Response

The Historical Ordinariness of Judicial Review

Ann Althouse*

The delightful thing about Philip Hamburger's *Law and Judicial Duty*[1] is the acting out—in 600-plus pages—of the surprise that is *ordinariness*.

We may think that it's exciting to picture the heroic judge, Chief Justice John Marshall, creating judicial review in *Marbury v. Madison*.[2] It's thrilling to imagine the Framers forging a brilliant new system with the judiciary as an independent, coequal branch of government and to extrapolate the powers that ought to be found there to realize that political vision. We feel bold defending the judiciary from naysaying challengers like Alexander Bickel who fret about the "counter-majoritarian difficulty."[3] We puff ourselves up devising elegant theories about the role of judges in preserving or expanding constitutional rights.

But Professor Hamburger is here to deflate all that grandiosity, to replace it with the grandeur of the *ordinary*: the judicial role is what it has long been, a matter of duty, fidelity to law, and the recognition

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1 Philip Hamburger, Law and Judicial Duty (2008).

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

3 Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16–22 (1962).

that there is a hierarchy in the various sources of law.[4] When we see it this way, judicial review is nothing more than one manifestation of what judges and legal scholars have perceived since medieval times, that within a hierarchy of kinds of law, inferior law in conflict with higher law is a nullity.

One response to what Professor Hamburger has labored so long and hard to demonstrate is: *Yes, everyone already knew that. It's obvious. Look at* Marbury v. Madison. No sooner does Chief Justice Marshall make his lofty pronouncement that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[5] than he immediately grounds it in the mundane role of dutiful judging: "Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[6] They must look at the sources of law, and when they see conflict, "determine which of these conflicting rules governs the case."[7] "This," Marshall says, "is of the very essence of judicial duty."[8]

Judicial duty. There it is. *Law and Judicial Duty*. The work of judges requires them to look at the law. In doing that, they may encounter two laws that purport to apply but also conflict. It becomes necessary to determine which law to apply. Is there any reason why the judge can't look at the Constitution? No, Marshall says, the Constitution is law, and—the Constitution being the *superior* law in the hierarchy—it must win out.[9]

But the reason we love to talk about *Marbury* is not because of that connection between the idea of law and judicial duty. I can still hear my old Federal Courts professor—the estimable Lawrence Sager—gently deriding this theory as the "Little Old Judge" theory.[10] The judges do what they must, not out of will or anything like political power, but solely because, in the nature of things, they must. The legal scholar cries out: *Please. There's much more going on. Is there not?*

The reason we love to talk about *Marbury* is because we *don't* believe that Marshall believed in the humble, dutiful judge. He was doing something much grander, we feel drawn to say. We see political

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4 HAMBURGER, *supra* note 1, at 19–30.

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

6 *Id.*

7 *Id.*

8 *Id.* at 178.

9 *Id.*

10 Lawrence G. Sager, *What's a Nice Court Like You Doing in a Democracy Like This?*, 36 STAN. L. REV. 1087, 1098 (1984).

power everywhere. If Marshall made the judicial review of statutory law *seem* ordinary, we want to say, it was because judges amass their political power by *portraying* themselves as neutral expositors of the law who read the texts, sort them into the proper hierarchical order, announce the results, and impose the consequences without regard to the political preferences and passions of the day. They portray themselves as devoid of personal will not because they are, but because they are not.

Ordinariness is a pose—a device. Anyone who watched a bit of Justice Sotomayor's confirmation hearings saw the *political* power of the Supreme Court nominee's profession of humble adherence to judicial duty. Sonia Sotomayor distanced herself from the idea, expressed by President Obama, that a judge's "quality of empathy, of understanding and identifying with people's hopes and struggles"[11] had something to do with decisionmaking; that a judge's *heart* matters.[12] "I don't—wouldn't approach the issue of judging in the way the President does," Sotomayor testified.[13]

> He has to explain what he meant by judging. I can only explain what I think judges should do . . . . 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. The judge applies the law to the facts before that judge.[14]

When Justice Sotomayor was confirmed, I proposed a toast: "To the appearance of empathy and experience that caught the President's eye! To all the sober obeisance to the dispassionate, neutral articulation of the law that won confirmation in the Senate!"[15]

It would seem that Justice Sotomayor knew what judges have long known: that judicial power is most stable and effective in the place where Professor Hamburger observes it to have been situated over the centuries.[16] *Law and Judicial Duty.* I mean no offense to Justice Sotomayor. She did what they all do. We remember John

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11 Jesse Lee, *The President's Remarks on Justice Souter*, posting to The White House Blog (May 1, 2009, 4:23 PM EDT), http://www.whitehouse.gov/blog/09/05/01/The-Presidents-Remarks-on-Justice-Souter/.

12 Carrie Dann, *Obama on Judges, Supreme Court*, posting to MSNBC First Read (July 17, 2007, 4:21 PM), http://firstread.msnbc.msn.com/archive/2007/07/17/274143.aspx.

13 *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 120 (2009) (statement of Sonia Sotomayor).

14 *Id.*

15 Ann Althouse, *A Toast to Now-Justice Sotomayor*, posting to Althouse (Aug. 6, 2009, 4:15 PM), http://althouse.blogspot.com/2009/08/toast-to-now-justice-sotomayor.html.

16 *See* HAMBURGER, *supra* note 1.

Roberts at his confirmation hearing likening judges to baseball umpires: "Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role."[17]

Justice Kennedy has discussed the way judges depend on people's belief in the law: the judicial power depends on a reverence for and an allegiance to the law.[18] This humble, dutiful role is the one people can believe in. Justice Kennedy knows that. They all know it. It's probably the only role that judges can embody and enact over a substantial period of time. We law professors may indulge in much fancier ideas, but we risk nothing. The law professor game is a different one—even as we too have life tenure—that is, after we've written a few *unordinary* things.

But in the struggle for independence and equal weight in the face of the legislative and executive branches of government, the judge's most powerful foundation is the duty to law—humility, not arrogance. Ever since Robert Bork failed to win confirmation—and I guess that's why we now have Justice Kennedy to talk about the role of judges—our judicial nominees have bent over backwards to avoid setting off our arrogance alarm, which, I think, is pretty fine-tuned in America.[19] We perceive arrogance easily, and the judges know it, performing with humility to win our reverence and allegiance—the reverence and allegiance that they depend on.

It's frustrating to scholarly observers who might want to see more grand, expansive exercises of power, and, conversely, it's frustrating to those who want to rein in judges. But the wily judges, the ones in the position of power, can see what has been seen for hundreds of years: that stable, defensible, workable power lies in the inscrutable expression of one's duty to law.

So here is my question for Professor Hamburger: Can it be that judges through the centuries have adopted a pose of judicial duty to

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17 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.).

18 Justice Anthony M. Kennedy, Keynote Address at The George Washington Law Review Symposium: Judicial Review: Historical Debate, Modern Perspectives, and Comparative Approaches 15 (Oct. 15, 2009) (transcript on file with *The George Washington Law Review*).

19 *See* John Heilemann, *Pining for Bork*, NEW YORK, Oct. 3, 2005, at 30, 30, *available at* http://nymag.com/nymetro/news/columns/powergrid/14584/ ("[T]he ease of Roberts's passage was due to his positioning as Bork's inverse doppelgänger: humble where Bork was arrogant, silken where Bork was spiky, cherubic where Bork was Mephistophelean—and evasive where Bork was candid.").

grow and preserve their own power? Surely there is some element of political realism in the profession of impersonal fidelity to law. It's easy for modern Americans to suspect our judges of deflecting criticism with the disingenuous—even disgusting—pretense of humility. I am quite aware of my status as a nonhistorian, so I need to ask: Professor Hamburger, will you lift the veil of history and expose the judges whose words you relied on to tell the story of judicial duty? To what extent were they political creatures finding political power in the impenetrable, well-fortified rhetoric of duty?

Also, in recognition of my status as nonhistorian, let me ask one more question. If we take Professor Hamburger's book as inspiration, what will we say about how judges today ought to interpret constitutional law?

I take as the central lesson of the book that judicial power *grounded in duty* is strong and stable.[20] Judges who work within this vision of their own power are resistant to intimidation *and* to self-aggrandizement.[21] Does what Hamburger teaches us require us to embrace originalism? Does it dictate a particular degree of activism or restraint?

I was struck when Justice Kennedy, speaking to the question of whether judicial review was implicit in the Constitution or whether it was invented, said, "If it's invented, then you can do whatever you want!"[22] But I didn't believe that. Why would the fact that judicial review is invented give you more room for activism? If judicial review is implicit, why don't you feel *that* is a stronger foundation from which to exercise power? You can say, as Justice Kennedy suggested: if you invented your own power, you feel free to do bold things with it; if it's implicit, it's somehow constrained.[23] But the reverse sounds at least as plausible: when you make up the theory of your own power, you feel you ought to rein yourself in and not grab too much power lest you expose yourself to criticism and retaliation; if the power is implicit, you feel secure in your authority and compelled to exercise the power that is more properly understood as a duty. Either inference works.

So I didn't believe Justice Kennedy when he said that "[i]f it's invented, then you can do whatever you want,"[24] and I don't think

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20 HAMBURGER, *supra* note 1, at 132.

21 *Id.* at 564 ("[J]udges could preserve their independent judgment even in the face of external threats as long as they could resist their desires and fears.").

22 Kennedy, *supra* note 18, at 10.

23 *See id.*

24 *Id.*

that if judicial review is grounded in centuries of fidelity to law that it's any more of a pull toward either restraint or activism. I don't see how it points us toward a more modest view of the judicial role, the dutiful little judge—the Little Old Judge—that strange mythical character that Justice Sotomayor played during the ritualistic confirmation hearings.

In Professor Hamburger's account, the reason judicial review is not made explicit in the text of the Constitution is because it was already a well-understood function of the ordinary work of judges.[25] If we accept this, those who are inclined toward expansive interpretation of constitutional law ought to feel bolstered up. Judicial review evolved over the ages; why shouldn't it continue to evolve? Why isn't it the ground for believing in "the notion of a living Constitution"[26] and in the expansive interpretation of constitutional rights? It's not a specific power granted to the judges by the Constitution. It's something inherent in the nature of judging. Doesn't that make *more* room for creativity?

But, by the same token, I think that those of us who are already inclined to originalism and narrow interpretation will also read Professor Hamburger's book and find encouragement in the idea of the dutiful judge. In other words, I question what Justice Kennedy said,[27] and I question any implication that Philip Hamburger's work points us in any particular way with respect to how constitutional interpretation ought to be done.

When it comes to the question of interpretation—constitutional law as the judges find or make it today—will Professor Hamburger's history jar anyone into a new position?

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25 HAMBURGER, *supra* note 1, at 617–21.

26 *See generally* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

27 *See supra* note 22 and accompanying text.