Judicial Review and Judicial Duty: The Original Understanding

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JUDICIAL REVIEW AND JUDICIAL DUTY: THE ORIGINAL UNDERSTANDING

LAW AND JUDICIAL DUTY. By Philip Hamburger.[1] Harvard University Press, 2008. Pp. xviii + 658. $49.95.

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What we call "judicial review" was not established in *Marbury v. Madison*, or by American courts. It had existed in English and then American law for centuries, not as some kind of peculiar power but rather as a corollary of the judicial duty to decide cases according to the law of the land. While that duty sometimes required judicial courage in the face of political threats, this was not its most difficult or pervasive demand. The real challenge was the requirement that judges purge their decision-making of the influence of their own wills, which required them to set aside their own views about natural law, God's will, sound policy, and even justice itself.

Phillip Hamburger's *Law and Judicial Duty* advances and defends these claims with subtlety and detailed evidence. He carries his historical study up through the end of the eighteenth century, and thus has little to say about subsequent changes in the understanding of judicial review and judicial duty. But there are obvious implications for our contemporary debates about the proper role of judges and about the distinction between law and politics. This review touches on those debates, and suggests that a broadened political role for the federal judiciary may have been more clearly foreseeable than the leading proponents of our Constitution thought it wise to acknowledge during the ratification debates.

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I. INTRODUCTION

In what has become a familiar ritual, Sonia Sotomayor presented herself for Senate confirmation as a judge who has never done anything except apply the law to the facts, and never will do anything else. Notwithstanding many speeches and law review articles in which she had articulated a rather different account of what judges do,[3] she resolutely maintained this position throughout her confirmation hearings.

Sotomayor's hearings, however, were not quite a repeat of the usual kabuki. For one thing, she had been nominated by a former law professor, who had said that he was *not* looking for judges who fit Sotomayor's description of herself because such judges *cannot exist*. In explaining his vote against confirming John Roberts as Chief Justice, then-Senator Obama said:

> [W]hile adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court, so that both a Scalia and a Ginsburg will arrive at the same place most of the time on those 95 percent of the cases—what matters on the Supreme Court is those 5 percent of cases that are truly difficult. In those cases, adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon. That last mile can only be determined on the basis of one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy. . . . [I]n those difficult cases, the critical ingredient is supplied by what is in the judge's heart.[4]

When asked about Obama's statement at her confirmation hearings, nominee Sotomayor promptly and unequivocally repudiated the views of the President by whom she had been nominated.[5]

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3. Most famously:

> Justice O'Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. I am not so sure . . . that I agree with the statement. First, as Professor Martha Minnow has noted, there can never be a universal definition of wise. Second, I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.

Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002).

4. Senator Barack Obama, Confirmation of Judge John Roberts (Sept. 22, 2005), *available at* http://obamaspeeches.com/031-Confirmation-of-Judge-John-Roberts-Obama-Speech.htm.

5. *Sotomayor Confirmation Hearings, Day 2*, N.Y. TIMES, Jul. 14, 2009, *available at* http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html.

Sotomayor's repeated, emphatic, and uncompromising insistence that the law alone always dictates her judicial decisions provoked Georgetown law professor Louis Michael Seidman to say what many other sophisticated legal observers must have been thinking:

> I was completely disgusted by Judge Sotomayor's testimony today. If she was not perjuring herself, she is intellectually unqualified to be on the Supreme Court. If she was perjuring herself, she is morally unqualified. . . . First year law students understand within a month that many areas of the law are open textured and indeterminate—that the legal material frequently (actually, I would say always) must be supplemented by contestable presuppositions, empirical assumptions, and moral judgments. . . .
>
> Perhaps Justice [sic] Sotomayor should be excused because our official ideology about judging is so degraded that she would sacrifice a position on the Supreme Court if she told the truth. Legal academics who defend what she did today have no such excuse. They should be ashamed of themselves.[6]

Observers even more sophisticated than Professor Seidman may have agreed that Sotomayor was lying, without sharing his outrage. After all, don't all the Justices, to one degree or another, tell the same sort of lies in their judicial opinions? If law is just politics by another means, the only lies worth condemning are those told by your political opponents. Why should anyone be ashamed of this, whether they are judges, nominees, or legal academics? Leaving aside Professor Seidman's indignation, obviously genuine and in that respect perhaps a bit unusual,[7] it would probably be hard to find a knowledgeable observer today who does not at least privately believe that all of our Supreme Court Justices frequently and inevitably make decisions based

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> I don't—wouldn't approach the issue of judging in the way the president does. He has to explain what he meant by judging. I can only explain what I think judges should do, which is judges can't rely on what's in their heart. They don't determine the law. Congress makes the laws. The job of a judge is to apply the law. And so it's not the heart that compels conclusions in cases, it's the law.

6. The Federalist Society Online Debate Series, July 13, 2009, http://www.fed-soc.org/debates/dbtid.30/default.asp.

7. Professor Seidman is an outspoken advocate of progressive judicial activism. *See, e.g.*, Louis Michael Seidman, Romer*'s Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67. His indignant attack on an Obama nominee who was once a leader of the Puerto Rican Legal Defense and Education Fund could hardly have involved dissembling based on partisan or narrowly political motivations.

largely on their personal political and moral beliefs, whatever they may say about The Rule of Law.

To the legal sophisticates who believe that ex-professor Obama was only stating what has obviously always been true, Philip Hamburger offers a fundamental challenge.

II. THE CONVENTIONAL WISDOM

A fairly standard story about American judicial power goes something like this. The Constitution is silent about the authority of the Supreme Court to declare Acts of Congress unconstitutional. That power was seized by the Court in *Marbury v. Madison*, a seizure made especially impressive by Chief Justice Marshall's politically shrewd opinion.[8] He confounded President Jefferson by ruling in favor of his administration, even while also declaring that the administration had behaved illegally. Even better, by holding that Congress had unconstitutionally enacted a *trivial* expansion of the Court's power, Marshall achieved a *radical* assertion of the Court's enduring power over Congress.[9] With these savvy maneuvers, *Marbury* laid the foundation for an independent and powerful judiciary, which has now become the undisputed final legal authority on the meaning of the Constitution. Our judges now perform the vital political function of shaping and reshaping constitutional law, sometimes to accord with the evolving needs and emerging moral vision of a diverse and dynamic nation, sometimes to resist spasms of undesirable innovation or backsliding produced by factional politics or democratic hysteria.

Consistently with this story, generations of American law students have begun their study of constitutional law with *Marbury*. And much of what they read in the rest of the introductory course tends to confirm the stirring saga that begins

8. The classic statement of this understanding is presented in ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 23–28 (3d ed. 2000) (1st ed. 1960). McCloskey stated at the outset that his goal was to show the Court as "an agency with a mind and a will and an influence of its own. . . . [N]ot many sophisticated persons would now take these words of [John Marshall] very seriously: 'Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing.'" *Id*. at xv.

9. The machiavellian interpretation of *Marbury* gains added credence from the fact that the Court was only able to find a constitutional violation after first adopting the most dubious interpretations of both the relevant constitutional provision and the statutory provision that was struck down. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 67–69 (1985).

with this putatively seminal case. And no wonder—most of what they read has been written by John Marshall's heirs.

This story should never have made much sense to anyone familiar with the history of the American founding. The argument for judicial review in *Marbury* substantially tracks the argument in *Federalist No. 78*, which suggests that the conclusion had already been widely accepted among those who ratified the Constitution. More generally, the ratification debates are replete with statements—by proponents and opponents of ratification alike—assuming that the new federal courts would have an obligation to invalidate unconstitutional statutes.[10] If everyone assumed that judicial review was an inherent part of the "judicial Power" conferred on federal judges by Article III, it did not need to be spelled out in the constitutional text, and the power did not need to be seized or invented by the Court in *Marbury*.

Accordingly, scholars have looked for the origin of judicial review in pre-*Marbury* case law. They have found a few tentative stirrings in colonial and early state and federal court decisions and perhaps at least a desire for such authority in Coke's famous report of *Dr. Bonham's Case*.[11] Although the evidence will not support the notion that *Marbury* illegitimately, or even dubiously, established judicial review, American judges may still seem as a practical matter to have created the power of judicial review for themselves—partly from the implicit logic of written constitutions, partly from institutional and personal self interest, and partly from a vision of its potentially salutary political effects.

In this account, the Supreme Court might have refrained from asserting the power of judicial review, and it is in any event Marshall and his successors who have determined the scope and purposes of this power. Accordingly, the continuing beneficence of their achievement depends largely on ensuring that the courts—and above all the United States Supreme Court—are staffed with people who have the political and moral wisdom to exercise this power appropriately. Hence Barack Obama's

10. Some of the delegates at Philadelphia doubted that courts *should* have the authority to declare statutes void, but nobody seems to have doubted that they *would* have that authority unless the Constitution expressly denied it to them. (pp. 602–03). It is possible that the existence of this authority may have been denied by some men during the ratification debates, but I do not recall seeing such a claim by any of the major participants.

11. 77 Eng. Rep. 638, 646 (1610). Hamburger argues that Coke's allusion to the notion that acts of Parliament could be held void has been widely misunderstood. (pp. 622–30).

emphasis on "one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy."

III. JUDICIAL DUTY

Law and Judicial Duty argues that all of the subtle variants of this story in the scholarly literature are wrong. Hamburger has a simple and counter-conventional thesis, which he supports with elaborate argument and documentation: judicial review has been with us for centuries, in the form of an unvarying duty to follow the law rather than to follow one's heart. According to Hamburger, the very term "judicial review" is misleading. For many centuries, English and American judges had a duty to decide cases in accord with the law of the land.[12] This was a duty of all judges, from the highest to the lowest. And it applied in all cases, not just those in which the legality of a government action, or the constitutionality of a statute, was at issue. The term "judicial review" is also misleading because it suggests a power or discretion that might be broader than the duty to follow the law.

This understanding of judicial duty was certainly not the one articulated by Barack Obama, but neither was it the simplistic straw man lampooned by Professor Seidman and many others today. Judges' belief that their duty gave them no choice but to follow the law of the land did not mean that it was always easy to know what the law required. Nor did it mean that judges would never be tempted to recur to their own moral and political beliefs when the law was uncertain or when its dictates were disagreeable or seemingly unjust. Nevertheless, Hamburger argues that the central achievement of English judges was the development of an intellectual and moral discipline through which fallible human beings could resist these temptations, and strive with considerable success to purge judicial decisions of the influence of individual will.

None of us could think they always succeeded, and neither did they. But however often they may have failed, due to human weakness, there was no recognized exception from this judicial duty, even in what Obama called "those 5 percent of cases that are truly difficult." Nor were these judges unaware of theories

12. The law of the land did not encompass subordinate laws, such as local customs, acts of municipal corporations, and colonial statutes.

resembling Obama's. At least as early as the fourteenth century, the common law approach to judicial duty faced a fundamental challenge from academically minded lawyers (especially those influenced by continental jurisprudence) who believed that judges had an obligation to follow natural or divine law when it conflicted with human law.

Without denying that natural and divine law had a higher authority than any human law, and without denying that English law was undoubtedly imperfect in many ways, English judges strongly resisted the conclusion that they *ever* had a right or duty to go against the law of the land while exercising their judicial office. Similarly, these judges denied that other external sources of law—such as civil, ecclesiastical, or international law, and even treaties —were obligatory in English courts unless and until they were incorporated in the law of the land (as had been done in some areas, such as maritime law).

Most of *Law and Judicial Duty* is devoted to tracing the persistence of this narrow but profoundly difficult and demanding ideal of judicial duty through English and American history up to the end of the eighteenth century. Perhaps the most striking feature of Hamburger's lucid and thoughtful account is how durable this understanding of the judicial office proved to be in the face of momentous political, religious, and social upheavals. Judicial understandings of the law of the land did of course change considerably over the centuries. The judges, however, were generally very disciplined in accommodating social change, preferring to act only indirectly, in small steps, and with the goal of discerning rather than creating the law. Notably, they were very resistant to intellectuals "whose experience with the rigidities of the common law made them eager for approaches that 'le[ft] the wit of man more free to turne and tosse.'"[13] (p. 117, quoting Francis Bacon).

Whatever else one may think of Sotomayor's Senate testimony, the understanding of judicial duty she professed came from people who were not airheads or legal naïfs.

13. This restless intellectual spirit may be seen as a variant of the academic natural law approach, just as the pragmatism of modern academic judges like Richard Posner may be seen as a variant within the modern higher-law tradition.

IV. JUDICIAL DUTY AND THE BALANCE OF POWERS

To all this, one might still object that it fails to account for the profound change that occurred when Americans adopted their written constitutions. Judicial review of the *Marbury* sort is a decision by a court to invalidate a statute adopted by a coordinate legislature. Acts of Parliament were never invalidated by the courts on constitutional grounds, and probably never could have been under English legal theory. Even if one wants to call the American practice of judicial review just another instance of "applying the law to the facts," isn't this a unique exercise of judicial power that requires a distinct understanding of its effects and rationale? The evidence in *Law and Judicial Duty* suggests two different answers to this question: no and maybe.

Contrary to a widespread misconception, Hamburger argues, English courts did not refrain from invalidating acts of Parliament because of that body's sovereignty. Rather, its statutes were immune from judicial invalidation primarily because Parliament served not only as a legislature but also as the highest court of the realm. As such, it had the authority to discern and declare the common law and the constitution, which was an element of the common law. Accordingly, it would have been absurd for subordinate courts to declare its acts unconstitutional, just as it would be absurd for our inferior federal courts to overrule the Supreme Court. That did not imply that Parliament was the creator of the English constitution, any more than our Supreme Court need be understood as the creator of our Constitution. Although there may have been no legal appeal from Parliament on constitutional questions, that was because of Parliament's judicial role, just as there is no legal appeal from constitutional decisions of our Supreme Court.[14]

This analysis is confirmed, according to Hamburger, by the fact that English courts did invalidate sovereign acts of the

14. Parliament also had the legislative authority to change the common law through statutes, and this might effectively have entailed a power to change England's customary constitution. If so, however, it was not for this reason that ordinary courts were unable to declare acts of Parliament unconstitutional, but rather on account of Parliament's status as the highest court of the realm. (pp. 237–42) It did not escape notice that this arrangement threatened to leave Parliament with the power to alter the constitution without the consent of the people. As we are frequently reminded, *this* kind of problem did not disappear when Americans adopted written constitutions that separated the judiciary from the legislature.

Crown that were contrary to the law of the land.[15] The difference between the Crown and Parliament was not that only one of them was sovereign, or that only one of them could bring severe political pressure to bear on the judges, but rather that only one of them was the highest court in the land. Accordingly, when American constitutions separated the highest judicial court from the legislature, no alteration of the traditional understanding of judicial duty was required. American judges could declare statutes unconstitutional for the same reason that English courts had long had a duty to declare acts of the Crown unconstitutional.

Notwithstanding this conclusion, some of the evidence in *Law and Judicial Duty* suggests that the seeds of our modern understanding of judicial review may already have germinated during the founding period, and in a surprising place. Had I been asked where to look for such seeds before I read this book, I might have pointed to *Calder v. Bull*,[16] thinking that dicta in Justice Chase's opinion shows that the academically oriented natural law approach to judging had not been decisively repudiated in our legal tradition. That approach, of course, eventually became controversial within the Supreme Court, and at some point the "living constitution" version of the higher law approach to judging became the dominant understanding of American constitutional law among people with legal training.

Hamburger argues that I would have been wrong. The common law had always recognized a distinction between the law of the land, always strictly binding on the courts, and local customs, whose legal validity was adjudicated under a test of reasonableness. At the time of *Calder*, Connecticut had not yet adopted a written constitution and was still governed by customary law. Hamburger believes that Chase's controversial claim—that "certain vital principles in our free Republican governments" may be invoked by courts to overrule an "apparent and flagrant abuse of legislative power"—applied

15. Judges also declined to assist parliamentary efforts to invade the constitutional authority of the Crown, and refused to enforce unconstitutional acts of a single house of Parliament (pp. 215, 249).

16. 3 U.S. (3 Dall.) 386 (1798). After a Connecticut probate court disapproved a will, the legislature ordered a rehearing by that same court. On rehearing, the court approved the will, and that decision was affirmed by the state appellate courts. The United States Supreme Court unanimously affirmed, holding that the Connecticut legislature had not violated the Ex Post Facto Clause of Article I, § 10. The Court also declined to hold that the Connecticut legislature had unconstitutionally exercised a power that it did not possess.

only to laws adopted under local custom. Accordingly, Chase did not mean that the United States Constitution imposed such constraints on Connecticut or that higher law principles could ever be invoked by judges to override a statute validly enacted pursuant to a written constitution. In Hamburger's view, Justice Iredell objected to Chase's loosely worded dicta only from an abundance of caution, and merely reaffirmed the utterly conventional and traditional view that abstract principles of natural law or natural justice may never justify a court in departing from the law of the land.[17]

Nevertheless, Hamburger does detect some founding era skepticism about the traditional view, and he finds it in a striking source. As every reader of the *Federalist Papers* has to be aware, a central purpose of our Constitution is to curb democratic excess and injustice. After the Philadelphia Convention, James Madison deeply regretted that Congress had not been given the power to veto state laws, a tool that he thought was probably indispensable for achieving this central purpose.[18] But it wasn't only the state governments that worried Madison. At Philadelphia, he and James Wilson persistently and forcefully pressed for the creation of a federal council of revision, whose function would have been to give the judiciary a share in the veto power, in order to help prevent Congress itself from enacting unconstitutional or unwise laws. The opposition to this proposal was equally forceful. Other delegates made the obvious and powerful points that involving judges in the creation of legislation would call for modes of thinking alien to the judicial office, and would inevitably tend to bias their legal judgment when those same laws came before them in their judicial capacity.

Characteristically, Madison acknowledged the merit in his opponents' points. He nonetheless insisted, and insisted strongly, that the disadvantages they noted were outweighed by the advantages, especially the utility of employing the "wisdom and weight" of the judges to strengthen the executive's ability to resist improper legislation. Nor was Madison's proposal a radical innovation. English courts had only stopped issuing advisory

17. I must confess that I am not fully persuaded by Hamburger's interpretation of Chase's dicta, even after re-reading the opinions in *Calder v. Bull*. If Chase meant only what Hamburger thinks he meant, the wording of his dicta was very loose indeed.

18. Madison did not believe that judicial power alone would even be able to keep the state governments within constitutional bounds (p. 595 n.16, quoting Letter from James Madison to Thomas Jefferson, Oct. 24, 1787).

opinions in 1760, and English judges had continued to give advice on legislation in the House of Lords. Some American states, moreover, had adopted councils of revision similar to what Madison and Wilson were proposing.

Madison's proposal must nonetheless have reflected one of two questionable judgments. Perhaps he was confident that the difficult self discipline required by the traditional understanding of judicial duty could survive the immersion of judges in the legislative process. Or perhaps he was willing to risk the loss of this self discipline for the sake of establishing a strong institutional counterweight to Congress. Hamburger appears to lean toward the second alternative, and so do I. If we're right, Madison certainly got what he wanted, even without a council of revision. But his opponents also turned out to be right, at least insofar as they feared that the nature of the judicial office would be radically transformed once judges became part-time legislators (as they often now are, if only in "those 5 percent of cases that are truly difficult").

Madison himself recognized that his balance-of-powers approach would require some kind of new checks on the judiciary in order to avoid the kind of judicial supremacy that the Court eventually proclaimed for itself in *Cooper v. Aaron*.[19] But what would those checks be? Hamburger thinks Madison had no answer. Accordingly, he does not attribute much significance to Madison's position, arguing that it was neither fully thought out nor widely accepted. For a more reliable exposition of the prevailing understanding, Hamburger turns to Alexander Hamilton's essay in *Federalist No. 78*.

Hamilton argued that judges would be obliged to refuse enforcement to unconstitutional laws, and that Acts of Congress could not be excepted from this rule. Having only judgment, not will, judges would be much less likely than members of Congress to substitute their own preferences for the will of the sovereign people as it is expressed in the Constitution. Granting that judges, too, could depart from their duty, Hamilton argued that this risk was inseparable from the decision to separate the

19. 358 U.S. 1, 18 (1958). After noting that American constitutions by their terms made no provision for resolving disagreements among the independent departments of government, Madison added that "as the Courts are generally the last in making their decision, it results to them, by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Dept paramount in fact to the Legislature, which was never intended, and can never be proper" (p. 551 & n.24, quoting "Observations on the 'Draught of a Constitution for Virginia'" (Oct. 15, 1788)).

judiciary from the legislature. The threat of impeachment, moreover, would keep such behavior from going too far.

Hamburger must be right that *Federalist No. 78* is strong evidence that the new Constitution was not meant to alter the age-old office (i.e. duty) of the judge. What we call judicial review was a necessary consequence of that understanding of the office, but it was not one that required judges to become philosopher- or economist-kings, calculating practitioners of interest-group politics, or moral shepherds of the people.

One wonders, though, whether Hamilton completely revealed his own thoughts in *Federalist No. 78*.[20] In the course of his reassuring argument that the judiciary is "incontestably" the weakest and least dangerous of the three departments of government, Hamilton quotes Montesquieu: "Of the three powers above mentioned, the JUDICIARY is next to nothing."[21] This quotation is extremely misleading. As its context in *The Spirit of the Laws* makes unmistakably clear, Montesquieu is referring to English *juries*, not to the government officials we call judges. In fact, perhaps the most intriguing aspect of Montesquieu's analysis of the English constitution is the absence of *any* discussion of the kind of judges Hamilton is discussing in *Federalist No. 78*. Montesquieu's omission, moreover, was surely deliberate.

As we know from *Federalist No. 9*, Hamilton was a very careful reader of *The Spirit of the Laws*, and it seems quite unlikely that he was unaware that he was mis-citing Montesquieu. Perhaps Montesquieu and Hamilton were persuaded that a modern republic requires independent judges to play a significant political role in maintaining the constitutional balance. Perhaps Montesquieu and Hamilton were also persuaded that this role requires judges to go well beyond "applying the law to the facts." And perhaps they believed that judges and responsible proponents of judicial independence are

20. Hamburger recognizes that Hamilton's comments about equitable interpretation in *Federalist No. 78* may have encouraged the development of a newly expansive understanding of the judicial role (pp. 355–57).

21. Hamilton appears to be citing and quoting from an English translation of *The Spirit of the Laws*, which was published in 1773 in London by Crowder, Ware and Payne, and that same year in Edinburgh by Kincaid and Creech. Hamilton's quotation is inaccurate, for it omits the words I have italicized in the sentence as it appears in the 1773 translation: "Of the three powers above mentioned, the judiciary is *in some measure* next to nothing."

also required to conceal or at least obscure the extent of their political activity.[22]

If that is so, perhaps the distance between Madison and Hamilton is less than it first appears to be. That, of course, would not resolve our contemporary debates about the Supreme Court's appropriate role, or tell us what kind of people should be appointed to it. It certainly doesn't imply the propriety of the kind of selective exercise of will endorsed by Barack Obama,[23] let alone the pervasive activism that Professor Seidman thinks is unavoidable.[24] It might instead prompt us to wonder whether the framers and proponents of the new Constitution gave sufficient thought to the dangers posed by a powerful and independent judiciary.[25] Hamburger's book raises such questions, and pursuing them in a dispassionate way would help keep academic discussions of the subject from resembling the burlesques so frequently performed by Senators and judicial nominees.

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22. For further detail, see PAUL O. CARRESE, THE CLOAKING OF POWER: MONTESQUIEU, BLACKSTONE, AND THE RISE OF JUDICIAL ACTIVISM (2003); Nelson Lund, *Montesquieu, Judicial Degeneracy and the United States Supreme Court*, *in* NATURAL MORAL LAW IN CONTEMPORARY SOCIETY, Holger Zaborowski ed. (Catholic U. of Amer. Press, forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1344487.

23. In his speech opposing John Roberts' confirmation as Chief Justice, Obama said:

> In those 5 percent of hard cases, the constitutional text will not be directly on point. The language of the statute will not be perfectly clear. Legal process alone will not lead you to a rule of decision. In those circumstances, your decisions about whether affirmative action is an appropriate response to the history of discrimination in this country or whether a general right of privacy encompasses a more specific right of women to control their reproductive decisions or whether the commerce clause empowers Congress to speak on those issues of broad national concern that may be only tangentially related to what is easily defined as interstate commerce, whether a person who is disabled has the right to be accommodated so they can work alongside those who are nondisabled— in those difficult cases, the critical ingredient is supplied by what is in the judge's heart.

Senator Barack Obama, Confirmation of Judge John Roberts (Sept. 22, 2005), *available at* http://obamaspeeches.com/031-Confirmation-of-Judge-John-Roberts-Obama-Speech.htm.

24. The Federalist Society Online Debate Series, July 19, 2009, http://www.fed-soc.org/debates/dbtid.30/default.asp ("[M]any areas of the law are open textured and indeterminate—[and] the legal material frequently (*actually, I would say always*) must be supplemented by contestable presuppositions, empirical assumptions, and moral judgments.") (emphasis added).

25. Perhaps it is too late even to think about moving our Supreme Court back toward the model described by Hamilton and Hamburger. But perhaps it is not inherently impossible. For some suggestions about steps that Congress might consider taking, see Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, GEO. WASH. L. REV. (forthcoming).

V. CONCLUSION

Judgments about *Law and Judicial Duty* as a work of historical scholarship will have to be made by those who are far more familiar with the sources than I could ever pretend to be. But I can say at least this much to anyone who wants to talk about the origins and nature of American judicial review, or about the duty of judges in our legal system: If you don't first become intimately familiar with this book, you run a big risk of looking like an ignoramus or a fool.