, when decisions interpreting an authoritative rule such as the first amendment turn the rule into something close to a question of reason, utility and justice.[92]

Many other contemporary constitutionalists, in contrast, think of American legislatures and executives as parallel to Hamburger's "subordinate bodies" whose acts "were generally subject to the common law test of law and reason."[93] Judicial review involves not only the testing of political choice against specific constitutional rules, but also more direct consideration of the justice and rationality of political decisions under such rubrics as equal protection and substantive due process. From this contemporary perspective, furthermore, the proper application of texts such as the first amendment often requires judicial consideration of issues of justice and utility as part of the court's application of the text to the case before it.[94]

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[91] To say this is not to say that all judges always live up to these principles, or even that there is universal agreement on what exactly the principles entail. For support on my claims about the principles and the problem of judicial default, *see* H. Jefferson Powell, *On Not Being "Not an Originalist,"* 7 U. ST. THOMAS L.J. 259 (2010); H. Jefferson Powell, *Further Reflections on Not Being "Not an Originalist,"* 7 U. ST. THOMAS L.J. 288 (2010). *See generally* H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION (2008) [hereinafter CONSTITUTIONAL CONSCIENCE] (arguing that judges have a moral obligation, as a matter of good faith, to decide cases on bases properly rooted in the Constitution, as understood in the terms and concepts they have inherited as a society-specific tradition).

[92] For a study of this perspective, *see* H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217 (2011). [hereinafter Powell, *Reasoning About the Irrational*].

[93] HAMBURGER, *supra* note 1, at 327.

[94] For additional discussion, see Powell, *Reasoning About the Irrational*, *supra* note 92.

Both of these perspectives respect the authority of the Constitution in granting political power and in limiting it, and both exclude direct judicial resort to "open-ended measures of reason or natural law."[95] Both, I believe, therefore accept in principle what Professor Hamburger tells us was the traditional common law understanding that "the judges served their function of enforcing law and preserving liberty by adhering to their duty" to say what the law is rather than by "adapt[ing] their decisions to their function:"[96] judges do justice precisely by doing law. What *Law and Judicial Duty* enables us to see is that our precise point of disagreement—and it is a sharp one—is not over whether judges are limited to enforcing the Constitution but whether, independently of its specific rules, the law of the Constitution includes a standard of reason, utility and justice, a modern analogue to the common law test of law-and-reason, by which the lawfulness of political choices can be measured.

This is both a difficult and a centrally important question and Hamburger himself seems to me to be persuaded by the answer in the negative, a resolution of the antinomy of authority and reason that would opt for the former pole in the opposition. At common law, he writes,

> [t]he duty of judges complemented the obligation of the law of the land, for both the duty and the law rested on a worldly skepticism as to whether men could reliably agree about reason and justice. . . . [I]f judges, like other men, could not be expected to understand what was reasonable and just without entering into dispute,[97] then the "ideal of judging" ought not invite such considerations in ways that might "reintroduce the very disagreement and conflict that men had avoided by recognizing the authority of their legislature and the obligation of its will."[98] In form, this is an historical statement about the implicit logic of the common law's ways of reconciling authority and reason, but it would be equally apt as part of a normative argument that contemporary American judges should view legislative and executive decisions as beyond re-examination in ways that repristinate the old law-and-reason measure.[99]

In the debate we ought to have over authority and reason, Philip Hamburger's will be a voice to reckon with, but my point here is not to debate his views, if indeed I've even discerned them correctly. What I hope to suggest is how illuminating, within that

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[95] Like the common law law-and-reason test, substantive due process and equal protection analyses are structured by doctrinal principles that their proponents assert are properly based on constitutional text and cabined by precedent and tradition. *See, e.g.*, the second Justice Harlan's famous opinion in Poe v. Ullman, 367 U.S. 497, 539-42 (1961) (dissenting).

[96] HAMBURGER, *supra* note 1, at 112.

[97] *Id.*, at 610.

[98] *Id.*

[99] I may be misreading Professor Hamburger's views. He insists at other points that for most Americans in the early Republic, "as a matter of common law ideals, American legislatures were not little high courts of Parliament," *id.* at 404, which suggests though it does not prove that the legislature's acts ought to have been subject to judicial examination under the 'law-and-reason' measure. Alternatively, Hamburger's point may be purely historical, or limited to the absence of the common law impediments to judicial "review" of acts of Parliament.

debate, are the concepts which *Law and Judicial Duty* supplies. Let me briefly give two examples.

When the Supreme Court's case law is examined in light of the antinomy of authority and reason, one can find many modern cases in which the Court reached its decision on the assumption that it can properly apply a 'law-and-reason' standard to legislative or executive action. Consider two instances: first, the Court's determination that a state legislature may have authority to protect fetal life but nonetheless cannot ban abortion because doing so would inflict "suffering . . . too intimate and personal for the State to insist upon,"[100] and, second, its holding that Congress has the power to protect patent rights against state infringement without due process but nonetheless cannot create a remedy against non-consenting states, because, in the Court's judgment, "the record at best offers scant support for Congress' conclusion" and the remedy it chose was "out of proportion" to its proper goals.[101] Our familiar analytic tools make it hard to see any relationship between such decisions; indeed, at first glance most constitutional lawyers would probably call one decision "liberal" and the other "conservative." Informed by *Law and Judicial Duty*, we can see that in both cases the Court opted for the "reason" side of the antinomy of authority and reason, almost certainly without fully grasping the implications of doing so. A Hamburgerian analysis would, in these and other cases, provide a powerful tool for working out those implications, and of course the same is true with respect to the many cases in which the Court has grasped the "authority" side of the antinomy with a similar lack of reflection.

My second example concerns the rather strange notion underlying a great deal of constitutional law that the judiciary's approach to determining the constitutionality of a political decision ought to be the same whether the judges are dealing with an act of Congress or a local municipal ordinance. If constitutional rules and principles are best thought of as abstract precepts invariant across factual context, that may make sense, but Professor Hamburger's reconstruction of the common law understanding of judicial duty exemplified a quite different approach. At common law, Hamburger tells us, courts modulated the standards by which they evaluated the lawfulness of political decisions according to the identity of the decision maker, so that the judicial duty to say what the law is differed depending on whether it was Parliament or the king (with their sovereign authority), or a subordinate body such as a corporation or colonial assembly. Perhaps judicial review under the federal Constitution ought to be similar. Once again, there is a debate over a fundamental aspect of constitutional law that we are not having but probably ought to be begin, and if we do, *Law and Judicial Duty* will be an important guide to the fundamental issues. More generally, Hamburger's work provides an important key to the reconciliation of positive law and substantive justice that has eluded us in modern constitutional law.

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[100] Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992) (plurality opinion by O'Connor, Kennedy & Souter, JJ.).

[101] *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. at 646.

III. The Antinomy of Power and Exposition

For the common lawyers, there was a "natural distinction" between the judicial office and the power to act legislatively or "ministerially."[102] We need not discuss all of the details of what made the judicial office unique in the common law understanding as Professor Hamburger understands it: what is important for my argument in this essay is his stress on the centrality of the judges' activity of exposition—their saying what the law is—in defining the particular and peculiar nature of judicial authority. As political will and authority moved to the forefront of legal thought in the late medieval and early modern periods, the old conceptual distinction between making the law and interpreting it took on added significance and substance. When Parliament made a law, or the king exercised his prerogative powers, the act was sovereign and (as we have seen) was legally binding on those to whom it was directed, if it was within the scope of the actor's authority. What made it so was the legislature's or the monarch's exercise of will; while both were of course subject to God's judgment, as an earthly matter each wielded an absolute discretion within the scope of its or his lawful authority. Once it was settled that the law of the constitution sets limits even to sovereign power, a responsible legislator or executive might be said to interpret the law in deciding whether to exercise that power, but since his power was rooted in discretion, the exposition of the law was only incidental to his office and, ordinarily, no more than implicit in his decision.[103]

In contrast, while a judge's decision "'byndes betweene the same parties,'"[104] that decision was not an exercise of will but one of judgment, and necessarily a judgment about what the law is rather than what the judge might think most just or useful for the law to be. The exposition of the law was essential even to a particular decision, and "[b]eyond the parties . . . what mattered was the reasoning underlying the court's judgment, and '[s]o the reasons, not the judgments are to be pressed.'"[105] The exposition of the law "traditionally belonged to the office of judgment rather than that of will or force . . . [because] such exposition seemed necessary for the judges in the exercise of their office if they not only had to understand or interpret the law but also had to expound the law."[106] Saying what the law is was not incidental but essential to the judicial office and so "the reasons that judges gave for the judgments of their court had authority," unlike whatever views of the law—if any—might have informed the

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[102] *See* HAMBURGER, at 402 n.12 (The adverb "ministerially" is in a quotation from Chief Justice Holt in *Case of Paty et al.* (Q.B. 1705)).

[103] *See* HAMBURGER, *supra* note 1, at 543–45 (discussing the common law view in its post-Revolutionary American form: "In order to act under law, the executive and legislative departments of government had to understand or 'interpret' it.").

[104] HAMBURGER, *supra* note 1, at 220 (quoting Speech of Thomas Hedley (June 23–28, 1610), *in Parliamentary Debate 72* (Westminster, Camden Society, Samuel Rawson Gardiner ed., 1862)).

[105] *Id.* at 220.

[106] *Id.* at 543.

exercise of will by legislature or executive.[107] Political decision was at its heart a matter of power, even if power delimited by law; judicial decision was at its heart a matter of exposition of the law, even if in a certain sense the judges exercised power in deciding cases in accord with their exposition.

As Professor Hamburger reads the evidence, this common law view of the unique relationship of the judicial office to the exposition of the law remained prevalent in the early years of the Republic.[108] By the time the United States Constitution was framed, however, a very different perspective, one informed by theoretical and functional analyses about the functioning of political power, was making headway among some Americans, prominent among them Madison and James Wilson, "the most philosophically inclined of the framers." Madison and Wilson (and their followers) were disinclined to put the same weight on the ideals of duty and independent judgment that informed the common law view, or the "natural distinction among the different powers of government" that the common lawyers had perceived. In the place of these older notions, Madison and Wilson "pursued [a] functional . . . view of a balance of power" among governmental institutions all of which could properly be analyzed as competing centers of will.[109] At the Philadelphia convention Madison and Wilson repeatedly sought, unsuccessfully, to include a council of revision in the proposed federal government's structure because they lacked confidence in the force of duty and inner independence to enable judges to stand against legislative will. Despite his defeat on that score, Madison continued after the Constitution's ratification to think in terms of "the calculations of utility that animated [his] theory of a balance of power."[110] In particular, he put little stock in the idea that the exposition of the law is uniquely judicial and argued vehemently in the First Congress for a "vision of the equal authority of the different branches of government in expounding their constitutional powers."[111]

Madison's view of the Constitution was a minority position during the founding era, Hamburger believes, but in the long run, the functional perspective, so alien to the common law ideals, has prevailed in American constitutional law. Once accepted, the functional perspective collapses the common law distinctions between "the office of judgment [and the] offices of will and force," and between the political exercise of power and the judicial exposition of the law.[112] The unsurprising if largely unintended consequence is that many lawyers come to assume that at least "some constitutional

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[107] *Id.* at 220; *see also id.* at 545 ("because [the judges'] reasoning was necessary in the course of their office, it had the authority of their office"). Hamburger points out that at least after 1776, the actions of American legislatures and executives "could be considered precedents within their own branches. The exposition of law by judges, however, was more generally authoritative." *Id.* at 543.

[108] He concludes that the state constitutions' "separation of judicial and lawmaking power seemed in America to leave judgments about the law, including constitutions, exclusively in the judicial courts." *Id.* at 404.

[109] HAMBURGER, *supra* note 1, at 509.

[110] *Id.* at 552.

[111] *Id.* at 551.

[112] *Id.* at 551–52.

questions [are] to be resolved more like matters of power than of law," and judicial decisions invalidating legislative or executive decisions come to resemble simple contests of power rather than resulting from the presence in our political system of quite different, and complementary, forms of authority.[113] As with ideals and practice, authority and reason, so power and exposition have become an antinomy in American constitutional law.

The opposition between power and exposition differs from the other two antinomies, however, in that each of the other antinomies attracts adherents to both of its opposing sides—there are fervent idealists about apolitical judging and robust attitudinalists, and both scope-of-authority-only and law-and-reason as approaches to judicial review have their supporters. However, within the legal profession, at any rate,[114] everyone pledges allegiance to the exposition of the law as the proper judicial task. No judge describes him or herself as simply exercising another form of political power that is in competition with other centers of political will. There is, one might think at first, no antinomy at all because we have retained the common law's understanding of judicial decision, on this matter, in pristine condition: we all believe in exposition not power. And yet think back to the earlier discussion of ideals and practice: there are weighty reasons, grounded in its outcomes, its actual decisions, to think that the judiciary, or more particularly the Supreme Court, *acts* like a center of power whatever the justices may say.

Law and Judicial Duty gives us another powerful means of tracing in constitutional law the presence of an unacknowledged antinomy, in this case that of power and exposition. For the common lawyers, the book teaches, a unique and salient aspect of the judicial office was the fact that its authority was essentially characterized by and grounded in an exposition of law, not an act of will. Legislators and executive officers have authority because they have the power of decision. Common law judges had authority because they reasoned about what the law is, and only on that basis could they decide the issues that came before them. In the contemporary federal judicial system, in contrast, the connection between genuine exposition and judicial decision has greatly attentuated. There has been a great deal of controversy over the lower federal courts' use of "unpublished" and "non-precedential opinions" in the disposition of cases, practices that the Supreme Court ostensibly avoids but which arguably are present in the Court's use of its discretion to deny certiorari and its occasionally blatant (and invariably unsuccessful) efforts to prevent lawyers from reasoning on the basis of these sorts of decisions.[115]

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[113] *Id.* at 554.

[114] The story would be very different if we focused on political scientists or journalists.

[115] *See* Fed. R. App. P. 32.1 (prohibiting federal courts from refusing to allow the citation of "unpublished" or "non-precedential" opinions). As the Advisory Committee notes to Rule 32.1 observe, the Rule is "extremely limited" and it neither requires the courts actually to issue "unpublished" opinions nor to accord them any precedential force. On the Court's certiorari discretion, *see, e.g.*, Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 730 (2012) (arguing that the contemporary Supreme Court "seeks to establish an unfettered prerogative over what issues to decide" through its control of its agenda); Edward A. Hartnett, *Questioning*

An even more important symptom of the role of this antinomy is the extremely wide-spread use of judicial law clerks to draft opinions. If the exposition of the law, and not just the making of decisions, is central to the office of the judge, a practice that undermines the judge's involvement in the process by which the expositions are crafted is deeply problematic. It is a harmful fiction for judges to believe "that by careful editing they can make a judicial opinion their own,"[116] and the decision to delegate opinion-writing to someone else thus abandons, first and foremost, "the self-disciplining effect of authorship":[117]

> [D]elegation of the opinion-drafting function to law clerks may increase the propensity of Justices to decide cases based solely on their policy preferences . . . . A Justice [or any other judge] who delegates the drafting of opinions to law clerks . . . does not have the opportunity to learn first-hand when an opinion will not "write" or to "become as familiar with the nuances of each case, including the difficulties of aligning a new case with prevailing doctrine and other lines of decisions.[118]

Opinion-writing is an "effort to explain [the judge's] decisions in a manner that will win the considered acceptance of other esteemed persons."[119] Delegating it to other hands suggests a basic shift in judging from authority, based on the effort to persuade to authority based on the power to coerce.

My point is not that judicial opinions must invariably be exposés of the judge's thought processes, and given the crushing workload of most federal and state judges it would be unrealistic to long for a world in which every final disposition is accompanied by an elaborate, personally crafted opinion by a judge. Much thought is needed in thinking through standards for a judiciary that must decide many cases and can expect only a limited number of judges of the first rank. Professor Hamburger's emphasis on the role of exposition in the authority of common law judges suggests, however, that we should not simply accept the status quo, and particularly with respect to the Supreme Court, where the workload issue is very different. The antinomy of power and exposition poses too serious a threat to the moral and intellectual coherence of law simply to ignore the problem it creates.

Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill, 100 COLUM. L. REV. 1643, 1648 (2000) (arguing that Congress's 1925 grant to the Supreme Court of discretion to hear most cases by writ of certiorari "has encouraged Supreme Court Justices to think of themselves less as deciders of cases and more as final arbiters of controversial questions"). For an example of the Court rather obviously trying to render a decision "non-precedential" without saying so, see Bush v. Gore, 531 U.S. at 109 ("Our consideration is limited to the present circumstances."). The justices themselves have played along: as of September 2010, no member of the Court has subsequently cited the decision, although other courts have cited it over 250 times.

[116] Richard A. Posner, *The Courthouse Mice*, NEW REPUBLIC, June 5 & 12, 2006, at 34.

[117] HOW JUDGES THINK, *supra* note 38, at 286.

[118] David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 961-62 (2007). Clerkly ghost-writing has been blamed for a variety of other problems as well. See generally Stephen J. Choi & G. Mitu Gulati, *Which Judges Write Their Opinions (And Should We Care)?*, 32 FL. ST. U. L. REV. 1077 (2005).

[119] Alvin B. Rubin, *Book Review*, 130 U. PA. L. REV. 220, 227 (1981).

IV. Conclusion

Philip Hamburger comments in a footnote toward the end of *Law and Judicial Duty* that there are "many assumptions about law [that] have been lost to view, thus leaving Americans with constitutional texts largely denuded of the presuppositions that once gave them meaning."[120] I have tried to bring out some of the implications for constitutional thought of his work on those assumptions. There are many other implications, and perhaps the most important involves the connection he draws between what we now call judicial review and the moral character of the judges who do the reviewing. A great deal of contemporary scholarship assumes an external perspective on the law and judicial behavior, which is essential if we are to understand the legal world in which we live, but which cannot in itself tell us, or our judges, how they should act. That latter question is a normative one, and in the end it can only be addressed, much less answered, if we recognize the inescapable role of moral commitment in judging. To say that is of course to state the nature of the issue, not to indicate anything about its proper resolution: the role, for example, of the judge's personal views on political and ethical matters is open for debate, and the great body of scholarship that simply assumes the inescapable rightness of the scholar's ideological commitments seems to me just as mistaken as a blinkered and dogmatic empiricism. I myself believe that much of the answer to how judges ought to make constitutional decisions lies in a reinvigorated understanding of what I have elsewhere called the constitutional virtues, those habits of mind and decision that are implicitly required by a Constitution "made for people of fundamentally differing views."[121] Professor Hamburger's common lawyers, with their insistence on the moral attributes that a judge should possess to exercise properly his office, might not entirely disagree.

The main thrust of *Law and Judicial Duty* is historical, but as I have said, the book is a twofold success, and Professor Hamburger's account of what he calls the common law ideals is a major contribution to how judges can properly engage in constitutional decision making in the moral circumstances of contemporary American society.

> [T]he common law ideals enjoy authority as the foundation of a strikingly successful combination of order and freedom in divided circumstances. The truth may be whole, but it is apt to be variously perceived in the modern world, and . . . the common law ideals . . . avoided the danger of asking discordant individuals, including judges, to decide what is reasonable and just . . . . In a world in which men could not expect to agree about reason and justice, the common law vision of authority allowed them to enjoy order amid their divisions, and by preserving and limiting different spheres of authority, this vision also

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[120] HAMBURGER, *supra* note 1, at 542 n.12.

[121] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). *See generally* CONSTITUTIONAL CONSCIENCE, *supra* note 91.

> preserved a substantial degree of freedom . . . . The common law ideals thus [have] acquired their most profound context in modernity rather than tradition.[122]

Law and Judicial Duty demonstrates, wonderfully, how the assumptions of the past can challenge our own unexamined assumptions in exciting and disturbing ways. We are all in Professor Hamburger's debt.

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[122] HAMBURGER, *supra* note 1, at 619.