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Expounding the Law: Law and Judicial Duty

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Response

Expounding the Law

Mary Sarah Bilder*

Introduction

In the fall of 2009, an editorial in the British *The Guardian* discussed the new supreme court for the United Kingdom.[1] The editorial emphasized, "The new court is not like others of the same name around the world. It has no power to nullify acts of parliament as unconstitutional."[2] It concluded, "This is a good day for grown-up government."[3]

On this side of the Atlantic, "grown-up government" means a Supreme Court with the power to nullify legislative acts as unconstitutional. Nevertheless, over two centuries after the Anglo-American legal tradition diverged into a British and an American path, a su-

* Professor and Michael and Helen Lee Distinguished Scholar, Boston College Law School. The author would like to thank Alfred Brophy, Daniel Hulsebosch, and Maeva Marcus for helpful comments on this Essay; the other participants at the conference; and Andrew Golden for research assistance. The footnotes in this Essay are not intended to be comprehensive. Readers interested in the topic in greater depth are advised to consult the two books that were the focus of this symposium: PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008), and BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

1 Editorial, *Supreme Court: Britain's October Revolution*, GUARDIAN (London), Oct. 1, 2009, at 34. *See generally* Constitutional Reform Act, 2005, c. 4 (Eng.) (establishing Britain's supreme court); Constitutional Reform Act 2005 (Commencement No. 11) Order 2009, No. 1604, c. 83 (putting the supreme court provisions of the Constitutional Reform Act into effect on October 1, 2009).

2 Editorial, *supra* note 1, at 34.

3 *Id.*

preme court and judicial review do not necessarily go together. This divergence suggests that what judges are supposed to do—in particular, what supreme court judges are supposed to do when confronted by legislation that goes against a constitution—is historically contingent.

The history of what judges are supposed to do is the subject of Philip Hamburger's impressive new book *Law and Judicial Duty*.[4] Hamburger begins by emphasizing that judicial review "often seems the central feature of American constitutional law."[5] He then asks, "Where does this power come from? And what is its character and scope?"[6] Hamburger argues in the following 600-plus pages that the common law ideals of law and judicial duty together "required judges to hold unconstitutional acts unlawful."[7] In short, a hierarchical conception of law and an oath to decide in "accord with the law of the land" meant that judges had no choice but to conduct judicial review.[8]

Hamburger's emphasis on the judicial perspective on constraint makes an important contribution to scholarship seeking to reconsider the myth of *Marbury v. Madison*.[9] Part I of this Essay discusses the difficulties facing any account of the history of judicial review. Part II considers three aspects of Hamburger's account: his reliance on the concept of duty, his use of a singular conception of the law, and his acknowledgment of an alternative concept, "expounding the law."

I. Difficulties Confronting Judicial Review Histories

For any scholar, to write on the history of judicial review is to enter a field already brimming with accounts. One of the wonderful, albeit daunting, aspects of electronic databases and Google is that they offer the ability to recover an increasing number of things written long ago on a subject. If one combines scholarship and commentary over the last two centuries on judicial review with the contemporary outpouring in law, history, and political science, there is an enormous amount written. Quite frankly, a mere mortal law professor is unlikely to be able to keep up with it all. Increasingly, many scholars will probably find themselves partway into writing a new article only to discover that someone a century ago already wrote a shorter, less heavily footnoted version.

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4 PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008).

5 *Id.* at 1.

6 *Id.*

7 *Id.* at 17.

8 *Id.* at 18.

9 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

Other difficulties confront the inquiry into why the American system favors judicial review. In exploring this area over the past decade, I have concluded that at least four significant problems exist: disciplinary divisions, terminology, comparisons, and precedents.

Disciplinary divisions abound. Law professors, political scientists, and historians are interested in different angles.[10] Not surprisingly, their paths of analysis lead to what appear to be divergent conclusions.[11] Legal scholars worry about constitutional doctrines and institutions such as courts.[12] Political scientists worry about principles of political science such as separation of powers.[13] Finally, historians worry about cultural and political practices and ideas such as constitutionalism.[14] Rather than being mutually exclusive, these approaches often describe different facets or strands of the same general phenomenon. What is everyone talking about?

In fact, although most modern scholars employ the term *judicial review*, it is itself historically contingent. Edward Corwin first used the phrase in 1909.[15] Before that, in the nineteenth century, writers favored *judicial duty* or *judicial power*.[16] Courts, however, usually just described setting aside or voiding acts repugnant to the constitution.[17] Indeed, the Ninth Circuit's recent use of repugnancy language was a refreshing return to a past practice[18]: "We find this to be repugnant to the Constitution, and a painful reminder of some of the most ignominious chapters of our national history."[19] Given the number of different labels, which one should be used?

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10 *See* Mary Sarah Bilder, *Idea or Practice: A Brief Historiography of Judicial Review*, 20 J. POL'Y HIST. 6, 8 (2008).

11 *Id.*

12 *See id.* at 8–10 (discussing Horace Gray, who stressed the continuity between "the current Supreme Judicial Court and its colonial predecessor").

13 *See id.* at 10–12 (describing political scientists' depiction of judicial review as an original doctrine grounded in American federalism).

14 *See id.* at 12–13 (discussing historians' placement of judicial review in the context of American colonialism).

15 Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 660, 670 (1909); *see also* Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 505 n.5 (2006) (discussing Corwin's development of the term *judicial review*).

16 *See* Bilder, *supra* note 15.

17 Bilder, *supra* note 10, at 7.

18 This is especially true if one has argued that judicial review grows out of the colonial experience of an imperial constitution founded on the notion of repugnancy. *See, e.g.*, MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE 10–11 (2004); Bilder, *supra* note 15, at 508, 543 & n.219.

19 al-Kidd v. Ashcroft, 580 F.3d 949, 981 (9th Cir. 2009) (finding that the use of the federal material witness statute to detain suspected terrorists violated the Constitution); *see also* Drake v. Portuondo, 553 F.3d 230, 240 (2d Cir. 2009) ("Since at least 1935, it has been the established

A related concern is how to choose the appropriate pre- and post-1787 comparison. Discontinuities between the two periods include: a mixed imperial government versus a tripartite national government; a Privy Council versus a Supreme Court; colonies versus states; and the laws of England versus a written Constitution, to name just a few.[20] The periods, however, also share continuities. Both embrace repugnancy language; the office of the judge; some power to negate legislation; some notion, however amorphous, of fundamental law; and some idea of constitutionalism.[21] What is the appropriate transformation?[22]

Lastly, this complexity means that accounts often get bogged down in a search for precedents, particularly during the transitional years of the 1780s. The line of state cases related to judicial review has remained relatively constant (plus or minus one or two) since the mid-nineteenth century.[23] In 1865, Horace Gray (later a Supreme Court Justice) penned an influential footnote listing some of these cases.[24] Two decades later, William Meigs wrote an influential article discussing them.[25] Nearly a century later, Gordon Wood's important

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law of the United States that a conviction obtained through testimony the prosecutor knows to be false is repugnant to the Constitution.").

20 *See* Mary Sarah Bilder, *Colonial Constitutionalism and Constitutional Law*, *in* TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: ESSAYS IN HONOR OF PROFESSOR MORTON J. HORWITZ 28, 29 (Daniel W. Hamilton & Alfred L. Brophy eds., 2009) [hereinafter Bilder, *Colonial Constitutionalism*] (discussing the shift from England's "[a]ssemblage of [l]aws" to America's written Constitution). For further discussion of some of these aspects, see Mary Sarah Bilder, *English Settlement and Local Governance*, *in* 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 63, 64, 83–103 (Michael Grossberg & Christopher Tomlins eds., 2008) [hereinafter Bilder, *English Settlement*] (describing the institutional development of America's pre-Revolutionary colonial governance structure, including the role of the Privy Council and the imperial Constitution).

21 For elaboration on some of these aspects, see Bilder, *English Settlement*, *supra* note 20, at 88–103 (discussing the pre-1787 court system and colonial law).

22 For an account on the transformation of constitutional law, see generally Bilder, *Colonial Constitutionalism*, *supra* note 20.

23 Some of the most prominent cases include the *Ten-Pound Act Cases* (N.H. 1786), *described in* 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 968–71 (1953); *Rutgers v. Waddington* (N.Y. City Mayor's Ct. 1784), *reprinted in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 392–419 (Julius Goebel Jr. ed., 1964); *Bayard v. Singleton*, 1 N.C. (1 Mart.) 5 (1787); *Trevett v. Weeden* (R.I. 1786), *described in* JAMES M. VARNUM, THE CASE, TREVETT AGAINST WEEDEN (Providence, John Carter 1787); and *Commonwealth v. Caton*, 8 Va. (4 Call) 5 (1782).

24 JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772 app. 1, at 529 n.32 (Boston, Little, Brown & Co. 1865) (appendix written by Horace Gray, Jr.).

25 William M. Meigs, *The Relation of the Judiciary to the Constitution*, 19 AM. L. REV. 175, 178–83 (1885).

The Creation of the American Republic brought renewed interest to the line.[26]

How should authors write about this relatively well-known list of cases? American law professors are not English Tudor-Stuart historians who can reference the *Five Knights Case*[27] or the *Ship Money Case*[28] and then simply explain what they are adding to the topic. Publishers and law review editors, wary of those readers unfamiliar with the subject, often want explanations as if the cases had just been discovered. Articles are also metrics for proving to the relevant authorities that one is accomplishing something.[29] More substantively, many authors process information by writing; because these cases are sufficiently complicated, writing one's own account is understandable. And, to be sure, I too have failed to cut such work product from past published works, realizing only in retrospect that the cases could have been deleted. Nonetheless, future histories of judicial review might try to avoid devoting so many printed pages to in-depth re-recounting of the facts of known cases. How then should authors deal with the precedents?

Hamburger takes an unusual and intriguing approach. He titles the section of these cases "Four Sets of Cases (with a Choice for the Reader)."[30] He suggests that "[r]ather than read the entire remainder of this chapter, the reader may wish to select a state—New Jersey, New Hampshire, Rhode Island, or North Carolina—and read about its case or cases."[31] As he explains, "[a]ny one of them . . . will suffice to illustrate how judges held statutes unconstitutional, and the reader should therefore feel free to read about any one state and then proceed to the next chapter."[32] Not all publishers may be so accommodating, but for authors with publishing clout, this presents an interesting possibility.

Readers would benefit from perusing Hamburger's account of the New Jersey precedent *Holmes v. Walton*.[33] Although several

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26 GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 453–63 (1969) (section entitled "The Enhancement of the Judiciary").

27 Darnel's Case (The Five Knights' Case), (1627) 3 How. St. Tr. 1 (K.B.).

28 Ship Money Case, (1637) 3 How. St. Tr. 825.

29 *See, e.g.*, Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 44 (1936).

30 HAMBURGER, *supra* note 4, at 406.

31 *Id.* at 407.

32 *Id.*

33 Holmes v. Walton (N.J. 1780), *described in* Austin Scott, Holmes vs. Walton*: The New Jersey Precedent*, 4 AM. HIST. REV. 456 (1899). For Hamburger's discussion, see HAMBURGER, *supra* note 4, at 407–22. Materials from the case are available at http://njlegallib.rutgers.edu/hw/.

scholars had written new accounts of the 1780s precedents using discovered archival materials,[34] *Holmes* had remained understudied. Hamburger's footnotes demonstrate his wide-ranging and careful archival research of this overlooked, yet important, case.[35]

More provocative than Hamburger's discussion of the traditional precedents is his chapter discussing less traditional cases.[36] For example, Hamburger includes a discussion of the Quock Walker cases.[37] In the final Quock Walker case, the Massachusetts Supreme Judicial Court held slavery unconstitutional under the 1780 state constitution.[38] The underlying cases and facts are fascinating. The cases are likely a standard part of many American Legal History course materials to demonstrate pre-1787 ideas of constitutionalism.[39] They may have been traditionally omitted from the judicial review precedent line because there was no positive legislative enactment permitting slavery,[40] and most scholars focus on the modern institutional conflict between courts and legislatures. The decision did not strike down a

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34 For an account of the New Hampshire *Ten-Pound Act Cases* (N.H. 1786), *described in* 2 CROSSKEY, *supra* note 23, at 968–71, see Richard M. Lambert, *The "Ten Pound Act" Cases and the Origins of Judicial Review in New Hampshire*, 43 N.H. B.J. 37 (2002). For *Rutgers v. Waddington* (N.Y. City Mayor's Ct. 1784), *reprinted in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY, *supra* note 23, at 392–419, see DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830, at 194–202 (2005). For *Trevett v. Weeden* (R.I. 1786), *described in* VARNUM, *supra* note 23, see BILDER, *supra* note 18, at 188–91. For *Commonwealth v. Caton*, 8 Va. (4 Call) 5 (1782), see William Michael Treanor, *The* Case of the Prisoners *and the Origins of Judicial Review*, 143 U. PA. L. REV. 491 (1994).

35 In addition to *Holmes*, those interested in the judicial review precedents might focus on the *Josiah Philips Case* (Va. Gen. Ct. 1778), *discussed in* 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES app. note D, at 293 (Lawbook Exch. 1996) (1803) (Hamburger chose not to include this Philips). I am aware of only two accounts of this bill of attainder case, both over a century old. *See* W. P. Trent, *The* Case of Josiah Philips, 1 AM. HIST. REV. 444 (1896); William Romaine Tyree, *The* Case of Josiah Philips, 16 VA. L. REG. 648 (1911); *see also* Treanor, *supra* note 34, at 538 n.212. Who knows whether there is anything new to be written, but it would seem to represent one of the earliest possible post-1776 confrontations of the problem.

36 HAMBURGER, *supra* note 4, at 476–503 (chapter entitled "Not Holding Legislative Acts Unconstitutional").

37 *Id.* at 476–84 (discussing the series of unpublished Massachusetts decisions concerning the slave Quock Walker). For prior discussions of the cases, see the sources listed in HAMBURGER, *supra* note 4, at 477 n.1. Horace Gray wrote the leading scholarship on the cases. *See* 13 PROC. OF THE MASS. HIST. SOC'Y 292–99 (Boston, Mass. Hist. Soc'y 1874). Gray had written the footnote suggesting cases in which judges had exercised judicial duty. *See supra* note 24 and accompanying text. For a brief discussion of Gray's role in promoting judicial review on the Supreme Court, see Bilder, *supra* note 10, at 10.

38 HAMBURGER, *supra* note 4, at 482–84.

39 *See, e.g.*, Mary Sarah Bilder, American Legal History Course Reader pt. 1 (Fall 2009) (unpublished course pack, on file with author).

40 *See* HAMBURGER, *supra* note 4, at 479.

legislative act but rather barred slavery as a customary practice or as a part of colonial common law.[41]

By including this case, Hamburger makes the crucial point that the lens through which judicial review cases have been investigated is too narrow. What if the history of judicial review was not regarded simply as legislative acts voided by a supreme court, but as practices found unconstitutional by a court? In fact, what if scholars stopped being so fretful about judicial review and thought more broadly about early American practices of constitutionalism?

Implicit in much contemporary scholarship is the emphasis that judicial review is not constitutionalism.[42] The "Chronological Table of State Decisions" at the end of Hamburger's book, however, contains sufficient unfamiliar names to suggest that more work can be done to discern the outer boundaries of state constitutionalism in the 1780s.[43] Daniel Hulsebosch's work on the conflict between the Treaty of 1783 and state law suggests another less familiar boundary.[44] If the shifting boundaries of early American constitutionalism are better understood, the smaller strand of judicial review might be disentangled.

In this sense, perhaps the most important contribution of Hamburger's book is to remind readers of the wider horizons of the fundamental inquiry. Three concepts raised by Hamburger's account offer opportunities for further exploration.

II. Exploring Law and Judicial Duty

A. The Language of Duty

Hamburger focuses on judges—and this lens on the judge is relatively new. This approach recalls the late John P. Dawson's work on the changing conception of the judge.[45] To compare the two is to em-

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41 *Id.* at 482–84.

42 *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009) (discussing the relationship between judicial review and the will of the people); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (rejecting the modern understanding that popular sovereignty is inapposite to judicial review); John Phillip Reid, *Another Origin of Judicial Review: The Constitutional Crisis of 1776 and the Need for a Dernier Judge*, 64 N.Y.U. L. REV. 963 (1989) (arguing that judicial review emerged as a means to curb the abuse of a sovereign legislature).

43 HAMBURGER, *supra* note 4, at 655–58.

44 Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI.-KENT L. REV. 825, 843–58 (2006) (discussing cases invalidating antiloyalist legislation that interfered with the Peace Treaty of 1783).

45 JOHN P. DAWSON, THE ORACLES OF THE LAW (1968).

phasize the degree to which the judge—as opposed to the judiciary—has been long understudied in the history of judicial review.

I agree with Hamburger that there is some notion, inherent in the office of the judge, that what judges did was decide cases and, in the course of deciding cases, they might on occasion have to limit legislation and more broadly limit law. Reading backwards through his book, I was fascinated by the repetitive trope of a judicial *duty*. This language, of course, appears in the account by Horace Gray, one of the first to try to describe the history of judicial review and an important participant in the consolidation of the Supreme Court's judicial review power after the Civil War.[46] Hamburger traces duty back through *Federalist No. 78*[47] and James Iredell's oft-discussed August 1786 editorial,[48] back through the state cases of the 1780s,[49] and even back to the very beginning of the seventeenth century with Sir Francis Bacon.[50]

Nonetheless, although the office of the judge was understood to involve, potentially, the requirement that some type of legislation be limited, it is not clear that *duty* was always or necessarily the language in which this aspect of the office was described. Not having read anything close to what Hamburger has on the English side, I can only raise a question. The fact that the office was sometimes described using the term *duty* does not mean it necessarily had to involve duty. Indeed, what does *duty* mean and how did the term change over time?

Even if one accepted that duty was the essential and static concept, questions remain about the relationship between duty and God. To put it differently, does duty need to be, or to remain, divinely derived? At the time of the Constitution, duty was an important word, but one that seems to have shifted to a republican notion rather than a religious notion. In some sense, the *people* or the *constitution* replace

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46 Bilder, *supra* note 15 (discussing Horace Gray's role in the development of the concept of judicial duty); *see also* Bilder, *supra* note 10, at 10 (discussing Gray's influence in promoting judicial review on the Supreme Court).

47 HAMBURGER, *supra* note 4, at 552–54 (discussing THE FEDERALIST NO. 78 (Alexander Hamilton)).

48 *Id.* at 464 ("'The duty of the [judicial] Power I conceive, in all cases, is to decide according to the Laws of the State'" (quoting An Elector [James Iredell], To the Public (Aug. 1786))); *see also id.* at 473 ("'[A]ny Act inconsistent with the Constitution was void; [a]nd . . . the Judges, consistently with their duties, could not carry it into effect.'" (quoting Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), *in* 3 THE PAPERS OF JAMES IREDELL 307 (Donna Kelly & Lang Baradell eds., 2003))).

49 *Id.* at 406–61.

50 *Id.* at 197.

God, the *Pope*, or the *crown/king*.[51] The importance of duty is that it appears to remove individual choice—one can see how that concept becomes important as ideas about judges exercising *will* come into increasing focus.[52] Over the last thousand years, the authority/authorities that people perceive to govern their lives have shifted—indeed, the early parts of Hamburger's book seem to engage in a fascinating conversation with an older body of English legal history about the origins of fundamental law and authority.[53] But does who or what gives judges the authority to limit legislation matter so long as those judges see judicial review as part of a cultural practice of what they do?

B. Multiple Authorities

Hamburger takes seriously the underlying logic, philosophy, and theory of judging and authority. Repeatedly, he imagines a hierarchy from a single authority (God) or a single source of law (the "law of the land"—note the singular *law*).[54] The mono-authority approach is coherent, logical, and perhaps even modern.

Early modern England, however, was a world of multiple authorities. Mixed government with overlapping authorities dominated the seventeenth- and eighteenth-century world. One of the interesting aspects of recent legal history on Tudor-Stuart England and colonial America is the importance of the idea of authorities in terms of ideas about franchises and liberties. Paul Halliday's recent work on habeas and Daniel Hulsebosch's work on imperial constitutions emphasize overlapping authorities and the plurality of jurisdictions.[55]

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51 *See* Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 UCLA L. REV. 1, 5 (2008) ("[I]t is quite striking, and certainly no accident, that . . . the U.S. Constitution made no reference whatsoever to God and cited as its primary source of authority not 'the word of God,' but 'We the People.'" (citation omitted)); *see also* Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1850 (2009) ("[Americans] increasingly preferred to think of themselves as citizens who created their government rather than as subjects of their ruler . . . ."). For a related argument that the American understanding of appeal has its origins in a much older conception of a hierarchy of authority, see Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913 (1997).

52 *See, e.g.*, ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 6–8 (1975) (discussing the tension between duty and morality in the role of the antislavery judge).

53 *See, e.g.*, J. W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY (1955); CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN (rev. ed. 1977) (1940); J. W. TUBBS, THE COMMON LAW MIND: MEDIEVAL AND EARLY MODERN CONCEPTIONS (2000).

54 *E.g.*, HAMBURGER, *supra* note 4, at 18.

55 *See* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 140–47 (2010)

Although I have attempted no statistical analysis, my impression is that the phrase Hamburger favors, *law of the land*, is not as dominant as *laws of England* during this period. Edward Coke calls his work *Institutes of the Lawes of England*.[56] Thomas Wood uses the title *An Institute of the Laws of England*.[57] Even as late as William Blackstone, the plural sense of *laws* appears in *Commentaries on the Laws of England*.[58] A rich, plural, and diverse body of English laws emerges, rather than a knowable, singular English law.[59] What appears at first like a slight semantic shift by Hamburger to a singular notion of law may be essential to constrain judicial duty, but the shift seems hard to align with seventeenth- and eighteenth-century Anglo-American legal culture.

Perhaps the conventional account has posited too abrupt a transition to mono-authorities (such as the Constitution and "the people") and separation of powers. Because the rhetoric of separation of powers appears dramatically in the 1770s and 1780s, the temptation is to construct it as a foundational political science or to assume that people thought about it the way that we do. To illustrate, even Gordon Wood originally suggested that the separation of powers model had firmly developed by the mid-1780s and predated the Constitution.[60]

(describing "laws of the lands"); HULSEBOSCH, *supra* note 34 (tracing the multiple authorities that informed New York's constitutional history); Daniel J. Hulsebosch, Imperia in Imperio*: The Multiple Constitutions of Empire in New York, 1750–1777*, 16 LAW & HIST. REV. 319 (1998) (discussing the same).

56 1 SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND (photo. reprint 1979) (1628).

57 THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND (London, Nutt & Gosling 1720).

58 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (photo. reprint 1979) (1765).

59 *See* Bilder, *English Settlement*, *supra* note 20, at 96–103 (discussing the difficulty of applying the diverse laws of England to the American colonies).

60 *See* Morton J. Horwitz, *A Historiography of the People Themselves and Popular Constitutionalism*, 81 CHI.-KENT L. REV. 813, 820 (2006) ("Gordon Wood . . . highlighted the shift on the eve of the constitutional convention to a theory of popular sovereignty," which became the basis for "an agency theory of separation of powers."). Some years ago now, Morton Horwitz asked me about Gordon Wood's 1969 account of separation of powers. WOOD, *supra* note 26, at 608 ("The separation of this governmental power, rather than simply the participation of the people in a part of the government, became the best defense of liberty."). Horwitz asked about Wood's suggestion that the separation of powers model was fully developed prior to the adoption of the Constitution. I have puzzled over that question ever since. Indeed, Gordon Wood's latest book seems to describe a more gradual shift towards separation of powers and the independent judiciary. *See* GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 400–32 (2009).

One of my favorite moments in James Madison's final version of his notes of the Philadelphia Convention occurs during his effort to save the Council of Revision (the idea that judges and the Executive would ex ante review laws for constitutionality).[61] Madison wrote that he "could not discover in the proposed association of the Judges with the Executive in the Revisionary check on the Legislature any violation of the maxim which requires the great departments of power to be kept separate & distinct."[62] Nowadays, the Council of Revision seems a perfect example of a violation of separation of powers. The fact that Madison could write so explicitly to the contrary hints that a modern understanding of separation of powers and his understanding might be different.

Although people wrote about three parts of government and separation of powers as a maxim (to use Madison's word) on the ground in the colonies, there had been two powers (executive and legislative) and two branches (governors and legislatures).[63] Judges were appointed by or were the same as either the executive or legislative authority.[64] There was a functional third branch for the colonists—the Privy Council—but that does not fit into a modern separation of powers model at all.[65] There were two obvious governmental functions: making laws and executing laws.[66]

Conceptualizing the judiciary as an independent third branch was tricky. Obviously, the first effort at a constitution—the Articles of Confederation—included no such separate institution.[67] The early state constitutions only gradually began to group together judicial functions in a third "branch."[68] The early history of the Supreme

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61 James Madison, Notes from the Constitutional Convention of 1787 (July 21, 1787), *in* 3 DEP'T OF STATE, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786–1870, at 390, 390–403 (1900).

62 *Id.* at 395.

63 Bilder, *English Settlement*, *supra* note 20, at 65.

64 *See id.*

65 *Id.*

66 *See Four Letters on Interesting Subjects*, *in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805, at 368, 387 (Charles S. Hyneman & Donald S. Lutz eds., 1983) (stating that "there is no more than two powers in any government . . . for the judicial power is only a branch of the executive").

67 ARTICLES OF CONFEDERATION art. IX (1777), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 9, 12 (Francis Newton Thorpe ed., William S. Hein & Co. 2002) (1909) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS] ("The United States in Congress assembled shall also be the last resort on appeal.").

68 *See, e.g.*, MASS. CONST. pt. 2, ch. III, *reprinted in* 3 THE FEDERAL AND STATE CONSTITU-

Court suggests a struggle between the Court and other branches to understand the meaning of separation of powers with respect to the judiciary. Recall the Supreme Court in the 1790s. Can it give advisory opinions?[69] Can it decide pension disputes?[70] The answers (both no) seem straightforward to the modern observer, but the fact that the questions were posed suggests again that the meaning of separation of powers for the judiciary was not always so clear.

C. Expounding the Law

Expanding Hamburger's important investigation about judicial duty into a larger inquiry about how judges thought about what they were supposed to do would reveal that much remains unclear about how late eighteenth-century American judges culturally constructed their roles.[71] What did they think they were doing? Equally important, regardless of what they *thought* they were doing, what were they *actually* doing? Perhaps someone should write a book like G. Edward White's *The American Judicial Tradition* that *concludes* with John Marshall.[72]

An exploration of the judicial tradition that began in England and ended in the United States should focus on the word *expound*. Hamburger notices the importance of the word. He repeatedly references *exposition of law* and titles chapter 7 "Authority to Expound Law."[73] Chapter 7 even begins with a glimpse of the complexity of *expound*.[74] In contrasting the early seventeenth-century common lawyers and the Roman law tradition, Hamburger notes that "[f]rom [the] imperial perspective, much of what common lawyers would consider the exposition of law was actually lawmaking."[75] This tension be-

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TIONS, *supra* note 67, at 1827, 1905–06 (original text of 1780 amended in part in 1918 (art. I) and in 1964 (art. II)).

69 *See* STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES 144, 149–70 (1997) (discussing the 1793 debate over advisory opinions between the Washington Administration and the Court).

70 *See* Maeva Marcus, *Judicial Review in the Early Republic*, *in* LAUNCHING THE "EXTENDED REPUBLIC": THE FEDERALIST ERA 25, 36–41 (Ronald Hoffman & Peter J. Albert eds., 1996) (discussing the interplay between the judiciary, the Washington Administration, and Congress in the pension dispute known as *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792)).

71 *See, e.g.*, BERNARD BAILYN, THE ORDEAL OF THOMAS HUTCHINSON (1974); A. G. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680–1810 (1981).

72 G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 24 (expanded ed. 1988).

73 HAMBURGER, *supra* note 4, at 218.

74 *Id.* at 218–25.

75 *Id.* at 220.

tween expounding the law and lawmaking, between how judges saw their tradition and how others did, is at the center of the judicial review difficulty.

Yet, this glimpse of differing perspectives slips away. Rather than continue to explore the thickness or richness of *expound*, Hamburger veers away towards repeating the word as a part of judicial duty.[76] He writes, for example:

> The exposition of law traditionally belonged to the office of judgment rather than that of will or force, and 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 explain what it was. At least therefore in their cases, the judges were understood to expound the law, including constitutions, with the authority of their office.[77]

What did it mean to expound the law? Courts do not use the word too frequently anymore.[78] In the Oxford English Dictionary, it has a number of meanings, but the one associated as "chiefly in *Law*" states "[t]o give a particular interpretation to; to construe in a specified manner."[79] The etymology includes "to put out, set forth, explain."[80] In early law books, statutes, cases, and precedents were often expounded.[81] The word also occupies a crucial place in *Marbury v. Madison*[82]: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity *expound* and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."[83]

To expound law suggests interpretation from a particular source—interpretation the way judges do it or the way a judicial tradition understands it.[84] Expounding is interpretation that in some

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76 *Id.* at 543–48, 614–15.

77 *Id.* at 543.

78 My cursory and imprecise Lexis search hinted that perhaps by the 1890s, the word had largely fallen out of use as a way to describe what courts and judges do. A more precise search would establish clearer trends.

79 5 The Oxford English Dictionary 581 (2d ed. 1989).

80 *Id.*

81 For example, when "expound*" is entered into the Eighteenth Century Collections Online database, it finds over 1500 works (including many reprints and subsequent editions) in the "Law" category. Again, a precise search would provide more specific results.

82 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

83 *Id.* at 177 (emphasis added).

84 *See* Raoul Berger, *New Theories of "Interpretation": The Activist Flight from the Constitution*, 47 Ohio St. L.J. 1, 8–9 (1986) [hereinafter Berger, *New Theories*] (equating "ex-

instances involves something that the *interpreting*/*making* law dichotomy does not capture. What happens is that expounding as a judicial practice gets squished and delegitimized as a rigid separation of powers model suggests that expounding cannot include anything that looks like making laws.[85]

Conclusion

Beginning in 2003 with *Marbury*'s bicentennial, the meaning of the case began to be turned on its head. Almost all the recent work on *Marbury* suggests that it was not a big deal with respect to the final judicial review discussion.[86] Wood recently noted that "few in 1803 saw [*Marbury*'s] far-reaching implications."[87] As has received increased attention, Chief Justice Chase had suggested widespread uniformity of belief on the power of the Court earlier in *Cooper v. Telfair*.[88]

If we see this period as struggling with the implications of an increasingly rigid and reified idea of separation of powers, Marshall's discussion in *Marbury* could be positioned nearer to the end of the story. The colonial period and early English tradition would contribute at least three practices: first, a judicial practice of limiting legislation (and other types of law) based on hierarchical conflict (as discussed in Hamburger) and a judicial practice of expounding law; second, a constitutional practice of limiting colonial legislation and law based on colonial conflicts with the laws of England; and third, a

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pounding" with "interpreting" and "interpreting" with plainly not "making law"); *see also* RAOUL BERGER, CONGRESS V. THE SUPREME COURT 49–56 (1969) (cataloging the 1787 Convention delegates' discussions about expounding and expositors).

85 *See* EDWARD S. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 42 (1914) (arguing that the Framers' rejection of the Council of Revision was based upon their desire to keep making law distinct from expounding law); *see also* Berger, *New Theories*, *supra* note 84.

86 For a few recent examples, see generally LAWRENCE GOLDSTONE, THE ACTIVIST: JOHN MARSHALL, *MARBURY V. MADISON*, AND THE MYTH OF JUDICIAL REVIEW (2008) (analyzing *Marbury* using a textualist approach to discern whether the Court established judicial doctrine or exercised political will); Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706 (2003) (dispelling the myth that *Marbury* stands for judicial supremacy); Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L.J. 1061 (2007) (discussing the multiple origins of judicial independence); Miguel Schor, *Mapping Comparative Judicial Review*, 7 WASH. U. GLOBAL STUD. L. REV. 257, 262 (2008) (stating that "*Marbury* did not found judicial review because the practice was well established before the case was decided"); William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV 455 (2005) (arguing that judicial review was a common practice before *Marbury*).

87 WOOD, *supra* note 60, at 442.

88 Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800) (Chase, C.J.) ("It is, indeed, a general opinion . . . by all this bar . . . that the Supreme Court can declare an act of congress to be unconstitutional."); *see also* Bilder, *supra* note 15, at 559–60; Marcus, *supra* note 70, at 47.

legislative practice of increasing authority over the making of law based on ideas of parliamentary supremacy in England and the people's supremacy in America. In the 1770s and the 1780s, a mantra arose about separation of powers that seemed to place these practices in conflict. And, yet, for a while—indeed, a surprisingly long time—the theoretical conflicts were seen as avoidable, ignorable, or deniable.

The advantage of an approach along these lines is that it highlights a great mystery about judicial review. Why does the Supreme Court appear to go out of the business of deciding controversial horizontal judicial review cases after *Marbury*?[89] Vertical review becomes more and more comfortable for the Court,[90] but horizontal review at the national level becomes more uncomfortable.[91] Mark Graber and Keith Whittington have recently argued that more judicial review exists after *Marbury* than indicated in traditional accounts.[92] Yet even these intriguing articles do not suggest widespread comfort by the Supreme Court with opposing Congress on controversial matters prior to the Civil War.[93] In part, the federal focus may be too narrow. Horizontal review at the state level becomes customary during this time, and that may help explain the resurgence in review after the Civil War.[94]

If there is a holy grail in this field it is coming up with a story about judicial review that is simple enough and compelling enough to teach on the first day of Constitutional Law.[95] In the old spoof on

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89 *See* WILLIAM E. NELSON, *MARBURY V. MADISON*: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW, at I (2000) (observing that "[f]ollowing *Marbury*, the Supreme Court did not assert its power of judicial review for another 54 years").

90 *See id.* at 79–81 (discussing the ease with which the Court invalidated state legislation in takings cases).

91 *See id.* at 82–83 (discussing the tendency of early nineteenth-century courts to leave the resolution of conflicts to the legislature).

92 Mark A. Graber, *The New Fiction:* Dred Scott *and the Language of Judicial Authority*, 82 CHI.-KENT L. REV. 177, 177–79, 181 (2007); Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1258–59 (2009).

93 *See* Whittington, *supra* note 92, at 1326–28.

94 *See* NELSON, *supra* note 89, at 81–82 (detailing state judicial review cases).

95 *See* Sanford Levinson, *Why I Still Won't Teach* Marbury *(Except in a Seminar)*, 6 U. PA. J. CONST. L. 588 (2004) (describing the shortcomings of using *Marbury* as an introduction to constitutional law). For discourse on the way in which *Marbury* has been discussed, see, for example, Tom Donnelly, *Popular Constitutionalism, Civic Education, and the Stories We Will Tell Our Children*, 118 YALE L.J. 948, 982–84 (2009) (reviewing the portrayal of *Marbury* in various high school textbooks); Davison M. Douglas, *The Rhetorical Uses of* Marbury v. Madison*: The Emergence of a "Great Case,"* 38 WAKE FOREST L. REV. 375 (2003) (arguing that *Marbury* did not become a seminal case until the late nineteenth century, when courts used it to justify the expansion of judicial power); Miguel Schor, *The Strange Cases of* Marbury *and* Lochner *in the*

English history, *1066 and All That*, the authors point out that history isn't what happened, "[i]t is what you can remember."[96] So long as casebooks and constitutional law professors fall back on teaching that *Marbury* invents judicial review, it does not matter that much what scholars write.[97]

Hamburger's insistence that judges always did limit legislation, however, is still a crucial and important step. As previously noted, Hamburger could have placed less reliance on the concept of duty alone, he could have emphasized the difficulty posed by a plural conception of applicable laws, and he could have explored more deeply the changing understanding of the idea of expounding the law. But his approach goes at least partway towards driving a stake through the *Marbury* myth.

Marbury did not invent judicial review. That feat belonged to Corwin.[98] *Marbury*—this is Hamburger's contribution—did not display judges exercising a new duty. It did not reveal the Supreme Court exercising some hitherto unknown power to strike down legislation against a constitution. And the exercise of this judicial power was not even particularly controversial in 1803. But *Marbury* is important. It marks the last time in American history that horizontal judicial review could be seen as quite so uncontroversial. It may mark the last moment where a Supreme Court Justice could declare that judicial review was the simple and seemingly uncontroversial consequence of expounding the law.

Constitutional Imagination, 87 TEX. L. REV. 1463, 1463–64 (2009) (noting that, although *Marbury* is generally praised as the "fountain head of judicial review," some scholars have vilified the decision for being both politicized and undemocratic).

96 WALTER CARRUTHERS SELLAR & ROBERT JULIAN YEATMAN, 1066 AND ALL THAT: A MEMORABLE HISTORY OF ENGLAND, at vii (1931) (emphasis omitted) (subtitled "Comprising All the Parts You Can Remember, Including One Hundred and Three Good Things, Five Bad Kings, and Two Genuine Dates").

97 *Compare* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 8–9 (3d ed. 2009) (textbook espousing the view that *Marbury* creates the authority for judicial review), *with* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 38–39 (6th ed. 2009) (textbook presenting the view that judicial review existed before *Marbury*).

98 *See supra* notes 15–16 and accompanying text.