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Review of [illegible] by Philip Hamburger (Harvard University Press, 2010)

" e history of judicial review is one of America's latter-day creation stories," Philip Hamburger insists in this painstakingly intricate legal-historical excavation, recovery, and restoration (606). e creation myth holds that the

practice is properly understood as only a small part of what really matters: the "duty" of the judge, as a function of his o ce, to declare government actions void as contrary to law. Hamburger's big book is devoted almost entirely to parsing what many nonexperts will consider a small—and remarkably arcane—distinction between "a judicial power to hold statutes unconstitutional" and "a duty of judges to decide in accord with the law of the land" (2). Hamburger assembles almost seven hundred pages of evidence from English and early American legal history to demonstrate, again and again, this single point.

e practice was not expressly authorized because, in swearing an oath to do their duty, it was simply presumed—in the United States (pre- and post-independence), but also by the nation's English progenitors—that judges were obligated to apply the law. Hamburger's book documents "the frequency and unselfconscious ease with which judges [at all levels] handled constitutional law" (477), and considered themselves "obliged," as matter of their routine duties, "to hold acts of governors and legislatures unconstitutional" (579).

Much of [illegible] is devoted to demonstrating that there was a long-standing requirement in England that subordinate law—including not simply legislation (of which, the farther back one goes, the less there was), but customs, corporate bylaws, and so forth—be consistent with the (customary)

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North Carolina judge), they “[

in the law, which he seized upon voraciously to do what was right, just, and useful, beyond the common law's con nes (see, for example, his antislavery opinion in [illegible] (1772)—not mentioned by Hamburger—or his creative adoption of the common law to further the development of an emerging commercial society, for which he was, and is still, celebrated). Mans eld's scholarly débouché provoked spirited rejoinders from defenders of the common law, like Lord Camden, who (in judicial opinions in 1765 and 1766) insisted: "It is better to leave the Rule in exible than permit it to be bent by the Discretion of the Judge." On the one hand, "the discretion of a judge," he warned, "is the law of tyrants; it is always unknown; it is di erent in different men; it is casual, and depends upon constitution, temper, and passion. In the best it is o en times caprice, in the worst it is vice, folly, and passion to which human nature is liable" (145–146). On the other hand, " e common law vision of judicial duty," Hamburger reports, "o en troubled Englishmen whose university education in civil and canon law had le them with a low view of national custom and high expectations for reframing it within academic generalizations. The common law, like other national customs, seemed to them necessarily incomplete, uncertain, unjust, and thus in need of learned explication" (116). So things stood in England at the time of American independence. Hamburger argues that Founding Era judges in the United States fell squarely into the common law camp—though he concedes that, from the outset, there were strong popular currents fed by both "academic" and "populist" appeals to higher, natural law—particularly in (ostensibly aberrant) revolutionary contexts. One critical di erence of course was that, animated by fears that constitutional liberty could be lost through either desuetude, sociological development, or transient, popular whim, Americans adopted written constitutions, in which the intended obligation was made manifest.

justice beyond the law—whether beyond its particular rules or more generally beyond its domain" (339). The Tory Lord Mansfield was denounced by Americans who "often shared the English Whig reaction to Mansfield's eager use of lacunae and exceptions to unravel long-settled common law doctrines," and "his distaste for the hard boundaries of the common law" (340). Among the most worried was Thomas Jefferson, who complained of Mansfield's endeavor to make English law "more uncertain under pretense of rendering it

of practicing lawyers. Hamburger is a careful enough scholar to note contrary strains along the way, but these he minimizes unduly.

For example, the appeal by judges (not to mention others concerned with law in democratic politics) to "academic" natural law in the U.S. constitutional tradition, while not constant, started very early and was extremely important, particularly when it came to questions of political inequality. Slavery of course was immensely important in this regard (the supposedly reviled "academic" judge Lord Mans eld's antislavery decision in [illegible] [1772] over time became a touchstone). Hamburger is right that the American legal tradition placed heavy emphasis on that nature of law as xed and on the limited nature of a judge's discretion. But others have demonstrated American law's remarkable mutability as well. Leaving aside constitutional matters, legal historians from J. Willard Hurst on down have shown the degree to which U.S. common law judges, who, while frequently professing their adherence to fixity and common law ideals, performed exactly the Mansfieldian function of adapting the common law to the "release of [commercial] energy."

In its insistence that questions of law be (hermetically) separated from considerations of power, the book is hostile to political science—not just to the discipline's contemporary incarnations, but even as James Madison understood it (and, for that matter, going all the way back to Hobbes). Both the Federalists and the Antifederalists debated the creation of the Constitution's Article III courts (and the outlines of the Constitution more generally) with the assumption that matters of power were at stake. eir frameworks of understanding were carried forward as a major theme in American politics and political thought, particularly when the judges, who admittedly o en understood themselves as doing their duty to God by enforcing the law objectively, were perceived by others, including powerful political party coalitions, as systematically issuing erroneous or biased decisions that, more than coincidentally, advanced some sectors of society at the expense of others. For example, the rst appointments to the federal bench, with lawyerly high-mindedness, might have understood themselves as brooding omnipresences; others, however, saw them as Federalists.

In (brilliantly, and e ectively) countering the myth of judicial review, Hamburger manufactures a myth of his own, a declension story involving the corruption and decline of duty-bound judging, and the substitution of power for duty in understandings of the judicial role. But, as Hamburger himself acknowledges, if this is the case, the rot starts early, and in high places. Among the corruptors are Montesquieu (and Locke) "who . . . made it easier for

Englishmen and Americans to talk about the separation of judicial and legislative power as part of the broader separation of three parts of government" (403). Hamburger reports that "no one more vigorously espoused this challenge to traditional ideals of judicial authority than James Madison," who, although he did not abandon the common law and judicial o ce and authority, "was not deeply attached to the distinctive authority of judges" (551). Madison "emphasized [a] balance-of-power justi cation [for the Article III courts] and minimized the degree to which it detracted from the distinctive authority of judges in expounding law" (552). Although his celebrated opinion in . . , . . . lucidly set out the law-as-duty approach, John Marshall is yet another agent of decline from the purity of the lawyerly ideal.

at said, the fact that the term "judicial review" itself (coined by Princeton political scientist Edward S. Corwin) and the ascension of . . , . . .

cosmopolitan, academic law schools, the old assumptions about law and judicial duty have lost their strength and clarity and today are scarcely understood, let alone inculcated" (615).

Although its focus is resolutely historical, like the work of any A-list constitutional law professor, is likely to have contemporary policy relevance (and was probably intended to). Its pesky criticisms of James Madison et al. notwithstanding, the book dovetails nicely with "new originalist" approaches to constitutional interpretation, which (in keeping with the ascendency of conservatives to power on the bench) no longer tend to emphasize judicial restraint (as "old originalist" approaches, fashioned at a time when liberals controlled the federal courts, did), but judicial restraint when judges are not guided by law, objectively understood, and a sti spine to do their duty when they are . . . ! To be sure, Hamburger's emphasis on the positivistic core of the common law ideals will not appeal to conservative evangelical, omist, and (West Coast) Straussian